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## Matters of Strata: Race, Gender, and Class Structures in Capital Cases

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# Matters of Strata: Race, Gender, and Class Structures in Capital Cases

Phyllis Goldfarb\*

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## *I. Introduction*

Our stratified society has long imbued race, gender, and class with social and material meaning.<sup>1</sup> Perceived differences become

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\* Jacob Burns Foundation Professor of Clinical Law, George Washington University Law School. Thanks to Esna Abdulamit for research assistance and to the *Washington & Lee Law Review* for an enriching symposium on capital punishment organized around the compelling case of *Commonwealth v. Giarratano*. I extend my gratitude to the participants in the symposium for their engagement with these weighty matters.

1. See generally CHRISTOPHER B. DOOB, SOCIAL INEQUALITY AND SOCIAL STRATIFICATION IN U.S. SOCIETY (2013). Part 1 of Doob’s text develops in a global context general concepts and theories of social stratification. *Id.* at 1–119. Part 2, entitled *Class, Race, and Gender*, contains six chapters on class, poverty, racism, and sexism. *Id.* at 120–346. The author’s aim is to “examine the processes that

embedded in our social structures, enabling them to powerfully influence our institutional operations while remaining largely in the backdrop, often unnoticed and unspoken despite their profound impact.<sup>2</sup> The American criminal justice system—especially its death penalty systems—are premier examples of institutions that operate in a manner deeply affected by structures of race, gender, and class.<sup>3</sup>

In some criminal and capital cases, the workings of race, gender, and class are more evident than in others. If a poor African-American man is charged with the rape and murder of a wealthy white woman, race, gender, and class will not be irrelevant characteristics in the popular understanding of the crime and the processing of the criminal case.<sup>4</sup> If one or more of the race, gender, and class characteristics of defendant and victim are switched, the case will be viewed differently.<sup>5</sup> Consequently, many people acknowledge the likelihood that beliefs about the meaning of these categories, even those that are unconsciously held, can

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have produced and sustained” inequalities in the U.S. between “select groups—higher-class members, whites, and males” who “have had better opportunities and, therefore, more extensive rewards” than have “lower-class people, racial and ethnic minorities, and women.” *Id.* at 1.

2. *See id.* at 2 (defining social stratification as “a deeply embedded hierarchy providing different groups varied rewards, resources, and privileges and establishing social relationships that both determine and legitimate those outcomes”).

3. *See infra* Parts II–III (analyzing how structures of subordination affect criminal justice processes).

4. Justice William Brennan recognized this reality with respect to race in his dissent in *McCleskey v. Kemp*. *See* 481 U.S. 279, 321 (1987) (Brennan, J., dissenting) (noting that a lawyer for a capital defendant, in particular a black defendant charged with killing a white victim, would have to inform his/her client that “there was a significant chance that race would play a prominent role in determining if he lived or died”).

5. For this reason, Professor Cynthia Lee proposes that judges give “race-switching” jury instructions in criminal cases that are especially susceptible to racial stereotyping, asking jurors to switch the races of the defendants and the victims in their minds to see if race-switching alters their conclusion. *See* Cynthia Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 482–85 (1996) (examining the operation, and the procedural possibilities for amelioration, of racial stereotypes in jury decision-making). If it does, this evidence of race bias encourages jurors to reconsider their initial conclusion about the case at issue. *Id.* at 488–95. Presumably, Lee’s proposal can be extended in appropriate cases to encompass gender and class issues as well.

animate the handling of a criminal case and influence its outcomes.<sup>6</sup>

*Giarratano v. Commonwealth*<sup>7</sup> is not a case in which the enduring features of race, gender, and class are readily understood to be influential.<sup>8</sup> Nonetheless, if these categories operate structurally in criminal cases, we should be able to excavate the role that they play in Giarratano's case or any other. In this essay, I accept that challenge and seek to examine the interactive role of race, gender, and class in capital cases in general and the *Giarratano* case in particular. Through this effort, I hope 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.

The reality that race, gender, and class structures affect the operation of American death penalty systems represents a profound concern about inequality and unfairness in the selection of defendants for death. But it also represents an indictment of American systems of capital punishment. According to the United States Supreme Court, the death penalty—among the gravest acts of government authority—can satisfy Eighth Amendment

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6. See *McCleskey*, 481 U.S. at 333 (Brennan, J., dissenting) (“Our cases reflect a realization of the myriad of opportunities for racial considerations to influence criminal proceedings.”); see also Jenny E. Carroll, *Images of Women and Capital Sentencing Among Female Offenders: Exploring the Outer Limits of the Eighth Amendment and Articulated Theories of Justice*, 75 TEX. L. REV. 1413, 1451 (1997) (“[T]he pervasiveness of gender expectations may well moot the necessity that they ever be raised explicitly in order to influence the sentencer’s decision.”); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 327, 322 (1987) (“Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role . . . . We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions.”); Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 590 (1977) (arguing that sexism and racism are deeply embedded in our culture and unconsciously affect behavior). Sociologist Christopher Doob provides evidence to show that “among developed nations the United States has some of the highest levels of social inequality” and that “systems of class, racial, and gender stratification provide the conceptual foundations for analyzing trends in social inequality.” DOOB, *supra* note 1, at 2.

7. 266 S.E.2d 94 (Va. 1980).

8. See *id.* at 103 (affirming the defendant’s death sentence for rape and murder).

prohibitions on cruel and unusual punishment only when it is administered non-arbitrarily and non-discriminatorily.<sup>9</sup> Under the Court's death penalty jurisprudence, a capital punishment system must distinguish in a principled way between who is sentenced to death and who is not.<sup>10</sup>

Consequently, 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>11</sup> The effect of this jurisprudential command, in combination with other cultural influences, may be to suppress official acknowledgment of the role that race, gender, and class play in death penalty decision-making, even where their work is obvious.<sup>12</sup> The upshot of acknowledging their role is to

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9. These are the primary Eighth Amendment requirements that the Supreme Court established in its per curiam opinion in *Furman v. Georgia*. See 408 U.S. 238, 239–40 (1972) (finding the death penalty as applied to be unconstitutional under the Eighth Amendment). Although each Justice wrote separately and no single opinion controlled, Justice Stewart's opinion expressed concerns echoed by other Justices in *Furman* and subsequent cases:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . [I]f any basis can be discerned for the selection of these few to be sentenced to death, it is the constitutionally impermissible basis of race . . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

*Id.* at 310 (Stewart, J., concurring).

10. According to *Furman*, the failure to establish a procedural system that could rationally distinguish death-worthy and non-death-worthy cases rendered the death penalty cruel and unusual in violation of the Eighth Amendment. See *id.* at 294 (Brennan, J., concurring) (“[I]t is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment. No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison.”); *id.* at 313 (White, J., concurring) (“[T]here is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.”).

11. See, e.g., Carroll, *supra* note 6, at 1451 (“[T]he use of gender-specific traits as mitigators or aggravators during the sentencing phase of the trial runs counter to the *Furman* goal of nonarbitrary application of the death penalty by introducing constitutionally impermissible factors to the sentencer.”); see also *McCleskey v. Kemp*, 481 U.S. 279, 341 (1987) (Brennan, J., dissenting) (“[E]vidence that race may play even a modest role in levying a death sentence should be enough to characterize that sentence as ‘cruel and unusual.’”).

12. See Lawrence, *supra* note 6, at 322 (“[T]he human mind defends itself

seriously undermine the legal structure of our death penalty system and its claim to impartial and legally principled decisions about who will be allowed to live and who will not.<sup>13</sup>

Although this essay does not focus on doctrinal arguments under the Eighth Amendment, it is important to note at the outset that the arguments it develops about the entanglement of race, gender, and class structures in capital decision-making processes, including those that condemned Joseph Giarratano, have profound Eighth Amendment implications.<sup>14</sup> These implications hang like a shadow over America's death penalty, representing reasons for official reluctance to acknowledge what is readily apparent and deeply important. In the process, the integrity of that system, one that refuses to recognize the visible presence of what law requires to be absent, is greatly diminished.<sup>15</sup>

## II. *The Role of Race*

I begin with two uncontroversial observations: The death penalty has played a role of long standing in American culture<sup>16</sup>

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against the discomfort of guilt by denying or refusing to recognize those ideas, wishes, and beliefs that conflict with what the individual has learned is good or right.”).

13. See *McCleskey*, 481 U.S. at 339 (Brennan, J., dissenting) (arguing that the majority's fear of finding petitioner's proof of race bias in death sentencing to be sufficient is based on its admitted reluctance to “open the door to widespread challenges to all aspects of criminal sentencing” and therefore suggests “a fear of too much justice”).

14. See *infra* Parts II–III (analyzing race, gender, and class structures embedded in the death penalty system).

15. In his dissent in *McCleskey*, Justice Brennan eloquently expresses this concern:

It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined.

*McCleskey*, 481 U.S. at 344 (Brennan, J., dissenting).

16.

In the more than three centuries since the earliest recorded lawful execution on these shores—1622, Daniel Frank, Colony of Virginia, for the crime of theft—there have been an estimated 18,000 to 20,000 persons lawfully put to death. . . . Massive and familiar as its presence has been in American society, the practice of capital punishment has

and race has played a role of long standing in American culture.<sup>17</sup> Although these two starting points will not necessarily lead to the conclusion that race and the death penalty are interconnected, the reality is—as abundant evidence reveals—that they are powerfully intertwined.<sup>18</sup> One cannot understand America’s penologies of capital punishment—its legitimation of state-imposed death—without understanding its ideologies of race, and vice versa.<sup>19</sup> Moreover, powerful ideologies of race interlock with other powerful ideologies, such as those of gender and class, ideologies that, reinforcing one another, create a complex hierarchy that separates the classes of those who decide others’ fate from those whose fates are decided.<sup>20</sup>

A symposium based on the capital case of Joseph Giarratano, a white man, is not the most likely occasion for examining these questions about the entanglement of race and the death penalty. Nonetheless, it is a valuable occasion for examining these questions because, if the roles I ascribe to the ideologies and hierarchies of America’s social strata in the capital punishment

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undergone major developments in the past century. . . .

HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA* 3 (3d ed. 1982).

17. See A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS—THE COLONIAL PERIOD* 391 (1978) (“[T]here is a nexus between the brutal centuries of colonial slavery and the racial polarization and anxieties of today.”).

18. See *generally* FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006) (exploring the relationship between race and the death penalty).

19.

[O]ur book is an effort . . . to show the ways that the death penalty is racialized, the places in the death penalty process where race makes a difference, and the ways the very meanings of race in the United States are constituted in and through our practices of capital punishment. . . . [T]he death penalty is, and has always been . . . a tool . . . to oppress racial minorities, and specifically, African-Americans.

*Id.* at 3. See also Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573, 587 (2011) (“[R]acial animosity flourishes inside systems and structures of domination, especially ones that have been constructed explicitly to deliver pain or punishment on the basis of perceived wrongdoing. The processes of derogation and demonization that characterize racial oppression have much in common with the most punitive criminal justice practices . . .”).

20. Sociologist Christopher Doob describes ideologies as “the complex of values and beliefs that support a society’s social-stratification systems and their distribution of wealth, income, and power.” DOOB, *supra* note 1, at 2.

process are accurate, then evidence of their operation should appear throughout a large volume of cases, not just in obvious ones. Therefore, this essay explores how structural hierarchies such as those built on ideas of racial difference are implicated in cases like Giarratano's.

### A. History of Race Ideologies

Accepting the challenge to examine the role of racial hierarchy in a case understood as non-racial requires attention to America's fraught and complex history of race. This history is grounded in awareness that from the colonial era through the Civil War, slavery constructed the meaning of race in America for more than two centuries.<sup>21</sup> Slavery was the practice, white supremacy was the ideology, and racial stereotypes were the consequence.<sup>22</sup> Slaveholders rationalized that Africans' natural inferiorities to white European colonists rendered them unsuited for liberty and in need of the control provided by the institution of slavery,<sup>23</sup> an institution with staggering economic benefits for the slaveholding

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21. See HIGGINBOTHAM, *supra* note 17, at 6 (“[T]he Constitution’s references to justice, welfare, and liberty were mocked by the treatment meted out daily . . . from the seventeenth through nineteenth centuries through the courts, in legislative statutes, and in those provisions of the Constitution that sanctioned [race-based] slavery . . . and allowed disparate treatment for those few blacks legally ‘free.’”); KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* i (1956) (“American Negroes still await the full fruition of their emancipation—still strive to break what remains of the caste barriers first imposed upon them in slavery days.”).

22.

[D]eep faith in white supremacy not only justified an economic and political system in which plantation owners acquired land and great wealth through the brutality, torture, and coercion of other human beings; it also endured, like most articles of faith, long after the historical circumstances that gave rise to the religion passed away.

MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 26 (2010).

23.

Faith in the idea that people of the African race were bestial, that whites were inherently superior, and that slavery was, in fact, for blacks' own good, served to alleviate the white conscience and reconcile the tension between slavery and the democratic ideals espoused by whites in the so-called New World.

*Id.*



classes.<sup>24</sup> Once the Civil War forced an end to slavery, a need arose for other forms of control of the several million newly-freed, racially-marked slaves<sup>25</sup> who, their former masters feared, might revolt against them.<sup>26</sup>

When federal efforts to support and protect former slaves during the Reconstruction era were brought to a premature halt, strictly enforced racial segregation policies and selectively enforced law enforcement policies—the era known as Jim Crow—emerged, providing white majorities with the control they felt they needed.<sup>27</sup> Stereotypes of black people, especially black men, as predatory, dangerous, and naturally inclined toward violence served to justify these systematic policies of racial control.<sup>28</sup> Once racial control policies were established, social conditions of segregation and inequality maintained the ideologies of racial

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24. See EDWARD E. BAPTIST, *THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM* xix (2014) (arguing that slavery was a “rocket booster” for American economic growth, that it created “massive quantities of wealth and treasure” and is implicated in the contemporary story of America’s “success, power, and wealth”).

25. See, e.g., DAVID M. OSHINSKY, *WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE* 83 (1996) (describing views of Southern penologists at the turn of the century who asserted that Southern white society needed strategies for dealing with their “large alien population, an inferior race”).

26. See, e.g., ALEXANDER, *supra* note 22, at 28 (“Rumors of a great insurrection terrified whites, and blacks increasingly came to be viewed as menacing and dangerous.”).

27. See *id.* at 30 (“Even among those most hostile to Reconstruction, few would have predicted that racial segregation would soon evolve into a new racial caste system as stunningly comprehensive and repressive as the one that came to be known simply as Jim Crow.”); see also DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 42 (2008) (“[T]he intensity of southern whites’ need to reestablish hegemony over blacks rivaled the most visceral patriotism of the wartime Confederacy. White southerners initiated an extraordinary campaign of defiance and subversion against the new biracial social order imposed on the South . . .”); Michael Fraser, *Crime for Crime: Racism and the Death Penalty in the American South*, 10 *SOC. SCI. J.* 1, 1 (2011) (“With their system of absolute control now gone, Southern whites were forced to utilize another tool to exercise oppression: the criminal justice system.”).

28. See ALEXANDER, *supra* note 22, at 28 (“[T]he current stereotypes of black men as aggressive, unruly predators can be traced to this period.”); see also PHILIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA* 4–5 (2002) (describing the “folk pornography” of daily Southern newspapers that detailed lurid crimes by blacks to create a “[c]umulative impression . . . of a world made precarious by Negroes”).

difference, at the same time that ideologies of racial difference maintained segregated and unequal social conditions.<sup>29</sup> In short, the past was not past—it flourished in new forms.

The rule of law, impartially administered, has long been vulnerable to these race ideologies. In the same regions where white-on-black racial violence, notably in the form of lynchings, was virtually ignored by criminal justice processes,<sup>30</sup> black-on-white violence was punished with special fervor, most notably with the death penalty.<sup>31</sup> This combination of circumstances provides evidence that criminal justice actors were using their authority strategically and selectively to reinforce cultural norms of racial hierarchy, and assigning the death penalty a key role in that racial narrative.<sup>32</sup>

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29. Convict leasing was a post-Civil War practice rooted in racial separation and inequality and designed to reinforce the ideologies of black inferiority that perpetuated the practice. *See generally* BLACKMON, *supra* note 27 (providing an in-depth examination of convict leasing practices in various states). Blackmon describes how for decades sheriffs in some Southern states used vagrancy laws to take black men into custody and lease them into harsh labor conditions that constituted slavery in all but name—“guilty of no crimes and entitled by law to freedom, [they] were compelled to labor without compensation, were repeatedly bought and sold, and were forced to do the bidding of white masters through the regular application of extraordinary physical coercion.” *Id.* at 2–4.

30. *See* DRAY, *supra* note 28, at 457 (describing the participation and complicity of law enforcement in lynchings of African-Americans, creating a system in which “lynch mobs operated with complete impunity”).

31. Disproportionate use of the death penalty against African-Americans convicted of violence against white victims was especially dramatic for non-murder crimes. Until *Coker v. Georgia* prohibited the death penalty for rape, in twelve southern states between 1945–1965, 110 of 119 defendants given death sentences for rape convictions were black. *See* 433 U.S. 584, 584 (1977) (finding the death penalty for rape to be unconstitutional under the Eighth Amendment); EVAN J. MANDERY, *A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA* 39 (2013) (citing findings from research of criminologist Marvin Wolfgang). Dray observes that this pattern of capital punishment links to post-Emancipation fears that sexual relationships between black men and white women threatened white supremacy through interbreeding. *See* DRAY, *supra* note 28, at 60 (examining anxieties of Southern whites in the post-Emancipation period). With or without evidence in support, allegations of sexual assault against white women by black men were a common trigger for lynchings, especially spectacle lynchings involving sexual mutilation. *See id.* at 82 (describing spectacle lynchings accompanied by sexual mutilation). The frenzy unleashed by these allegations is a form of projection, because the rape of black women by white men was a central feature of the slave system. *See id.* at 70 (noting the widespread practice of rape of black slave women by white male slaveowners).

32. *See* FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL*

These are the post-slavery realities that underlie the empirical evidence presented to the Supreme Court in the 1980s in the case of *McCleskey v. Kemp*.<sup>33</sup> That evidence, never refuted by the Supreme Court, showed race, particularly the race of the victim, to be a statistically significant factor in determining who received death sentences.<sup>34</sup> When the Supreme Court upheld McCleskey's death sentence despite compelling evidence that race was playing a major role in selecting who lived and who died at the hands of the state, it effectively upheld the role of the death penalty in supporting racial hierarchy and gave racial hierarchy a continuing role in the state's infliction of death.<sup>35</sup>

*McCleskey* was a 5–4 opinion that was disavowed by its author Justice Powell after his retirement.<sup>36</sup> So its conclusion, its implications, and the ideas it embodies are sharply contested. These are reminders—befitting a symposium in a Law Review bearing the names of Washington and Lee—that in many ways the ghosts of the colonial and antebellum slave system continue to

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PUNISHMENT 97 (2003) (providing statistical support for the conclusion that “lynching history predicts modern executions”).

33. See 481 U.S. 279, 313, 316–320 (1987) (holding that a study showing statistically significant race-of-victim disparities in the imposition of the death penalty did not prove discrimination in violation of the Eighth or Fourteenth Amendments).

34. Using regression analyses in an effort to isolate the role that race may have played in capital sentencing from the role that more than two hundred legitimate factors may have played, Iowa law professor David Baldus and his research team concluded that killing a white victim proved as significant an explanatory factor in who received death sentences as having a prior murder conviction. See DAVID BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 147 (1990) (analyzing the factors that contribute to an individual's likelihood of receiving a death sentence).

35. Writing for the majority in *McCleskey*, Justice Powell observed that while there is “some risk of racial prejudice influencing a jury's decision,” the Baldus study did not demonstrate a constitutionally unacceptable risk of “racial prejudice influencing capital sentencing decisions.” *McCleskey*, 481 U.S. at 308–09. Edward Lazarus, a Supreme Court clerk from the *McCleskey* era, asserts that Powell's inability to uphold McCleskey's claims was derived from Powell's need to believe in the “myth of southern progress,” the notion that “the South had achieved a dramatic reformation on matters of race.” EDWARD LAZARUS, CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT 200 (1998).

36. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451–52 (1994) (describing Justice Powell's reversal of views on *McCleskey*).

inhabit our cultural contests. Since the late nineteenth century, America has been at war with itself, deeply divided on whether and how to challenge racial hierarchy and on the role law should play in supporting or mitigating the racial hierarchy that became embedded in American culture through its slave system.<sup>37</sup> As recent events illustrate, questions about whether and how black lives matter are still haunting us, as they have for centuries.<sup>38</sup> The legal and ideological battles that undergird drug laws, stop and frisk policies, police shootings, presidential campaigns, and most certainly the death penalty, remain volatile and unresolved.<sup>39</sup>

As coercive institutions empowered to keep people in bondage, state criminal justice systems have long been key sites for these ideological and legal battles.<sup>40</sup> The Fourteenth Amendment, part

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37. See ALEXANDER, *supra* note 22, at 20–57 (describing how disruptions in hierarchical racial structures of society—such as the abolition of slavery, demise of Jim Crow, and the accomplishments of the civil rights movement—have led to successful efforts to exploit racial resentments of poor and working-class whites and to install new systems of racial control).

38. In 2012, after numerous publicized deaths of African-Americans by white police and the widespread failure to hold police accountable, the #BlackLivesMatter movement was formed. *About the Black Lives Matter Movement*, BLACK LIVES MATTER, <http://blacklivesmatter.com/about/> (last visited June 7, 2016) (discussing the history of the organization) (on file with the Washington and Lee Law Review). The mission of the movement is to broaden “the conversation around state violence to include all of the ways in which Black people are intentionally left powerless at the hands of the state. We are talking about the ways in which Black lives are deprived of our basic human rights and dignity.” *Id.*

39. See DRAY, *supra* note 28, at xi (“Is it possible for white America to really understand blacks’ distrust of the legal system, their fears of racial profiling and the police, without understanding how cheap a black life was for so long a time in our nation’s history?”). Observers of American culture often note its distinctive racial history and the way that history continues to pervade America’s social and political structure. See PETER BALDWIN, *THE NARCISSISM OF MINOR DIFFERENCES: HOW AMERICA AND EUROPE ARE ALIKE* 226 (2009) (claiming that the most significant distinction between America and Europe “is not a grand opposition of worldviews or ideologies . . . [i]t is the still unresolved legacy of slavery and its tragic modern consequence of a . . . racially identifiable underclass”).

40. See ALEXANDER, *supra* note 22, at 13 (“Like Jim Crow (and slavery), mass incarceration operates as a tightly networked system of laws, policies, customs, and institutions that operate collectively to ensure the subordinate status of a group defined largely by race.”); OSHINSKY, *supra* note 25, at 32–33 (describing perception of white Southerners that post-Civil War law enforcement meant “keeping the ex-slaves in line”); Fraser, *supra* note 27, at 1 (“With their system of absolute control now gone, Southern whites were forced to utilize another tool to exercise oppression: the criminal justice system.”).

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>41</sup> Questions of federalism—the appropriate balance between federal and state power—continue to live in this battleground, shaped by a cataclysmic conflict about the meaning of race in America.<sup>42</sup>

The story of Criminal Procedure—the constitutional regulation of law enforcement processes and a course taught in every law school—is one of the federalism stories that emerged from the Civil War and carried forward its preoccupations with race.<sup>43</sup> The Scottsboro cases, capital cases involving nine black male teenage defendants falsely accused yet sentenced to death for the rape of two white women, exposed the role of state criminal justice and death penalty systems in perpetuating racial stereotypes and racial subordination by state violence.<sup>44</sup> The notoriety of criminal justice scandals like these provoked quests to find federal mechanisms that might limit states' racialized, and sometimes lethal, abuses of criminal justice processes.<sup>45</sup>

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41. See GARRETT EPPS, *AMERICAN EPIC: READING THE U.S. CONSTITUTION* 169 (“[T]he new nation that emerged from the Civil War could not exist as a self-governing, democratic republic without strong federal monitoring of individual rights.”).

42. See ALEXANDER, *supra* note 22, at 26 (“Federalism—the division of power between the states and the federal government—was the device employed to protect the institution of slavery and the political power of the slaveholding states.”); *id.* at 25 (“The Southern slaveholding colonies would agree to form a union only on the condition that the federal government would not be able to interfere with the right to own slaves.”).

43. See LAZARUS, *supra* note 35, at 85 (describing the constitutional history of Criminal Procedure as “forc[ing] state law enforcement officials to observe federal constitutional standards” to combat notorious racialized abuses of state criminal justice processes).

44. For gripping narratives of the Scottsboro case and the racial dynamics that pervaded it, see generally DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* (1969); JAMES GOODMAN, *STORIES OF SCOTTSBORO* (1994).

45. See LAZARUS, *supra* note 35, at 85 (“Scottsboro was a potent symbol of what could go wrong locally in the American judicial system and a spur to both those who would expunge bigotry from the system and those seeking to enforce national standards of justice upon the states.”).

Reconstruction's Fourteenth Amendment was one of the limiting mechanisms, a weapon in the fight to disentangle state criminal justice and racial ideology.<sup>46</sup> Through its limits on state power, the criminal justice protections contained in the federal Bill of Rights were incorporated through the Fourteenth Amendment as limits on the actions of state authorities.<sup>47</sup> The Supreme Court first applied the incorporation doctrine to reverse a state's criminal conviction in the Scottsboro cases, launching the broad constitutionalization of Criminal Procedure.<sup>48</sup> Succinctly stated, incorporation was a post-Reconstruction tool for reinforcing the rule of law and curbing the worst racial abuses of state criminal justice systems.<sup>49</sup> The expansion of federal habeas corpus remedies was another approach to the same problem, providing greater access to federal court review of state criminal justice actions.<sup>50</sup>

The incorporation doctrine, the constitutionalization of Criminal Procedure, and habeas corpus remedies are ostensibly race-neutral legal mechanisms. Debates about their scope are often devoid of explicitly racial content.<sup>51</sup> But all of these legal mechanisms were born of America's deep-seated racial conflicts. When we recall their racial history, we can see more clearly the

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46. See EPPS, *supra* note 41, at 166–69 (arguing that one of the meanings of the Fourteenth Amendment, drafted to make sure that the newly freed slaves obtained full rights of citizenship, was that “states must respect the same limits as the federal government when they deal with any American citizen.”).

47. See *id.* at 169 (explaining that the post-Civil War need for federal monitoring of state protection of individual rights led to courts finding individual rights “incorporated” into the Fourteenth Amendment).

48. See *Powell v. Alabama*, 287 U.S. 45, 73 (1932) (reversing the Scottsboro convictions by incorporating the Sixth Amendment right to counsel as binding on the states through the Fourteenth Amendment).

49. See LAZARUS, *supra* note 35, at 85 (“The blood of the Scottsboro cases courses through all these [Supreme Court] decisions [protecting the procedural rights of criminal defendants].”).

50. See ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 1* (2001) (“Attempts to extend the range and efficacy of the writ have . . . been inseparably connected for centuries with attempts to secure justice for those who at any particular moment find themselves execrated by the dominant forces in society.”).

51. See, e.g., Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1554 (2011) (critiquing the Supreme Court's race-neutral discussion of Fourth Amendment doctrine and its avoidance of facts identifying the race of the parties and relevant actors when deciding Criminal Procedure cases).

pervasive racial influences on the contours of our contemporary criminal justice systems. And when we view these systems now, we can begin to appreciate that they look the way they do because of a significant cultural dynamic: longstanding racialized uses of state criminal justice systems and fairly recent multifaceted efforts to limit their racialized uses, followed by the pushback against those limiting efforts that has gathered force in recent decades.<sup>52</sup>

### *B. Understanding Race in the Giarratano Case*

This brief description of the history of the many and varied efforts to recapture state criminal justice systems from racialized uses helps us to understand some of the ways that Joseph Giarratano's case was shaped by race. To one degree or another, every criminal case has been shaped by race. Our criminal justice system was forged in America's racial cauldron and would not look as it does but for our racial history. The constitutional arguments that Giarratano framed in his jail cell, his access to the federal courts to review Virginia court actions, the legal doctrines that offered promise of relief but ultimately constrained his remedies, are a product of the ongoing battle of ideologies that are, not exclusively but in significant part, an inheritance of our racial past and a continuing mold for our legal system's future.

Moreover, Giarratano's was a death penalty case, and as much or more than any other practice, America's capital punishment system was forged in its racial cauldron.<sup>53</sup> When the end of slavery removed the value of black lives as property, it enhanced the risk

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52. See *History of Racism and Immigration Timeline*, RACIAL EQUITY TOOLS, <http://cw.routledge.com/textbooks/9780415892940/data/8%20history%20and%20immigration%20timeline.pdf> (depicting the history of racial equity in America as including centuries of African-American oppression followed by a relatively brief period of civil rights advances, then subsequent decades of retrenchment).

53. See Bryan Stevenson, *Close to Death: Reflections on Race and Capital Punishment in America*, in *DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? THE EXPERTS ON BOTH SIDES MAKE THEIR BEST CASE* 93 (Hugo Bedau & Paul Cassell eds., 2004) (“[T]he struggles over capital punishment in America have been fought from trenches that were dug in other, fateful conflicts in the nation’s history—conflicts about slavery, about Southern culture, about state and federal powers, about race relations . . .”) (citing David Garland, *Judicial Lightning*, *THE TIMES LITERARY SUPPLEMENT* (Oct. 25, 2002)).

of having black lives taken, as one author noted, by “white mobs and white courts.”<sup>54</sup> Most lynching victims were African-American,<sup>55</sup> such that lynching was understood as a practice of racial violence staged publicly to bolster white supremacist norms.<sup>56</sup> When Southern states turned away from lynching in the twentieth century, whether due to fear of federal anti-lynching legislation or otherwise,<sup>57</sup> we can find examples of officials calling off would-be lynch mobs by implicitly promising capital punishment as law’s alternative route to a parallel outcome.<sup>58</sup> A recent empirical study by researcher Franklin Zimring reports that, without exception, the states with the most extensive lynching histories, including Virginia, now use the death penalty and “collectively dominate the nation’s execution totals.”<sup>59</sup> Although Giarratano is white, Virginia’s attachment to the death penalty that was imposed on him is part of a racial pattern, a legacy rooted in its racial past.

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54. OSHINSKY, *supra* note 25, at 29.

55. See ZIMRING, *supra* note 32, at 90 (analyzing data showing that “[t]he victims of lynching were overwhelmingly African American”).

56. See DRAY, *supra* note 28, at xi (describing lynching as a system of terror used to “maintain power whites had over blacks, a way to keep blacks fearful and to forestall black progress and miscegenation” and “a constant source of intimidation to all black Southerners young and old and a daily reminder of their defenselessness”).

57. Some scholars suggest that in the early twentieth century fear of anti-lynching legislation led Southern states to turn away from lynching. See, e.g., MICHAL R. BELKNAP, *FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-BROWN SOUTH* 21 (1987) (discussing potential causes for the decline of lynching).

58. The term “legal lynching” began to be used to refer to capital trials of blacks for crimes against whites. See, e.g., CARTER, *supra* note 44, at 115 (“[O]fficials begged would-be-lynchers to ‘let the law take its course,’ thus tacitly promising that there would be a quick trial and the death penalty.”); GOODMAN, *supra* note 44, at 26 (describing, in a chapter entitled “Legal Lynching,” the view that the hypocritical use of legal procedure to deny rights in the courtroom then impose a death sentence resembled the practice of lynching, such that “the façade of judge and jury would replace the rope . . .”).

59. ZIMRING, *supra* note 32, at 96.



### 1. *Departure and Return of the Death Penalty*

There is yet more evidence of the racial pedigree of the death penalty in America. *Furman v. Georgia*,<sup>60</sup> the 1972 U.S. Supreme Court case that temporarily halted America's death penalty, was brought to the Supreme Court by the NAACP Legal Defense Fund, a legal organization founded by Thurgood Marshall and dedicated to the advancement of civil rights and racial justice.<sup>61</sup> Those in the contemporary movement to abolish the death penalty are known as abolitionists, a racial justice echo that voices its link with the abolitionist movement of the nineteenth century that sought to end slavery.<sup>62</sup> As Evan Mandery writes in *A Wild Justice*, his book about the *Furman* case, "everyone understood *Furman* to have been about race."<sup>63</sup> Four years later, when the Supreme Court reinstated the death penalty in the 1976 case of *Gregg v. Georgia*,<sup>64</sup> it was clear that this retrenchment was tied to backlash against the civil rights movement and the civil rights advances that it had precipitated.<sup>65</sup> This backlash expressed itself in a racially charged tough-on-crime movement.<sup>66</sup> But for the resentment of civil rights

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60. See 408 U.S. 238, 229–30 (1972) (holding that state death penalty statutes which allowed the arbitrary imposition of capital sentences constituted cruel and unusual punishment under the Eighth Amendment).

61. See MANDERY, *supra* note 31, at 31–35 (describing how and why the Legal Defense Fund put the death penalty on its litigation agenda).

62. See, e.g., Diann Rust-Tierney, *We, Too, Are Abolitionists: Black History Month, Slavery and the Death Penalty*, HUFFINGTON POST (May 25, 2011), [http://www.huffingtonpost.com/diann-rusttierney/we-too-are-abolitionists\\_b\\_168386.html](http://www.huffingtonpost.com/diann-rusttierney/we-too-are-abolitionists_b_168386.html) (last visited Oct. 4, 2016) (exploring connections between the two abolitionist movements and describing the death penalty as an "outdated legacy of slavery") (on file with the Washington and Lee Law Review).

63. MANDERY, *supra* note 31, at 276; see also *id.* at 266 ("Why was the public so angry with the Supreme Court about *Furman*? . . . The most significant context is race.").

64. See 428 U.S. 153, 207 (1976) (finding state death penalty statutes consistent with Eighth Amendment standards due to their procedures for guiding jurors' discretion in issuing death sentences).

65. See MANDERY, *supra* note 31, at 275–76 (asserting that "the public's antipathy" for the Supreme Court's decisions on race and social issues was "expressed in the campaign to revive capital punishment" because *Furman*'s vulnerability—a 5–4 decision with nine separate opinions followed by personnel changes on the Court—signaled that the campaign could succeed).

66. See ALEXANDER, *supra* note 22, at 40 ("Proponents of racial hierarchy found they could install a new racial caste system without violating the law or the new limits of acceptable political discourse, by demanding 'law and order' rather

progress that led to restoration of capital punishment, the death penalty would have been unavailable to the Virginia courts that imposed it on Joe Giarratano in 1979.<sup>67</sup> Long after its abolition in most Western democracies, the death penalty survived in America, a relic of America's centuries-old and still highly charged racial dynamics.<sup>68</sup>

## 2. Executive Clemency

Despite the death sentence that he received and the proximity to execution that he experienced, the fact that Joe Giarratano no longer lives under the official threat of death may have a racial aspect as well. Based on a review of the facts of the case and questions about guilt, Giarratano was granted a conditional pardon and a commutation of sentence—from death to life with parole—by Governor Douglas Wilder, who indicated that the state's attorney general should consider granting Giarratano a retrial.<sup>69</sup> If a retrial were granted, its outcome would prevail over

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than 'segregation forever.'"); MANDERY, *supra* note 31, at 271–74 (describing Nixon's decision to manipulate racialized law and order rhetoric for partisan reasons—appealing to the racial hostilities of white Southern voters).

67. See MANDERY, *supra* note 31, at 274 (“The justices [had been] agents of unwanted social change, and through their decisions on busing and capital punishment had sought to aid and protect a population that whites regarded as dangerous and undesirable.”).

68. See DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION* 11 (2010) (“What was once a familiar moral debate has been reborn as a sociological and historical problem: how to explain the peculiarities of America's twenty-first century death penalty? . . . [America] continue[s] to use capital punishment at a time when all other Western democracies have decisively abandoned it.”); see also ZIMRING, *supra* note 32, at 5–6 (“Alone among the Western democracies, state governments in the United States authorize and conduct executions as criminal punishment . . .”). Most of the executions in the United States since 1976 have taken place in the South. See FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 31, 128–30 (1986) (reviewing America's execution statistics and concluding that “[a]t first sight, so striking is the contrast between the South and the other regions that the South appears to be ‘another country’”).

69. See B. Drummond Ayres, Jr., *Virginia Governor Blocks an Execution*, N.Y. TIMES (Feb. 20, 1991), <http://www.nytimes.com/1991/02/20/us/virginia-governor-blocks-an-execution.html> (last visited Oct. 4, 2016) (reporting Wilder's commutation of Giarratano's death sentence) (on file with the Washington and Lee Law Review); John F. Harris, *Wilder Grants Reversal of Death Sentence*, WASH. POST (Feb. 20, 1991), <https://www.washingtonpost.com/archive/politics/1991/02/20/wilder-grants->

the sentence remaining from the conditional pardon.<sup>70</sup> Because the prosecutor's office with authority to provide a retrial never permitted it and the Parole Board has yet to grant parole, Giarratano remains incarcerated.<sup>71</sup>

Although Governor Wilder expressed support for the death penalty as Virginia governor<sup>72</sup> and refused clemency in other cases,<sup>73</sup> it is not unthinkable that his perspective as the grandson of slaves, the namesake of Frederick Douglass, and a child of segregation, then the first African-American elected to statewide office in Virginia and the first African-American governor in the country,<sup>74</sup> influenced his willingness to entertain skepticism about

reversal-of-death-sentence/e26bf0dd-523b-4445-9e2e-b8726c6f03b5/ (last visited Oct. 4, 2016) (same) (on file with the Washington and Lee Law Review); Pamela Overstreet, *Wilder Grants Conditional Pardon*, UPI (Feb. 19, 1991), <http://www.upi.com/Archives/1991/02/19/Wilder-grants-conditionalpardon/5330666939600/> (last visited Oct. 4, 2016) (same) (on file with the Washington and Lee Law Review).

70. See Walter A. McFarlane, *The Clemency Process in Virginia*, 27 U. RICH. L. REV. 241, 247 (1992) (describing the limits on the Governor's authority that required Giarratano's conditional pardon to be structured as it was).

71. See John F. Harris, *Terry Rules Out New Trial for Pardoned Killer: Attorney General Certain of Giarratano's Guilt*, WASH. POST (Feb. 21, 1991), <https://www.washingtonpost.com/archive/local/1991/02/21/terry-rules-out-new-trial-for-pardoned-killer/f123b9b6-5216-49a1-9602-b16581d555ce/> (last visited Oct. 4, 2016) (examining Giarratano's request for a new trial) (on file with the Washington and Lee Law Review). Although his life sentence renders him parole eligible, the parole board has denied Giarratano's previous requests for parole based primarily on the seriousness of the underlying crime. See Joseph Giarratano, *Joe's Blog #12—The Virginia Parole Board's Decision*, FREE JOE GIARRATANO (Apr. 29, 2014), <http://freejoeg.com/joes-blog-12-virginia-parole-boards-decision/> (last visited Oct. 4, 2016) (stating the parole board's reasons for rejecting his parole requests) (on file with the Washington and Lee Law Review).

72. See L. DOUGLAS WILDER, SON OF VIRGINIA: A LIFE IN AMERICA'S POLITICAL ARENA 134 (2015) ("I had campaigned [for governor] on a strong law-and-order platform, including supporting the death penalty . . .").

73. See Harris, *supra* note 69 (stating that Governor Wilder "has refused three other pleas for clemency from condemned murderers during his 13 months in office").

74. In his memoir, Wilder describes the effects of segregation on his life and his political career, his involvement in civil rights activities, and his view that the justice system was "stained by segregation." Wilder, *supra* note 72, at 46–47. Wilder was an admirer and associate of Spottswood Robinson, a high-profile Virginia civil rights lawyer. *Id.* When Robinson became dean of the law school at Howard University, Thurgood Marshall appointed Wilder to succeed Robinson as a registered agent for the NAACP Legal Defense Fund, enabling Wilder to meet civil rights lawyers from all over the country and to be "involved in some of the

the accuracy of Giarratano's conviction,<sup>75</sup> despite political pressure to allow his execution to proceed.<sup>76</sup> Growing up in a segregated black community, educated in segregated schools and a historically black college, attending Howard Law School where civil rights litigation was invented by professors like Charles Hamilton Houston and students like Thurgood Marshall—both of whom pursued a legal campaign to dismantle segregation as lawyers at the NAACP Legal Defense Fund—and having extensive experience as a criminal trial lawyer, Wilder undoubtedly encountered many stories of wrongful convictions and executions of innocents, given the racialized context that made these narratives especially prevalent among African-Americans.<sup>77</sup>

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great civil rights cases of the day.” *Id.*

75. *See id.* at 47 (describing his role in “representing those who were in danger of being left outside the system of justice unless I helped them”).

76. Because Giarratano had numerous supporters, Wilder experienced political pressure both to grant and to deny clemency to Giarratano. *See Ayres, supra* note 69 (“Under intense pressure from both conservatives and liberals, Gov. L. Douglas Wilder of Virginia decided today to spare the life of Joseph M. Giarratano . . .”). Typically, politicians in death penalty jurisdictions assess their political risks as greater in granting clemency than in denying it. *See, e.g., Stephen B. Bright & Patrick J. Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U.L. REV. 760, 774 (1995) (“[F]rom California to Texas to Florida, candidates for governor sound as if they’re running to be executioner.”) (quoting Bob Minzesheimer, *Executioner’s Song Heard in Governor Races*, USA TODAY, Oct. 27, 1994, at 9A). Indeed, news reports implied that the decision of Virginia’s Attorney General to refuse Giarratano a new trial was politically motivated. *See Harris, supra* note 69 (observing that Attorney General Terry was expected to run for Virginia governor in 1993). The widespread perception that governors—such as Governor George W. Bush of Texas—deny clemency based on a self-serving political calculus explains an editorial cartoon that appeared in *The Boston Globe* in 2000, depicting a Texas inmate being put to death by lethal injection as a Texas corrections official explains to him: “Sorry—no reprieve . . . the Governor’s campaign needs a shot in the arm.” *Wasserman’s View*, BOSTON GLOBE, June 23, 2000, at A24.

77. Governor Wilder describes the inequalities he experienced growing up in racially segregated Virginia and expresses admiration for civil rights lawyers and the movement to end segregation. *See WILDER, supra* note 72, at 40–47 (describing the need for, and the role of lawyers in, efforts to dismantle segregation). Noting that he had been a criminal trial lawyer for many years, *id.* at 134, Wilder indicates that he saw himself making a contribution to civil rights “chiefly by representing African American folks in the courts.” *Id.* at 45. He observes that many of his cases “were not about race per se but race was often the underlying issue.” *Id.* at 47.

### 3. Juries

Where narratives like these have remained especially prevalent among African-Americans in our still largely segregated communities, the systematic exclusion of African-Americans from juries has disproportionately excluded many whose backgrounds have generated an openness to considering the possibility of official error.<sup>78</sup> Through the combined operation of jury eligibility laws<sup>79</sup>

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78. See, e.g., Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1019–20 (2003) (reviewing social science research suggesting that, relative to white jurors, black jurors are more skeptical about “the fairness of the legal system” and that “many Blacks are socialized in environments that are mistrustful of the egalitarian claims of White America”). In the state of Virginia, a 2009 poll conducted by *The Washington Post* showed that while seventy-two percent of white Virginians supported the death penalty, fifty-six percent of African Americans living in Virginia opposed it. See Jennifer Agiesta, *On Eve of Execution, Virginians Broadly Support Death Penalty*, WASH. POST (Nov. 9, 2009), [http://voices.washingtonpost.com/behind-the-numbers/2009/11/on\\_eve\\_of\\_execution\\_virginians.html](http://voices.washingtonpost.com/behind-the-numbers/2009/11/on_eve_of_execution_virginians.html) (last visited Oct. 4, 2016) (reporting differential levels of death penalty support by race) (on file with the Washington and Lee Law Review).

79. Criminal defendants are constitutionally entitled to a jury drawn from a pool representative of the community. See generally *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975). However, because jury pools are commonly drawn from voter lists and, for a variety of converging reasons, voter lists disproportionately exclude African-Americans, jury pools typically underrepresent African-Americans. See Cynthia A. Williams, *Jury Source Representativeness and the Use of Voter Registration Lists*, 65 N.Y.U.L. REV. 590, 626 (1990) (describing the inaccuracy in census and voter registration data that “results in the systematic underrepresentation of distinctive groups of the community in jury pools”); see also Stevenson, *supra* note 53, at 90 (“In several Alabama counties, over a quarter of the African American population is illegally underrepresented on the list of prospective jurors.”).

Of course, criminal justice policies that disproportionately convict and incarcerate African-Americans, then attach voting disabilities to felony convictions, will systematically reduce African-Americans’ eligibility for jury service. See ALEXANDER, *supra* note 22, at 17 (“Like Jim Crow, mass incarceration . . . authorizes discrimination against [large segments of the African American community] in voting, employment, housing, education, public benefits, and jury service.”). As Alexander observes, “Felon disenfranchisement laws have been more effective in eliminating black voters in the age of mass incarceration than they were during Jim Crow.” *Id.* at 187–88. She further notes that “a large percentage of black men (about 30 percent) are automatically excluded from jury service because they have been labeled felons.” *Id.* at 189; see also Adam Liptak, *Exclusion of Blacks from Juries Raises Renewed Scrutiny*, N. Y. TIMES (Aug. 16, 2015), [http://www.nytimes.com/2015/08/17/us/politics/exclusion-of-blacks-from-juries-raises-renewed-scrutiny.html?\\_r=0](http://www.nytimes.com/2015/08/17/us/politics/exclusion-of-blacks-from-juries-raises-renewed-scrutiny.html?_r=0)

and jury selection practices—such as those that permit prosecutors to peremptorily strike African-Americans from juries as long as, if challenged later, they can articulate race-neutral reasons for the strikes<sup>80</sup>—in many communities juries rarely contain more than a token number of African-Americans, if any.<sup>81</sup> Because jurors are

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(last visited Oct. 4, 2016) (“Blacks may be less likely to be on jury lists that are drawn from voter registration records, less likely to appear when called, more likely to qualify for hardship exemptions and more likely to be disqualified for felony convictions.”) (on file with the Washington and Lee Law Review).

80. See *Batson v. Kentucky*, 476 U.S. 79, 97 (1986) (shifting the burden to the prosecutor to offer race-neutral explanations for peremptory challenges after the defendant makes a prima facie showing of discrimination in the prosecutor’s use of challenges). *Batson* has proven ineffective in preventing race-based peremptory challenges to jurors. See Hilary Weddell, *A Jury of Whose Peers?: Eliminating Racial Discrimination in Jury Selection Procedures*, 33 B.C.J.L. & SOC. JUST. 453, 478 (2013) (“[P]eremptory challenges continue to be used seemingly on race alone, and the current construction of the *Batson* challenge does little to curb this use.”). This is so even after the Supreme Court’s recent decision in *Foster v. Chatman*. See 136 S. Ct. 1737, 1755 (2016) (holding prosecutor’s race-neutral explanations to be pretextual only because of the subsequent disclosure of his notes showing that he consciously struck all of the eligible black jurors on the basis of race in the trial of a black Georgia teenager for the murder of an elderly white woman). See Phyllis Goldfarb, *Response, Foster v. Chatman: E-Racing the White Jury’s Constitutional Veneer*, GEO. WASH. L. REV. ON DOCKET (May 29, 2016), <http://www.gwlr.org/foster-v-chatman-e-racing-the-white-jurys-constitutional-veener-examining-what-lies-beneath/> (last visited Oct. 4, 2016) (observing that “were it not for the belated revelations in the prosecutor’s notes, Foster’s *Batson* challenge would have continued to fall short”) (on file with the Washington and Lee Law Review).

81. A recent study compiled the following evidence of the widespread exclusion of African Americans from jury service:

From 2005 to 2009, in cases where the death penalty has been imposed, prosecutors in Houston County, Alabama have used peremptory strikes to remove 80% of the African Americans qualified for jury service. As a result, half of these juries were all-white and the remainder had only a single black member, despite the fact that Houston County is 27% African-American.

In 2003, the Louisiana Crisis Assistance Center found that prosecutors in Jefferson Parish felony cases strike African-American prospective jurors at more than three times the rate that they strike white prospective jurors. Louisiana allows convictions . . . even if only 10 of 12 jurors believe the defendant is guilty. The high rate of exclusion means that in 80% of criminal trials, there is no effective black representation on the jury because only the votes of white jurors are necessary to convict, even though Jefferson Parish is 23% black.

In the years before and after *Batson*, Georgia prosecutors in the Chattahoochee Judicial Circuit used 83% of their peremptory strikes against African Americans, who make up 34% of the circuit’s

not representative of the regions from which they are drawn, their views may not be representative.<sup>82</sup> In capital cases, the process of “death-qualifying” a jury—by removing all the jurors with conscientious scruples about the death penalty<sup>83</sup>—will exacerbate the problem, as the accumulated lessons of the lives of people of color make them disproportionately disinclined toward death sentences and thereby ineligible to sit as capital jurors, even in the guilt-innocence phase of capital trials.<sup>84</sup>

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population.

EQUAL JUSTICE INITIATIVE, *ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY* 14 (2010), <http://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf> [hereinafter EJI REPORT]. The EJI Report recounts numerous stories of African-American citizens, descendants of slaves and some of them survivors of Jim Crow, who have lived in a single county for their entire lives and have never been called for jury duty, or who have been called but struck from the jury for so-called race-neutral reasons that also applied to whites permitted to serve as jurors. *See id.* at 16–35 (describing the impact of race-based jury selection on the African-American community).

82. *See* Lynch & Haney, *supra* note 19, at 580 (examining studies that “have found that race of the juror can matter in capital case outcomes”).

83. “Death qualification” refers to the practice of removing from a capital jury, prior to trial, people who hold moral qualms about the death penalty. *See* *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (upholding the exclusion of jurors removed for cause after expressing with less than “unmistakable clarity” concerns about the death penalty that were deemed to prevent or substantially impair the performance of their duties). The *Wainwright* standard for “death-qualifying” a jury is broader than the original death qualification standard articulated in *Witherspoon v. Illinois*. *See* 391 U.S. 510, 529–531 (1968) (reversing a death sentence imposed by a jury from which people had been excluded after voir dire for voicing conscientious scruples against infliction of the death penalty); *see also* Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1463 (1997) (“Death-qualified juries are less likely to share the racial and status characteristics or the common life experiences with capital defendants that would otherwise enable them to bridge the vast differences in behavior the trial is designed to highlight.”).

84. A recent Gallup poll found that twenty-nine percent of white respondents opposed the death penalty, compared to fifty-five percent opposition among black respondents. *See* Andrew Dugan, *Solid Majority Continue to Support Death Penalty*, GALLUP (Oct. 15, 2015), [http://www.gallup.com/poll/186218/solid-majority-continue-support-death-penalty.aspx?g\\_source=solid%20majority%20continue%20to%20support%20death%20penalty&g\\_medium=search&g\\_campaign=tiles](http://www.gallup.com/poll/186218/solid-majority-continue-support-death-penalty.aspx?g_source=solid%20majority%20continue%20to%20support%20death%20penalty&g_medium=search&g_campaign=tiles) (last visited Oct. 4, 2016) (comparing differential levels by race in support for the death penalty) (on file with the Washington and Lee Law Review); *see also* Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U.L. REV. 26, 45–47 (2000) (reporting data showing that white jurors expressed more anger toward defendants than black jurors did, regardless of the defendant’s race, and that black jurors were better able than white jurors to empathize with both

In other words, regardless of the race of the defendant, the systematic and rampant exclusion of African-Americans from juries skews fact-finding in the direction of more convictions and death sentences.<sup>85</sup> These realities can influence other aspects of the process. For example, even when there are legitimate defenses, the possibility of actual innocence, or questions about the degree of guilt, defendants understandably bent on escaping the possibility of a death sentence may choose to plead guilty to obtain a sentence less than death.<sup>86</sup> The pressure to do so will only increase where the defendant's sense of the jury is that selection processes have skewed it toward a conviction and death sentence.

While issues surrounding jury composition play a role in an overall analysis of the continuing pervasive effects of racial dynamics on criminal justice processes, they do not play a role in the *Giarratano* case. In what we now understand to be a decision-

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black and white defendants and to “keep the sin separate from the sinner”); Adam Liptak, *Facing a Jury of (Some of) One's Peers*, N.Y. TIMES (July 20, 2003), [http://www.nytimes.com/2003/07/20/weekinreview/20\\_LIPT.html](http://www.nytimes.com/2003/07/20/weekinreview/20_LIPT.html) (last visited Oct. 4, 2016) (“‘There is a major bleaching of juries,’ said Samuel R. Gross, a law professor at the University of Michigan. ‘Many more African-Americans are excluded than whites. The biggest demographic predictor of attitudes toward the death penalty is race.’”) (on file with the Washington and Lee Law Review); Lynch & Haney, *supra* note 19, at 589 (“[R]acial animus is one of the most consistent and robust predictors of support for the death penalty.”) (quoting James D. Unnever, Francis T. Cullen & Cheryl Lero Jonson, *Race, Racism and Support for Capital Punishment*, 37 CRIME & JUST. 45, 69 (2008)).

85. The death qualification of jurors prior to a capital trial removes jurors who oppose the death penalty not just from the sentencing phase of the trial, but from the guilt-innocence phase as well. *See supra* notes 83–84 and accompanying text (providing explanation of the “death qualification” process). Yet studies show “a powerful correlation between attitudes toward the death penalty and receptiveness to evidence of defendant's guilt.” Liptak, *supra* note 84. *See also* Richard Morin, *Bias in the Jury Box?*, WASH. POST (Mar. 21, 2004), <https://www.washingtonpost.com/archive/opinions/2004/03/21/bias-in-the-jury-box/c1bdc75a-879f-4a24-a21f-08a5c2d67387/> (last visited Sept. 8, 2016) (describing research that shows death-qualified juries are more conviction-prone) (on file with the Washington and Lee Law Review). In *Lockhart v. McCree*, the Supreme Court rejected a challenge to death qualification prior to trial that was based on research showing that death-qualified juries were more conviction-prone. *See generally* 476 U.S. 162 (1986).

86. *See* Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions are Common in Capital Cases*, 44 BUFFALO L. REV. 469, 488 (1996) (reporting a study that showed sixteen homicide exonerees had pled guilty and that they explicitly noted a fear of execution as the reason that they chose to plead guilty, despite their innocence).



making process motivated by a suicidal aim, Joe Giarratano waived his right to a jury when he was tried for murder.<sup>87</sup> Aware of gaps in his memory, addled by years of severe substance abuse, and believing that he may have committed murder, Giarratano thought he deserved to die.<sup>88</sup> Refusing to plead to eliminate the prospect of the death penalty, Giarratano chose a bench trial to fulfill his suicide mission.<sup>89</sup> With the help of his appointed defense counsel, he waived a jury, presented an unsupported defense at trial, obtained a conviction, and asked the judge for a death sentence.<sup>90</sup> As events confirmed, Giarratano had correctly identified the most efficient route to assisted suicide.

#### 4. Judges

Of course, the judge had to play his expected role in the suicide plan. Knowing that Giarratano had declined to accept a plea to avoid the death penalty then waived his right to a jury trial,<sup>91</sup> knowing that Giarratano had suffered abuse in an unstable home as a child and that he turned to drug and alcohol abuse starting at age eleven,<sup>92</sup> knowing that Giarratano had attempted to take his own life multiple times and was being administered psychotropic drugs during trial,<sup>93</sup> the judge might have decided that, despite Giarratano's request for death, an appropriate sentence in these circumstances was life in prison.<sup>94</sup> Although the judge was

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87. See *In re Joseph M. Giarratano*, Petition for Conditional Pardon by the Governor of the Commonwealth of Virginia 3 (1991), [http://freejoeg.com/wp-content/uploads/2013/11/07\\_S\\_Exhibits\\_Volume\\_SIX\\_of\\_SEVEN.pdf](http://freejoeg.com/wp-content/uploads/2013/11/07_S_Exhibits_Volume_SIX_of_SEVEN.pdf) [hereinafter 1991 Petition] (explaining Giarratano's decision to waive his right to a jury).

88. *Id.* at 2–9.

89. *Id.* at 2–3.

90. *Id.*

91. *Id.*

92. Testimony at the sentencing hearing provided the judge with this information. See *Giarratano v. Commonwealth*, 266 S.E.2d 94, 100–102 (Va. 1980) (describing testimony at the sentencing hearing on Giarratano's childhood).

93. *Id.*

94. In a companion case to *Gregg v. Georgia*, *Woodson v. North Carolina* rejected the imposition of an automatic death sentence for a specified offense. See *Woodson*, 428 U.S. 280, 301 (1976) (“[O]ne of the most significant developments in our society's treatment of capital punishment has been the rejection of the

required under law to make an independent moral judgment as to whether the circumstances of Giarratano's life reduced his culpability and made the death penalty excessive in his case, Giarratano presumed that the judge would oblige his request to receive a death sentence.<sup>95</sup> Why was this a safe wager?

The selection process for state trial court judges reinforced the likelihood that the judge would deliver the death sentence that Giarratano sought.<sup>96</sup> In states that have relied on the death penalty to the greatest extent—states of the old Confederacy<sup>97</sup>—judges are elected.<sup>98</sup> State judges typically serve for a term of years, then stand for re-election against potential opponents, or survive a retention election, to continue to serve.<sup>99</sup> In states where

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common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense.”).

95. See *id.* at 304 (“[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.”). In Giarratano's case, the trial judge found that at the time of the offense the defendant was not under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct, or to conform his conduct with the law, was not significantly impaired. See *Giarratano v. Commonwealth*, 266 S.E.2d 94, 102–03 (Va. 1980) (analyzing Giarratano's mental state at the time of the offenses for which he was convicted). Although these were factors expressly identified in the Virginia mitigation statute, the statute also clarifies—consistent with constitutional requirements—that mitigation cannot be limited to the identified factors. See VA. CODE § 19.2-264.4 (2010) (outlining sentencing proceedings in Virginia).

96. Justice Stevens recognized this reality in his dissent in *Harris v. Alabama*, 513 U.S. 504, 521 (1995) (Stevens, J. dissenting) (“[G]iven the political pressures they face, judges are far more likely than juries to impose the death penalty. This has long been the case . . .”).

97. As of April 7, 2016, 1167 of 1433 executions in the United States since 1976 have taken place in the South, more than eighty-one percent of all executions in the post-*Gregg* era. *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO CTR., <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> (last visited Oct. 4, 2016) (on file with the Washington and Lee Law Review).

98. Virtually all states that have the death penalty, and all Southern states, subject state judges to elections. See Bright & Keenan, *supra* note 76, at 776–80 (detailing judicial election procedures across the country).

99. Four-year and six-year judicial terms are most common in states that require judges to face elections. See *id.* at 777–78 n.85–87 (listing state statutes and constitutional provisions establishing judicial terms and elections). The states that rely most on the death penalty are the states that select judges through contested elections. *Id.* at 777 n.85. Judges often tout their death penalty

the death penalty is popular, judges are under political pressure to impose and support death sentences where they can.<sup>100</sup> Those who fail to do so when opportunities arise are vulnerable to ugly reelection campaigns, and potential rejection, in the next election cycle.<sup>101</sup>

Political pressure to impose death sentences in states with considerable support for the death penalty may remain acute in Virginia, where trial court judges are elected by the Virginia General Assembly rather than by the voting populace.<sup>102</sup> In this unusual selection procedure, voting legislators may be concerned about their own reelection to the Virginia state legislature and will be inclined to make safe judicial choices that pose limited risk to their reelection prospects.<sup>103</sup> Because judicial choices reflect

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rulings during their electoral campaigns. *See id.* at 787 (“Incumbent judges have used capital cases to advance their chances of reelection or retention.”).

100. *See id.* at 765 (“[T]hese political pressures have a significant impact on the fairness and integrity of capital trials. When presiding over a highly publicized capital case, a judge who declines to hand down a sentence of death, or who [upholds] the Bill of Rights, may thereby sign his own political death warrant.”). These political pressures can also influence the exercise of prosecutorial discretion for elected district attorneys and for prosecutors who are not elected themselves but who may aspire to become judges. *See id.* at 781 (“One of the most frequently traveled routes to the state trial bench is through prosecutors’ offices. A capital case provides a prosecutor with a particularly rich opportunity for media exposure and name recognition that can later be helpful in a judicial campaign.”).

101. In 1998, Judge Charles Baird of the Texas Court of Criminal Appeals was the sole dissenter from the denial of an appeal by Karla Faye Tucker, the first woman executed in Texas in the modern era. *See* Christy Hoppe, *Board Unanimously Rejects Tucker’s Plea for Clemency: Federal Courts, Governor Could Delay Execution*, DALLAS MORNING NEWS (Feb. 3, 1998) (reporting the legal decisions that led to the execution of Karla Faye Tucker). Soon thereafter, Judge Baird was ousted when he sought reelection. *See* Mark Hansen, *Hanging Judges: Going Against Prevailing Currents in Capital Cases Can Sink a Career*, 85 A.B.A.J. 91 (1999) (“It was the worst thing I could have done for my political campaign,” Baird said of the dissent. “But it was the right thing to do in the face of the law and due process.”). For many other examples of judges made politically vulnerable by decisions in death penalty cases, see generally Bright & Keenan, *supra* note 98, at 761–65.

102. *See* VA. CONST. art. VI, § 7 (delineating procedures for judicial elections).

103. *See, e.g.*, Bright & Keenan, *supra* note 98, at 789 (“[P]erceived ‘softness’ on crime or on the death penalty may have consequences not only for the judge, but also for those who would nominate or vote to confirm the judge . . .”).

directly on these legislators, the safest path is to choose judges who will reliably comport with the prevailing political will.<sup>104</sup>

In states like Virginia, where in many of its regions the death penalty has the backing of majorities, legislators have political incentives to elect judges who will find favor with the general electorate by demonstrating their willingness—sometimes even their eagerness—to impose death sentences.<sup>105</sup> In a judicial selection system like this, the pro-death penalty views of the majority will control.<sup>106</sup> The anti-death penalty views that predominate among minorities, who are disproportionately subject to the harshest punishments, will have far more difficulty finding their way to the bench.<sup>107</sup> These political dynamics were especially pronounced in the late 1970s, an era of post-civil rights

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104. *See id.* at 791–92 (“As a result of the increasing prominence of the death penalty in judicial elections as well as other campaigns for public office, judges are well aware of the consequences to their careers of unpopular decisions in capital cases.”).

105. Although support for the death penalty has declined somewhat in recent years, a majority of Americans still support it. *See Shrinking Majority of Americans Support the Death Penalty*, PEW RES. CTR. (Mar. 28, 2014), <http://www.pewforum.org/2014/03/28/shrinking-majority-of-americans-support-death-penalty/> (last visited Sept. 8, 2016) (noting that fifty-five percent of Americans favor the death penalty for murder compared to thirty-seven percent of Americans who oppose the practice) (on file with the Washington and Lee Law Review). Support for the death penalty also appears to be declining in Virginia, although a sizeable majority of Virginians continue to favor it. A November 2009 poll by *The Washington Post* showed that two-thirds of Virginians still support the death penalty. *See Jennifer Agiesta, On Eve of Execution, Virginians Broadly Support Death Penalty*, WASH. POST (Nov. 9, 2009), [http://voices.washingtonpost.com/behind-the-numbers/2009/11/on\\_eve\\_of\\_execution\\_virginians.html](http://voices.washingtonpost.com/behind-the-numbers/2009/11/on_eve_of_execution_virginians.html) (last visited Sept. 8, 2016) (reporting that sixty-six percent of Virginians favor the death penalty compared to thirty-one percent who are opposed to the death penalty) (on file with the Washington and Lee Law Review).

106. Under the Virginia Constitution, all state appellate judges are elected by the General Assembly as well. VA. CONST. art. VI, § 7. The error-correction role of the appellate bench can be compromised, especially on inflammatory issues such as capital sentences for those convicted of high profile local murders, when appellate judges share the political motivations and political vulnerability of trial judges. *See Bright & Keenan, supra* note 98, at 785 (“A few rulings in highly publicized cases may become more important to a judge’s survival on the bench than qualifications, judicial temperament, management of the docket, or commitment to the Constitution and the rule of law.”).

107. *See Agiesta, supra* note 105 (noting that a 2009 poll by *The Washington Post* showed that while seventy-two percent of white Virginians supported the death penalty, fifty-six percent of African Americans living in Virginia opposed it).

backlash.<sup>108</sup> Through political structures controlled by white majorities, judges inclined toward issuing death sentences were selected to preside over Virginia's courts.<sup>109</sup> Racial dynamics played a supporting role in sustaining the judicial selection system that enhanced the likelihood that Giarratano would be condemned to die.

### 5. *Race of Victims*

These are the less than obvious ways that race influenced Joe Giarratano's case. Yet the most obvious way that race played a role in the *Giarratano* case is that he was convicted of killing white victims.<sup>110</sup> In America, capital punishment has been reserved primarily for those convicted of killing white people.<sup>111</sup> Indeed, the Baldus study confirmed empirically what many had long understood from observation and experience.<sup>112</sup> Baldus' gargantuan study, conducted over years, demonstrated that defendants convicted of killing white victims increased their chances of receiving a death sentence by more than four times, compared with those convicted of killing non-whites, a statistic

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108. See MANDERY, *supra* note 31, at 275 (discussing how, in the 1970s, "frustration with the Supreme Court was really born out of underlying resistance to the Court's position on race and social issues"). Giarratano was convicted in 1979, in the midst of this cultural battle. *Giarratano v. Commonwealth*, 266 S.E.2d 94, 95 (Va. 1980).

109. See Bright & Keenan, *supra* note 98, at 785 (examining the incentive structure that leads judges to issue death sentences).

110. See David Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner & Barbara Broffitt, Symposium, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1657–58 (1998) ("[T]he defendants in white-victim cases were more likely to receive a death sentence than the defendants in black-victim cases. The strongest race-of-victim effects were observed among the cases with average levels of defendant culpability.>").

111. After systematically reviewing more than two-dozen existing studies concerning the influence of race on the death penalty, the General Accounting Office reported that in eighty-two percent of the studies, defendants convicted of murdering whites were more likely to receive death sentences than those convicted of murdering blacks. U.S. GEN. ACCT. OFF., DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5–6 (1990).

112. See Stevenson, *supra* note 79, at 97 ("The legacy of racial apartheid, racial bias, and ethnic discrimination is unavoidably evident in the administration of capital punishment in America.").

reinforcing a cultural message that the lives that matter most should be avenged and that white lives matter most.<sup>113</sup> The Baldus study provides empirical evidence that an ideology of white supremacy, or ideas about racial difference, are at work in deciding which capital defendants will be chosen for death.<sup>114</sup>

### *III. Other Ideologies at Work*

If this assessment of the way that race is implicated at least to some degree in all capital cases, including the *Giarratano* case, is sound, it follows that examining race alone will yield only a partial analysis. Race never occurs alone, but always in combination with other identity characteristics. For example, the victims that Giarratano was convicted of killing were not just white, they were white women.<sup>115</sup> This opens additional questions: How does gender interact with race in the *Giarratano* case? Answering this question first requires a backdrop understanding of prevailing gender ideologies.

#### *A. Gender Ideologies*

Women have long been constructed as prototypical victims, a class of people vulnerable to male aggression and therefore dependent on the protection of other men.<sup>116</sup> These are key

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113. See Baldus et al., *supra* note 34, at 143 (detailing the statistical impact of the victim's race on the likelihood of receiving a death sentence).

114. See Stevenson, *supra* note 79, at 99 ("The death penalty is dis-enabling to a nation still struggling to overcome the legacy of slavery and racial apartheid because it operates in a manner that reveals insidious race consciousness.").

115. See 1991 Petition, *supra* note 87, Joint Appendix 2, Transcript of Hearing before Thomas R. McNamara, May 22, 1979, at 17 (describing each of the female victims, Michelle and Barbara Kline, as "Caucasian female").

116. See CYNTHIA K. GILLESPIE, *JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE AND THE LAW* 115–16 (1989) (describing differences in male and female socialization such that a woman can spend decades "absorbing the message that she is, and ought to be, gentle, weak and helpless; that she needs to be protected from pain and injury; that she cannot really rely on her own strength to save her"). This gender socialization may explain why researchers have identified a "female victim effect" in which crimes with female victims are punished more severely than crimes with male victims. See, e.g., Caisa Elizabeth Royer et al., *Victim Gender and the Death Penalty*, 82 UMKC. L. REV. 429–

features of patriarchy, a structure in which gender determines who acts and who is the recipient of others' actions.<sup>117</sup> Patriarchal cultures like ours often express chivalrous norms in circumstances where protecting women from male aggression is deemed appropriate.<sup>118</sup> While no longer articulated as the basis of official policies, chivalry retains a surprising hold on popular consciousness.<sup>119</sup> Even so, the generalization has significant qualifiers.

For example, the more women diverge from classic female stereotypes—deferential, caretaking, demure, chaste,

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33, 461–63 (2014) (reviewing several studies finding a correlation between female victims and the likelihood that a death sentence will be pursued and imposed, and concluding after additional research that “victim gender continues to influence capital sentencing decisions”).

117. See Janet Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83, 83 (1980) (“By patriarchy, I mean any kind of group organization in which males hold dominant power and determine what part females shall and shall not play . . .”).

118. Originally understood as the gallantry expected of knights, the word “chivalry” came to be used to mean “courtesy.” ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/topic/chivalry> (last visited Oct. 4, 2016) (on file with the Washington and Lee Law Review). More precisely, given its origin in the behavioral code of the men who were knights, the word conveyed gendered imagery, such that one of its definitions is: “an honorable and polite way of behaving especially toward women.” MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/chivalry> (last visited Oct. 4, 2016) (on file with the Washington and Lee Law Review). The female counterpart of chivalry was “the cult of true womanhood.” See Barbara Welter, *The Cult of True Womanhood: 1820–1860*, 18 AM. Q. 151, 151–52 (1966) (detailing the manipulation of women into believing they should strive for piety, purity, submissiveness, and domesticity within the home). Only women perceived as conforming to these tenets of domesticity, submissiveness, piety, and purity were deemed worthy of protection, such that they applied primarily to middle-class white women. See PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* 5–8 (1984) (explaining race and class implications of gender ideologies). In addition to these race and class effects, gender ideologies reinforced the dominance and submission model of male-female relationships that feminist theorists have decried. See CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 42 (1987) (“[I]f gender is an inequality first, constructed as a socially relevant differentiation . . . then sex inequality questions are questions of systematic dominance, of male supremacy. . .”).

119. See, e.g., Michael Dowd, *Dispelling the Myths About the “Battered Woman’s Defense”*: Towards a New Understanding, 19 FORDHAM. URB. L.J. 567, 575 (1991) (“[S]tereotypes of women as pure and passive, as caregivers and nurturers, have been taught and accepted by men—and women—for centuries, making the erosion of such beliefs a long and frustrating process.”).

submissive—the less likely it is that they will be deemed worthy of male protection.<sup>120</sup> Moreover, chivalry is a color-coded phenomenon, in that some women of color, not as readily perceived as conforming to female stereotypes, are not granted the same level of protection.<sup>121</sup> To the extent that the criminal justice system embodies dominant norms, created largely by those who organize and operate it—disproportionately empowered white men—white women are the standard beneficiaries of chivalrous responses.<sup>122</sup>

Female murder victims, especially white female victims, can evoke chivalrous impulses that enhance the likelihood that death sentences will be imposed on those convicted of killing them.<sup>123</sup> In

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The ideology of gender has long suggested that to be a timid, delicate, passive, demure, docile, deferential, and nurturing caretaker is to be a woman worthy of the love and protection of men. . . . It is women's inability to live up to the ideal that disqualifies them from entitlement to male protection . . . and contributes to women's views that they are to blame for violence against them.

Phyllis Goldfarb, *Describing Without Circumscribing: Questioning the Construction of Gender in the Discourse of Intimate Violence*, 64 GEO. WASH. L. REV. 582, 608 (1996).

121. See, e.g., Sharon Angella Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN'S L.J. 191, 198–99 (1991) (noting that, “[t]hroughout history, Black women's experiences with patriarchy differed from those of white women” because Black women have been portrayed as deviant, immoral, and not worthy of male protection).

122. See Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 27 (1999) (“Men are men to the extent they are *not* women: masculine, independent, invulnerable, tough, strong, aggressive, powerful, commanding, in control, rational, and non-emotional. ‘Real women’ (that is, middle- or upper-middle-class white women) are dependent, vulnerable, pliant, weak, supportive, nurturing, intuitive, emotional, and empathic.”). In the criminal justice system, decisions are made—whether on the basis of the gendered imagery of chivalry or otherwise—largely by white decision-makers. See, e.g., Stevenson, *supra* note 79, at 91 (“Although black people constitute 26 percent of the Alabama population, there are no African American appellate court judges in the entire state, and fewer than 2 percent of the prosecutors and 4 percent of the criminal court judges are black.”). With the predominance of white males in criminal justice decision-making positions, outcomes show marked gender effects. See, e.g., Theodore R. Curry, *The Conditional Effects of Victim and Offender Ethnicity and Victim Gender on Sentences for Non-Capital Cases*, 12 PUNISHMENT & SOC'Y 438 (2010) (reporting that white female homicides produced longer sentences than homicides against men of all races).

123. See, e.g., Royer et al., *supra* note 116, at 431–32 (“Several studies have found that the murder of a white female puts the offender at the greatest risk of being sentenced to death.”). Although research has not proven that chivalrous



the *Giarratano* case, the fact that the murder victims Barbara “Toni” Kline and Michele Kline were white, mother and daughter, one a teenager, may have tapped the kind of unconscious gender imagery that increased the chances Giarratano would receive the death sentence.<sup>124</sup> Rather than protecting them, he was found to have grievously harmed them—the teenage daughter sexually assaulted then strangled, her mother stabbed—an aggravated crime only intensified by the violation of chivalrous gender norms.<sup>125</sup>

But chivalry has its limits. Because women are subject to more violence from family members and intimates than from any other source, one might think that protective impulses would have focused the harshest punishments on the domestic violence

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attitudes toward women explain these findings, Royer’s research team identified an influential variable—perceptions of victim vulnerability—that may increase the severity of punishment and correlate with gender. *See id.* at 436–37 (“[V]ictim vulnerability is likely to be relevant in determining sentencing.”). To the extent that perceived vulnerability on the basis of gender increases severity of punishment, the chivalry thesis may be implicated. *See also* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1557 (1998) (reporting that in surveys of capital jurors, when the victim was female, 21.3% of jurors found that fact aggravating).

124. *See In re Joseph M. Giarratano, Jr.*, Petition for Conditional Pardon 3–5 (September 4, 2009) [hereinafter 2009 Petition] (describing the victims and their murders). In fact, Giarratano received the death sentence after his conviction for the rape-murder of Michelle, the teenage victim, whom the Virginia appellate court referred to as a child. *See Giarratano v. Commonwealth*, 266 S.E.2d 94, 103 (Va. 1980). Through the use of the word “child,” the court may have been conveying perceptions of victim vulnerability that make a defendant more culpable and more deserving of death. Jurors have reported that killing a child victim would make them significantly more likely to sentence a defendant to death. *See* Scott E. Sundby, Symposium, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343, 346–47 (2003) (“[M]ore than half of the jurors (53%) stat[ed] that a child victim would make them ‘much more likely’ to send the defendant to the death chamber); Garvey, *supra* note 123, at 1556 (reporting research showing that “a sizeable majority of jurors would be more likely to impose death if the victim was a child”).

125. *See Giarratano*, 266 S.E.2d at 103 (finding the death penalty not excessive or disproportionate for the murder of Michelle, in part because of the horror she must have experienced as she was strangled); *see also* Elizabeth Rapaport, *The Death Penalty and Gender Discrimination*, 25 LAW & SOC’Y REV. 367, 370, 380 (1991) (observing that felony murders represent a significant percentage of the murders that receive capital sentences and noting the extra opprobrium with which our culture regards rape-murders); Royer et al., *supra* note 116, at 461 (“[S]exual violence during the crime increased the likelihood that the defendant would be sentenced to death.”).

problem.<sup>126</sup> Yet, perversely, had the female victims been Giarratano's mother or wife or daughter, these relationships might have been mitigating facts, reducing the likelihood that he would receive a death sentence.<sup>127</sup>

This punishment discount for the lethal violence men commit against female intimates disappears when the genders are reversed.<sup>128</sup> While the lethal violence that women commit against male intimates is far less frequent, it is often punished more severely.<sup>129</sup> Women are sentenced to death at higher rates than are men for domestic violence murders.<sup>130</sup>

This collection of seemingly inconsistent responses to similar circumstances can be viewed as a problem of gender hierarchy. Statistics suggest that domestic violence is a wide-ranging

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126. See NAT'L COALITION AGAINST DOMESTIC VIOLENCE, *Why Do Women Use Force or Violence in Intimate Partner Relationships?*, <http://ncadv.org/files/Why%20Women%20Use%20Force%20or%20Violence%20in%20Intimate%20Partner%20Relationships.pdf> ("Women are five times more likely than men to be victimized by a spouse or partner, ex-partner, boyfriend, or girlfriend."); see also Diane Craven, BUREAU OF JUST. STATS. SPECIAL REP., *Sex Differences in Violence Victimization, 1994*, at 4 (1997), <http://www.bjs.gov/content/pub/pdf/SDVV.PDF> (reporting that sixty-two percent of all victimizations against women were committed by people they knew).

127. See *Godfrey v. Georgia*, 446 U.S. 420, 432–33 (1980) ("The petitioner's crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder. His victims were killed instantaneously. They were members of his family who were causing him extreme emotional trauma."); see also Rapaport, *supra* note 125, at 375 ("[M]urders of nonintimates by men are twice as likely to lead to the death penalty as are murders of intimates."). Rapaport states that because domestic murders are more likely than predatory murders to have women and children as victims, regarding predatory murders as more heinous than domestic murders "privileges the interests of men over those of women and children and supports patriarchal values." *Id.* at 378. Although Giarratano was acquainted with the two women he was convicted of killing, it would be an exaggeration to regard his as a conviction for domestic violence, because the evidence suggests he occasionally slept on the victims' couch but was not in intimate relationship with either.

128. See Rapaport, *supra* note 125, at 382 ("[A] strikingly high percentage of the women on death row, unlike the men, killed family or intimates.").

129. See *id.* at 367, 370–71 (presenting data showing that although "[t]he victims of women killers are substantially more likely than those of men to be family members and less likely to be strangers" and women commit a small percentage of murders, "death-sentenced women are more likely than death-sentenced men to have killed intimates").

130. See *id.* at 375–76 ("The high percentage of intimacy murders among death-sentenced women may reflect differential treatment of male and female murders of intimates . . .").

problem.<sup>131</sup> In our current systems, the more common the problem, the more it crosses social classes, the less deviant it is, and the less appropriate the extreme sanction of the death penalty becomes.<sup>132</sup> As a result, male-on-female violence between intimates is punished less severely not despite the fact that it is rampant, but because it is.

By contrast, the limited prevalence of female-perpetrated lethal violence between intimates makes it deviant behavior.<sup>133</sup> Additionally, although all of women's violence defies gender stereotypes, domestic crimes violate the stereotype of women as family caregivers.<sup>134</sup> Behaving counter to stereotype can operate to intensify punitive reactions to a crime.<sup>135</sup> This gendered pattern of punishment perpetuates the patriarchal norms that bolster gender hierarchy, as women remain disproportionately subject to men's violence, both private and public.<sup>136</sup>

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131. One in five women have been victims of severe physical violence by an intimate partner in their lifetime. See *Statistics*, NAT'L COALITION AGAINST DOMESTIC VIOLENCE, <http://www.ncadv.org/learn/statistics> (last visited Oct. 4, 2016) (reporting statistics for intimate partner violence) (on file with Washington and Lee Law Review).

132. See Rapaport, *supra* note 125, at 376–77 (asserting that, although the death penalty is to be reserved for the most reprehensible murders, “[t]he worst cases of domestic violence, unlike the worst cases of robbery violence, are not, as such, eligible for capital adjudication”).

133. See *id.* at 369–71 (“[I]n the twelve years 1976–1987, women made up 14.3 percent of murder and non-negligent manslaughter suspects known to the police” but “women who kill are more likely than men to kill family and other intimates.”).

134. See Goldfarb, *supra* note 120, at 608 (including “nurturing caretaker” as part of the ideological content of gender for women).

135. See, e.g., Victor L. Streib, 58 U. CIN. L. REV. 845, 878–79 (1990) (observing that women sentenced to death and executed were likely to be “poor, uneducated, of the lowest social class in the community,” and to have “manifested an attitude of violence”). Streib further notes that “[t]heir victims tended to be white and of particularly protected classes, either children or socially prominent adults” and that “perhaps most fatally for them, they committed shockingly ‘unladylike’ behavior allowing the sentencing judges and juries to put aside any image of them as ‘the gentler sex.’” *Id.*; see also Carroll, *supra* note 6, at 1451–52 (noting the role of violating gender expectations in death sentencing for women).

136. See Rapaport, *supra* note 125, at 379 (challenging the view that domestic violence, “from which women and children suffer disproportionately, is less reprehensible” than stranger violence). Rapaport suggests that “[t]he supposition that predatory violence is more reprehensible than domestic violence is a symptom or effect of the ancient family privacy doctrine that has supported male domestic authority . . . at the price of tolerating . . . a culture of domestic

Principles of human psychology support the status quo. Because decision-making in the criminal justice system is likely to serve the felt interests of those who organize and operate it—again, disproportionately white men—these decision-makers may identify in some respects with men who contribute to the widespread problem of domestic violence crimes against female intimates.<sup>137</sup> Identification may contribute to a reluctance to punish these crimes harshly.<sup>138</sup> At the same time, these decision-makers are less likely to identify with those who commit crimes against women who are non-intimates.<sup>139</sup> In fact, they may punish these crimes with special fervor, reserving their chivalrous responses for circumstances like these.<sup>140</sup>

Of course, race and class ideologies intersect with these gender patterns. Non-intimates who commit violence against women are perceived as menacing predators, creating imagery that has been coded by race, class, and gender for centuries.<sup>141</sup> Inflicting harsh

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violence.” *Id.*

137. See Robert J. Smith, Justin D. Levinson, & Zoe Robinson, *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 895 (2015) (“At the core of research on implicit in-group favoritism is the principle that people automatically associate the in-group or ‘us,’ with positive characteristics, and the out-group, or ‘them,’ with negative characteristics.”).

138. See *id.* at 895–96 (reporting results of study that found in-group favoritism to be an automatic and strong phenomenon).

139. See ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 247 (2000) (describing the process by which decision-makers “disempower the group constructed as ‘other’ in order to empower *our group* by contrast to ‘them’” and requiring us to imbue “the ‘others’ with intrinsic, immutable qualities making them different from *us*”).

140. See Haney, *supra* note 83, at 1460–61 (“Human beings react punitively toward persons whom they regard as defective, foreign, deviant, or fundamentally different from themselves.”); *id.* at 1463 (“[F]ew capital jurors will every truly know—by experience, identification, or intuition—the harsh realities of capital defendants’ lives.”).

141. The racialized treatment of rape allegations is especially revealing. See ZIMRING & HAWKINS, *supra* note 68, at 35 (reporting prior research results showing that “there has been a systematic, differential practice of imposing the death penalty on blacks for rape and, most particularly, when the defendants are black and their victims are white”). Although the death penalty is no longer available for rape, it is available for rape-murders and inflammatory racial imagery can infect those trials. See, e.g., PETE EARLEY, *CIRCUMSTANTIAL EVIDENCE: DEATH, LIFE, AND JUSTICE IN A SOUTHERN TOWN* (1995) (relaying a journalist’s account of the capital case of an African-American man falsely convicted—based on perjured testimony and appeals to prejudice—but later exonerated of the murder of a young white woman in Monroeville, Alabama, the

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>142</sup>

Moreover, patriarchal gender norms socialize men to commit aggressive acts to a far greater extent than women.<sup>143</sup> Our culture is not so chivalrous as to exclude women from death sentences, but, when provoked to impose the death penalty,<sup>144</sup> it imposes death sentences primarily on those understood to be violent aggressors, who will be disproportionately male.<sup>145</sup> In these circumstances, the death penalty acts symbolically to annihilate the threat they pose.<sup>146</sup> Despite the absence of evidence that the death penalty makes society safer, the cultural choice to use state violence to reassert dominance over those deemed to have perpetrated violence can be understood in patriarchal terms as well, a response consistent with socialization into male-defined roles of dominance and aggression.<sup>147</sup>

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setting for a similar case in Harper Lee's *To Kill a Mockingbird*).

142. Because the same degree of opprobrium is not shown for crimes against family victims, Elizabeth Rapaport notes "the extreme disapprobation which our society reserves for crimes inflicted on other men's women and children." Elizabeth Rapaport, *Some Questions About Gender and the Death Penalty*, 20 GOLDEN GATE U.L. REV. 501, 559 (1990).

143. See *id.* at 510 ("More than ninety-five percent of those convicted of violent crimes are male."); see also Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189-90 (1991) (examining interconnections between forms of subordination, "both the obvious and non-obvious relationships of domination," and suggesting an explanation of the racially-motivated murder of a Chinese-American man as not just an expression of racism, but also of patriarchy, the acculturation of boys into a patriarchal culture of "dominance and aggression").

144. See Rapaport, *supra* note 125, at 367 (noting that although "it is widely supposed that women murderers are chivalrously spared the death sentence . . . women are represented on contemporary U.S. death rows in numbers commensurate with the infrequency of female commission of those crimes which our society labels sufficiently reprehensible to merit capital punishment").

145. See *id.* at 373 ("Men are demonstrably more prone than women to commit violent crime.").

146. See Joan W. Howarth, *Review Essay: Feminism, Lawyering, and Death Row*, 2 S. CAL. REV. L. & WOMEN'S STUD. 401, 414 (1992) ("The execution is a ritual by which law-abiding people reclaim power from criminals.").

147. See *id.* at 411-20 (arguing that feminists should oppose capital

Beyond these gender patterns, there are other ways that we might see patriarchal ideologies as implicated in the crime for which Joe Giarratano was convicted. A mother and daughter in Norfolk, Virginia were brutally slaughtered. While there is a genuine question as to the identity of the perpetrator, the odds are good that the perpetrator was a person who had been socialized by 1979 into a predominantly male culture of dominant and aggressive behavior, including its misogynistic expressions.<sup>148</sup> Viewed in this way, it is fair to say that forty-year-old patriarchal norms played a significant role in the violent tragedy that took two lives and forcibly re-directed Joe Giarratano's life into decades of confinement.

### B. Class Ideologies

Class bias is implicated in the *Giarratano* case in more and less obvious ways. Like Giarratano, people under death sentence are, nearly to a person, people lacking in means, an easily foreseeable consequence of societal decisions to underfund systems of public defense.<sup>149</sup> Many had poor representation at the trials

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punishment because, among other reasons, the death penalty dehumanizes and objectifies people, and uses the legal system “to convert killing a person into something lawful . . . the triumph of an idealized version of justice that hides the racist, classist, messy, freakish, and imperfect reality”). Howarth views these aspects of capital punishment as incompatible with feminism and, implicitly, as a product of the dominant, non-feminist, patriarchal world view. This world view emerges from what sociologist Allan Johnson understands as “patriarchy’s core motivating force”—“male distrust and fear of other men.” See Becker, *supra* note 122, at 24 (“Patriarchal culture values ‘control and domination’ most, because control and domination of other men ensures one’s own safety from them.”). Supporting this perspective, Robert Burt has compared the death penalty to war-making, another male-identified institution. See Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1764 (1987) (“Capital punishment is warfare writ small.”).

148. See Becker, *supra* note 122, at 26–30 (“Although the subjugation of women is not the central dynamic driving patriarchy, patriarchal culture is deeply misogynistic and valorizes masculinity. . . . [V]iolence [against women is] . . . more understandable when one considers how love, need, fear, envy, hate, and resentment combine in the feelings of many men toward women.”).

149. See *Death Penalty Representation*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-penalty-representation> (last visited Sept. 8, 2016) (“Almost all defendants in capital cases cannot afford their own attorneys. In many cases, the appointed attorneys are overworked, underpaid, or

that resulted in their death sentences.<sup>150</sup> We know that the quality of representation significantly correlates with the quality of justice, yet under a system of law we permit the harshest punishments to be imposed on thousands of people who receive the compromised form of justice that we make available to those who cannot pay to defend their lives.<sup>151</sup> Devoting insufficient public resources to accurate fact-finding and therefore unfairly allocating the risk of punishment to the poorest people is a virulent form of class bias.<sup>152</sup>

The legal vulnerability that class inequality creates compounds many other vulnerabilities. While being poor in America may include being disproportionately subject to unjustified punishment, even lethal punishment, we also know that it can include struggling to put food on the table and a roof overhead for you and your family.<sup>153</sup> Low-income communities

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lacking the trial experience required for death penalty cases.”) (on file with the Washington and Lee Law Review). In Alabama, the state with the highest per capita rate of executions in the United States, there is no statewide public defender system, despite the fact that ninety-five percent of death row inmates are indigent. AMERICAN CIVIL LIBERTIES UNION, SLAMMING THE COURTHOUSE DOORS: DENIAL OF ACCESS TO JUSTICE AND REMEDY IN AMERICA 7–8 (2010), [https://www.aclu.org/files/assets/HRP\\_UPRsubmission\\_annex.pdf](https://www.aclu.org/files/assets/HRP_UPRsubmission_annex.pdf).

150. See 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) (“Poor people accused of capital crimes are often defended by lawyers who lack the skills, resources, and commitment to handle such serious matters. This fact is confirmed in case after case.”).

151. The observation that quality of representation correlates with quality of justice is so readily apparent that it unites commentators across the political spectrum. *Compare id.* (“It is not the facts of the crime, but the quality of legal representation, that distinguishes th[e] case where the death penalty was imposed, from many similar cases, where it was not.”), and Stevenson, *supra* note 79, at 97 (“Death sentences are imposed in a criminal justice system that treats you better if you are rich and guilty than if you are poor and innocent.”), with Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 319–21 (2011) (stating that legal outcomes are influenced by significant disparities in the quality of legal representation).

152. See Stevenson, *supra* note 79, at 95–96 (“Poverty has become a defining feature of America’s death penalty system. Support for capital punishment necessarily means accepting a punishment that is applied unequally and that largely condemns poor and disfavored defendants who are unable to obtain adequate legal assistance.”).

153. Because “the United States has greater economic inequality than any other developed nations . . . a vast array of Americans face systemic restraints inhibiting or eliminating their chances to be successful.” DOOB, *supra* note 1, at

where education and health are poor, where jobs and opportunities are scarce, and where trauma and substance abuse are high contain crime-generating conditions, yet other than policing and punishment, our culture offers little assistance to those who grow up in these communities and who, by and large, stay in them.<sup>154</sup>

Joseph Giarratano experienced these multiple forms of class bias. Subject to violence and abuse as a child, he received limited services.<sup>155</sup> When he ran away, authorities repeatedly returned him to his abusive home.<sup>156</sup> Foreseeably, the traumatized, severely depressed, and abused child grew into a substance-abusing adolescent and young adult.<sup>157</sup> The cumulative physiological and

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8, 17; see also Robert Rector & Rachel Sheffield, *Understanding Poverty in the United States: Surprising Facts About America's Poor*, HERITAGE FOUND. (Sept. 13, 2011), <http://www.heritage.org/research/reports/2011/09/understanding-poverty-in-the-united-states-surprising-facts-about-americas-poor> (last visited Oct. 4, 2016) (stating that the traditional definition of the word “poor” suggests “an inability to provide nutritious food, clothing, and reasonable shelter for one’s family”) (on file with the Washington and Lee Law Review). Haney understands the death penalty process as withholding from jurors the role of poverty—its undermining of parenting that makes poor children vulnerable to depression, impulsivity, low self-esteem, substance abuse, and delinquency—in the etiology of crime, resulting in an attribution of the defendant’s violence to his inherent evil. See Haney, *supra* note 83, at 1471–73 (“[M]ost habits of violence and aggressive demeanors are learned defensively—usually in childhood and often in response to chronically abusive, harmful, or threatening circumstances defendants certainly did not choose and over which they had no control.”).

154. See, e.g., Kathryn M. Young & Joan Petersilia, *Keeping Track: Surveillance, Control, and the Expansion of the Carceral State, Pulled Over: How Police Stops Define Race and Citizenship*, 129 HARV. L. REV. 1318, 1322 (2016) (Book Review) (observing that the criminal justice system creates a perpetual, “peripheral” citizenship). Criminal justice system-induced peripheral citizenship is difficult to escape because, as the authors observe, “the modern criminal justice apparatus destabilizes lives, particularly those lived in poor and minority communities.” *Id.* Consequently, “[i]nstead of helping people gain stability, the system actually frustrates people’s chances of getting jobs, keeping their housing, and staying out of trouble.” *Id.*

155. See 1991 Petition, *supra* note 87, at 5 (“Social Service authorities recognized, at least as early as 1973, that his home environment was unhealthy and some attempts were made to find an alternative home; but Joe always was returned to his mother’s guardianship.”).

156. See *id.* (noting that “[a]t an early age, Joe began trying to escape the horror and shame of the abuse to which he was subjected by running away from home,” though he was repeatedly returned).

157. See *id.* (“When running away failed to provide the escape he so desperately needed, and when authorities consistently returned him to a life of physical, psychological, and sexual abuse, Joe, at eleven years old, turned to



psychological effects of living with such struggles, without protection or assistance, throughout his formative years contribute to an understanding of how Joe Giarratano became vulnerable to prosecution for murder, why he reached the doubtful conclusion that he was responsible for murder, how he found a court system willing to condemn to death to be a viable route out of the misery in his life,<sup>158</sup> and why his appointed attorney would stand by and allow his client to pursue this self-destructive path.<sup>159</sup> Viewed from

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drugs, the escape that was most readily available in his home.”).

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Without an understanding of the effects of childhood abuse and drug and alcohol blackouts, most people who have led relatively normal lives would not understand why a person would assume they did something as horrible as killing two people and go on to confess to such a crime. . . . Being so convinced, [Giarratano] did everything he could to convince others [that he should receive a death sentence] or carry out the job himself [through suicide].

*Id.* at 11, 14.

159. While Giarratano’s questionable belief in his own guilt and his suicidal mental state rendered him unable to assist in his defense and incompetent to stand trial, his court-appointed attorney did little to try to understand Giarratano’s situation, background, psychological state, or even the facts of the case—information germane to the sentencing phase as well as the guilt-innocence phase. *Id.* at 69. Instead, “his attorney simply assumed that Mr. Giarratano was guilty, just as did everyone else.” *Id.* at 64. This assumption, and the likely awareness that Giarratano wanted to die, prevented the attorney from performing rudimentary aspects of his role, such as conducting fact investigation or impeaching a police officer who testified that Giarratano confessed to raping Michelle Kline, even though the officer’s written, contemporaneous record of Giarratano’s statement contained no such admission. *Id.* at 44–45. This is a key piece of testimony, as the rape made the murder of Michelle death-eligible under Virginia’s statute. *See Giarratano v. Commonwealth*, 266 S.E.2d 94, 99 (Va. 1980) (upholding Giarratano’s conviction for capital murder under the statutory provision that authorizes a capital sentence for the “willful, deliberate and premeditated killing of a person during the commission of, or subsequent to, rape”).

Imagine how different Giarratano’s trial might have been if his attorney had created the kind of trusting relationship with his client that Marie Deans was subsequently able to form. *See infra* note 178 and accompanying text (describing the Giarratano-Deans relationship). While our system does not facilitate court-appointed attorneys devoting themselves to such a degree to a single client, in a case like this one a greater measure of individualized attention was part of the attorney’s duty of representation. *See, e.g., James M. Doyle, The Lawyers’ Art: ‘Representation’ in Capital Cases*, 8 YALE J.L. & HUMAN. 417, 426 (1996) (observing the “consensus among accomplished death-penalty lawyers” that they should “collect all of the information—school records, medical history, family memories, the defendant’s own accounts—that bear on the defendant’s humanity”

this perspective, the *Giarratano* case illustrates how, in our society and its legal system, class strata matter in a profound material way.

### C. Interlocking Ideologies

The overlap between class subordination and race subordination is dramatic.<sup>160</sup> The reasons that racial minorities, and especially African-Americans, are overrepresented among the poor are not accidental but structural.<sup>161</sup> Among the multiple brutalities and deprivations imposed by race-based chattel slavery was the deprivation of African-Americans' access to a livelihood.<sup>162</sup> The century after slavery's end saw the emergence of multiple obstacles for African-Americans, including markedly unequal

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then "present this information in as compelling a form as possible").

160. See, e.g., Stevenson, *supra* note 79, at 94 ("Racial minorities in the United States are also disproportionately poor. Poverty and economic disadvantage among people of color increase the risk of wrongful or unfair treatment in the criminal justice system."); see also DARIA ROITHMAYR, REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE 11 (2014):

[I]ssues of class are in the US issues of race. This is true particularly when it comes to the poorest of the poor. . . . Owing to discrimination, those families who can afford to pass down wealth for college educations and housing down payments tend to be disproportionately white. The same goes for networks that are able to refer high paying jobs in lucrative occupations. Set against the backdrop of Jim Crow and slavery, institutional feedback loops reproduce racial disparity. . . .

161. See Douglas S. Massey, *American Apartheid: Segregation and the Making of the Underclass*, 96 AM. J. SOC. 329, 345 (1990) (using data to demonstrate that racial segregation in housing plays a key role in concentrating poverty and creating an urban underclass, because "[r]acial segregation takes the overall loss in black income, concentrates it spatially, and focuses it on fragile neighborhoods that are the least able to absorb it"); see also ROITHMAYR, *supra* note 160, at 4–10 (arguing that racial inequality persists because early white advantage leads to continuing advantage, maintaining a "self-reinforcing system of distribution of resources and opportunities . . . built on the foundations of slavery and Jim Crow").

162. See Rogers M. Smith, "One United People": *Second-Class Female Citizenship and the American Quest for Community*, 1 YALE J.L. & HUMAN. 229, 257 (1989) (arguing that the ideology underlying the Constitution's three post-war amendments was "the central importance of free labor as the source of all productive value" and that "every human being had a natural right to pursue his trade and reap the fruits of his labor," making slavery "the height of injustice").

access to education, jobs, housing, and health care.<sup>163</sup> These conditions compounded the racialized uses of law enforcement and ensnared many African-Americans in criminal justice processes.<sup>164</sup> In turn, criminal sanctions produced further obstacles, as the disabilities that accompanied them reduced the prospect for material subsistence and opportunity.<sup>165</sup> Such potent and interactive structural combinations preserved racial hierarchy by stifling the economic progress and life's chances of African-Americans.

While European immigrants came to colonial America for economic opportunity, African people were forcibly brought to America to promote the economic advance of European-Americans.<sup>166</sup> Extending from these early mutually reinforcing structures of race, power, and wealth, economic dependency and exploitation became persistent features of America's structures of

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163. See ROITHMAYR, *supra* note 160, at 4–10 (explaining the continuous reproduction of racial hierarchy through the cartel-like conduct of white majorities in the allocation of economic opportunities such as housing, jobs, and education); ALEXANDER, *supra* note 22, at 35 (“By the turn of the twentieth century, every state in the South had laws . . . that disenfranchised blacks and discriminated . . . in virtually every sphere of life, lending sanction to a racial ostracism that extended to schools, churches, housing, jobs, restrooms, hotels, restaurants, hospitals, orphanages, prisons, funeral homes, morgues, and cemeteries.”); see also BAPTIST, *supra* note 24, at xvi (“In non-Confederate states, many restaurants wouldn’t serve black customers. Stores and factories refused to hire African Americans. Hundreds of Midwestern communities forcibly evicted African-American residents . . .”).

164. When the civil rights era abolished formal segregation, Alexander argues that a nationwide law and order movement focused on African-Americans replaced segregation as the mechanism for maintaining racial hierarchy. ALEXANDER, *supra* note 22, at 35–40.

165. See *id.* at 1–2 (“Once you’re labeled a felon, the old forms of discrimination—employment discrimination, housing discrimination, denial of the right to vote, denial of educational opportunity, denial of food stamps and other public benefits, and exclusion from jury service—are suddenly legal.”); see also DONALD BRAMAN, DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA 174 (2004) (finding that the inability of released prisoners “to earn a decent living and support a family was far more shameful than their criminality”). According to Braman, “the stigma of criminality leads to the shame of being unable to support one’s children, to help one’s mother, and so forth.” *Id.*

166. See BAPTIST, *supra* note 24, at xxi–xxii (arguing that returns from the cotton monopoly power enabled by slavery drove American economic expansion, modernization, and industrialization, such that it is accurate to say “the commodification and suffering and forced labor of African Americans is what made the United States powerful and rich”).

racial difference, interacting with racialized allocation of failing schools, predatory business practices, limited employment, and the devastating lifelong consequences of criminal convictions.<sup>167</sup> America might well have waged a more effective war on poverty if it were not simultaneously a war on race subordination, if poverty alleviation could have been accomplished without undermining the structures that for centuries have supported a system of racial caste.<sup>168</sup>

If structures of race make Americans less interested in eliminating structures of poverty, then race is a discernible part of the reason that capital defendants have inadequate lawyers at trial, part of the reason that our society has not supported a higher-functioning criminal justice system, and even part of the reason that so few social services are available to people like Joe Giarratano, whose life might have been transformed far earlier if services had been available to him when he had urgent needs for help. In an indirect yet meaningful way, the interlocking realities of race and class stratification in America can be viewed as playing a significant role in the tragically converging situations that led to Joe Giarratano's conviction.

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[W]ith high rates of poverty come a variety of other social and economic conditions: reduced buying power, increased welfare dependence, high rates of family disruption, elevated crime rates, housing deterioration, elevated infant mortality rates, and decreased educational quality. These outcomes, moreover, do not occur in isolation but represent a set of mutually reinforcing conditions. Thus, the increase in poverty concentration that follows automatically when the minority poverty rate rises in a segregated city brings about a constellation of other changes in the social and economic composition of neighborhoods that have profound implications for the well-being of those who live there.

Massey, *supra* note 161, at 342.

168. Alleviating poverty would significantly alter America's status quo racial hierarchy, because the racial wealth gap remains "staggeringly large," though it traces to Jim Crow and slavery. See ROITHMAYR, *supra* note 160, at 62 (citing economic data showing that "the dramatic wealth differences at emancipation—when black former slave families began with zero net worth—and the impact of segregated schooling likely explain the majority of modern wealth differences").

*IV. What's Lost and What's Learned*

Learning about the sterling qualities of intellect<sup>169</sup> and altruism<sup>170</sup> that Joe Giarratano exhibits today, we cannot help but wonder why, as a culture, we are willing to sacrifice so many who are capable of so much.<sup>171</sup> What lessons do we derive from the wrenching Gothic story that resulted in Giarratano's decades of incarceration? Do social stratification and structures of subordination prevent us from experiencing our connection to children living in scarring conditions like those that Giarratano endured? Why do we let fester the conditions that lead to crime and then regard the crime as nothing more than a voluntary act of individual responsibility? The need to maintain race, gender, and class hierarchies begins an explanation of what is otherwise inexplicable and disfiguring.

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169. See 2009 Petition, *supra* note 115, at 9 (“On death row, Joe became a voracious reader, studying philosophy, American history . . . [,] and peaceful conflict resolution. Joe educated himself to an extent that many never achieve . . . began to study the law, and learned that he possessed a hidden talent, despite his almost complete lack of any formal education.”). Giarratano’s law review article considering the importance of appellate remedies in capital cases was published in the *Yale Law Journal*. See generally Joseph M. Giarratano, “*To the Best of Our Knowledge, We Have Never Been Wrong*”: *Fallibility vs. Finality in Capital Punishment*, 100 *YALE L.J.* 1005 (1991).

170. See 2009 Petition, *supra* note 124, at 9–10 (describing Joe’s work as a jailhouse lawyer, filing motions, petitions, and stays of execution on behalf of dozens of Virginia inmates who had no lawyers, including Earl Washington, later exonerated by DNA evidence, who would have been executed but for Giarratano’s legal intervention on his behalf); *id.* at 10–11 (describing Giarratano’s assistance to the American Civil Liberties Union (ACLU) in challenging inhumane prison conditions, and his creation of an inmate-led peace studies and alternatives to violence program). Professor Jack Boger describes Giarratano as “unfailingly thoughtful, courteous, honorable, deeply concerned about others,” observing that Giarratano “has worried more about, and has done more for, his fellow inmates on Virginia’s death row—many of them illiterate and confused about their plight—than have their prison counselors and attorneys.” *Id.* at 46.

171. Giarratano’s transformation is described as “a testament to the power of the positive force of the human spirit.” *Id.* at 1. Professor Michael Milleman writes, “In another lifetime, with the most modest family support that we all take for granted, Joe Giarratano would have been a brilliant lawyer.” *Id.* at 46; see also MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* 409 (2001) (“We are to acknowledge that life’s miseries strike deep, striking to the heart of human agency itself. And yet we are also to insist that they do not remove humanity, that the capacity for goodness remains when all else has been removed.”).

Many people's acts were involved in creating the situation of defendants like Joe Giarratano, including the acts of turning deaf ears toward defendants' needs.<sup>172</sup> Recognizing this collective role, the caricature of a crime as an act of individual free will by a defendant who is an enemy of the community begins to unravel.<sup>173</sup> Instead, the defendant can be seen as the offspring of the community.<sup>174</sup>

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172. Some argue that individual behavior should be understood as collectively produced. See generally John Hospers, *What Means This Freedom?*, in FREE WILL AND DETERMINISM 26 (Bernard Berofsky ed., 1966). Craig Haney argues that the individualist ideology of criminal behavior found a strong foothold after the widespread poverty that economic transformations of the nineteenth century produced, because its accompanying concerns about social control of economic and property crime led the middle and upper classes to view crime as contained in the character of the lower classes, "thereby justifying their punitive segregation." See Craig Haney, *Criminal Justice and the Nineteenth-Century Paradigm: The Triumph of Psychological Individualism in the 'Formative Era'*, 6 L. & HUM. BEHAV. 191, 198 (1982) [hereinafter Haney, *The Nineteenth-Century Paradigm*] ("Urbanization and industrialization had created increasing numbers of alienated and dislocated poor who were more likely to commit economic crime. At the same time, there now existed a propertied class with a growing desire to be protected from the poor."). Therefore, Haney sees the individualist view as sociohistorically contingent, and anachronistic, although "it has continued to serve as the core behavioral assumption of American criminal law." *Id.* at 229–30; see also Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557, 1564 (2004) ("[E]xposure to violent, abusive parenting is *criminogenic*." (emphasis added)).

173. Richard Boldt has examined the ideological function of ascribing free will to individuals through criminal justice blaming practices that "submerg[e] the causal roots of conduct . . ." Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PENN. L. REV. 2245, 2253 (1992); see also Robin West, *Narrative, Responsibility, and Death: A Comment on the Death Penalty Cases from the 1989 Term*, 1 MD. J. CONTEMP. LEGAL ISSUES 161, 175 (1990) (arguing that talking exclusively about rights and neglecting narratives undermines the "opportunity to construct an alternative understanding of societal responsibility for criminality that might challenge the unbridled individualism of the narrative account provided by the conservative majority").

174. See Haney, *The Nineteenth-Century Paradigm*, *supra* note 172, at 228 ("[A] person is a personality because he belongs to a community . . ." (quoting GEORGE HERBERT MEAD, *THE SOCIAL PSYCHOLOGY OF GEORGE HERBERT MEAD* 239 (1956))); see also *id.* ("[T]he interdependence of the individual personality with the institutional structure of society [is] destroying the one-way notion of social causation and criticizing its underlying individualism" (quoting RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 159 (1955))). According to Haney, these "powerful competing perspectives" emphasize "the social and cultural determinants of behavior." *Id.* at 227–29.

In another criminal justice context, James Doyle observes the role of collective

Though it is considered anathema to American criminal justice, communal responsibility for conditions that generate crime is an idea found in many sources.<sup>175</sup> Some feminist philosophies articulate it, some of them grounding the perspective in women's traditional role as caretakers of dependents and extending the perspective into social and political life.<sup>176</sup> Joe Giarratano's life gives us reason to reconsider our culture's thorough rejection of a communal responsibility perspective.

Freed from the addictions that numbed the pain of a childhood of abuse,<sup>177</sup> enabled by relationships with extraordinary people

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decisions in individual choices about involvement in illegal drug activity:

A claim that [inner city] residents bear no responsibility for the drug epidemic that plagues their communities would be ridiculous, but can it possibly be true that the larger society bears *no* responsibility? . . . The [inner city] has no goods or services, or at least so few that the decision to traffic in drugs is an economically rational (even if morally unattractive) decision. The economic conditions that have given rise to that situation cannot be entirely a product of the [inner city] itself. The drugs are not grown, or refined, or even, for the most part, wholesaled in the [inner city]. Nevertheless, larger society tends to assume that the [inner city] residents, so distant and different, have created the drug epidemic for themselves.

James M. Doyle, *Into the Eight Ball: The Colonialists' Landscape in American Criminal Justice*, 12 B.C. THIRD WORLD L.J. 65, 93 (1992).

175. See also CHRISTOPHER JENCKS, *RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS* 22, 203 (1992) (urging concrete policies based on an understanding of the dynamic between individual responsibility and societal obligations "to distribute our material goods and services more equally" and to "reduce poverty, joblessness, illiteracy, violence, or despair" by changing "our institutions and attitudes in hundreds of small ways"); Sharon Beckman, *Can Criminal Punishment Survive Christian Scrutiny?: A Comment on Jeffrey Murphy's 'Christianity and Criminal Punishment'*, in 6 PUNISHMENT & SOCIETY, no. 1, 2004, at 87, 88, 93 (arguing that Christian principles would preclude "harsh, condemnatory, and stigmatizing" criminal punishments that follow from "our widespread toleration of intolerable conditions," our disregard of "disparate impact on people of color and the poor," and "our failure to explore less destructive ways of promoting public well being. . ."). See generally Mead, *supra* note 174; Hofstadter, *supra* note 174; NICOLA LACEY, *STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES* (1988) (critiquing individual culpability as a basis for criminal punishment and grounding justifications for punishment in communitarian political theory).

176. See generally NEL NODDINGS, *CARING: A RELATIONAL APPROACH TO ETHICS AND MORAL EDUCATION* (2d ed. 2013); OLENA HANKIVSKY, *SOCIAL POLICY AND THE ETHIC OF CARE* (2004); ROBIN WEST, *CARING FOR JUSTICE* (1997); ALLISON M. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* (1983).

177. Giarratano's mother physically abused him, leading him to use drugs and alcohol—readily available in his home—at such an early age that by the time

like Marie Deans,<sup>178</sup> exposed to important philosophical thinkers through the books that he read in the solitude of his cell,<sup>179</sup> Joe Giarratano gained access to his ability and his humanity.<sup>180</sup> He has been cultivating them ever since, through reading, communicating, peacemaking, writing letters, writing blogs, writing briefs, and helping fellow inmates craft pro se legal claims that their lawyers might file if only they had lawyers.<sup>181</sup>

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he was twenty-one, a medical examination found that his liver was already permanently damaged. See 2009 Petition, *supra* note 124, at 2–3 (describing the abuse that Giarratano suffered as a child). Ironically, his life changed when he came to death row: “On death row he purged himself of the alcohol and hard drugs . . . . When the fog cleared, another person seemed to emerge.” Maryanne Vollers, *As His Date with the Executioner Nears, Joe Giarratano Says He’s No Killer—and Some People Believe Him*, PEOPLE (May 28, 1990), <http://www.people.com/people/archive/article/0,,20117758,00.html> (last visited Sept. 8, 2016) (on file with the Washington and Lee Law Review).

178. At the time Marie Deans met Giarratano, she was the executive director of the Virginia Coalition on Jails and Prisons. She also had been the founder of Murder Victims Families for Reconciliation. When they met, Giarratano was on anti-psychotic medication and was seeking to waive his appeals to hasten his execution. Deans persuaded Giarratano that his own life was worth saving and that he should pursue appellate remedies. She also uncovered evidence that cast doubt on the reliability of Giarratano’s confessions and raised the possibility of his innocence. See 2009 Petition, *supra* note 124, at 5–7 (identifying problems with the evidence supporting the theory that Giarratano murdered Barbara and Michelle Kline). Giarratano credits Deans with restoring his will to live and to take his appeals rather than submit to execution: “She told me I wasn’t a monster. I was a human being, and she cared about me. Nobody had ever told me things like that before.” Vollers, *supra* note 177.

179. See Vollers, *supra* note 177 (“Although Giarratano had never before finished a book, the shelf in his cell began to accumulate well-thumbed works of Aristotle, Gandhi, and Goethe.”); see also 1991 Petition, *supra* note 87, at 20 (“When Joe is not doing legal work, he is reading or writing. He is a student of Tocqueville, Locke, Jefferson, Hume and the American Constitution, which he knows, understands and loves as few Americans do. He is also a student of theology . . . Dostoevsky, Faulkner, Camus and Pirsig.”).

180. Giarratano has been described as having an “agile intelligence,” “hunger for learning,” “basic decency,” and “concern for others around him.” See 2009 Petition, *supra* note 124, at 68 (identifying traits Giarratano exhibits that make an impression on those who meet him). Martha Geer, an attorney for the law firm that filed in the U.S. Supreme Court the case of *Murray v. Giarratano*, 492 U.S. 1 (1989), wrote that Giarratano “critiqued our papers and our arguments with a sophistication that I cannot explain—I have no idea where it comes from given his educational and cultural background . . . . He got nothing out of this. All of the effort was on behalf of others and on behalf of the principle of fairness.” *Id.* at 57.

181. See Colman McCarthy, *Death Row Certainties*, WASH. POST (June 11, 1989) (“[Giarratano] has lived 10 years in . . . a cage with the prospect of death as the sole release—and yet his discussion of justice, nonviolence and human rights



Joseph Giarratano's transformation reveals to us the extraordinary cost of our social, political, and legal structures of subordination. His continued incarceration, even after he has become parole eligible and reasonable doubt of innocence has been documented, compels us to find other approaches.<sup>182</sup> Were it not for the distortions introduced by race, gender, and class ideologies, the tragedies of his life might have been altered, and his treatment by the criminal justice system might have been more attentive and accurate.<sup>183</sup> At the same time, released from imagined

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is as lucid as any I have heard. I have read some of his writings. They, too, are reflective and reasoned.”). As for Giarratano's legal work, McCarthy writes: “Among his successful appeals is one that gives Virginia prisoners the right to receive visits from reporters, phone calls from lawyers, and confidential mail.” *Id.*

Giarratano's most well-known legal work is the civil case that he prepared for his co-plaintiff Earl Washington, an illiterate, mildly retarded inmate facing execution without a lawyer for his state habeas corpus proceedings. Although both the U.S. District Court and the U.S. Court of Appeals for the Fourth Circuit, sitting *en banc*, upheld Giarratano's theory that the constitutional right to meaningful access to the courts required that indigent death row inmates receive court-appointed lawyers for state post-conviction proceedings, the U.S. Supreme Court in *Murray v. Giarratano*, 492 U.S. 1 (1989), ultimately reversed in a plurality opinion. Nonetheless, Virginia and many other states subsequently enacted a law requiring the appointment of state post-conviction counsel in these circumstances. See Eric M. Freedman, *Giarratano Is a Scarecrow: The Right to Counsel in State Post-Conviction Proceedings*, 91 CORNELL L. REV. 1079, 1086 n.45 (2006) (observing that thirty-three of thirty-seven death penalty states now recognize a right to counsel for state post-conviction proceedings). And thanks to Giarratano—and a number of others who subsequently intervened—Washington lived long enough to be exonerated. Eric M. Freedman, Symposium, *Earl Washington's Ordeal*, 29 HOFSTRA L. REV. 1089, 1103 (2001).

182. Paradoxically, due to the emphasis in parole hearings on acceptance of responsibility and remorse, Giarratano's assertion of innocence makes him less likely to be granted parole. See Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491, 493 (2008) (“[A]dmitting guilt increases the likelihood of a favorable parole outcome for an inmate whereas proclaiming innocence serves to diminish the chance for release.”). Consequently, Giarratano has been denied parole on multiple occasions. See, e.g., 2009 Petition, *supra* note 124, at 87 (noting that Giarratano was denied parole in 2004 and 2007). Based on this record, the petition sought a conditional pardon for Giarratano, because “the stark and unjust reality is that he very likely is never going to be paroled . . . . Parole for Joe is an illusory hope despite the weighty, compelling, and longstanding record he has amassed that demonstrates he is deserving of immediate release.” *Id.* at 86, 92.

183. See Haney, *supra* note 83, at 1450 (“[A] vast and elaborate system *outside* the courtroom, founded on misconception, supports the existence, operation, and increased popularity of the death penalty.”).

constructions of race, gender, and class, our culture would be safer, fairer, and more reflective of our collective humanity.