

9-15-2017

## The Death Penalty's Darkside: A Response to Phyllis Goldfarb's *Matters of Strata: Race, Gender, and Class Structures in Capital Cases*

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### Recommended Citation

Kevin Barry & Bharat Malkani, *The Death Penalty's Darkside: A Response to Phyllis Goldfarb's Matters of Strata: Race, Gender, and Class Structures in Capital Cases*, 74 WASH. & LEE L. REV. ONLINE 184 (2017), <http://scholarlycommons.law.wlu.edu/wlulr-online/vol74/iss1/9>

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THE DEATH PENALTY'S DARKSIDE:  
A RESPONSE TO PHYLLIS  
GOLDFARB'S *MATTERS OF STRATA*:  
*RACE, GENDER, AND CLASS  
STRUCTURES IN CAPITAL CASES*

Kevin Barry\* & Bharat Malkani\*\*

*Abstract*

*In Matters of Strata: Race, Gender, and Class Structures in Capital Cases, Professor Phyllis Goldfarb examines the ways in which race, class, and gender affect the American criminal justice system generally, and its death penalty system in particular. This Response focuses on one of Goldfarb's observations: The relationship between slavery and the death penalty. This relationship helps to explain why, over the past four decades, the thirteen states that comprised the former Confederacy have been responsible for nearly all of this nation's executions. Although the U.S. Supreme Court has repeatedly failed to address the death penalty's roots in slavery, several state court judges have risen to the occasion, calling out the impermissible taint of bias that colors the death penalty. This Response suggests how the death penalty's connection to slavery should inform death penalty jurisprudence and concludes with a discussion of the future of abolition, given a Supreme Court in flux.*

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### I. Introduction

On February 27, 2017, Arkansas Governor Asa Hutchinson announced that he would execute one-fifth of those on the state's death row because the drugs needed to kill them were set to expire at the end of April.<sup>1</sup> Much was made of how many people the governor intended to execute—a record eight inmates in eleven days.<sup>2</sup> Much was also made of how they would be executed—a lethal cocktail of three drugs, one of which has been known to fail and apparently did fail in at least one of the executions.<sup>3</sup> But little attention has been paid to *who* was executed. Although four white men and four black men were slated for death, three of the four

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1. Andrew DeMillo, *Arkansas Governor Sets Execution Dates for 8 Inmates*, U.S. NEWS (Feb. 27, 2017), <https://www.usnews.com/news/arkansas/articles/2017-02-27/arkansas-governor-sets-execution-dates-for-8-inmates> (last visited May 25, 2017) (on file with the Washington and Lee Law Review).

2. Camila Domonoske, *Arkansas Readies For 8 Executions, Despite Outcry Over Pace, Method*, NAT'L PUB. RADIO (March 31, 2017), <http://www.npr.org/sections/thetwo-way/2017/03/31/521967661/arkansas-readies-for-8-executions-despite-outcry-over-pace-method> (last visited May 25, 2017) (on file with the Washington and Lee Law Review).

3. *Id.*; Phil McCausland, *Arkansas Execution of Kenneth Williams 'Horri-fying': Lawyer*, NBC NEWS (April 27, 2017), <http://www.nbcnews.com/storyline/lethal-injection/arkansas-executes-kenneth-williams-4th-lethal-injection-week-n752086> (last visited May 25, 2017) (on file with the Washington and Lee Law Review).

white men were spared.<sup>4</sup> Nothing says black lives *don't* matter quite like the death penalty.<sup>5</sup>

The invisibility of race in death penalty jurisprudence is well documented.<sup>6</sup> Some commentators have rightly referred to racism as the death penalty's "dark side": ever-present but often difficult to discern.<sup>7</sup> In her characteristically thoughtful essay, *Matters of Strata: Race, Gender, and Class Structures in Capital Cases*, Professor Phyllis Goldfarb shines the light on the death penalty's dark side.<sup>8</sup> Using the case of a former Virginia death row inmate, Joseph Giarratano, as her lens, she examines the multitude of ways in which race, class, and gender affect the American criminal justice system generally, and its death penalty system in particular.<sup>9</sup>

In this Response, we focus on one of Goldfarb's observations: The relationship between slavery—the pinnacle of American racism—and the death penalty.<sup>10</sup> In Part II, we briefly explore the

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4. Mark Berman, *Fourth Arkansas Execution in Eight Days Prompts Questions About Inmate's Movements*, WASH. POST (April 28, 2017), [https://www.washingtonpost.com/news/post-nation/wp/2017/04/27/arkansas-readies-to-carry-out-last-planned-execution-before-drugs-expire/?utm\\_term=.7f01badaf3e4](https://www.washingtonpost.com/news/post-nation/wp/2017/04/27/arkansas-readies-to-carry-out-last-planned-execution-before-drugs-expire/?utm_term=.7f01badaf3e4) (last visited May 25, 2017) (on file with the Washington and Lee Law Review).

5. See Phyllis Goldfarb, *Matters of Strata: Race, Gender, and Class Structures in Capital Cases*, 73 WASH. & LEE L. REV. 1395, 1405 (2016) ("[Q]uestions about whether and how black lives matter are still haunting us, as they have for centuries.").

6. See, e.g., CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 78–115 (2016).

7. See *id.* at 321 (discussing "the darker sides of the American death penalty—particularly the extent to which the resonance of the practice and its continued use have been inseparably connected to race").

8. Goldfarb, *supra* note 5, at 1395–99.

9. See generally *id.*

10. See *id.* at 1401–05. We are in good company discussing this connection in relation to Goldfarb's work. For a thoughtful and thorough response to Goldfarb's essay that discusses the death penalty's roots in slavery, see generally John D. Bessler, *The Inequality of America's Death Penalty: A Crossroads for Capital Punishment at the Intersection of the Eighth and Fourteenth Amendments*, 73 WASH. & LEE L. REV. ONLINE 487 (2017).

history of the two institutions.<sup>11</sup> The death penalty's connection to slavery is not a distant parallel; it is a straight line. Over the past four decades, the thirteen states of the former Confederacy have been responsible for nearly all of this nation's executions.<sup>12</sup> This relationship is not a coincidence.

We next turn to judicial responses to slavery and the death penalty. In Part III, we discuss how a majority of the United States Supreme Court has been unwilling to draw a link between slavery and the death penalty.<sup>13</sup> From *Furman* and *McCleskey* to *Buck* and *Foster*, the Court has responded with silence when confronted with the death penalty's roots in slavery.

In Part IV, we discuss several state court justices that have risen to the occasion, finding an unacceptable taint of racial bias in the administration of the death penalty dating back to slavery.<sup>14</sup> We discuss their findings and suggest two doctrinal pathways for future courts to follow. Specifically, we argue that the death penalty's roots in slavery should inform courts' determination of the national consensus that the death penalty purportedly enjoys and the legitimate purposes that it purportedly achieves.

In Part V, we discuss the future of abolition, given a Supreme Court in flux.<sup>15</sup> We conclude with some general remarks.

### I. A Straight Line

The death penalty's connection to slavery is not the stuff of hyperbole or analogy. The histories of both institutions are tightly bound. As Goldfarb explains, "the ghosts of the colonial and antebellum slave system" continue to haunt our death penalty.<sup>16</sup>

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11. See *infra* Part I.

12. See *State v. Santiago*, 122 A.3d 1, 52 (Conn. 2015) (noting that "[t]he thirteen states that comprised the Confederacy have carried out more than 75 percent of the nation's executions over the past four decades").

13. See *infra* Part II.

14. See *infra* Part III.

15. See *infra* Part IV.

16. See Goldfarb, *supra* note 5, at 1404–05.

Indeed, “[o]ne cannot understand America’s penologies of capital punishment—its legitimation of state-imposed death—without understanding its ideologies of race” that began with slavery.<sup>17</sup>

From the earliest colonial days, slavery and the death penalty were symbiotic.<sup>18</sup> In the southern states, one of the principal purposes behind the death penalty was to protect the white minority from violence and rebellion by an enslaved black majority.<sup>19</sup> Capital punishment was therefore a vital component in the machinery of slavery: the perpetual threat of death served to keep slave populations under control.<sup>20</sup> Fear of captivity in prison, the reasoning went, would mean little to those already enslaved; indeed, “imprisonment would have been a reward, giving the slave time to rest.”<sup>21</sup> Without the threat of death, slavery may have been lost to rebellion.<sup>22</sup> And without slavery, the death penalty may have lost its appeal as a deterrent.<sup>23</sup> Slavery demanded the death penalty, and the death penalty, in turn, demanded slavery. The connection between the institutions is not a distant parallel but rather a straight line.

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17. *Id.* at 1400–02.

18. See STEIKER, *supra* note 6, at 17 (“The distinctive Southern embrace of capital punishment is in large part a product of the South’s historical practice of chattel slavery and of slavery’s enduring racial legacy long after the end of the Civil War.”); see also STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 142 (2002) (“The South’s retention of capital punishment for blacks was surely a direct result of slavery.”).

19. *Id.* at 7, 19.

20. *Id.*

21. Brief of *Amici Curiae* National Association for the Advancement of Colored People et al., *Aikens v. California*, 1971 WL 134376, at \*9 (U.S. Aug. 31, 1971) [hereinafter NAACP Amic. Br.]; see also BANNER, *supra* note 18, at 142.

22. Cf. MANISHA SINHA, *THE SLAVE’S CAUSE* 500 (2016) (discussing slave rebellions and revolutionary abolition).

23. 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 May 25, 2017) (“Had it not been for slavery, the death penalty would have likely been abolished in America.”) (on file with the Washington and Lee Law Review).

Slavery and the death penalty not only reinforced each other but also closely resembled each other—both were explicitly race conscious in their application.<sup>24</sup> Although the death penalty, unlike slavery, applied to both blacks and whites, state “slave codes” ensured that blacks were subject to capital punishment for a wider range of crimes than whites.<sup>25</sup> Such laws even compensated white slaveholders for the “taking” of executed slaves.<sup>26</sup> In colonial Georgia, for example, the criminal code provided for an automatic death sentence for blacks who committed murder, while non-black murderers could receive a life sentence.<sup>27</sup>

During the 1830s and 1840s, many states limited their lists of capital crimes and moved executions out of the public arena into more private settings.<sup>28</sup> Importantly, these death penalty reforms did not extend to slaves and free blacks.<sup>29</sup> A study by George Stroud in 1856 found that in Virginia, for example, there were sixty-six potentially capital crimes that attracted the death penalty when committed by slaves, yet just one crime for which

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24. See NAACP Amic. Br., *supra* note 21, at \*8–11 (discussing the pre-1935 history of formal and informal capital punishment by whites against non-whites).

25. See *id.* At \*9 (“Every southern state defined a substantial number of felonies carrying capital punishment for slaves and lesser punishments for whites.”).

26. See STEIKER, *supra* note 6, at 19–21 (noting that the owners of executed slaves were compensated “in the same way that property owners today are compensated when their land is taken by the state for a public use such as a highway”); see also *Race and Capital Sentencing*, 101 HARV. L. REV. 1603, 1619 n.11 (1988) (discussing slave codes’ racially disparate punishments); Harry V. Ball & Lawrence M. Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197, 212 n.50 (1965) (discussing slave codes’ reimbursement of slaveholders).

27. See *State v. Loftin*, 724 A.2d 129, 207 (N.J. 1999) (Handler, J., dissenting) (citing *McCleskey v. Kemp*, 481 U.S. 279, 329 (1987) (Brennan, J., dissenting))).

28. See, e.g., BANNER, *supra* note 18, at 139–41; STEIKER, *supra* note 6, at 20–21; Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, in *FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA* 103–06 (Charles J. Ogletree Jr & Austin Sarat eds. 2006).

29. See, e.g., *Loftin*, 724 A.2d at 208 (discussing racially disparate manner of executions); NAACP Amic. Br., *supra* note 21, at \*9–11 (discussing racially disparate punishments).

white defendants could be executed.<sup>30</sup> In Mississippi, there were thirty-eight crimes that were capital for slaves but not for whites.<sup>31</sup> And in Georgia, as in many southern states, black men were executed for raping white women, while white men were imprisoned or fined.<sup>32</sup>

Slaves and free blacks also faced gruesome public executions, including crucifixion, starvation, and having one's hands cut off prior to being hanged or burned alive.<sup>33</sup> White defendants, by contrast, were hanged in private.<sup>34</sup> The emergence of such racially disparate death penalties reinforced the view—held to this day—that black bodies are worth less than those of whites.<sup>35</sup> Not surprisingly, the opponents of slavery, like Frederick Douglass, decried the death penalty as “a mockery of justice.”<sup>36</sup>

Although many slavery abolitionists contributed to the cause of death penalty abolition by “excoriating ‘hangman clergymen’ who supported the death penalty and the inhumane notion of retributive justice,”<sup>37</sup> the progress of the anti-slavery movement

30. GEORGE M STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 75–87 (2d ed. 1856).

31. *Id.*

32. *Id.*

33. *See Loftin*, 724 A.2d at 208 (discussing racial distinctions in administration of death penalty); *see also* NAACP Amic. Br., *supra* note 21, at \*9 (discussing crucifixion, burning, and starvation).

34. *See Loftin*, 724 A.2d at 208.

35. South Carolina's 1740 slave code “must be understood not only for what it did to blacks and slaves—assuring their submissiveness, guaranteeing their ignorance, and sanctioning great brutality,” but also for what it did to whites—“impos[ing] an obligation on white inhabitants to set aside any natural human compassion and grant[ing] extraordinary inducements to those who would revel in brutality against blacks.” A. LEON HIGGINBOTHAM JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS, THE COLONIAL PERIOD 199 (1978).

36. Frederick Douglass, *Capital Punishment is a Mockery of Justice*, in 3 JOHN BLASSINGAME, THE FREDERICK DOUGLASS PAPERS 242–248 (1985); *see also* PAUL CHRISTIAN JONES, AGAINST THE GALLOWES: ANTEBELLUM AMERICAN WRITERS AND THE MOVEMENT TO ABOLISH CAPITAL PUNISHMENT (2011).

37. SINHA, *supra* note 22, at 380; *see also* BANNER, *supra* note 18, at 142–43 (“In the North the most outspoken supporters of abolishing capital punishment were also in favor of abolishing slavery and a host of other reforms.”); LAWRENCE B. GOODHEART, THE SOLEMN SENTENCE OF DEATH: CAPITAL PUNISHMENT IN

brought efforts to eliminate capital punishment to a halt in the 1850s and 1860s.<sup>38</sup> For example, in Connecticut, a grassroots campaign to abolish the death penalty in the 1840s and early 1850s founded in 1854, as “[p]ublic attention turned away to the more pressing issues of Irish immigration and the expansion of slavery in the western territories.”<sup>39</sup> And Marvin Bovee delayed the publication of his anti-death penalty book on the eve of the Civil War, noting that it would be inappropriate to defend the lives of murderers and rapists when so many soldiers were heroically sacrificing their lives on the battlefield.<sup>40</sup> As David Brion Davis has argued, after the Civil War, Americans were hardened to the loss of life, thus dissipating any anti-death penalty sentiments.<sup>41</sup>

As Goldfarb explains, following the end of slavery, the death penalty was vital to reasserting white control over the newly-freed black population.<sup>42</sup> In the years following the Civil War, slave codes gave way to “Black Codes,” which reinstated a dual system of criminal justice based explicitly on race, with the death penalty at its center.<sup>43</sup> As was the case under slavery, blacks “were given harsher punishments than whites for committing similar offenses.”<sup>44</sup> In Alabama, Mississippi, and South Carolina, for

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CONNECTICUT 107 (2011) (discussing “mainstream ministers [who] denounced the radical antislavery movement” and “castigated opponents of the death penalty”).

38. BANNER, *supra* note 18, at 134; *see also* *Furman v. Georgia*, 408 U.S. 238, 338–39 (1972) (Marshall, J., concurring) (discussing the history of abolition).

39. GOODHEART, *supra* note 37, at 109.

40. JOHN D. BESSLER, *DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA* 45–46 (1997). Bovee eventually published his tract in 1869, *see generally* MARVIN BOVEE, *CHRIST AND THE GALLOWS; OR, REASONS FOR THE ABOLITION OF CAPITAL PUNISHMENT* (1869).

41. *See* DAVID BRION DAVIS, *FROM HOMICIDE TO SLAVERY: STUDIES IN AMERICAN CULTURE* 40 (1986) (“After the Civil War, men’s finer sensibilities, which had once been revolted by the execution of a fellow being, seemed hardened and blunted.”).

42. Goldfarb, *supra* note 5, at 1402; *see also* STEIKER, *supra* note 6, at 19.

43. *State v. Loftin*, 724 A.2d 129, 208 (N.J. 1999) (Handler, J., dissenting).

44. *Id.*

example, “only blacks could be executed for raping a white woman.”<sup>45</sup>

Although Reconstruction ended *de jure* discrimination under the Black Codes, it did not—and, indeed, *could* not—end *de facto* discrimination.<sup>46</sup> As Goldfarb notes, “[t]he past was not the past; it flourished in new forms.”<sup>47</sup> Reconstruction’s failure to secure equal rights for black people has been well-documented, with numerous scholars detailing how proponents of racial segregation turned to the criminal justice system, generally—and the death penalty, specifically—as a tool of racial control.<sup>48</sup> Racial discrimination, no longer explicit in the law, persisted in the administration of the death penalty under Jim Crow.<sup>49</sup>

In the late nineteenth century, southern states openly defended a racially discriminatory death penalty as necessary to deter white vigilantism, i.e., lynching.<sup>50</sup> Black people suspected of crimes were going to be killed no matter what, the argument went. Better, then, to execute black people after trial than for white mobs to cut them down and parade their mutilated remains through the street. The Equal Justice Initiative has noted that when

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45. *Id.*

46. *See Loftin*, 724 A.2d at 208 (“Despite the abolition of the Black Codes during Reconstruction, racial discrimination in the administration of criminal justice remained.”); Goldfarb, *supra* note 5, at 1402 (discussing selective enforcement of law enforcement policies during Jim Crow era).

47. Goldfarb, *supra* note 5, at 1403.

48. *See, e.g., id.* at 1402–03 (“[S]trictly enforced racial segregation policies and selectively enforced law enforcement policies . . . provid[ed] white majorities with the control they felt they needed”); *see also* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2011).

49. *See* Goldfarb, *supra* note 5, at 1402 (“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.”).

50. STEIKER, *supra* note 6, at 23 (“[O]ne of the primary considerations in favor of retention (and of reinstatement after abolition) of the death penalty was the need to maintain capital punishment to reduce incidence of mob violence.”).

proponents of racial justice campaigned against lynchings during the 1920s and 1930s, communities turned to the death penalty instead.<sup>51</sup> Campaigns against lynchings in the early twentieth century, therefore, ultimately helped to consolidate the use of capital punishment in America.

In the mid-twentieth century, the progress of racial justice once again worked to the disadvantage of death penalty abolition. Between 1957 and 1965, five states abolished the death penalty—Alaska, Hawaii, Vermont, West Virginia, and Iowa.<sup>52</sup> But, as Goldfarb notes, the successes of the Civil Rights movement in the 1960s and 1970s provide at least a partial explanation for the failure of the anti-death penalty movement to secure lasting, *nationwide* abolition before the U.S. Supreme Court.<sup>53</sup> When the Court temporarily outlawed capital punishment in 1972 in *Furman v. Georgia*, it was perceived as yet another interference with “states’ rights”—the same argument advanced by the Confederate states in defense of slavery.<sup>54</sup> This backlash culminated in the restoration of the death penalty four years later

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51. EQUAL JUSTICE INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* (2d ed. 2015), <http://eji.org/sites/default/files/lynching-in-america-second-edition-summary.pdf>; see also James W. Clarke, *Without Fear or Shame: Lynching, Capital Punishment and the Subculture of Violence in the American South*, 28 BRIT. J. POL. SCI. 268, 284–85 (1998).

52. Hugo Adam Bedau, *Background and Developments*, in *THE DEATH PENALTY IN AMERICA, CURRENT CONTROVERSIES* 3, 9 (1997).

53. Goldfarb, *supra* note 5, at 1410–11 (“But for the resentment of civil rights progress that led to restoration of capital punishment, the death penalty would have been unavailable.”); see also EVAN MANDERY, *A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA* 264–280 (2013).

54. See *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972). During oral arguments in *Gregg v. Georgia*, 428 U.S. 153 (1976), the Solicitor General—Robert Bork—argued that “these cases are about democratic government, the right of various legislatures of the United States, to choose or reject—according to their own moral sense and that of the people, the death penalty, in accordance with the Constitution.” EVAN MANDERY, *A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA* 386–387 (2013).

in *Gregg v. Georgia*,<sup>55</sup> which purported to rid the death penalty of arbitrariness once and for all.<sup>56</sup>

Not surprisingly, given the death penalty's roots in slavery and its reinforcement of racial subordination after the Civil War, the task the Supreme Court set for itself in *Gregg* has proven impossible. The post-1972 death penalty systems, like their forbearers, remain rife with discrimination.<sup>57</sup> As Carol and Jordan Steiker note, "the current map of active death penalty states is predominantly a map of the former Confederacy."<sup>58</sup> And as Goldfarb points out, nearly all executions occur in states "with the most extensive lynching histories."<sup>59</sup> The sickening spectacle in Arkansas in April 2017 is a case in point.<sup>60</sup> Arkansas, a former slaveholding state, seceded from the Union at the start of the Civil War in 1861.<sup>61</sup> Between 1877 and 1950, 491 African Americans were lynched in Arkansas, just behind Mississippi (614), Georgia (595), and Louisiana (559).<sup>62</sup> Further, Arkansas is home to Phillips County, the site of a staggering 244 lynchings—the most of any county in the U.S. and nearly five times the number of lynchings as second place Caddo, Louisiana, with 51.<sup>63</sup>

The northern experience also sheds light on the death penalty's connection to slavery. In the late 1700's and early 1800's,

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55. 428 U.S. 153, 195 (1976).

56. *See id.* (stating that concerns with arbitrariness could be "met by a system that provides for a bifurcated proceeding").

57. *See, e.g.*, *State v. Santiago*, 122 A.3d 1, 66–68 (Conn. 2015); *State v. Loftin*, 724 A.2d 129, 208 (N.J. 1999); *see also* STEIKER, *supra* note 6, at 110 ("[T]he unjust influence of race in the capital punishment process continues unchecked."); Bedau, *supra* note 52, at 459 ("The good-faith hopes of the *Gregg* majority in 1976 . . . have simply not been borne out in practice in the two decades since then.").

58. STEIKER, *supra* note 6, at 17.

59. Goldfarb, *supra* note 5, at 1409.

60. *See generally* DeMillo, *supra* note 1, and accompanying text.

61. Ralph Wooster, *The Arkansas Secession Convention*, 13 ARK. HIST. Q. 172 (1954).

62. EQUAL JUST. INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR, SECOND EDITION 16, <http://eji.org/sites/default/files/lynching-in-america-second-edition-summary.pdf>.

63. *Id.* at 17.

for example, the northern states of Pennsylvania, New Hampshire, Massachusetts, Connecticut, Rhode Island, Vermont, New York, and New Jersey took steps to restrict the use of capital punishment.<sup>64</sup> In the years that followed, the death penalty faded in these states as the number of death-eligible crimes and executions declined, and as calls for abolition of the death penalty increased.<sup>65</sup> Connecticut is a case in point. Over the course of its nearly 400-year-old experiment with the death penalty, a single theme characterized Connecticut's relationship to the death penalty: the reluctance to impose it.<sup>66</sup> Indeed, between 1960 and 2012, when it repealed the death penalty, Connecticut executed only 2 people—both of whom volunteered for it.<sup>67</sup>

In many non-slave-holding states admitted to the Union in the first half of the nineteenth century, the connection between slavery and the death penalty was even more direct. Michigan and Wisconsin, which were admitted as free states in 1837 and 1848, respectively, abolished their death penalties less than a decade after admission.<sup>68</sup> Maine, admitted in 1820, and Minnesota, admitted in 1858, took a bit longer; they abolished their death-penalties within seventy and sixty years of admission,

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64. STEIKER, *supra* note 6, at 20–21; *see generally* David Brion Davis, *The Movement to Abolish Capital Punishment in America, 1787-1861*, 63 AM. HIST. REVIEW 23 (1957) (surveying the history of the abolition of the death penalty in several Northern states).

65. *See, e.g.*, State v. Santiago, 122 A.3d 1, 36 (Conn. 2015) (stating that “[s]ecularization, evolving moral standards, new constitutional and procedural protections, and the availability of incarceration as a viable alternative to execution have resulted in capital punishment being available for far fewer crimes and criminals, and being imposed far less frequently, with a concomitant deterioration in public acceptance” over Connecticut’s “nearly 400 year history”); STEIKER, *supra* note 18, at 20–21 (discussing “[t]he substantial narrowing of the ambit of the death penalty down to murder and treason . . . in the North by the time of the Civil War,” and discussing “legislative initiatives for wholesale abolition of capital punishment in the North . . . [f]rom the 1830s to the 1850s”).

66. *See* Santiago, 122 A.3d at 38 (“[C]onnecticut’s whole state history demonstrates a reluctance to impose the death penalty.”) (internal quotation marks omitted).

67. *Id.*

68. Bedau, *supra* note 52, at 9.

respectively.<sup>69</sup> While the northern states were no strangers to racism, their racism knew bounds.<sup>70</sup>

From this brisk historical survey, a central theme emerges: where slavery was not firmly entrenched, the death penalty withered; where slavery flourished, the death penalty remained an integral part of the criminal justice system. As Carol and Jordan Steiker have noted, in the North, the death penalty abolition movement and the slavery abolition movement were “mutually reinforcing.”<sup>71</sup> In the South, the linkage of the two movements “led them to fail together.”<sup>72</sup>

Some have taken offense to the death penalty’s comparison to slavery. During a public hearing on the bill that repealed Connecticut’s death penalty in 2012, State Senator John Kissel, a Republican with six prisons and 8,000 inmates in his district, objected to testimony comparing the death penalty to slavery:

[T]o analogize folks that support [the death penalty] to people that supported slavery, that’s so offensive. To analogize this to individuals that just act out of rage or vindictiveness, that’s just not right. . . . I take umbrage at the whole slavery thing because, once upon a time, one of my relatives was a surgeon in the union side of the Civil War. Come on, man, . . . to make that analogy, I think, is a stretch.<sup>73</sup>

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69. *Id.* at 9.

70. *Compare* Dist. Attorney for Suffolk Dist. v. Watson, 411 N.E.2d 1274, 1286 (Mass. 1980) (“We reject any suggestion that racial discrimination is confined to the South or to any other geographical area.”), *with* *Santiago*, 122 A.3d at 52 (noting that executions are “overwhelmingly confined to the South [and states bordering the South], the very same jurisdictions that were last to abandon slavery and segregation, and . . . were most resistant to the federal enforcement of civil rights norms”); *see also* *Loftin*, 724 A.2d at 206 (Handler, J., dissenting) (discussing racism, slavery, and the death penalty); NAACP Amic. Br., *supra* note **Error! Bookmark not defined.**, at \*8-13 (same).

71. STEIKER, *supra* note 6, at 22.

72. *Id.*

73. Hrg. on Raised Bill No. 280, *An Act Revising the Penalty for Capital Felonies*, Before the Connecticut General Assembly, Joint Committee on

But the link between slavery and the death penalty is not a stretch, and the death penalty's support among northerners does not make it so. While it is true that people in Connecticut have supported the death penalty throughout history, they—unlike their brethren to the south—have been reluctant to use it.<sup>74</sup> And one of the primary reasons that Connecticut has lacked an appetite for execution is because it does not share the South's long history of slavery and its tolerance for state-sponsored violence to sustain racial control.<sup>75</sup>

## II. *The Silent Branch*

In *Dred Scott v. Sanford*, the U.S. Supreme Court explicitly sanctioned slavery, articulating a powerful defense of racial subordination that set the stage for the Civil War.<sup>76</sup> Although the Supreme Court has not explicitly defended racial subordination in the death penalty context, it certainly has not challenged it. In *Justice Accused*, Robert Cover examines how the judiciary responded to the moral and legal dilemmas posed by slavery, and notes how even anti-slavery judges were ultimately complicit in the survival of slavery.<sup>77</sup> His analysis can be applied to today's judiciary, particularly the ways in which the U.S. Supreme Court has failed to acknowledge the pervasive influence of slavery on the administration of capital punishment.

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Judiciary, March 14, 2012 (statement of Sen. John Kissel) <https://www.cga.ct.gov/2012/juddata/chr/2012JUD00314-R001100-CHR.htm>.

74. See generally *supra* notes 66–67 and accompanying text (discussing Connecticut's reluctance to impose death penalty).

75. See generally *supra* note 18 and accompanying text (discussing relationship between slavery and death penalty).

76. See *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857) (“[N]either the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in [the Declaration of Independence].”).

77. See generally ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1984).

A majority of the Supreme Court has never addressed the death penalty's historical roots in slavery. Take *Furman*, for example, in which a majority of the Court imposed a moratorium on the death penalty out of concern for arbitrariness.<sup>78</sup> Despite the centrality of race to the issue of arbitrariness, only Justices Douglas and Marshall squarely addressed racial discrimination in their concurring opinions.<sup>79</sup> Neither of them mentioned slavery.<sup>80</sup> Some commentators argue that the majority's decision to ignore race enabled, or even encouraged, states to recalibrate their death penalty statutes.<sup>81</sup>

*McCleskey v Kemp*, decided in 1987, is often considered to be the Court's seminal decision on the relevance of race to questions of the death penalty's constitutionality.<sup>82</sup> In that case, the Court infamously held that statistical evidence of racial disparities in the application of capital punishment are to be tolerated, and that a person's death sentence will only be quashed on such grounds if it can be shown that a decision-maker in his or her particular case acted with specific discriminatory intent.<sup>83</sup> Not surprisingly, the majority made no mention of the death penalty's roots in slavery. Only Justice Brennan, writing for the four dissenters, drew parallels between the modern death penalty and the race-conscious criminal justice systems that reinforced slavery.<sup>84</sup> "[W]e cannot pretend that in three decades we have completely escaped the grip of a historical legacy spanning centuries," he wrote.<sup>85</sup>

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78. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972).

79. *Id.* at 256–57 (Douglas, J., concurring) (stating that standardless death penalty statutes were “pregnant with discrimination”); *id.* at 364 (Marshall, J., concurring) (“It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population.”).

80. *See generally id.*

81. *See* MANDERY, *supra* note 54, at 277–278 (noting that “those aggrieved by the Court’s race decisions sublimated their anger into the effort to revive capital punishment”).

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

83. *Id.* at 297–99, 312–13.

84. *Id.* at 328–33 (Brennan, J., dissenting).

85. *Id.* at 344.

“[W]e remain imprisoned by the past as long as we deny its influence on the present.”<sup>86</sup>

The decision in *McCleskey* has been described by Anthony Amsterdam, who led the death penalty abolitionist efforts of the 1960s and 1970s, as “the *Dred Scott* of our time.”<sup>87</sup> Michelle Alexander has likewise written that “*McCleskey v. Kemp* and its progeny serve much the same function as *Dred Scott* and *Plessy*”—preserving racial caste systems.<sup>88</sup> In *Dred Scott*, Chief Justice Taney infamously declared that slaves were sub-human for the purposes of the American legal system: “It is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted [the Declaration of Independence].”<sup>89</sup> In Taney’s view, black people were “so far inferior, that they had no rights which the white man was bound to respect... [Africans] were brought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made of it.”<sup>90</sup> As *McCleskey*’s many critics rightly argue, capital punishment, like slavery, is premised on the belief that some people are not worthy of membership in the human family.<sup>91</sup>

Besides Justice Brennan, no other Supreme Court Justice has attempted to place the death penalty in its historical, slavery-rooted context. Instead, the focus has been on the notoriously difficult-to-prove animus and stereotypes of individual actors in the death penalty system—not on the system itself. In recent years, for example, the Court has struck down several death

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86. *Id.*

87. Adam Liptak, *New Look at Death Sentences and Race*, NY TIMES (April 29, 2008), <http://www.nytimes.com/2008/04/29/us/29bar.html> (last visited May 30, 2017) (on file with the Washington and Lee Law Review).

88. ALEXANDER, *supra* note 48, at 194.

89. *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857).

90. *Id.*

91. *See, e.g., McCleskey*, 481 U.S. at 336 (Brennan, J., dissenting) (“Enhanced willingness to impose the death sentence on black defendants, or diminished willingness to render such a sentence when blacks are victims, reflects a devaluation of the lives of black persons.”).

sentences in which inmates have demonstrated that prosecutors or jurors based their decision to seek or impose a death sentence on the grounds of race. However, in none of these cases have the Justices expressly acknowledged the legacy of slavery.

In *Buck v. Davis*,<sup>92</sup> decided earlier this year, the Court accepted that Duane Buck had been unconstitutionally sentenced to death because a psychologist had testified that, as a black man, Buck was particularly prone to violence.<sup>93</sup> But Chief Justice Roberts, writing for a 6-2 majority, failed to note that this stereotype—that a black man is biologically prone to “dangerousness”—derives from the so-called scientific studies that were used to justify slavery.<sup>94</sup> Similarly, in *Foster v. Chatman*,<sup>95</sup> decided in 2016, the Court ruled in favor of petitioner, and chastised the prosecutor who had deliberately struck black people off the jury with the intent to empanel an all-white jury.<sup>96</sup> As Goldfarb notes in her article, the phenomenon of all-white juries being empaneled against black defendants so as to ensure a conviction finds its roots in slavery and in post-emancipation attempts to subjugate black people.<sup>97</sup> Yet the Court in *Foster v. Chatman* again refrained from mentioning slavery.<sup>98</sup>

Taking their lead from the Supreme Court, the lower federal courts and nearly all state courts have remained silent on the death penalty’s connection to slavery. For example, the Fourth Circuit Court of Appeals recently overturned Johnny Bennett’s

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92. 137 S. Ct. 759 (2017).

93. *See id.* at 776 (holding that defense attorney’s introduction of psychologist’s testimony that “one of the factors pertinent in assessing a person’s propensity for violence was his race, and that Buck was statistically more likely to act violently because he is black” constituted ineffective assistance of counsel).

94. *Id.* at 776 (characterizing the psychologist’s testimony as “a particularly noxious strain of racial prejudice” without reference to its roots in slavery).

95. 136 S. Ct. 1737 (2016).

96. *See id.* at 1755 (holding that “prosecutors were motivated in substantial part by race when they struck [two black prospective jurors]”).

97. *See* Goldfarb, *supra* note 5, at 1414–15 (discussing jury eligibility laws and jury selection practices that combine to exclude African-Americans from the jury box).

98. *See generally* Foster, 136 S. Ct. 1737.

death sentence on the grounds that the prosecutor in his case had used racially inflammatory language during the trial.<sup>99</sup> Prosecutor Donald Myers had referred to Bennett—an African American—variously as “King Kong,” a “caveman,” a “mountain man,” a “monster,” a “big old tiger,” and “[t]he beast of burden.”<sup>100</sup> Although the Court found in Bennett’s favor, it made only oblique reference to “historical prejudice against African Americans, who have been appallingly disparaged as primates or members of a subhuman species in some lesser state of evolution.”<sup>101</sup>

The reluctance of courts to explicitly use the word “slavery,” or to squarely confront the ways in which the legacy of slavery is woven into the fabric of capital punishment, can mean only one of three things. First, there simply is no connection between slavery and the modern death penalty: the past is in the past, thanks to procedural safeguards imposed by the Supreme Court. Second, there is a connection, but courts are not troubled by it. Or third, there is a troubling connection, but there is nothing courts can do about it.

The first conclusion is untenable. The Court in *Gregg* did not sever the death penalty’s ties to slavery and racial subordination,<sup>102</sup> and the regional differences in the application of the death penalty are not coincidental. As Goldfarb ably demonstrates, racial animus and stereotypes are not issues that affect some cases but not others.<sup>103</sup> The entire death penalty

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99. See *Bennett v. Stirling*, 842 F.3d 319, 324-25 (2016) (holding that prosecutor’s argument, which depicted Bennett “as less human on account of his race,” exceeded “all permissible bounds” in violation of due process).

100. *Id.* at 321.

101. *Id.* at 324–25.

102. See *Glossip v. Gross*, 135 S. Ct. at 2760 (2015) (“Despite the *Gregg* Court’s hope for fair administration of the death penalty, 40 years of further experience make it increasingly clear that the death penalty is imposed arbitrarily, *i.e.*, without the ‘reasonable consistency’ legally necessary to reconcile its use with the Constitution’s commands.”) (quoting *Gregg*).

103. See Goldfarb, *supra* note 5, at 1408 (“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.”).

system is steeped in the values and beliefs that underpinned slavery; the notion that some people do not belong to the moral and political human community and can be treated and discarded as mere objects instead.<sup>104</sup>

The second conclusion is unthinkable. The Court, as a chronicler of history, has an obligation to expose the death penalty's roots in slavery.<sup>105</sup> By remaining silent, the Court legitimizes a racial legacy that continues to drive the death penalty today.

The third conclusion is unacceptable. There is much the Court can do and little to prevent it from doing so. We turn now to the ways in which several state supreme court justices have addressed the death penalty's connections to slavery, and how and why the Supreme Court and state and federal lower courts should do the same.

### III. *Looking Back, a Way Forward*

The Supreme Court's failure to address the death penalty's connection to slavery serves only to deepen the connection. As Chief Justice Roberts noted in another context, "[T]o blind yourself to history is both prideful and unwise. 'The past is never dead. It's not even past.'"<sup>106</sup>

Despite the Supreme Court's silence, several state courts have risen to the occasion, expressing concern over the death penalty's ties to racism generally, and to slavery in particular. In 1980, in

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104. See *Furman v. Georgia*, 408 U.S. 238, 272–73 (1972) (Brennan, J., concurring) ("The true significance of . . . punishments [condemned by history] is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded.").

105. See STEIKER, *supra* note 6, at 111 ("[T]he Court's failure to address forthrightly the death penalty's racialized history and current practice has disserved the Court in its role as chronicler of history and social and political practices.").

106. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2623 (2015) (Roberts, C.J., dissenting) (quoting William Faulkner, *REQUIEM FOR A NUN* 92 (1951)).

*District Attorney v. Watson*, the Massachusetts Supreme Judicial Court held that the death penalty violated the state constitution based in part on evidence of racial discrimination in the administration of the death penalty throughout the southern states.<sup>107</sup> According to the court, “[t]he conclusion is inescapable that the death penalty is reserved for those who kill whites, because the criminal justice system in these states simply does not put the same value on the life of a black person as it does on the life of a white.”<sup>108</sup> The race of the defendant also mattered, with “a disproportionate number of nonwhite offenders being sentenced to death.”<sup>109</sup> To the Massachusetts high court, this discounting of black lives, a practice rooted in slavery, was fatal to the death penalty.

In 1999, in *State v. Loftin*, Justice Handler of the New Jersey Supreme Court similarly argued in dissent that New Jersey’s death penalty statute was unconstitutional because of “a long and relentless history of racism that has not only the capacity to cause a disproportionate impact on blacks in the administration of the death penalty, but has indeed done so from the era of slavery in this country, and, many argue, to the present.”<sup>110</sup>

And in 2015, in *State v. Santiago*, the Connecticut Supreme Court declared the death penalty unconstitutional based, in part, on its finding that the death penalty “appears to be inescapably tainted by caprice and bias,” particularly, “racial and ethnic discrimination.”<sup>111</sup> Significantly, statistical evidence of such

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107. *Dist. Att’y for Suffolk Cty. v. Watson*, 411 N.E.2d 1274, 1285–86 (Mass. 1980), *superseded by constitutional amendment*, MASS. CONST. art. CXVI, *and by statute*, MASS. GEN. LAWS ch. 265, § 2 (2008); *see also* *State v. Dicks*, 615 S.W.2d 126, 134 (Tenn. 1981) (finding “irrefutable” the *Watson* Court’s conclusion that “the death penalty is administered with unconstitutional arbitrariness and discrimination”).

108. *Id.* at 1286.

109. *Id.*

110. *State v. Loftin*, 724 A.2d 129, 206 (N.J. 1999) (Handler, J., dissenting); *see also id.* at 207–08 (discussing historical relationship between slavery and the death penalty).

111. *State v. Santiago*, 122 A.3d 1, 66–68 (Conn. 2015); *see also id.* at 36 (“[T]hroughout every period of our state’s history, the death penalty has been

discrimination was not before the court, nor were alleged instances of racial bias by individual prosecutors, jurors, and judges.<sup>112</sup> Instead, the court assumed that there existed a *risk* of racial and ethnic discrimination in capital sentencing, and concluded that such risk deprived the death penalty of any legitimate penological purpose.<sup>113</sup> The court also pointed to the “striking” disparity in death penalty usage between the northern states and “the thirteen states that comprised the Confederacy,” noting that the latter “were last to abandon slavery and segregation, and . . . were most resistant to the federal enforcement of civil rights norms.”<sup>114</sup>

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imposed disproportionately on those whom society has marginalized socially, politically, and economically: people of color, the poor and uneducated, and unpopular immigrant and ethnic groups. It always has been easier for us to execute those we see as inferior or less intrinsically worthy.”).

112. *Compare id.* at 85 (Norcott & McDonald, JJ., concurring) (“[W]e cannot end our state’s nearly 400 year struggle with the macabre muck of capital punishment litigation without speaking to the persistent allegations of racial and ethnic discrimination that have permeated the breadth of this state’s experience with capital charging and sentencing decisions. We recognize that this particular challenge to [racial and ethnic discrimination in] our state’s capital punishment regime has not been raised or briefed in the present case and, therefore, cannot serve as the basis for the majority’s holding today.”), *with id.* at 67 n. 104 (“Justices Norcott and McDonald refer to what now appears to be strong evidence demonstrating that impermissible racial and ethnic disparities have, in fact, permeated this state’s capital sentencing scheme. We decline to address or resolve such claims, however, because they are not before us at this time.”).

113. *See id.* at 66–68 (concluding that “individualized sentencing necessarily opens the door to racial and ethnic discrimination in capital sentencing,” and that it is not “possible to eliminate arbitrary and discriminatory application of capital punishment through a more precise and restrictive definition of capital crimes if prosecutors always remain free *not* to seek the death penalty for a particular defendant, and juries not to impose it, for any reason whatsoever”) (emphasis in original).

114. *Id.* at 52; *see also* NAACP Amic. Br., *supra* note **Error! Bookmark not defined.**, at \*8 (“[T]he large proportion of nonwhites who were executed is merely the present phenomenon of racial discrimination being exercised against the nonwhite. Slavery was exclusively a Southern phenomenon, lynching was primarily a Southern phenomenon, and the general data with respect to all crimes, and particularly the crime of rape, indicates that the South has been the prime contributor to the disproportionate application of the death penalty to blacks.”).

Calling the majority's commentary on race "extraordinary and inflammatory," the *Santiago* dissenters shot back:

[T]he majority suggests that Southerners are *racists*, and so are those who support the death penalty. Painting Southerners and supporters of the death penalty with the broad brush of racism could appear to some to be racist itself and reinforces stereotypes that have no foundation in fact or law.<sup>115</sup>

In a concurring opinion, Justices Fleming Norcott and Andrew McDonald traced the "unmistakable racial dimension" of Connecticut's death penalty, including the fact that "in almost 400 years, no white person has ever been executed in Connecticut for the murder of a black person."<sup>116</sup> Like the majority, the concurring justices emphasized the impermissible *risk* that "the death penalty in Connecticut, as elsewhere, has been and continues to be imposed disproportionately on racial and ethnic minorities, and particularly on those whose victims are members of the white majority."<sup>117</sup> Responding to the dissenters' *McCleskey*-based argument that there was no evidence of individual racial animus, the concurring justices discussed the death penalty's deeper roots in subordination by the cultural majority that, regrettably but inevitably, carries through to the present day:

We strongly emphasize that the fact that a charging or sentencing decision may be based in part on

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115. *State v. Santiago*, 122 A.3d 1, 394–95 (Conn. 2015) (Espinosa, J., dissenting); *see also id.* at 137 n.1 (Rogers, C.J., dissenting) ("Because the majority points to no evidence that the citizens of this state support slavery or resist civil rights, I can only conclude that the majority has cited these sources as part of its general strategy of creating an aura of disrespectability around the death penalty that is in no manner derived from the contemporary moral values of this state's legislature or its citizens.").

116. *Id.* at 87 (Norcott & McDonald, JJ., concurring).

117. *Id.* at 96 (Norcott & McDonald, JJ., concurring); *see also id.* at 95 ("A thorough and fair-minded review of the available historical and sociological data thus strongly suggests that systemic racial bias continues to infect the capital punishment system in Connecticut in the post-*Furman* era.") (Norcott & McDonald, JJ., concurring).

impermissible racial factors does not imply that the prosecutor, judge, or juror making that decision is “racist,” as that term is typically used. Statistical studies from other jurisdictions have demonstrated that the most likely explanation for such disparities is the tendency of members of the majority race to be more empathetic to majority victims, who resemble themselves, and less sympathetic to minority perpetrators, with whom they are less able to identify. This conclusion is bolstered by recent scientific studies that now document what has long been recognized: most, if not all, of us exhibit unconscious or implicit bias.

It likely is the case that many, if not most, of the documented disparities in capital charging and sentencing arise not from purposeful, hateful racism or racial animus, but rather from these sorts of subtle, imperceptible biases on the part of generally well-meaning decision makers. Historically, though, it is difficult to refute . . . that, at varying times throughout our history, the lives of Native Americans, African Americans, Asians, Irish, Italians, Jews, Roman Catholics, and Hispanics simply have not been considered to be as innately valuable as those of the cultural majority.<sup>118</sup>

Together, these decisions suggest two doctrinal pathways for the courts’ consideration of the death penalty’s roots in slavery, which neatly align with the Supreme Court’s two-part proportionality test under the Eighth Amendment.<sup>119</sup>

First, in determining whether there exists objective evidence of a “national consensus” in support of the death penalty, courts should consider not only the dwindling number of southern states that retain and impose the death penalty, but also those states’

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118. *Id.* at 95–96 (Norcott & McDonald, JJ., concurring); *see also* McCleskey v. Kemp, 481 U.S. 279, 332 (1987) (“[A]mericans share a historical experience that has resulted in individuals within the culture ubiquitously attaching a significance to race that is irrational and often outside their awareness.”).

119. *See* Kevin Barry, *The Death Penalty & the Dignity Clauses*, 102 IOWA L. REV. 383, 418 (2017) (discussing the Court’s two-prong proportionality inquiry).

historical commitment to slavery.<sup>120</sup> A penalty rooted in slavery, which retains robust support among only a small number of states with a deeply troubling legacy of slavery, is a penalty that has lost the support of the Nation.<sup>121</sup>

Second, in determining whether the death penalty furthers the deterrent and retributive goals of punishment, courts should acknowledge a state's legacy of slavery and the death penalty's historical roots in slavery, and should consider whether this linkage creates a substantial risk that race continues to play a role in the selection of people for death.<sup>122</sup> A penalty that risks deterring primarily black offenders and those who murder whites, and that risks targeting black people for "just desserts" and expressing outrage for white but not black victims, does not further the legitimate purposes of deterrence and retribution. It furthers racial subordination—an impermissible purpose if ever there was one.<sup>123</sup>

Clearly, courts troubled by the death penalty's connection to slavery *can* address this connection in their jurisprudence. But there are many reasons why courts may not want to do so,

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120. See, e.g., *State v. Santiago*, 122 A.3d 1, 52 (Conn. 2015) ("The geographic concentration of . . . executions [carried out nationwide since 1976] is remarkable. The thirteen states that comprised the Confederacy have carried out more than 75 percent of the nation's executions over the past four decades.").

121. *Id.*

122. See *id.* at 96 (Norcott & McDonald, JJ., concurring) ("[T]he death penalty in Connecticut, as elsewhere, has been and continues to be imposed disproportionately on racial and ethnic minorities, and particularly on those whose victims are members of the white majority."); *id.* at 66 ("[T]he selection of which offenders live and which offenders die appears to be inescapably tainted by caprice and bias.").

123. See Barry, *supra* note 118, at 424 n.278 (discussing illegitimacy of racially discriminatory death penalty); cf. STEIKER, *supra* note **Error! Bookmark not defined.**6, at 90–91, 110 (discussing NAACP Legal Defense Fund's argument in *Furman* that "the death penalty remained on the books in large part *because of its racially discriminatory administration*") (emphasis added); NAACP Amic. Br., *supra* note 21, at \*21 ("Racism, from which many receive concrete economic benefits and psychic sustenance, subsides with great resistance—especially given the current attempts by irresponsible politicians to revive fears in the white populace of the 'black rebel' with the code words of 'Law and Order.'").

including: concern with alienating southern states by depicting them as “racist”; the *McCleskey* majority’s concern with opening the floodgates to arguments over the role of racism and the legacy of slavery in non-capital cases;<sup>124</sup> and an abiding faith that race can be removed from the equation of death in the future without wading into an ugly past. None of these reasons is persuasive.

The alienation of southern states is a legitimate concern but should not guide the courts in deciding to address slavery. Not all southerners lost the Civil War; for many of the descendants of enslaved people and whites whose homes dotted the Underground Railroad, *their* South won. Similarly, not all southerners support the death penalty. A decision acknowledging the death penalty’s ties to slavery does not disparage a monolithic South; rather, it pays tribute to southern voices that have not been heard.<sup>125</sup> Acknowledging these ties, moreover, does not require calling anyone a “racist.” As Connecticut Supreme Court Justices Norcott and McDonald stated, “[t]he types of subtle biases that influence members of the majority to make decisions favoring their own race may well be inevitable, albeit regrettable. When unconsciously made, they do not inherently impugn the diligent and good faith work of our prosecutors, police, judges, and jurors.”<sup>126</sup>

Fear of opening the floodgates to non-capital challenges based on the legacy of slavery is also overblown. As the Massachusetts Supreme Judicial Court stated, “[o]ur society’s failure to bring evenhandedness to the entire spectrum of criminal punishment

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124. See *McCleskey v. Kemp*, 481 U.S. 279, 314–15 (1987) (“McCleskey’s claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system.”); Steiker, *supra* note 6, at 98–109 (discussing various reasons for Supreme Court’s “deafening silence on the subject of race in its foundational capital punishment cases”).

125. Cf. Ben Jones, *The Republican Party, Conservatives, and the Future of Capital Punishment*, J.CRIM. L. & CRIMINOLOGY (forthcoming) (discussing increasing number of conservatives who have turned against the death penalty in recent years based on the “[t]he failure of death penalty policy to live up to key conservative principles—limited government, fiscal responsibility, and promoting a culture of life”) (draft on file with author).

126. *State v. Santiago*, 122 A.3d 1, 98 (Conn. 2015) (Norcott & McDonald, JJ., concurring).

calls for great and persistent effort toward improvement. However, we are not required to abandon all such punishments on constitutional grounds.”<sup>127</sup> Stated another way, “[t]he death penalty is fundamentally different from other punishments for which we may, reluctantly, have to tolerate some degree of unintentional systemic disparity or imperfection.”<sup>128</sup>

Lastly, faith in a color-blind death penalty is deeply misguided. For over forty years, courts have tried and failed to eliminate race from the death penalty calculus.<sup>129</sup> The taint of bias and caprice, rooted in slavery, simply cannot be removed.

#### IV. *The Future of Abolition*

It has been over 40 years since *Gregg* revived a dying death penalty.<sup>130</sup> For over a decade, Justice Kennedy has applied his characteristic logic of the heart to the Court’s death penalty jurisprudence, setting the table for a *per se* challenge that would put the death penalty to rest forever.<sup>131</sup> At the time of this writing, it now appears that he is prepared to step away from that table.<sup>132</sup>

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127. *Dist. Att’y for Suffolk Cty. v. Watson*, 411 N.E.2d 1274, 1286 (Mass. 1980).

128. *State v. Santiago*, 122 A.3d 1, 99 (Conn. 2015) (Norcott & McDonald, JJ., concurring).

129. *See* Bedau, *supra* note 52, at 459 (“The good-faith hopes of the *Gregg* majority in 1976 . . . have simply not been borne out in practice in the two decades since then.”); *see also* *Glossip v. Gross*, 135 S. Ct. 2726, 2761–62 (2015) (Breyer, J., dissenting) (discussing racial disparities); *State v. Santiago*, 122 A.3d 1, 66–68 (same).

130. *See* *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) (holding that death penalty is not *per se* unconstitutional).

131. *See* Barry, *supra* note 119, at 417–18 (discussing Justice Kennedy’s role in “limit[ing] the expansion of the death penalty on dignity grounds” in a series of judicial decisions over the past decade).

132. *See generally* Cody Derespina, *Chuck Grassley Expects Supreme Court Resignation This Summer*, FOX NEWS (Apr. 20, 2017), <http://www.foxnews.com/politics/2017/04/20/chuck-grassley-expects-supreme-court-resignation-this-summer.html> (last visited May 29, 2017) (on file with the Washington and Lee Law Review).

The settings will be cleared, and the death penalty will likely remain with us for some time—a crude tool to be used by politicians to rally their base, to reinvigorate their campaigns, to make America “great.”<sup>133</sup> Power, not principle, will continue to define the death penalty.

We remind Justice Kennedy that he can stop this carnival of cruelty, this macabre charade. History has given him an ability that few can claim: He can prevent death.<sup>134</sup> Should he retire without declaring the death penalty unconstitutional, we shall forever number the losses spurred by his inaction. What a waste of lives and legacy. Rather than the Justice who brought long-awaited coherence to the Eighth Amendment’s dignity doctrine,<sup>135</sup> Justice Kennedy will become just another retired Justice who wished he had.<sup>136</sup>

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133. See Matt Ford, *Donald Trump’s Racially Charged Advocacy of the Death Penalty*, THE ATLANTIC (Dec. 18, 2015), <https://www.theatlantic.com/politics/archive/2015/12/donald-trump-death-penalty/420069/> (last visited May 29, 2017) (discussing then presidential candidate Donald Trump’s address to police and correctional officers, in which he called for the death penalty for “anybody killing a police officer”) (on file with the Washington and Lee Law Review).

134. To declare the death penalty unconstitutional, Justice Kennedy would need the support of Justices Ginsburg, Breyer, Kagan, and Sotomayor—all four of whom appear willing to declare the death penalty unconstitutional. See Barry, *supra* note 119, at 417 (noting that Chief Justice Roberts and Justices Thomas and Alito support the constitutionality of the death penalty). Justice Gorsuch seems unlikely to join his four liberal colleagues in abolishing the death penalty, as suggested by his rejection of stay-of-execution requests as a judge for the Tenth Circuit and his vote in April 2017 as a Justice of the Supreme Court to deny a stay request from death row inmates facing execution in Arkansas. Robert Barnes, *Gorsuch Casts Death-Penalty Vote in One of His First Supreme Court Cases*, WASH. POST (Apr. 21, 2017), [https://www.washingtonpost.com/politics/courts\\_law/gorsuch-casts-death-penalty-vote-in-one-of-his-first-supreme-court-cases/2017/04/21/2d9bc5dc-26a8-11e7-a1b3-faff0034e2de\\_story.html?utm\\_term=.9d0a5aec3919](https://www.washingtonpost.com/politics/courts_law/gorsuch-casts-death-penalty-vote-in-one-of-his-first-supreme-court-cases/2017/04/21/2d9bc5dc-26a8-11e7-a1b3-faff0034e2de_story.html?utm_term=.9d0a5aec3919) (last visited June 1, 2017) (on file with the Washington and Lee Law Review).

135. See *id.* at 416–18 (stating that Justice Kennedy has “played a leading role in pushing dignity closer to the center of American constitutional law and discourse for a quarter-century”).

136. See, e.g., JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451–52 (1994) (“I have come to think that capital punishment should be abolished.”).

Eventually, though, the Supreme Court will abolish the death penalty, bringing the U.S. in line with 141 other abolitionist countries throughout the world.<sup>137</sup> When the Court abolishes, it will almost certainly base its decision on the death penalty's inherently flawed administration—the unreliability, arbitrary imposition, and protracted delay that deprives the death penalty of any legitimate purpose.<sup>138</sup> The Court might also find that the death penalty is at odds with human dignity; it is the ultimate humiliation.<sup>139</sup> Such reasoning will be much welcomed among abolitionists, but an opportunity will have been missed. As a chronicler of history, the Court should take the opportunity to shine the light on the role that slavery has played in perpetuating the legitimacy of the death penalty since colonial times.<sup>140</sup> This will ensure an accurate picture of one of our country's most racist institutions. More importantly, it will ensure that the death penalty, like slavery, never returns.

In the meantime, the abolition movement will continue, with government, businesses, and private citizens all playing a role.<sup>141</sup>

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137. See Death Penalty Info. Ctr., Abolitionist and Retentionist Countries, <https://deathpenaltyinfo.org/abolitionist-and-retentionist-countries> (listing abolitionist and retentionist countries).

138. See *Glossip v. Gross*, 135 S. Ct. 2726, 2756 (2015) (“Today’s administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty’s penological purpose.”).

139. See Barry, *supra* note 119, at 427–28 (“Hopefully, the Court will conclude that, even if the death penalty were administered consistently, swiftly, and reliably, the death penalty would still lack a legitimate penological purpose because *no* purpose can justify the State’s deprivation of the dignity of life.”) (emphasis in original); see also Bharat Malkani, *Dignity and the Death Penalty in the United States Supreme Court*, 44 HASTINGS CONST. L.Q. 145, 146–47 (2017) (arguing that “[d]ignity should . . . provide a framework for finding the death penalty to be contrary to the Eighth Amendment prohibition on ‘cruel and unusual punishments’”).

140. See STEIKER, *supra* note 6, at 111 (“[T]he Court’s failure to address forthrightly the death penalty’s racialized history and current practice has disserved the Court in its role as a chronicler of history and social and political practices.”).

141. See *generally* *New Voices*, DEATH PENALTY INFO. CENT.,

Judges, legislators, and governors will continue to halt the death penalty through judicial abolition, statutory repeal, moratoria, and clemency. Prosecutors will refuse to seek the death penalty and defenders will slow its progress through legal challenges to the death penalty *per se* and as applied. Police chiefs and prison wardens will highlight the death penalty's exorbitant costs and secondary trauma, while international leaders mobilize the shame of the world community. Media, researchers, and academics will focus national and international attention on the intractable issues of innocence, botched executions, arbitrariness and racial discrimination, undue delay, disability, poverty, and inadequate representation. Medical professionals and drug manufacturers will decry lethal injection's perversion of medical ethics. Civil rights organizations, faith groups, and family members of murder victims will hold vigils, disrupt the flow of lethal injection drugs, and organize grassroots campaigns to reform and eventually end the death penalty.

Like the movement to abolish slavery, death penalty abolition will eventually achieve its end and, in time, will be widely regarded as right. Indeed, Harriett Tubman, who once had a price on her head for disrupting the flow of free black labor in the antebellum south, will soon grace the front of the \$20 bill (although Donald Trump has suggested that slaveholder Andrew Jackson ought to remain there); the D.C. home of former slave turned abolitionist statesman, author, and activist Frederick Douglass is a national historic site; and John Brown, who was hanged for attempting to overthrow the slave system through armed conflict, assumed the

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<https://deathpenaltyinfo.org/new-voices> (last visited May 29, 2017) (featuring concerns about the death penalty raised by a diverse array of professionals from across the political spectrum) (on file with the Washington and Lee Law Review); *see generally* DEATH PENALTY INFO. CENT., <https://deathpenaltyinfo.org/> (last visited May 30, 2017) (compiling information on, among other things, arbitrariness, clemency, costs, innocence, disability, racism, inadequate representation, and the opinion of the international community and victims as it relates to the death penalty) (on file with the Washington and Lee Law Review).

status of icon “in the eyes of African Americans, abolitionists, and revolutionaries all over the world.”<sup>142</sup>

In anticipation of the death penalty’s inevitable abolition, we close with the following words of gratitude.

To the growing number of young people in the U.S. who see the death penalty as an anachronism that divides rather than unites our increasingly diverse society, we look forward to the contribution you will make. Indeed, we have already seen it. The #BlackLivesMatter movement—founded in 2012 in response to widely publicized incidents of black people being shot by police officers—has included death penalty abolition among its core aims, calling out the death penalty for “devalu[ing] Black lives” and “target[ing] Blacks and other people of color and poor people throughout . . . history.”<sup>143</sup> Although more men of color are incarcerated and shot by police than are executed each year, the death penalty is of critical importance for one simple reason: If the State can execute people of color, it can do anything to people of color. The death penalty is, quite literally, low-hanging fruit—and strange fruit, indeed. Be indignant in your advocacy; you deserve better from your country.

To those like Phyllis Goldfarb who have stood against the death penalty for so long, we thank you for shining the light that we follow. We are students of your advocacy—one of us, quite literally. As you say, the reality that race permeates the American death penalty “represents not only a profound concern about inequality and unfairness in the selection of defendants for death,” but also “an indictment of American systems of capital

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142. Maya Rhodan, *The Harriet Tubman \$20 Bill Could Make an Early Debut*, TIME (Dec 07, 2016), <http://time.com/4593420/harriet-tubman-20-bill-donald-trump-design/> (last visited May 29, 2017) (on file with the Washington and Lee Law Review); see generally SINHA, *supra* note 22, at 566; *Frederick Douglass, National Historic Site, District of Columbia*, NAT’L PARK SERV., <https://www.nps.gov/frdo/index.htm> (last visited May 29, 2017) (on file with the Washington and Lee Law Review).

143. *End the War on Black People*, THE MOVEMENT FOR BLACK LIVES <https://policy.m4bl.org/end-war-on-black-people/> (last visited May 29, 2017) (on file with the Washington and Lee Law Review).

punishment.”<sup>144</sup> We look forward to the day when the Supreme Court agrees. In solidarity, and one day in victory, we salute you.

### VI. Conclusion

When the history of the death penalty is written, the death penalty’s connection to slavery will not be a distant parallel but a straight line. Phyllis Goldfarb’s article, *Matters of Strata: Race, Gender, and Class Structures in Capital Cases* traces that line.<sup>145</sup> The institution of slavery helps to explain why, over the past four decades, the thirteen states that comprised the former Confederacy have been responsible for nearly all of this nation’s executions.<sup>146</sup> Although the U.S. Supreme Court has failed to address this connection, several state court judges have risen to the occasion, calling out the impermissible taint of bias that colors the death penalty. More courts, including the Supreme Court, should follow their lead. In the meantime, we, like our abolitionist forebears, will fight. Emancipation was once considered “a wild delusive idea,” but it became a reality.<sup>147</sup> So, too, will abolition of the death penalty.

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144. Goldfarb, *supra* note 5, at 1397.

145. *See id.* at 1404–05 (stating that “the ghosts of the colonial and antebellum slave system continue to inhabit our cultural contests,” particularly the legal and ideological battles over the death penalty).

146. *See* State v. Santiago, 122 A.3d 1, 52 (Conn. 2015) (discussing geographic concentration of executions in the states that comprised the Confederacy).

147. *See generally* Frederick Douglass, *Speech on the Dred Scott Decision*, TEACHING AM. HIST., <http://teachingamericanhistory.org/library/document/speech-on-the-dred-scott-decision-2/> (last visited May 29, 2017) (on file with the Washington and Lee Law Review).