

The American Death Penalty and the (In)Visibility of Race

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Racial injustice has always cast a shadow over American criminal justice. In the context of capital punishment, racial disparities have been evident since colonial times. Black people have suffered not only disparate treatment as alleged perpetrators and victims of capital crimes under facially neutral capital statutes, but also explicit racial discrimination under antebellum capital statutes that varied in their application based on the racial status of victims and perpetrators. Following the Civil War, blacks suffered a lengthy era in which lynchings were common, followed by an era of so-called legal lynchings in the South, in which legal protections were minimal at best. Against this backdrop, it is unsurprising that the NAACP Legal Defense and Education Fund led the constitutional-litigation campaign against the death penalty in the 1960s and 1970s. What is surprising, however, is the Supreme Court's avoidance of the race issue in its foundational constitutional cases. Despite the centrality of racial discrimination in litigants' arguments, the Court consistently avoided direct engagement with the issue of racial discrimination in capital punishment. After surveying the centrality of race both to the history of capital punishment in America and to the litigants' constitutional strategy, we document the Court's strategies of avoidance. We then consider possible explanations for the Court's silence and note some unanticipated consequences of the Court's race-neutral approach to its constitutional regulation of capital punishment.

INTRODUCTION

Sometimes the historical context in which important constitutional doctrines are born or elaborated may influence deciding judges in subtle, perhaps even unconscious, ways. Consider, for example, how the Cold War imperative for the recognition of the civil rights of black Americans may have affected midcentury court rulings on racial equality¹ or how the intrusive policing of

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¹ See Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 210 (Oxford 2004) ("The justices' unanimity in all three

gay men in public lavatories may have influenced consideration of the constitutionality of the bugging of phone booths and other forms of surveillance.² Arguments that these background events influenced constitutional law are necessarily speculative given that the salience of the events may have lurked below the level of consciousness.

The racial context informing the foundational constitutional challenges to capital punishment is different. The justices who “constitutionalized” the death penalty in the 1960s and 1970s could not have avoided consciously reflecting on the racial history of capital punishment in America, given that the constitutional campaign against the death penalty was led by the nation’s preeminent racial-justice organization, the NAACP Legal Defense and Education Fund (LDF). During this time, the litigants and their amici consistently thrust the issue of race to the forefront, and nobody with even a modicum of historical awareness could have missed the salience of race to the American practice of capital punishment.

Strangely, though, the birth of the Supreme Court’s constitutional regulation of capital punishment was largely devoid of mention of the racially inflected history of the law and practice of the death penalty, despite how central the issue of race was to the litigation effort that forced the Court’s hand. One can read the entire canon of the Court’s pathbreaking cases on capital punishment during the 1960s and 1970s without getting the impression that the death penalty was an issue of major racial significance in American society.

In what follows, we highlight how inextricably race and the death penalty have been entwined in American history, survey the near absence of discussions of race in the Supreme Court’s formative Eighth Amendment cases of the 1960s and 1970s, and contemplate the possible causes and costs of this strange strategy of willful silence.

1950 race cases—an impressive accomplishment for this ordinarily splintered Court—is most plausibly attributable to the Cold War imperative.”)

² See David Alan Sklansky, “One Train May Hide Another”: *Katz*, *Stonewall*, and the Secret Subtext of *Criminal Procedure*, 41 UC Davis L Rev 875, 880, 897–900 (2008) (contending that the Court’s landmark decision in *Katz v United States*, 389 US 347 (1967), and the Fourth Amendment jurisprudence that flowed from it were influenced by the justices’ anxieties, perhaps unconscious, about the use of peepholes and undercover decoys to police gay men’s encounters in public lavatories).

I. VISIBILITY

It is impossible to find a time in American history, even well before the birth of the Republic, when the use of the death penalty was not racially inflected. Even in seventeenth-century colonial America, a frontier society in which overall populations were small and black inhabitants few, the rate of execution of blacks still far exceeded that of whites on a per capita basis (though the majority of those executed were white).³ Moreover, although the white execution rate declined over the course of the seventeenth century, the black execution rate did not experience a similar consistently downward trend.⁴

During the eighteenth century, the colonial population grew more than tenfold, including a large influx of African slaves mostly to the South.⁵ Whereas in the seventeenth century the majority of executions occurred in New England and the majority of those executed were white,⁶ in the eighteenth century the majority of executions occurred in the South and the majority of those executed were black.⁷ This substantial shift in the use of the death penalty seems clearly linked to the expansion of the South's slave-labor economy and the demand by slave owners for state assistance in disciplining the growing enslaved population, a demand motivated by both economic-productivity concerns and the perceived need to protect the increasingly outnumbered white population.⁸

Not only did the number of blacks executed surpass the number of whites executed during the eighteenth century (a trend that continued until the Civil War), but blacks were often executed for different crimes.⁹ Whereas the vast majority of whites sentenced to death were executed for murder, substantial numbers of blacks were executed for nonhomicidal crimes.¹⁰ From the late eighteenth century to the Civil War, the rate of execution for nonlethal crimes varied considerably by race, with

³ Howard W. Allen and Jerome M. Clubb, *Race, Class, and the Death Penalty: Capital Punishment in American History* 29–31 (SUNY 2008).

⁴ *Id.* at 31.

⁵ *Id.* at 31–32.

⁶ *Id.* at 29.

⁷ Allen and Clubb, *Race, Class, and the Death Penalty* at 33 (cited in note 3).

⁸ See Stuart Banner, *The Death Penalty: An American History* 142 (Harvard 2003) (“From the perspective of slaveowners, harsh punishments were necessary to manage such large captive populations.”).

⁹ Allen and Clubb, *Race, Class, and the Death Penalty* at 33–34 (cited in note 3).

¹⁰ See *id.* at 60–64.

many more blacks being “executed for non-lethal and unknown” offenses than whites across all regions of the country.¹¹ In the South, where the majority of executions of blacks occurred, the nonlethal crimes that most frequently led to executions were slave revolt, rape, attempted rape, and attempted murder.¹²

Moreover, blacks were much more likely than whites to be subject to the most extreme modes of execution. Although the majority of executions of both whites and blacks were by hanging until the twentieth century, much more terrifying and torturous methods were occasionally employed during the colonial era and into the early nineteenth century.¹³ In the British colonies, burning at the stake was a common torturous punishment, whereas in Louisiana (a colony ruled by France, then Spain), breaking on the wheel was more common.¹⁴ In addition, gibbeting (hanging in a cage or in chains) was sometimes employed as a method for displaying the body of the executed convict after death.¹⁵ Sometimes the bodies of executed convicts were decapitated or otherwise dismembered and the heads or body parts publicly displayed.¹⁶ These more terrifying and torturous execution practices were uncommon, but when they were employed, it was disproportionately in the execution of blacks, especially slaves convicted of revolt or serious crimes against whites.¹⁷ Slave revolt was considered a form of “petit treason” on the basis of an analogy between the household and the state; such crimes were thus subject to a form of “super-capital punishment” in light of the perceived enormity and treachery of the underlying offense.¹⁸

At the time of the Founding, capital punishment was an entrenched legal and social practice, explicitly acknowledged

¹¹ Id at 60–62. See also Michael A. Powell, *The Death Penalty in the South*, in Gordon Morris Bakken, ed, *Invitation to an Execution: A History of the Death Penalty in the United States* 203, 204–05 (New Mexico 2010) (noting that the overwhelming majority of executions of whites in both the North and the South in the period stretching from the early Republic to the Civil War were for the crime of murder).

¹² See Allen and Clubb, *Race, Class, and the Death Penalty* at 63–64, 74 (cited in note 3).

¹³ See id at 42.

¹⁴ Id at 36, 45.

¹⁵ Banner, *The Death Penalty* at 72–74 (cited in note 8).

¹⁶ Id at 74–75.

¹⁷ Allen and Clubb, *Race, Class, and the Death Penalty* at 45 (cited in note 3).

¹⁸ Banner, *The Death Penalty* at 71 (cited in note 8).

several times in the Constitution.¹⁹ Despite this apparent acceptance of the practice of capital punishment, many of the Founders and important thinkers of the time had begun to question it in light of the influential critique by Italian jurist Cesare Beccaria.²⁰ Initiatives to restrict the death penalty escalated in the new Republic, in contrast to Mother England, where expansive capital statutes continued to flourish at the turn of the nineteenth century.²¹ This rethinking and restriction of the death penalty, however, was regionally variable within the United States. While the North progressively narrowed the ambit of capital punishment, and the Midwest inaugurated the mid-nineteenth-century movement toward full-scale abolition, the South restricted the death penalty only for whites, simultaneously *expanding* its ambit in an explicitly racial fashion.²²

In the North, the use of capital punishment for nonlethal offenses fell sharply from the end of the eighteenth to the middle of the nineteenth century, such that by 1860, no Northern state authorized execution for any offense other than murder or treason.²³ Indeed, the North began to restrict the use of capital punishment even for the crime of murder. In 1794, Pennsylvania promulgated legislation dividing murder into degrees and restricting the death penalty to murders in the first degree.²⁴ This innovation eventually spread widely, but the only Southern states to quickly adopt it did so with the explicit provision that the new limitation did not apply to slaves.²⁵

¹⁹ The Fifth Amendment presumes the availability of the death penalty in three separate clauses—the guarantee of a grand jury in “capital” cases, the protection against being placed twice in jeopardy “of life or limb,” and the guarantee of due process of law prior to deprivation of “life.” US Const Amend V.

²⁰ See Carol S. Steiker and Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U Chi Legal F 117, 126–27.

²¹ See Douglas Hay, *Property, Authority, and the Criminal Law*, in Douglas Hay, et al, eds, *Albion’s Fatal Tree: Crime and Society in Eighteenth-Century England* 17, 18 (Pantheon 1975).

²² See Allen and Clubb, *Race, Class, and the Death Penalty* at 63 (cited in note 3) (“The number of capital offenses was reduced for whites, but if anything the number was increased where African Americans were concerned.”); Powell, *The Death Penalty in the South* at 204 (cited in note 11) (“Although the offenses for which capital punishment applied to whites diminished in the South, the same was not true for blacks; the list of crimes for which they could be punished by death became more extensive rather than less.”).

²³ Banner, *The Death Penalty* at 131 (cited in note 8).

²⁴ *Id* at 98.

²⁵ See *id* at 99.

This exception reflected the widespread practice throughout the South prior to the Civil War of maintaining separate capital offenses on the basis of slave status and on the basis of race, regardless of slave status. For example, in antebellum Virginia, “free African Americans (but not whites) could get the death penalty for rape, attempted rape, kidnapping a woman, and aggravated assault—all provided the victim was white; slaves in Virginia were eligible for death for commission of a mind-boggling sixty-six crimes.”²⁶ At the same time, whites in Virginia could face the death penalty for just four crimes.²⁷ While Virginia had the most lopsided ratio of black-to-white capital crimes, the other Southern states also promulgated racially skewed capital codes. For example:

[S]laves in Texas (but not whites) were subject to capital punishment for insurrection, arson, and—if the victim were white—attempted murder, rape, attempted rape, robbery, attempted robbery, and assault with a deadly weapon. Free blacks were subject to capital punishment for all these offenses plus that of kidnapping a white woman.²⁸

The explicitly race- and slave-based capital codes prevalent in the South, as well as the especially torturous modes of execution used for slave revolts and other serious crimes by blacks, not only reflected prevailing racist attitudes and institutions but also helped produce those attitudes by using the fearsome spectacle of public executions to imbue race and slave status with the utmost significance. From early colonial times through the Civil War, racial attitudes were hardened and entrenched “by mobilizing race-encoding categories of punishment: Who is whipped, who is hanged, and who is burned at the stake?”²⁹ As a result, in effect if not in explicit intent, “one of the functions of the death penalty . . . was *to create race*: to segregate the myriad

²⁶ Sheri Lynn Johnson, *Coker v. Georgia: Of Rape, Race, and Burying the Past*, in John H. Blume and Jordan M. Steiker, eds, *Death Penalty Stories* 171, 191 (Foundation 2009).

²⁷ George M. Stroud, *A Sketch of the Laws Relating to Slavery in the Several States of the United States of America* 75 (Longstreth 2d ed 1856).

²⁸ Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, in Charles J. Ogletree Jr and Austin Sarat, eds, *From Lynch Mobs to the Killing State: Race and the Death Penalty in America* 96, 99 (NYU 2006).

²⁹ Stephen John Hartnett, 1 *Executing Democracy: Capital Punishment & the Making of America, 1683–1807* 20 (Michigan State 2010).

social positions of the New World into hard and fast categories of white and black, free and enslaved.”³⁰

While the South was robustly enforcing its many capital statutes against slaves and free blacks in the first half of the nineteenth century, a movement to abolish capital punishment was gathering momentum in the North and Midwest. Five Northeastern states enacted so-called Maine laws, which were named after a Maine statute passed in 1837 that required a one-year waiting period between conviction and execution and that resulted in a *de facto* moratorium on executions.³¹ In 1846, Michigan became the first state to abolish the death penalty for murder, followed by Rhode Island in 1852 and Wisconsin in 1853.³² The abolition movement lost steam in the 1850s, as the issue of slavery and the impending Civil War took precedence over other issues.³³ Despite several decades of death-penalty-abolition discussion, debate, and legal reform in the North and Midwest, abolition was simply a nonstarter in the South. In large part, abolition was inconceivable because of the widely held belief that capital punishment was needed to maintain the South’s slave economy and society.³⁴ But the death-penalty-abolition movement’s failure even to develop a toehold in the South doubtless also reflected the close connection in both people and ideology between the death-penalty-abolition movement and the slavery-abolition movement.³⁵

An ironic result of the split between the North and the South on capital punishment is that the United States now holds the odd position of being in *both* the vanguard and the rearguard of worldwide death-penalty abolition. The state of Michigan has the much-vaunted distinction of being “the first government in the English-speaking world to abolish capital punishment for murder and lesser crimes.”³⁶ It has unwaveringly maintained its 1846 abolitionist stance to the present day. At the same time, the United States as a nation is currently the

³⁰ *Id.*

³¹ Banner, *The Death Penalty* at 134 (cited in note 8).

³² *Id.*

³³ *Id.*

³⁴ See *id.* at 142.

³⁵ See Banner, *The Death Penalty* at 142–43 (cited in note 8). See also Philip English Mackey, ed, *Voices against Death: American Opposition to Capital Punishment, 1787–1975* xxviii (Burt Franklin 1976).

³⁶ Eugene G. Wanger, *Michigan & Capital Punishment*, 81 Mich Bar J 38, 38 (2002).

only Western democracy that still maintains the death penalty; indeed, the United States has one of the top five execution rates in the world today, along with China, Iran, Iraq, and Saudi Arabia.³⁷ This schizophrenic posture is a direct result of regional division on the issue within the United States, which was born of differing attitudes regarding the race-based practice of chattel slavery.

With the South's defeat in the Civil War and the subsequent passage of the Fourteenth Amendment, explicitly race-based capital codes could no longer be maintained. But race continued to influence the application of facially neutral capital statutes through prosecutorial discretion, all-white sentencing juries, and the practice of extrajudicial executions by lynch mobs.³⁸ In the aftermath of the Civil War, the death penalty offered "an alternative form[] of racial subjugation," necessary in the eyes of some white Southerners "to restrain a primitive, animalistic black population."³⁹ White Southerners feared violent revenge and property crimes by the impoverished freed population,⁴⁰ but above all, they seemed to fear sexual aggression by black men against white women.⁴¹ These attitudes not only supported the use of capital punishment but also prompted rampant private violence against the newly freed black population, resulting in what one historian called a "reign of terror" and an "orgy of racial violence" in the postbellum South.⁴² The practice of lynching, which reached its peak in the late nineteenth and early twentieth centuries, constituted "a form of unofficial capital punishment" that, in its heyday, was even more common than the official kind.⁴³ Whether one considers only legal executions or includes extralegal lynchings, a substantial majority of executions in the second half of the nineteenth century took place in

³⁷ Laura Smith-Spark, *China, U.S. in Top 5 for Executions Worldwide*, (CNN, Apr 10, 2013), archived at <http://perma.cc/9MDK-FZBP>.

³⁸ See Allen and Clubb, *Race, Class, and the Death Penalty* at 81 (cited at note 3).

³⁹ Banner, *The Death Penalty* at 228 (cited in note 8).

⁴⁰ See Allen and Clubb, *Race, Class, and the Death Penalty* at 68 (cited in note 3).

⁴¹ See William D. Carrigan, *The Making of a Lynching Culture: Violence and Vigilantism in Central Texas, 1836–1916* 153 (Illinois 2004) ("Especially in the South, the late nineteenth century was beset with white paranoia on the topic [of the rape of white women by black men].").

⁴² *Id.* at 112–13. See also Randall Kennedy, *Race, Crime, and the Law* 45 (Pantheon 1997) (describing the charge of rape by a black man of a white woman as "the most emotionally potent excuse" for lynchings).

⁴³ Banner, *The Death Penalty* at 229 (cited in note 8).

the South, and the vast majority (more than 75 percent) of Southern executions were of blacks.⁴⁴

Even during the country's most active period of death-penalty abolition—the Progressive Era at the turn of the twentieth century, when ten states abolished the death penalty for murder—race played a highly salient role.⁴⁵ Although none of the abolishing states were in the Deep South, their abolitions proved tenuous, with eight of the ten states ultimately reinstating the death penalty, often within only a few years of abolition.⁴⁶ During the abolition and reinstatement debates, two arguments with potent racial overtones were powerfully present—the need to retain capital punishment both to prevent lynchings and to promote a program of eugenics.⁴⁷ The surprising prominence and salience of these death-penalty arguments in the early twentieth century “reveal how much the debates about capital punishment at that time were debates about race and how much the death penalty itself, as it was practiced on the ground, was racially inflected.”⁴⁸

Although the first half of the twentieth century saw a substantial decline in lynch-mob violence, the death penalty continued to serve as a means of racial subjugation, especially in the South. The breadth of Southern capital statutes persisted into the twentieth century: “[M]ost of the southern states’ capital crimes on the eve of the Civil War were still capital nearly a century later.”⁴⁹ Moreover, the need to forestall lynch-mob violence led Southern reformers to urge expediting the criminal process to allow for immediate trials followed by instant executions—pressures that created the practice known derogatorily as “legal lynching.”⁵⁰ The South’s distinctive racial history thus left its mark not only on the substance of capital statutes, but also on procedure in capital trials (and criminal justice more generally). Indeed, the Supreme Court’s criminal procedure revolution of the 1960s, in which the Court recognized and expanded many

⁴⁴ See Allen and Clubb, *Race, Class, and the Death Penalty* at 70, 76, 97, 101, 105, 121, 133 (cited in note 3).

⁴⁵ See Carol S. Steiker and Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 *J Crim L & Crimin* 643, 646–61 (2010).

⁴⁶ *Id.* at 649.

⁴⁷ See *id.* at 646.

⁴⁸ *Id.* at 661.

⁴⁹ Banner, *The Death Penalty* at 228 (cited in note 8).

⁵⁰ See Michael J. Klarman, *Powell v. Alabama: The Supreme Court Confronts “Legal Lynchings”*, in Carol S. Steiker, ed., *Criminal Procedure Stories* 1, 2–3, 5, 11 (Foundation 2006).

constitutional protections for criminal defendants, itself had an unstated racial subtext in light of the substantial “intersection of the criminal procedure revolution and the struggle for racial equality, especially in the South.”⁵¹

The lack of adequate legal process in capital trials in the South, especially in cases involving black men accused of raping white women, brought the NAACP and other civil rights organizations repeatedly to the South to defend the accused, who often faced dubious charges on the flimsiest of evidence.⁵² The participation of Thurgood Marshall in one such effort in Groveland, Florida, is the subject of Gilbert King’s Pulitzer Prize-winning book, *Devil in the Grove*, in which King suggests that the case “became the impetus behind the NAACP’s capital punishment program, which eventually led to the Supreme Court ruling [in *Furman v Georgia*⁵³] that capital punishment was unconstitutional.”⁵⁴

The straight line that King draws from Groveland to *Furman* is supported by the staggering statistics regarding the racial use of rape prosecutions in the South long after lynching’s heyday. The overwhelming majority of convicted rapists executed in the South in the twentieth century were black.⁵⁵ Racial disparities for murder, though less striking, were evident in the South as well.⁵⁶ Although racial disparities in execution rates were less obviously stunning outside the South, blacks were still executed in disproportion to their numbers everywhere in the United States.⁵⁷ Indeed, over the broad sweep of American history from 1608 to 1945, blacks, along with other minority groups, constituted a majority of those executed.⁵⁸ Blacks alone constituted almost half of those executed in that long timeframe—and

⁵¹ Carol S. Steiker, *Introduction*, in Steiker, ed, *Criminal Procedure Stories* vii, viii (cited in note 50).

⁵² For examples of these cases of alleged rape, see generally *Irvin v State*, 66 S2d 288 (Fla 1953); *Irvin v Chapman*, 75 S2d 591 (Fla 1954); *Sims v Balkcom*, 136 SE2d 766 (Ga 1964). For an example of the NAACP’s involvement in civil actions, see generally *Earle v Greenville County*, 56 SE2d 348 (SC 1949) (seeking damages for a lynching).

⁵³ 408 US 238 (1972).

⁵⁴ Gilbert King, *Devil in the Grove: Thurgood Marshall, the Groveland Boys, and the Dawn of a New America* 5 (HarperCollins 2012).

⁵⁵ See Barrett J. Foerster, *Race, Rape, and Injustice: Documenting and Challenging Death Penalty Cases in the Civil Rights Era* 9–10 (Tennessee 2012); Banner, *Traces of Slavery* at 107 (cited in note 28).

⁵⁶ Banner, *Traces of Slavery* at 107 (cited in note 28).

⁵⁷ Allen and Clubb, *Race, Class, and the Death Penalty* at 168 (cited in note 3).

⁵⁸ *Id* at 148.

they would constitute a much larger proportion if lynch-mob executions were included in the count.⁵⁹

The dry statistics on the use of capital punishment were a lived reality for the civil rights activists of the mid-twentieth century, especially for Thurgood Marshall, who risked his life in Groveland and throughout his work on other capital trials in the South. The extent to which the history of the American death penalty was “soaked in racism” was not news to the NAACP.⁶⁰ Just as the nineteenth-century movement for legislative death-penalty abolition was tied to the slavery-abolition movement in personnel and ideology, the twentieth-century movement for judicial death-penalty abolition was tied to the civil rights movement. Unsurprisingly, the impetus and focus of the ensuing litigation strategy were race based in ways that could not possibly have been overlooked or misunderstood by the courts.

II. INVISIBILITY

The salience of race in American capital punishment law and practice prior to the 1960s contrasts sharply with its relative invisibility in the judicial opinions issued in the foundational cases of the modern era. Concerns about racial discrimination clearly motivated judicial interest in subjecting the death penalty to constitutional regulation. The LDF, the preeminent civil rights organization devoted to eradicating racial discrimination, was the public face of the legal assault on capital punishment. The legal claims that it advanced in the Supreme Court, as well as the evidence offered in support of those claims, focused on the persistence of racial discrimination. The emphasis on racial discrimination in the briefs was evident not only in the briefs filed by the LDF but also in those prepared by a variety of amici. And yet a cursory—indeed, even a careful—reading of the Court’s opinions in the defining era (from roughly 1963 to the late 1970s) reveals little attention to racial discrimination. This Part will document the odd dialogue between death-penalty litigants and the Court during this era, in which litigants repeatedly urged the Court to limit or abolish the death penalty because of its racially discriminatory administration and the Court consistently declined to use race as the lens for understanding or regulating the American death penalty.

⁵⁹ Id at 148–49.

⁶⁰ Banner, *Traces of Slavery* at 97 (cited in note 28).

Before the 1960s, defense lawyers challenged various aspects of capital convictions but rarely challenged the constitutionality of the death penalty itself. The Supreme Court heard some challenges to execution methods,⁶¹ including a challenge to Louisiana's effort to try again after the infamous botched electrocution of Willie Francis in 1946.⁶² The *Scottsboro Boys* case yielded a decision establishing the right to counsel in capital cases,⁶³ making it the first case to suggest that capital trials demand greater procedural protections than noncapital trials. But for the most part, lawyers representing death-sentenced inmates raised generic claims available to all criminal defendants, challenging discrimination in jury selection, coercive interrogation techniques, improper venue, and so forth. The constitutionality of capital punishment qua punishment went unquestioned in part because of its long-standing pedigree (it was a continuous practice in most states from the colonial and Founding eras through the 1950s) and in part because of the textual acknowledgements of the practice in the Constitution itself.⁶⁴

But the same concerns about racial injustice that had produced *Brown v Board of Education of Topeka*⁶⁵ and the broader criminal procedure revolution led the Supreme Court to invite constitutional scrutiny of the death penalty. "Invite" is the appropriate word because Justice Arthur Goldberg decided to scrutinize the death penalty as an available punishment before any litigants had advanced that argument. In the summer of 1963, he directed his law clerk, Alan Dershowitz, to analyze whether the death penalty remained consistent with constitutional standards.⁶⁶ Dershowitz was skeptical about the plausibility of rejecting the death penalty as unconstitutional, and his resulting memorandum instead emphasized two related aspects of its administration: its use in nonhomicidal cases such as rape, and its racially discriminatory application.⁶⁷ Goldberg was unable to

⁶¹ See, for example, *Wilkerson v Utah*, 99 US 130, 132–33 (1878) (rejecting a constitutional challenge to execution via firing squad); *In re Kemmler*, 136 US 436, 441, 447 (1890) (rejecting a constitutional challenge to death by electrocution).

⁶² See *Louisiana v Resweber*, 329 US 459, 460–61 (1947).

⁶³ See *Powell v Alabama*, 287 US 45, 71 (1932).

⁶⁴ See note 19 and accompanying text.

⁶⁵ 347 US 483 (1954).

⁶⁶ For a discussion of the origins and development of Goldberg's memo on capital punishment and his subsequent dissent from the denial of certiorari in *Rudolph v Alabama*, 375 US 889 (1963), see Evan J. Mandery, *A Wild Justice: The Death and Resurrection of Capital Punishment in America* 3–30 (Norton 2013).

⁶⁷ See Mandery, *A Wild Justice* at 21–22 (cited in note 66).

convince his colleagues to grant review in the death-penalty cases that came to the Court, so he chose to publish his “dissent from the denial” of certiorari, joined by Justices William Brennan and William Douglas, in two cases involving black inmates sentenced to death for the rape of white victims.⁶⁸ At Chief Justice Earl Warren’s urging, Goldberg omitted any reference to race in his published opinion,⁶⁹ instead announcing his view that several questions surrounding the availability of the death penalty for rape were “relevant and worthy of argument and consideration,” including whether such a practice violates “evolving standards of decency,” whether taking life to protect a value other than life constitutes excessive punishment, and whether the permissible aims of punishment could be achieved in such cases with punishments less than death.⁷⁰

Despite the absence of any overt arguments about race, *Rudolph v Alabama*⁷¹ immediately caught the attention of the LDF. In the preceding decades, the LDF had taken an interest in a limited number of capital cases, focusing primarily on cases involving black defendants who had a plausible claim of actual innocence, as well as cases involving some systemic issues like racial discrimination in grand jury selection.⁷² Now, though, three members of the Court had revealed their discomfort with the one aspect of the American death penalty—its availability for rape—that was undeniably linked to racial prejudice. LDF lawyers responded by pursuing an ambitious empirical study of rape cases in the South in order to document its racially discriminatory dimensions. They engaged Professor Marvin Wolfgang, a leading criminologist at the University of Pennsylvania, to design the study, and they sent a cohort of law students to courthouses throughout the Deep South during the summer of 1965 to gather the raw data needed to show disparate treatment.⁷³ The nature of the project and the manner of its

⁶⁸ Id at 27–28.

⁶⁹ Id at 28–29. Warren permitted Goldberg to retain a footnote to the *United Nations Report on Capital Punishment*, which itself included data on the death penalty’s racially discriminatory use; both “Dershowitz and Goldberg hoped that this oblique reference would be enough” to reflect discomfort about the death penalty’s racist administration. Id at 29.

⁷⁰ *Rudolph*, 375 US at 889–91.

⁷¹ 375 US 889 (1963).

⁷² See Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961* 56–57 (Oxford 1994).

⁷³ Michael Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment* 78, 86–88 (Random House 1973).

execution—young liberals traveling to the Deep South in order to uncover racial discrimination—made clear that the LDF’s work on the death penalty was of a piece with its other civil rights work of the same era.

The resulting litigation in *Maxwell v Bishop*⁷⁴ challenged discriminatory patterns in Arkansas capital-rape cases. Wolfgang had concluded that black-on-white-rape cases in Arkansas were more likely to yield capital sentences than any other racial combinations, controlling for twenty-nine nonracial variables.⁷⁵ On federal habeas, the district court resisted the claim of racial discrimination by faulting the study’s methodology.⁷⁶ The Eighth Circuit (then-judge Harry Blackmun writing for the panel) affirmed, holding that Maxwell had failed to establish discrimination in his case and expressing skepticism about his ever prevailing on the basis of statistical showings of statewide discrimination.⁷⁷

By the time that Maxwell lost in the Eighth Circuit, the LDF approach to capital cases had expanded dramatically. Instead of focusing solely on black defendants or largely on issues of racial discrimination, the LDF embarked on a more encompassing effort to bring the American death penalty to a halt. The LDF’s “moratorium” strategy was to prevent any executions—regardless of the inmate’s race—by raising all available procedural claims.⁷⁸ Some of those claims were garden-variety challenges to illegal searches, questionable confessions, and the like, relying on the Warren Court’s dramatic extension of criminal procedural protections to state inmates.⁷⁹ But many of the claims focused specifically on defects in capital litigation, including the ubiquitous practice of excluding potential jurors who had any qualms about the death penalty; the use of “unitary” trials, in which defendants had no separate opportunity to seek mercy apart from the adjudication of guilt or innocence; and the failure of state capital schemes to provide any guidance as to who should receive the death penalty.⁸⁰

⁷⁴ 398 F2d 138 (8th Cir 1968).

⁷⁵ Mandery, *A Wild Justice* at 38–39 (cited in note 66).

⁷⁶ See *Maxwell*, 398 F2d at 145.

⁷⁷ *Id.* at 148 (“We are not certain that, for Maxwell, statistics will ever be his redemption.”).

⁷⁸ See Meltsner, *Cruel and Unusual* at 71, 106–07 (cited in note 73).

⁷⁹ See David Garland, *Peculiar Institution: America’s Death Penalty in an Age of Abolition* 222–23 (Belknap 2010).

⁸⁰ *Id.* at 67–70.

The decision to attack the death penalty itself implicated complicated judgments that were both pragmatic and principled. LDF lawyers realized that the Court might not embrace its claims of racial discrimination and understood that the best hope for many death-sentenced black inmates might rest on broader reforms—perhaps even abolition—of the capital system. In addition, LDF lawyers were themselves opposed to the death penalty even apart from its racially discriminatory administration, and when they realized that their strategies could benefit a broader swath of inmates, they felt obligated to expand their charge. Tony Amsterdam, the brilliant architect of the LDF effort, explained that “[w]e could no more let men die that we had the power to save . . . than we could have passed by a dying accident victim sprawled bloody and writhing on the road without stopping to render such aid as we could.”⁸¹

Importantly, many of the LDF’s new capital-specific claims drew on and reinforced concerns about racial discrimination. Death qualification of jurors⁸² was a common means of excluding minorities from capital juries.⁸³ Standardless discretion in state capital statutes allowed prosecutors and juries to reach different results in similar cases and insulated racial disparities from judicial review.

When the LDF sought review of Maxwell’s case before the US Supreme Court, it focused primarily on the extensive evidence of racial discrimination in Arkansas rape cases and the ways that standardless discretion facilitated that discrimination. The petition for certiorari declared that the “detailed and exhaustive examination” of the cases “graphically demonstrates the grim consequences of leaving unfettered and uninformed discretion to juries to choose between death and lesser penalties for rape in a state which has historically practiced racial discrimination.”⁸⁴ The petition evocatively compared the sort of

⁸¹ Id at 108 (quotation marks omitted).

⁸² See Nancy J. King, *Silencing Nullification Advocacy inside the Jury Room and outside the Courtroom*, 65 U Chi L Rev 433, 483 (1998) (defining “death qualification” as “authorizing the disqualification of only those jurors who are unable to exercise the discretion required by law”).

⁸³ See Motion for Leave to File Brief Amici Curiae and Brief Amici Curiae of the NAACP Legal Defense and Educational Fund, Inc, and the National Office for the Rights of the Indigent, *Witherspoon v Illinois*, No 1015, *33–34 (US filed Mar 12, 1968) (available on Westlaw at 1968 WL 129362) (“Witherspoon LDF Brief”).

⁸⁴ Petition for a Writ of Certiorari to the United States Court of Appeals for the Eight Circuit, *Maxwell v Bishop*, No 622-13, *35–36 (US filed Oct 9, 1968) (“Maxwell Certiorari Petition”).

discrimination evident in the Arkansas system to the practice of lynching in an earlier era: “Decisions of this Court have long recognized that violence may emanate from the state as well as from the mob, and that violence under color of law is as dangerous to the social fabric as that not cloaked with legitimate authority.”⁸⁵

Ultimately, the Court granted certiorari on Maxwell’s claims regarding standardless discretion and Arkansas’s unitary structure but declined to review the claim of racial discrimination.⁸⁶ Notwithstanding the Court’s limited grant of certiorari, both Maxwell’s lawyers and amici continued to press the issue of racial discrimination. An amicus brief filed on behalf of various Jewish organizations argued extensively that the death penalty for rape constituted a “badge of slavery,” offering an elaborate chart demonstrating the near-perfect overlap between states that practiced racial segregation and those that authorized the death penalty for rape.⁸⁷ An amicus brief filed on behalf of various civil rights advocates (including William Coleman, Burke Marshall, and Cyrus Vance) argued that the Arkansas procedure for selecting jurors—which tied eligibility to payment of a poll tax—likely contributed to the jurors’ understanding of their charge “as authorizing them to take race into account in deciding [Maxwell’s] fate.”⁸⁸

While *Maxwell* was pending, the Court ruled in *Witherspoon v Illinois*⁸⁹ against Illinois’s overbroad approach to death-qualifying jurors.⁹⁰ In light of this development, Maxwell’s LDF lawyers filed a supplemental pleading with the Court. Maxwell’s lawyers realized that he was entitled to relief under *Witherspoon* but urged the Court to nonetheless address the issues on which

⁸⁵ Id at *42.

⁸⁶ See *Maxwell v Bishop*, 393 US 997, 997–98 (1968) (granting certiorari).

⁸⁷ Brief Amici Curiae of the Synagogue Council of America and Its Constituents (The Central Conference of American Rabbis, the Rabbinical Assembly of America, the Rabbinical Council of America, the Union of American Hebrew Congregations, the Union of Orthodox Jewish Congregations of America, the United Synagogue of America) and the American Jewish Congress, *Maxwell v Bishop*, No 622-13, *26–30 (US filed Sept 15, 1969) (available on Westlaw at 1969 WL 136886).

⁸⁸ Brief Amici Curiae of Berl I. Bernhard, William Coleman, Samuel Dash, John W. Douglas, Steven Duke, William T. Gossett, John Griffiths, Rita Hauser, George N. Lindsay, Burke Marshall, Monrad S. Paulsen, Steven R. Rivkin, Whitney North Seymour, Jerome J. Shestack, and Cyrus R. Vance, Urging Reversal, *Maxwell v Bishop*, No 622-13, *6 (US filed Oct 24, 1969) (available on Westlaw at 1989 WL 1184278).

⁸⁹ 391 US 510 (1968).

⁹⁰ Id at 521–23.

certiorari had been granted.⁹¹ In their view, if the Court were to grant Maxwell relief on narrow grounds and decline to address the broader questions of standardless discretion and unitary proceedings in other cases, those choices “could only be characterized as incredibly heedless of human life” given the number of inmates potentially affected by the broader claims.⁹² Indeed, Maxwell’s lawyers used the opportunity presented by the supplemental brief to ask the Court to *broaden* the scope of its consideration and revisit its decision not to grant certiorari on the underlying claim of racial discrimination.⁹³

The Court subsequently reversed Maxwell’s sentence based on *Witherspoon* in a brief opinion that did not mention race.⁹⁴ In describing the procedural posture of the case, the Court indicated that Maxwell’s federal habeas petition had claimed, “among other things,”⁹⁵ that the Constitution prohibited the standardless discretion and unitary procedure of the Arkansas capital scheme, conspicuously omitting the empirical challenge to Arkansas’s use of the death penalty to punish almost exclusively interracial rapes involving black defendants and white victims. The Court then concluded that the wholesale exclusion of jurors with any conscientious reservations about the death penalty required reversal.⁹⁶ At the end of the opinion, the Court noted that it had granted certiorari in two other cases presenting the standardless-discretion and unitary-proceeding challenges.⁹⁷

⁹¹ See Supplemental Brief for Petitioner, *Maxwell v Bishop*, No 622-13, *5–6 (US filed Sept 17, 1969) (available on Westlaw at 1969 WL 120077).

⁹² Id at *31.

⁹³ See id at *1 n 1.

⁹⁴ See generally *Maxwell v Bishop*, 398 US 262 (1970).

⁹⁵ Id at 264.

⁹⁶ See id at 265–66.

⁹⁷ Id at 267 & n 4. Prior to the decision to reverse Maxwell’s conviction on *Witherspoon* grounds, both Douglas and Brennan drafted opinions (neither of which were ever published) addressing the claims regarding Arkansas’s unitary proceeding and the jury’s standardless discretion in imposing death. See generally *Maxwell v Bishop*, No 622-13 (1970) (draft concurrence of Brennan), on file with the Library of Congress (“Brennan Draft Concurrence”); *Maxwell v Bishop*, No 622-13 (1970) (draft opinion of Douglas), on file with the Library of Congress (“Douglas Draft Opinion”). Douglas’s opinion, denominated the “opinion of the Court,” rejected the unitary proceeding because it discouraged defendants from presenting important mitigating evidence relevant to the sentencing decision. Douglas Draft Opinion at 4–5. Douglas’s draft would have found standardless discretion intolerable because of the unfairness of a procedure that afforded absolute discretion with respect to such an important interest. See id at 6. Both Douglas and Brennan highlighted the possibility that such discretion could result in racially discriminatory decisionmaking, though neither ventured an opinion on the racial distribution of capital verdicts in Arkansas rape cases. Id at 8; Brennan Draft Concurrence at 5. Interestingly,

Rudolph and *Maxwell* were missed opportunities in the sense that the Court flagged troublesome capital-rape cases involving black men sentenced to death for raping white victims in the Deep South and ultimately chose not to comment on—much less address or remedy—the widely appreciated fact of racial discrimination inseparable from the practice. But the Court’s silence about race extended to the other foundational cases in which litigants highlighted the ubiquitous risk of racial discrimination. In *Witherspoon* itself, *Witherspoon*’s lawyers argued that the exclusion of scrupled jurors—those who harbored doubts about the death penalty—would undermine a defendant’s right to a fair cross section of the community in capital cases, explicitly noting the disproportionate exclusion of blacks in the operation of Illinois’s death-qualification process.⁹⁸ Likewise, the LDF’s amicus brief insisted that the death-qualification process in many states allowed prosecutors to do indirectly what they could not do directly—prevent blacks from sitting on capital juries.⁹⁹ Even though *Witherspoon* had been convicted of murder rather than rape, the LDF highlighted in its statement of interest its particular concern about racial discrimination in the operation of capital punishment; the statement observed that Wolfgang’s recent empirical work confirmed the LDF’s view “that the death penalty is administered in the United States in a fashion that makes racial minorities, the deprived and

both justices cited *Yick Wo v Hopkins*, 118 US 356 (1886), as the lead case against the exercise of “naked and arbitrary power” over a significant interest, even though *Yick Wo* involved discretion exercised by a licensing board outside of the criminal justice system. Douglas Draft Opinion at 6; Brennan Draft Concurrence at 5–6. The “real” reason to cite *Yick Wo*, though neither Douglas nor Brennan made the point explicitly, is that the result of the discretion exercised in *Yick Wo*—like the distribution of the Arkansas death penalty in rape cases—was inexplicable except on racial grounds: virtually every person of Chinese descent seeking a laundry license was denied, whereas virtually all other applicants were approved. *Yick Wo*, 118 US at 373–74. In the constitutional canon, *Yick Wo* stands for the proposition that intentional racial discrimination can be demonstrated even absent a facially discriminatory statute. See generally, for example, David E. Bernstein, *Revisiting Yick Wo v. Hopkins*, 2008 U Ill L Rev 1393 (acknowledging the influence of racial considerations on the justices). In their respective opinions, Douglas and Brennan seem to transform *Yick Wo* into a procedural decision about unbridled discretion rather than a substantive showing of undisguised racism. They both avoid commenting on the empirical evidence that race did play a role in Arkansas cases, though they make explicit (indeed, in some respects, more explicit than the Court in *Furman*) the connection between standardless discretion and the risk of racially discriminatory outcomes.

⁹⁸ Petitioner’s Brief, *Witherspoon v Illinois*, No 1015, *17–20 (US filed Mar 11, 1968) (available on Westlaw at 1968 WL 112521).

⁹⁹ *Witherspoon* LDF Brief at *38–39 (cited in note 83).

downtrodden, the peculiar objects of capital charges, capital convictions, and sentences of death.”¹⁰⁰ The LDF also noted in the body of its brief that the risk of death qualification disproportionately excluding blacks was particularly high “when persons opposed only to the death penalty for rape are excluded as scrupled.”¹⁰¹ The ACLU also emphasized in its amicus brief the discriminatory application of the death penalty, which itself might cause blacks to harbor greater doubts about the punishment than other groups (citing evidence that 78 percent of blacks opposed the death penalty).¹⁰² The various briefs together suggested the possibility of a troubling dynamic, in which blacks experienced the death penalty as racially discriminatory, thereby enabling their disproportionate exclusion from capital juries based on their “scruples,” which in turn would contribute to discriminatory results.

Despite the numerous references to race in the pleadings, the justices’ resulting opinions made no mention of race. Justice Potter Stewart’s majority opinion in *Witherspoon* emphasized that the issue before the Court was a “narrow one,” declining to address whether death qualification undermined a defendant’s right to a fair trial at the guilt stage and affirming that states retained the power to exclude prospective jurors who clearly indicated their refusal to vote for death.¹⁰³ Though the Court cited a recent Gallup Poll indicating relatively low support for the death penalty nationwide,¹⁰⁴ it declined to report the much larger number of blacks who opposed the death penalty and the corresponding disproportionate exclusion of black jurors that Illinois’s death-qualification practices entailed; it likewise failed to confront the continuing disproportionate exclusion of blacks that would result from *permissible* death-qualification measures untouched by the decision.

The standardless-discretion question avoided in *Maxwell* resurfaced first in *McGautha v California*¹⁰⁵ as a due process

¹⁰⁰ Id at *3-M.

¹⁰¹ Id at *28.

¹⁰² Brief of the Illinois Division, American Civil Liberties Union, as Amicus Curiae, *Witherspoon v Illinois*, No 1015, *17 (US filed Mar 1, 1968) (available on Westlaw at 1968 WL 112520).

¹⁰³ *Witherspoon*, 391 US at 513–14.

¹⁰⁴ Id at 520 n 16 (citing a 1966 Gallup Poll in which only 42 percent of Americans expressed that they favored capital punishment for convicted murderers).

¹⁰⁵ 402 US 183 (1971).

claim¹⁰⁶ and then again in *Furman* under the Eighth Amendment.¹⁰⁷ The *McGautha* briefing makes less of race than did the similar briefing in *Maxwell*, perhaps in part because the litigation strategy in *Maxwell* emphasized the connection between standardless discretion and the discriminatory results contained in the Wolfgang study.¹⁰⁸ By the time of *McGautha*, the stock language framing the standardless-discretion claim denounced the “arbitrariness,” “discrimination,” and “irrationality” wrought by the absence of standards, and virtually all the briefs use these terms frequently and interchangeably.¹⁰⁹ Both the brief for McGautha and some of the amicus briefs in his case explicitly claimed that standardless discretion produced racially discriminatory outcomes,¹¹⁰ though the briefs as a whole did not make this their primary point. In response, California offered empirical data supporting its claim that “all indications are that a defendant’s race plays no part” in capital-jury decisionmaking in California, with the raw data showing that black offenders constituted a smaller percentage of death-sentenced inmates (23 percent) than non-death-sentenced inmates (39 percent) convicted of first-degree murder.¹¹¹

When the Court rejected the standardless-discretion claim in *McGautha* (as well as the companion claim regarding unitary trials), many observers thought that global challenges to capital punishment were essentially exhausted.¹¹² But the Court immediately granted certiorari in four new cases—collected in *Furman*—that asked whether the death penalty could be imposed in those cases consistent with the Eighth Amendment’s

¹⁰⁶ Id at 196.

¹⁰⁷ *Furman*, 408 US at 239.

¹⁰⁸ See text accompanying notes 82–88.

¹⁰⁹ See, for example, Brief for Petitioner, *McGautha v California*, No 203, *18 (US filed Aug 4, 1970) (available on Westlaw at 1970 WL 122021) (“McGautha Petitioner’s Brief”); Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae, *McGautha v California*, No 203, *7, 13 (US filed Nov 3, 1970) (available on Westlaw at 1970 WL 122024) (“McGautha Amicus Motion”). See also Brief for the United States as Amicus Curiae, *McGautha v California*, No 203, *82, 109 (US filed Oct 15, 1970) (available on Westlaw at 1970 WL 122193).

¹¹⁰ See McGautha Petitioner’s Brief at *20 (cited in note 109). See also, for example, McGautha Amicus Motion at *30–31 (cited in note 109).

¹¹¹ Respondent’s Brief, *McGautha v California*, No 203, *74 (US filed Sept 25, 1970) (available on Westlaw at 1970 WL 122022).

¹¹² See, for example, Mandery, *A Wild Justice* at 111–12, 114 (cited in note 66) (describing the LDF’s disappointment with the *McGautha* decision); Banner, *The Death Penalty* at 257 (cited in note 8) (noting that, after *McGautha*, “[t]he movement to use the courts to abolish capital punishment seemed to have come to an end”).

prohibition of cruel and unusual punishment.¹¹³ Like McGautha, the defendants in all four cases were black.¹¹⁴ But the *Furman* briefing emphasized to a greater extent the ways in which racial discrimination permeated state capital systems. The inventive LDF strategy did not directly encourage the Court to invalidate the death penalty because of racial discrimination. Rather, the litigants argued that the fact of racial discrimination accounted for capital statutes staying on the books despite dwindling popular support.¹¹⁵ That is, the standardless discretion in state schemes permitted the application of capital punishment solely against despised, marginal groups—particularly blacks—and the broader public’s concerns about the death penalty were likely muted by the knowledge of its limited reach. In *Aikens v California*,¹¹⁶ which was later mooted by the invalidation of a statute under state law, the petitioner’s brief captured this argument poignantly: “A legislator may not scruple to put a law on the books (still less, to maintain an old law on the books) whose general, even-handed, non-arbitrary application the public would abhor—precisely because both he and the public know that it will not be enforced generally, even-handedly, non-arbitrarily.”¹¹⁷ More directly, Aikens’s brief stated that “[t]hose who are selected to die are the poor and powerless, personally ugly and socially unacceptable . . . [and disproportionately] black.”¹¹⁸

Furman’s own brief also intimated that the absence of standards could produce discriminatory outcomes. Furman argued that the jury that had sentenced him to die (for a minimally aggravated crime¹¹⁹) knew very little about him or his circumstances—apart from the facts of his crime, his age, and his race.¹²⁰ Georgia responded that it could “hardly be presumed that the juries in this country have conspired to sentence only certain classes of persons within our society, or that the juries

¹¹³ *Furman*, 408 US at 239.

¹¹⁴ Corinna Barrett Lain, *Furman Fundamentals*, 82 Wash L Rev 1, 16, 31 (2007).

¹¹⁵ Brief for Petitioner, *Aikens v California*, No 68-5027, *39–43, 50–53 (US filed Sept 10, 1971) (available on Westlaw at 1971 WL 134168) (“Aikens Petitioner’s Brief”).

¹¹⁶ 406 US 813 (1972).

¹¹⁷ Aikens Petitioner’s Brief at *22 (cited in note 115).

¹¹⁸ *Id.* at *51.

¹¹⁹ See Carol S. Steiker, *Furman v. Georgia: Not an End, but a Beginning*, in Blume and Steiker, eds, *Death Penalty Stories* 95, 95–96 (cited in note 26) (describing Furman as a “thwarted burglar who shot—quite possibly accidentally—toward a closed door while fleeing”).

¹²⁰ See Brief for Petitioner, *Furman v Georgia*, No 69-5003, *8, 12 (US filed Sept 9, 1971) (available on Westlaw at 1971 WL 134167).

responsible for the death penalties now outstanding were infected with an impermissible discrimination.”¹²¹ Georgia, like California in *McGautha*, maintained that the evidence did not support an inference of “rampant” discrimination and that the high concentration of blacks on death row in Georgia was likely attributable to the high offending rates of blacks.¹²²

The amicus briefs in *Furman* extensively documented the role of race in American capital punishment. A coalition of Jewish organizations again drew the Court’s attention to the connection between segregation and retention of the death penalty.¹²³ A brief filed on behalf of several civil rights organizations (including the NAACP and the Southern Christian Leadership Conference) broadly outlined race’s shadow over the American death penalty. The brief declared that “[t]he total history of the administration of capital punishment in America, both through formal authority, and informally, is persuasive evidence, that racial discrimination was, and still is, an impermissible factor in the disproportionate imposition of the death penalty upon non-white American citizens.”¹²⁴ The brief recounted racial discrimination in the administration of the death penalty during slavery and the experience of lynching and vigilantism stretching from the post-Reconstruction era through the mid-1930s, explicitly arguing that “the disproportionate numbers of non-white persons executed by formal capital punishment” violated the Eighth Amendment.¹²⁵ Another amicus brief, filed on behalf of various churches, argued that the death penalty denies condemned persons their religious freedom by depriving them of the

¹²¹ Brief for Respondent, *Furman v Georgia*, No 69-5003, *79 (US filed Sept 24, 1971) (available on Westlaw at 1971 WL 126674) (“Furman Respondent’s Brief”).

¹²² *Id.* at *80 (citing 1970 Atlanta Police Department statistics indicating that 187 murders were committed by black offenders compared to 55 murders committed by white offenders).

¹²³ See Brief Amici Curiae and Motion for Leave to File Brief Amici Curiae of the Synagogue Council of America and Its Constituents (The Central Conference of American Rabbis, the Rabbinical Assembly of America, the Rabbinical Council of America, the Union of American Hebrew Congregations, the Union of Orthodox Jewish Congregations of America, the United Synagogue of America) and the American Jewish Congress, *Furman v Georgia*, No 69-6003, *29–34 (US filed Sept 9, 1971) (available on Westlaw at 1971 WL 134169).

¹²⁴ Motion for Leave to File Brief as Amici Curiae and Brief Amici Curiae of the National Association for the Advancement of Colored People, National Urban League, Southern Christian Leadership Conference, Mexican-American Legal Defense and Educational Fund, and the National Council of Negro Women, *Furman v Georgia*, No 69-5003, *7 (US filed Aug 31, 1971) (available on Westlaw at 1971 WL 134376).

¹²⁵ *Id.* at *8–13 (capitalization altered).

opportunity to seek salvation.¹²⁶ It further argued that the disproportionate application of the death penalty to men who are from “less-favored ethnic and socio-economic groups” compounds the violation by adding to the mental suffering of offenders who are aware of the invidious discrimination directed at their groups.¹²⁷

Five justices in *Furman* agreed that the prevailing administration of the death penalty violated the Eighth Amendment, though each wrote separately to explain the grounds for his support of the one-paragraph, per curiam opinion. Notwithstanding the briefs’ sustained and evocative references to the role of racial discrimination in the American death penalty, the various opinions supporting the judgment are relatively sparse in their references to the problem of race, especially in light of their extraordinary collective length (about 135 pages in the US Reports).¹²⁸ Justices Brennan and Byron White made no arguments whatsoever about racial discrimination. Douglas alone offered a sustained critique of the discriminatory administration of the death penalty, quoting a presidential study that had observed that “[t]he death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.”¹²⁹ Douglas discussed the race and crimes of the offenders before the Court; the offenders were two black men convicted of raping white women and one black man convicted of murder in the commission of a burglary.¹³⁰ He then added that he could not conclude, based on the records before the Court, “that these defendants were sentenced to death because they were black.”¹³¹ Instead, he criticized the unbridled discretion afforded judges and juries in such cases, concluding that the “discretionary statutes are unconstitutional in their operation” because they are “pregnant with discrimination.”¹³² Stewart likewise indicated that “racial discrimination ha[d] not been proved”¹³³ but concluded that the administration of the death

¹²⁶ See Brief Amici Curiae of the West Virginia Council of Churches, Christian Church (Disciples) in West Virginia, and United Methodist Church, West Virginia Conference, *Furman v Georgia*, No 69-5003, *4 (US filed Aug 26, 1971).

¹²⁷ *Id.* at *11.

¹²⁸ See *Furman*, 408 US at 240–374.

¹²⁹ *Id.* at 249–50 (Douglas concurring) (quotation marks omitted).

¹³⁰ *Id.* at 252 (Douglas concurring).

¹³¹ *Id.* at 253 (Douglas concurring).

¹³² *Furman*, 408 US at 256–57 (Douglas concurring).

¹³³ *Id.* at 310 (Stewart concurring).

penalty was unconstitutional because it had been “wantonly and [] freakishly inflicted.”¹³⁴

Justice Marshall offered an extensive history of capital punishment in the United States, moving from the early and late colonial periods to the Founding era and then through the nineteenth and twentieth centuries.¹³⁵ None of this history references race or racial discrimination. Marshall then focused on whether capital punishment was necessary to achieve various possible goals of punishment, such as retribution, deterrence, incapacitation, encouragement of pleas, eugenics, and efficiency.¹³⁶ Finally, Marshall asked whether the death penalty remained consistent with prevailing morality, focusing not on polling data (which he argued was of limited value) but instead on whether American citizens would support the death penalty if they were aware “of all information presently available.”¹³⁷ The “facts” developed by Marshall included the absence of any proven deterrent effect beyond that obtained through life imprisonment, the rarity of death sentences relative to convictions for murder, the low recidivism rate for convicted murderers released from prison, and their generally good behavior while incarcerated.¹³⁸ In Marshall’s view, these facts alone would be sufficient to persuade “the great mass of citizens . . . that the death penalty is immoral and therefore unconstitutional.”¹³⁹ He then added three “supplement[al]” facts that would likely “convince even the most hesitant of citizens to condemn death as a sanction”—its discriminatory administration, its application against innocent persons, and its dislocating effects on the rest of the criminal-justice system.¹⁴⁰ On the discrimination point, Marshall cited studies providing evidence of racial discrimination, as well as evidence of discrimination on the basis of sex, class, intelligence, and privilege.¹⁴¹ His entire treatment of discrimination occupies three paragraphs in his sixty-page concurrence, and only one of

¹³⁴ Id (Stewart concurring) (quotation marks omitted).

¹³⁵ Id at 316–22 (Marshall concurring).

¹³⁶ *Furman*, 408 US at 342–59 (Marshall concurring).

¹³⁷ Id at 362 (Marshall concurring).

¹³⁸ Id at 362–63 (Marshall concurring).

¹³⁹ Id at 363 (Marshall concurring).

¹⁴⁰ *Furman*, 408 US at 363–64 (Marshall concurring).

¹⁴¹ Id at 364–66 (Marshall concurring), citing, among others, US Department of Justice Bureau of Prisons, *National Prisoner Statistics Bulletin No 45*, in *Capital Punishment 1930–1968* 7, 28 (1969); Martin E. Wolfgang, *A Sociological Analysis of Criminal Homicide*, in Hugo Adam Bedau, ed, 1 *The Death Penalty in America* 405, 411–14 (Oxford rev ed 1967).

those paragraphs focuses on race.¹⁴² Notably absent in his lengthy history of the American death penalty, and in his discussion of the “purposes” of capital punishment, is any indication that the death penalty was used to oppress minorities; like Douglas, Marshall appeared as troubled by the seeming *underenforcement* of the death penalty against the privileged as he was by the application of capital punishment against minorities and the poor.¹⁴³

As a whole, the five concurrences convey the impression that the majority justices were extremely reluctant to assert that the defendants before them (even the two defendants condemned for rape) might have been victims of racial discrimination. Despite ample ammunition in the amicus briefs—particularly the civil rights organizations’ brief—none of the justices seemed willing to offer a detailed history of the role of race in shaping capital statutes and practices for over two hundred years. Douglas and Marshall—the only two justices who addressed race at all—seemed content to suggest that relatively recent outcomes were discriminatory (that is, dating from the early twentieth century), along both racial and nonracial lines.¹⁴⁴ Perhaps most tellingly, none of the justices seemed willing to describe, much less embrace, the thrust of the LDF’s argument—that the death penalty remained on the books largely *because of* its racially discriminatory administration.¹⁴⁵ Indeed, Marshall’s hypothesis that most American citizens would reject the death penalty if they only knew about its discriminatory administration seemed in considerable tension with the LDF’s claim that most Americans (and legislatures) tolerated the retention of the death penalty precisely *because* they were aware of its exclusive application against societal outcasts, including racial minorities.¹⁴⁶

¹⁴² See *Furman*, 408 US at 364–66 (Marshall concurring).

¹⁴³ Compare *id.* at 366 (Marshall concurring) (“Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape.”), with *id.* at 256 (Douglas concurring):

A law that stated that anyone making more than \$50,000 would be exempt from the death penalty would plainly fall, as would a law that in terms said that blacks, those who never went beyond the fifth grade in school, those who made less than \$3,000 a year, or those who were unpopular or unstable should be the only people executed.

¹⁴⁴ See *id.* at 248–52 (Douglas concurring); *id.* at 364–65 (Marshall concurring).

¹⁴⁵ See text accompanying notes 115–17.

¹⁴⁶ See Aikens Petitioner’s Brief at *54 (cited in note 115) (“Whether it happen by accident or design that penalties of this sort fall most furiously upon the poor and

When *Furman* invalidated prevailing capital statutes, many participants and observers believed that they had witnessed the end of the American death penalty. Had *Furman* stuck—with states choosing to forgo redrafting their statutes or the Court invalidating any such efforts—claims regarding the American death penalty’s racially discriminatory administration would have been buried alongside the death penalty itself. The LDF would have known, at some level, that concerns about racial justice informed the Court’s decisions, but the record of opinions would have reflected a sort of euphemistic code, with repeated condemnations of “arbitrariness,” “wantonness,” and “freakishness,” rather than many forthright condemnations of racial prejudice.¹⁴⁷

But just as Warren had underestimated the backlash that would follow the Court’s nonaccusatory opinion in *Brown*, which had whitewashed the long-standing connections between chattel slavery, white-supremacist ideology, and state segregation of schools,¹⁴⁸ the *Furman* Court misread public attitudes toward capital punishment and the willingness of states to acquiesce in judicial abolition, even if framed in a similarly nonaccusatory manner. In the four years following *Furman*, thirty-five states reenacted capital statutes, and the Court agreed to address whether death sentences obtained under five of the new capital schemes could be imposed consistent with the Eighth Amendment.¹⁴⁹

In many ways, the litigation before the Court was a reprise of *Furman*. The LDF controlled the litigation (although its lawyers were not named as lead counsel on the petitioners’ briefs). The LDF strategy was again to emphasize the unreviewable discretion to impose or withhold the death penalty, despite the promulgation of aggravating factors to guide sentencing discretion in many of the new statutes and the mandatory

friendless and upon racial minorities, the supposed ‘acceptance’ of the penalty is nonetheless a product of the outcast nature of those who bear the brunt of it.”).

¹⁴⁷ In his discussion of *Furman*, Professor Evan Mandery argues that, “whatever the justices may have intended, everyone understood *Furman* as having been about race.” Mandery, *A Wild Justice* at 276 (cited in note 66).

¹⁴⁸ See Jordan Steiker, Book Review, *American Icon: Does It Matter What the Court Said in Brown?*, 81 *Tex L Rev* 305, 312–15 (2002) (discussing the mild tone of *Brown* and the Court’s failure to speak more clearly and forthrightly about the “true” meaning of segregation).

¹⁴⁹ See generally *Gregg v Georgia*, 428 US 153 (1976); *Proffitt v Florida*, 428 US 242 (1976); *Jurek v Texas*, 428 US 262 (1976); *Woodson v North Carolina*, 428 US 280 (1976); *Roberts v Louisiana*, 428 US 325 (1976).

requirement of death upon conviction of first-degree murder in others. Whereas the *Furman* briefs emphasized the absence of standards within the capital statutes themselves, the 1976 briefs pointed toward the numerous opportunities for unconstrained police, prosecutorial, and juror discretion to withhold the death penalty prior to sentencing, even under North Carolina's and Louisiana's purportedly mandatory statutes.¹⁵⁰

As in *Furman*, the petitioners' briefs sought to document the role of racial discrimination in capital litigation. Though none of the five cases involved a capital conviction for rape, each petitioner's brief indicated that "[r]acial discrimination in the application of the death penalty for rape ha[d] been sufficiently blatant to allow of overwhelming statistical proof."¹⁵¹ Having worked so extensively with Wolfgang to produce the rape study, the LDF was aware of the empirical challenges involved in producing a comparable study for murder, especially given the rarity of death sentences and the costs of designing and implementing an empirically sound study.¹⁵² That recognition prompted the petitioners' concession that a "similarly overwhelming comprehensive demonstration of racial discrimination ha[d] concededly not yet been made in connection with the death penalty for murder."¹⁵³ But the petitioners nonetheless insisted that the "frequently discriminatory infliction of death can decently be viewed only as an enduring cause of national shame"¹⁵⁴ and that "very strong evidence" of such continuing discrimination in murder cases could be inferred from a variety of empirical studies, informed observation of the capital systems, and "the intuitive implausibility of the hypothesis that the same people,

¹⁵⁰ See, for example, Brief for Petitioner, *Gregg v Georgia*, No 74-6257, *13 (US filed Feb 26, 1976) (available on Westlaw at 1976 WL 194055) ("Gregg Petitioner's Brief") ("[T]he sentencing stage is only one of the many stages in the criminal process subject to unrestrained and arbitrary discretion."); Brief for Petitioner, *Roberts v Louisiana*, No 75-5844, *37 (US filed Feb 25, 1976) ("Roberts Petitioner's Brief"):

The notion that the death penalty is mandatory "if the jury brings in a verdict of guilty" of first degree murder depends (in the vernacular) upon a very big "if"; and, even then, death is not by any means the inevitable or predictable outcome of the case. For "[d]iscretion permeates the entire criminal justice system, from police detection and arrest, through prosecutorial charging and plea negotiation, to jury deliberation, appellate reconsideration, and executive pardon."

¹⁵¹ See, for example, Gregg Petitioner's Brief at *25a n 50 (cited in note 150).

¹⁵² See Meltsner, *Cruel and Unusual* at 76-78 (cited in note 73).

¹⁵³ Gregg Petitioner's Brief at *25a n 50 (cited in note 150).

¹⁵⁴ *Id.* at *25a-27a.

operating through the same procedures in rape and murder cases, have practiced racial discrimination in the rape cases but risen scrupulously above its influence when the charge is murder.”¹⁵⁵ The petitioners also noted the “sobering” fact that the percentage of nonwhites on death row post-*Furman* was not significantly different than pre-*Furman*.¹⁵⁶ Despite the fact that the death-sentenced inmates in three of the five cases were white—Gregg (Georgia), Proffitt (Florida), and Jurek (Texas)—several of the briefs included appendices listing the race of the defendants in all post-*Furman* cases within the state yielding capital verdicts.¹⁵⁷ In addition, the petitioners alluded to recent findings that blacks faced harsher punishment in cases involving white victims,¹⁵⁸ representing a shift from the focus on the race of the defendant in earlier cases. The overall message of the petitioners’ briefs regarding racial discrimination was clear. The petitioners’ briefs in both *Gregg* and *Jurek* concluded their passages regarding racial discrimination with the following evocative plea: “The time is too late now to rectify the errors of the past; such, of course, is the nature of capital punishment. It is not too late—nor is it too early—to prevent the repetition of those errors in the future.”¹⁵⁹

The issue of race was particularly salient in the amicus briefs. The LDF filed a brief in *Gregg* on its own behalf, indicating in its statement of interest that its experience “in handling capital cases over a period of many years convinced [it] that the death penalty is customarily applied in a discriminatory manner against racial minorities and the economically underprivileged.”¹⁶⁰ The LDF went further, arguing that “the evil of discrimination was not merely adventitious, but was rooted in the very nature of capital punishment.”¹⁶¹ Amnesty International filed an amicus brief in each of the five cases, making a similar

¹⁵⁵ Id at *25a n 50.

¹⁵⁶ Id at *28a n 51.

¹⁵⁷ See, for example, Brief for Petitioner, *Jurek v Texas*, No 75-5394, Appendix 1 (US filed Feb 26, 1976) (available on Westlaw at 1976 WL 181478) (“Jurek Petitioner’s Brief”); Roberts Petitioner’s Brief at Appendix A (cited in note 150); Brief for Petitioners, *Woodson v North Carolina*, No 75-5491, Appendix A (US filed Feb 26, 1976) (available on Westlaw at 1976 WL 181483).

¹⁵⁸ Gregg Petitioner’s Brief at *25a n 50 (cited in note 150).

¹⁵⁹ Id at *27a–28a; Jurek Petitioner’s Brief at *82–83 (cited in note 157).

¹⁶⁰ Brief for the NAACP Legal Defense and Educational Fund, Inc as Amicus Curiae, *Gregg v Georgia*, No 74-6257, *1 (US filed Feb 25, 1967) (available on Westlaw at 1976 WL 178715).

¹⁶¹ Id at *1–2.

point by explaining that it “is the worldwide experience of Amnesty International that the death penalty is applied in a highly discriminatory fashion against ethnic and religious minorities, against political prisoners, [and] against the disadvantaged.”¹⁶² On the other side, in an extensive amicus brief rejecting the proposition that the death penalty is unconstitutional per se, the United States devoted an entire section to the proposition that “capital punishment is not imposed on the basis of race.”¹⁶³ The brief, filed by then–solicitor general Robert Bork, is best known for its claim of empirical support for deterrence,¹⁶⁴ an argument that appeared central to the Court’s ultimate embrace of the death penalty as a permissible punishment in three of the cases.¹⁶⁵ But the brief also engaged the empirical studies that the petitioners had cited to support claims of racial bias.¹⁶⁶ According to the United States, those studies did not support a claim of continuing racial discrimination in murder cases, as they focused primarily on discrimination in cases litigated at a time when blacks were excluded from jury service.¹⁶⁷ Similarly, the United States “[did] not question” the conclusion of Wolfgang’s study of racial discrimination in rape cases in the South from 1945 to 1965 but rather argued that the study neither proved continuing discrimination in such cases nor similar discrimination in murder cases.¹⁶⁸ The brief also foreshadowed some vulnerabilities of framing the constitutional claim against the death penalty on racial grounds, arguing that none of the defendants offered evidence of racial discrimination in their individual cases and noting that “the possibility that racial discrimination exists upon occasion in the criminal justice

¹⁶² Motion for Leave to File Brief of Amicus Curiae and Brief of Amnesty International as Amicus Curiae, *Gregg v Georgia*, No 74-6257, *3 (US filed Feb 25, 1976) (available on Westlaw at 1976 WL 178716).

¹⁶³ Brief for the United States as Amicus Curiae, *Gregg v Georgia*, No 74-6257, *65 (US filed Mar 25, 1976) (available on Westlaw at 1976 WL 194056) (“Gregg US Brief”) (capitalization altered).

¹⁶⁴ See *id.* at *34.

¹⁶⁵ See *Gregg*, 428 US at 184 (concluding that, although statistical evidence regarding the deterrent effects of the death penalty are “inconclusive,” the “death penalty is undoubtedly a significant deterrent” for some); *Furman*, 408 US at 301 (supporting the argument that marginal deterrence is a justification for the death penalty despite the lack of conclusive statistical findings of its effectiveness); *Roberts*, 428 US at 354–55 (same).

¹⁶⁶ See Gregg US Brief at Appendix A (cited in note 163).

¹⁶⁷ *Id.* at *66.

¹⁶⁸ *Id.* at *4a–5a, Appendix A.

system is not an argument against the penalty imposed upon petitioners.”¹⁶⁹

The Court subsequently upheld the “guided discretion” statutes and invalidated the “mandatory” ones.¹⁷⁰ Given the widespread reauthorization of the death penalty in many states, the Court could not credit the view that the death penalty was inconsistent with prevailing standards of decency.¹⁷¹ Nor was the Court prepared to conclude that the newly designed means of guiding sentencing discretion were incapable of ameliorating the “arbitrariness” and “caprice” of the old standardless-discretion schemes.¹⁷² More broadly, the Court maintained that states could validly invoke deterrence and retribution as grounds for retaining the death penalty.¹⁷³ Strikingly absent from the decisions is any mention of the problem of racial discrimination. Douglas was no longer on the Court, and Marshall’s dissent focused on the weakness of the deterrence claim and the inadequacy of retribution to justify capital punishment.¹⁷⁴ Brennan, the only other dissenter, wrote in abstract terms about how the death penalty denies human dignity.¹⁷⁵ Though the opinions collectively occupied slightly fewer pages than those in *Furman* and its companion cases, it is nonetheless remarkable that concerns about racial discrimination were never voiced or addressed in the 210 or so pages of analysis that would answer, for the first (and, to date, only) time, the question whether the American death penalty is a constitutional form of punishment. The absence of race is especially notable given that the Court chose several states from the Deep South as the locus of the five cases (Georgia, Louisiana, North Carolina, Florida, and Texas).¹⁷⁶

The Court’s decisions endorsing three of the new capital schemes and the death penalty as a permissible punishment

¹⁶⁹ Id at *68.

¹⁷⁰ Banner, *The Death Penalty* at 274–75 (cited in note 8). Compare *Woodson*, 428 US at 305 (declaring a mandatory-death-penalty statute unconstitutional); *Roberts*, 428 US at 336 (same), with *Gregg*, 428 US at 206–07 (upholding a statute that guided the jury’s discretion with aggravating or mitigating circumstances).

¹⁷¹ See *Gregg*, 428 US at 179 (Stewart) (plurality) (noting that statutory developments “undercut substantially the assumptions upon which [the standards-of-decency argument] rested”).

¹⁷² Id at 203 (Stewart) (plurality).

¹⁷³ See id at 182–86.

¹⁷⁴ See id at 231–41 (Marshall dissenting).

¹⁷⁵ See *Gregg*, 428 US at 227–31 (Brennan dissenting).

¹⁷⁶ See generally id; *Roberts*, 428 US 325; *Woodson*, 428 US 280; *Proffitt*, 428 US 242; *Jurek*, 428 US 262.

were issued in July 1976, at the end of the 1975 Term. When the Court returned to begin the 1976 Term, it immediately agreed to address the question that Goldberg had broached more than a decade earlier—whether the death penalty was permissible as applied to rape.¹⁷⁷ The grant was encouraging to the LDF; with the Court's invalidation of the mandatory schemes, Georgia alone authorized capital punishment for the rape of an adult woman,¹⁷⁸ and it seemed unlikely that the Court would engage with the issue if it were inclined to uphold the practice. Interestingly, the Court selected a white inmate's case as the vehicle to address the issue. Throughout the 1960s and 1970s, the Court paid close attention to the varying facts and procedural postures of the underlying cases as it decided which inmates raising common claims would be the face of the claims, as opposed to those whose cases would simply be held pending resolution of the issue. Chief Justice Warren Burger, for example, unsuccessfully sought to include an extremely aggravated Georgia case in the 1976 litigation because he thought that the high level of aggravation would convince the Court to resurrect capital punishment.¹⁷⁹ Justice Lewis Powell, on the other hand, wanted to exclude Woodson from the 1976 cases¹⁸⁰ because Woodson was black and his victim was white.¹⁸¹

That the Court chose Coker, a white rapist, as the face of the claim strongly suggested that the Court wanted to avoid racial bias as the primary or even a significant ground for the decision. If the Court had believed the underlying practice to be racially discriminatory and had wanted to invoke that fact as a basis for relief, the presence of a white defendant would complicate the decision because it would require the Court to explain why discrimination in *other* cases justified overturning Coker's death sentence (exactly the sort of problem that Bork highlighted in his amicus brief in *Gregg*¹⁸²). Moreover, as Professor Sheri Lynn Johnson notes in her account of the *Coker* litigation, at the time that Coker sought certiorari, the Court had petitions for certiorari pending in two other Georgia rape cases with black defendants raising the same claim; her review of the records in

¹⁷⁷ See *Coker v Georgia*, 429 US 815 (1976) (granting certiorari).

¹⁷⁸ See *Coker v Georgia*, 433 US 584, 584, 615 (1976).

¹⁷⁹ See Mandery, *A Wild Justice* at 345 (cited in note 66).

¹⁸⁰ See note 149.

¹⁸¹ See Mandery, *A Wild Justice* at 344 (cited in note 66).

¹⁸² See *Gregg* US Brief at *68 (cited in note 163).

those cases led her to conclude that the race of the defendant was the only significant ground of distinction.¹⁸³

Despite the signal reflected in the Court's choice of Coker, the LDF emphasized racial discrimination in its brief. The LDF documented in a chart the declining use of the death penalty to punish rape, identifying the number of executions for rape per year since 1946 and separating white and black offenders.¹⁸⁴ The LDF discussed historical evidence supporting the claim that, "in Georgia, the death penalty[] for rape was specifically devised as a punishment for the rape of white women by black men."¹⁸⁵ Citing the Wolfgang study, the LDF argued that "[r]ecent statistical studies have proved the fact of discrimination conclusively."¹⁸⁶ Ultimately, the LDF argued that acceptance of the death penalty for rape rested on "racial, not penal, considerations,"¹⁸⁷ and that, "where race does not enter the picture, its acceptance is positively aberrational."¹⁸⁸ Hence, just as in *Furman*, the LDF insisted that racial prejudice and discriminatory enforcement facilitated the continued retention of a practice that society otherwise would already have rejected.¹⁸⁹

An amicus brief filed on behalf of the leading advocacy groups for women's equality—including the National Organization for Women's Legal Defense and Education Fund and the Women's Law Project—reinforced the claim of racial bias by asserting that the practice of punishing rape with death was tied to Southern traditions that "valued white women according to their purity and chastity and assigned them exclusively to white men."¹⁹⁰ The brief, authored by Ruth Bader Ginsburg, powerfully exposed the ways in which the death penalty for rape fundamentally rested on both sexist and racist beliefs. The brief detailed

¹⁸³ See Johnson, *Of Rape, Race, and Burying the Past* at 195 (cited in note 26).

¹⁸⁴ Brief for Petitioner, *Coker v Georgia*, No 75-5444, *52 (US filed Dec 9, 1976) (available on Westlaw at 1976 WL 181481) ("Coker Petitioner's Brief").

¹⁸⁵ *Id.* at *54 (citation omitted).

¹⁸⁶ *Id.* at *55-56.

¹⁸⁷ *Id.* at *56.

¹⁸⁸ Coker Petitioner's Brief at *56 (cited in note 184).

¹⁸⁹ See *id.* ("This freakishly rare and racially disproportionate imposition of the death penalty for the crime of rape in Georgia has insulated an excessive punishment from the scrutiny of enlightened public conscience.")

¹⁹⁰ Brief Amicus Curiae of the American Civil Liberties Union, the Center for Constitutional Rights, the National Organization for Women Legal Defense and Education Fund, the Women's Law Project, the Center for Women Policy Studies, the Women's Legal Defense Fund, and Equal Rights Advocates, Inc, *Coker v Georgia*, No 75-5444, *6 (US filed Dec 3, 1976) (available on Westlaw at 1976 WL 181482) ("Coker NOW Brief").

how the crime of rape was long regarded as a crime against the property of a woman's husband or father.¹⁹¹ It described efforts by women in the 1930s to bring an end to lynching by mobs that "commit acts of violence and lawlessness in the name of women."¹⁹² It also described the racially discriminatory laws (noted above) that treated black-on-white rapes differently than other rapes in antebellum Georgia.¹⁹³ It concluded that "the death penalty for rape is an outgrowth of both male patriarchal views of women no longer seriously maintained by society[] and gross racial injustice created in part out of that patriarchal foundation."¹⁹⁴ On the state's side, the respondent's brief omitted any reference to rape in its lukewarm defense of its practice, conceding that "Georgia, of course, has no interest in executing all rapists" (exactly the point made by the LDF) and suggesting that "at some future date" the practice might be deemed excessive.¹⁹⁵ The state's nonresponsiveness to claims of racial discrimination was exacerbated by its unexplored declaration at the end of the brief that "[t]radition and history support the retention of the death penalty for rape."¹⁹⁶ Indeed.

The Court declared the death penalty "grossly disproportionate and excessive punishment for the crime of rape" and "therefore forbidden by the Eighth Amendment."¹⁹⁷ The plurality devised a new methodology for gauging excessiveness, looking first at the current judgment reflected in state statutes and jury decisionmaking.¹⁹⁸ The plurality observed that the decline in state capital-rape statutes (which Georgia attributed to the Court's intervention in *Furman*) signaled declining societal support for the punishment, as did the relatively few capital verdicts obtained in Georgia post-*Furman*.¹⁹⁹ The plurality then brought its own judgment "to bear on the question of the acceptability of the death penalty under the Eighth Amendment."²⁰⁰ Borrowing from a theme in Ginsburg's amicus brief, the

¹⁹¹ See id at *11.

¹⁹² Id at *10 (citation omitted).

¹⁹³ See id at *16–19.

¹⁹⁴ Coker NOW Brief at *19 (cited in note 190).

¹⁹⁵ Brief for Respondent, *Coker v Georgia*, No 75-5444, *12, 23 (US filed Jan 14, 1977) (available on Westlaw at 1977 WL 189754).

¹⁹⁶ Id at *23.

¹⁹⁷ *Coker*, 433 US at 592 (White) (plurality).

¹⁹⁸ See id at 594–97 (White) (plurality).

¹⁹⁹ Id at 595–96 (White) (plurality) (noting only six death sentences in the sixty-three rape convictions reviewed by the Georgia Supreme Court since 1973).

²⁰⁰ Id at 597 (White) (plurality).

plurality concluded that the crime of rape “does not compare with murder” in terms of “moral depravity and of the injury to the person and to the public.”²⁰¹ Brennan and Marshall concurred in the result, but they did so based on their categorical rejection of the death penalty as a permissible punishment.²⁰²

Neither the plurality nor the dissenting opinions made any reference to race. Given the long-standing historical connection between race and capital punishment for rape,²⁰³ the role of the LDF in developing empirical evidence of racial discrimination in the Wolfgang study of rape cases,²⁰⁴ the acknowledgement of the persuasiveness of that study in Bork’s brief in the 1976 cases,²⁰⁵ and the continued emphasis on racial bias by the litigants in *Coker*,²⁰⁶ it is astonishing that concerns about race did not merit even a passing reference in the ultimate *Coker* opinions. *Coker* represents the height of the Court’s avoidance of race, because Georgia’s continued authorization of death for rape was simply impossible to explain or understand without examining the racial history surrounding that practice.

Coker is, in many respects, the appropriate bookend to *Rudolph*. In the fourteen years between those two decisions, the Court embarked on a remarkable project to engage with the constitutionality of the American death penalty. The Court initiated the conversation and ultimately produced the first moratorium on executions in the United States, followed by the first—and only—brief period of judicial abolition.²⁰⁷ Even as it initiated the conversation, the Court took great pains to separate the questions of race and capital punishment. Goldberg and his colleagues declined to mention race in their initial inquiry into the appropriateness of death for rape. The Court refused to grant certiorari in *Maxwell* on the issue of the racially discriminatory administration of capital punishment for rape in the South and declined to respond to claims of racial discrimination in several of its foundational cases, including *Witherspoon*. And when the Court finally invalidated prevailing statutes in *Furman*, the justices who supported that result were reluctant to suggest that

²⁰¹ *Coker*, 433 US at 598 (White) (plurality).

²⁰² See *id.* at 600 (Brennan concurring); *id.* at 601 (Marshall concurring).

²⁰³ See text accompanying notes 26–28.

²⁰⁴ See text accompanying notes 73–78.

²⁰⁵ See text accompanying notes 164–68.

²⁰⁶ See text accompanying notes 184–88.

²⁰⁷ See generally *Furman*, 408 US 238 (resulting in a de facto moratorium on the death penalty in America).

the black petitioners (two of whom had been sentenced to death for raping white women) might have been victims of racial discrimination and instead highlighted the generally “wanton” and “freakish” nature of American death sentences.²⁰⁸ When the death penalty was resurrected in 1976, the Court selected three white inmates to serve as the face of the constitutional challenges to the Georgia, Florida, and Texas schemes and ultimately upheld the new schemes without addressing the lingering question of racial discrimination. *Coker* followed quickly on the heels of the 1976 cases, as the Court wanted to excise the most obviously objectionable part of what was now going to be an ongoing practice. But, in shoring up the death penalty against continuing fears of racial discrimination, the Court managed to say nothing about the racial discrimination that the justices—and everybody else—knew that they were addressing.

III. EXPLAINING THE GAP

The Court’s deafening silence on the subject of race in its foundational capital punishment cases is striking but, on reflection, perhaps not altogether surprising. Ample reasons of various kinds—strategic, institutional, ideological, and psychological—help explain what otherwise might appear to be a baffling obtuseness. Not every consideration applies to every justice in every case, though more than one explanation might be at work at any given time, even with regard to the work of individual justices. Moreover, not every consideration necessarily operated at a conscious level. Rather, what follows is an attempt to consider why a “race-neutral” constitutional approach to the issue of capital punishment may have been appealing to the Supreme Court even—perhaps especially—in the racially charged era of the 1960s and 1970s.

First, as a strategic matter, the Court had already committed itself to a challenging racial-justice agenda with regard to school desegregation in *Brown* in 1954. Though the Court bought time with its 1955 decision in *Brown v Board of Education of Topeka*²⁰⁹ (“Brown II”), which promoted a gradualist “all deliberate speed” approach to the enforcement of its desegregation mandate,²¹⁰ the Court returned to school desegregation in

²⁰⁸ Id at 310.

²⁰⁹ 349 US 294 (1955).

²¹⁰ Id at 301.

the late 1960s and early 1970s at exactly the same time that it took on capital punishment. In 1968, the same year as the Court's death-penalty decision in *Witherspoon*, the Court decided *Green v County School Board*,²¹¹ holding that a Virginia school board's "freedom of choice" plan was not adequate to promote compliance with *Brown's* desegregation mandate.²¹² And in 1971, just one year prior to *Furman*, the Court decided *Swann v Charlotte-Mecklenburg Board of Education*,²¹³ upholding court-ordered busing as an equitable remedy to achieve integration in a large public school system in North Carolina.²¹⁴ These controversial rulings, though more publicly palatable at that time than they would have been in the 1950s,²¹⁵ embroiled the Court, the public, and the NAACP (which litigated both cases) in controversy, in the South and beyond.

In light of the Court's ongoing role in the school-desegregation battle, it is no wonder that Chief Justice Warren, the architect of the Court's unanimous opinion in *Brown*, hesitated to add capital punishment to the simmering pot of racial issues. Black murderers and rapists presented a much less sympathetic face for civil rights enforcement than schoolchildren. Not only did Warren refuse to be a fourth vote for certiorari in *Rudolph*, but he also insisted that Justice Goldberg cut the race argument out of his dissent from denial, despite the prominence of that argument in the memorandum that Goldberg had circulated to the Court.²¹⁶ Warren explained to Goldberg that the public would not accept any softening of the punishment for rape given widespread white fears of sexual violence by blacks.²¹⁷ The same concern for public sensibilities led Warren to delay confronting the constitutionality of laws prohibiting interracial marriage, which were finally invalidated in 1967 in *Loving v Virginia*.²¹⁸

In addition to protecting its ongoing project of school desegregation from controversial entanglements, the Court doubtless sought (unsuccessfully, as it turned out) to move on the issue of capital punishment in a way that would avoid generating a new

²¹¹ 391 US 430 (1968).

²¹² *Id.* at 441.

²¹³ 402 US 1 (1971).

²¹⁴ *Id.* at 30.

²¹⁵ See Klarman, *From Jim Crow to Civil Rights* at 341–43 (cited in note 1).

²¹⁶ See Mandery, *A Wild Justice* at 28 (cited in note 66).

²¹⁷ See *id.*

²¹⁸ 388 US 1 (1967). See also Mandery, *A Wild Justice* at 28 (cited in note 66).

version of the backlash that had greeted its handiwork in the school-desegregation context. There was good reason for the Court to worry that constitutional limitation or abolition of capital punishment for explicitly racial reasons would inspire more-spirited public resistance than apparently race-neutral interventions. First, the death penalty was more popular, widely authorized, and vigorously employed in the South than in any other region of the country.²¹⁹ The Warren Court's desegregation rulings and its criminal procedure revolution already seemed to target Southern institutions, and these decisions engendered substantial backlash in that region.²²⁰ The Court might well have feared that a ruling against capital punishment that focused on its racial aspects would further stoke fires that were already burning, especially given that the only non-Southern respondent (California) in *Furman* dropped out before the Court's decision when the case was mooted by a state constitutional ruling on the death penalty.²²¹

Moreover, throughout the 1960s and 1970s, crime rates were rising across the country, especially in inner-city, minority communities.²²² The race riots of the late 1960s and the increasingly militant stance of black radicals also fed growing fears of black violence.²²³ Indeed, the Republican Party sought to capitalize on these fears by using crime as a racially coded wedge issue to appeal to Southern white Democrats as part of its "Southern strategy" to convince "Dixiecrats" to switch party affiliation.²²⁴ Rising crime rates and fear of black crime not only increased the likelihood of political backlash to a race-based judicial curtailment of capital punishment, but they also may have engendered ambivalence among some of the justices about the underlying racial discrimination claim. While the LDF had very strong evidence—based both on raw numbers and on Wolfgang's statistical analysis—of racial discrimination in the use of the death

²¹⁹ See Banner, *The Death Penalty* at 228–30 (cited in note 8).

²²⁰ See Garland, *Peculiar Institution* at 222–23, 234–36 (cited in note 79).

²²¹ See *Aikens v California*, 406 US 813, 814 (1972) (dismissing the case as moot in light of the California Supreme Court's decision striking down the California death penalty in *People v Anderson*, 493 P2d 880 (Cal 1972)).

²²² See Garland, *Peculiar Institution* at 239 (cited in note 79); Mandery, *A Wild Justice* at 264–65 (cited in note 66).

²²³ See Yohuru Williams, "A Red, Black and Green Liberation Jumpsuit": Roy Wilkins, the Black Panthers, and the Conundrum of Black Power, in Peniel E. Joseph, ed., *The Black Power Movement: Rethinking the Civil Rights–Black Power Era* 167, 175–76 (Routledge 2006).

²²⁴ See Garland, *Peculiar Institution* at 238–44 (cited in note 79).

penalty for rape, the same was not true for murder, which comprised the majority of capital prosecutions.²²⁵ The raw numbers on the race of capital-murder defendants did not present the same striking prima facie case for an inference of discrimination as the rape numbers did—a point that California made in its brief in the *McGautha* litigation²²⁶ and that then-solicitor general Bork noted in his brief for the United States in *Gregg*.²²⁷ Nor did the LDF have the resources to undertake the expansive—and expensive—statistical analysis of capital murder necessary to prove its discrimination case, as the LDF acknowledged in its own brief.²²⁸ Consequently, the Court may have entertained the alternative inference explicitly urged by Georgia in *Furman*—that the overrepresentation of blacks on death row was attributable to their overrepresentation among murderers.²²⁹

Given the difference in the strength of the discrimination inference with regard to capital prosecutions for rape and those for murder, the Court may well have preferred to deal with the issue by eliminating the most obviously problematic cases on some other ground, thus avoiding the need to dig deep into the statistical morass. This explanation fits perfectly with what the Court in fact did: only a year after *Gregg*, the Court constitutionally invalidated the death penalty for rape on proportionality grounds in *Coker*—a case with a white defendant and a decision devoid of any discussion of race.²³⁰ A Court sympathetic to the racial discrimination claim in capital-rape cases but skeptical of it in its broader form could thus solve the most obviously troubling racial aspects of capital punishment without committing

²²⁵ See Powell, *The Death Penalty in the South* at 204 (cited in note 11).

²²⁶ See *McGautha* Respondents Brief at *74 (cited in note 111) (stating that “all indications are that a defendant’s race plays no part” in jury decisionmaking in California based on raw first-degree murder statistics).

²²⁷ See *Gregg* US Brief at *66–67 (cited in note 163).

²²⁸ See *Gregg* Petitioner’s Brief at *25a n 50 (cited in note 150) (recognizing that a “similarly overwhelming comprehensive demonstration of racial discrimination ha[d] concededly not yet been made in connection with the death penalty for murder”). To make its argument regarding racial discrimination in murder cases, the LDF was left to extrapolate from Wolfgang’s rape analysis and to suggest what would become apparent only a decade later, after David Baldus’s statistical analysis of capital murder—that the lack of strikingly apparent discrimination in the murder context was largely attributable to a strong race-of-the-victim bias. See Garland, *Peculiar Institution* at 282 (cited in note 79). The bias toward capital prosecutions when murder victims were white tended to counterbalance the bias toward prosecutions of black murder defendants, given the intraracial nature of most homicides.

²²⁹ See note 122 and accompanying text.

²³⁰ *Coker*, 433 US at 592.

itself on the larger, technically fraught issue of what constitutes adequate proof of racial discrimination in sentencing outcomes.

The technical expertise needed to evaluate claims of racial discrimination may also have made avoidance of the issue more attractive to the Court. As the more sophisticated litigants recognized, raw numerical disparities (of the kind referenced by Justice Douglas in his solo concurrence in *Furman*²³¹) are insufficient to prove discrimination; rather, further analysis is necessary to demonstrate that the disparities are caused by racial discrimination as opposed to other, nonracial factors—such as differences in crime rates, differences in the severity of the crimes committed, or differences in the records or other characteristics of the offenders. The best tool to sort through these possibilities—multiple-regression analysis—is difficult for nonstatisticians to use or understand, and the justices may have appropriately doubted their capacity to evaluate the reliability of such evidence. Justice Lewis Powell, the author of the majority opinion in *McCleskey v Kemp*,²³² upholding a death sentence against a statistical claim of racial discrimination,²³³ acknowledged in a memorandum to one of his law clerks that his “understanding of statistical analysis—particularly what is called regression analysis—range[d] from limited to zero.”²³⁴ The move that Powell ultimately made in *McCleskey*—raising questions about the methodological soundness of the statistical study but ultimately deciding the case on legal grounds, assuming without deciding the validity of the study—is a move that recurs in the Court’s constitutional decisionmaking.²³⁵ Powell, who joined the

²³¹ See *Furman*, 408 US at 249–51 (Douglas concurring).

²³² 481 US 279 (1987).

²³³ See Garland, *Peculiar Institution* at 282 (cited in note 79).

²³⁴ Justice Lewis Powell, Memorandum to Law Clerk *27 (Sept 16, 1986), archived at <http://perma.cc/2F2T-DBQZ>.

²³⁵ For example, in *Witherspoon*, the Court put off until another day whether there was sufficient statistical proof that death-qualified juries were skewed toward conviction, declaring the data that the petitioners offered on the matter “too tentative and fragmentary.” *Witherspoon*, 391 US at 517. When the Court finally reached the issue, it assumed for the sake of argument that the statistical proof was valid but decided the case on legal rather than statistical grounds. See *Lockhart v McCree*, 476 US 162, 173 (1986):

Having identified some of the more serious problems with McCree’s studies, however, we will assume for purposes of this opinion that the studies are both methodologically valid and adequate to establish that “death qualification” in fact produces juries somewhat more “conviction-prone” than “non-death-qualified” juries. We hold, nonetheless, that the Constitution does not prohibit the States from “death qualifying” juries in capital cases.

Court just in time for the *Furman* litigation, was certainly not alone among the justices in his uneasiness with statistical proof. As a result, many of the justices may have felt that their personal legitimacy as jurists was threatened in cases involving statistical proof,²³⁶ and thus they may have preferred to render decisions on purely legal rather than statistical grounds. This dynamic may also have informed the Court's ultimate conclusion in *McCleskey* that judging in general—and with regard to claims of racial discrimination in particular—requires evaluating proof in individual cases rather than examining broader statistical evidence.²³⁷

In addition to concerns about the legitimacy of their judicial role, the justices may have avoided the racial aspects of the capital punishment litigation in part because of concerns about the legitimacy of the Court as an institution. Addressing a controversial topic like capital punishment through the lens of procedural justice, as illustrated most clearly by the decisions of swing justices Stewart and White in *Furman*, may have seemed less socially divisive than applying the lens of racial justice. Moreover, the procedural-justice focus may have seemed more distinctively judicial and less potentially legislative than a focus on racial equality. The workings (and failings) of the judicial process are well within the special expertise of courts, in contrast to the evaluation of expert, technical proof of racial discrimination in outcomes, which may seem more suited to the legislative venue. The Court's timing of its entrance into the capital punishment fray was important with respect to this consideration. The Warren Court had faced frequent and vociferous criticism for stepping beyond the appropriate boundaries of what was supposed to be the "least dangerous branch" of government, given that the judiciary controls neither army nor purse.²³⁸ The Court's foundational capital punishment cases came on the heels of this criticism, in the waning days of the Warren Court and the early days of the Burger Court. Thus, the swing justices may

²³⁶ See Sundby, 10 Ohio St J Crim L at 14 (cited in note 234) (describing Justice Powell's "aversion" to evaluating the statistical analysis presented in *McCleskey*, which was exacerbated by a clerk's memorandum criticizing the lower courts for failing to understand the Baldus study).

²³⁷ See id at 13. See also *McCleskey*, 481 US at 297.

²³⁸ See generally Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale 2d ed 1986) (mounting one of the most rigorous criticisms of the Warren Court's judicial activism and arguing for a policy of judicial restraint).

have sought to dispose of the death-penalty issue in the way least likely to feed into this critique—once again unsuccessfully, given that the dissenting justices repeatedly sounded the theme that the Court was inappropriately intruding into the legislative sphere.²³⁹

Interestingly, the South African Constitutional Court’s 1995 decision invalidating capital punishment under the postapartheid constitution,²⁴⁰ in the very first case presented to it for review, also largely eschewed race-based argumentation²⁴¹—a silence perhaps even more surprising than that of the US Supreme Court, given the overt and extreme racism of the apartheid regime. In an exploration of the reasons for the South African Court’s apparent avoidance of race in its ruling on capital punishment, one commentator suggests a similar motivation to that posited above—that is, to establish the Court as the appropriate adjudicator of the issue (in contrast to Parliament), a motivation especially strong in the context of establishing an inaugural constitutional court with the power of judicial review.²⁴² “In this setting, the Justices may have sought to elevate purely legal decisionmaking over considerations that require the pragmatic, fact-based wisdom of legislators.”²⁴³ Under this view, the South African Court sought “a lens that privileged the expertise and position of the judiciary” so as to “legitimize[] that body’s elevation over its parliamentary rival.”²⁴⁴

On a broader ideological level, the US Supreme Court’s relative silence on the issue of race in capital punishment was of a piece with its approaches in the two most closely related constitutional areas—the regulation of criminal justice and the promotion of racial equality. In the broader criminal justice area, the Court presaged its approach to capital punishment by largely avoiding explicit discussion of race, even in cases in which the racial context was undeniably significant.²⁴⁵ More generally,

²³⁹ See, for example, *Furman*, 408 US at 403–05 (Burger dissenting).

²⁴⁰ *State v Makwanyane and Another*, 1995 (3) SA 391 (CC) (S Afr).

²⁴¹ See Owen Roberts, *Race-Blind Abolition: Makwanyane’s Unused Inequality Argument* *1 (unpublished manuscript, Apr 2014) (on file with authors).

²⁴² See *id.* at *24–25.

²⁴³ *Id.* at *24.

²⁴⁴ *Id.* at *24–26.

²⁴⁵ The best example of this avoidance is the Court’s decision in *Duncan v Louisiana*, 391 US 145 (1968), the case that incorporated the right to trial by jury. The opinion talks in broad terms about the abstract value of juries, even while the accused was a black teenager charged with assault for “slap[ping]” the arm of one of a group of four white boys who were harassing two black boys; this altercation took place in the midst of

instead of focusing on *outcomes* in the criminal justice context—the kinds of punishments imposed, the length of criminal sentences, or the distribution of criminal penalties—the Court focused on the *procedures* by which punishment was imposed.²⁴⁶ The Warren Court viewed the most significant constitutional problems with the American criminal-justice system as procedural ones and hoped to ameliorate them by extending the rights to counsel and trial by jury and by regulating police interrogations and lineups. Consequently, it must have seemed natural, or at least plausible, to focus on procedural deficiencies in the capital punishment system, even under the more outcome-oriented Eighth Amendment, which forbids cruel and unusual punishments rather than mandating any special procedural protections.

In the context of constitutional litigation regarding racial equality, the Court obviously did not eschew discussions of race, but it did consistently express the hope that race-based remedies were merely stopgap measures necessary to achieve a race-blind future. For example, in the school-busing context, the Court referred to the court-ordered busing plan that it approved in 1971 as an “interim corrective measure” that would not necessarily require yearly judicial monitoring or updating once desegregation was achieved.²⁴⁷ Similarly, in the affirmative action context, the Court struck down the use of racial quotas in university admissions but upheld the voluntary use of race for the promotion of diversity,²⁴⁸ a remedial measure that Justice Sandra Day O’Connor later explicitly maintained should be “limited in time”—specifically, to 25 years—before evolving into constitutionally favored “race-neutral” policies.²⁴⁹ This aspiration toward a race-blind future, present even in the era in which the Court most endorsed race-conscious remedial measures to effect the constitutional guarantee of equality, made a race-neutral

a highly contested school-desegregation fight in one of the most racially divided parishes in Louisiana. *Id.* at 147, 151–58. See also generally Nancy J. King, *Duncan v. Louisiana: How Bigotry in the Bayou Led to the Federal Regulation of State Juries* in Steiker, ed., *Criminal Procedure Stories* 261 (cited in note 50) (describing the racial context of the *Duncan* litigation).

²⁴⁶ See William J. Stuntz, *The Collapse of American Criminal Justice* 74–85 (Belknap 2011) (describing and critiquing the procedural focus of the Bill of Rights).

²⁴⁷ *Swann*, 402 US at 27.

²⁴⁸ *Regents of the University of California v. Bakke*, 438 US 265, 369 (1978).

²⁴⁹ *Grutter v. Bollinger*, 539 US 306, 342–43 (2003).

approach to the constitutionality of capital punishment that much more appealing.

Indeed, both the Court's commitment to procedural justice and its aspiration toward a color-blind ideal reflect a larger and deeper commitment, one more rooted in the 1960s and 1970s than in the present—that is, the Court's deeply optimistic faith in the constitutional perfectibility of social and legal institutions. To have invalidated the death penalty on the ground of racial disparities in its administration would have betrayed this faith by giving up hope that such disparities could be remedied by the right procedural interventions or “interim corrective measures.”²⁵⁰ A race-based abolition of the death penalty would have constituted an acknowledgement that the effects of institutionalized racism could not be erased by constitutional intervention—the very last message that the Supreme Court wanted to send in the era of constitutionally mandated school desegregation and criminal procedure reform. The LDF's opponents cleverly and powerfully appealed to this reluctance by arguing that evidence of past disparities should be discounted in light of the Court's own constitutional interventions. For example, Georgia argued that inferences of current racial discrimination from past disparities were not justified because “safeguards against arbitrariness or other lack of due process for disadvantaged persons have increased substantially in the last several decades . . . [including] the right to effective assistance of counsel for the indigent.”²⁵¹ And Bork argued that “[t]he only studies that even inferentially suggest a possibility of racial discrimination were conducted in the South during a time when blacks were often excluded from grand and petit juries. They do not demonstrate that discrimination persists now that blacks sit in judgment on other blacks.”²⁵² Once again, the South African context offers a similar dynamic—the new justices acted with the hope that conditions would improve with the official end of apartheid and the

²⁵⁰ *Swann*, 402 US at 27.

²⁵¹ Furman Respondent's Brief at *80 (cited in note 121). See also Supplemental Brief for Respondent, *Furman v Georgia*, No 69-5003, *14–15 (US filed Mar 25, 1972) (available on Westlaw at 1972 WL 125855):

[I]t must be remembered that both Furman and Jackson were tried in the latter months of 1968, *after* the Georgia jury selection system was corrected to expunge the element of prima facie discrimination which arose from the use of segregated tax digests as a source of jurors, by substituting the voter lists. The potentiality of racially discriminatory juries was erased in both of these trials.

²⁵² Gregg US Brief at *66 (cited in note 163).

belief that “inequality . . . may be curable in the long run” through legal intervention.²⁵³

Even as the Court officially proclaimed the possibility of equality through law, surely the justices entertained doubts about the speed and completeness of change over time, especially given the baseline of long-standing racial inequality that the Court started from in the 1960s and 1970s. In light of these entirely plausible doubts, the justices may have hesitated to treat racial disparities as a ground for invalidating capital punishment because of the likelihood that similar disparities existed and would continue to exist in the imposition of noncapital punishments—which could not simply be excised from the legal system like the single penalty of death. Indeed, when the Court finally squarely addressed the issue of racial disparities in capital sentencing in *McCleskey*, this concern about the scope of the remedy was paramount. As Powell explained, “McCleskey’s claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system.”²⁵⁴ These concerns must have been heightened by the Court’s decision to invalidate the use of capital punishment for the crime of rape. The Court had seen the staggering statistics on the race-based use of prosecutions for rape in the South, and it could not possibly have believed that disparate charging and sentencing in rape cases would disappear simply because the death penalty was off the table. To invalidate the entire criminal-justice system if its workings could be shown—as they plausibly could—to be affected by racial prejudice would be unthinkable. But if the Court relied on racial disparities to invalidate capital punishment, it would be forced to explain why similar disparities must be accepted in the imposition of ordinary criminal punishment. The Court no doubt sought to avoid a public announcement that racism is unavoidable and therefore must be tolerated—both for the country’s sake and for the justices’ own psychological comfort.

Indeed, the Court knew exactly what such a disheartening announcement would sound like, as Justice Antonin Scalia had circulated a memo to his fellow justices in *McCleskey* that suggested that he might write a concurrence along precisely these lines. Scalia explained, “Since it is my view that the unconscious

²⁵³ Roberts, *Race-Blind Abolition* at *27, 28 (cited in note 241) (quotation marks omitted), citing *Makwanyane* at ¶ 185 (Didcott concurring).

²⁵⁴ *McCleskey*, 481 US at 314–15.

operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof.”²⁵⁵ Although Scalia never wrote this concurrence, his characteristic bluntness revealed the Court’s dilemma with regard to evidence of racial disparities in capital sentencing. If the Court directly addressed the issue and declared the statistical proof of racial discrimination inadequate, then it would simply invite further litigation, as armies of social scientists would seek to provide the missing proof. If the Court declared the statistical proof adequate and granted relief, then it would have to face the inevitable challenge to the entire criminal-justice system without the possibility of granting similar relief. The *McCleskey* Court, by assuming without deciding the soundness of the Baldus study but denying individual relief based on statistical proof, tried to have it both ways—to avoid the enormity of the remedy sought for systemic discrimination while still maintaining that the Constitution prohibited racial discrimination in individual cases. As the Court must have predicted, the *McCleskey* decision proved controversial not least because of its disingenuousness.²⁵⁶ The remedial difficulties that the Court ultimately addressed in *McCleskey* must have been apparent in the litigation regarding racial disparities in the Court’s foundational cases, thus offering yet another powerful motivation to steer the discussions and ground the decisions in race-neutral terms.

Thus, the Court’s focus on issues such as death qualification in *Witherspoon*, arbitrariness in swing *Furman* concurrences, and proportionality in *Coker*—without any sustained discussion of the racial significance of these particular legal issues or of the broader racial context—turns out to be less mysterious than it appears at first blush. As the litigants pounded on the racial issues in the Court’s foundational capital punishment cases, the justices had ample opportunity to consider the costs, along many dimensions, of opening a public discussion about the evidence and constitutional significance of racial disparities in the administration of the death penalty. The Court’s failure to engage robustly in this discussion could not have been inadvertent, and

²⁵⁵ Justice Antonin Scalia, *Memorandum to the Conference Re: No. 84-6811-McCleskey v. Kemp* (Jan 6, 1987), available at Library of Congress, Thurgood Marshall Papers, *McCleskey v Kemp* file (“Memorandum from Scalia”).

²⁵⁶ See Sundby, 10 Ohio St J Crim L at 33–35 (cited in note 234).

thus its silence reflects the power of the kinds of considerations that we have attempted here to unearth and flesh out.

IV. CONSIDERING THE CONSEQUENCES OF AVOIDANCE

What consequences flowed from the Court's avoidance of race in its foundational decisions? As in *Brown*, the Court's various opinions, from *Rudolph* to *Coker*, offered a woefully incomplete picture of the underlying practice. The price of omitting a discussion of race was to create the false impression that the greatest failings of the American capital punishment system could be found in discrete procedures (such as the death qualification of jurors, unitary trials, and the absence of guidance in state capital statutes). Of course, the Court might have had good reasons, both political and epistemological, for resisting the most encompassing and speculative of the LDF's claims—that the death penalty remained on the books largely because only blacks and other marginal groups were caught in the execution net. But even if the Court was not persuaded by that assertion, it could have said much more about how race historically and at that time informed decisions at every level, including legislative selection of crimes punishable by death, prosecutorial decisions to charge capitally in individual cases, judge and jury verdicts, and appellate and executive discretionary outlets from the ultimate imposition of the punishment.

As discussed below, the failure to come to terms with race has had complicated consequences for death-penalty jurisprudence, but, in a more basic sense, this failure disserved the Court in its role as a chronicler of history and social and political practices. Had the Court framed its constitutional regulation of capital punishment against the backdrop of antebellum codes, lynchings, mob-dominated trials, and disparate-enforcement patterns, the Court would have done a much better job of explaining *why* the death penalty deserved the sustained attention of the American judiciary. This would have been true even had the Court ultimately framed its doctrines in nonracial terms. Moreover, to the extent that the Court's silence about race was calculated (as in *Brown*) to preserve the Court's capital and prevent popular backlash or resistance, it was spectacularly unsuccessful. As in *Brown*, the Court's general audience understood that it was taking sides in a culture war over racial status even as the Court omitted the history of deliberate discrimination that offered the greatest justification for its interventions.

In the short term, the Court's failure to acknowledge racial discrimination in cases like *Rudolph* and *Coker* undermined the strength of that claim when it arrived before the Court in the late 1980s. As Professor Johnson persuasively argues, *Coker* managed to erase the most racially discriminatory practice (punishing rape with death) without providing the racial context surrounding that decision; thus, when the Court finally engaged a statistical study of racial discrimination in *McCleskey*, it was presented with a much less racially skewed death penalty and no "official" judicial record that race had ever played a substantial role in recent capital sentencing.²⁵⁷ As a result, the Court was better able to give Georgia prosecutors and judges the benefit of the doubt and to "decline to assume that what is unexplained is invidious."²⁵⁸ Johnson argues that a stronger opinion in *Coker* documenting the race-of-the-victim effects in rape cases would have made it more difficult to dismiss strong race-of-the-victim effects in the Baldus study—a dynamic that might have been outcome determinative given the Court's 5–4 division.²⁵⁹ Perhaps so. But Justice Powell, the only available majority vote in *McCleskey*, was undoubtedly aware of Wolfgang and the rape studies even though they did not make their way into the *Coker* decision. His reluctance to side with the dissenters seems just as plausibly attributable to the problem of remedy and fears of spillover to the noncapital side of the criminal-justice system discussed above as to his need, in Justice Scalia's words, for "more proof."²⁶⁰

The most dramatic consequences of the Court's silence about race were neither contemplated nor foreseeable. Three powerful strands of contemporary capital jurisprudence are traceable to the Court's framing of its decisions in its early cases and thus, in some ways, traceable to the Court's decision to bypass race. The first two strands are the robust requirement of individualized sentencing²⁶¹ and the accompanying heightened representational requirements in capital trials.²⁶² The Court's decision in *Maxwell* and later in *Furman* to focus on the problem of standardless discretion (rather than, say, racially

²⁵⁷ See Johnson, *Of Rape, Race, and Burying the Past* at 196–200 (cited in note 26).

²⁵⁸ *McCleskey*, 481 US at 313.

²⁵⁹ See Johnson, *Of Rape, Race, and Burying the Past* at 200 (cited in note 26).

²⁶⁰ Memorandum from Scalia (cited in note 255).

²⁶¹ See *McCleskey*, 481 US at 297.

²⁶² See *Rompilla v Beard*, 545 US 374, 387 (2005).

discriminatory outcomes) has radically transformed capital practice, but in ways that are themselves contingent, complex, and unanticipated. The Court's regulatory intervention in *Furman* required states to provide capital-sentencing guidelines if they sought to retain the death penalty. Numerous jurisdictions, including North Carolina and Louisiana, pursued what they regarded as the clearest and most definitive path in this regard—the decision to make capital punishment mandatory for certain crimes.²⁶³ When the Court rejected the mandatory statutes, it formally recognized, in unprecedented language, the significance of a defendant's character and background as well as the circumstances of the offense to the death-penalty decision.²⁶⁴ That recognition not only required states to provide a meaningful vehicle for the consideration of mitigating evidence broadly defined,²⁶⁵ but it also profoundly altered the way that institutional actors conceived of the responsibilities of trial counsel.²⁶⁶ Instead of treating capital cases like any other serious felonies, capital-trial lawyers increasingly understand their special obligation to investigate and present a wide range of mitigating evidence. Such efforts require a capital-defense team, with psychiatric, psychological, and mitigation specialists, and these heightened demands are reflected in both the increasingly specific professional norms promulgated by the American Bar Association²⁶⁷ and the Court's own doctrines elaborating the Sixth Amendment right to effective counsel as applied to capital sentencing.²⁶⁸

The irony, of course, is that the Court's concern about the absence of guidelines ultimately produced a much more substantial commitment to open-ended individualized sentencing. That

²⁶³ See Banner, *The Death Penalty* at 269 (cited in note 8).

²⁶⁴ See *Woodson v North Carolina*, 428 US 280, 304 (1976) (Stewart) (plurality).

²⁶⁵ See, for example, *Tennard v Dretke*, 542 US 274, 288–89 (2004).

²⁶⁶ See Carol S. Steiker and Jordan M. Steiker, *Entrenchment and/or Destabilization? Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment*, 30 L & Inequality 211, 228 (2012).

²⁶⁷ Compare American Bar Association, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989) (former ABA guidelines), archived at <http://perma.cc/U3Q5-87HQ>, with American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L Rev 913 (2003) (new ABA guidelines).

²⁶⁸ See, for example, *Rompilla*, 545 US at 387 (holding that the absence of an adequate mitigation investigation denied the defendant his Sixth Amendment right to effective representation); *Wiggins v Smith*, 539 US 510, 524–25 (2003) (same); *Williams v Taylor*, 529 US 362, 396 (2000) (same).

commitment has improved death-penalty representation, but it has also proven extraordinarily costly. Contemporary capital trials are far more expensive than their counterparts in the 1960s and 1970s, and those costs have increasingly destabilized the practice.²⁶⁹ Capital prosecutions have declined dramatically over the past fifteen years, and the costs associated with capital-trial defense—commonly borne by local rather than state governments—have contributed significantly to the decline.²⁷⁰

Would a race-conscious or race-focused capital jurisprudence have avoided these developments? If the Court had addressed the racially discriminatory application of capital-rape statutes in *Rudolph* or *Maxwell*, it might have alleviated some of the pressure to address the “arbitrary” and “freakish” aspects of the American death penalty a few years later.²⁷¹ It is difficult to assess, counterfactually, whether an early win on race grounds would have contributed momentum to the sort of temporary abolition achieved in *Furman* (with the unexpected consequences described above) or, on the other hand, would have defused a continuing commitment by the LDF to attack, or the Court to regulate, capital punishment.

The race avoidance in *Coker* produced a third powerful strand of contemporary death-penalty law—the Court’s proportionality doctrine. Prior to *Coker*, the Court had virtually no experience gauging whether particular punishments, though permissible generally, were excessive as applied to particular offenses or offenders. And *Coker* could have avoided this difficult enterprise by choosing a black defendant–white victim case and ruling that the long-standing (and continuing) racial discrimination in capital-rape prosecutions required prohibiting the practice. Instead, the Court sought to assess proportionality by looking at “objective” indicia of prevailing values (state statutes and jury decisionmaking) and consulting its own judgment regarding the challenged practice and the purposes of punishment.²⁷² That proportionality approach yielded modest results in the first two decades after *Coker*, with the Court upholding the death penalty as applied to juveniles²⁷³ and persons with intellectual

²⁶⁹ See Steiker and Steiker, 30 L & Inequality at 231–33 (cited in note 266).

²⁷⁰ Steiker and Steiker, 2010 U Chi Legal F at 142 (cited in note 20).

²⁷¹ See note 134 and accompanying text.

²⁷² *Coker*, 433 US at 592.

²⁷³ *Stanford v Kentucky*, 492 US 361, 380 (1989).

disabilities²⁷⁴ and carving a small layer of protection for nontriggerpersons convicted under the law of parties.²⁷⁵ But the past fifteen years have seen a dramatic expansion of the doctrine. The Court reversed the earlier denials of protection for juveniles²⁷⁶ and persons with intellectual disabilities²⁷⁷ and, in the context of a defendant sentenced to death for child rape, condemned the application of capital punishment to nonhomicidal ordinary crimes.²⁷⁸

More importantly, the Court's new proportionality jurisprudence has broadened the criteria for assessing prevailing standards of decency, consulting professional and expert opinion, opinion polling data, and world practices and attitudes.²⁷⁹ This new methodology facilitated the Court's rejections of the juvenile death penalty and the execution of the intellectually disabled despite the fact that, in both cases, more death-penalty states permitted the challenged practice than prohibited it (a fact that would have been fatal under the Court's prior approach). In addition, the new methodology indicates a potential route to judicial abolition, as each of the emerging factors increasingly weighs against the continued retention of the death penalty writ large.²⁸⁰

In light of the unexpected growth of the individualization requirement (and the accompanying extraordinary costs of capital representation), as well as the contemporary expansion of the proportionality doctrine, the race avoidance of *Rudolph*, *Maxwell*, *Furman*, and *Coker* might have yielded more-substantial and intrusive regulation of state capital practices than more-focused, race-based approaches. This dynamic is not unfamiliar. In the wake of the Civil War, advocates for racial justice sought explicit, simple declarations of racial equality in the Civil Rights Act of 1866²⁸¹ and the Fourteenth Amendment. For example, Congressman Thaddeus Stevens, leader of the Radical Republicans in the House of Representatives, proposed

²⁷⁴ *Penry v Lynaugh*, 492 US 302, 340 (1989).

²⁷⁵ See *Enmund v Florida*, 458 US 782, 788 (1982); *Tison v Arizona*, 481 US 137, 158 (1987).

²⁷⁶ *Roper v Simmons*, 543 US 551, 578–79 (2005).

²⁷⁷ *Atkins v Virginia*, 536 US 304, 321 (2002).

²⁷⁸ *Kennedy v Louisiana*, 554 US 407, 446–47 (2008).

²⁷⁹ See Carol S. Steiker and Jordan M. Steiker, *Lessons for Law Reform from the American Experiment with Capital Punishment*, 87 S Cal L Rev 733, 764 (2014).

²⁸⁰ See *id.*

²⁸¹ 14 Stat 27, codified at 42 USC §§ 1981–82.

the following amendment: “All national and State laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color.”²⁸² And an original proposal for the Civil Rights Act would have condemned any race discrimination with respect to “civil rights or immunities.”²⁸³ Concerns about the potentially broad implications of general guarantees of racial equality (including their consequences for antimiscegenation laws, segregation, and voting restrictions) caused the Reconstruction-era Congress to ultimately embrace a narrower, more targeted Civil Rights Act, safeguarding specific rights of economic personhood.²⁸⁴ Those same concerns likely informed the choice to forgo Stevens’s straightforward protection against racial discrimination in favor of the vague, nonracial language in the Fourteenth Amendment, which protects “privileges and immunities” from abridgement, assures “due process of law” prior to deprivations of life, liberty, or property, and prohibits denials of “equal protection of the laws.”²⁸⁵ The desire not to intrude too much on racial prerogatives ultimately paved the way for a dramatic expansion of the scope of liberty and equality protected by the Fourteenth Amendment apart from race, though it obviously came at the price of delaying (or at least contributing to the delay) for at least three-quarters of a century the dismantling of Jim Crow.²⁸⁶ So too might race avoidance in the capital punishment context produce more-enduring and intrusive regulation of capital punishment than the more-limited, though more-threatening, race-based intervention that the Court abjured.

CONCLUSION

The American death penalty is often described as exceptional. In the mid-nineteenth century, Alexis de Tocqueville observed the relative mildness of the American death penalty, and the decision of some American states to limit or abolish capital

²⁸² Paul Brest, et al, *Processes of Constitutional Decisionmaking: Cases and Materials* 309 (Aspen 5th ed 2006).

²⁸³ *Id.* at 302.

²⁸⁴ See Andrew Kull, *The Color-Blind Constitution* 76–79 (Harvard 1992).

²⁸⁵ US Const Amend XIV. See also Kull, *The Color-Blind Constitution* at 82–86 (cited in note 284).

²⁸⁶ The cost here might be overstated, given that the explicit guarantee of racial equality in the context of voting did little to protect that right until congressional intervention in the 1960s. See Klarman, *From Jim Crow to Civil Rights* at 253 (cited in note 1).

punishment put the United States ahead of its European counterparts.²⁸⁷ Today, the United States is viewed as an outlier in the other direction, chided for its barbarity as the sole Western democracy that retains capital punishment. The United States is also an outlier among current retentionist states in its extensive efforts to regulate and tame the practice. But perhaps the most long-standing and consistent ground for distinction is the extent to which the American death penalty is and has been “soaked” in racism.²⁸⁸ The story of how the American death penalty came under assault in the 1960s, was almost judicially abolished in the early 1970s, and has been subject to continuing constitutional regulation thereafter cannot be told without detailed attention to race. And yet the Supreme Court opinions addressing the American death penalty during this foundational era are soaked in euphemism, addressing problems of “arbitrariness,” “caprice,” and “disproportionality.” We have sought to illuminate the causes and consequences of the Court’s race avoidance. We are confident that, whatever the future holds for the American death penalty, its destiny is in some important sense linked to the distinctive and destructive role of racial discrimination in American society.

²⁸⁷ See Alexis de Tocqueville, 2 *Democracy in America* 166 (Vintage 1990).

²⁸⁸ Banner, *Traces of Slavery* at 97 (cited in note 28).