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## Introduction

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By now the connection between race and the killings of African-Americans, in particular through lynchings and the death penalty, is widely recognized among scholars, activists, and legal officials. As a result, saying that there is a long and deep connection between this country's racial politics and its uses of the killings of African-Americans through lynchings and the death penalty will come as a surprise to few. Indeed, one way to track this connection is by examining the recent history of the United States Senate's response to the history of lynching and the United States Supreme Court's death penalty jurisprudence. Prior to the summer of 2005, there had been palpable silence concerning this country's history of lynching. The House of Representatives had passed four antilynching bills and seven presidents, Republicans and Democrats, had repeatedly urged Congress to pass legislation making lynching a federal crime. These measures were consistently rebuffed by powerful southern senators who used the filibuster (ironically, the same way it was employed to prevent the desegregation of public schools) to prevent this legislation from ever receiving a formal vote.<sup>1</sup> Fortunately, in June 2005, the Senate voted to apologize formally for its failure to pass anti-lynching legislation. The Senate's recent apology is both admirable and regrettable. It is admirable in that there is finally a public acknowledgement of our history of lynching. It is regrettable in that occurred only after nearly five thousand reported lynchings, many of whom were African-American.

Starting with *Furman v. Georgia*, decided in 1972, the Court has confronted a series of cases in which petitioners have asserted that decisions throughout the system of capital punishment are illegitimately influenced by race. Sometimes the Court has acknowledged those claims; sometimes

it has not. In the late 1970s, in *Maxwell v. Bishop* and *Coker v. Georgia*, statistical evidence was presented to the Court that showed that African-American defendants were being sentenced to death for the crime of rape as part of a racially discriminatory pattern.<sup>2</sup> The Court did not include this racial dynamic in its reasoning, but it did find that applying the death penalty for the crime of rape was grossly disproportionate and therefore unconstitutional.<sup>3</sup>

A decade later, in *McCleskey v. Kemp*, the Court held that statistics showing racial disparity in the imposition of the death penalty were “insufficient to demonstrate discriminatory intent or unconstitutional discrimination in the Fourteenth Amendment context, [and] insufficient to show irrationality, arbitrariness and capriciousness under any kind of Eighth Amendment analysis.”<sup>4</sup> It is important to note, however, that the Court did not dispute the validity of the petitioner’s statistical findings; instead, it said that the findings did not show with clear enough proof that the statistical anomaly was caused by racial discrimination within the system. Simply put, the Court held that although there appears to be a strong correlation between race and the death penalty, statistics alone cannot prove causation.<sup>5</sup>

For several decades social science studies of capital punishment have focused on the connection of race and capital punishment. Those studies, including the one that provided the basis for the *McCleskey* litigation, have documented a rather consistent pattern of racialization, showing, for example, powerful race-of-the-victim effects in the decisions about who will receive a death sentence. Furthermore, we know that of all the executions that have taken place in the United States since 1976, nearly 43% have been of defendants that were either black or Hispanic. Of current death row inmates, approximately 55% are either black or Hispanic.<sup>6</sup> Of all defendants sentenced to death since 1976, 81% of the victims in their cases have been white.<sup>7</sup> As a recent report by the Sentencing Project suggests, “[W]hile racial dynamics have changed over time, race still exerts an undeniable presence in the sentencing process.”<sup>8</sup>

The legitimacy, if any, of the state’s ultimate sanction depends on its fairness, its consistency with our deepest commitments to due process and equal treatment under law. Indeed over time, the trend in arguments about the death penalty has shifted from arguments about whether the death penalty can be justified on retributive or deterrence grounds to arguments about whether the accused in all cases has been adequately represented by counsel and other process-oriented arguments. At the same

time, this shift has been accompanied by a general truncation of appellate review in capital cases, thereby making it all the more important to bring to light any potential biases in the administration of the death penalty. In this context, our book is an effort not so much to describe the fact of the race-capital punishment nexus but to show the ways that the death penalty is racialized, the places in the death penalty process where race makes a difference, and the ways the very meanings of race in the United States are constituted in and through our practices of capital punishment.

In addition to our effort to examine the ways race influences capital punishment, this book also attempts to situate the linkage between race and the death penalty in the history of this country.<sup>9</sup> Doing so reveals that the death penalty is, and has always been, rarely a punishment used objectively against those deserving of it; it has been instead a tool that has been used, throughout history, to oppress racial minorities, and specifically, African-Americans.<sup>10</sup> Today, the connection of race and the death penalty has become a substantial issue of national debate following former Illinois Governor George Ryan's decision to put a moratorium on the death penalty in that state and commute the sentences of all current death row inmates.<sup>11</sup> Governor Ryan explicitly questioned the effect race might be having in sentencing decisions when he discussed his reasons for stopping capital punishment in Illinois.<sup>12</sup> Since this decision, several other states have begun to examine the impact that race may have on local administration of the death penalty. For example, Pennsylvania has considered and Kentucky has enacted legislation that allows defendants to use statistical data to prove that race was a factor in the decision either to seek the death penalty in their cases or to ultimately impose a capital sentence.<sup>13</sup> Moreover, the former governor of Maryland placed a moratorium on the death penalty pending the outcome of a study by the University of Maryland on the fairness of the state's death penalty administration.<sup>14</sup>

The connection of race and the death penalty has been further thrust into the limelight by the recent proliferation of DNA testing. Spearheaded largely by Barry Scheck's Innocence Project, progressive groups in nearly every state have used DNA testing to exonerate death row inmates. Over the past five years, more than one hundred death row inmates have not only been removed from death row but freed from prison altogether due to the DNA testing of evidence stored from the original crime scenes proving conclusively that they were not the perpetrators.<sup>15</sup> Most of those who have been exonerated have been members of racial minorities. As they have left death row, they have provided the nation a vivid portrait of

the racial composition of those given capital sentences. Also in recent years, courts have been taking race into consideration when reviewing sentencing decisions. Thus, Wilbert Rideau, a famed prison journalist, was granted a new trial when the Supreme Court overturned his conviction after nearly forty-two years on the grounds that blacks were completely excluded from his jury.<sup>16</sup>

In Congress, attention is now being given to the impact of race on capital punishment. Thus the Racial Justice Act (RJA) has twice passed the United States House of Representatives. That act would allow capital defendants to do what *McCleskey* forbids, namely, to challenge their death sentences by using statistical evidence of discriminatory impact and thereby raising an equal protection claim. In making such an “impact” claim under the RJA, defendants may demonstrate that within “the state in which they were convicted, a disproportionately higher number of one particular race is given the death penalty.”<sup>17</sup>

This book appears at an important time in our national conversation about capital punishment. Indeed, it seems fair to say that we are now in a period of national reconsideration of the issue. This period has been marked by dramatic declines in the number of people receiving death sentences and the number of people being executed.<sup>18</sup> In addition, the Supreme Court has demonstrated increasing skepticism about the death penalty and its constitutionality in different contexts; as a result, the Court has begun to narrow its application. Thus, in 2002, it held that execution of the mentally retarded constitutes cruel and unusual punishment and is therefore prohibited by the Eighth Amendment.<sup>19</sup> Just a few years later, in *Roper v. Simmons*,<sup>20</sup> the Court narrowed the scope of the death penalty even further, declaring that the execution of juveniles who have committed a capital crime before the age of 18 is unconstitutional under the Eighth and Fourteenth Amendments.<sup>21</sup> In that holding, the Court relied on “the evolving standards of decency that mark the progress of a maturing society.”<sup>22</sup> In both *Atkins* and *Roper*, the Court also referred to a “national consensus”<sup>23</sup> that has arisen against the death penalty in those two contexts. It is not a far leap for one to assume if a similar “national consensus” forms around the connection of race and the death penalty, that the Court might be willing to further scrutinize capital sentencing decisions where race can be shown to be a substantial contributing factor.

Three cases decided during the Supreme Court’s 2004 term, *Miller-El v. Dretke*,<sup>24</sup> *Johnson v. California*,<sup>25</sup> and *Roper v. Simmons*<sup>26</sup> indicate that the

Supreme Court has begun to reevaluate the way the death penalty is applied and at the same time reexamine the process that has operated to produce all-white juries and sentence a disproportionate number of blacks to death. *Miller-El* and *Johnson* marked a revival of *Batson v. Kentucky*,<sup>27</sup> the case holding that excluding blacks because of their race denied both the defendant and the excluded jurors of equal protection of the laws.<sup>28</sup> Together, these cases suggest that race is once again at the forefront of the Court's thinking about the death penalty.

International law played a significant role in narrowing the scope of the death penalty. In *Roper v. Simmons*, which held the juvenile death penalty unconstitutional, the Court "referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'"<sup>30</sup> Justice Kennedy, writing for the Court, noted "the overwhelming weight of international opinion against the juvenile death penalty."<sup>31</sup> He cited Article 37 of the United Nations Convention on the Rights of the Child, the laws of the United Kingdom, and the fact that only seven other countries in the world—Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China—had executed juvenile offenders since 1990.<sup>32</sup>

Combined with the Court's increasing willingness to refer to international norms, *Roper*, *Miller-El*, and *Johnson*, three cases from the Court's 2004–05 term, highlight what may be a progressive trend in the Court's death penalty jurisprudence. *Roper*, *Miller-El*, and *Johnson*, taken together, suggest that the Court has begun to rethink the groups to whom the death penalty is applied, as well as the role of race in the process by which it is applied. Because Justice O'Connor and the Chief Justice were not members of the *Roper* majority, even if Chief Justice Roberts and Justice O'Connor's replacement share Justice Scalia's views, both the holding and the Court's more expansive vision of rights informed by international norms should remain intact. While there is little evidence to indicate that the Court would reconsider the constitutionality of the death penalty, *Roper*, *Johnson*, and *Miller-El*, and the concept of rights prompting the Court's references to international law may serve as basis for a serious reexamination of race and the death penalty.

The Supreme Court also has demonstrated increasing frustration with lower courts, such as the Texas Court of Criminal Appeals, which stridently refuses to follow Supreme Court precedents in the death penalty context.<sup>33</sup> On June 13, 2005, a divided Supreme Court issued two surpris-

ing decisions.<sup>34</sup> Both involved African-American defendants convicted of crimes against white victims. Both were convicted of murder and in one case the defendant was sentenced to death. In an extraordinary rebuke of prosecutors, and to some extent of the judges who presided over these cases, the Court found that prosecutors had removed black jurors who were otherwise competent to serve on the juries. A largely conservative Court, seven of whose members had been appointed by Republican presidents, drew a line in the sand: race still matters in insuring that persons tried in America's courts receive a fair trial. Even in cases where the evidence against the defendant may be overwhelming, the government can't enhance its ability to obtain a conviction by denying qualified African-Americans the opportunity to serve on juries in cases where African-Americans are the defendants.

In addition, the Texas Court of Criminal Appeals and the United States Court of Appeals for the Fifth Circuit have both been targets of criticism in recent years "for denying appeals from prisoners seeking to overturn their death sentences" as well as their insistence on "going to great lengths to justify their decisions, even in the face of overwhelming evidence or contrary rulings from the Supreme Court."<sup>35</sup> Making the connection between this resistance and race explicit, a scholar likened the behavior of the Texas judges to that witnessed during "desegregation days."<sup>36</sup>

Individual Justices have also spoken publicly about their doubts about capital punishment. For example, Justice Sandra Day O'Connor was quoted in 2001 as noting that "[s]erious questions are being raised about whether the death penalty is being fairly administered in this country."<sup>37</sup> She also expressed some concern about the system's potential for error, as indicated in our prior discussion of DNA testing: "If statistics are any indication, the system may well be allowing some innocent defendants to be executed."<sup>38</sup> Additionally, in recent years, Justice Stephen Breyer and Justice O'Connor have emphasized the importance of considering international legal standards in the area of capital punishment.<sup>39</sup> This trend in relying on international law was apparent in Justice Anthony Kennedy's opinion in *Roper* as well.<sup>40</sup> In conjunction with doubts about the death penalty's capability for fair and just administration expressed by state officials like Governor Ryan, such sentiments about the penalty's operation in the United States may signal its troubled and uncertain future.

The essays in this book speak to these doubts and this future, focusing in particular on the question of how and why the connection between race and the death penalty has been so strong throughout American history.

We do not believe that the connection can be explained through the examination of just one aspect of race or just one aspect of the death penalty system; rather, each aspect, from the jury's decision to invoke the death penalty, to the historical underpinnings of the death penalty itself, must be examined in order to understand the statistics that show such a strong link between race and the death penalty. Thus Part I, entitled "The Meaning and Significance of Race in the Culture of Capital Punishment," assesses the proposition that the death penalty has its historical origins in lynching and that the impetus behind mob-style justice persists in today's capital punishment system. Part II, "Race and the Death Penalty Process," focuses on how race and racial politics influence the decisions of actors in the death penalty process, especially juries, to apply the death penalty in particular cases. Part III, "Race, Politics, and the Death Penalty," seeks to move the discussion of race and the death penalty outside the purely legal context. It features essays that take a broader look at that relationship and concludes with an assessment of the significance of race in today's national reconsideration of capital punishment.

Part I, "The Meaning and Significance of Race in the Culture of Capital Punishment," begins with "Capital Punishment as Legal Lynching," by Timothy Kaufman-Osborn, who discusses how the death penalty developed from southern lynchings of suspected black criminals. Courts began to sentence defendants to death because they knew that angry mobs would try to achieve such results unlawfully if the courts did not do so. He contends that although the death penalty is a secret, ostensibly race-neutral process, it has served to perpetuate racial categories. Yet he contends that although some aspects of current execution may mirror lynchings of the past, it is important not to let this analogy obscure more pointed analysis. He argues that even though both acts, execution and lynching, help to solidify the racial subordination of African-Americans, the techniques used to accomplish the result are very different. The author concludes that the practices of due process do not make lynching and capital punishment identical but "mask the continued articulation of the racial contract within a polity that no longer openly espouses the rhetoric of white supremacy."

In the next essay, Charles Ogletree discusses the historical use of the death penalty as a discriminatory mechanism and, like Kaufman-Osborn, argues that racism still exists throughout our capital punishment system. Courts and legislatures have long tolerated the disparate impact of the death penalty, despite the obvious questions it raises regarding justice and

fairness within our legal system. The impact exists based on the race of the victim as well as on the race of the defendant. However, the courts have rejected numerous statistical accounts of the disparity (as seen in *McCleskey v. Kemp*).

The death penalty in our country is historically and inextricably tied to race. Under slavery, the harsh penalties meted out to slaves reflected “white supremacy and fear, and allowed slaves to be put to death for transgressions ranging from helping a fellow slave escape to destroying property.” These punishments were determined solely on the whim of the master. Postslavery, lynching became the new method for whites to quite literally control the lives of blacks. The next phase in American death penalty history moved to the courtrooms, where “legal lynchings” occurred. These proceedings had all the accessories of a fair trial—the courtroom, the judge, the jury. However, there was little fairness to be had for black defendants because “whites deferred to the courts, but remained ready to return to mob justice if the results were not favorable to them.”

Like Kaufman-Osborn, Ogletree argues that although we may have more sophisticated accessories, our current death penalty system does little to counteract the old discriminatory impulses exemplified during the lynching phase of American history. *McCleskey* clearly invited the legislature to determine the issue of discrimination, but efforts to implement remedies have met with opposition. The proposed Racial Justice Act, which would allow defendants to seek judicial relief if their states administered the death penalty disproportionately, has not yet been enacted into law. Finally, citing declining international support for the death penalty (including its abolition in South Africa), Ogletree ends by noting that “the time has come to finally embrace the moral courage to reject the tolerance of racial discrimination in the application of capital punishment, and also to follow the lead of progressive nations throughout the world in shutting down the state-operated machinery of death.”

Part I concludes with Stuart Banner’s “Traces of Slavery: Race and the Death Penalty in Historical Perspective.” Banner suggests that the death penalty is haunted by the continuing specter of racial subordination in the United States—“of black victims lynched by white mobs, of black defendants condemned by white juries, of slave codes and public hangings.” Understanding the racial history of capital punishment may help to elucidate the continuing importance of these images. Banner asserts that “for most of American history, capital crimes were defined unequally divided

by race.” This practice of discrimination, as well as the ceremonial and public nature of the executions helped to “reinforce the racial hierarchy.”

Early in our history, state governments instituted separate punishments for blacks and whites, with blacks being subjected much more often to the capital penalty. Banner notes that there were two other methods for eliminating convicted blacks from society, lynching or deportation. After the Civil War, though, these methods were outlawed, as were unequal sentencing statutes. However, instead of creating true reform, this simply led to an effort to mask racial disparities and create a façade of a race-neutral justice. In such a system, one method of ensuring racially unequal sentences was “by vesting capital sentencing discretion in all-white juries,” guaranteeing harsher sentences for black defendants. Capital sentencing became a useful tool to maintain racial subordination under the guise of formal equality.

Banner concludes by noting an interesting shift in the race-death penalty nexus. In the 1960s and ’70s, opposition to capital punishment was used in the battle against racial disparities in general. Today, in contrast, racial disparities are used to condemn the capital punishment system as a whole.

Part II, “Race and the Death Penalty Process,” examines the effect of race in today’s death penalty process, focusing in particular on the role of the capital jury. The beginning essay takes a broad view of one death penalty system. Glenn L. Pierce and Michael L. Radelet analyze legal and extralegal factors in the death penalty system of Illinois, using statistical data they gathered from various criminal agencies. The extralegal factors include sex of offender and victim, race of offender and victim, and geographic region.

Pierce and Radelet found that cross-regional differences, sex of murder victim, and race of victim were all statistically significant. The authors also note that although it first appears that black offenders are less likely to receive a death sentence, “it is important to also control for the race of the victim.” Seeing the data in this light shows that “blacks are most likely to be convicted for killing other blacks, and the murders of black victims are the least likely to receive a death sentence.”

In “Death in ‘Whiteface’: Modern Race Minstrels, Death Penalty Judgments, and the Culture of American Apartheid,” Benjamin Fleury-Steiner grapples with how racial prejudice enters the jury room. He examines stories told by capital jurors in an effort to analyze the effect on death penalty sentencing of the “ideology or broad belief system grounded in the idea that the poor nonwhite or ‘white trash’ others are innately prone to irre-

sponsibility and immorality.” He asserts that in order to fulfill jury expectations, jurors must don a “white face,” identifying themselves with the class of privilege and solidifying their own identity by defining the “other” as their polar opposite. Juries, behind closed doors, are able to “keep the nefarious tradition of minstrelizing the other *alive*.”

The minstrel shows of the nineteenth century were as much about “communicating stories of dominant-subordinate racial *identities*” as they were tools for demeaning blacks. Today, however, overt acts of racism are no longer as commonplace in the justice system. Instead, Fleury-Steiner asserts, the racism that is unseen or unsaid is “driven by *implied* ideological representations minus the blatantly racist, cork-painted face that was synonymous with Jim Crow-era black face minstrel performances.”

The criminal black minstrel narrative is an often-relied-upon stereotype in jury sentencing decisions, and just as during the pre-civil-rights era, this narrative tells the story that “whites are law-abiding and blacks are lawless.” Creating and heeding this narrative of black lawlessness “serves to legitimize America’s excessively punitive war on economically and racially marginalized outsiders.” Specifying blacks as inherently criminal “has been an indispensable way for political elites to justify the ‘dangers’ of black crime as it simultaneously reinvests . . . in white suburban privilege.”

The juror stories collected by Fleury-Steiner exhibit the tenacity of these images in current American thought. The racialization of the defendant is a way for the juror to help identify and assimilate the defendant’s identity into the juror’s schema. Mitigating factors, such as a language barrier or a history of abuse, are not significant to the white-faced juror and can be seen as threatening to his sense of the defendant’s individual responsibility. The death penalty provides an arena within which these minstrelized narratives operate in our criminal justice system. Fleury-Steiner concludes that “[t]he death penalty forces jurors into an endless and, indeed, arbitrary game of privileging one life over another.”

Mona Lynch concludes Part II by trying to understand further the dynamics of racialization in death penalty juries. Lynch notes that stereotyping of the kind described by Fleury-Steiner operates below the level of consciousness, a circumstance that renders impossible its removal from the jury sentencing process. Modern prejudice is especially insidious in that it veils itself with the formalities of the law, masking its previously overt nature.

Lynch lists four elements of the capital system that leave room for the articulation of subconscious racism. First, the capital jury selection process allows for a demographically skewed group of people more likely to “hold racial stereotypes and biased attitudes about people of color.” Second, the nature of capital trials “involves violence and often other forms of serious criminal behavior [and] feeds into cultural stereotypes about several ethnic groups.” While some stereotypes of blacks have faded, their purported “inherently violent nature” is one that has held strong over time. Third, the ambiguous nature of death-sentencing allows room for aversive racism to flourish (aversive racism espouses egalitarian beliefs but engages in racism under “nonracial” auspices). Fourth, because empathy plays a large role in sentencing, generalized racism will prevent jurors from empathizing with the defendant, and will affect the way jurors view mitigating evidence.

To test these hypotheses, Lynch reports the results of an experiment whereby laypersons were shown footage of a simulated capital trial but were told was a real trial. Investigators manipulated the footage to vary the race of the defendant and the victim, and then asked the test subjects to render their decisions based on the evidence of the crime, as well as the aggravating and mitigating evidence presented. Some were asked to give an individual judgment; others were grouped into “juries.” The test was designed to determine if, “in this complex, yet ambiguous, decision-making task, race of defendant and race of victim would have an impact on penalty decision.”

Lynch asserts that these findings show the “pervasive influence of cultural stereotypes about race.” Even more, with the pretense of “guided discretion,” jurors are able to “rationalize that the law and the guidelines have led them to the outcome they have chosen.” She concludes that the law clings to the traditional model of overt racism and continues to ignore the very different and subtle modern racism that pervades our capital system today.

Part III, “Race, Politics, and the Death Penalty,” moves beyond the legal process to broaden our understanding of ways to think about and combat the racialization of capital punishment. It begins with Stephen Bright’s “Discrimination, Death, and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty.” Bright argues that the legal safeguards in our capital punishment system, “are either nonexistent or inadequate.” To combat racism, *McCleskey* relied upon the right to a repre-

sentative jury, prohibition of peremptory challenges on the basis of race, and the right to question jurors regarding potential bias in interracial crimes. However, as Bright asserts, these rights are not being enforced, and even when they are, are not strict enough to combat the kind of racism described by Fleury-Steiner, Lynch, and others. Moreover, the historical racism of the death penalty cannot be ignored because it is one of America's "most prominent vestiges of slavery and racial violence."

Bright outlines many studies as well as specific cases that show the racism faced by black defendants. Within the death penalty system, blacks are present often only as defendants because "even in many areas with substantial minority populations, all of the judges and prosecutors are white." Voting jurisdictions are drawn to dilute minority votes; juror commissions help keep blacks out of the jury pools; and minorities are excluded from top positions in law enforcement. Unconscious racism is extremely dangerous to the capital system in that it is very hard to detect. A juror may have a latent fear of blacks, thus making conviction or a death sentence a more likely outcome.

Although there is popular support for the death penalty, Bright argues that we must not expedite executions lest we undermine the foundations of our entire legal system. "Courts cannot deliver justice when they tolerate prejudice and racial exclusion." He says that courts must officially recognize the discrimination because "[s]ilence about racial discrimination in capital cases will only allow it to continue to fester." Once it is acknowledged, we can begin to consider the rearrangements in our society and politics that will be necessary to begin to come to terms with it.

We conclude this book by considering the place of race in today's abolitionist politics. In "The Rhetoric of Race in the 'New Abolitionism,'" Austin Sarat declares that traditional abolitionists opposed the death penalty on three principles closely associated with humanist liberalism or political radicalism: (1) the sanctity of life (all humans are to be treated with dignity, even criminals); (2) "the moral horror, the 'evil,' of the state willfully taking the lives of any of its citizens"; and (3) death is always a cruel punishment. Today's abolitionism, instead, turns on the legal precepts of due process and equal protection. Central to both forms of abolitionism has been the question of racial inequalities in death sentencing.

After *Furman*, which halted all executions, an intense pro-capital-punishment backlash occurred, and the Supreme Court reversed its position in *Gregg*, allowing executions to continue with certain procedural safeguards. Pro-capital-punishment sentiment, until recently, has been on the

rise, making the work of abolitionists extremely difficult. Procedural safeguards have been stripped as the public grew impatient with the small number of executions and the slow pace of the appeals system. On all this, the new abolitionist seeks to “change the subject from the legitimacy of execution to the imperatives of due process.”

Long after *Furman*, Justice Harry Blackmun became a leading voice for the new abolitionism, declaring boldly that he would “no longer tinker with the machinery of death.”<sup>41</sup> He had determined that the goals of consistency and individuality could not be attained simultaneously. Race was the center of his attention. He noted that the guided discretion formula provided for in *Gregg* allowed the racial prejudices in society to infect the justice system.

The American Bar Association embraced the principles of new abolitionism when it “called for a complete moratorium on executions in the United States.” Taking a somewhat optimistic approach, like Blackmun, the ABA implied that the death penalty, as *currently administered*, is unconstitutional—apparently leaving open the possibility of a reformed, constitutional death penalty scheme at some future time. However, Sarat asserts that this is effectively “a call for the abolition, not merely the cessation, of capital punishment.” The reforms for which the ABA holds out hope for are simply impossible in light of the “pervasiveness of racial prejudice throughout the society combined with the wide degree of discretion necessary to afford individualized justice.” The ABA’s action lends “legitimation to the new abolitionism, and the basis for a nationwide moratorium movement.”

Sarat views the actions of Illinois Governor George Ryan as a “powerful expression of the new abolitionism.” In January 2000, Ryan declared a moratorium on all executions and then subsequently commuted all death row sentences. He remarked upon the pervasiveness of race in the death penalty system but leaned most heavily on the notion of condemning innocent men and women. His attention to the subject has helped provide “new abolitionists with their most powerful rhetorical weapon and a springboard to other issues.” The moratorium announcement helped fuel the debate about race and capital punishment, but Sarat contends that with it, “wrongful conviction, not race, became the central element” of new abolitionism.

The place of race in death penalty debate has shifted since the times of *Furman*. Governor Ryan’s reliance on innocence has “diminished the importance of race in new abolitionist rhetoric.” The shift is necessary,

according to Sarat, in order to “transcend the usual political and ideological divides” that the issue of race tends to create. He cautions, however, that new abolitionists “must resist the temptation to further marginalize the discourse of race in their rhetoric and politics,” and must also use “the practices of capital punishment to highlight the role that the state has played, and continues to play, in the constitution of race relations.”

Today the death penalty is the new “peculiar institution” of American society. Its advocates proclaim that it is doled out only to the guilty. However, statistics illuminate an abyss between the number of minority executions relative to the minority population as a whole; the fact that the vast majority of capital defendants are charged with crimes against whites; and the overwhelming numbers of innocent men freed from death row in recent years who were from minority groups. Race and the death penalty have been, and continue to be, deeply entangled. When these facts are looked at in light of the amount of discretion that is involved in the capital sentencing process from the time of arrest through the time of sentencing, it is hard not to conclude that in the future race will continue to pervade the process. From the racial profiling that occurs before an arrest, to the prosecutorial decision of whether to seek the death penalty, to the peremptory challenges of jurors, to the final decision of whether to impose the death penalty, there are many opportunities for prejudice to infect the system.

The chapters in this book illustrate the various ways that the death penalty is racialized, address the reasons for the profound impact of race on the death penalty, and highlight the blight that the racially discriminatory application of the death penalty has placed on the United States. Together, they invite and foster discussion of a persistent problem that we no longer have the luxury of ignoring.

#### NOTES

1. Sheryl Gay Stolberg, *Senate Issues Apology Over Failure on Antilynching Law*, N.Y. TIMES, June 14, 2005.

2. See *Maxwell v. Bishop*, 398 U.S. 262 (1971) and *Coker v. Georgia*, 433 U.S. 584 (1977).

3. See *id.*

4. *Id.* at 289 (quoting *McCleskey v. Kemp*, 753 F.2d 877, 891 (11th Cir. 1985)) (alteration in original). As an example of the drastic claims of disproportionality that were nonetheless found unacceptable under *McCleskey*, see *Stephens v. State*, 456 S.E.2d

560, 561 (Ga. 1995) (finding insufficient for federal and state due process and equal protection challenges Stephens's evidence that "[i]n Hall County, where Stephens was convicted, the trial court found that one hundred percent of the persons serving a life sentence [were] African-American, although African-Americans make up less than ten percent of the county population and approximately fifty to sixty percent of the persons arrested in drug investigations. Relying on evidence provided by the State Board of Pardons and Paroles, the trial court also found that 98.4 percent of the persons serving life sentences for drug offenses were African-American, although African-Americans comprise only 27 percent of the state's population.").

5. *McCleskey*, 481 U.S. at 297 n.7.

6. <http://www.aclu.org/DeathPenalty/DeathPenalty.cfm?ID=9312&c=62> and <http://www.deathpenaltyinfo.org/article.php?scid=5&did=184>.

7. *Id.* at 7.

8. THE SENTENCING PROJECT, RACIAL DISPARITY IN SENTENCING: A REVIEW OF THE LITERATURE 1 (Mark Mauer, ed., 2005).

9. See, e.g., Jesse Jackson et al., LEGAL LYNCHING: THE DEATH PENALTY AND AMERICA'S FUTURE 72 (2001) ("[T]here is a special relationship between the death penalty and African-Americans, a relationship going back to antebellum days, when the gallows was a means of punishing slaves, and on through the worst years of Jim Crow.").

10. "The death penalty is a direct descendant of lynching and other forms of racial violence and racial oppression in America." Stephen B. Bright, *Discrimination, Death, and Denial: Race and the Death Penalty*, in MACHINERY OF DEATH: THE REALITY OF AMERICA'S DEATH PENALTY REGIME 45 (David R. Dow & Mark Dow, eds., 2002).

11. For an analysis of Ryan's decision, see Austin Sarat, MERCY ON TRIAL: WHAT IT MEANS TO STOP AN EXECUTION (2005). See Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1 (2002) (maintaining that Governor Ryan's decision was not based on a moral opposition to the death penalty but, rather, on concerns about systemic problems, and that 66 percent of Illinois residents approved of the governor's moratorium).

12. See Amnesty International, *United States of America: Death by Discrimination—The Continuing Role of Race in Capital Cases* (April 2003).

13. For example, a Pennsylvania committee recommended that the state legislature pass a racial justice act and commission studies to scrutinize the impact that a victim's race may have on a jury's decision to put a defendant to death. Kentucky has also enacted its own version of the Racial Justice Act, which allows defendants in capital cases to use statistical evidence of racial discrimination to demonstrate that race influenced the decision to seek the death penalty. Amnesty International USA, *Death Penalty Facts: Racial Prejudices*, available at <http://www.amnestyusa.org/abolish/racialprejudices.html>.

14. Maggie Mulvihill & Franci Richardson, *It's Time for Age of Innocence: A Call for Commission on Wrongful Convictions*, BOSTON HERALD, May 7, 2004, available at <http://news.bostonherald.com/localRegional/view.bg?articleid=22001>.

15. <http://www.innocenceproject.org/>.

16. <http://www.deathpenaltyinfo.org/newsanddev.php?scid=5>.

17. In Senate hearings, the proposed bill was referred to as the so-called Racial Justice Act: opponents of the bill said that “the racial quota death penalty provision—the so-called Racial Justice Act is really a death penalty abolition act.” 140 Cong. Rec. S-12269, 103rd Cong., 2d Sess. (1994).

18. Data available from the Death Penalty Information Center, <http://www.deathpenaltyinfo.org>.

19. *Atkins v. Virginia*, 536 U.S. 304 (2002).

20. 125 S. Ct. 1183 (2005).

21. *Id.* at 1200.

22. *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958).

23. *Roper*, 125 S. Ct. at 1191–92.

24. 125 S. Ct. 2317 (2005).

25. 125 S. Ct. 2410 (2005).

26. 125 S. Ct. 1183 (2005).

27. 106 S. Ct. 1712 (1986).

28. *Id.* at 1716.

29. *Roper*, 125 S. Ct. at 1200.

30. *Id.* at 1198.

31. *Id.*

32. *Id.* at 1199.

33. See Linda Greenhouse, *Justices Give Second Hearing in a Texas Death Row Case*, N.Y. TIMES, Dec. 7, 2004 (“In the intervening two years [before the Miller-El case], the Supreme Court has made clear its growing unease with the administration of the death penalty in Texas and its exasperation with the state and federal courts that hear appeals from the state’s death row.”).

34. *Johnson v. California* (125 S. Ct. 2410); *Miller-El v. Dretke* (125 S. Ct. 2317)

35. *Id.*

36. Cragg Hines, *Supremes to Texas Appeals Court: You Still Don’t Get It*, HOUSE CHRON., Nov. 21, 2004.

37. See <http://www.cbsnews.com/stories/2001/07/03/supremecourt/main299592.shtml>.

38. *Id.*

39. See, e.g., O’Connor Speech Puts Foreign Law Center Stage, Jonathan Ringel, *Fulton County Daily Report* 10-31-2003, available at [http://www.law.com/jsp/newswire\\_article.jsp?id=1067350962318](http://www.law.com/jsp/newswire_article.jsp?id=1067350962318) (maintaining that international decisions should be persuasive authority in American courts). Justice Breyer has repeatedly demonstrated a reliance on international law in such contexts. See, e.g.,

*Knight v. Florida*, 528 U.S. 990 (1999) (Breyer, J. dissenting from the denial of certiorari) (“A growing number of courts outside the United States—*courts that accept or assume the lawfulness of the death penalty*—have held that lengthy delay in administering a *lawful* death penalty renders ultimate execution inhuman, degrading, or unusually cruel.”).

40. See *Roper*, 125 S. Ct at 1198 (“Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”).

41. See *Callins v. Collins*, 510 U.S. 1141, 1145 (1994).