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Black Man's Burden: Race and the Death Penalty in America

Nearly 120 years ago, Frederick Douglass, the former slave and great African American leader, described the American criminal justice system as follows: "Justice is often painted with bandaged eyes. She is described in forensic eloquence, as utterly blind to wealth or poverty, high or low, white or black, but a mask of iron, however thick, could never blind American justice, when a black man happens to be on trial."[1] Sadly, little has changed in the century and a half since Douglass had cause to condemn the state of the justice system in America. Nowhere is this more true than in the application of the "ultimate punishment"—the punishment of death.

After September 11th, America's attitudes about crime and punishment shifted dramatically. Americans, without regard to race, class, or religion, were all shocked by the tragic circumstances of the terrorist attack, and have not been reluctant to seek vengeance. The response in the African American community has been particularly surprising, given the history of racial discrimination in America. As I discuss the intersection of race and criminal justice, specifically in the context of capital punishment, it is critical to reveal some facts that are frequently ignored in this country today. African Americans are, by and large, conservative. They are among our nation's most patriotic citizens. They are prepared to sacrifice their own liberty by supporting governmental efforts to protect their security. Even though discriminatory treatment by law enforcement against African

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[1] Frederick Douglass, The United States Cannot Remain Half-Slave and Half-Free, Speech on the Occasion of the Twenty-First Anniversary of Emancipation in the District of Columbia, delivered in the Congregational Church, Washington, D.C. (April 16, 1883), *in* 4 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, RECONSTRUCTION AND AFTER 357 (Philip S. Foner ed., 1975).

Americans is well documented,[2] a recent survey indicates that an overwhelming majority of African Americans support the racial profiling of Muslims and Arab-Americans as a result of September 11th.[3]

Like the entire criminal justice system, the administration of the death penalty in America places a disproportionate burden on African Americans. The focus of my comments will be on race and capital punishment. Beyond my concerns about race, the death penalty faces challenges from a number of other quarters as well. Among the most recent developments:

- On June 20, 2002, the Supreme Court decided *Atkins v. Virginia*,[4] holding that it is unconstitutional to execute the mentally retarded. Writing for the court, Justice Stevens followed previous decisions articulating how the Eighth Amendment's prohibition on cruel and unusual punishment is to be applied. The Court noted that prohibited forms of punishment are not fixed, but rather vary according to "evolving standards of decency that mark the progress of a maturing society."[5] When the Supreme Court upheld executions of the mentally retarded thirteen years ago in *Penry v. Lynaugh*,[6] Justice Sandra Day O'Connor's reasoning for the majority was based on a determination that there was no national consensus against the practice—that is, executing the mentally retarded did not violate Americans' notions of decency at the time.[7] Since that case was decided in 1989, the number of death penalty states barring executions of the retarded has grown from two to eighteen, such that eighteen of thirty-eight death penalty states—and thirty of fifty states total—bar executions of the mentally retarded.[8] In *Atkins*, Justice O'Connor was again in the majority, but this time holding that "evolving standards of decency" now prohibit

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[2] *See, e.g.*, David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999).

[3] *See* Mark Z. Barabak, *America Attacked; Times Poll; U.S. Keen to Avenge Attacks*, L.A. TIMES, Sept. 16, 2001, at A1 (noting that 68% of non-white poll respondents supported racial profiling of "people who fit the theoretical description of a terrorist").

[4] 122 S. Ct. 2242 (2002).

[5] *Id.* at 2247 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

[6] 492 U.S. 302 (1989).

[7] *Id.* at 334.

[8] *See* Aimee D. Borromeo, Comment, *Mental Retardation and the Death Penalty*, 3 LOY. J. PUB. INT. L. 175 (2002).

executing the mentally retarded.[9]

- Further evidence of the shift in attitude came in late February 2002, when the Georgia Parole Board commuted the death sentence of a mentally ill defendant to life in prison.[10] We will watch carefully Supreme Court cases in the near future since we can see that even staunch supporters of capital punishment, like Justice O'Connor, are noticing the public mood shifting away from the death penalty.
- In addition, the Supreme Court issued a stay of execution on February 15, 2002, to Thomas Miller-El, an African American death row inmate in Texas who claims that prosecutors deliberately kept African Americans off the jury during his murder trial.[11] Miller-El's case could provide some much-needed clarity to the Supreme Court's jurisprudence on racial discrimination in jury selection, and, as I will discuss shortly, could also provide one step toward reducing the disparities in sentencing rates of people of color sitting on death row.
- The Supreme Court also recently found unconstitutional state death penalty laws that allow the judge, rather than the jury, to decide whether the death penalty will be imposed. This case, *Ring v. Arizona*,[12] implicates capital punishment laws in nine states, calling into question up to 800 death sentences.[13]
- More recently, a federal district court judge in New York struck down the Federal Death Penalty Act as unconstitutional because it "deprived innocent people of a significant opportunity to prove their innocence . . . [and] creates an undue risk of executing innocent people."[14] On September 24, 2002, a federal district judge in Vermont overturned a death sentence based on a finding that the Federal Death Penalty Act determines eligibility for imposition of the death penalty in a manner inconsistent with Sixth Amend-

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[9] *Atkins*, 122 S.Ct. at 2252.

[10] *Georgia Won't Execute Mentally Ill Killer*, TIMES UNION (ALBANY), Feb. 26, 2002, at A3.

[11] Miller-El v. Cockrell, 122 S.Ct. 981, *amended at* 122 S. Ct. 1202 (2002).

[12] 122 S.Ct. 2428 (2002).

[13] *See*, *e.g.*, Charles Lane, *Court: Judges Can't Impose Death Penalty; Only Jury May Decide to Execute Defendant*, WASH. POST, June 25, 2002, at A1.

[14] United States v. Quinones, 205 F. Supp. 2d 256, 257 (S.D.N.Y 2002).

ment and Due Process rights.[15] The court also noted that "[c]apital punishment is under siege."[16]

- And finally, Professor James Liebman of Columbia Law School released the second part of his comprehensive study of error rates in capital sentencing in early 2002. The initial findings from two years ago showed an error rate in capital sentencing of 68%—that is, more than two out of every three death sentences were overturned due to "serious error."[17] Further study has shown that the states that use the death penalty most often have error rates that exceed the national average, and that the occurrence of capital sentencing error is higher in states that have a higher proportion of African Americans in the population.[18]

In addition to issues regarding who should be eligible for execution, who makes that decision, and how to guarantee accuracy and avoid error, there is a fundamental issue regarding the role that race has played in the death penalty in America. I will discuss a number of racial elements of the application of capital punishment, and I will specifically mention the impact of the death penalty on black defendants, black victims, and black communities. In the context of race, I will note the connection between the current system of capital punishment and the historical use of extra-judicial lynchings against blacks during the Jim Crow era. Based on this analysis I will then raise some questions regarding the best strategies for abolitionists who want to address the racially disparate impact of the death penalty.

I

THE LEGACY OF LYNCHING

In a sense, to take a historical view, the racially disproportionate application of the death penalty can be seen as being in historical continuity with the long and sordid history of lynching in this country. It is also notable in this regard that the states of

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[15] *See* United States v. Fell, 2002 WL 31113946 (D. Vt. 2002).

[16] *Id.* at *17.

[17] JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 i, 4-5 (2000), *available at* http://justice.policy.net/proactive/newsroom/release.vtml?id=18200.

[18] *See* James S. Liebman et al., A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It ii-iii (2002), *available at* http://justice.policy.net/proactive/newsroom/release.vtml?id=26641.

what is often called the "Death Belt"[19]—the southern states that together account for over 90% of all executions carried out since 1976—overlap considerably with the southern states that had the highest incidence of extra-legal violence and killings during the Jim Crow era.[20] This similarity appears to be more than mere coincidence or correlation—and indeed, a cursory evaluation of some of the factors that explain the high incidence of lynching shows that many of those factors are present in the impulse to impose capital punishment today.

Before evaluating the factors that motivated lynchings in America, it is instructive to begin with a case study.[21] While the facts of the case described in the Supreme Court's decision of *United States v. Shipp*[22] seem astonishing in many respects, they were altogether common in many places in this country at the time.

In a cemetery in Chattanooga, Tennessee, lies an unremarkable headstone for Ed Johnson, a black man born in 1882 who died at the hands of a white lynch mob on March 19, 1906.[23] The inscription reads: "God bless you all. I am an innocent man . . . Farewell until we meet again in the sweet by and by."[24]

Ed Johnson was a young, uneducated African American who grew up in Chattanooga. He had no job, no home, and no immediate family. In the early 1900s, he was wrongly accused of raping a white woman. During his trial, he was taunted by the public, the press, and even by a member of the jury. The trial judge and the Tennessee trial courts ignored both these procedural injustices and his actual innocence. An all-white jury con-

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[19] The nine states that make up the Death Belt are, in order of the number of executions: Texas, Florida, Louisiana, Georgia, Virginia, Alabama, Mississippi, North Carolina, and South Carolina. *See* Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923, 1924-25 & n.14 (1994); *see also* Stephen B. Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679, 682 n.12 (1990).

[20] States with the highest number and rate of lynchings between 1900 and 1929 include the nine Death Belt states in addition to Arkansas, Kentucky, Missouri, Oklahoma, and Tennessee. *See* SOUTHERN COMMISSION ON THE STUDY OF LYNCHING, LYNCHINGS AND WHAT THEY MEAN 74 tbl. II (1931).

[21] The case of Ed Johnson's lynching is described in detail in MARK CURRIDEN & LEROY PHILLIPS, JR., CONTEMPT OF COURT: THE TURN-OF-THE-CENTURY LYNCHING THAT LAUNCHED 100 YEARS OF FEDERALISM (1999).

[22] 214 U.S. 386 (1909).

[23] *See* CURRIDEN & PHILLIPS, *supra* note 21.

[24] *Id.*

victed him of rape, and there was vocal demand for him to be lynched. The lives of two black lawyers and a white Supreme Court justice intersected in an effort to save Ed Johnson from an unfair conviction and an illegal lynching.

Noah Parden and his law partner, Styles Hutchins, feared that the local sheriff, Joseph Shipp, would allow an unruly, white lynch mob to kill Ed Johnson before Johnson's conviction and sentence could be reviewed. Parden and Hutchins took the unprecedented step of traveling to Washington, D.C., to ask the Supreme Court to hear Mr. Johnson's appeal.[25]

In what may be the first argument ever made by African American lawyers before a Justice of the United States Supreme Court, Parden and Hutchins met with Justice John Marshall Harlan and urged him to intervene to prevent Johnson's lynching in Tennessee. Many recall Justice Harlan's powerful and lonely dissent in *Plessy v. Ferguson*,[26] in which he argued:

> [I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.[27]

Parden and Hutchins were fortunate that Justice Harlan accepted their arguments that the Supreme Court should intervene to ensure an opportunity for appellate review of a fatally defective conviction. Justice Harlan issued a stay of execution, prohibiting the state of Tennessee from executing Johnson. Despite this impressive victory, Sheriff Shipp and the white lynch mob ignored the Supreme Court's directive. As the Supreme Court subsequently determined, Sheriff Shipp facilitated the mob's efforts to remove Mr. Johnson from jail and to lynch him.[28] In fact, Mr. Johnson was lynched, shot and his body mutilated. In an unprecedented step, the U.S. Department of Justice filed contempt of court charges in the Supreme Court against Sheriff

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[25] *Id.* at 3-4.

[26] 163 U.S. 537 (1896).

[27] *Id.* at 559 (Harlan, J., dissenting), *quoted in* CURRIDEN & PHILLIPS, *supra* note 21, at 11.

[28] *See* United States v. Shipp, 214 U.S. 386 (1909).

Shipp and several associates.[29] They were convicted, but in further irony to Ed Johnson's death, received sentences of less than three months.

Unfortunately, the tragic circumstances did not end with Ed Johnson's lynching. The two African American lawyers, Parden and Hutchins, became frequent targets of death threats, were ostracized by African Americans in their own community for stirring up racial tensions, and virtually lost their law practice.[30]

Even Parden's minister publicly opposed the effort to appeal Johnson's conviction to the Supreme Court, telling the *Chattanooga News* that "[t]he best [element] of the colored people do not approve of reopening the case and the colored lawyers who are advocating it are making a serious mistake, not only for themselves but for the community in which they live."[31]

The Johnson case is but one example of many lynchings that took place in the South—the Tuskegee Institute estimates that nearly 5,000 lynchings took place between 1882 and 1968.[32] While lynchings no longer occur at the same frequency as during the Jim Crow era, the practice certainly did not stop in the 1960s—to give one prominent example, just four years ago in Texas, an African American was chained by two white assailants to the back of a pickup truck, and was dragged through the streets until he was decapitated.[33]

A number of factors appear to have motivated the practice of lynching. At a fundamental level, lynching was an expression of racism and racial discrimination—it reflected an effort to assert the superiority of whites over blacks. A number of sociologists, including Gunnar Myrdal, have suggested that lynching was a tool used to maintain racial caste distinctions and to keep blacks in a position of subjugation.[34] As such, it served not only to eliminate individual blacks who had violated social norms, but also functioned as a powerful incentive for blacks to "learn their place." Even a summary glance at the statistics presented in

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[29] *See* CURRIDEN & PHILLIPS, *supra* note 21, at 253-57.

[30] *Id.* at 234-35.

[31] *Id.* at 146.

[32] *See* ROBERT L. ZANGRANDO, THE NAACP CRUSADE AGAINST LYNCHING, 1909–1950 5-7 (1980).

[33] *See* King v. State, 29 S.W.3d 556, 558-59 (Tex. App. 2000); *see also Painful Killing Described as Trial Nears Its End*, N.Y. TIMES, Feb. 23, 1999, at A16.

[34] *See* GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 36, 563 (1944).

more recent examinations of racial disparities in capital sentencing, to be discussed shortly, demonstrates that racial discrimination is still a powerful force in the decisions the legal system makes about who gets to live and who will die.

In addition, a number of historians have commented on the recreational element of extralegal killings. As one historian wrote: "In rural [areas] . . . lynchings, manhunts and kidnappings certainly offered a degree of 'excitement' to otherwise culturally deprived southerners. The noted social critic H.L. Mencken said as much when he argued that the gala events surrounding lynchings were pathological substitutes for more normal community activities."[35] That an element of recreation still exists in legal executions today is reflected in contemporary accounts of execution observers. The Reverend Jesse Jackson quoted a prison pastor as stating, on the eve of an execution by hanging in 1993: "If this execution . . . were not in its essence an act of barbarism, there would not have been more than 100 reporters waiting to see if they would be chosen by lottery to serve as one of the 12 official witnesses of the actual execution."[36] And more than 1,500 journalists applied to witness Timothy McVeigh's execution;[37] this in addition to the thousands of requests that Attorney General John Ashcroft received for the execution to be publicly televised.[38]

Lynchings served a number of other purposes as well. The impulse may have been an expression of anti-state sentiments, or more specifically, a concern that state judicial processes were not to be trusted to reach the correct outcome. In this regard, lynchings may have reflected concern with the possibility of acquittals, or a concern for the delay between the moment of judgment and the moment when the sentence would be carried out.

In addition, lynching can be seen as a manifestation of a peculiar culture of violence in America's southern states.[39] A number of historians have discussed the southern "code of honor," which

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[35] WALTER T. HOWARD, LYNCHINGS: EXTRALEGAL VIOLENCE IN FLORIDA DURING THE 1930s 139 (1995).

[36] JESSE JACKSON, LEGAL LYNCHING: RACISM, INJUSTICE, AND THE DEATH PENALTY 26 (1996) (quoting the pastor of Walla Walla prison in Washington).

[37] *See* Sally Jackson, *Dispatches from Texas*, THE AUSTRALIAN, Apr. 26, 2001, at M08.

[38] *See* Kim Campbell, *Does Public Have a Right to Watch?* CHRISTIAN SCI. MONITOR, June 12, 2001, at 1.

[39] Although most lynchings occurred in the South, between 1882 and 1968 there were lynchings in every state in the continental United States except Massachusetts,

justified extreme violence when that code was breached, and thus promoted and countenanced lynching and mob violence.[40]

Given the many similarities between the illegal but often officially sanctioned practice of lynching, and the current imposition of the death penalty, it seems at times that the only difference between lynching and capital punishment is the gloss of legality and procedural regularity that the latter enjoys. In this regard, application of the death penalty may be fairer than the vigilante justice that characterized the Jim Crow era, but not by much.

In fact, a number of scholars and activists have referred to America's history of lynching and Jim Crow as the appropriate point of reference for an understanding of the dynamics of our current legal system. Reverend Jackson used the title "Legal Lynching" for his book on the death penalty;[41] and Professor Emma Coleman Jordan has hypothesized that "lynching [is] a contemporary civic metaphor for the black experience within the American legal system."[42]

II

RACE AND THE DEATH PENALTY

This history of lynching and the reasons for its prevalence will be useful to bear in mind as we consider the ways in which race still predominates in the American criminal justice system.

A. Racial Discrimination in Jury Selection

An examination of recent findings just in the area of racial jury composition illustrates this point. Race has historically played a role in the ability of black defendants to invoke their right under the U.S. Constitution to a fair and impartial jury of their peers,[43]

Rhode Island, New Hampshire, and Connecticut. *See* ZANGRANDO, *supra* note 32, at 5 tbl.1.

[40] *See*, *e.g.*, HOWARD, *supra* note 35, at 21, 92 (citing JACQUELINE DOWD HALL, REVOLT AGAINST CHIVALRY: JESSIE DANIEL AMES AND THE WOMEN'S CAMPAIGN AGAINST LYNCHING (1979)).

[41] *See* JACKSON, *supra* note 36.

[42] Emma Coleman Jordan, *Crossing the River of Blood Between Us: Lynching, Violence, Beauty, and the Paradox of Feminist History*, 3 J. GENDER RACE & JUST. 545, 547 (2000).

[43] The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accu-

and the racial composition of the jury is of particular importance in capital cases. These rights are dramatically undermined by the use of peremptory jury challenges as a pretext for discriminating against people of color.

Some background into the relevant history and caselaw is necessary at this point. In the 1986 decision *Batson v. Kentucky*,[44] the Supreme Court held that prosecutorial use of peremptory challenges to exclude potential jurors on the basis of race violated the Equal Protection Clause. In a concurring opinion, Justice Thurgood Marshall (who had other problems with the decision, to be discussed in a moment) celebrated the decision as a "historic step toward eliminating the shameful practice of racial discrimination in the selection of juries."[45]

Before *Batson*, prosecutors routinely struck black jurors based purely on racism, or gross racial prejudice and generalizations. The history of criminal prosecution in Dallas County, Texas, is illustrative of this point. The prosecutor's office in Dallas County prepared a jury selection instruction book that included the following instruction: "Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury no matter how rich or well educated."[46] Even once the instruction manual was revised to remove the explicitly racist terms, prosecutors were still advised to eliminate "any member of a minority group" from a petit jury.[47]

While such blatant and outrageous instructions now seem to be a relic of the past, existing statistical evidence reveals the continuing disproportionate use of peremptory challenges to remove blacks from the venire.[48] As one commentator has explained,

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sation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the [a]ssistance of [c]ounsel for his defense.

U.S. CONST. amend. VI.

44 476 U.S. 79 (1986).

45 *Id.* at 102 (Marshall, J., concurring).

46 *Id.* at 104 n.3.

47 *Id.* at 104.

48 *See*, *e.g.*, *id.* at 103 (citing United States v. Carter, 528 F.2d 844, 848 (8th Cir. 1975)) ("In 15 criminal cases in 1974 in the Western District of Missouri involving black defendants, prosecutors peremptorily challenged 81% of black jurors."); *id*. at 103 (citing United States v. McDaniels, 379 F. Supp. 1243 (E.D. La. 1974)) ("[I]n 53 criminal cases in 1972-1974 in the Eastern District of Louisiana involving black defendants, federal prosecutors used 68.9% of their peremptory challenges against black jurors, who made up less than one-quarter of the venire."); *id.* at 103 (citing McKinney v. Walker, 394 F. Supp. 1015, 1017-18 (D.S.C. 1974)) ("[I]n 13 criminal

"the discriminatory use of peremptory challenges is the single most significant means by which racial prejudice and bias are injected into the jury selection system."[49]

Batson has been viewed as a major accomplishment in the effort to eliminate this form of jury discrimination. The Court in *Batson* reaffirmed the principle, established in *Strauder v. West Virginia*,[50] that a state denies a black defendant equal protection by putting him on trial before a jury from which members of his race have been purposefully excluded.[51] Moreover, *Batson* reaffirmed the principle, announced in *Swain v. Alabama*,[52] that a state's purposeful denial of jury participation on the basis of race also violates the excluded juror's Fourteenth Amendment right to equal protection.[53]

The *Batson* decision, however, left to the trial courts the important issue of determining whether a defendant had established a prima facie case of discrimination, and whether the prosecution had rebutted that prima facie showing. The Supreme Court has since provided lower courts with little direction regarding how those determinations are to be made, and has declined to give lower courts more information on how to determine when a prosecutor's race-neutral justifications for challenges are acceptable.

State and lower federal courts have shown widely different views regarding the existence of a prima facie case under *Batson*. At the trial level, many courts frequently accept explanations that are no more than after-the-fact rationalizations for challenges which appear to have been made on subconsciously racial grounds.[54] For example, although the Alabama Supreme Court

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trials in 1970-1971 in Spartansburg County, South Carolina, involving black defendants, prosecutors peremptorily challenged 82% of black jurors.").

[49] Theodore McMillian & Christopher J. Petrini, Batson v. Kentucky*: A Promise Unfulfilled*, 58 UMKC L. REV. 361, 363 (1990); *see also* Sheri Lynn Johnson, *Batson Ethics for Prosecutors and Trial Court Judges*, 73 CHI.-KENT L. REV. 475 (1998); Felice Banker, Note, *Eliminating a Safe Haven for Discrimination: Why New York Must Ban Peremptory Challenges from Jury Selection*, 3 J. L. & POL'Y 605, 613 (1995).

[50] 100 U.S. 303 (1879).

[51] *See Batson*, 476 U.S. at 84-89.

[52] 380 U.S. 202 (1965).

[53] *See Batson*, 476 U.S. at 84; *see also* Arielle Siebert, Batson v. Kentucky*: Application to Whites and the Effect on the Peremptory Challenge System*, 32 COLUM. J.L. & SOC. PROBS. 307, 313 (1999).

[54] *See* Sheri Lynn Johnson, Comment, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1033 n.108 (1988) ("By prevailing usage, discriminatory

has insisted that "[n]o merely whimsical or fanciful reason will suffice as an adequate explanation,"[55] state trial courts have not always scrutinized prosecutorial explanations closely. In *Wallace v. Alabama*,[56] the prosecutor explained that he challenged:

- A young black female because she was a homemaker and lacked knowledge of what life was like out on the street;
- Another young black female because she was a student who did not indicate that she was working, and therefore "would not have had the necessary experience to be able to draw on and make a judgment in this case";
- An older black female who was retired, and might be more sympathetic because she "appeared to be a grandmotherly type";
- A young black male who had a beard, which the prosecutor explained meant he was likely to "go against the grain";
- A middle-aged black man because he was unemployed and therefore might be irresponsible; and
- A middle-aged black female because she appeared to be in the same age group as the defendants' parents or mothers.[57]

Amazingly, the trial court found the prosecutor's thin, allegedly "race-neutral" explanations sufficient to rebut the prima facie case of discrimination, and the appeals court affirmed.[58]

In *Missouri v. Alexander*,[59] a prosecutor explained that he challenged a black juror because the juror was unemployed, did not understand one of the questions asked during voir dire, and lived in a high crime neighborhood.[60] Unemployment, lower ed-

purpose encompasses race-dependent decisions, whether or not the actor is aware that race has influenced the decision making process.").

[55] Jackson v. Alabama, 516 So. 2d 768, 772 (Ala. 1986).

[56] 530 So. 2d 849 (Ala. Crim. App. 1987).

[57] *See id.* at 851-52. In other cases, courts have accepted prosecutors' explanations that a juror was challenged because of his or her demeanor. *See* United States v. Forbes, 816 F.2d 1006, 1010 (5th Cir. 1987) (finding a challenge to have been racially neutral when the prosecutor "sensed by [the juror's] posture and demeanor that she was hostile to being in court"); Illinois v. Talley, 504 N.E.2d 1318, 1327 (Ill. App. Ct. 1987) (finding a challenge to have been exercised for racially neutral reasons when the prosecutor explained that he was "not too happy with [the juror's] demeanor").

[58] *Id.* at 852.

[59] 755 S.W.2d 397 (Mo. Ct. App. 1988).

[60] *Id.* at 398.

ucation, and crime are found more frequently in minority communities, yet the court seemed unconcerned that minorities might be excluded disproportionately because of these reasons.

B. Disproportionate Imposition of Capital Punishment

Death penalty opponents have been pursuing claims of racial discrimination in the application of the death penalty for a long time. A number of major death penalty cases were actually brought as racial discrimination claims, even though the Supreme Court chose to decide the cases on other grounds. One example is *Coker v. Georgia*,[61] in which the Supreme Court invalidated laws that imposed the death penalty for the crime of rape.

Coker had argued in his brief to the Supreme Court that capital sentencing was tainted by an impermissible degree of racial bias. Coker presented evidence that over a twenty-year period in the South, black men accused of raping white women were more than eighteen times as likely to be sentenced to death as white men accused of the same crime.[62] But the Supreme Court decided the case solely on the grounds that the death penalty was disproportionate to the crime of rape, and was thus in violation of the Eighth Amendment's prohibition on cruel and unusual punishment.[63] The Court completely sidestepped the racial issue—remarkably, there is not a single mention of race, or of Coker's racial argument, in the Court's reported opinion.

There is ample other data of racial disparities in the criminal justice system. In February 2002, Human Rights Watch released an analysis of the 2000 Census data, and reported a number of disturbing, if unsurprising, findings:[64]

- Blacks and Hispanics make up 62% of the incarcerated population, though comprising only 25% of the national population.[65]

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[61] 433 U.S. 584 (1977).

[62] *See* Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 206 (2001).

[63] *See Coker*, 433 U.S. at 588-600.

[64] *See* Press Release, Human Rights Watch, U.S.: *Incarceration Rates Reveal Striking Racial Disparities* (Feb. 27, 2002), *at* http://hrw.org/press/2002/02/race0227.htm.

[65] The arrest rates for blacks are much lower than incarceration rates. *See* Sourcebook of Criminal Justice Statistics, Section 4, tbl.4.10 *at* http://www.albany.edu/sourcebook/1995/pdf/t410.pdf (reporting that for the year 2000 there were a to-

- In twelve states, between 10-15% of the black male population is in prison.
- In some states, Hispanic youths are incarcerated at seven to seventeen times the rate of white youths, and black youths are incarcerated at twelve to twenty-five times the rate of whites.
- Black women are incarcerated at rates between ten and thirty-five times greater than white women in fifteen states.

These statistics serve to highlight what we already knew about the overwhelming degree to which blacks are involved in the nation's penal system—as Marc Mauer's famous book *Race to Incarcerate* pointed out, *twenty-nine percent* of black males born in 1991 can be expected to be imprisoned in their lifetime.[66]

The Supreme Court's silence on the racial disparities in *Coker* is instructive—the Court was doing its best to avoid discussing the overwhelming evidence of racial disparity, and it succeeded. But less than ten years after *Coker*, the Court confronted the issue of racial discrimination in capital sentencing head-on, in the landmark case of *McCleskey v. Kemp*.[67]

Professor David Baldus' seminal study on racial disparities in the imposition of the death penalty[68] served as the centerpiece of the *McCleskey* case, in which Warren McCleskey's lawyers argued that the racially discriminatory application of Georgia's death penalty statute violated the Equal Protection Clause of the Fourteenth Amendment. The study revealed racial disparities in the imposition of the death penalty in the state of Georgia, and identified the race of both the defendant and the victim as determinative factors in whether a defendant would be sentenced to death.[69] Specifically, the study noted:

> [D]efendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks. According to this model, black defendants were 1.1 times as likely to receive a death sentence as other defendants. Thus, the Baldus study indicates that black de-

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tal of nine million arrests, of which 69.7% of those arrested were white and 27.9% were black).

[66] *See* MARC MAUER, RACE TO INCARCERATE 125 (1999).

[67] 481 U.S. 279 (1987).

[68] *See* David C. Baldus et. al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983).

[69] *See McCleskey*, 481 U.S. at 286-87.

> fendants . . . who kill white victims have the greatest likelihood of receiving the death penalty.[70]

Professor Baldus also noted a remarkable disparity in the rate at which the death penalty was sought—"prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims."[71]

Writing for the 5-to-4 majority in *McCleskey*, Justice Lewis Powell conceded that the Baldus study was "valid statistically,"[72] but concluded that it only demonstrated a risk that race factored into some capital sentencing determinations.[73] The Court determined that the risk of racial discrimination in capital sentencing determinations was negligible:

> The likelihood of racial prejudice allegedly shown by the study does not constitute the constitutional measure of an unacceptable risk of racial prejudice. The inherent lack of predictability of jury decisions does not justify their condemnation . . . . At most, the Baldus study indicates a discrepancy that appears to correlate with race, but this discrepancy does not constitute a major systemic defect. Any mode for determining guilt or punishment has its weaknesses and the potential for misuse. Despite such imperfections, constitutional guarantees are met when the mode for determining guilt or punishment has been surrounded with safeguards to make it as fair as possible.[74]

While premising its holding on the determination that racial disparity in the administration of the death penalty did not constitute a "constitutionally significant risk of racial bias,"[75] Justice Powell articulated another reason for his holding, which seemed to indicate a fear that treating McCleskey's claim as legitimate would open up a Pandora's Box and reveal the pervasive role of race in criminal processes:

> McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties.

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[70] *Id.* at 287.
[71] *Id.*
[72] *Id.* at 292 n.7.
[73] *Id.*
[74] *Id.* at 282 (quoting case syllabus).
[75] *Id.* at 313.

> Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. . . . [T]here is no limiting principle to the type of challenge brought by McCleskey. The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment.[76]

Thus, despite overwhelming evidence of discrimination,[77] the response of the courts has been to deny relief on the grounds that patterns of racial disparities are insufficient to prove racial bias in individual cases. Justice William Brennan criticized this approach, remarking:

> It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined.[78]

While the Court offered a number of rationalizations to deny Warren McCleskey relief, Justice Brennan's strongly-worded dissent left no doubt as to the significance of race in the application of the death penalty. As Justice Brennan explained:

> At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of McCleskey's past criminal conduct were more important than the fact that his victim was white. Furthermore, counsel would feel bound to tell McCleskey that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks. In addition, frankness would compel the disclosure that it was more likely than not that the race of McCleskey's victim would determine whether he received a death sentence: 6 of every 11 defendants convicted of killing a white person would not have received the death penalty if their victims had been black. . . . Finally, the assessment would not be complete without the information that cases involving black defendants and white victims are more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim. The story could be told in a variety of ways, but McCleskey could not fail to grasp its es-

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[76] *Id.* at 314-19 (citations omitted).

[77] *See* Cynthia K.Y. Lee, *Race and the Victim: An Examination of Capital Sentencing and Guilt Attribution Studies*, 73 CHI.-KENT L. REV. 533 (1998).

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

> sential narrative line: there was a significant chance that race would play a prominent role in determining if he lived or died.[79]

Regrettably, Justice Powell did respond to Justice Brennan's challenge, but only after he left the Court. When interviewed by his biographer and asked whether there were any decisions he would change, he stated that he would have voted differently on *McCleskey*.[80]

What Justice Brennan characterized as the "reverberations of injustice" are still being felt today. A number of recent studies show that racially disproportionate death penalty sentencing is as pervasive as ever, and continues to plague the capital punishment system.

C. Recent Empirical Findings

Two recent studies by Professor Baldus report a number of key findings. First, as I discussed earlier, *Batson* has not been particularly successful in eliminating racially-motivated peremptory challenges in capital trials.[81] Second, and perhaps more importantly, there is a distinct correlation between the likelihood that a jury will return a capital sentence and the number of blacks on the jury—the more black jurors there are, the less likely the jury is to return a death sentence.[82] This correlation grows even stronger when the capital defendant is black.

A recent study from Professor William Bowers, resulting from his work with the Capital Jury Project, confirms the finding that the more black members there are on a jury, the less likely the jury is to return a death sentence.[83] Again, the pattern is even more noticeable when the defendant is black. Professor Bowers interviewed capital jurors to identify what might explain this

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[79] *Id.* at 321-22 (citations omitted).

[80] *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451 (1994). In addition, Justice Powell noted that he now thought capital punishment should be abolished entirely. *Id.*

[81] *See* David C. Baldus et. al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3 (2001); David C. Baldus et. al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998).

[82] *See* Baldus et al., *Use of Peremptory Challenges*, *supra* note 78, at 85 fig. 6.

[83] *See* William J. Bowers et. al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171 (2001).

striking result, and his findings confirm the assertion that capital sentencing is unacceptably susceptible to racial factors. Jurors listed three main considerations that weighed into a decision whether to apply the death penalty: lingering doubts about the defendant's guilt,[84] the extent of the defendant's remorsefulness, and the defendant's future dangerousness.[85] In each consideration, black jurors viewed black defendants more favorably than did white jurors.[86] When evaluations of the defendant's character are so starkly different along racial lines, and when the result of the evaluation means the difference between lethal injection or life in prison, we can see that battles over who sits on the jury really are battles for life or death.

D. Burdens Resulting from Racially Disproportionate Capital Sentencing

In light of the continued racial imbalance in the application of the death penalty, the burden that the Supreme Court's decision in *McCleskey* places on blacks continues to operate at a number of levels. At the first, most obvious level, the racially disproportionate sentencing of blacks puts black *defendants* in the position of having their actions judged and punished more harshly than similarly situated white defendants.

At a second level, however, the racial imbalance in how death sentences are handed out shows a disregard for black *victims*. Disproportionate application of the death penalty in cases where the victim is white compared to cases where the victim is black reflect a disturbing racial calculus: White lives are considered to be more valuable than black lives, because the killing of a white is treated as a more serious crime—a crime worthy of a more severe punishment—than the killing of a black.

And at a third level, following from this devaluation of black life, we can see that the judicial failure to acknowledge racially disproportionate capital sentencing shows a systemic disregard for black *communities*. By treating the lives of black victims as being less valuable than the lives of white victims, the Court's

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[84] Bowers describes lingering doubts about the defendant's guilt as "perhaps the strongest 'operative' impediment to capital jurors' imposition of a death sentence." *Id.* While lingering doubt is not a recognized mitigating factor, it would be difficult to characterize a vote based on the possibility of innocence as jury nullification (where a juror votes to acquit a defendant despite a belief in the defendant's guilt).

[85] *Id.* at 203.

[86] *Id.* at 193-94, 203-26 & tbls. 3-5.

death penalty jurisprudence deprives black communities of equal access to and treatment by the justice system. Professor Randall Kennedy has pointed out a seeming paradox in claims of this kind—he notes that because most killers of blacks are other blacks, correcting the systemic bias that assigns more lenient punishment to killers of blacks would ultimately result in *more* blacks being sent to death row.[87] Kennedy argues that "the [black] community as a whole is disadvantaged by the relative leniency extended to killers of blacks, but black . . . criminals who murder Negroes *benefit* from the undervaluation of black victims. Remedying that bias . . . might move some black criminals closer to the gas chamber."[88]

The fallacy of this assertion, with all due respect to my colleague, Professor Kennedy, is that he assumes the way to rectify this imbalance is to move in the direction of executing *more* people—that is, he claims that the way to address the undervaluation of black life is to sentence black killers of other blacks to death at the same (higher) rate at which black killers of whites are sentenced to death. However, we could approach the problem instead by ceasing to *over*-value white life so much—that is, we could *decrease* the rate at which we execute black killers of whites such that it matches the rate at which we execute black killers of blacks. Rather than executing more people, we could execute fewer.

More importantly, the undervaluation of black life is not just evident in our capital sentencing rates, but is seen in the grossly racially disproportionate way in which our entire system of criminal justice operates. These racial differences occur at every stage of criminal processing, from arrest, prosecution, and jury selection to trial conduct, sentencing, and parole.

Justice Powell's majority opinion in *McCleskey* recognized this reality, when he noted, as I quoted earlier, that "McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system."[89] Justice Powell recognized that if statistical evidence of racially disparate impact sufficed to call the procedural regularity of the death penalty into question, every stage of the criminal justice

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[87] *See* Randall L. Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1393 (1988).

[88] *Id.* at 1392-93 (emphasis in original).

[89] *McCleskey*, 481 U.S. at 314-15.

system would be vulnerable to the same charge. Unfathomably, rather than taking that as a reason to reject the death penalty imposed in McCleskey's case, Justice Powell claimed that the Court should punt on the issue, leaving it instead to the legislature to deal with if it so chose. As Justice Brennan suggested in his dissenting opinion, this astounding rationale "[t]aken on its face . . . seems to suggest a fear of too much justice."[90] This is exactly the claim I am making with respect to the disregard for black defendants, black victims, and black communities that we see in the way the death penalty is administered—capital punishment is but one particularly egregious example of the system-wide failure to offer to blacks the same amount of justice.

Conclusion: Strategic Questions for Death Penalty Opponents

This discussion of the current state of the system of capital punishment in America leads to an obvious question: Now what? What strategies can we pursue to move toward the possible objectives identified in the title of this conference—Abolition, Moratorium, or Reform? And as an abolitionist, I must ask as well: How do we choose which of these objectives to pursue most vigorously?

Professors Carol Steiker and Jordan Steiker have argued that the history of constitutional regulation of the death penalty since the *Gregg v. Georgia*[91] decision in 1976 has focused almost entirely on making incremental refinements to procedural aspects of the capital sentencing process.[92] If we think of opposition to the death penalty as having been effective mostly along the lines of incremental procedural fixes, it does not take much of a stretch to see that the current system of capital punishment is really in continuity with the American history of extra-legal violence and lynching—it is just more procedurally protected and has the minor additional virtue of being legal.

This point raises important issues of strategy for those who oppose the death penalty. As an abolitionist, I feel that we must constantly be asking what the likely outcome will be from any

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[90] *Id.* at 339 (Brennan, J., dissenting).

[91] 428 U.S. 153 (1976).

[92] *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 Harv. L. Rev. 355 (1995).

arguments we raise against the death penalty. Most arguments of unconstitutionality could be addressed in ways that actually strengthen, or further entrench, the system of capital punishment in this country. As one commentator recently noted: "[B]y focusing on flaws in the operation of the death penalty, opponents run the risk of surrendering the moral argument. They might also find themselves inadvertently helping to repair a system they would rather see eliminated," ending up with a "modernized, sanitized death penalty."[93]

For example, the issue of innocence and DNA testing has been much in the news lately. Two years ago, Illinois Governor George Ryan imposed an indefinite moratorium on executions in his state, following the exoneration of thirteen prisoners who had been incorrectly sent to death row.[94] And the recent book by Barry Scheck, Peter Neufeld, and Jim Dwyer—*Actual Innocence*—conducted an extensive analysis of the risks of executing innocent defendants and suggested that there is some evidence that we have already executed defendants who were wrongly convicted.[95] The risk of executing the innocent can be a powerful argument for the abolition of the death penalty, but it can also be used by retentionists to strengthen their position as well. Say that the resources are made available to deploy DNA testing in every capital case, and the identity of the defendant is positively identified each time—concern about innocence would no longer be a valid objection to the death penalty. As one author argued recently:

> DNA evidence will in fact lead to greater support for the death penalty in the long run. . . . While many people in this country currently may be concerned by the potential for mistakes in determining the guilt of a defendant, once they are convinced that there is little likelihood of mistake, the majority will continue to support the death penalty.[96]

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[93] Thomas Healy, *Death Penalty Support Drops as Debate Shifts; Foes Turning Focus from Moral Issues to Flaws in the System*, BALTIMORE SUN, July 25, 2001, at 1A.

[94] *See* Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1 (quoting the Governor as concerned about Illinois' "shameful record of convicting innocent people and putting them on death row").

[95] *See* JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE (2000).

[96] John B. Wefing, *Wishful Thinking by Ronald J. Tabak: Why DNA Evidence Will Not Lead to the Abolition of the Death Penalty*, 33 CONN. L. REV. 861, 861-62 (2001).

As another example, a number of recent legal challenges to the system of capital punishment in America have focused on the "death row phenomenon"—the claim that extensive incarceration under the conditions on death row causes such psychological trauma as to constitute cruel and unusual punishment in violation of the Eighth Amendment.[97] A number of abolitionists have argued that the procedural requirements of the administration of the death penalty in America result in so many levels of direct and collateral review that all condemned prisoners face the possibility of an indeterminate and inordinately long stay on death row. Indeed, a number of foreign and international tribunals have accepted this claim.[98] Again, however, there is a retentionist argument lurking here—if there is a problem with excessive delay in the execution of a death sentence, we should just pass more laws like the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[99] to restrict the opportunities for collateral review of a death sentence.

It is even possible that a moratorium, such as that in place in Illinois, and as proposed nationwide by the American Bar Association,[100] could serve as a means for marshaling support for the continued use of capital punishment rather than its abolition. A recent survey of public opinion on death penalty matters reveals that about the same percentage of Americans favor a moratorium as favor the death penalty, and notes that these results are not necessarily inconsistent.[101]

All of these examples raise the question whether any of the

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[97] *See* Knight v. Florida, 528 U.S. 990, 994-95 (1999) (Breyer, J., dissenting in denial of certiorari); Lackey v. Texas, 514 U.S. 1045 (1995) (Stevens, J., memorandum respecting denial of certiorari); McKenzie v. Day, 57 F.3d 1461, 1487 (9th Cir. 1995) (Norris, J., dissenting). *See generally* WILLIAM A. SCHABAS, THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE 96-156 (1996).

[98] *See* Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 IND. L.J. 809, 830 n.128 (2000) (citing Catholic Commission for Justice & Peace in Zimbabwe v. Attorney General, No. S.C. 73/93 (Zimb. June 24, 1993) (reported in 14 HUM. RTS. L.J. 323 (1993)); Soering v. United Kingdom, 11 Eur. H.R. Rep. 439, 478 (Eur. Ct. H.R. 1989), *available at* http://hudoc.echr.coe.int/Hudoc2doc/HEJUD/sift/204.txt.

[99] Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

[100] *See* Press Release, American Bar Association, ABA House of Delegates Approves Call for Halt in U.S. Executions Until Death Penalty Fairness Assured (Feb. 3, 1997), *available at* http://www.abanet.org/media/feb97/death.html.

[101] *See* Richard Morin and Claudia Deane, *Support for Death Penalty Eases; McVeigh's Execution Approved, While Principle Splits Public*, WASH. POST, May 3, 2001, at A9.

successes that the abolition movement has achieved, especially since the death penalty was reinstated after *Gregg*, have brought us any closer to getting rid of capital punishment for good; or whether at each juncture we have only pointed out the most glaring errors so that retentionists could fix them and then say—see, it's okay for us to have the death penalty, we've fixed the irregularities in the system. This is not an unimportant concern; after all, most of the procedural protections now provided for in the administration of capital punishment came out of constitutional challenges to the death penalty.

One way that the strategy of incremental, procedural change might succeed is to force what might be called the "Blackmun Revelation." As Justice Harry Blackmun wrote eight years ago in his dissenting opinion in *Callins v. Collins*,[102] just months before stepping down from the Supreme Court:

> From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.[103]

The Blackmun Revelation is thus that none of these incremental changes ever ultimately remedy the problem, so at some point we must conclude that perhaps the problem cannot be remedied.

This is the same revelation that Justice Powell reached, as I mentioned earlier, although regrettably he was off the Court by this time. As Justice Powell's biographer has claimed, his statement that he would change his vote in *McCleskey* was based not on fundamental moral opposition to the death penalty, but rather on a concern that it could never be fairly and non-arbitrarily administered.

As Justice Blackmun further stated in *Callins*:

> Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, see *Furman v. Georgia*, and, despite the effort of the States and courts to devise legal formulas and

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[102] 510 U.S. 1141 (1994).

[103] *Id.* at 1145 (Blackmun, J., dissenting from denial of certiorari).

> procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. This is not to say that the problems with the death penalty today are identical to those that were present 20 years ago. Rather, the problems that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious as they were in their original form.[104]

Are we just chasing these problems down one hole, only to have them reappear, just as virulent and pernicious, from another? How can we shape our advocacy and activism to put the death penalty away for good?

The struggle for racial equality is inextricably tied to the struggle for fairness in the criminal justice system. And in both of these struggles, there is a long road ahead. Six months before he died, Justice Marshall spoke from Independence Hall in Philadelphia, where he received the Liberty Bell Award on July 4, 1992. He described the unfinished journey to racial equality as follows:

> I wish I could say that racism and prejudice were only distant memories . . . and that liberty and equality were just around the bend. I wish I could say that America has come to appreciate diversity and to see and accept similarity.
>
> But as I look around, I see not a nation of unity but of division—Afro and white, indigenous and immigrant, rich and poor, educated and illiterate.
>
> But there is a price to be paid for division and isolation. . . .
>
> We cannot play ostrich. Democracy cannot flourish amid fear. Liberty cannot bloom amid hate. Justice cannot take root amid rage. . . . We must go against the prevailing wind. We must dissent from the indifference. We must dissent from the apathy. We must dissent from the fear, the hatred and the mistrust. We must dissent from a government that has left its young without jobs, education, or hope. We must dissent from the poverty of vision and the absence of moral leadership. We must dissent because America can do better, because America has no choice but to do better. . . .
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> Take a chance, won't you? Knock down the fences that divide. Tear apart the walls that imprison. Reach out; freedom lies just on the other side.[105]

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[104] *Id.* at 1144-45.

[105] CARL T. ROWAN, DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL 453-54 (quoting Justice Marshall) (1993).