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Color of Death: Impact of Racial Bias On the Application of the Death Penalty

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I. Introduction

> The death penalty is not about whether people deserve to die for the crimes they commit. The real question of capital punishment in this country is, do we deserve to kill? - Bryan Stevenson[2]

1. The question above has long plagued the American justice system. Who decides who lives, and who dies? Even further beyond that question is the ask, are some victims more deserving of justice than others? In the United States, the longstanding history of the death penalty has split Americans on grounds of both morality and applicability. As of 2022, more than 70% of the world's countries have abolished capital punishment in law

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2 BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (2014).

or practice. Yet the death penalty continues to exist in various parts of the world, especially in countries with large populations and, unironically, those with a historically dictatorial rule. Recently, global studies have shown a clear trend away from capital punishment in general, as many countries have either abolished the death penalty or discontinued its use by law or practice. The U.S. remains an outlier among its close allies and other democracies in its continued legality and use of the death penalty. While international law does not prohibit the death penalty, many countries consider it a violation of fundamental human rights.[3] It is essential to consider how the death penalty is viewed worldwide as this review assists in evaluating evolving standards of decency and what should be considered cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution, as compared to other international legal treatises.

2. "The death penalty has been used to enforce racial hierarchies throughout United States history, beginning with the colonial period and continuing to this day," said Ngozi Ndulue, the Death Penalty Information Center's Senior Director of Research and Special Projects.[4] Ms. Ndulue continued to state:

> It's discriminatory presence as the apex punishment in the American legal system legitimizes all other harsh and discriminatory punishments. That is why the death penalty must be part of any discussion of police reform, prosecutorial accountability, reversing mass incarceration, and the criminal legal system as a whole.[5]

3. This paper is intended to highlight those implications of racial biases that are not only prevalent but consistent in the present-day application of the death penalty.

II. Historical Background of the Death Penalty in the United States

a. Colonial Times

4. British colonists influenced the institutionalization of the death penalty in the United States more than any other historical group. When European settlers came to the new world, a new venture in which they fled persecution, they brought with them the practice of capital punishment. Death was sought for "high crimes" such as treason, but also

3 *Policy Issues: International*, Death Penalty Information Center (2017).

4 Ngozi Ndulue, *Enduring injustice: The Persistence of Racial Discrimination in the U.S. Death Penalty,* Death Penalty Information Center (2020).

5 Ngozi Ndulue, *Enduring injustice: The Persistence of Racial Discrimination in the U.S. Death Penalty,* Death Penalty Information Center (2020).

for those misconducts as trivial as stealing grapes from the food plot of another. For almost as long as the death penalty has existed in the United States, so has opposition to it. The first documented reforms of the death penalty in the U.S. occurred when Thomas Jefferson, one of the United States' founding fathers, introduced a bill to revise colonial Virginia's death penalty laws.[6] The bill proposed that capital punishment be used only for the crimes of murder and treason. It was defeated by only one vote. More importantly, the death penalty was historically used as a form of social control — often times being enforced against slaves to assert dominance over the minority class.[7] Nearly half of the executions in the United States before 1860 were of enslaved blacks who were alleged to have been plotting or participating in revolts against slavery.[8] In the seventeenth century, black residents comprised only a small fraction of colonial America, yet their execution rate far exceeded that of whites on a per capita basis. As the colonial population expanded, due largely to the influx of African slaves in the southern regions, executions skyrocketed in numbers. Most eighteenth century executions took place in the South, and most of those put to death were black. While whites were typically executed only after being convicted of murder, black defendants received death penalty sentences and were executed even for nonlethal crimes. Even more daunting, harsher methods of execution were performed against people of color. Although hanging was the norm, more torturous routines were reserved for black people, especially slaves found guilty of revolt or major indiscretions against whites, like alleged rape.[9]

5. Racial inequalities in present day capital punishment applications are consistent with what is known about the racial norms that existed in the slave era, Jim Crow, and other historically discriminatory times. Present day capital punishment is more commonly practiced in places where lynching of black citizens occurred more frequently, and in states in which slavery was still legal as of 1860. Because of these trends, scholars have posed the notion that capital punishment reflects a legacy of lynching and slavery. The legacy of slavery has been transmitted through institutional practices, legal structures, and controlling organizations since the antebellum South used executions to suppress potential rebellions of enslaved people.[10]

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6 *Early History of the Death Penalty*, DEATH PENALTY INFORMATION CENTER (2019)

7 David Rigby & Charles Seguin, *Capital Punishment and the Legacies of Slavery and Lynching in the United States*, 694 AAPSS 205, 205–17 (2021)

8 Paul H. Blackman & Vance McLaughlin, *Mass Legal Executions of Blacks in the United States,* 17th-20th Centuries, HOMICIDE STUDIES (2003)

9 Carol S. Steiker & Vance McLaughlin, *The American Death Penalty and the (In)Visibility of Race*, 82 U. Chi L. Rev. 243, 245-46 (2015); See also, Margaret Burnham, *Retrospective Justice in the Age of Innocence, in Wrongful Convictions and the DNA Revolution: Twenty-Five Years of Freeing the Innocent*, Cambridge Uni. Press 291, 291-313 (2017).

10 Paul H. Blackman & Vance McLaughlin, *Mass Legal Executions of Blacks in the United States,* 17th-20th Centuries, HOMICIDE STUDIES (2003

b. The Abolitionist Movement

6. As the demand to end slavery came to the forefront in the United States, the political undertones of the nation's views surrounding the practice of capital punishment began to shift as well. Immediately after the Civil War ended in 1865, states from the former Confederacy promulgated laws designed to restrain and inhibit the rights and freedoms of newly "freed" slaves.[11] Even after the Civil War, Southern states continued to use the death penalty primarily against black citizens, despite the passage of the Fourteenth Amendment's equal protection and due process guarantees.[12] Even as some U.S. states began to slowly irradicate the use of the death penalty, most states held onto capital punishment. Some states made more crimes capital offenses, especially for offenses committed by newly freed slaves.

7. Prosecutorial charging decisions accompanied by unfettered prosecutorial discretion, all-white juries, and lynch mobs seemingly achieved what the newly embraced Fourteenth Amendment had intended to bar — a capital punishment regimen not only influenced, but shaped by racial prejudice.[13] Even as modernized statutes and legislative reform began to take shape, executions of black citizens allowed whites to subject the African American community to the same humiliation and dehumanization it had endured throughout the slave era. The majority of executions during this era, whether through legal avenues or through "vigilante justice", happened in the formerly confederate South — a geographical venue that in some areas still proudly promulgates divisive ideologies and racist theories to this day. Of those executions, more than seventy five percent involved black people.[14]

c. The Death Penalty Throughout the Twentieth Century – "Legal Lynching"

8. Although lynchings declined throughout the twentieth century, southern states crafted what some scholars have deemed as "legal lynching" techniques. Most southern states retained overly broad death penalty statutes that re-emphasized the antebellum era and imposed such laws mainly against black people.[15] American sociologist and criminologist Marvin Wolfgang, famed for his studies within the field of violent crimes, concluded

11 *History of Law: The Fourteenth Amendment,* Tulane Online Law Blog (2017).

12 See Carol S. Steiker & Vance McLaughlin, *The American Death Penalty and the (In)Visibility of Race*, 82 U. Chi L. Rev. 243, 245–46 (2015); See also, Sherod Thaxton, *Disentangling Disparity: Exploring Racially Disparate Effect and Treatment in Capital Charging,* 45 Am. J. Crim. L. 95, 120 (2018).

13 *The Abolitionist Movement*, DEATH PENALTY INFORMATION CENTER (2019).

14 Carol S. Steiker & Vance McLaughlin, *The American Death Penalty and the (In)Visibility of Race*, 82 U. Chi L. Rev. 243, 245–46 (2015)

15 Carol S. Steiker & Vance McLaughlin, *The American Death Penalty and the (In)Visibility of Race*, 82 U. Chi L. Rev. 243, 245–46 (2015)

that black men in the former Confederate and bordering states represented over 89 percent of all people executed for rape between the years of 1930 and 1974.[16] In 1977, the Supreme Court outlawed the death penalty for rape crimes not on equal protection grounds, but as a violation of the Constitution's prohibition against cruel and unusual punishment.[17] Southern states not only maintained the broad capital punishment statutory language, but additionally expedited the trial and sentencing processes to "deter lynching". This streamlined approach, while allegedly intended to herd off white masses on the quest for the aforementioned vigilante justice, actually produced grave injustices. Ineffective assistance of counsel, insufficient time for collection and review of trial discovery, and a societal climate that promoted divisiveness injected itself into the veins of what was Constitutionally promised to be a fair and impartial judicial process. Professor Michael Radelet's work reveals that, in the past two decades, state officials have posthumously pardoned at least six people who were executed in the first half of the twentieth century. Five of the six pardons involved black defendants wrongfully convicted of murdering white people in Georgia, Maryland, and South Carolina.[18]

9. Throughout the 1960's, public support of capital punishment reached all-time low. A Gallup poll showed support of the death penalty at only 42% in 1966.[19] Court opinions began shifting as the Civil Rights Era took the bull of American society by the horns. In 1968, *Witherspoon v. Illinois* held that, "A sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."[20]

10. The Court found that where the prosecutor was allowed, per the law, to eliminate every potential juror who expressed any reservations about the death penalty whatsoever, the state crossed the line of what was supposed to be neutrality, producing a jury exceedingly willing to condemn a man to die regardless of the potential evidence to be put forth.[21] To execute the defendant would have deprived him of his life without due process of law, as guaranteed by the Fourteenth Amendment of the Constitution.[22] The decision in *Witherspoon* was simply scratching the surface of what was to come in regard to legal reform involving the death penalty – at least temporarily.

16 See also, Marvin E. Wolfgang & Marc Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 Annals Am. Acad. Pol. & Soc. Sci. 119, 123 (1973).

17 *Coker v. Georgia*, 433 U.S. 584 (1977).

18 Michael L. Radelet, *How DNA has Changed Contemperary Death Penatly Debates in Wrongful Convictions and the DNA Revolution: Twenty-Five Years of Freeing the Innocent,* Cambridge University Press (2017).

19 *Death Penalty*, GALLUP.COM (2021).

20 *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968).

21 *Witherspoon v. Illinois*, 391 U.S. 510, 518 (1968).

22 *Witherspoon v. Illinois*, 391 U.S. 510, 532 (1968).

11. As racial inequalities turned to tragedies of the wrongfully accused becoming the wrongfully executed, the NAACP Legal Defense Fund approached the inconsistencies of the application of the death penalty with strategy. The group focused on the capital procedures in strident, collecting statistical reports to provide to legislative committees and other governmental entities as well as to present in criminal defense claims, which began the conversation as to the erratic and arbitrary application of the death penalty. In the short term this strategy proved successful as it not only laid groundwork for additional research to come after, but also provided context to the Courts who were about to approach the 1972 case of *Furman v. Georgia*.

III. Furman v. Georgia and the Cultural Shift of the Death Penalty

12. In the case of *Furman*, defendant Furman was allegedly burglarizing a private home when a family member of the home discovered him. Furman attempted to flee the residence, and in doing so tripped and fell. The gun that he was carrying went off and subsequently killed a resident of the home. He was convicted of murder and ultimately sentenced to death. The Supreme Court was faced to answer the question: does the imposition and carrying out of the death penalty constitute cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments?

13. In a divided 5–4 decision, the Court's one-paragraph per curium opinion held that the imposition of the death penalty in these cases did constitute cruel and unusual punishment, and thus violated the Constitution. However, the majority could not agree as to a rationale for its decision. There was no signed opinion of the court, or any plurality opinion, as none of the five justices constituting the majority joined officially with the opinion of another. Throughout over two hundred pages of commentary, only Justices Brennan and Marshall believed the death penalty to be unconstitutional in all instances. Other concurrences focused on the arbitrary nature with which death sentences have been imposed, often insinuating to a racial bias against black defendants, however such a bias was never explicitly cited.[23] Chief Justice Warren Burger and Justices Harry Blackmun, Lewis F. Powell, and William H. Rehnquist, each appointed by republican President Richard Nixon, dissented. The multiple dissenting opinions, all coming from historically conservative Justices, reinforced a bitter social divide that has continued long beyond the Civil Rights Era.

14. A nation-wide moratorium, or temporary suspension of executions and death sentences, was instilled subsequent to the Court's decision. The Supreme Court's decision

23 *Furman v. Georgia*, 408 U.S. 238 (1972).

marked the first time the Justices vacated a death sentence under the Eighth Amendment's Cruel and Unusual Punishment Clause, resulting in over 630 death sentences being vacated. Over the course of the next four years, thirty-seven states reconstructed their capital punishment statutes to comply with the Court's new Constitutionality requirements.[24]

IV. Gregg v. Georgia and the Overhaul of Furman

15. Of those thirty-seven states, Georgia was perhaps the most devoted to finding the loopholes to again instill death upon defendants.[25] The cases of *Gregg v. Georgia*, *Proffitt v. Florida*, *Jurek v. Texas*, *Woodson v. North Carolina*, and *Roberts v. Louisiana* were the first to reaffirm the death penalty. Mainly in *Gregg*, the Court held that the punishment of death did not invariably violate the United States Constitution; that the death penalty was not a form of punishment that could never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it; and that the concerns that the penalty of death not be imposed in an arbitrary or capricious manner were met by a carefully drafted statute that ensured that the sentencing authority, i.e., a jury, was given adequate information and guidance to assist in their decision-making.[26]

16. In *Furman*, the Court set out two broad guidelines that state legislatures must follow in order to craft a constitutional capital sentencing scheme. First, the statutory language must provide objective criteria to direct and limit the death sentencing discretion. The objectiveness of these criteria must in turn be ensured by appellate review of all death sentences. In other words, a guarantee of the Fourteenth Amendment's constitutionally guaranteed due process. Second, the scheme must allow the sentencer (whether judge or jury) to consider the character and record of an individual defendant, evidence that is not usually permitted in trial proceedings except under specific circumstances.[27]

17. With regard to the modified Georgia statute under *Gregg*, the Court held that the statutory system under which defendant was sentenced, which focused primarily on the jury's attention on the particularized nature of the crime in addition to the particularized characteristics of the defendant and also provided a method for review, did not violate the Constitution. The Court found that "the Georgia legislature has plainly made an effort to guide the jury in the exercise of its discretion," and that "It gave the Georgia Supreme Court the power and the obligation to perform the task of deciding

24 Corinna Barrett Lain, *Deciding Death*, 57 Dule L. Rev. 1, 1–83 (2007).

25 Corinna Barrett Lain, *Deciding Death*, 57 Dule L. Rev. 1, 1–83 (2007).

26 *Gregg v. Georgia*, 428 U.S. 153 (1976).

27 *Constitutionality of the Death Penalty in America,* Death Penalty Information Center (2019).

whether in fact the death penalty was being administered for any given class of crime in a discriminatory, standardless, or rare fashion."[28]

18. The Court continued that if Georgia's Supreme Court "properly performs the task assigned to it," then "death sentences imposed for discriminatory reasons or wantonly or freakishly for any given category of crime will be set aside." As modern statistics have gone on to show, while Constitutional in theory, this has not been the case in application.

V. The Baldus Study and the Race of Victim Effect

19. In response to the benchmark decisions of *Gregg* and the implementation of the newly developed "guided discretion" model, researcher David Baldus, in conjunction with other scholarly colleagues, began empirical research which revealed in numbers what many professionals in the criminal justice field were already aware of — an impact of racial bias on the application of the death penalty.

a. The Baldus Study: An Overview

20. In 1983 Professor Baldus, along with Charles A. Pulaski and George Woodworth, published a study examining the presence of racial discrimination in death penalty sentencing. The study analyzed over 2,000 murder cases occurring in the state of Georgia in the 1970's. The cases examined by Baldus all occurred between the timespan of two United States Supreme Court cases involving Georgia: the previously discussed *Furman v. Georgia* (1972) and *McCleskey v. Kemp* (1987), which will be discussed in the following sections.[29]

21. The study looked primarily to the race of the victim, rather than the defendant, in each murder case to evaluate the occurrence of racial discrimination in the sentencing procedures of defendants. The strategy of comparing the race of the victim to the sentence, rather than the race of the defendant alone, had not been prominently pursued prior to the Baldus Study. The study did also examine, while, to a lesser extent, the race of the defendant in order to evaluate the presence of racial discrimination further in the sentencing structure.[30]

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28 *Gregg v. Georgia*, 428 U.S. 153, 223 (1976).

29 David C. Baldus & Charles A. Pulaski, *Equal Justice and the Death Penalty: A Legal and Empirical Analysis,* NORTHEASTERN UNIVERSITY PRESS (1990).

30 Adam Hugo Bedau, *The Death Penalty in America: Current Controversies*, NEW YORK: OXFORD UNIVERSITY PRESS (1997).

22. While commonly referred to as the Baldus Study in whole, the study was actually two individual research undertakings that, in conjunction, created the empirical study. The first was the *Procedural Reform Study*, in which David Baldus and his colleagues compiled data on over 200 variables for 594 defendants who were tried and sentenced for murder in Georgia from March 1973 through July 1978. The purpose of the procedural reform study was to compare the manner with which Georgia sentenced already convicted murder defendants before and after the landmark decision of *Furman v. Georgia*. The study then looked for reforms in the sentencing procedures after *Furman v. Georgia* and assessed how legislative reforms made to accommodate the new requirements of *Gregg* affected discrimination in sentencing decisions. Baldus and his colleagues looked specifically at two aspects of a trial during the procedural reform study. First, whether or not the prosecutor assigned to the case chose to seek a death sentence after a capital murder conviction was awarded, and secondly, whether or not the jury imposed a death sentence after the initial guilt phase of the trial.[31] Critics argue that this initial research frame lacked data on the strength of the evidence of the defendant's guilt that actually led to the conviction, and, because it was restricted to murder convictions, it did not examine the possibility of pretrial discrimination in charging decisions and plea bargaining.

23. The second study, the *Charging and Sentencing Study*, covered 1,066 Georgia homicide prosecutions from 1973 through 1980, manslaughter convictions, and guilty pleas, as well as murder convictions, and also included comprehensive data on an expanded list of over 400 non-racial variables. The charging and sentencing study focused mainly on the influence that racial and other illegitimate case characteristics had on the progression of cases from the point of indictment, all the way through the adjudicatory process to the death penalty sentencing decision.

24. After evaluating the initial findings in the studies, Baldus and his colleagues subjected their data to extensive analysis involving 230 variables that could have potentially explained the findings on non-racial grounds. In one analysis that exposed the data to 39 nonracial variables, Baldus found that defendants accused of killing white victims were 4.3 times more likely to receive the death penalty than defendants accused of killing black victims. This analysis also showed that black defendants were 1.1 times more likely than white defendants to receive the death penalty.[32]

25. The study faced many attacks from the sociology and criminology communities, including the following — the database was too inaccurate to form a basis for useful conclusions; thestatistical models used by Baldus and his colleagues were flawed; the

31 David C. Baldus, et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. Crim. L. & Criminology 661 (1983).

32 David C. Baldus, et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. Crim. L. & Criminology 661 (1983).

data did not demonstrate that the capital-sentencing system in Georgia was discriminatory; and the statistical methodology used had no value in this context.[33]

b. The Race of Victim Effect

26. Regardless of its critiques, it was because of the Baldus Study that light was shone on the seldomly discussed race of victim effect. In short, the race of the victim, not the defendant, steers cases in the direction of death. Notwithstanding the perpetrator's race, those who kill whites are more likely to face capital charges, receive a death sentence, and die by execution than those who murder black victims.[34]

27. In 1990 the Government Accountability Office conducted a review of over 25 studies of capital sentencing procedures. It was concluded that 82 percent of the studies conducted revealed that the race of a victim influenced the likelihood of the defendant being charged with capital murder, and eventually receiving the death penalty. The study also concluded a pattern of evidence indicating racial disparities in capital sentencing procedures. While there are comparable numbers of black and white murder victims in the United States, 77 percent of the people executed since 1976 were convicted of killing white victims, while only 13 percent were convicted of killing black victims.[35]

28. Individual analysis on a state-by-state basis has revealed similar statistical data. A 2007 report on capital punishment in Connecticut found that defendants were more likely to face the death penalty in cases where the victim was white rather than a person of color.[36] An analysis of death penalty cases in New Mexico from 1979 to 2007 reached a similar conclusion. It determined that, even though non-Hispanic whites only embodied 30 percent of all homicide victims, they encompassed 50 percent of all the victims in homicides charged as capital offenses.[37] Consequently, Connecticut and New Mexico have since repealed the death penalty. In 96 percent of states where there have been reviews of race and the death penalty, there was statistical evidence found revealing a pattern of either race-of-victim or race-of-defendant discrimination, or in many cases,

33 Samuel R. Gross, *David Baldus and the Legacy of McCleskey v. Kemp,* 97 Iowa L. Rev., 1906, 1906–24 (2012).

34 Daniel S. Medwed, *Black Deaths Matter: The Race-of-Victim Effect and Capital Punishment*, 86 Brook. L. Rev. 960 (2021).

35 *Race of the Victim*, NATIONAL COALITION TO ABOLISH THE DEATH PENALTY (2022).

36 Daniel S. Medwed, *Black Deaths Matter: The Race-of-Victim Effect and Capital Punishment*, 86 Brook. L. Rev. 960 (2021).

37 Daniel S. Medwed, *Black Deaths Matter: The Race-of-Victim Effect and Capital Punishment*, 86 Brook. L. Rev. 960 (2021).

both.[38]

VI. McCleskey v. Kemp

29. While one would believe numbers, statistical evidence, and empirical data to be overwhelmingly sufficient to indicate the disproportionate application of the death penalty, the Supreme Court was not swayed by such. In a landmark ruling in *McCleskey v. Kemp* in 1987, a bitterly divided U.S. Supreme Court voted 5-4 that statistical evidence of racial discrimination in the application of the death penalty was insufficient to overturn an individual death sentence.

30. Warren McCleskey was convicted of two counts of armed robbery and one count of murder. During the sentencing phase, the jury imposed the death penalty when McCleskey did not put forth any mitigating circumstances to be heard by the jury. The state supreme court affirmed the trial court's decision and denied a petition for writ of certiorari. McCleskey then filed a petition for a writ of habeas corpus in federal court in which he alleged the state's capital sentencing process was administered in a racially discriminatory manner and was thus in violation of his Fourteenth Amendment right. McCleskey based his claims on the Baldus Study, which indicated, through the statistical data noted above, a hazard that racial prejudice entered into capital sentencing determinations.

31. Significant evidence was presented to the Court from the Baldus Study, in which the Court responded: "Evidence in the form of a complex statistical study indicating that a state's capital punishment statute is administered in such a way that black murderers and murderers who murder white people are more likely to receive a death penalty were not sufficient to show the type of discriminatory effect required of defendant."[39]

32. The Court additionally concluded that McCleskey's statistics did not "Demonstrate a prima facie case in support of the contention that the death penalty was imposed upon him because of his race, because of the race of the victim, or because of any Eighth Amendment concern."[40]

33. As to McCleskey's Fourteenth Amendment claim, the Court found that the methodology of the Baldus Study was flawed in several respects. Claiming that it was because of these defects, the Court held that the Baldus Study "fail[ed] to contribute anything of value" to McCleskey's claim. Accordingly, the Court denied the petition as it was based

38 David C. Baldus, et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. Crim. L. & Criminology 661 (1983).

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

40 *McCleskey v. Kemp*, 481 U.S. 279, 288 (1987).

upon the Baldus Study. The Court observed that the post-*Gregg* procedures implemented to prevent against jury racial bias and jury trial inefficiencies generally were sufficient to safeguard a defendant's rights.[41] In layman's terms, the Court held that McCleskey did not provide sufficient evidence to show that his case, personally, was impacted by racial discrimination.

34. Dissenting from the Court's opinion, Justices Brennan, Marshall, Blackmun, and Stevens stated:

> The Court observes that "the *Gregg*-type statute imposes unprecedented safeguards in the special context of capital punishment," which "ensure a degree of care in the imposition of the death penalty that can be described only as unique." Notwithstanding these efforts, murder defendants in Georgia whose victims were white are more than four times as likely to receive the death sentence as are defendants with black victims. Nothing could convey more powerfully the inflexible reality of the death penalty: "that the effort to eliminate arbitrariness in the infliction of that ultimate sanction is so plainly doomed to failure that it — and the death penalty — must be abandoned altogether."[42]

35. Being as though it is presently binding law, *McCleskey* now acts as a substantial barrier to the elimination of racial inequalities in the criminal justice system and continues to perpetuate an unfair racial imbalance that has come to define the American criminal justice system. The *McCleskey* decision reached far beyond the confines of Georgia's capital punishment system and Warren McCleskey's appeal as an individual defendant. It created a crippling burden of proof for any defendant seeking to prove the scarring influence and biases of race in the criminal justice system.

36. Numerous studies that have been conducted in the 20 years following McCleskey have shown that race continues to play a critical role in virtually all aspects of the criminal justice process, including the application of the death penalty.[43] Distinguished attorney and professor Anthony Amsterdam once remarked, "*McCleskey* is the Dred Scott decision of our time," referencing *Dred Scott v. John F.A. Sandford*, which has come to be known as a harsh, irreparable scar on American jurisprudence.[44] The *McCleskey* decision has rationalized that these types of challenges to due process and the Constitution as a whole will not be tolerated by the American legal system. For example, Earl Matthews, an African American, South Carolina death row inmate, maintained that his

41 *McCleskey v. Kemp*, 481 U.S. 279, 299 (1987).

42 *McCleskey v. Kemp*, 481 U.S. 279, 320 (1987).

43 *The Legacy and Importance of McCleskey v. Kemp*, NAACP Legal Defense and Educational Fund (2022).

44 Steven F. Schatz and Teresa Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single County Case Study*, 34 Cardozo L. Rev. 1227, 1227–1282 (2013).

death sentence was the result of prevalent racial discrimination that violated the Equal Protection Clause of the Fourteenth Amendment, parallel to that of Warren McCleskey's claim.[45] To support his assertion, Matthews presented statistical evidence showing that in Charleston County, the county in which a jury convicted and sentenced him to death, a prosecutor was more likely to seek a death sentence for a black defendant accused of killing a white victim than for any other racial combination of victims and defendants. Matthews presented additional evidence to prove that on top of the racial implications of prosecutorial discretion, those same defendants were more likely to receive a death sentence.[46]

37. The statistics proffered by Mr. Matthews were not the sole evidence presented to the Court. Testimony from former Charleston County police officers, prosecutors, defense lawyers, and community leaders reinforced these statistics and directed that those racial considerations affected the prosecution of capital cases in Charleston County. Matthews also presented circumstantial evidence of systemic racial discrimination, including information suggesting that hiring and firing practices within the state attorney's office and other prosecutorial actions in his case were motivated by racial hostility.

38. The court did not even somewhat assess the validity of Mr. Matthews's allegations, but rather, the federal district court judge summarily dismissed the proceedings on the grounds of the previously held decision in McCleskey. The Court referred to *McCleskey*, stating that the *McCleskey* decision precluded this type of challenge to a death sentence from being brought forth. The Court of Appeals for the Fourth Circuit affirmed the district court's decision, and the State of South Carolina executed Mr. Matthews on November 6, 1997.[47]

39. The curtailed review of Mr. Matthews's claim is not exclusive. Many courts that face post-*McCleskey* capital-sentencing racial discrimination claims presume that *McCleskey*, by default, precludes fair and just appellate advocacy. Although some researchers have concluded that *McCleskey* precludes all statistically based claims involving racial bias and the death penalty, the rule of law that was adopted does not hold on its face that these types of claims are not achievable in capital cases. In other equal protection scenarios, the showings made in many post-*McCleskey cases* would have triggered the opposing party's (in these cases, the government's) duty to rebut the prima facie case of racial discrimination.[48] This procedural distortion of the *McCleskey* holding is a violation

45 John H. Blume, et al., *Post-McCleskey Racial Discrimination Claims in Capital Cases*, 83 Cornell L. Rev. 1771 (1998).

46 John H. Blume, et al., *Post-McCleskey Racial Discrimination Claims in Capital Cases*, 83 Cornell L. Rev. 1771 (1998).

47 John H. Blume, et al., *Post-McCleskey Racial Discrimination Claims in Capital Cases*, 83 Cornell L. Rev. 1771 (1998).

48 John H. Blume, et al., *Post-McCleskey Racial Discrimination Claims in Capital Cases*, 83 Cornell L. Rev. 1771 (1998).

of due process in itself.

VII. Prosecutorial Discretion and the Death Penalty

40. Prosecutors encompass one of the most important and pivotal roles in the death penalty machine. As many state and federal agencies see, shortness of staff and limited resources place a stronghold on the large case load that many prosecuting attorneys face. Decisions include how thoroughly to investigate individual cases, whether formal charges are even to be filed, the number and severity of violations to allege, the rigor of prosecution, and whether or how much to plea bargain.[49] In criminal homicide cases a wider range of penalties and sanctions are available than for almost any other charge in the American criminal justice system. Prosecutors have unconstrained discretion in deciding whether or not to pursue capital charges, seeking the death penalty in approximately 1 percent of all capital eligible cases. Notably among the 38 states that allow the death penalty, approximately 98 percent of prosecutors are white.[50]

41. Important to note from the above cited *Furman* decision, the use of execution by the states is not per se unconstitutional, however the process by which it was being carried out at the time is what violated the Eighth Amendment's prohibition of cruel and unusual punishment. The statutes approved in *Gregg* and similar cases throughout the states each attempted to channel discretion, serving as a type of protective conduit within the judicial process. In the Georgia and Florida statutes, this was accomplished according to the Court's standard by itemizing the aggravating and mitigating circumstances that the sentencer, a judge or jury, must consider before imposing a death sentence. Both statutes provided that a jury can only impose a death sentence if the existence of at least one statutory aggravating circumstance was established beyond and to the exclusion of any reasonable doubt.[51]

42. While this level of discretion impacted the sentencing procedures of death penalty cases, before a jury can impose a death sentence, a prosecutor must first seek it. Contrary to what many public citizens understand, a prosecutor may decline to request the death penalty even though the factual circumstances of a case permit it. Even if the discretion of the jury could be guided through the newly constructed statutes, the prosecutor's discretion to seek or not seek the death penalty is still virtually limitless since

49 Michael Radalet & Glenn Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 Law & Soc'y Rev. 587 (1985).

50 *Race, and the Death Penalty*, American Civil Liberties Union (Last visited Mar 22, 2022).

51 Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 Law & Soc'y Rev., 437, 437-478 (1984).

the Georgia statute in *Gregg*, like all other state statutes, does not require the monitoring or review of said prosecutors' decisions.[52] In the *Gregg* decision making process, Justice White stated:

> Unless prosecutors are incompetent in their judgments, the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. Thus, the prosecutor's charging decisions are unlikely to have removed from the sample of cases considered by the Georgia Supreme Court any which are truly "similar." If the cases really were "similar" in relevant respects, it is unlikely that prosecutors would fail to prosecute them as capital.[53]

43. While in theory it is to be believed that prosecutors seek death penalty sentences on a consistent and routine schedule, contrary to Justice White's comments above, racial discrimination in the form of prosecutorial discretion has been identified in the pre-sentencing, sentencing, and post-sentencing stages of the capital punishment process.

a. Pre-Sentencing

44. Harold Garfinkel, studying potential capital cases from North Carolina between 1930 and 1940, found that both a defendant's and victim's race correlated with the grand jury's decision to indict for first-degree murder (as opposed to other degrees of murder), as well as the prosecutor's decision to not pursue lower-degree murder charges.[54] Blacks accused of killing white victims were punished the most harshly. More recently, William Bowers found in 1984 that the races of both defendants and victims affected the likelihood of prosecutors obtaining first-degree murder grand jury indictments.[55] Similarly, under South Carolina's current statute, researchers Jacoby and Paternoster found that prosecutors were 3.2 times more likely to seek the death penalty for defendants charged with killing whites than for those charged with killing black victims. It was also determined that prosecutors were four times more likely to seek the death penalty for black defendants accused of killing white victims than for black defendant's accused of killing black victims.[56]

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52 Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 Law & Soc'y Rev., 437, 437-478 (1984).

53 *Gregg v. Georgia*, 428 U.S. 153, 225 (1976).

54 Harold Garfinkel, *Research Note on Inter-and Intra-Racial Homicides*, 27 Social Forces 369 (1949).

55 William J. Bowers, *The Pervasiveness of Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 74 J. Crim. L. & Criminology 1067, 1067–1100 (1983).

56 Joseph E. Jacoby & Raymond Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J. Crim. L. & Criminology 379 (1982).

b. Sentencing

45. As noted above, the Baldus Study widely expanded the research of the impact of race in the sentencing phase. Additionally, Bowers and Pierce, using data from Georgia, Texas, Ohio, and Florida, found that the races of victims and defendants were significant factors in the imposition of the death penalty in all four states. Even further, researchers Gross and Mauro used the FBI's Supplemental Homicide Reports to examine sentencing patterns in eight states – Arkansas, Florida, Georgia, Illinois, Mississippi, North Carolina, Oklahoma, and Virginia. They found what they called "remarkably stable and consistent" discrimination in the sentencing phase based on victim's race in not just one, but all of the states studied.[57]

c. Post-Sentencing

46. In post-conviction relief studies, it has been proven that black offenders are significantly less likely than whites to have their death sentences commuted. A more recent post-sentencing study of the first 145 cases decided by the Florida Supreme Court under the post-*Furman* holding found that the number of victims in a case, the trial jury's sentence recommendation (i.e., life without parole or death), and the correlation between a victim's sex and a defendant's race all wielded substantial impacts in a statistical analysis predicting outcome. Black male defendants with white female victims were the most likely group to have their death sentences affirmed.[58]

d. Inconsistencies in Prosecutorial Discretion

47. Varying jurisdictions have varying applications of the death penalty. Some state attorney's offices go to trial frequently, while some offer a surplus of plea deals. Some elected officials maintain a "tough on crime" persona, while others pursue a more rehabilitative approach. St. Louis Circuit Attorney Jennifer Joyce, whose jurisdiction covers the entirety of the city, has never taken a capital case to trial since her election in 2001.[59] On the contrary, Prosecutor Robert McCulloch, whose jurisdiction is the adjacent suburban county, has won death sentences against 10 people since 2000 (despite the fact that the county only reflects a quarter of the murders as compared to the city).[60] The two longtime Democrats have neighboring jurisdictions with one urban and one more rural, yet almost opposite applications of capital punishment.

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57 William J. Bowers, et al., *Legal Homicide: Death as Punishment in America*, 1864-1982, NORTHEASTERN UNIVERSITY PRESS (1984).

58 Marvin E. Wolfgang, et al., *Comparisons of the Executed and Commuted among Admissions to Death Row*, 53 J. Crim. L. & Criminology 301 (1962).

59 Tim Rieterman, *Death Row Inmates Casting a Wider Net*, LOS ANGELES TIMES (July 15, 2008).

60 Tim Rieterman, *Death Row Inmates Casting a Wider Net*, LOS ANGELES TIMES (July 15, 2008).

48. This is only one example of the inconsistent enforcement of the death penalty across judicial lines. Because prosecutors have an unfettered discretion of seeking the death penalty or not, it is difficult, if not impossible, to regulate its application across varying geographical jurisdictions.

49. Importantly, the role of partisanship in the application of the death penalty cannot be ignored. Just over three-quarters of Republicans and registered independents who identify toward the Republican Party (77 percent) favor the death penalty for defendants convicted of murder, including 40 percent of those persons who strongly favor it. Democrats and Democratic leaning voters are more divided, with 46 percent favoring the death penalty, and 53 percent being opposed.[61]

50. This favoritism is a main stake in the campaign process for many elected officials, as well as State Attorneys. Thirty-eight states allow the death penalty. In 32 of those states, judges are subject to elections. Political pressures on the shoulders of judges regarding the death penalty are most painfully felt when the judge, rather than a jury, makes the definitive decision on a life-or-death sentence.[62] In nine death penalty states, judges determine whether a defendant is to receive a death sentence. In eight of these nine states, the judges are subject to elections to retain their positions.

51. Even where judges are appointed officials and are thus not subject to elections, the political undertones of the death penalty are often times grounds for the exclusion of judicial candidates who have not obligated themselves to a hard stance for or against the death penalty.[63] The affiliation with being "soft on crime" in traditionally conservative jurisdictions, or a perception of being more retributive than restorative in a more liberal dominion are motivators for judges or prosecutors to flaunt their unwaveringly taken positions, and many respectable candidates who know that capital punishment is not working are more hesitant to speak out. Politicians stoking the passions of the American people through propaganda-type politics undermines the essential impartiality of the criminal justice process.

VIII. Remedies and Reparations

52. While many politicians argue that the death penalty and the idea of capital punishment is complex and difficult to understand, the issue of racial bias on a defendant's

61 *U.S. Politics & Policy, Most Americans Favor the Death Penalty Despite Concerns About its Administration*. Pew Research Center (2021).

62 *Killing for Votes: The Dangers of Politicizing the Death Penalty Process*, DEATH PENALTY INFORMATION CENTER (1996).

63 *Killing for Votes: The Dangers of Politicizing the Death Penalty Process*, DEATH PENALTY INFORMATION CENTER (1996).

sentence is truly black and white. Statutory reform, moratoriums while research is evaluated, and conviction review units to monitor prosecutorial discretion are all ways to weed out the longstanding bias that has for so long plagued the capital punishment process.

a. Statutory Reform

Statutory reform has been proposed in order to better protect citizens who face this type of disparate treatment. In the 103rd Congress in the years of 1993-1994, Democratic Representative Don Edwards of California sponsored H.R.4017, the Racial Justice Act.[64] The Act's intention was to amend the Federal judicial code to prohibit putting a person to death under color of State or Federal law in the execution of a sentence that was imposed based on race. The act specified that:

1. An inference that race was the basis of a death sentence is established if valid evidence is presented demonstrating that, at the time the sentence was imposed, race was a statistically significant factor in decisions to seek or to impose the sentence of death in the jurisdiction in question.[65] In order to prove the above inference, the Act clarified that evidence relevant to establish an inference that race was the basis of a death sentence included evidence that, at the pertinent time, death sentences were being imposed in the jurisdiction significantly more frequently: (1) upon persons of one race compared to another; or (2) against persons of one race compared to another as punishment for capital offenses.[66]
2. The Act further directed the court to determine the validity of statistical evidence presented to establish an inference that race was the basis of a sentence of death.
3. To the extent it is compiled and publicly made available, evidence must take into account the statutory aggravating factors of the crimes involved, including comparisons of similar cases involving persons of different races. [67]
4. The Act prohibited the death sentence from being carried out when an inference that race was the basis of a death sentence is established unless and until the government rebuts the inference by a preponderance of the evidence. The additional burden of rebutting the defendant's position was intended to prevent the government from relying on mere assertions that it did not intend to discriminate, and to ensure that the cases in which death was imposed fit the statutory criteria for imposition of the death penalty. This burden of persuasion vs. burden of production rebuttal of evidence requirement, while not identical, is similar to other areas of

64 Racial Justice Act, H.R.4017, 103rd Cong. (1994).

65 Racial Justice Act, H.R.4017, 103rd Cong. (1994).

66 Racial Justice Act, H.R.4017, 103rd Cong. (1994).

67 Racial Justice Act, H.R.4017, 103rd Cong. (1994).

law, such as employment discrimination law, where the defendant must present evidence to rebut the assertion of discrimination presented by a plaintiff.

5. The Act also required that all data collected by public officials concerning factors relevant to the imposition of the death sentence be made publicly available, increasing prosecutorial transparency.

53. Ultimately, the Act was dropped in the interest of gaining congressional consideration of the 1994 Crime Reform Bill. While the Act did not pass, it began to turn the gears of legislative reform and statutory modification. Following suit, individual states have proposed legislative reform in order to counter this deadly issue. In 2009, North Carolina's Racial Justice Act permitted death-row prisoners to challenge their death sentences by presenting evidence, including statistical studies, that racial bias was a significant factor that contributed to their death sentences.[68] In the four years following the law's passage, more than 130 prisoners filed such challenges. Control of the legislature and governorship changed parties soon after the Act's enactment, and in 2012 the Republican legislature retroactively amended the statute to scale back the situations in which relief could be granted. The "Amended RJA" banned statewide evidence of discrimination, and limited statistical proof of discrimination to cases tried only within the county or judicial district in which the crime itself had occurred. The modifications also constricted the time period in which evidence of historical discrimination could be measured. Proof was limited to cases tried in the ten years before the crime and two years after the imposition of the defendant's sentence. The new law also required the defendant to present some evidence of discrimination in his or her particular case, which was a main challenge seen in the *McCleskey* case, in addition to the more generalized statistical evidence. After four defendants' won their claims under the new standard, the legislature retroactively repealed the entire Racial Justice Act.[69]

54. More recently in 2020, the California legislature passed three racial justice reform bills intended to reduce the influence of racial, ethnic, and socioeconomic bias in the administration of the death penalty in the state with the country's largest death row.[70] The state's legislature overwhelmingly approved AB-2512, which aims to combat racism in assessing whether a capital defendant or death-row prisoner is intellectually disabled and is thus ineligible for the death penalty.

55. The next bill approved in the same year, the California Racial Justice Act, prohibits the state from seeking or obtaining a conviction or imposing a sentence "on the basis of

68 *North Carolina Supreme Court Strikes Down Racial Justice Act Repeal, Permits Race Challenges by 140 Death-row Prisoners*, Death Penalty Information Center (2020).

69 *North Carolina Supreme Court Strikes Down Racial Justice Act Repeal, Permits Race Challenges by 140 Death-row Prisoners*, Death Penalty Information Center (2020).

70 *California Legislature Passes Racial Justice Package Affecting Death- Penalty Practices,* Death Penalty Information Center (2020).

race, ethnicity, or national origin." The bill requires overturning a conviction or sentence for a variety of discriminatory reasons, including but not limited to: when the judge, a lawyer, a law enforcement officer, an expert witness, or a juror in the case exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin; used racially discriminatory language about the defendant's race, ethnicity, or national origin; when race, ethnicity, or national origin was a factor in the prosecution's exercise of discretionary jury strikes; when a defendant receives a longer or more severe sentence than was imposed on other similarly situated individuals convicted of the same offense; and more.

56. Lastly, the state approved a major reform in the jury selection process, which bars the use of discretionary strikes to remove a prospective juror whenever "there is a substantial likelihood that an objectively reasonable person would view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, as a factor" in the challenge to the juror.[71] The passage of all three bills during a time of animosity and divisiveness in the United States proved that substantial statutory change could come through societal demands.

b. Moratoriums – More of Them?

57. While California's 2020 legislative reform was a strong shift in the societal winds of the death penalty, it wasn't the first time the State took a staunch stance in opposition to capital punishment. In 2019, Governor Gavin Newsom signed an executive order declaring a moratorium on the death penalty in California.[72] The order called for the immediate withdrawal of California's lethal injection protocols and immediately halted an action in the execution chamber at San Quentin State Prison.[73] Governor Newsom has had a historically strong opposition to the death penalty and in January of 2022 announced a plan for its dismantling within a two-year period.

58. Prior to Governor Newsom's halt on capital punishment, Governor John Kitzhaber declared a moratorium on executions in the state of Oregon in 2011. Governor Kitzhaber stated, "I refuse to be a part of this compromised and inequitable system any longer; and I will not allow further executions while I am Governor."[74] Following suit, Governor Kate Brown announced on February 18, 2015, that she would continue the state's moratorium on executions.

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71 *California Legislature Passes Racial Justice Package Affecting Death- Penalty Practices,* Death Penalty Information Center (2020).

72 See *Governor Gavin Newsom Orders a Halt to the Death Penalty in California*, Press Release (2019).

73 *See Governor Gavin Newsom Orders a Halt to the Death Penalty in California*, Press Release (2019).

74 *State and Federal Info: Oregon*, DEATH PENALTY INFORMATION CENTER (2017).

59. Just five days prior to Governor Brown's continuance of the Oregon moratorium, Governor Tom Wolf of Pennsylvania announced a moratorium on executions, citing concerns about innocence, racial bias, and the death penalty's effects on victims' families.[75] Presently, twenty-three states have affirmatively abolished the death penalty, and it remains in use with twenty-four. The above three states are examples of how legislators and statewide leaders standing up for capital punishment reform can have lifesaving impacts on defendants whose trials have been impacted by racial bias. Continued demand by constituents can influence state leaders to pause executions, to reevaluate the underlying policy reasonings as to why these laws are in place, to restructure legislative framework, and to consider the empirical data that has been and is currently being collected regarding racial implications in capital punishment.

c. Conviction Review Units

60. Finally, the instillation of conviction review units or boards in all state attorneys' offices is essential to ensure the equal and fair application of capital punishment. The Florida Bar defines a conviction review unit as "a division or office within the local prosecutor's office that conducts extrajudicial, fact-based review of secured convictions to investigate plausible allegations of actual innocence."[76]

61. The purpose of a conviction review unit is to identify and potentially remedy wrongful convictions within an office's jurisdiction, should they occur, through the careful review of trial and sentencing materials. CRU's act as a safeguard against wrongful convictions, but even more seriously, wrongful executions.

62. The implementation of these units throughout the United States is somewhat new and statistical evidence has not been collected to prove whether or not they can prevent racial bias from inserting itself into the phases of a trial, to include capital sentencing. However, the continued review of a defendant's case and claims at the very least serves as an opportunity to review and reevaluate the best possible practices and policies in the criminal justice system.[77] This type of public accountability increases transparency and trust between the general public, prosecutors, and defense attorneys. The conviction review units can assess beyond just innocence as a whole but can also be critical in determining whether racial biases held a responsibility in an inmate's sentencing.

75 *State and Federal Info: Oregon*, DEATH PENALTY INFORMATION CENTER (2017).

76 Joshua E. Doyle, *Conviction Integrity Units*, THE FLORIDA BAR (2019).

77 Rawan Bitar, *The Importance of Conviction Integrity*, THE FLORIDA BAR (2018).

IX. In Conclusion

63. It is apparent that racial biases impact the application of the death penalty beginning in the pretrial phases of prosecutorial discretion, trickling all the way through to the sentencing portions of a trial, and even implementing itself within post-conviction review. While disheartening and frustrating, the empirical data that has been collected confirms this, but it also provides us with groundwork for improvement. Knowing where we stand as a nation, as well as individual states, points us to exactly where we need to improve. We cannot go back to change the past, to rewrite court opinions, to prevent statutes from being enacted or to change the historical construction of our nation. What we can do is acknowledge our imperfections, we can use the data collected to re-evaluate evolving standards of decency in our society, we can identify where in our legislative system reform is not just necessary but imperative, we can instill more consistent policies within our prosecuting offices, and we can ensure the proper, ethical review of death penalty sentences.

64. While the question posed at the beginning of this essay may still remain unanswered, until racial biases, animosities, and prejudices are completely and entirely irradicated from the capital punishment schematics, we cannot continue to play a lottery game of life and death with the lives of citizens whose constitutional rights ensure impartiality.