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## Where Black Lives Matter Less: Understanding the Impact of Black Victims on Sentencing Outcomes in Texas Capital Murder Cases from 1973 to 2018

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**WHERE BLACK LIVES MATTER LESS: UNDERSTANDING THE  
IMPACT OF BLACK VICTIMS ON SENTENCING OUTCOMES IN  
TEXAS CAPITAL MURDER CASES FROM 1973 TO 2018**

JELANI JEFFERSON EXUM\* AND DAVID NIVEN\*\*

ABSTRACT

*The systemic disregard for Black lives in America was on full display when footage of a police officer kneeling on the neck of George Floyd went viral. Mr. Floyd's resultant death set off protests declaring that Black Lives Matter throughout the nation and across the world. While national attention rightfully turned to demanding police accountability for undue violence, the prevailing conversation also incorporated at least a declared concern for addressing institutionalized racism within the criminal justice system and other American institutions. The term of the day became "antiracism." With regard to police killings, the lesson is that police officers disproportionately kill Black people in this country with impunity because our system of policing encourages such violence, and our legal jurisprudence protects that use of violence. Combining the Black Lives Matter declaration with antiracism ideals requires systemic changes that will directly address the disproportionate and racist outcomes of policing. When combined with the larger antiracist movement—the call for antiracist policies across American institutions—the Black Lives Matter movement provided a powerful model for revealing the historic lack of protection for Black people as they live and work in this country. Declaring that Black Lives Matter is a reminder that Black lives have value, too, and ought to be legally protected. However, even when there is a system that is arguably in place to vindicate the unjust loss of life, Black people still remain unprotected.*

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*The application of the death penalty in America reveals the troubling truth that Black deaths do not matter.*

*Scholars and advocates have long acknowledged that the death penalty is disproportionately applied to Black offenders. It is also well known that the race of a victim is a leading factor in a capital defendant's risk of receiving the death penalty, with those convicted of murdering whites significantly more likely to receive the death penalty than those convicted of murdering Blacks. This Article takes an in-depth look at statistics covering the sentencing outcomes in capital murder cases in Texas from 1973 to 2018, revealing the clear evidence that race matters in the imposition of the death penalty. However, this Article does not simply join the chorus of voices that have recognized the racial disparity in the death penalty. Rather, the authors argue that the lesson from the Black victim effect on the death penalty decision fits into the broader, historic, and present-day context of devaluing Black lives. As the Texas example provides, the devaluing effect of Blackness is apparent. This is not simply a failure to recognize the value of Black lives—as the Black Lives Matter movement exposes—but a reflection of the societal view that Blackness actually reduces the value and importance of all things—from property to community spaces to ultimate humanity. In life, Black people are vastly under-protected by the law, and the same is true for Black people even in a system designed to exact retribution for death. When we accept the fact that the death penalty reveals that Black deaths do not matter, then it becomes apparent that there is not an antiracist fix for the death penalty other than its abolition.*

*In this Article, the authors present the most comprehensive data ever assembled on capital murder cases in Texas to affirm that the scope of the race of victim difference is jarring. This data shows how pervasive race is in death penalty outcomes. In every single comparison the racial disparity was statistically significant, and harsher punishment was associated with white victims than with African American victims, who clearly mattered less. The truth, of course, is that Black victims matter as much as any, even if the legal system and society haven't recognized their value. Within a database of thousands of cases there are thousands of tragic stories of lives upended by acts of an almost unspeakable nature. The details differ from case to case, but across all those thousands of cases the race of victim disparity persists. The math is straightforward. Indeed, the odds against the patterns seen here—emerging by chance—are truly astronomical. The race of the victim matters in the Texas criminal justice system.*

*As a matter of jurisprudence and policy making, however, the meaning of this data is uncertain. When legislators debate the death penalty, racial disparities are among the most frequently cited concerns of opponents of the death penalty. Supporters of the death penalty, however, dispute both the math and the meaning of findings of racial disparities, taking particular offense at the suggestion that race influences sentencing or influences their own views. These*

*authors argue that abolition is the only corrective approach. We must make the radical choice to uproot systems, like the death penalty, that allow the anti-Black biases in our national consciousness to not only thrive, but to be just. To do otherwise is to perpetuate a system where Black lives matter less.*

## INTRODUCTION

In the Summer of 2020, the systemic disregard for Black lives in America was on full display when footage of a police officer kneeling on the neck of George Floyd went viral. Mr. Floyd's resultant death set off protests declaring that Black Lives Matter throughout the nation and across the world. While national attention rightfully turned to demanding police accountability for undue violence, the prevailing conversation also incorporated at least a declared concern for addressing institutionalized racism within the criminal justice system and other American institutions. The term of the day became "antiracism." With regard to police killings, the lesson is that police officers disproportionately kill Black people in this country with impunity because our system of policing encourages such violence, and our legal jurisprudence protects that use of violence. Combining the Black Lives Matter declaration with antiracism ideals requires systemic changes that will directly address the disproportionate and racist outcomes of policing. When combined with the larger antiracist movement—the call for antiracist policies across American institutions—the Black Lives Matter movement provided a powerful model for revealing the historic lack of protection for Black people as they live and work in this country. Declaring "Black Lives Matter" is a reminder that Black lives have value, too, and ought to be legally protected. However, even when there is a system that is arguably in place to vindicate the unjust loss of life, Black people still remain unprotected. The application of the death penalty in America reveals the troubling truth that Black deaths do not matter.

Scholars and advocates have long acknowledged that the death penalty is disproportionately applied to Black offenders.<sup>1</sup> It is also well known that the race of a victim is a leading factor in a capital defendant's risk of receiving the death penalty, with those convicted of murdering whites significantly more likely to receive the death penalty than those convicted of murdering Blacks.<sup>2</sup> This Article takes an in depth look at statistics covering the sentencing outcomes in Texas capital murder cases from 1973 to 2018 to reveal the clear evidence that race matters in the imposition of the death penalty. However, this Article does not simply join the chorus of voices that have recognized the racial

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1. See, e.g., Gary Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783, 783–88 (1981).

2. *DPIC Analysis: Racial Disparities Persisted in U.S. Death Sentences and Executions in 2019*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/news/dpic-analysis-racial-disparities-persisted-in-the-u-s-death-sentences-and-executions-in-2019> [<https://perma.cc/YD48-7S3Q>] (last visited Jan. 21, 2020); *Executions by Race and Race of Victim*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/executions-overview/executions-by-race-and-race-of-victim> [<https://perma.cc/G5JJ-MGND>] (last visited Feb. 14, 2022); *Race and the Death Penalty*, ACLU, <https://www.aclu.org/other/race-and-death-penalty> [<https://www.aclu.org/other/race-and-death-penalty>] (last visited Feb. 14, 2022).

disparity in the death penalty. Rather, it argues that the lesson from the Black victim effect on the death penalty decision fits into the broader, historic, and present-day context of devaluing Black lives. Through the example that Texas provides, the devaluing effect of Blackness is apparent. This is not simply a failure to recognize the value of Black lives—as the Black Lives Matter movement exposes—but is a reflection of the societal view that Blackness actually reduces the value and importance of all things—from property to community spaces to ultimate humanity. In life, Black people are vastly under-protected by the law, and the same is true for Black people—even in a system designed to exact retribution for death. When we accept the fact that the death penalty reveals that Black deaths do not matter, then it becomes apparent that there is not an antiracist fix for the death penalty other than its abolition.

This Article reports quantitative findings from the authors' study of Texas capital murder convictions, documenting the consistent disparity in sentencing relating to the race of the victim. Finding that the punishments imposed in cases with Black victims are uniformly lower than in cases with white victims, the authors consider anew the urgency of the assertion that Black Lives Matter. This discussion is situated within the larger death penalty debate and considers how the findings here fit a pattern in which the legal system—in both criminal and civil matters—tolerates racial devaluation.

The Article proceeds in four parts. Part I presents data revealing a stark disparity in death sentence rates in Texas based on the race of the victim. Part II situates the findings within the notion of the death penalty as a tool of retribution. Part III considers how race of victim disparities fit a larger pattern of devaluing Black lives. Part IV suggests disparities are inherent to the death penalty and that the sentence is irredeemable.

### I. RACE MATTERS: THE NUMBERS

This Article is based on a comprehensive database of 15,394 capital murder convictions in Texas from 1973 to 2018.<sup>3</sup> Over those four and half decades, Texas leads the nation in the number of executions.<sup>4</sup> Of those 15,394 capital murder cases, death sentences were imposed in 5.2% of all convictions. Based on this outcome, we should expect that the death sentence rate should cluster around 5.2% for variables that should be unrelated to the imposition of the sentence, such as race. If race of the victim, for example, is unrelated to

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3. Portions of these data were collected via the Texas Department of Criminal Justice (“TDCJ”) through the Offender and Victim Information elements available online and the Public Information Application (“PIA”) systems. Individual offenders were then tracked through Texas District Courts (“TDC”) Court Activity Database. Court records on file in each of the districts provided victim information as well as the weapon(s) used in the crime.

4. *Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976> [<https://perma.cc/CN94-YC7C>] (last visited Feb. 16, 2021).

sentencing, then the death sentence rate should be near 5.2% in both white and African American victim cases. This proves not to be the case. Rather than finding roughly proportional results, the data reveals a stark disparity based on race of victim. As shown in Table 1, death sentences occur in 8.5% of cases with white victims and 2.7% of cases with African American victims. Thus, far from clustering near the baseline, cases with white victims were actually three times more likely to result in a death sentence than cases with African American victims. This result comports with studies of capital murder cases in numerous states, including Florida,<sup>5</sup> Georgia,<sup>6</sup> Kentucky,<sup>7</sup> Missouri,<sup>8</sup> North Carolina,<sup>9</sup> Ohio,<sup>10</sup> Oklahoma,<sup>11</sup> and Pennsylvania,<sup>12</sup> that found a strong relationship between the race of the victim and the resulting sentence. Findings of racial

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5. Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLA. L. REV. 1 (1991) (finding cases with white victims to be six times more likely to receive a death sentence than those with Black victims).

6. David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 708–10 (1973) (“Georgia’s . . . death-sentencing rate . . . is .06 (15/246) for [B]lack victim cases versus (85/348) for white victim cases. . . . [And] as compared to white victim cases, the level of aggravation in [B]lack victim cases must be substantially greater before the prosecutor will even seek a death sentence.”).

7. Thomas J. Keil & Gennaro F. Vito, *Race and the Death Penalty in Kentucky Murder Trials: 1976–1991*, 20 AM. J. CRIM. JUST. 17 (1995).

8. Jonathan R. Sorensen & Donald H. Wallace, *Capital Punishment in Missouri: Examining the Issue of Racial Disparity*, 13 BEHAVIORAL SCI. & THE L. 61 (1995); Michael Lenza et al., *The Prevailing Injustices in the Application of the Missouri Death Penalty (1978 to 1996)*, 32 SOC. JUST. 151, 158 (2005) (“[B]lacks who kill whites are five times more likely to be charged with capital murder than are [B]lacks who kill [B]lacks. Whites with [B]lack victims are half as likely to be charged with capital murder than are whites who kill other whites.”).

9. Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina, 1980–2007*, 89 N.C.L. REV. 2119, 2145 (2010) (finding cases with white victims to be approximately three times more likely to receive a death sentence than those with Black victims).

10. Marian R. Williams & Jefferson E. Holcomb, *Racial Disparity and Death Sentences in Ohio*, 29 CRIM. JUST. J. 207 (2001) (finding cases with white victims to be more than twice as likely to receive a death sentence than those with Black victims).

11. Glenn L. Pierce et al., *Race and Death Sentencing for Oklahoma Homicides Committed Between 1990 and 2012*, 107 J. CRIM. L. & CRIMINOLOGY 733, 750 (2017) (finding “rather large disparities in the odds of a death sentence that correlate with the gender and the race/ethnicity of the victim. . . . [C]ases with white female victims, cases with white male victims, and cases with minority female victims are significantly more likely to end with a death sentence in Oklahoma than are cases with non-white male victims”).

12. Jeffery T. Ulmer et al., *The Race of Defendants and Victims in Pennsylvania Death Penalty Decisions: 2000–2010*, 37 JUST. Q. 955 (2020).

imbalance in Connecticut,<sup>13</sup> Maryland,<sup>14</sup> and New Jersey<sup>15</sup> sentencing outcomes contributed to what were ultimately successful efforts to abolish the death penalty in those states.<sup>16</sup>

*A. The Startling Effect of the Victim's Race*

As a matter of both math and logic, unbiased processes should produce unremarkable patterns. That is, an unbiased coin flipped hundreds or thousands of times should land on heads roughly half the time and land on tails roughly half the time. Were a coin flipped a thousand times to land on heads twice as often as it lands on tails, the results would defy even the most generous statistical boundaries of what a fair coin could produce. Thus, we would conclude that some element of the process has biased the outcome and led to the pattern observed. If race does not affect the criminal justice system, we should expect the race of the victim to be unrelated to the outcome of the case. That is, an unbiased process examined across hundreds or thousands of cases should produce roughly the same punishment for crimes against white victims as it does for crimes against African American victims. Table 1 suggests this is not the case.

**Table 1. Death Sentence Rate by Race of Victim**

All Cases/All Offenders	Death Sentence Rate
White Victim	8.5
African American Victim	2.7
	p < .00001
	n = 11,822

The scope of that gap—between results that would suggest neutrality and the results actually found here—is conveyed by a measure of statistical

13. John J. Donohue III, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?*, 11 EMPIRICAL LEGAL STUD. 637 (2014).

14. Raymond Paternoster et al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978–1999*, 4 U. MD. L.J. RACE, RELIG., GENDER, & CLASS 1 (2004).

15. David C. Baldus et al., *Race and Proportionality Since McCleskey v. Kemp, (1987): Different Actors with Mixed Strategies of Denial and Avoidance*, 39 COLUM. HUM. RTS. L. REV. 143 (2007).

16. Scherzer argues the proportionality review process in New Jersey served to both limit the use of the death penalty in New Jersey and undergird arguments for abolition, see Aaron Scherzer, Note, *The Abolition of the Death Penalty in New Jersey and Its Impact on Our Nation's Evolving Standards of Decency*, 15 MICH. J. RACE & L. 223, 237–40 (2009). Niven and Donnelly find that references to racial disparities were a major theme among legislators in Connecticut who voted to abolish the death penalty, see David Niven & Ellen A. Donnelly, *Who Challenges Disparities in Capital Punishment?: An Analysis of State Legislative Floor Debates on Death Penalty Reform*, 18 J. ETHNICITY IN CRIM. JUST. 95 (2020).







case, *McCleskey v. Kemp*.<sup>22</sup> In that case, Warren McCleskey, a Black man, had been convicted of two counts of armed robbery and one count of murder in Fulton County, Georgia.<sup>23</sup> His convictions arose out of the killing of a white police officer during the robbery of a furniture store.<sup>24</sup> A jury convicted McCleskey of murder, and, after a sentencing hearing, the jury recommended a death sentence.<sup>25</sup> The court followed the jury's recommendation and sentenced McCleskey to death.<sup>26</sup> On appeal, McCleskey raised several issues, including claims that the Georgia capital sentencing process was administered in a racially discriminatory manner, violating the Eighth and Fourteenth Amendments.<sup>27</sup> In support of his claim, McCleskey pointed to a statistical study performed by Professors David C. Baldus, Charles Pulaski, and George Woodworth ("the Baldus study") that showed "a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant."<sup>28</sup> The Baldus study concluded that, "even after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing [B]lacks," and "[B]lack defendants were 1.1 times as likely to receive a death sentence as other defendants."<sup>29</sup> Ultimately, the Baldus study indicates that, as a Black defendant convicted of killing a white victim, McCleskey was in the class of individuals with "the greatest likelihood of receiving the death penalty."<sup>30</sup>

In its arguments before the U.S. Supreme Court, the State of Georgia went to great lengths in order to explain away racial disparities in death sentences.<sup>31</sup>

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

23. *Id.* at 283.

24. *Id.*

25. *Id.* at 284.

26. *Id.* at 285.

27. *McCleskey*, 41 U.S. at 286 (1987).

28. As the Supreme Court explained in *McCleskey*: "The Baldus study is actually two sophisticated statistical studies that examine over 2,000 murder cases that occurred in Georgia during the 1970's. The raw numbers collected by Professor Baldus indicate that defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing [B]lacks received the death penalty in only 1% of the cases. The raw numbers also indicate a reverse racial disparity according to the race of the defendant: 4% of the [B]lack defendants received the death penalty, as opposed to 7% of the white defendants. Baldus also divided the cases according to the combination of the race of the defendant and the race of the victim. He found that the death penalty was assessed in 22% of the cases involving [B]lack defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving [B]lack defendants and [B]lack victims; and 3% of the cases involving white defendants and [B]lack victims." *Id.*

29. *Id.* at 287.

30. *Id.*

31. R.J. MARATEA, KILLING WITH PREJUDICE: INSTITUTIONALIZED RACISM IN AMERICAN CAPITAL PUNISHMENT 88 (2019).

During oral arguments, Georgia's deputy attorney general told the Justices that "white victim cases are qualitatively different from [B]lack victim cases," later elaborating that Black victims were more likely to be murdered in "a barroom quarrel, if you will."<sup>32</sup> Georgia presented no data on barroom quarrels or any of their other allied assertions. Nonetheless, the Supreme Court's decision denying McCleskey's constitutional claims suggests that the racially disparate outcomes are somehow explainable by something other than discrimination by the decisionmakers.

In holding that there was no constitutional violation in McCleskey's case,<sup>33</sup> the Supreme Court reasoned:

Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused. The unique nature of the decisions at issue in this case also counsels against adopting such an inference [of discriminatory purpose] from the disparities indicated by the Baldus study.<sup>34</sup>

The Court's preoccupation with the special nature of discretion suggests that it was leaving open the possibility that there could be many factors—beyond simply race—that informed the decisionmakers' choice to impose a death sentence. But, of course, that conclusion is exactly what the Baldus study was refuting. However, the Court dismissed the significance of the study's findings and curtly stated that the Baldus study was "clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose."<sup>35</sup> In other words, there must be some other perfectly acceptable explanation for the racially disparate outcomes. The history of the death penalty in Georgia belies that assumption,<sup>36</sup> and similar excuses remain faulty with regards to today's death penalty statistics.

For the moment, leave aside the dicey logic that ungirds the expectation that the details of murder cases vary systematically by race. The more fundamental point here is that even when we pull these capital cases apart by particular details

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32. *Id.*

33. Prior to *McCleskey*, the Supreme Court had already established that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause" and that "absent a 'stark' pattern," "impact is not determinative" in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265–66 (1977).

34. *McCleskey v. Kemp*, 41 U.S. 279, 297 (1987).

35. *Id.*

36. See Ursula Bentele, *The Death Penalty in Georgia: Still Arbitrary*, 62 WASH. UNIV. L.Q. 573, 580–84 (1985) (describing the wide variety of aggravating circumstances that fit into the capital category which "make[] the unbridled discretion of juries . . . particularly dangerous," because if the defendant "fits into one of the categories eligible for capital punishment, any reason, or no reason, can serve to place him on death row. It does not matter whether the jury chooses to execute him because he was [B]lack, or poor, or psychotic"); Arnold Barnett, *Some Distribution Patterns for the Georgia Death Sentence*, 18 U.C. DAVIS L. REV. 1327, 1334–41 (1985) (describing the origins of the modern death penalty in Georgia).

of the crime, the race of victim disparity persists. For example, death sentence rates in the Texas data vary by the weapon used in the crime. Across these Texas cases, those accused of murdering by use of their hands are the most likely to be sentenced to death. Meanwhile, murder with a blunt object or a knife is more likely to result in a death sentence than murder by firearm. But even as those details are unquestionably consequential to the outcome of the case, the race of victim disparity persists across every category of weapon. Cases with white victims are more likely to result in death sentences than cases with African American victims if the crime was committed with a gun.<sup>37</sup> Or if the crime was committed with a knife.<sup>38</sup> Or with a blunt object.<sup>39</sup> Or with the assailant's hands.<sup>40</sup> Or with another object.<sup>41</sup>

As an example, Table 3 shows the death sentence rate in firearm cases. Mirroring the overall data, we again see a disparity by race of victim in cases with African American defendants. Moreover, with white defendants we again see a massive race of victim disparity, with white victim cases being ten times more likely to result in a death sentence than African American victim cases.

**Table 3. Death Sentence Rate by Race of Victim & Offender**

<b>Firearm Cases Only</b>	White Defendant	African American Defendant
White Victim	14.9	7.59
African American Victim	1.39	5.0
	p < .00001	p < .005
	n = 2367	n = 2943

Even when we remove cases that resulted in death sentences from the analysis, the data still reveals a race of victim disparity. Table 4 shows the average sentence (in years) imposed in cases that did not result in a death sentence. Consistent with the previous data, once again we find a disparity, with harsher punishment imposed on those convicted of murdering a white Texan. With sentencings about four years longer for white victims than African American victims, we once again see a highly statistically significant difference.

37. In the authors' dataset, the death sentence rate is 7.7% in cases where a gun was used against a white victim and 2.7% in African American victim cases.

38. In the authors' dataset, the death sentence rate is 10.7% in cases where a knife was used against a white victim, and 4.7% in African American victim cases.

39. In the authors' dataset, the death sentence rate is 11.2% in cases where a knife was used against a white victim, and 3.8% in African American victim cases.

40. In the authors' dataset, the death sentence rate is 92.7% in cases where a white victim was killed with the assailant's hands, and 78.9% in African American victim cases.

41. In the authors' dataset, the death sentence rate is 3% percent in cases where something other than a gun, knife, blunt object, or the assailant's hands were used against a white victim, and 1.3% in African American victim cases.

By eliminating death sentences from consideration, this comparison removes cases that ostensibly represent the worst and most heinous crimes. And yet the disparity in race of victim punishment remains. It cannot be a function of the unique nature of capital sentencing cases since the same dynamic applies to the entire body of cases.

**Table 4. Length of Sentence by Race of Victim**

	Sentence in Years (mean)
White Victim	51.3
African American Victim	47.5
	p < .00001
	n = 11,139

## II. THE DEATH PENALTY'S RETRIBUTION PROBLEM

The Supreme Court has maintained that the death penalty satisfies the retribution and general deterrence theories of punishment.<sup>42</sup> In Eighth Amendment cases examining claims of Cruel and Unusual Punishment, the Court explains that “capital punishment is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes.”<sup>43</sup> In addressing retribution, which measures an offender’s moral desert,<sup>44</sup> the Supreme Court expounds that “capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose

42. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (“The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.”).

43. *Kennedy v. Louisiana*, 554 U.S. 407, 441 (2008).

44. Retribution punishes in accordance with philosophical views on just desert and moral blameworthiness. Deontological retribution focuses “on the blameworthiness of the offender, as drawn from the arguments and analyses of moral philosophy.” Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 *CAMBRIDGE L.J.* 145, 148 (2008). This deontological approach to retribution comes from the work of Immanuel Kant. See *IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS* 101 (John Ladd transl., 1965). For another traditional account of retribution, see G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* 98 (S.W. Dyde transl., 1896) (1821). For a modern retributivist view, see Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 *VAND. L. REV.* 2157, 2193 (2001). In its empirical form, retribution “focuses on the blameworthiness of the offender. But in determining the principles by which punishment is to be assessed, it looks not to philosophical analyses but rather to the community’s intuitions of justice.” Robinson, *supra* note 44, at 149; see also Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 *WAKE FOREST L. REV.* 211, 217 (2012) (explaining “the crime-control benefits from distributing punishment according to people’s shared intuitions of justice”).

extreme culpability makes them the most deserving of execution.”<sup>45</sup> The mitigating and aggravating factors that jurors consider in the capital sentencing decision are designed to identify the worst of the worst offenders. In terms of retribution, it stands to reason, then, that juries decide to sentence offenders to death when they are convinced that those aggravating factors indicate a level of moral blameworthiness for which a life sentence would be an insufficient punishment. The decision faced by capital jurors “is the highly-charged moral and emotional issue of whether the defendant, notwithstanding his crimes, is a person who should continue to live.”<sup>46</sup>

The statistics on the impact of a victim’s race are evidence of the failures of retributivist punishment. Retribution, by its very nature, requires the sentencing decision makers to impose their own view of value upon the defendant. One cannot assess the moral desert of another without assessing the significance of the harm caused by that person weighed against the individual’s redemptive worth. Some scholars argue that the reason for the racially disparate capital punishment decisions is that capital jurors, who are mostly male and mostly white,<sup>47</sup> may not be able to identify with Black capital defendants and may identify more with the victim when the victim is white.<sup>48</sup> In other words, “jurors may have a difficult time empathizing with mitigating evidence presented by Black defendants and, conversely, victim impact testimony might disproportionately magnify the loss of White victims compared to non-White victims.”<sup>49</sup> Said more bluntly, jurors see less loss when the victim is Black, and less redeemability when the defendant is Black.<sup>50</sup> Additionally, scholars have theorized that retribution is “inextricably tied to race,” and therefore “cannot be

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45. *Kennedy*, 554 U.S. at 420 (quoting *Roper v. Simmons*, 543 U.S. 551, 568 (2005)).

46. See Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L. REV. 299, 334–35 (1983).

47. Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U.L. REV. 513, 544 (2014) (explaining that the process of death qualification leads to capital juries that are mostly comprised of white males).

48. *Id.* at 534–44 (discussing how racial stereotypes affect white jurors in capital cases).

49. *Id.* at 517.

50. See Levinson et al., *supra* note 47, at 518 n.9. This blunt point often gets lost—or sanitized—by labeling it implicit bias. For discussions on implicit bias in the death penalty context, Levinson suggests the following resources involving implicit bias social science research: *Implicit Racial Bias: A Social Science Overview*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 9 (Justin D. Levinson & Robert J. Smith eds., 2012); Mahzarin R. Banaji, *Implicit Attitudes Can Be Measured*, in *THE NATURE OF REMEMBERING: ESSAYS IN HONOR OF ROBERT G. CROWDER* 117, 123 (Henry L. Roediger III et al. eds., 2001) (giving “a more theoretical perspective underlying work on implicit bias”); Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 *PSYCHOL. REV.* 4 (1995).

contemplated without also considering the corresponding impact” of racial arbitrariness.<sup>51</sup> Professor Justin Levinson has explained it in this manner:

[T]he tendency to punish crimes against White [sic] Americans more severely should have been reduced by the combination of channeling society’s taste for retribution into the formal justice system and requiring heavy anti-arbitrariness procedural regulation in the administration of capital punishment. This has not been the case.<sup>52</sup>

This view takes issue with the adequacy of the death penalty process, requires room for retribution, yet allows for racial bias to influence that retributive determination, thus leading to arbitrariness. The Supreme Court has plainly held that death may not be imposed in an arbitrary manner.<sup>53</sup> However, the term “arbitrary” makes outcomes sound unpredictable, which the data shows is not the case. As explained previously, the statistics in Texas and throughout the country are not rooted in mere chance. Instead, the data demonstrates that race matters in the capital sentencing context. The racially disparate outcomes that we are witnessing in the death penalty decisions—which exist across relevant case factors—highlight that jurors are

[E]xpressing [the] retributive sentiments as their community of death qualified jurors see things—that [B]lack capital defendants are more morally blameworthy than white capital defendants; that defendants who have taken the life of a white person are especially deserving of the death penalty; and that [B]lack defendants who take the life of a white person are the worst of the worst capital defendants.<sup>54</sup>

In the death penalty context, the Supreme Court has recognized the importance of the jury as the exactors of retribution. In January 2016, the Supreme Court decided *Hurst v. Florida*, in which it examined Florida’s capital sentencing scheme.<sup>55</sup> Under Florida law, “the maximum sentence a capital felon

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51. Levinson et al., *supra* note 47, at 517, 541.

52. *Id.* at 541.

53. *See, e.g.,* *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (“[T]he death penalty . . . [can]not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.”) (citing *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)). Indeed, Justice Marshall raised concerns about the risk of “arbitrariness” in his *McCleskey* dissent. *See* *McCleskey v. Kemp*, 481 U.S. 279, 322–23 (1987) (Marshall, J., dissenting). Justice Marshall asserted that, since *Furman*, the “Court had been concerned with the risk of the imposition of an arbitrary sentence, rather than the proven fact of one.” *Id.* at 323. The “emphasis on risk acknowledges the difficulty of divining the jury’s motivation in an individual case,” and “reflects the fact that concern for arbitrariness focuses on the rationality of the system as a whole, and that a system that features a significant probability that sentencing decisions are influenced by impermissible considerations cannot be regarded as rational.” *Id.*

54. Jelani Jefferson Exum, *Should Death Be So Different?: Sentencing Purposes and Capital Jury Decisions in an Era of Smart on Crime Sentencing Reform*, 70 ARK. L. REV. 227, 244–45 (2017).

55. 577 U.S. 92, 94 (2016).



may receive on the basis of the conviction alone [was] life imprisonment.”<sup>56</sup> Similar to other states, Florida law only authorized the conviction for a capital offense to carry life imprisonment and required the finding of additional aggravating factors in order for death to be imposed on the defendant.<sup>57</sup> However, Florida’s capital procedure allowed an advisory jury to make a recommendation to a judge, who then would make the final findings needed to impose a death sentence.<sup>58</sup> Death could only be imposed if a separate sentencing hearing “result[ed] in findings by the court that such person shall be punished by death.”<sup>59</sup> Because this death penalty sentencing procedure exposed a defendant to a higher punishment than that authorized by the jury’s guilty verdict, the Supreme Court ultimately held that it violated the Sixth Amendment right to a jury trial.<sup>60</sup> The Court made clear in its holding that when state law only allows for a death sentence when certain aggravating factors are present, it must be the jury, and not the judge, who finds the existence of those facts that make death appropriate.<sup>61</sup> In other words, in these types of situations, it must be the jury who finds that retribution and/or deterrence requires the imposition of the death penalty in an individual case. In *Ring v. Arizona*, a 2014 case relied upon by the *Hurst* Court, Justice Breyer found the jury essential in carrying out the retributive justification for capital punishment.<sup>62</sup> As he explained in his concurrence:

In respect to retribution, jurors possess an important comparative advantage over judges. In principle, they are more attuned to “the community’s moral sensibility,” because they “reflect more accurately the composition and experiences of the community as a whole[.]” Hence they are more likely to “express the conscience of the community on the ultimate question of life or death,”[] and better able to determine in the particular case the need for retribution, namely, “an expression of the community’s belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.”<sup>63</sup>

Of course, Justice Breyer’s words are expressing a pristine idea that is sullied by reality. It may be true that juries are more capable than judges of

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56. *Id.* at 92.

57. *Id.* at 94.

58. *Id.* at 95–96.

59. *Id.* at 92 (citing FLA. STAT. § 775.082(1)).

60. *Hurst v. Florida*, 577 U.S. 92, 103 (2016).

61. *Id.* at 102–03 (“Florida’s sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.”).

62. 536 U.S. 584, 614–15 (2014) (Breyer, J., concurring) (“As to the first, I note the continued difficulty of justifying capital punishment in terms of its ability to deter crime, to incapacitate offenders, or to rehabilitate criminals. Studies of deterrence are, at most, inconclusive.”).

63. *Id.* at 615–16 (Breyer, J., concurring) (quoting *Spaziano v. Florida*, 468 U.S. 447 (1984), *Witherspoon v. Illinois*, 391 U.S. 510 (1968), & *Gregg v. Georgia*, 428 U.S. 153 (1976)).

reflecting the conscience of the community. But our persistent racial disparities in capital sentencing show us that the “certain crimes”—that “are themselves so grievous an affront to humanity that the only adequate response” is the death penalty—are routinely those crimes that take the lives of white people, and not those crimes that result in the death of Black people. And, in that way, juries are actually expressing the true racist sentiments of their communities. A version of this form of “race-based retribution”<sup>64</sup> was on display in the 2017 Supreme Court case *Buck v. Davis*.<sup>65</sup> The case, a procedural nightmare, involved questions regarding the proper standard for certificate of availability, as well as what constitutes extraordinary circumstances for a Rule 60(b) motion to reopen a final judgment.<sup>66</sup> However, what is most relevant to this discussion was the basis for Defendant Duane Buck’s claim of ineffective assistance of counsel. Buck’s own expert psychologist witness testified at his sentencing hearing that being Black was a “statistical factor” that increased Mr. Buck’s probability of being a danger in the future.<sup>67</sup> “‘Future dangerousness’ [of the defendant] is one of the ‘special issues’ that a Texas jury must find to exist—unanimously . . . before a defendant may be sentenced to death.”<sup>68</sup> The purported expert’s reasons for using race in this assessment was nothing regarding the particular defendant, but instead his “expert” opinion was based on the “sad commentary that minorities, Hispanics and [B]lack people[] are over represented in the Criminal Justice System.”<sup>69</sup> On cross-examination, the prosecutor sought to clarify this position, asking: “You have determined that the sex factor, that a male is more violent than a female because that’s just the way it is, and that the race factor, Black, increases the future dangerousness for various complicated reasons; is that correct?”<sup>70</sup> The “expert” answered, “Yes.”<sup>71</sup> In other words, this psychologist explained how Blackness makes someone statistically more likely to be a future danger than a white person. Under Texas law (and the law of many other states), likely future dangerousness is one of the aggravating factors that jurors are required to consider in their capital sentencing decision.<sup>72</sup> In short, under this psychologist’s assessment, being Black means being more likely

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64. Exum, *supra* note 54, at 246.

65. 137 S. Ct. 759 (2017).

66. *Id.* at 767.

67. *Id.* at 768 (“In determining whether Buck was likely to pose a danger in the future, [Buck’s second expert] considered seven ‘statistical factors.’ The fourth factor was ‘race.’ His report read, in relevant part: ‘4. **Race.** Black: Increased probability. There is an over-representation of Blacks among the violent offenders.’”); Brief for Petitioner, *Buck v. Davis*, 137 S. Ct. 759 (2016) (No. 15-8049), 2016 WL 4073689, at \*5, \*7.

68. Brief for Petitioner, *supra* note 67, at \*5 (citing TEX. CODE. CRIM. PROC. art. 37.071, § 2).

69. *Id.* at \*7.

70. *Id.* at \*7–8.

71. *Id.* at \*8.

72. See Carla Edmonson, *Nothing Is Certain but Death: Why Future Dangerousness Mandates Abolition of the Death Penalty*, 20 LEWIS & CLARK L. REV. 857, 859–60, 862 (2016).

deserving of the death penalty than others. This is race-based retribution. Mr. Buck was sentenced to death.<sup>73</sup> The Supreme Court's reversal of the decision below and remand for further consideration indicates that the Court agreed that race-based retribution was at play. The Court stated:

Given that the jury had to make a finding of future dangerousness before it could impose a death sentence, [the expert's] report said, in effect, that the color of Buck's skin made him more deserving of execution. It would be patently unconstitutional for a state to argue that a defendant is liable to be a future danger because of his race.<sup>74</sup>

Thankfully, the Supreme Court condemned this use of race as a proxy for blameworthiness in Mr. Buck's case. However, what the Court has failed to do—since the days of *McCleskey*—is recognize that race-based retribution is what routinely occurs in capital cases. A closer look at the effect that the race of victims plays in the death penalty reveals the unfortunate truth: that Black lives are not valued, and therefore, the act of killing Black people is less worthy of death than killing whites.

### III. THE BLACK EFFECT: HOW THE VICTIM DISPARITIES IN THE DEATH PENALTY FIT INTO THE PATTERN OF DEVALUING BLACK LIVES

Something quite illuminating is revealed when capital cases are examined with regard to the number of victims. Unsurprisingly, multiple victim cases are far more likely to result in a death sentence than cases where there is a single victim. But here again, it is found that there is a racial disparity in single victim cases and a racial disparity in multiple victim cases. The results in Table 5 below reveal a meaningful disparity based on race of victim when the defendant is African American. In such instances, cases are about twice as likely to result in a death sentence with a white victim relative to cases with an African American victim. Once again, an even larger disparity applies when the defendant is white, with death sentences occurring eleven times as frequently with white victims relative to African American victims. Multiple victim cases—which are a small subset of the total database—reveal that even in a category of cases in which death sentences are far, far more common, the race of victim disparity nonetheless persists. With white defendants and multiple African American victims, death sentences are imposed in 12.5% of cases. With white defendants, at least one African American victim, and at least one white victim, death sentences are imposed in 18.75% of cases. With white defendants and multiple white victims, death sentences are imposed in 74% of cases. These figures suggest a truly profound scope of difference in the treatment of white victim and African American victim cases. Adding just one Black victim to the pool of

73. Brief for Petitioner, *supra* note 67, at \*8.

74. *Buck v. Davis*, 137 S. Ct. 759, 775, 780 (2017).

victims drastically reduces the likelihood of the death penalty being imposed. A conviction for murdering multiple whites is highly likely to result in a death sentence. A conviction for murdering multiple African Americans in Texas is highly likely to result in avoiding a death sentence.

**Table 5. Death Sentence Rate by Race of Victim & Offender**

Single Victim Cases	White Defendant	African American Defendant
White Victim	11.9	5.97
African American Victim	1.08	2.9
	p < .00001	p < .00001

Another way to contemplate that startling data is to consider the roughly equal likelihood of a death sentence for a white defendant convicted of murdering multiple African Americans relative to white defendants convicted of murdering one white victim. Which is to say, in the realm of prosecutions, it takes multiple African American lives to equal the value of one white life. This clear devaluing of Black lives fits within historic and present-day realities for Black Americans.

*A. The Explicit Devaluation of Black Lives: “Most likely only a negro”*

Scholars have studied the concept of “devaluation” and how it plays out in various legal contexts. Though the Texas death penalty data shows a devaluation of Black lives compared to white lives, it is important to understand that “[d]evaluation affects the way we value activities, institutions, injuries, and other ‘things,’ which, strictly speaking, have no race or gender.”<sup>75</sup> As Professor Martha Chamallas explains:

Devaluation does not operate directly at the level of the individual or even the social group; rather, it operates to affix a “gender” or “race” to a neutral activity or category and simultaneously to place it on a hierarchy of value. What is devalued is the entire category at issue, whether it is women’s work, housework, part-time work, emotional harm, “feminine” behavior or [B]lack life.<sup>76</sup>

It is interesting that, twenty years before the Black Lives Matter movement, Professor Chamallas recognized that Black lives may be a devalued category.<sup>77</sup> Her devaluation theory and the Black Lives Matter movement embrace the same understanding. The category—here, life—is neutral, but once race is affixed to it, it is placed in a hierarchical value system, with Black life ranking near or at

75. Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 772 (2001).

76. *Id.* (citations omitted).

77. Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PENN. L. REV. 463, 471–74 (1998) (writing about using the death penalty as an example to prove devaluation).

the very bottom. It remains necessary to proclaim that Black Lives Matter because historically and presently our systems have repeatedly devalued the entire category of Black life.<sup>78</sup> In Texas—and throughout the nation—the category of “murder victim” is also neutral. But the data shows that when race is added to include Black murder victims, the entire category is devalued. This devaluation has been happening to anything affixed to Blackness throughout American history.

Unlike criminal law, tort law provides disturbing proof of the historical devaluation of Black lives because it requires putting an actual monetary value on those lives. American tort doctrine was shaped through railroad injury cases in the mid to late nineteenth century, a time when railroad companies faced thousands of lawsuits for causing injuries.<sup>79</sup> To avoid trials and settle claims, railroad companies organized claims agents to devalue Blacks.<sup>80</sup> In her article, *Torts, Race, and the Value of Injury, 1900–1949*, Professor Jennifer Wriggins explains that “[a]n influential text for railroad claims agents published in 1927 endorsed racial inequality in claims practices”<sup>81</sup> and “explain[ed] that juries did not value the life of a [B]lack man equally with that of a white man . . . .”<sup>82</sup> The manual addressed the significance of race in determining the settlement value for cases, explaining that “[a] brakeman is not always a brakeman. A white brakeman is a brakeman; but a negro brakeman is most likely only a negro.”<sup>83</sup> As a result of this devaluing by claims agents, railway companies and other transportation industries had lessened incentives to prevent injuries to Blacks because their injuries were less costly.<sup>84</sup> Devaluation is not confined to simply failing to recognize an abstract value. It can result in physical harm, or at least in a failure to adequately protect from harm.

The legal incentive to offer less protection to Black lives works to further devalue those lives. This is highlighted in more recent tort cases in which race is raised as a meaningful data point for valuation. In *McMillan v. City of New York*, a 2008 case from the Eastern District of New York, the African American male plaintiff suffered a severe spinal cord injury in a ferryboat crash.<sup>85</sup> As evidence related to damage computation at trial, the defendant’s expert relied on

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78. Kevin Cokley, *We Need Leaders to Affirm that Black Lives Matter, Not Exploit the Phrase to Divide Us*, USA TODAY (July 13, 2020, 5:00 AM), <https://www.usatoday.com/story/opinion/2020/07/13/black-lives-matter-exploited-for-political-economic-gain-column/5397072002/> [<https://perma.cc/HX7V-MTJ3>].

79. Jennifer B. Wriggins, *Torts, Race, and the Value of Injury, 1900–1949*, 49 HOW. L.J. 99, 108 (2005).

80. *Id.*

81. *Id.* at 109 (referencing SMITH R. BRITTINGHAM, *THE CLAIM AGENT AND HIS WORK: INVESTIGATION AND SETTLEMENT OF CLAIMS FOR PERSONAL INJURIES* 270–71 (1927)).

82. *Id.* (quoting BRITTINGHAM, *supra* note 81).

83. *Id.* (quoting BRITTINGHAM, *supra* note 81).

84. Wriggins, *supra* note 79, at 110.

85. 253 F.R.D. 247, 248 (E.D.N.Y. 2008).

data showing that African Americans who experience spinal cord injuries were likely to have a shorter life expectancy after such injury “than persons of other ‘races’ with similar injuries.”<sup>86</sup> Writing for the District Court, Judge Jack Weinstein held that such race-based statistical evidence was impermissible because it was based on the biological fiction of race and the unreliability of race statistics.<sup>87</sup> To Justice Weinstein’s credit, he recognized the dangers of using race to determine value. However, it is often difficult to disentangle the institutional aspect of racism from evidence impacting value in a case.

Lead paint cases are useful examples of how institutional racism, Black devaluation, and legal evidence intertwine. Despite prohibitions on the sale of lead-based paint since 1978, the Environmental Protection Agency has indicated as recently as 2011 that lead poisoning remains the top environmental health threat to children six years of age and younger in the United States.<sup>88</sup> Lead paint poisoning disproportionately affects low income areas,<sup>89</sup> which means communities of color suffer disproportionately from lead poisoning.<sup>90</sup> In 2017, it was reported that the Black population in the United States has the highest rate of poverty—a staggering 24.1% compared to 9.1% for the white population.<sup>91</sup> Given the prevalence of lead paint and other lead hazards in poverty-stricken areas, Black children are “nearly three times more likely than white children to have elevated blood-lead levels.”<sup>92</sup> In their study, *The Racial Ecology of Lead Poisoning: Toxic Inequality in Chicago Neighborhoods, 1995-2013*, Harvard Sociologists Robert J. Sampson and Alix S. Winter concluded that there were “extraordinarily high rates of lead toxicity” in Black and Latino neighborhoods, with “prevalence rates topping 90% of the child population.”<sup>93</sup> As the authors explained, “lead toxicity is a source of ecological inequity by race and a pathway

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86. *Id.*

87. *Id.* at 248–53.

88. See Donna Heron, *Lead Poisoning: Number One Environmental Health Threat to Children Ages Six and Younger in the U.S.*, ENV’T PROT. AGENCY (Oct. 25, 2011), [https://archive.epa.gov/epapages/newsroom\\_archive/newsreleases/5e312cbe6666dca8852579340068ebef.html](https://archive.epa.gov/epapages/newsroom_archive/newsreleases/5e312cbe6666dca8852579340068ebef.html) [<https://perma.cc/473Q-9UXS>].

89. David E. Jacobs et al., *The Prevalence of Lead-Based Paint Hazards in U.S. Housing*, 110 ENV’T. HEALTH PERSP. A599, A606 (2002) (finding that thirty-five percent of low-income housing within the United States contained lead-based paint hazards).

90. Emily A. Benfer, *Contaminated Childhood: The Chronic Lead Poisoning of Low-Income Children and Communities of Color in the United States*, HEALTH AFFS. (Aug. 8, 2017), <https://www.healthaffairs.org/doi/10.1377/hblog20170808.061398/full/> [<https://perma.cc/Y797-JXZ4>].

91. *Id.*

92. *Id.*

93. Robert J. Sampson & Alix S. Winter, *The Racial Ecology of Lead Poisoning: Toxic Inequality in Chicago Neighborhoods, 1995-2013*, 13 DU BOIS REV. 261, 279 (2016), [https://scholar.harvard.edu/files/alixwinter/files/sampson\\_winter\\_2016.pdf](https://scholar.harvard.edu/files/alixwinter/files/sampson_winter_2016.pdf) [<https://perma.cc/9KAR-PYVR>].

through which racial inequality literally gets into the body.”<sup>94</sup> This “ecological inequality” plays out as inequality in the court system as well. In calculating damages, courts have traditionally allowed the introduction of evidence of a plaintiff’s “life expectancy, worklife expectancy, and average income values particularized to the plaintiff’s gender and, where available, race.”<sup>95</sup> So, when Black and Latino children are injured by lead paint, and their lost future earning capacity is assessed, race-based predictive tables are often used.<sup>96</sup> This results in that group—Black and Latino children—systematically receiving considerably lower awards than would other groups, especially whites.<sup>97</sup> The devaluation of these young Black and Latino lives results in the defendants—typically public housing authorities and landlords in low-income areas—having a lessened incentive to maintain the health standards of their properties.<sup>98</sup> That reduced incentive works to the detriment of Black and Latino children who disproportionately live in low-income or government housing.<sup>99</sup> And the cycle continues.

### 1. The Implicit Devaluation of Black Lives

Tort law outcomes show how the devaluation of Black lives plays out in explicit terms—through damage prediction charts. Perhaps unsurprisingly, tort law is also a vehicle for implicit racial bias to pervade. In their study, *Do Black Injuries Matter?: Implicit Bias and Jury Decision Making in Tort Cases*, Professors Johnathan Cardi, Valerie Hans, and Gregory Parks found that “the dollar awards for the injuries suffered by [B]lack plaintiffs were lower than awards for the same injuries experienced by white plaintiffs.”<sup>100</sup> When award decisions were broken down by the actual decision maker, the study found that participants with higher implicit bias scores<sup>101</sup> “attributed significantly more

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94. *Id.*

95. Ronen Avraham & Kimberly Yuracko, *Torts and Discrimination*, 78 OHIO ST. L.J. 661, 666 (2017) (citing *Watson v. S. Shore Nursing & Rehab. Ctr., LLC*, 965 N.E.2d 1200, 1209 (Ill. App. Ct. 2012) (using a race and gender government table to estimate the life expectancy of a Black male); *Probst v. Wroten*, 433 So. 2d 734, 744 (La. Ct. App. 1982) (authorizing gender-based work-life expectancy tables despite the plaintiff’s objection); *Johnson v. Misericordia Cmty. Hosp.*, 294 N.W.2d 501, 527 (Wis. Ct. App. 1980) (using race-based yearly government salary tables), *aff’d*, 301 N.W.2d 156 (Wis. 1981)).

96. Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1432, 1440–41 (2015).

97. *Id.*

98. *Id.*; see generally Laura Greenberg, *Compensating the Lead Poisoned Child: Proposals for Mitigating Discriminatory Damage Awards*, 28 B.C. ENV’T AFFS. L. REV. 429 (2001).

99. Chamallas, *supra* note 96.

100. Johnathan Cardi et al., *Do Black Injuries Matter?: Implicit Bias and Jury Decision Making in Tort Cases*, 93 S. CAL. L. REV. 507, 507–08 (2020).

101. *Id.* at 536–37 (“The lower the score, the weaker the negative association with African-American faces and positive association with Caucasian faces; the higher the score, the stronger

legal responsibility to [B]lack defendants than to white defendants and recommended higher awards for plaintiffs who sued [B]lack defendants.”<sup>102</sup> Implicit racial bias “describes the cognitive processes whereby, despite even the best intentions, people automatically classify information in racially biased ways.”<sup>103</sup> The Race Implicit Association Test (“IAT”)<sup>104</sup> used in the tort damages study measures the reaction time in which individuals associate traits (pleasant meaning words and unpleasant meaning words) with images of Black and white faces.<sup>105</sup> The purpose of the IAT is to assess implicit attitudes toward Blacks versus whites. In the torts study, participants were assigned scenarios in which fictitious plaintiff’s, varied by race (Black and white), were injured.<sup>106</sup> Participants were asked to assess the legal responsibility of the defendants and the level of damages the plaintiffs deserved.<sup>107</sup> After completing the torts exercise, the study participants took the Black-white Race IAT.<sup>108</sup> Though the overall results of tort the study are complex and require further inquiry, the observations do raise interesting connections to the death penalty context.

As previously discussed, capital jurors routinely undervalue Black lives. Interestingly, the torts study found that the plaintiff’s race did not affect the participants’ liability determinations.<sup>109</sup> However, the study did conclude that “[B]lack plaintiffs were awarded lesser damages than white plaintiffs in suits between individuals[,]” though it was unclear whether that difference was actually attributed to race.<sup>110</sup> Race was also not found to be a factor in the amount of damages awarded overall.<sup>111</sup> However, the implicit bias level of the participant did seem to make a difference, though the explanations were complicated. Ultimately, the study concluded that “[t]he higher the participant

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the negative association with African-American faces and positive association with Caucasian faces.”).

102. *Id.* at 507.

103. Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U.L. REV. 795, 797 (2012).

104. See *Frequently Asked Questions*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/faqs.html> [<https://perma.cc/5GYA-PXKW>] (last visited Feb. 21, 2020) (“The Implicit Association Test (IAT) [comes in the form of an online test that] measures the strength of associations between concepts (e.g., black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy).”).

105. See Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCH. 1464 (1998); see also IMPLICIT MEASURES OF PERSONALITY 1, 6 (Bernd Wittenbrink & Norbert Schwarz eds., 2007).

106. Cardi et al., *supra* note 100, at 531.

107. *Id.*

108. *Id.* at 532.

109. *Id.* at 550.

110. *Id.* at 552.

111. Cardi et al., *supra* note 100, at 552.



IAT score, the less likely a white defendant was held liable[.]”<sup>112</sup> In other words, the more a participant implicitly favored whites over Blacks, the less likely that participant was to hold white defendants liable for a plaintiff’s injuries. Additionally, the study found that “high IAT scorers ordered [B]lack defendants to pay more than white defendants—this was true regardless of the race of the plaintiff.”<sup>113</sup> These results suggest that it matters—to the juror holding an anti-Black implicit bias—that whites are often less responsible for their damaging actions and that, when Blacks are responsible for hurting others, they ought to pay more dearly. These results match perfectly with what our data reveals in the death penalty cases in Texas. Blacks are seen as more deserving of the harshest punishment—the death penalty—when they wrong others. Add to this that whites are seen as generally less liable, then it stands to reason that when there is a white victim in a death penalty case, the perpetrator must pay a significant price—oftentimes with their life. The life or death challenge in the capital context is that researchers using the IAT have discovered that the majority of tested Americans carry implicit negative attitudes toward Blacks and associate Blacks with negative stereotypes.<sup>114</sup> Of course, screening civil jurors for their implicit bias levels is not a part of jury *voir dire*, so we can expect varying levels of implicit bias among jurors.<sup>115</sup> This is especially significant in the death penalty process where capital jurors are overwhelmingly white and male—a group that has higher levels of implicit bias against Black people.<sup>116</sup> In this way, bias that is implicit is just as deadly as the explicit.

## 2. Historic Devaluation: The Legal Meaning of Blackness

Whether explicit or implicit, Black lives have been devalued from the moment they were forcibly brought to America. The explicit devaluation has been intertwined with the development of our American understandings of what race means and how one comes to be recognized as Black. The infamous “one-

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112. *Id.* at 551.

113. *Id.*

114. Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Website*, 6 GRP. DYNAMICS 101, 101 (2002) (“[T]he data collected are rich in information regarding the operation of attitudes and stereotypes, most notably the strength of implicit attitudes, the association and dissociation between implicit and explicit attitudes, and the effects of group membership on attitudes and stereotypes.”); see also Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 GRP. PROCESSES & INTERGROUP REL. 359, 361 (2007) (discussing studies that show scores on the Implicit Association Test are linked to harmful group behaviors).

115. Judge Mark W. Bennett has suggested screening potential jurors for potential bias. See Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV. 149, 170 (2010).

116. Shervin Assari, *Interaction Between Race and Gender on Implicit Racial Bias Against Blacks*, INT. J. EPIDEMIOLOGIC RES. 43, 47 (2018).

drop rule” used in determining who is Black, and thus not entitled to the privileges of whiteness, is an example of the enduring American tenet of equating Blackness with a depreciative effect. In his book, *Who Is Black? One Nation’s Definition*, Professor F. James Davis describes the one-drop rule in this manner:

To be considered [B]lack in the United States not even half of one’s ancestry must be African [B]lack. But will one-fourth do, or one-eighth, or less? The nations answer to the question “Who is black?” has long been that a [B]lack is any person with **any** known African [B]lack ancestry. This definition reflects the long experience with slavery and later with Jim Crow segregation. In the South it became known as the “one-drop rule,” meaning that a single drop of “black blood” makes a person a [B]lack. It is also known as the “one black ancestor rule,” some courts have called it the “traceable amount rule,” and anthropologists call it the “hypo-descent rule,” meaning that racially mixed persons are assigned the status of the subordinate group. This definition emerged from the American South to become the nation’s definition, generally accepted by whites and [B]lacks. Blacks had no other choice. As we shall see, this American cultural definition of [B]lacks is taken for granted as readily by judges, affirmative action officers, and [B]lack protesters as it is by Ku Klux Klansmen.<sup>117</sup>

Thus, any so-called drop of Blackness made a person legally and socially Black. As Professor Davis explains, the one-drop rule is uniquely American because “[n]ot only does the one-drop rule apply to no other group than American [B]lacks, but apparently the rule is unique in that it is found only in the United States and not in any other nation in the world.”<sup>118</sup> And because American courts used Blackness to uphold slavery,<sup>119</sup> deny citizenship to Blacks,<sup>120</sup> and maintain race-based segregation that was oppressive to Black

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117. F. JAMES DAVIS, *WHO IS BLACK? ONE NATION’S DEFINITION* (1991), *partially reprinted* by PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/jefferson/mixed/onedrop.html> [<https://perma.cc/MKK8-KT99>] (last visited Mar. 28, 2022).

118. *Id.*

119. *See, e.g.*, *State v. John Mann*, 13 N.C. 263 (1829) (holding that the cruel and unreasonable battery on a slave by the hirer is not indictable because “[t]he power of the master must be absolute to render the submission of the slave perfect.”); *see also* *Prigg v. Pennsylvania*, 41 U.S. 539, 625–26, 645–46 (1842) (upholding the Fugitive Slave Law because enslaved Blacks were property and retrieving “this species of property” was vital to slave masters’ interests).

120. *See* *Dred Scott v. Sanford*, 60 U.S. 393, 404, 406 (1856) (denying U.S. citizenships to Blacks because, at the nation’s founding Blacks were “considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.”).

people,<sup>121</sup> this also meant that one drop of Blackness legally depreciated the value of the human.

We see this depreciative Black effect in property law and policy as well. Treating Blackness as a factor that devalues property was done explicitly in the case of redlining. In 1933, the federal government created the Home Owners' Loan Corporation ("HOLC") to increase home ownership as a response to the housing crisis during the Depression. The detrimental legacy of the redlining approach to mortgage lending is explored in full in Richard Rothstein's informative book, *The Color of Law*.<sup>122</sup> Rothstein explains that:

The HOLC created color coded maps of every metropolitan area in the nation, with the safest neighborhoods colored green and the riskiest colored red. A neighborhood earned a red color if African Americans lived in it, even if it was a solid middle-class neighborhood of single-family homes.<sup>123</sup>

While redlining of this sort clearly impeded the creation of wealth among Black families,<sup>124</sup> it also illustrates that the presence of Blackness diminished the valuation of white areas as well. Areas where whites lived could get a green rating if, HOLC appraisers determined that "it had 'not a single foreigner of negro.'"<sup>125</sup> It is within this context of devaluation and depreciation that the racial disparities in the death penalty sit—where the presence of even one Black victim devalues the victim pool and lessens the risk that a jury will determine that the defendant owes society their life. Similar to what happens in capital cases, the Black devaluation effect in property law, while once clearly explicit, still exists in an implicit form. Recent reports reveal that, not only are Black neighborhoods still undervalued,<sup>126</sup> but that even Black homeowners in affluent areas have their individual homes undervalued by appraisers.<sup>127</sup> What all of these examples show

121. *See Plessy v. Ferguson*, 163 U.S. 537 (1986) (upholding race-based segregation as not violative of equal protection while at the same time recognizing that a Black man is not lawfully entitled to the reputation of being a white man).

122. RICHARD ROTHSTEIN, *THE COLOR OF LAW* 64 (Liveright Publishing Corp. 2017).

123. *Id.*

124. Pedro da Costa, *Housing Discrimination Underpins the Staggering Wealth Gap Between Blacks and Whites*, ECON. POL'Y INST. (Apr. 8, 2019), <https://www.epi.org/blog/housing-discrimination-underpins-the-staggering-wealth-gap-between-blacks-and-whites/> [<https://perma.cc/A93M-P6FT>].

125. ROTHSTEIN, *supra* note 122, at 64.

126. ANDRE PERRY ET AL., BROOKINGS METRO. POL'Y PROGRAM, *THE DEVALUATION OF ASSETS IN BLACK NEIGHBORHOODS: THE CASE OF RESIDENTIAL PROPERTY* (2018), [https://www.brookings.edu/wp-content/uploads/2018/11/2018.11\\_Brookings-Metro\\_Devaluation-Assets-Black-Neighborhoods\\_final.pdf](https://www.brookings.edu/wp-content/uploads/2018/11/2018.11_Brookings-Metro_Devaluation-Assets-Black-Neighborhoods_final.pdf) [<https://perma.cc/QH85-ERUK>]; *see also* Michelle Singletary, *Being Black Lowers The Value Of My Home: The Legacy Of Redlining*, WASH. POST (Oct. 23, 2020), <https://www.washingtonpost.com/business/2020/10/23/redlining-black-wealth/> [<https://perma.cc/3SGC-SVWJ>].

127. Debra Kamin, *Black Homeowners Face Discrimination in Appraisals*, N.Y. TIMES (Aug. 27, 2020), <https://www.nytimes.com/2020/08/25/realestate/blacks-minorities-appraisals-discrimi>

is that seeing Black lives as less valuable than white lives is not a new American phenomenon, nor is it one that seems to be nearing an end.

#### CONCLUSION: THE LACK OF REDEMPTION FOR THE DEATH PENALTY

The racial disparities in the death penalty are not isolated. Instead, they fit into the broader American legacy of racism and anti-Blackness. To ignore the prevalence of Black lives mattering less, or to discount the realness of anti-Blackness, is to completely misconstrue the context of the death penalty statistics. Such misconstruction (whether based on actual misunderstanding or willful blindness) encourages our legal system to develop strategies to deal with racial disparities that will never lead to their eradication. When the death penalty data is put in its proper historic and current context, it becomes clear that present-day America is unable to employ the death penalty in a racially just manner.

In *Gregg v. Georgia*, in 1976, the Supreme Court breathed life into the death penalty by holding that capital punishment is not automatically unconstitutional.<sup>128</sup> While the *Gregg* court confirmed the position from the 1972 *Furman v. Georgia* decision, that the death penalty cannot be applied in an arbitrary manner,<sup>129</sup> the procedural protections against arbitrariness suggested by the Court in *Gregg* completely ignore the reality of anti-Blackness as a basis for death penalty decisions. The Court said that:

[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.<sup>130</sup>

However, bifurcated jury proceedings and jury guidance have nothing to do with weeding out racial bias. The suggested protections against arbitrariness focus on not letting the legal guilt of the offender infect the jury's determination of the appropriate punishment. But, that focus ignores what is really at stake in capital cases—that jurors may deem a defendant more deserving of death if he

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nation.html [https://perma.cc/DV6G-JDTP]; see also Robin Young & Sabrina McMahon, *Biracial Couple Gets Lower House Appraisal With Black Family Members Present*, WBUR (Sept. 23, 2020), <https://www.wbur.org/hereandnow/2020/09/23/home-appraisal-bias-racism> [https://perma.cc/PCT7-H2QL].

128. *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) (“We now hold that the punishment of death does not invariably violate the Constitution.”).

129. *Id.* at 189. (“*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”)

130. *Id.* at 195.

kills white people than if he has even one Black victim. How does a bifurcated jury protect against that risk? It simply does not. Race was the arbitrary factor that led the Justices in *Furman* to say that it violates the constitution for the death penalty to be applied in an arbitrary manner.<sup>131</sup> But, ever since *Gregg* shifted the solution to process, racial bias has ceased to be recognized as the actual problem.

The Texas death penalty data shows how pervasive race is in death penalty outcomes. Taken in sum, we see: a race of victim disparity in death sentences overall; a race of victim disparity in death sentences sorted by race of defendant; a race of victim disparity in death sentences sorted by weapon used; a race of victim disparity in cases with a single victim; and a race of victim disparity in multiple victim cases. Race is everywhere. Race is so prevalent that we even see a race of victim disparity in non-death sentence cases. In every single comparison, the racial disparity was statistically significant. In every single comparison, harsher punishment was associated with white victims than with African American victims, who clearly mattered less.

The truth, of course, is that Black victims matter as much as any, even if the legal system and society have not recognized their value. And when they are killed, it is not most likely in “a barroom quarrel” as Georgia’s assistant attorney general speculated in *McCleskey*.<sup>132</sup> Roderick “Chip” Brownlow had just arrived home from high school with his younger brother.<sup>133</sup> A good student and athlete at Waco’s Connally High School, Chip was due to graduate in two weeks and had plans to attend college. Chip’s cousin, Garvin Graves, who grew up with the family and who he considered a brother, had just returned that day to spend the summer at home from college in Pennsylvania.

Chip was not killed in a barroom quarrel. He died in his front yard, amidst the tears and cries of his family. Terry Don Woodward’s family lived next door. Woodward, with his neck decorated with a “white pride” message and gun in hand, came after the Brownlows that day. Witnesses testified that he called out a racial epithet and “I will kill you” before taking aim at Chip and his family. Woodward fired his gun several times and ran across the Woodward property. The family scattered and ducked for cover. But Chip Brownlow tripped and fell. As Woodward loomed over him, Chip pled for his life. “He walked up and stood over Chip,” Garvin Graves testified. “Chip was on the ground with his hands up and was saying, ‘Please don’t shoot me. Don’t shoot me.’” Woodward shot Chip

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131. *Furman v. Georgia*, 408 U.S. 238, 242 (1972).

132. MARATEA, *supra* note 31, at 88.

133. Imaeye Ibanga & Mike Anderson, *Police Standoff Ends Peacefully*, WACO TRIBUNE-HERALD, May 15, 2003, at 1C; Tommy Witherspoon, *Murder Trial Set to Begin in Waco*, WACO TRIBUNE-HERALD, Nov. 17, 2003, at 1C; Tommy Witherspoon, *That’s the Man Who Shot Chip*, WACO TRIBUNE-HERALD, Nov. 19, 2003, at 1A; Tommy Witherspoon, *Shooting Defendant Claims Self Defense*, WACO TRIBUNE-HERALD, Nov. 20, 2003, at 1A; Tommy Witherspoon, *Guilty Verdict in Death of Teen*, WACO TRIBUNE-HERALD, Nov. 21, 2003, at 1A; Tommy Witherspoon, *Teen’s Killer Gets Life in Prison*, WACO TRIBUNE-HERALD, Nov. 22, 2003, at 1A.

Brownlow at close range and then ran from the scene. Police located Woodward the next day. A seven-hour standoff against members of five police agencies ensued before Woodward was finally taken into custody.

Woodward was convicted of murder for the death of Chip Brownlow, and aggravated assaulted for shooting at Chip's younger brother. He was sentenced to life in prison, with a thirty-year minimum. To the consternation and confusion of some of the victim's family, the death penalty was never sought.

Within a database of cases there are, of course, thousands of tragic stories of lives upended by acts of an almost unspeakable nature. The details differ from case to case. But across all those thousands of cases, the race of victim disparity persists. The math is straightforward. Indeed, the odds against the patterns seen here, emerging by chance, are truly astronomical. Which is to say, the penalties imposed for killing Roderick "Chip" Brownlow and thousands of other African Americans in Texas were less severe than the penalties imposed for killing whites.

The race of the victim matters in the Texas criminal justice system. The results are consistent with previous studies limited to several counties within Texas that also found racial disparities in sentencing. Here, the authors present the most comprehensive data ever assembled on capital murder cases in Texas to affirm that the scope of the race of victim difference is jarring.

As a matter of jurisprudence and policy making, however, the meaning of the data is uncertain. Baldus and colleagues argue that the courts have often shrugged in response to race of victim disparities owing to "remedial uncertainties" and "the potential political fallout" of declaring the system tainted by discrimination.<sup>134</sup> When legislators debate the death penalty, racial disparities are among the most frequently cited concerns of opponents of the death penalty.<sup>135</sup> Findings of racial imbalance in Connecticut,<sup>136</sup> Maryland,<sup>137</sup> and New Jersey<sup>138</sup> sentencing outcomes contributed to what were ultimately successful efforts to abolish the death penalty in those states.<sup>139</sup> Supporters of the death penalty, however, dispute both the math and the meaning of findings of racial disparities, taking particular offense at the suggestion that race influences sentencing or influences their own views.<sup>140</sup>

After studying the matter in several states, Baldus and colleagues conclude that eliminating the race of victim disparity in death sentences requires either

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134. Baldus et al., *supra* note 15, at 169.

135. Niven & Donnelly, *supra* note 16.

136. Donohue III, *supra* note 13.

137. *Id.*

138. Baldus et al., *supra* note 15, at 144.

139. Scherzer, *supra* note 16, at 223 (arguing the proportionality review process in New Jersey served to both limit the use of the death penalty in New Jersey and undergird arguments for abolition).

140. *See* Niven & Donnelly, *supra* note 16.

abolition of the death penalty or a severe narrowing of its application coupled with close judicial scrutiny of racial patterns.<sup>141</sup> These authors argue that abolition is the only corrective approach. While many have focused that the death penalty is unconstitutional because the race of the defendant is unduly relevant, these authors argue that the effect of the victims' race also warrants abolition of the death penalty. This is not because the authors believe that the death penalty ought to be applied more often to vindicate the loss of Black lives. Rather, the persistent importance of the race of the victim in the death penalty context demonstrates an area of law where Blackness is not seen as equal to whiteness. The goal, then, is not simply to increase the application of the death penalty to avenge more Black victims, but rather to recognize that the racial outcomes in capital punishment teach us about the biases held in our society. The death penalty is a tool for carrying out those biases. In keeping with the momentum of today's antiracism reckoning, abolishing the death penalty is the only antiracist solution. It would dismantle an area of the law that allows for the unbridled exercise of racial bias. Professor Ibram X. Kendi describes antiracism as "a radical choice in the face of history, requiring a radical reorientation of our consciousness."<sup>142</sup> History shows us that Blackness has been devalued since the founding of America. We must make the radical choice to uproot systems, like the death penalty, that allow the anti-Black biases in our national consciousness to not only thrive, but to be just. To do otherwise is to perpetuate a system where Black lives matter less.

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141. Baldus et al., *supra* note 15.

142. DR. IBRAM X. KENDI, HOW TO BE AN ANTIRACIST (2019).