

## Book Review

### The Accidental Death Penalty

COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT.  
By Carol S. Steiker & Jordan M. Steiker. Cambridge, Massachusetts:  
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The modern Supreme Court's treatment of capital punishment is a paradigm of what Robert K. Merton referred to as "the problem of the unanticipated consequences of purposive action."<sup>1</sup> The Court's bizarre regulatory enterprise, which requires that death penalty statutes simultaneously curtail arbitrariness and treat defendants as individuals, is now forty years old.<sup>2</sup> Even the most casual student of capital punishment's history can't help but be struck by how much of the formative background was pure happenstance.

An essential, rarely noted starting point to understanding these events is that the National Association for the Advancement of Colored People Legal Defense Fund (LDF) never intended to challenge the death penalty under the Eighth Amendment. LDF's leadership believed the argument needed to be held back.<sup>3</sup> At the National Conference on the Death Penalty in 1968, the incomparable Tony Amsterdam discouraged attendees from raising the Eighth Amendment argument, urging them to focus instead on procedural claims.<sup>4</sup> LDF's strategy was to educate the Supreme Court about the problems with capital punishment and to overwhelm the lower courts with

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1. Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894, 894 (1936).

2. The bizarreness was most famously described by Justice Scalia in his concurrence in *Walton v. Arizona*:

To acknowledge that "there perhaps is an inherent tension" between this line of cases and the line stemming from *Furman*, is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II. And to refer to the two lines as pursuing "twin objectives," is rather like referring to the twin objectives of good and evil. They cannot be reconciled.

497 U.S. 639, 664 (1990) (Scalia, J., concurring) (citations omitted) (quoting *McCleskey v. Kemp*, 481 U.S. 279, 363 (1987) (Blackmun, J., dissenting) and *Spaziano v. Florida*, 468 U.S. 447, 459 (1984), *overruled by Hurst v. Florida*, 136 S. Ct. 616 (2016)).

3. EVAN J. MANDERY, *A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA* 60 (2013).

4. *Id.* at 61–62.

appeals—“like sand poured in a machine.”<sup>5</sup> It was essential to this scheme to get cases before the Supreme Court “in the right order.”<sup>6</sup>

In October 1968, the Supreme Court granted certiorari in *Boykin v. Alabama*,<sup>7</sup> challenging the death penalty for robbery as excessive.<sup>8</sup> Later that term, the Court announced that it also would hear *Maxwell v. Bishop*,<sup>9</sup> on the constitutionality of standardless sentencing and single-phase trials.<sup>10</sup> When the Justices conferenced the cases on March 6, 1969, they didn’t agree on much, but Justice William Brennan saw a clear path to overturning William Maxwell’s conviction on the single-phase-trial issue.<sup>11</sup> *Witherspoon v. Illinois*<sup>12</sup> had dealt a blow to capital punishment the prior term.<sup>13</sup> Had *Maxwell* continued the trend, it’s easy enough to imagine the death penalty dying from a thousand cuts.<sup>14</sup>

But rather than assign *Boykin* and *Maxwell* to Justice Brennan, Chief Justice Earl Warren instead assigned the opinions to Justice William Douglas.<sup>15</sup> Looking backwards, this choice stands out as a historical flux point—the moment where the butterfly alters the path of the impending hurricane. The superficially insignificant decision—to assign a pair of death penalty opinions to one liberal Justice rather than another—sends this entire history down a different path.

Rather than focus solely on the question of single-phase trials, as the master conciliator Brennan urged, the irascible, iconoclastic Douglas attempted a more ambitious opinion, which also addressed the standards question.<sup>16</sup> During the negotiations, Douglas managed to alienate almost everyone on the Court, including his only true ally, Abe Fortas.<sup>17</sup> By the time

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5. MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 71 (1973).

6. MANDERY, *supra* note 3, at 58.

7. 395 U.S. 238 (1969); MANDERY, *supra* note 3, at 66.

8. *Boykin*, 395 U.S. at 240.

9. 398 U.S. 262 (1970) (per curiam).

10. *Id.* at 264.

11. MANDERY, *supra* note 3, at 70–84, 89–92 (detailing the Court’s conference and discussions regarding *Maxwell v. Bishop*, particularly Justice Brennan’s ultimately unsuccessful strategy for getting five votes in favor of Maxwell on the single-phase trial issue).

12. 391 U.S. 510 (1968).

13. *Id.* at 522–23 (holding 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”).

14. In retrospect, LDF First Assistant Counsel Michael Meltzer identified *Maxwell* as a turning point, a chance for the Court to take “a measured step toward abolition.” MANDERY, *supra* note 3, at 97.

15. *Boykin v. Alabama*, 395 U.S. 238, 239 (1969); William J. Brennan, Jr., Associate J., U.S. Supreme Court, The 1968 Oliver Wendell Holmes, Jr. Lecture: Constitutional Adjudication and the Death Penalty: A View From the Court, in 100 HARV. L. REV. 313, 316 (1986).

16. MANDERY, *supra* note 3, at 89–90.

17. *Id.* at 91–92.

Douglas decided to focus solely on the single-phase-trial issue, his opportunity had passed. Following a scandal surrounding his acceptance of a contribution from a Las Vegas financier, Fortas resigned on May 13th.<sup>18</sup> Shortly thereafter, John Harlan withdrew his vote in *Maxwell*, saying he wouldn't "provide the fifth vote in such a crucial case."<sup>19</sup> The Court put *Maxwell* over to the following term and decided *Boykin* on the narrowest possible grounds.<sup>20</sup>

From here, things spiraled. Warren Burger replaced Earl Warren in May 1969.<sup>21</sup> The Burger Court decided *Maxwell* on *Witherspoon* grounds<sup>22</sup> and held over the larger procedural question for the following term when the Court would be at full strength. In April 1970, Harry Blackmun was nominated to replace Abe Fortas.<sup>23</sup> The Minnesota twins, Burger and Blackmun, joined John Harlan's opinion in *McGautha v. California*,<sup>24</sup> rejecting the constitutional necessity of single-phase trials and jury standards.<sup>25</sup> The case was a resounding defeat for abolition forces.<sup>26</sup> *Furman*<sup>27</sup> and its companion cases were taken as housekeeping matters. When the Court broke for summer recess, everyone believed the Eighth Amendment cases would be decided 8–1, with Justice Brennan writing the sole dissent.<sup>28</sup>

That *Furman* came out as it did is one of the great eleventh-hour surprises in Supreme Court history. On June 9th, 1972—just twenty days before *Furman* would be announced—no majority had emerged.<sup>29</sup> It's easy and natural to imagine *Furman* having come out the other way. "Contingency much more than determinism characterized the tumultuous foundational death penalty era of the 1960s and 1970s," write Carol and Jordan Steiker in their new book, *Courting Death: The Supreme Court and Capital*

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18. *Id.*

19. *Id.* at 92.

20. *Id.*

21. *Id.*

22. *Maxwell v. Bishop*, 398 U.S. 262, 266–67 (1970) (per curiam) ("It appears, therefore, that the sentence of death imposed upon the petitioner cannot constitutionally stand under *Witherspoon v. Illinois*."); MANDERY, *supra* note 3, at 96.

23. MANDERY, *supra* note 3, at 93–94.

24. 402 U.S. 183, 184 (1971).

25. *Id.* at 185–86.

26. Justice Brennan said: "In candor, I must admit that when *McGautha* was decided, it was not just a lost skirmish, but rather the end of any hope that the Court would hold capital punishment to be unconstitutional." MANDERY, *supra* note 3, at 114 (quoting Brennan, *supra* note 16, at 321).

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

28. MANDERY, *supra* note 3, at 118–19.

29. *See id.* at 197–200 (discussing the uncertainty Justice White, the deciding vote in *Furman*, exhibited towards the death penalty in the days leading up to the Court's decision).

*Punishment*.<sup>30</sup> Had *Furman* been decided differently, “[t]he consequences for the path of capital punishment in America would have been profound.”<sup>31</sup>

The flux point: on that Friday afternoon, Potter Stewart walked to Byron White’s chambers and struck a deal.<sup>32</sup> Stewart would condemn the arbitrariness of the death penalty,<sup>33</sup> rather than its treatment of people as a means to an end, as he had intended.<sup>34</sup> In exchange White would provide the decisive fifth vote based on his idiosyncratic position that the problem with the death penalty was the infrequency of its use.<sup>35</sup>

It’s possible that Stewart could have foreseen what would follow from this fateful arrangement. His and White’s opinions, which were perceived as the core holding of the most fractured decision in Supreme Court history, left open the possibility for states to revise their statutes.<sup>36</sup> But Stewart neither intended nor foresaw this consequence. He believed his decision would end the American death penalty.<sup>37</sup> The ensuing backlash surprised and disappointed him.<sup>38</sup>

When Stewart, Lewis Powell, and John Paul Stevens came together four years later to address the constitutionality of the revised death penalty statutes,<sup>39</sup> Stewart and Powell in particular felt constrained by history. “I accept *Furman* as precedent,” Powell wrote to himself in April 1976.<sup>40</sup> Each man also harbored deep misgivings about capital punishment. The compromise they struck—another flux point—can only be understood in this context. Here we need to distinguish between the unintended consequences of purposeful action (such as when Arthur Goldberg dissented from *Rudolph*

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30. CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 77 (2016).

31. *Id.* at 76.

32. MANDERY, *supra* note 3, at 215–17.

33. *Furman v. Georgia*, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring).

34. MANDERY, *supra* note 3, at 168, 173, 197.

35. *Id.* at 215–17.

36. *See Furman*, 408 U.S. at 309–10 (Stewart, J., concurring) (arguing that the petitioners in this case were “capriciously selected” and that the death penalty cannot be “wantonly” and “freakishly” imposed, as it was in this case); *id.* at 310–11, 313 (White, J., concurring) (explaining that the death penalty is not unconstitutional per se and that the crucial issue in this case was the infrequency with which the death penalty was applied).

37. Stewart told his clerks that “the death penalty in America was finished.” MANDERY, *supra* note 3, at 242.

38. Stewart said, “I misjudged the passion among voters.” *Id.* at 401.

39. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 206–07 (1976) (plurality opinion) (upholding as constitutional the revised Georgia statutory scheme for imposition of the death penalty, which requires the finding of at least one aggravating factor, the consideration of mitigating factors, and direct review by the state supreme court); *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976) (plurality opinion) (finding the mandatory imposition of the death penalty for homicidal offenses, as required by North Carolina’s revised statute, to be unconstitutional under the Eighth Amendment).

40. MANDERY, *supra* note 3, at 404.

v. *Alabama*<sup>41</sup> as a signal to the bar) and the unintended consequences of purposeless action—or, more charitably, actions whose central purpose was to avoid an abhorrent result. The historical record is devoid of any evidence of Stewart, Stevens, or Powell thinking through how the *Furman* principle of nonarbitrariness would co-exist with the *Woodson*<sup>42</sup> (and later *Lockett*<sup>43</sup>) principle of unconstrained discretion,<sup>44</sup> or whether they even could co-exist at all.<sup>45</sup> Their compromise, which established the parameters of constitutional regulation, seems best understood simply as a splitting of the baby by men who felt bound to uphold the constitutionality of a practice about which they each harbored such substantial misgivings.

Over the past two decades, no two American scholars have done more to explore and expose the abject failure of this enterprise than the redoubtable Steikers. *Courting Death*, which synthesizes and expands upon their prior scholarly contributions, immediately takes its place as the seminal text on the subject. Readable and accessible, it is an extraordinary scholarly achievement, with revelations even for those well familiar with the Steikers' oeuvre.

It could hardly be surprising that a compromise constructed so hastily and with such ambivalence could have failed. The surprise is the breadth of that failure. Judged against any measure of success, the Court's regulation has been a spectacular disappointment. In 1976, the Court "embarked on a course that seemed to please no one," write the Steikers.<sup>46</sup> The death penalty is "perversely[] both over- and underregulated."<sup>47</sup>

From the standpoint of death penalty supporters, the Court has created a "labyrinthine" structure that causes extraordinary delay between sentence and execution.<sup>48</sup> This delay undermines the deterrence and retributive goals of capital punishment and, ironically, advances awareness of the innocence problem, which the Steikers see as the "foreseeable by-product" of the Court's regulation.<sup>49</sup>

From the standpoint of death penalty opponents, the Court's scheme created a veneer of regularity that solidified sagging confidence in capital

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41. 375 U.S. 889 (1963) (Goldberg, J., dissenting from denial of certiorari).

42. 428 U.S. 280.

43. *Lockett v. Ohio*, 438 U.S. 586 (1978).

44. See *Lockett*, 438 U.S. at 605 (plurality opinion) (holding unconstitutional a statute that prevents consideration of "the defendant's character and record and [the] circumstances of the offense"); *Woodson*, 428 U.S. at 304 (plurality opinion) (requiring "[c]onsideration of both the offender and the offense in order to arrive at a just and appropriate sentence").

45. MANDERY, *supra* note 3, at 408–19 (discussing the roles played by Stewart, Stevens, and Powell in the 1976 capital cases).

46. STEIKER & STEIKER, *supra* note 30, at 154.

47. *Id.* at 155.

48. *Id.*

49. *Id.* at 209.

punishment in the two decades following *Gregg*<sup>50</sup> (until the problem of wrongful convictions became more widely known)<sup>51</sup> and helped tame what Robert Weisberg calls the “existential moment” of death.<sup>52</sup> “After *Furman*,” Steiker and Steiker write, jurors “are more likely to *believe* that the offense before them is especially deserving of death.”<sup>53</sup> A similar belief has caused governors to be less vigilant in exercising their oversight function.<sup>54</sup> But this belief has no basis in reality, as the regulatory enterprise has done nothing to combat the arbitrariness and racism that the Court explicitly and implicitly condemned in *Furman*. Sentencing was arbitrary before and is arbitrary now.

Some of the blame lies with the specifics of the Court’s regulatory choices. Its post-*Gregg* decisions have not meaningfully analyzed whether capital statutes meaningfully limit the class of death-eligible offenders, a function the Steikers termed “narrowing” in their seminal 1997 article, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*.<sup>55</sup> The Court, they say, has essentially abandoned any effort to require specificity in aggravating factors, and it has utterly ignored any exploration of how they function collectively.<sup>56</sup> In California, more than 87% of first degree murders are potentially eligible for the death penalty under the state’s definitions.<sup>57</sup> In Colorado, the rate is 91.1%.<sup>58</sup>

Another culprit is the questionable ability of courts—and the Supreme Court in particular—to create social change. This limitation, explored by Gerald Rosenberg,<sup>59</sup> among others, is exacerbated in the context of capital punishment. For the death penalty to function as a nonarbitrary legal system, laws must differentiate between those who deserve to live and die with a specificity of draftsmanship that Justice John Harlan deemed “beyond . . .

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

51. STEIKER & STEIKER, *supra* note 30, at 156.

52. Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 353.

53. STEIKER & STEIKER, *supra* note 30, at 162.

54. *See id.* at 141 (noting the sharp decline in individual commutations in Texas because of executive trust in extended judicial review).

55. *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 372 (1995) (defining “narrowing” as a body of legislation that reduces those eligible to receive the death penalty as those offenders deemed “most deserving”).

56. STEIKER & STEIKER, *supra* note 30, at 159–62. The Steikers allow for the possibility that this abandonment could be meaningful. *See id.* at 177 (“[T]he Court could look more closely at whether state aggravating factors collectively accomplish much in terms of limiting the class of death-eligible offenders.”).

57. Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283, 1308–09, 1331 (1997).

58. Justin Marceau et al., *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 U. COLO. L. REV. 1069, 1109 (2013). The prosecution sought the death penalty in only 2.78% of cases, pursued through sentencing in only 0.93% of cases, and obtained a death sentence only 0.56% of the time. *Id.* at 1111–12.

59. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 420–29 (2d ed. 2008).

human ability” in *McGautha*.<sup>60</sup> It’s difficult to imagine such superhuman consistency in a federalist system committed to state autonomy. It’s definitively impossible in a scheme that requires the preservation of jury discretion.<sup>61</sup>

But *Courting Death* is most damningly a condemnation of the way the Supreme Court—and lawyers in general—talk about complicated ethical issues, a vivid illustration of how disempowering and problematic it is for judges to drape themselves “in the longiloquent language of a generalized logic.”<sup>62</sup> In its analysis of the gross divergence between the text and subtext of the Supreme Court’s capital punishment decisions, *Courting Death* soars. No dinner table conversation about American capital punishment could go on for more than a few minutes without discussing racism, but racism has been virtually absent from the critical Supreme Court decisions.<sup>63</sup>

Race is the issue that brought LDF to the capital punishment campaign.<sup>64</sup> In *Witherspoon*, LDF’s and the ACLU’s amicus briefs focused on racial discrimination, yet the Court’s opinion made no mention of race.<sup>65</sup> LDF’s argument about jury discretion, first presented in *Maxwell* and ultimately rejected in *McGautha*, focused on how the lack of standards exacerbated discrimination.<sup>66</sup> In *Furman*, LDF’s briefs drew attention to the pervasiveness of race discrimination in state sentencing.<sup>67</sup> The various amicus briefs documented the history of race discrimination in the administration of capital punishment.<sup>68</sup> Everyone understood *Furman* as a case about race.<sup>69</sup> Yet, only Justice Douglas and Justice Marshall mentioned race in their opinions, and neither put the practice in its historical context.<sup>70</sup>

60. *McGautha v. California*, 402 U.S. 183, 204 (1971) (“To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.”).

61. See STEIKER & STEIKER, *supra* note 30, at 177 (“The inevitability of discretion means that the capital decision cannot be tamed through legal language.”).

62. FRED RODELL, *Woe Unto You, Lawyers!* 68 (2d ed. 1957).

63. The Steikers first explored these issues in their extraordinary article. Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, 82 U. CHI. L. REV. 243, 253–94 (2015).

64. See MANDERY, *supra* note 3, at 48 (discussing how in LDF case selection, “[r]ace was always the factor”).

65. STEIKER & STEIKER, *supra* note 28, at 85–86.

66. *Id.* at 83, 86–87.

67. *Id.* at 88. See also Motion for Leave to File Brief as Amici Curiae and Brief Amici Curiae of the National Association for the Advancement of Colored People et al. at 2–7, *Furman v. Georgia*, 408 U.S. 238 (1972) (No. 69-5003) (discussing the findings that the way the death penalty was administered was inherently racist against minorities and the poor).

68. See STEIKER & STEIKER, *supra* note 28, at 87–88 (outlining how the various briefs addressed racial discrimination in the administration of the death penalty).

69. MANDERY, *supra* note 3, at 276.

70. See *Furman v. Georgia*, 408 U.S. 238, 242, 250–51 (1972) (Douglas, J., concurring) (noting that “[i]t would seem to be incontestable that the death penalty inflicted on one defendant is

From here, seemingly impossibly, race faded further into the background. LDF's *Gregg* brief emphasized that its experience "in handling capital cases over a period of many years convinced [it] that the death penalty is customarily applied in a discriminatory manner against racial minorities and the economically underprivileged."<sup>71</sup> None of the 1976 decisions referenced race discrimination.<sup>72</sup>

A year later the Court considered the constitutionality of the death penalty for rape.<sup>73</sup> The abolition campaign had begun about thirteen years earlier when Justice Arthur Goldberg dissented from the Court's refusal to grant certiorari in the appeal of Frank Lee Rudolph, "a black man who had been sentenced to die for raping a white woman."<sup>74</sup> Goldberg's position was predicated on his law clerk Alan Dershowitz's research showing profound race discrimination in the use of the death penalty for rape.<sup>75</sup> LDF's first foray into capital punishment advocacy was a study of racism in twelve southern states, which revealed that 110 of 119 defendants who received the death penalty for rape were black.<sup>76</sup> The constitutionality and morality of the death penalty for rapists could not be separated from that history. LDF wrote, "[I]n Georgia, the death penalty, for rape was specifically devised as a punishment for the rape of white women by black men."<sup>77</sup> In an amicus filing for several advocacy groups including the National Organization for Women Legal Defense and Education Fund, Ruth Bader Ginsburg wrote that the practice of punishing rape with death derived from Southern traditions "which valued white women according to their purity and chastity and

'unusual' if it discriminates against him by reason of his race," and discussing a study that found that black capital offenders had a higher frequency of executions than their white counterparts (citing Rupert C. Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 *CRIME & DELINQ.* 132, 141 (1969)); *id.* at 364-65 (Marshall, J., concurring) (acknowledging the existence of racial discrimination in the administration of executions).

71. Brief for the NAACP, Legal Defense and Education Fund, Inc. as Amicus Curiae at 1, *Gregg v. Georgia*, 428 U.S. 153 (1976) (No. 74-6257), 1976 WL 178715, at \*1.

72. STEIKER & STEIKER, *supra* note 30, at 94.

73. See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (deciding 7-2 that the death penalty was a "grossly disproportionate and excessive punishment for the crime of rape").

74. *Rudolph v. Alabama*, 375 U.S. 889, 889 (1963) (Goldberg, J., dissenting from denial of certiorari) (calling on the Court to decide "whether the Eighth and Fourteenth Amendments . . . permit the imposition of the death penalty on a convicted rapist who has neither taken nor endangered human life," and listing questions that "seem relevant and worthy of . . . consideration"); MANDERY, *supra* note 3, at 28.

75. See ALAN M. DERSHOWITZ, *SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE* 291 (2002) ("I cited national prison statistics showing that between 1937 and 1951, 233 blacks were executed for rape in the United States, while only 26 whites were executed for that crime."); see also MANDERY, *supra* note 3, at 19 (summarizing how Dershowitz showed Justice Brennan the research he had done for Brennan in an effort to bring Brennan to Goldberg's side).

76. MANDERY, *supra* note 3, at 38-39.

77. Brief for Petitioner at 54, *Coker v. Georgia*, 433 U.S. 584 (1977) (No. 75-5444), 1976 WL 181481, \*54.



assigned them exclusively to white men.”<sup>78</sup> Nevertheless, neither the plurality nor dissenting opinions in *Coker v. Georgia*<sup>79</sup> made any mention of race.

No one could have been surprised when the Court rejected a systemic claim to Georgia’s capital punishment scheme on the basis of statistical evidence of racism. *McCleskey v. Kemp*<sup>80</sup> was the case in this history. *Furman* and *Gregg* raised important questions with which any humane society must grapple: What, if any, are the limits on the severity of punishment? What procedural protections are defendants entitled to? But it’s possible to make a cogent argument in favor of the use of capital punishment in select, especially heinous cases. It’s impossible to defend the American system, which reserves the death penalty for a handful of defendants drawn randomly among poor people who kill white victims. *McCleskey* demanded that the Court deal with systemic racism in criminal justice and our nation’s history of cruelty to African-Americans, especially in the South.<sup>81</sup> Yet, Justice Powell’s opinion reads like a disquisition on the nature of proof and statistics, utterly detached from the lived history of American capital punishment.

The Steikers point to several forces behind this extraordinary disconnect, some legitimate, some not. Crime rates were on the rise.<sup>82</sup> Abolishing the death penalty because of racism would suggest that the Court lacked the capacity to combat institutionalized racism, even as it was engaged in its controversial desegregation project. “There were good reasons,” the Steikers write, “for the Court to worry that constitutional limitation or abolition of capital punishment for explicitly race-based reasons would inspire more spirited public resistance than apparently race-neutral interventions.”<sup>83</sup>

Most importantly, the Justices couldn’t conceive how to limit the impact of the proof of racism if its validity was admitted. Justice Lewis Powell wrote, “McCleskey’s claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice

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78. Brief Amici Curiae of the American Civil Liberties Union et al. at 6, *Coker v. Georgia*, 433 U.S. 584 (1977) (No. 75-5444), 1976 WL 181482, at \*6. See also STEIKER & STEIKER, *supra* note 28, at 95–96 (describing Ruth Bader Ginsburg’s brief as “powerfully expos[ing] the ways in which the death penalty for rape fundamentally rested on both sexist and racist beliefs”); Steiker & Steiker, *supra* note 55, at 274–75 (same).

79. 433 U.S. 584 (1977).

80. 481 U.S. 279 (1987).

81. See STEIKER & STEIKER, *supra* note 28, at 174 (discussing the Baldus study, put before and rejected by the Court in *McCleskey*, which found that “the race of the victim powerfully influenced the imposition of the death penalty in post-*Furman* Georgia and that cases with black defendants and white victims were much more likely to generate death sentences than any other racial pairing”).

82. *Id.* at 100 (noting that crime rates in the 1960s and 1970s rose, especially in inner-city minority communities).

83. *Id.*

system.”<sup>84</sup> The Steikers say, “[I]f the Court relied on statistical racial disparities to invalidate capital punishment, it would be forced to explain why similar disparities must be accepted in the imposition of ordinary criminal punishment.”<sup>85</sup> Powell and his colleagues thought that crediting McCleskey’s argument simply would have been too destabilizing.<sup>86</sup>

Maybe, maybe not. All we can say for certain is that the “system” we have today, eviscerated by the Steikers, is not a system at all, but rather a thin veneer of regularity that somehow simultaneously has divested decision makers of moral responsibility for their actions, exposed the unreliability of its procedures, and created extraordinary delays, which are a cruelty independent of executions themselves. Its complexity and incompetence is stunning.

All the more stunning is that that no one in this history got what he wanted. At bottom, *Courting Death* is a case study for what happens when nine men charged with the solemn duty of overseeing a complex ethical and legal system refuse to ever speak about it honestly.

They get exactly what they deserve.

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84. *McCleskey*, 481 U.S. at 314–15.

85. STEIKER & STEIKER, *supra* note 30, at 108.

86. *Id.* at 108–09.