

SYMPOSIUM ON PURSUING RACIAL
FAIRNESS IN CRIMINAL JUSTICE: TWENTY
YEARS AFTER *McCLESKEY v. KEMP*

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COMMENTARY, SOUNDING THE ECHOES
OF RACIAL INJUSTICE BEYOND THE
DEATH CHAMBER: PROPOSED STRATEGIES
FOR MOVING PAST *McCLESKEY*¹

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I thank Professors Dorothy Roberts, Kendall Thomas, and David Rudovsky for providing such provoking food-for-thought at this special Symposium.² These three scholars propose ways of helping us

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1. “It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined.” *McCleskey v. Kemp*, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting).

2. The ideas in this article were originally presented at the symposium entitled “Pursuing Racial Fairness in the Administration of Justice: Twenty Years After *McCleskey v. Kemp*,” held by the NAACP Legal Defense and Educational Fund and Columbia Law School on March 2–3, 2007.

move past *McCleskey v. Kemp*'s framework,³ which fosters the legal denial of race discrimination in the application of criminal laws in the United States. Professors Roberts and Thomas offer examples of the ways in which courts ignore the historical realities of racism in criminal justice and propose that we educate and re-educate people about the fundamentals of racial discrimination in the application of criminal laws.⁴ Professor Rudovsky offers examples of successful litigation challenging criminal justice policies and practices that target African Americans and other people of color living in the United States.⁵

The scholarship these authors present has several overlapping themes. First, racial caste systems still exist in the United States, and their most common and accepted expression is through criminal law enforcement. Second, "protection" of white communities continues to be a central goal of criminal law enforcement as well as a principal reason for racial discrimination and other constitutional errors. Third, moving past *McCleskey* requires a multi-layered re-education campaign that includes several inseparable, complementary components: litigation incorporating historical and social science research, community organizing, and legal challenges of racial discrimination at all levels of the criminal justice system. I suggest that these tactics need to snowball and build on themselves in diverse jurisdictions in order to gain momentum for a widespread reconsideration of *McCleskey*.

3. See *McCleskey*, 481 U.S. at 292–299 (holding that a capital defendant asserting an equal protection violation under the Fourteenth Amendment must present evidence of purposeful discrimination in his own case and that statistical evidence of statewide patterns resulting in racial disparities in death sentencing was insufficient to establish racial animus and warrant relief).

4. See Kendall Thomas, Nash Professor of Law & Co-Director, Ctr. for Study of Law & Culture, Columbia Law School, Transforming the Popular Discourse on Crime, Race, and Rights, Remarks at the NAACP Legal Defense and Educational Fund and Columbia Law School Symposium: Pursuing Racial Fairness in the Administration of Justice: Twenty Years After *McCleskey v. Kemp* (Mar. 3, 2007); see also Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 Colum. Hum. Rts. L. Rev. 262, 263–67 (2007).

5. See David Rudovsky, *Litigating Civil Rights Cases to Reform Racially Biased Criminal Justice Practices*, 39 Colum. Hum. Rts. L. Rev. 97, 116–19 (2007).

I. REESTABLISHING THE TRUTH ABOUT HISTORICAL AND CONTEMPORARY RACISM IN AMERICAN CRIMINAL JUSTICE

Professor Roberts presents a critical reminder of the direct link between racial subjugation—beginning with slavery, through Jim Crow, and into the modern era—and unprecedented incarceration rates and disenfranchisement of black and brown men.⁶ She calls for an interdisciplinary approach.⁷ Her work is a reminder that the legal framework established by *McCleskey*, *Whren v. United States*,⁸ and *City of Los Angeles v. Lyons*,⁹ among other cases, has completely divorced the law from the social and historical realities that have inspired most of our criminal laws and criminal justice practices. These cases accomplish this result by, on the one hand, requiring evidence of law enforcement's subjective, intentional discrimination (*McCleskey*) or consistent police abuse (*Lyons*), while holding, on the other hand, that an officer's subjective intent is irrelevant in evaluating the constitutionality of a police stop (*Whren*). Together, these decisions erect hurdles that render it nearly impossible to make a legal showing of racial discrimination in criminal arrests or prosecutions, though common experience and common sense leave little doubt that race continues to remain as salient as ever in public attitudes about crime and punishment¹⁰ and

6. Roberts, *supra* note 4, at 268–79.

7. *Id.* at 267.

8. See generally *Whren v. United States*, 517 U.S. 806 (1996) (holding that a police officer's subjective reasons for a traffic stop are not relevant in a case alleging racial discrimination; rather, the stop's constitutionality must be considered from a reasonable officer's view of the circumstances prompting the stop).

9. See generally *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (holding that a plaintiff who was put in a chokehold by police that injured his larynx lacked standing to seek equitable relief enjoining police from using chokeholds on citizens because he could not “make the [required] incredible assertion” that all Los Angeles police always choke any citizen whom they encounter or that the Los Angeles Police Department maintained a policy ordering or authorizing police to use chokeholds).

10. See, e.g., Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online (31st ed.), http://www.albany.edu/sourcebook/tost_2.html, tbl.2.11.2007 (reporting that 51% of African-American respondents surveyed reported having “very little confidence” in the criminal justice system as compared to 30% of white respondents); tbl.2.0002.2005 (reporting that 71% of white respondents reported believing that there was no police brutality in their area as compared to 29% of African-American respondents who reported so believing); tbl.2.12.2007 (reporting that 60% of white respondents reported

in the application of criminal laws.¹¹ Justice Brennan's dissent in *McCleskey* may have marked the last time any Supreme Court opinion explicitly acknowledged the direct link between a desire to subjugate African Americans and the architecture of criminal codes throughout the United States.¹²

History books have consistently documented the intention to use criminal laws to racially subjugate. For example, Judge A. Leon Higginbotham's *In the Matter of Color*¹³ and *Shades of Freedom*¹⁴ as well as David Oshinsky's *Worse Than Slavery*¹⁵ (which traces the plantation-to-prison evolution in Mississippi) report the immediate link between the end of slavery and the establishment of criminal and penal codes in post-Civil War America. In addition, the media has reported on law enforcement backlashes when African Americans appear to gain political or economic strength.¹⁶ For example, a documentary entitled *Bastards of the Party*¹⁷ explores the history of

having a great deal of confidence in the police, as compared to 22% of African-American respondents so reporting).

11. *Id.* at tbl.5.52.2002, Characteristics of Felony Defendants in the 75 Largest Counties (documenting that in 2002, 31% of felony defendants in the nation's 75 largest counties were white, 43% were black, and 24% were Hispanic).

12. *McCleskey v. Kemp*, 481 U.S. 279, 328–35 (1987) (Brennan, J., dissenting) (describing a “dual system of crime and punishment” in Georgia from the colonial period into the twentieth century, which “expressly differentiated between crimes by and against blacks and whites”).

13. *See generally* A. Leon Higginbotham, Jr., *In the Matter of Color: Race & The American Legal Process: The Colonial Period* (Oxford University Press 1980) (1978) (describing colonial South Carolinian penal codes that imposed the death penalty for convicted slaves and, in some circumstances, free black persons and mandated lesser punishment for whites).

14. *See generally* A. Leon Higginbotham, Jr., *Shades of Freedom: Racial Politics and Presumptions of the American Legal Process* 50–52 (1996) (describing colonial-era Virginia statutes that effectively decriminalized the murder of a slave when committed by a slave master).

15. *See generally* David M. Oshinsky, *Worse than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice* (1996) (documenting the history of Parchman Farm—Mississippi's infamous prison—including its post-Civil War and post-emancipation role in providing plantation labor through the leasing of black convicts to farmers).

16. *See* Darryl Fears, *In Tulsa, Keeping Alive 1921's Painful Memory*, Wash. Post, June 1, 2005, at A3 (describing a reparation lawsuit argued by Professor Charles Ogletree on behalf of families of victims of the 1921 race riots in Tulsa, Oklahoma); *see also* Charles J. Ogletree, Jr., *Tulsa Reparations: The Survivors' Story*, 24 B.C. Third World L.J. 13, 16–19 (2003) (explaining the rationale for the Tulsa race riot reparation litigation).

17. *Bastards of the Party* (HBO 2007).

African-American gangs, which remain a central target of federal and state law enforcement, including federal capital prosecutions. According to the film, modern gangs were formed in response to vicious Jim Crow-era segregation and racial violence in Los Angeles in order to protect black neighborhoods from police brutality and racist attacks. They evolved into the Black Panther Party and splintered off into smaller factions that began to combat one another rather than protect their communities as they were founded to do.

This film is a reminder that black neighborhoods in many cities at one time built their own social service institutions, such as early childhood education, after school programs, and protective law enforcement-like entities. These self-help organizations were a threat to the broader racial order in many communities; as Professor Anthony Amsterdam described in his opening remarks, they threatened to disturb the nation's racial "caste system."¹⁸ Professor Roberts, too, highlights this point in noting that the most repressive criminal justice policies often follow periods of civil rights gains that shake the "white racial hegemony."¹⁹ She also argues, significantly, that another particularly pernicious feature of criminal law and the penal system's marginalization and subjugation of African Americans is that the more successful the de facto results of those policies are, the less necessary it is for law enforcement to resort to outright racist violence and other overt discrimination.²⁰ This allows the legal system to "push race underground" and, given the *McCleskey* framework, renders a legal challenge to prosecution with unmistakably racist impacts and genesis nearly impossible to prove.²¹

18. Anthony G. Amsterdam, University Professor and Professor of Law at New York University School of Law, Opening Remarks at the NAACP Legal Defense and Educational Fund and Columbia Law School Symposium: Pursuing Racial Fairness in the Administration of Justice: Twenty Years After *McCleskey v. Kemp* (Mar. 2, 2007), in 39 Colum. Hum. Rts. L. Rev. 34, 34 (2007).

19. Roberts, *supra* note 4, at 272 (quoting Alex Lichtenstein's assertion that incarceration rates of minorities in particular increase after periods of "white racial hegemony" have ended).

20. *Id.* at 272.

21. See Kendall Thomas, "*If There is Such a Thing*": Race, Sex, and the Politics of Enjoyment in the Killing State (unpublished manuscript, on file with the author); see also Roberts, *supra* note 4, at 261; Amsterdam, *supra* note 18 at 47 (concluding that under *McCleskey*, statistical data showing racial differentiation would most likely be insufficient to show a constitutional violation).

McCleskey has discouraged practical legal application (litigation) challenging the unjust historical realities Professor Roberts so aptly describes. I discuss below that Professors Roberts and Thomas sound a compelling alarm to litigators and policymakers to reawaken America to the reality of racism in the criminal justice system by pleading it, arguing it, and documenting it in court. As legal advocates, we must build a record of the inescapable historical facts of racism in the application of criminal laws via amicus briefs and building factual records in criminal and civil cases, like the ones Professor Rudovsky describes.²² We must bolster legal efforts by shoring up public recognition of the problem through news stories, books, film, and other means of educating policymakers and their constituents that our criminal justice policies are by design, and not by accident, devastating communities of color.

This kind of public education campaign is also indispensable to remind voters and prospective jurors about the crucial importance of exercising their rights to hold elected officials, including prosecutors, accountable for their choices of which cases to prosecute. Professor Roberts directs us to notice that the maintenance of mass incarceration policies, the administration of the death penalty, and the infliction of police terror is in part attributable to the disenfranchisement of targeted communities.²³ Any successful advocacy must re-engage these communities and show politicians that criminal justice reform is no longer a liability, but actually a requirement of service to their constituents.

Professor Roberts also urges accountability for police misconduct.²⁴ The legal and policy shields that protect police after they shoot unarmed citizens are one specific target for reform.²⁵ Many litigators arguing civil rights cases have represented clients

22. Rudovsky, *supra* note 5, at 102–105 (describing civil litigation in New Jersey and Philadelphia, as well as a study by the New York State Attorney General, all documenting racial disparities in police stops of civilians).

23. Roberts, *supra* note 4, at 281–83.

24. *Id.* at 284–86.

25. See Peter Neufeld, Op-Ed., *Ask a Policeman*, N.Y. Times, Dec. 24, 2006, § 4, at 8 (criticizing New York prosecutors' policy of shielding police from investigative interviews after they are implicated in shooting even unarmed suspects); see also Erik Luna, *Transparent Policing*, 85 Iowa L. Rev. 1107, 1112–16, 1162–63 (2000) (describing the impact of police brutality and misconduct on the community's trust of police, and proposing information-sharing policies to enhance the efficacy of law enforcement practices).

who were terrorized or tricked by police before “confessing” to crimes; many times interrogations are peppered with racial epithets and/or threats of capital prosecution.²⁶ Reform of interrogation techniques is one place to start. It can effectively increase the cost to police of their use of certain interrogation tactics, encouraging changes such as the suppression of incriminating statements wrought as a result of police misrepresentation of, for example, the presence of evidence incriminating the suspect.²⁷

If Professor Roberts’ recounting of the historical and contemporary realities of racism in American criminal law lays a bedrock foundation for building a framework for challenging *McCleskey*, Professor Thomas pushes for excavating beneath that foundation by “first free[ing ourselves] of the law”²⁸ and deepening the recent scholarly interest in the cultural roots of the death penalty’s application in the United States.²⁹ Professor Thomas’ article brings to mind Professor Charles Lawrence’s groundbreaking piece describing the power of unconscious racism.³⁰ Professor Thomas’ article can be read as calling readers to look for, recognize, and document “Unconscious Racism, Plus.” This is particularly important at a time when, as he reminds us, courts, policymakers, and in many respects, popular culture are operating as though we are in a “post-racial” era, in which nothing but the most blatant, Jim Crow-style

26. See, e.g., Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. Rev. 891, 907–23 (2004) (describing social psychology of police interrogation techniques leading to false confessions); Welsh S. White, *Confessions in Capital Cases*, 2003 U. Ill. L. Rev. 979, 1008–1014 (discussing the coercive impact on murder suspects of threats of capital prosecution and describing illustrative cases involving suspects who falsely confessed after being threatened with the death penalty); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denv. U. L. Rev. 979, 985–1000 (1997) (describing interrogation techniques leading to false confessions).

27. See, e.g., Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering Deceptive Interrogation Techniques*, 33 Fordham Urb. L.J. 791, 834–40 (2006) (advocating for policy reform and legal challenges to deceptive interrogation tactics).

28. Thomas, *supra* note 21, at 9.

29. Thomas, *supra* note 4.

30. See generally Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987) (objecting to the requirement set forth in *Washington v. Davis*, 426 U.S. 229 (1976), that challenges to facially neutral laws with discriminatory impacts require a showing of discriminatory intent and purpose).

bigotry establishes that criminal justice practices in the United States have been overwhelmingly racially biased. As Professor Roberts writes, in many instances these practices were designed to subjugate African Americans, and have resulted in staggering rates of incarceration of black men.³¹ Professor Thomas urges that we learn to look for ways to think about the relationship of race/racism and capital punishment in this “post-racial” state.

A fact illustrating Professor Thomas’ point is that the next six people who are slated to be executed by the United States are black men.³² The first three to have been executed in 2001 and 2002 were a white man (Timothy McVeigh), a black man, and a Latino man.³³ When the Department of Justice under former United States Attorney General Janet Reno issued a report finding “disturbing” statistics that pointed to imbalanced application of federal capital prosecutions, which resulted in disproportionate conviction and death sentences of African Americans,³⁴ former Attorney General John Ashcroft released his own study, purporting to rebut the Reno findings and concluding that no racial discrimination exists in federal capital prosecutions.³⁵ The Department of Justice, moreover, took steps to bolster this impression. First under Ashcroft’s direction and then under that of former Attorney General Alberto Gonzales, the Department centralized federal death prosecutions to an

31. Roberts, *supra* 4, at 263–64.

32. The Federal Capital Habeas Project monitors the case status of every prisoner sentenced to death by the United States. According to the Project, the next six people slated for execution are James Roane, Richard Tipton, Cory Johnson, Anthony Battle, Orlando Hall, and Bruce Webster. All are African American. Deborah Fins, NAACP LDF, *Death Row U.S.A.* 63 (2007), available at http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Winter_2007.pdf.

33. Death Penalty Info. Ctr., *Federal Executions 1927–2003*, <http://www.deathpenaltyinfo.org/article.php?scid=29&did=149> (last visited Sept. 12, 2007).

34. U.S. Dep’t of Justice, *The Federal Death Penalty System: A Statistical Survey (1988–2000)* (Sept. 12, 2000), available at <http://www.usdoj.gov/dag/pubdoc/dpsurvey.html>. Commenting on the report, Attorney General Reno said that she was “sorely troubled” by its findings of racial disparities in the application of the federal death penalty, and Deputy Attorney General Eric Holder said that he was “personally and professionally disturbed.” Marc Lacey & Raymond Bonner, *Reno Troubled by Death Penalty Statistics*, *N.Y. Times*, Sept. 13, 2000, at A17.

35. U.S. Dep’t of Justice, *The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review*, 14 *Fed. Sent’g Rep.* 40, 40–41 (June 6, 2001), available at <http://www.usdoj.gov/dag/pubdoc/deathpenaltystudy.htm>.

unprecedented degree.³⁶ It has prosecuted a number of cases involving alleged white supremacists,³⁷ as well as Russian³⁸ and a few Italian³⁹ mafia members. This expansion of federal death, even into federal courts in jurisdictions that have consistently turned away from the death penalty, such as Massachusetts,⁴⁰ Vermont,⁴¹ and North Dakota,⁴² has been in a purported effort to apply the death penalty in a more even-handed and less geographically concentrated manner.

The symbolism of prosecuting a member of the Aryan Brotherhood, in particular, is likely calculated to help distract from

36. See generally John Gleeson, *Supervising Federal Capital Punishment: Why the Attorney General Should Defer When U.S. Attorneys Recommend Against the Death Penalty*, 89 Va. L. Rev. 1697 (2003) (describing the uniformity required by Department of Justice in death penalty prosecutions); see also David Hechler, *U.S. Death Penalty in Wake of Ashcroft: Will Gonzales Loosen AG's Grip?*, Nat'l L. J., Nov. 29, 2004, at 1 (discussing whether Gonzales will continue "Ashcroft's aggressive approach" to federal death prosecutions); William Glaberson, *Capital Cases and Agendas: Ashcroft Sets a Tone on the Death Penalty*, N.Y. Times, Feb. 8, 2003, at B1 (describing Attorney General Ashcroft's high degree of control over death penalty cases).

37. See *Prison Aryans Are Sentenced to Life Terms*, N.Y. Times, Nov. 22, 2006, at A24 (reporting that Aryan Brotherhood members Barry B. Mills and Tyler D. Bingham "received consecutive life terms without possibility of parole," notwithstanding prosecutors' arguments for the death penalty); see also Press Release, U.S. Dep't of Justice, Leaders of Aryan Brotherhood's Federal Faction Convicted of Racketeering and Murder Offenses (Sept. 15, 2006), <http://www.usdoj.gov/usao/cac/news/pr2006/121.html> (describing prosecutions of Mills and Bingham and related Aryan Brotherhood members, including 18 guilty pleas, 4 convictions, and 14 additional defendants awaiting trial).

38. See Joe Mozingo, *Jury Votes Death for 2 in Killings*, L.A. Times, Feb. 14, 2007, at B3 (reporting death sentences awarded in federal prosecution of Iouri Mikhel and Jurijus Kadamovas, two alleged members of Russian mob).

39. See Michael Brick, *U.S. to Seek Death Penalty for a Reputed Crime Boss*, N.Y. Times, Apr. 3, 2007, at B5 (reporting on federal death prosecution of "Vinny Gorgeous" in New York).

40. See *United States v. Sampson*, 300 F. Supp. 2d 278, 281 (D. Mass. 2004) (deciding the appropriate venue for Gary Sampson's execution and noting that the execution cannot be carried out in Massachusetts, though the crimes took place there, because Massachusetts law "does not provide the death penalty for any offense").

41. See Death Penalty Info. Ctr., *The Federal Death Penalty*, <http://www.deathpenaltyinfo.org/article.php?scid=29&did=147> (last visited Sept. 17, 2007) (listing Vermont as one of the non-death penalty states in which the United States pursued capital prosecution of a crime that resulted in a federal capital sentence).

42. *Id.* (listing North Dakota).

the historical racism of the death penalty and sanitize the contemporary racism of its administration. Prosecuting a handful of high-profile cases involving particularly unsavory white defendants may be an attempt to offer a foil to allegations that the federal death penalty is racist in its application. This is an example of a tactic that might be supposed to persuade people that the federal death penalty has entered the “post-racial” era that Professor Thomas describes. The fact is, of course, that no amount of death penalty expansion can undo its history, its purpose, and its legacy.⁴³ No perpetuation of injustice to new groups has worked to restore justice to historically targeted groups.

Professor Thomas also encourages us to think about ways in which race, though not explicitly expressed in capital cases, is nevertheless present through the marginalization of another set of social characteristics, such as sexual orientation or gender.⁴⁴ The concept of the “social imaginary” is important to understanding Professor Thomas’ challenge for overcoming *McCleskey*. It denotes understanding “the ways in which people imagine ‘their social existence, how they fit together with others . . . and the deeper normative notions and images that underlie these expectations.’”⁴⁵ As Professor Amsterdam mentioned during his remarks, this is in keeping with Emile Durkheim and Gunnar Myrdal’s observations that the severity of criminal punishment in America is directly related to the *caste* of the alleged perpetrator and the alleged victim.⁴⁶

I offer an illustration from one of my own cases. I represent an African-American man convicted of the capital murder of a white man.⁴⁷ My client was tried for capital murder before a Mobile,

43. *McCleskey v. Kemp*, 481 U.S. 279, 328–29, 332 (1987) (Brennan, J., dissenting) (“Evaluation of *McCleskey*’s evidence cannot rest solely on the numbers themselves. We must also ask whether the conclusion suggested by those numbers is consonant with our understanding of history and human experience. Georgia’s legacy of a race-conscious criminal justice system, as well as this Court’s own recognition of the persistent danger that racial attitudes may affect criminal proceedings, indicates that *McCleskey*’s claim is not a fanciful product of mere statistical artifice [I]t would be unrealistic to ignore the influence of history in assessing the plausible implications of *McCleskey*’s evidence.”).

44. See Thomas, *supra* note 21, at 7–8.

45. *Id.* at 10.

46. Amsterdam, *supra* note 18, at 39.

47. *Williams v. State*, 782 So. 2d 811, 816 (Ala. Crim. App. 2000).

Alabama trial court judge, who was appointed to the bench by George Wallace, Alabama's governor, who was famous for declaring: "Segregation now . . . segregation tomorrow . . . segregation forever."⁴⁸ In an unrelated case, a bar complaint was filed against the same judge for advising a young defense lawyer not to work so hard to get bail on behalf of his clients because "we need more niggers in jail."⁴⁹ Despite litigation pointing to evidence of the judge's bias against our client and his witnesses, so far no reviewing court has been willing to upset our client's death sentence or even to conduct its own evidentiary hearing on some of the constitutional issues presented in post-conviction litigation.⁵⁰

Cases like this come to mind in reference to what Professor Thomas describes as the perceived intrusion of minority/disenfranchised/subjugated groups on the "racial enjoyment" of the majority.⁵¹ Professor Thomas also posits that "the 'death penalty imaginary' imbues the 'good' citizens with a sense of" what Kenneth Karst has termed "belonging to America."⁵² This sense of enjoyment was perhaps most crudely expressed in the celebrations and picnics that often occurred at the public lynchings throughout the first half of the last century.⁵³ Professor Thomas urges that we collectively ask: "What does the practice of capital punishment do for (some of) *us*?"⁵⁴ How does it make us feel safe and protected? How does it cement our status as belonging among the "good citizens"? Asking this question is crucial in finding strategies to reverse the attractiveness of capital punishment and other racially discriminatory criminal justice policies to policymakers, their constituents, jurors, and judges.

48. George C. Wallace, Inaugural Address (Jan. 14, 1963), in *Black, White, and Gray: Twenty-one Points of View on the Race Question* 177, 180 (Bradford Daniel ed., 1964).

49. Ken Silverstein, *The Judge as Lynch Mob*, Am. Prospect, May 7, 2001, at 26, 27.

50. See generally *Williams v. Haley*, No. 01-0777-CB-C (S.D. Ala. filed Oct. 30, 2006) (denying petition for habeas relief).

51. *Id.* at 18, 22 (emphasis added) (quoting Dylan Evans).

52. *Id.* at 26 (quoting Kenneth Karst).

53. See Leon F. Litwack, *Hellhounds*, in *Without Sanctuary: Lynching Photography in America* 8, 8-26 (James Allen et al., 2003) (describing how lynchings often became public spectacles that attracted large numbers of enthusiastic spectators and assumed a "carnival-like atmosphere").

54. Thomas, *supra* note 21, at 28.

II. WHAT HAS WORKED: SUCCESSFUL RACE-BASED LITIGATION

Professors Roberts and Thomas have provided the historical background and methodology necessary for challenging publicly the confines of “post-racial” discourse. This foundation is crucial for developing litigation and complementary strategies that will undo *McCleskey*’s legal framework. Professor Rudovsky offers some “where the rubber hits the road” instruction about the litigation that has challenged racial discrimination in the application of criminal laws.⁵⁵ He reminds readers that litigants have enjoyed some success by framing non-capital cases as presenting racial discrimination at the criminal justice system’s “point of entry,” such as civil lawsuits that challenge police practices.⁵⁶ This type of litigation succeeds, moreover, despite myriad procedural obstacles presented by *McCleskey*, *Lyons*, and *Whren*.⁵⁷ Such barriers include governing “substantive constitutional standards that fail to address racial bias and other documented unfair practices in the criminal justice system”,⁵⁸ federal legislative limits on remedies such as those established in the Anti-Terrorism and Effective Death Penalty Act⁵⁹ and the Prison Litigation Reform Act,⁶⁰ and “door closing” laws that “strip[] the courts of the power to review certain practices or policies, or that limit[] the remedies that may be considered for proven violations . . . such as limitations on standing, immunities, exceptions to the exclusionary rule, and federalism principles” that warrants federal court deference to state court factual determinations and legal conclusions.⁶¹

One of the likely reasons that “point of entry” legal challenges have succeeded despite these formidable barriers is that the challenges were publicly sponsored and undertaken, either as a result of legislative action or court-ordered consent decrees.

55. Rudovsky, *supra* note 5, at 106–19 (describing civil litigation’s potential to deter racial profiling and citing examples of successful civil litigation).

56. *Id.* at 100.

57. *Id.* at 97–99, 106–08, 114–17.

58. *Id.* at 98.

59. *Id.* (citing Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 28 & 42 U.S.C. (2006))).

60. *Id.* at 98–99 (citing Prison Litigation Reform Act (PLRA) of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in scattered sections of 11, 18, 28 & 42 U.S.C. (2006))).

61. *Id.* at 98, n.4.

Furthermore, legal challenges have relied on full factual reports in which law enforcement officers described their reasons for conducting stops and searches.⁶² Where officers failed to record this data, government reports noted the failure and reported it as a problem. Data collection has thus emerged as a key element of the success of these legal challenges to racial profiling.

Also significant to the success of "point of entry" litigation is that it is not hampered by the independent action of different decision-makers, as was the case in *McCleskey*, where capital prosecutors' and juries' independent choices foiled the Fourteenth Amendment claim.⁶³ Racial profiling suits succeed even though they challenge the actions of individual state actors. As Professor Rudovsky reports, as long as the officers whose behavior is the subject of the lawsuit are working for the same agency and there is evidence of that agency's repeated targeting of racial minorities, a legally sufficient Fourteenth Amendment claim can be established, as has occurred in some cases.⁶⁴ "Stop and search" data, for instance, satisfy the requirement established in *United States v. Armstrong* that plaintiffs point to similarly situated white people who are not subject to the challenged practices.⁶⁵ Professor Rudovsky reminds us that where racial profiling is based on an *expressly* race-conscious policy, there should be no need for a comparison to similarly situated non-minority people. Moreover, as an example of another policy that makes legal challenges to police racial profiling easier to win than challenges to alleged selective prosecution, Professor Rudovsky points to the fact that police are not afforded the same presumption of correctness that prosecutors are.⁶⁶

Professor Rudovsky's discussion of the "point of entry" lawsuits brings to mind the *Thomas v. City of Gulfport* litigation that the NAACP Legal Defense and Educational Fund, Inc. (LDF) undertook in partnership with the Southern Center for Human

62. See *id.* at 102 (explaining that litigants challenging racial profiling in common police practices have provided documentation as to the scope of the problem).

63. *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987).

64. See Rudovsky, *supra* note 5, at 110–12.

65. See *id.* at 111; *United States v. Armstrong*, 517 U.S. 456, 465 (1996).

66. Rudovsky, *supra* note 5, at 112.

Rights (SCHR).⁶⁷ Also a “point of entry” lawsuit, the focus in *Thomas* was more explicitly on economic bias than on racial bias, though one of the allegations in the complaint was that police targeted African-American neighborhoods in search of people unable to pay “old fines,” who were then subject to arrest for that reason alone.⁶⁸ The *Thomas* lawsuit shares in common with Professor Rudovsky’s examples of “point of entry” suits its underscoring of the plight of a relatively sympathetic group of people. They were not charged with serious, much less capital, crimes. Rather, the plaintiffs were charged with crimes such as public drunkenness and riding a bike without a light and were unable to afford their fines. They were then taken back to court, unrepresented by counsel, and jailed essentially for being poor.⁶⁹ Seeing the impact of capricious law enforcement practices through the eyes of a “sympathetic” group may be a gateway to highlighting the inefficiency and injustice of policies that depend on generalizations or racial stereotypes. Also, as with racial profiling

67. See Complaint, *Thomas v. City of Gulfport*, No 1:05-CV-349-LG-RHW (S.D. Miss. July 2005), available at http://www.naacpldf.org/content/pdf/gulfport/Thomas_v._City_of_Gulfport.pdf [hereinafter Complaint].

68. The Complaint alleged: “The City of Gulfport employs a special force of police officers charged with trolling the streets of Gulfport to round up citizens who have failed to pay fines assessed by the Gulfport Municipal Court. These officers conduct periodic sweeps, during which they search the streets for people who look as though they might owe the City old fines. During these sweeps, the officers go to predominately African-American neighborhoods and stop people in the streets without any legitimate reason, but for the sole purpose of checking to see if they owe the City old fines. Those who owe fines are taken to jail.” *Id.* ¶ 2. The Complaint also pled debtor’s prison allegations, including some of the following: violations of right to counsel under *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (holding that, “absent a knowing and intelligent waiver,” a court may not imprison an individual for any offense—whether “petty, misdemeanor or felony”—when the individual did not receive legal representation at trial), and *Alabama v. Shelton*, 535 U.S. 654, 658 (2002) (holding that the court cannot impose a suspended sentence that may actually result in deprivation of the defendant’s liberty unless defendant received legal representation at trial); violations of defendants’ constitutional rights under *Bearden v. Georgia*, 461 U.S. 660, 672 (1983) (holding that “in revocation proceedings for failure to pay a fine,” the court must examine whether the failure to pay was willful before seeking imprisonment for the probationer), and *Tate v. Short*, 401 U.S. 395, 398 (1971) (finding that the “Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full”) (quoting *Morris v. Schoonfield*, 399 U.S. 508, 509 (1970) (per curiam)).

69. See, e.g., Complaint, *supra* note 67, ¶¶ 22, 58.

lawsuits, when law enforcement practices like “sweeps”⁷⁰ that depend on generalizing characteristics of certain communities (racial, economic, etc.) are exposed as wasting money that could be spent protecting communities from real danger, public policy reforms of such practices are likely to follow.

Thomas v. City of Gulfport and “point of entry” suits echo Professor Rudovsky’s observation about innocence: he instructs that correcting the flawed criminal justice practices unearthed by wrongful convictions will effect reforms that will necessarily reduce the impact of bad criminal justice policies on black and brown communities because they bear most of the brunt of law enforcement practices that lead to wrongful convictions.⁷¹ Indeed, “point of entry” lawsuits foster the perception that the targeted people are innocent of wrongdoing. Nicknames for the lawsuits like “Driving While Black” or “Flying While Arab or Asian” highlight the perception that the plaintiffs have done nothing wrong and have just been racial minorities in the wrong place at the wrong time.

The plaintiffs in these innocence suits often have not been convicted of any crime, or they have been accused or convicted of a very minor violation. People can thus put themselves in the plaintiffs’ shoes. Moreover, on a less conscious or explicit level, the more we highlight the plight of the innocent person, targeted in part because he fit the “profile,” the more likely we are to diminish the notion that criminal defendants generally—a disproportionate number of whom are black men—are dangerous and that even if they are not guilty of this, they are probably guilty of something.

Revealing the racist underpinnings of the entire system, starting with police stops all the way through capital prosecutions, will require increased information sharing, attention to such phenomena as “protecting” white communities (discussed further, *infra*), as well as suits to stop discriminatory law enforcement. Data collected as a result of racial profiling suits in particular jurisdictions can be used to raise Eighth and Fourteenth Amendment challenges to capital prosecutions in those jurisdictions. This multi-layered approach is a way of developing the deeper historical and social context necessary to rebut the “post-racial” legal and policy

70. By “sweeps,” I am referring to mass arrests targeting communities or neighborhoods supposed to be the site of particular criminal activity.

71. Rudovsky, *supra* note 5, at 120–123.

framework civil rights and criminal defense lawyers have been forced to reckon with since *McCleskey*.

Protecting white communities is also a goal of many law enforcement policies. As Professor Roberts writes, racist law enforcement follows periods of civil rights gains that are perceived as a threat to white racial hegemony.⁷² Several studies have shown that pursuing the protection of white communities at all costs leads to higher rates of error as well as to racial discrimination in criminal cases. For example, Professor Rudovsky notes that the statistics revealed by a study of police pedestrian and car stops in white areas of Philadelphia⁷³ showed “hugely disproportionate stops by race,” while stops in predominantly African-American parts of the city were “roughly proportionate to the population in those areas.”⁷⁴ The same disparity was evident in the New York Attorney General’s 1999 study of police stops.⁷⁵ Professor Rudovsky reports that the New York study showed that racial disparities in stop rates are particularly pronounced in parts of the city where the majority of the population is white.⁷⁶ In precincts where African Americans represented 10% or less of the population and whites represented 80% or more of the population, African Americans accounted for 30% of the stops during the investigated period.⁷⁷ The study also documented that arrest rates based on stops differed by race, with black and Latino people less likely than whites to be arrested once they were stopped: police stopped 9.5 black people for each stop that resulted in an arrest; 8.8 Latinos; yet only 7.9 whites per arrest.⁷⁸ These arrest data strongly suggests that racial discrimination reported in the study is *not* a product of crime rates, allocation of police resources, or other factors that may have impacted the data on stops.

72. Roberts, *supra* note 4, at 273.

73. Rudovsky, *supra* note 5, at 104 (citing Plaintiffs’ Fifth Monitoring Report, Pedestrian and Car Stop Audit, NAACP v. City of Philadelphia, No. 96-CV-6045 (E.D. Pa. Dec. 7, 2000)).

74. *Id.* at 23–28.

75. Civil Rights Bureau, Office of Att’y Gen. of the State of N.Y., The New York City Police Department’s “Stop & Frisk” Practices: A Report to the People of the State of New York From The Office Of The Attorney General 88–89 (Dec. 1 1999), available at http://www.oag.state.ny.us/press/reports/stop_frisk/stop_frisk.html [hereinafter “Stop & Frisk” Practices].

76. Rudovsky, *supra* note 5, at 104–05.

77. *Id.* at 105.

78. “Stop & Frisk” Practices, *supra* note 75, at 111.

Similarly, another problem to be exposed (on the opposite end of the criminal justice spectrum) is one of the findings in Professors Liebman, Fagan, and West's "Broken System" study: that a factor contributing to a high error rate in capital cases is the over-use by jurisdictions of the death penalty even for prosecuting crimes that were not the worst of the worst.⁷⁹ The researchers found that some of the conditions that pressured counties and states to overuse the death penalty—and thus resulted in an increased risk of erroneous convictions and sentences—were race, politics, and poor law enforcement.⁸⁰ The study made two findings with regard to race as a factor in wrongful capital conviction. First, "[t]he closer the homicide risk to whites in a state comes to equalling or surpassing the risk to blacks, the higher the error rate."⁸¹ The authors found that reversal rates in capital cases were twice as high in areas where homicides more heavily affected whites (compared to blacks) than where they more heavily affected blacks.⁸²

Second, there was a direct correlation between the proportion of African Americans in a state, and in one study a direct correlation between the number of welfare recipients in a state, and the rate of serious capital error.⁸³ As Professors Liebman, Fagan, and West explained, "[b]ecause this effect has to do with traits of the population at large, not those of particular trial participants, it appears to be an indicator of crime fears driven by racial and economic conditions."⁸⁴ Indeed, the authors more explicitly concluded that "when whites and other influential citizens feel threatened by homicide, they put pressure on officials to punish as many criminals as severely as possible," which results in mistaken capital convictions of people who are later found to have committed a less serious crime or to be completely innocent.⁸⁵ These findings in cases ranging from "stop and frisk" encounters to capital prosecutions strongly suggest

79. See James S. Liebman et al., *A Broken System Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It*, ii (2002), available at <http://www2.law.columbia.edu/brokensystem2/report.pdf>.

80. *Id.* at iii.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *A Broken System, Part II: Questions About the Study*, <http://www.thejusticeproject.org/press/reports/a-broken-system-part-ii-qa.html> (last visited Sept. 30, 2007).

that the racial considerations at play in *McCleskey* are still actively informing application of criminal laws at all levels of law enforcement.

III. CONCLUSION: PROPOSED STRATEGIES FOR MOVING PAST *MCCLESKEY*

This Symposium was convened to consider ways in which the truth can be exposed about the continuing influence of race in criminal prosecution and punishment and to propose measures for combating this racism. The following is my proposal for a strategy going forward. First, I propose that civil rights litigators undertake a thorough re-education of policymakers and grassroots constituents about what they already know: race matters in the criminal justice system. It pervades and drives our criminal laws, from the most minor violations to the ultimate penalty. The re-education campaign must include social science research and popular culture. It must infuse litigation with evidence of the real-life circumstances of racial discrimination, both historical and contemporary, in the jurisdictions in which legal challenges are brought.

Second, as demonstrated by the racial profiling “point-of-entry” litigation context, data collection of all kinds is key: statistical studies, sentencing data, jury composition data, and policy-and-practice documentation from police and prosecutors. To that we should add depositions and affidavits from former prosecutors, police, residents, and leaders of the impacted communities as well as historians and others who can “give life” to statistics demonstrating racial disparities in the targeted jurisdictions.

Putting this kind of information into the official record of a tribunal *matters*. It creates a precedential history, even if we do not win every case in which we raise these issues. This kind of record builds on itself over time and starts to chip away at the “post-racial” illusion that courts have succeeded in creating for at least the last two decades since *McCleskey*.

Finally, litigation strategies should be distributed through different layers of the justice system: cities, counties, states, and the federal government. They should include examination of each level of the criminal justice system, from stops and searches, misdemeanor cases, and bail practices all the way to capital prosecutions and sentences. These litigation strategies must include partners in social

science, history, and people with thorough local knowledge of the relevant communities. As Professor Amsterdam advised during his opening remarks, organizing the community around these efforts is critical.⁸⁶ It will help drive the recomposition of juries, push elected officials to be accountable to the communities most devastated by racist criminal justice policies, and expose the kinds of racism about which people must be re-educated.

Litigation strategies must be flanked by complementary approaches. We have to deepen our efforts in education, so that no single excuse or proxy can continue to deny the pervasive relevance of race in punishment, and so that no one can with a straight face continue to pretend—despite all common-sense and evidence to the contrary—that absent a documented intention to prosecute on the basis of race, our justice system is colorblind.

86. Amsterdam, *supra* note 18, at 50–52.