

THE DEATH PENALTY IN AMERICA: RIDING THE TROJAN HORSE OF THE CIVIL WAR

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INTRODUCTION

After the end of the Civil War, slavery was formally abolished, and the right to vote and other civil rights for African-Americans were finally enshrined into the Constitution of the United States via the Reconstruction Amendments. However, such a narrow reading of the history of this period belies the nebulous boundary between “war” and peace. As Yoram Din-stein has noted, “[t]he phrase ‘war’ lends itself to manifold uses. . . [and thus] may appear to be a flexible expression suitable for an allusion to any serious strife, struggle or campaign.”¹

This expansive notion of war is appropriate for describing African-Americans’ arduous path as they have struggled to achieve the status of equal human beings endowed with full civil rights. This paper will examine how public officials with Confederate sympathies in the postwar South managed to preserve, in law and in practice, many of the badges of slavery that had ostensibly been eradicated by the Reconstruction Amendments and the early Civil Rights Acts; and will do so with specific reference to racial disparities imposed by the death penalty.² Under our modern legal system, “much has remained consistent in the administration of injustice for black ‘defendants’ . . . [since] the age of slavery, when blacks had little to nothing in the way of legal recourse.”³ Keeping in mind that capital punishment is an exercise of power over the powerless,⁴ this article seeks to trace the lineage of this inequality by examining the historical symbiosis between the application of the death penalty and the legacies of slavery and apartheid in the United States.

The analysis of this paper will proceed in three parts. First, I will present a historical overview of the institution of slavery that will clarify how it entrenches a social caste system by reducing the slave to an object of property. Second, I will closely examine the period following the American Civil War to demonstrate how a faction of Southern public officials reestablished the domination of whites in the postbellum South by formally acknowledging civil rights for African-Americans while simultaneously continuing to subjugate them through both legal and quasi-legal channels. Third, I will analyze how capital punishment has played a central role in allowing America to retain the indelible stain of racial inequality long after the emancipation of the slaves, purported to fulfill the egalitarian promise upon which America was founded.

I. THE LAW OF SLAVERY FROM ROME TO ANTEBELLUM AMERICA

SLAVES AS PROPERTY UNDER ROMAN LAW

The institution of slavery reduces human beings to objects devoid of any protections against incursions upon their life, liberty, and dignity. In order to understand how slaves were owned in antebellum America, it is helpful to trace the lineage of the legal institution of ownership back to the concept of *do-*

minium that emerged in the late Republican period of Ancient Rome. *Dominium* “was the highest, the ultimate form of title to property, specifically distinguished from lesser types of property interest.”⁵ Under *dominium*, “[t]he owner was lord and master of his property.”⁶

Slavery was widely practiced and deeply imbedded in the social order of Rome, and the distinction between slaves and free men was one of three constitutional elements of personhood under Roman law.⁷ This distinction had enormous juridical consequences, as “in many ways slaves were regarded as property rather than as human beings.”⁸ As with any other object of property falling under the rubric of *dominium*, they were “things”⁹ without rights¹⁰ that “could be acquired, owned and disposed of.”¹¹

The concept of *dominium*, with its almost unlimited powers for the owner, was a means of keeping the ever-increasing slave population under control.¹² This explains the stripping of juridical protection for slaves under *dominium*,¹³ which meant that “a master could do what he liked with his slave, over whom he had the power of life and death.”¹⁴

THOMAS HOBBS’ INFLUENCE ON ENGLISH THOUGHT ON SLAVERY

Roman law was preserved throughout the Middle Ages via Justinian’s Digest¹⁵ and other ancient documents, and ultimately formed the bedrock of most civil law systems that had developed in Continental Europe by the Sixteenth century. While the courts of England developed their own distinct brand of common law, Roman law was preserved by the English in their universities: for centuries, the elite establishments of Oxford and Cambridge taught exclusively Roman law and not common law. Against this backdrop, Seventeenth century political philosopher Thomas Hobbes published his *Leviathan*, “...a work which more than any other defined the character of modern politics.”¹⁶ According to Hobbes, whose philosophical treatise was heavily influenced by classical jurisprudence, prior to the establishment of civil society, human beings existed in a state of nature.¹⁷ In this state, all men enjoyed a common capacity for dominion over all things in the world, as well as over one another.¹⁸ Although all men were formally equal in this environment, scarcity of resources and unchecked animalistic impulses meant that life was a perpetual war, where every man was enemy to every man.¹⁹ The resulting quality of life was necessarily “solitary, poor, nasty, brutish, and short.”²⁰ For these reasons, Hobbes argued that it was imperative for humans to form social covenants, in which some men relinquished their natural dominion to a higher sovereign in exchange for peace and security.²¹

Hobbes postulated that these social covenants for establishing sovereign power of one human over another could be created either by acquisition (i.e., force)²² or by institution (i.e., consent).²³ He described two ways of acquiring power by force: (1) by generation, “when a man maketh his children”²⁴; or (2) by

conquest, when a man “subdueth his enemies to his will.”²⁵ In contrast to sovereign power that is forcefully acquired, Hobbes theorized that sovereign authority could also be instituted when men freely consent to give a higher authority - i.e. the state - the power and responsibility to ensure peace and security.²⁶ The most obvious and direct mechanism through which a state pursues this mandate is the criminal law.²⁷ Hobbes was convinced that the quality of the sovereignty exercised by these two types of “commonwealths”²⁸ was “the very same.”²⁹

In this sense, a family was akin to a “little Monarchy,”³⁰ with the male head of the household exercising a despotic dominion over his underlings (including wives, children, and slaves) in the absence of any superseding authority. The power delegated to the resulting state often included the head of the family’s right to impose death upon his subjects.³¹ Once sovereign power was authoritatively vested in the state, “the sovereign of each [state] hath dominion over all that reside therein,”³² including the children and slaves of the men who convened the commonwealth, since “no man can obey two masters.”³³

Thus, two central themes become clear from Hobbes’ oeuvre: power and inequality. Hobbes felt no qualms over limiting the liberty of some humans so that peace and prosperity could prevail for society as a whole. In his view, the sovereign power that some men exercised over others was merely a mutation of man’s natural right to self-defense,³⁴ for if a man did not subordinate his enemy, there was nothing in the state of nature to stop his enemy from killing him. In this way, “[v]iolence, as both a... fact and metaphor, [became] integral to the constitution of modern law.”³⁵ Such violence has the direct effect of sustaining inequality, since “[l]aw in its determining effect cannot be everything. Obviously, law must choose and elevate some modes of existence and suppress or ignore others.”³⁶

FROM ANTIQUITY TO AMERICA: THE ROMAN AND HOBBSIAN ROOTS OF AMERICAN SLAVERY

William Blackstone, in his *Commentaries on the Laws of England*, expanded on the Hobbesian undertones of legal domination.³⁷ In one passage, he wrote:

[t]here is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.³⁸

This domination was reaffirmed as a distinctly American institution when James Madison wrote approvingly of “that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.”³⁹

Premised upon the concept of dominion that emerged in Ancient Rome, slavery flourished in America for nearly a century after it was abolished in England.⁴⁰ Together, these closely related legal institutions perpetuated a stark disparity in the valuation of human life between white Americans and Afri-

can-Americans.⁴¹ As Chief Justice Taney of the United States Supreme Court infamously stated in the *Dred Scott* decision, blacks were considered “so far inferior, that they had no rights which the white man was bound to respect.”⁴² This dearth of rights for slaves was consistent with Hobbes’s idea that the dominant class needed to reinforce the normative social order against the specter of insubordination. In keeping with the Hobbesian premise that sovereign power will only be delegated to a

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higher authority when the head of the household is incapable of maintaining peace, we would expect to see a rise in the application of sovereign state power in situations when the status quo is most threatened. This expectation is supported by the observation that for most of the history of American slavery, “the controlling factor in a slave’s life was not the legislation on the books but the master’s whim. Though slaves were occasionally

tried in courts and tribunals, the chattel slavery system gave slaveholders almost total control over their ‘property,’ including the manner in which slaves were punished.”⁴³ However, as the institution of slavery continued to face mounting pressure, both from within the United States and a fledgling international movement toward its abolition,⁴⁴ we see a gradual rise in the use of the law as a means of buttressing the American social hierarchy. Therefore, although evidence from early colonial times shows some instances of equality under the law, laws dealing with law-breaking slaves grew more stringent as the slave population increased and threats of slave insurrections rose. These ‘Slave Codes’ were extreme laws reflecting white supremacy and fear, and allowing slaves to be put to death for transgressions ranging from helping a fellow slave escaping to destroying property.⁴⁵

Further evidence of the correlation between racially discriminatory penal practices and slavery is found in the higher preponderance of capital punishment in areas where slavery was most integral to the local economy. Thus, we see that from a very early point in the colonial period, northern colonies, who had never been as reliant on plantation-based agriculture as the southern colonies, adopted much more lenient attitudes toward capital punishment,⁴⁶ while “[i]n the South, capital punishment had a different history linked, in large part, to slavery.”⁴⁷ Not only was capital punishment more prevalent in the South generally, but it “was a powerful tool for keeping the slave population in submission.”⁴⁸ This was in part due to the perceived need to control them as they were not only a captive workforce, but also made up significant portions of the populations of many southern states.⁴⁹

As the above examples demonstrate, “[c]apital punishment during this time... [embodied] an ‘emphatic display of power, a reminder of what the state could do to those who broke the laws.’”⁵⁰ The most brutal and extreme exhibitions of emphatic state power were almost always reserved for the subjugated classes, who had the most to gain from a disruption of the social status quo and the least to lose should their efforts be thwarted. Therefore, in an attempt to ratchet up the deterrent

II. THE WAR THAT DIDN'T END

THE RESISTANCE AGAINST RECONSTRUCTION

The surrender of the Confederate army in the Spring of 1865 marked the formal end of the American Civil War and ushered in the Reconstruction period of American history. While it is generally conceded that “[t]he Confederate generals surrendered honorably... the spirit of the South was hardly defeated. Slavery was gone, but the idea of states’ rights and autonomy survived.”⁶⁶ The indomitable spirit of the Confederacy was apparent immediately following its surrender to Union forces. In 1865, pending re-admission to the Union, every southern state passed a series of “Black Codes” that purported to reduce freed slaves to second class citizenship and give whites “some of the control of blacks they had during slavery.”⁶⁷ Such thinly-veiled attempts at reintroducing slavery through the juridical back door were met with swift action after the 1866 federal election yielded a Congress devoted to the agenda of “Radical Reconstruction.”

Under the doctrine of Radical Reconstruction, the federal government sought to ensure the adherence of recalcitrant southern authorities to the letter and spirit of the Reconstruction

Amendments, which formally abolished slavery and extended voting and other civil rights to black freedmen. In order to ensure compliance, Congress passed the Reconstruction Acts of 1867, placing the South under federal military control.⁶⁸ It was under the authority of this martial law that freed slaves were registered to vote. The ensuing elections saw a handful of blacks elected to Congress, as well as sizeable black constituencies (and in some cases, majorities) elected to state public office.⁶⁹

As one can imagine, the federal laws passed immediately after the Civil War

“had effected a complete revolution in [American] constitutional jurisprudence by transferring from the states to the United States [responsibility over] all the fundamental rights of citizens – their life, their liberty, and their property.”⁷⁰ Such a massive change from the antebellum power dynamic in the South was met with considerable opposition by the recently deposed southern white establishment, who resented this complete rewriting of the “racial contract” upon which America had been founded.⁷¹ Such resentment was exacerbated by the perceived “fervor with which Reconstruction Republicans set about the legislative remodeling” through legislative instruments “drawn in sweeping language appropriate to the federal government’s new-found sense of power.”⁷²

THE NEW DEPARTURE: THE TROJAN HORSE OF RACE RELATIONS IN AMERICA

The short-term effectiveness of Radical Reconstruction in ensuring the right to vote and civil rights for blacks was a humiliating blow to the supremacy of the white southern establishment after the Civil War. Having recently faced military defeat through both the loss of the Civil War and the failure to resist the presence of federal troops during Radical Reconstruction, any hope for resurrecting a semblance of antebellum domi-

value of criminal power against potential insurrection, “many executions were ‘intensified’ through extreme methods such as burning at the stake, dismemberment, dissection, and public display of bodies after death;”⁵¹ barbarous tactics that were usually, if not always, reserved for blacks.⁵² In fact, offences by slaves against their masters for crimes of “petit treason”⁵³ were often brutally punished in a manner quite similar to those convicted of treason against the state.

The disparity in the application of capital punishment between the northern and southern regions of America continued to widen in the decades leading up to the Civil War. Early movements in the 18th century to abolish or restrict the death penalty⁵⁴ “were mostly concentrated in northern states,”⁵⁵ and formed part of a broader movement toward the “rejection of other social institutions such as slavery.”⁵⁶ This trend continued well into the Nineteenth century, when “[l]aws in northern states were ‘all in the direction of abolition’ from the 1820s through the 1850s.”⁵⁷ At the same time, the abolitionist cause was much more attenuated in the South. “This owed itself partly to the institution of slavery, which was firmly in place in the South until after the Civil War.”⁵⁸ Even where modest abolitionist trends were observed in the South, the death penalty retained a distinctly racial flavor. “No southern states abolished capital punishment completely, but every southern state did eliminate it for some crimes committed by whites.”⁵⁹ Moreover, “in southern states, capital punishment was still used for crimes related to spreading discontent among free black people, insubordination among slaves, and even attempted rape by a black person against a white person.”⁶⁰

The disparity between northern and southern states is also visible in the differing pace at which executions ceased to be conducted as public spectacles.

Whereas “from 1830 to 1860, every Northern state... moved its public hangings indoors” in response to a concern that public executions fostered “occasions for rioting, revelry and ribaldry,”⁶¹ the abolition of public executions took much longer in the South, with the last public execution occurring in 1936 in Kentucky.⁶² Because public executions were believed to engender licentiousness, “[p]erceptions of unruly crowds meant public executions were no longer perceived as legitimate exercises of state power nor mechanisms to deliver a message of lawful retribution.”⁶³ This posed a much greater problem for southern authorities, who relied more heavily on public executions to serve as a manifestation of force and pedagogy of power in order to secure their inequitable social hierarchies.⁶⁴ Thus, it would be more difficult for southern authorities to accept that public executions had a futile (or worse, a detrimental) effect on public order, since the public execution was so integral to the state’s “display of the majestic, awesome power of sovereignty.”⁶⁵

By the 1860s, it was apparent that the abyss between northern and southern states on the issue of slavery had become so entrenched that a war was inevitable. The ultimate “victory” of Union forces on the battlefield, however, would prove to be a Pyrrhic victory in the struggle for equality.

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nation required the adoption of a radical new strategy against an overbearing, even suffocating, federal presence. This article suggests that, at this point in American history, southern jurists adopted a strategy of apparent acceptance of the Reconstruction agenda that actually allowed many badges of slavery to persist in relatively undiluted form.

Southern authorities appear to have modeled their approach to restoring the antebellum status quo on a Roman precedent. In the *Aeneid*, famed Roman poet Virgil recounts the legendary story of how Rome was founded. One episode from this epic has since gained almost universal recognition in Western society: the “Trojan Horse” used by the Greeks during their long siege upon the city of Troy. The Greek army, whose “strength [was] broken in warfare” after many years of futile hostilities,⁷³ offered the colossal wooden horse as a gift. The Trojans accepted the horse as a token of peace and surrender, and brought it within their city’s walls.⁷⁴ Later that night, as the Trojans slept, the horse “opened wide” and “emitted men,”⁷⁵ who stole into the darkened city, “[l]et in their fellow soldiers at the gate, [a]nd joined their combat companies as planned.”⁷⁶ This parable is instructive in understanding how the southern authorities regained the upper hand in the ongoing war for political supremacy in the postbellum South.

As the Greeks realized in the *Aeneid*, the Southern establishment understood that they did not have sufficient military prowess to achieve their objectives through all-out war. Thus, a new, less belligerent approach was needed to continue the struggle for “states’ rights.” This strategy was first employed by a faction of southern Democrats known as “Redeemers,” whose primary political objective was the return of political sovereignty to the southern states through cooperation with and concession to the federal government and the North.⁷⁷ The Redeemers gradually gained control of the party agenda through the implementation of a “New Departure” tactic, whereby the emphasis of political dialogue was shifted away from suffrage and civil rights to economic and other less controversial matters. The movement became so successful that within four years, all Democrats and most northern Republicans agreed that Confederate nationalism and slavery were dead and further federal military interference was unnecessary.⁷⁸ By 1870, the Democratic–Conservative leadership across the South decided it had to end its opposition to Reconstruction as well as to black suffrage in order to survive and move on to new issues.⁷⁹

Like the Trojans, whose readiness to accept the Horse was likely prompted by a desire to end a seemingly endless war with little prospect of victory in sight, the willingness of southern Democrats to suddenly surrender on such a major bone of political contention was welcomed by a beleaguered Republican party yearning to turn the page on this chapter of American political history.⁸⁰ The South’s willingness to accept the new constitutional reality convinced the Republicans to adopt a let-alone policy toward the South.⁸¹ The goal of the New Departure was ultimately achieved in the Compromise of 1877, whereby The South agreed to accept the hotly-disputed victory of Republican presidential candidate Rutherford Hayes in the election one year earlier, if he agreed to withdraw the last of the federal troops from their states.⁸² At that point, all sides agreed that Reconstruction was finished.⁸³

Hobbes wrote, “war consists not in battle only, or the act of fighting; but in a tract of time, wherein the will to contend by battle is sufficiently known.”⁸⁴ With those words in mind we understand how, in the course of Reconstruction, a hotly contested Civil War morphed into a cold war fought along political and juridical fronts. With the perfection of the New Departure in 1877, it became clear that the courts were the new battlefield.⁸⁵ Future grievances between the North and the South would be governed by the rule of law and the requirements of due process. What remained to be seen was the extent to which the Supreme Court and Congress would go to eliminate the social implications of slavery and racial discrimination.⁸⁶ As African-Americans would soon learn, neither would go very far.

The Supreme Court set the tone when it released a series of decisions that gradually overturned much of the Reconstruction civil rights legislation. Beginning with the *Civil Rights Cases*⁸⁷ of 1883, it held that the Fourteenth Amendment only gave Congress the power to outlaw public, not private, discrimination.⁸⁸ The Court reinforced this ruling with *Plessy v. Ferguson*⁸⁹ in 1896, announcing that state-mandated segregation was legal as long as the law provided for “separate but equal” facilities. As a result, “[t]he strict limitation of the postbellum amendments to state action expresse[d] the view called ‘states’ rights’ – the very position that the South fought for in the Civil War, which had ostensibly been repudiated not only by the war but also by the Thirteenth, Fourteenth, and Fifteenth Amendments, as well as the civil rights acts of 1866 and of 1875.”⁹⁰

This laissez-faire line of Supreme Court jurisprudence permitted state courts to follow suit. They enforced a wide range of postwar “Jim Crow Laws” that transformed the South into a virtual apartheid state, where African-Americans became second-class citizens continuing to bear many badges of the slavery from which they had supposedly been emancipated. While varying widely in their disregard of the Reconstruction Amendments,⁹¹ what these laws had in common was “[t]hrough these means, the neutrality of the liberal state was formally upheld, as demanded by the social contract, without in any significant way challenging the racial polity.”⁹² Indeed, so striking was the ability of southern authorities to retain the essence of slavery through their juridical institutions, that “[i]f you look at the subsequent history of the United States, there is some truth in the paradoxical statement that the Confederacy was born when Lee handed Grant his sword.”⁹³

III. CAPITAL PUNISHMENT’S ROLE IN EXTENDING THE BADGES OF SLAVERY

LYNCHING AS A CONTINUATION OF WHITE DOMINION

The central premise for the Compromise of 1877 was the understanding that Southern lawmakers would formally adhere to the aims of Reconstruction. Thus, the art of the New Departure and its Jim Crow Laws was in how they spawned an entire movement allowing sovereignty over the South to be wrested from the federal government and returned to local white hands without appearing to violate the postbellum Constitution. Once this repatriation of sovereign control was complete, the subjugation of blacks resumed with zeal and was hindered only by a need to outwardly conform to due

process. One stark example of this phenomenon was the proliferation of lynching that occurred at the hands of local mobs. While it is generally conceded that the practice of lynching far predates the Civil War,⁹⁴ it has also been observed that prior to that conflict “only rarely were the punishments imposed under what had come to be known as ‘Lynch’s Law’ specifically capital,”⁹⁵ and it was only after Reconstruction that “the term ‘lynching’ c[a]me to acquire its contemporary connotations... the targeting of African-Americans, and, more specifically, African-American men, chiefly in the South, and the absence of the due process of law.”⁹⁶

That the widespread lynching of blacks began its ascent following the New Departure is no coincidence. Rather, this trend served as a useful “means of reaffirming an endangered form of white... identity... [and] a lethal means of regenerating the racial contract once the racial polity could no longer be secured through the institution of chattel slavery.”⁹⁷ “Lynchings were characterized by their celebratory and public nature, their brutal method of killing, their disregard for any semblance of due process for the accused, and an absence of punishment for the killers.”⁹⁸ By restoring the antebellum dichotomy between racial classes⁹⁹ and affirming life-or-death sovereignty of white males over blacks, “lynching provided a *de facto* extralegal restoration of the antebellum Black Codes.”¹⁰⁰

In order for the application of lynch law to survive the scrutiny of the Supreme Court, it was imperative that lynching cloak itself in the Court’s language condoning “private” discrimination. Southern law enforcement claimed that the state did not perpetuate the violence. This fiction was enough to shield lynching from the scrutiny of the federal courts, since they had no jurisdiction to intervene on the mere grounds that state police and prosecutors were failing to solve crimes. For these reasons, “conventional definitions of lynching [typically] ...draw a sharp line of demarcation between violence inflicted in

the name of the law and that which stands outside or in violation of the law.”¹⁰¹

Nonetheless, a brief peek under the hood of this ruse reveals the reality of state participation in these supposedly “private” acts. “[A]s the very phrase ‘lynch law’ implies... the mutually exclusive opposition between the legal and the illegal fails to appreciate how unstable and often irrelevant was the liberal formulation of the distinction between the official and unofficial, public and private, in the conduct of lynching.”¹⁰² The complicity of southern public officials in lynchings was entrenched by the refusal of southern senators in the

United States Congress to endorse an anti-lynching bill that would allow federal law enforcement officials to investigate and prosecute lynchings when local authorities failed to intervene.¹⁰³ Although no less than seven presidents had requested such a law from Congress, and the House of Representatives had passed an anti-lynching bill four times, “the Senate’s powerful southern senators used the filibuster to ensure that the bill never got a vote.”¹⁰⁴ Once again, we see the *modus operandi* of the New Departure at work; southern lawmakers could invoke the democratic principle of legislative due process to perpetuate a racist legacy passed down from the antebellum era.

Recent scholarship has challenged the conventional depiction of lynch law:

[M]any lynchings should be classified not as irrational deeds perpetrated by mobs of private persons, acting without legal authority but, rather, as ritualized enactments that drew their authority from the unwritten racial contract of the white community and that patterned their proceedings, to a greater or lesser extent, on the very judicial procedures they are characteristically said to flout.¹⁰⁵

This argument maintains that the public spectacle lynchings of African-Americans by whites in the post-Reconstruction era “should be located not in the domain of the illegal or the extralegal but, rather, near the heart of a more comprehensive structure of racial control, one that vested informal police powers in members of the white race and that encouraged vigilantism as a necessary complement to its weak agencies of formally authorized political discipline.”¹⁰⁶

THE DEATH PENALTY AS A “LEGAL LYNCHING”

While it is true that no region in America has displayed a historical monopoly over capital punishment, it is also true that “[d]eath penalty practice in America is highly regionalized.”¹⁰⁷ The plain fact of the matter is that “[m]ost modern executions occur in the South,”¹⁰⁸ where “the death penalty is as firmly entrenched as grits for breakfast.”¹⁰⁹ This pronounced regional disparity means that it is impossible to speak of an American

pattern or single national profile regarding capital punishment.¹¹⁰

This regionalization shares a close historical affinity with the institution of slavery, and its disproportionate application against blacks in the modern era is a vestige of the dominion historically enjoyed by the white elite establishment over blacks.

A historical examination of capital punishment in America reveals its provocative correlation with lynching.¹¹¹ The incidence of racially-motivated lynchings, which rose to prominence after

Reconstruction, declined steadily from a peak in the 1890s and disappeared (or at least went into hiding)¹¹² by the 1940s-1950s.¹¹³ Despite this apparent success at eradicating racial violence, however, a judicial analogue had been created in its place. “With these ‘legal lynchings,’ whites deferred to the courts but remained ready to return to mob justice if the results were not favorable to them.”¹¹⁴ In this way, institutionalized racial violence against African-Americans was able to persist to a great degree.¹¹⁵ For example, over half (54%) of citizens executed between 1930 and 1967 were African-American,¹¹⁶ despite never comprising more than 11% of the American population during that time,¹¹⁷ and three out of five executions during that

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time took place in the southern states,¹¹⁸ where 90% of those executed for rape, 100% of those executed for burglary, and 83% executed for armed robbery, were black.¹¹⁹ Throughout that period, blacks never consisted of more than 25% of the population of the South.¹²⁰

This statistical trend is faithful to the Redeemers' strategy of weaving antebellum attitudes into the fabric of democratic institutions. Because legislatures and courts were enacting and applying facially neutral laws, the law provided a gloss of "stability and regularity"¹²¹ that was absent in the context of mob lynchings. The genius of these legal lynchings was in how they co-opted the Constitution itself -specifically, the division of powers doctrine, as the pursuit of criminal prosecutions has historically been understood as a matter of local concern- to shelter a racist institution.¹²² Under the pretense of due process,¹²³ a legal apparatus was created that would "use force against its citizens without itself appearing like a criminal."¹²⁴ Much like the Greeks who attacked the city of Troy under cover of nightfall, these complicit agents worked "in a state of relative invisibility,"¹²⁵ fostered by an "epistemology of ignorance"¹²⁶ that deflected accusations of bias by pointing an exculpatory finger toward the incontrovertibly race-neutral language of the black-letter law.¹²⁷ As an end result, "[m]ore graphic forms of racial violence, such as spectacle lynching, became less imperative once white dominance was assured by less transparent but more calculable means,"¹²⁸ and with the passage of time the Confederacy's most enduring weapon in perpetuating the subordination of blacks as "subpersons"¹²⁹ has proven not to be the musket or the noose, but the gavel.¹³⁰

The ability of the state to impose the death penalty completes this paradigm. "Along with the right to make war, the death penalty is the ultimate measure of sovereignty and the ultimate test of political power."¹³¹ Thus, "[w]ith the end of slavery... [t]he belief that capital punishment was necessary to

restrain a primitive black population became an article of faith among white southerners lasting well into the twentieth century."¹³² Because the death penalty treats "members of the human race as nonhumans, as objects to be toyed with and discarded,"¹³³ it is the ultimate manifestation of the ability of the state "to do anything it pleases with life,"¹³⁴ a direct Hobbesian descendant "of the personal power of kings."¹³⁵

CONCLUSION

The purpose of this analysis is not to illustrate that the American system of capital punishment system is tainted by race. Rather, by tracing the link between the current practice of capital punishment and the classical doctrine of dominion, it attempts to expose how the imposition of state-sanctioned death in contemporary America is marred by the indelible stain of slavery. Having been stealthily carried into modern jurisprudence via the Trojan Horse of the New Departure, the Hobbesian paradigm of a master wielding life-or-death dominion over his chattel remains a live concept in the American criminal justice system today, particularly in the South. Through its racially selective administration, the modern application of the death penalty represents one of the most enduring fronts in the struggle for legal equality, a vestige of a Civil War that purportedly ended nearly a century and a half ago.

ENDNOTES

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YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 3 (3d ed. 2001) (noting, in popular language "references are frequently made to 'war against the traffic in narcotic drugs,' 'class war' or 'war of nerves'").

² See MATTHEW B. ROBINSON, DEATH NATION: THE EXPERTS EXPLAIN AMERICAN CAPITAL PUNISHMENT 109-15, 178-83 (Pearson Education Inc. 2008) (conducting a survey of 96 death penalty experts, of whom 84% agreed that the death penalty is "plagued by a racial bias" of some kind, and 80% of whom agreed that capital punishment was "plagued by a social class bias" of some kind); Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, in FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 221-28 (Charles J. Ogletree, Jr. & Austin Sarat eds., New York Univ. Press 2006) (providing an overview of how racism lingers in the contemporary criminal justice system); CHARLES J. OGLETREE, *Making Race Matter in Death Matters*, in FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 61 (Charles J. Ogletree, Jr. & Austin Sarat eds., New York Univ. Press 2006) ("The application of death as a punishment for black Americans in unique and cruel forms throughout American history is undeniable. The underlying currents involved in this sordid history - fear, white supremacy, devaluation of black life, hatred, and a desire to control - may not be exact reasons for the suspicious disparities in capital punishment today, but one cannot help but wonder whether some of the same impulses are at work.").

³ OGLETREE, *supra* note 2, at 56.

⁴ Anne Norton, *After the Terror: Mortality, Equality, Fraternity*, in THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE 27 (Austin Sarat, ed., Oxford Univ. Press 1999).

⁵ ANDREW BORKOWSKI, TEXTBOOK ON ROMAN LAW 146 (Blackstone Press Limited 1994).

⁶ *Id.*

⁷ See *id.* at 78 ("There were three constituent elements of status in Roman law - *libertas*, *civitas* and *familia*. The person of full status was the one who possessed all three elements: he had *libertas* (freedom) in that he was not a slave; he had *civitas* (citizenship) in that he was a citizen of Rome, not a foreigner; and he had *familia* ('family') in that he belonged to a Roman household. Loss of any or all of these elements resulted in *capitis deminutio* ('a loss of status'), the gravity of which depended on the circumstances").

⁸ *Id.* at 79.

⁹ *Id.* at 80.

¹⁰ *Id.* at 79.

¹¹ BORKOWSKI, *supra* note 5, at 79 ("[T]heir human personality was recognized to some extent in law, however tenaciously Romans might have tried to adhere at times to the notion that a slave was simply a 'thing'").

¹² See *id.* at 80 (stating that the emergence of the institution of *dominium*, which vested a heightened concentration of prerogatives over all property in the hands of the owner, closely coincided with the rise of slavery as a social institution in the Roman Republic because "[t]he overall treatment of slaves varied from period to period. In early Rome it seems that slaves were generally treated well, possibly because they were relatively few in number. Their treatment deteriorated when Rome's overseas expansion began in the third century BC. Wars of conquest fought abroad resulted in the enslavement of large numbers of foreigners.").

¹³ *Id.*

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¹⁴ *Id.* at 84.

¹⁵ *See id.* at 87 (referencing the Digest, a comprehensive and massively influential compilation of jurisprudence that was issued by the Roman Emperor Justinian between 529 to 534 AD, and would later serve as the bedrock juridical authority for all civil law justice systems, comprising continental Europe as well as numerous overseas jurisdictions).

¹⁶ THOMAS HOBBES, *LEVIATHAN: REVISED STUDENT EDITION* ix (Richard Tuck ed., Cambridge Univ. Press 1996).

¹⁷ *See id.* at 89.

¹⁸ *Id.*

¹⁹ *Id.* at 120.

²⁰ *Id.*

²¹ *Id.* at 121.

²² HOBBES, *supra* note 16, at 121.

²³ *Id.*

²⁴ *See id.* (stating that humans gain such power because the helpless infant implicitly relinquishes its natural right to self-dominion in exchange for paternal protection).

²⁵ *See id.*

²⁶ *See id.* (suggesting that only free men had the power to delegate their personal sovereignty, since slaves, wives, and children were under the sovereignty of the male head of the household).

²⁷ GRAHAM PARKER, *AN INTRODUCTION TO CRIMINAL LAW* 51 (Methuen Publications 1977) (noting on the emergence of criminal law as a social control mechanism, “[t]he criminal law became a distinct legal entity – with its own special rules and procedures – when society wanted protection from antisocial acts that threatened internal security but could not be resolved by money payments or the chaotic private ‘justice’ of the feud. A central authority... assumed the role of protector of the people and guardian of the *status quo*”).

²⁸ HOBBES, *supra* note 16, at 121.

²⁹ *Id.* at 142.

³⁰ *Id.*

³¹ JOSEPH A. MELUSKY & KEITH A. PESTO, *CRUEL AND UNUSUAL PUNISHMENT: RIGHTS AND LIBERTIES UNDER THE LAW* 35 (ABC-CLIO 2003).

³² Hobbes, *supra* note 16, at 140.

³³ *Id.* at 139.

³⁴ *See* GEORGE P. FLETCHER, *THE GRAMMAR OF CRIMINAL LAW: VOLUME ONE: FOUNDATIONS* 26 (Oxford Univ. Press 2007) (“formal, public punishment grows out of the practice of self-defense by private individuals”).

³⁵ AUSTIN SARAT & THOMAS R. KEARNS, *INTRODUCTION TO LAW’S VIOLENCE* 1, 3, 7 (1992).

³⁶ PETER FITZPATRICK, “Always More to Do”: *Capital Punishment and the (De) Composition of Law*, in *THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE* 128-29 (Austin Sarat, ed., Oxford Univ. Press 1999).

³⁷ WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (Banks & Brothers, Law 1892) (showing how the homogenization of early post-colonial legal attitudes was greatly facilitated by the singular reliance of nascent American lawmakers on this text, and in this, we see deep Hobbesian undertones as well as an explicit preservation, in pristine form, of the classical Roman concept of *dominium*).

³⁸ J.W. Harris, *Property and Justice* 29, 30 (1996).

³⁹ James Madison, *Parties*, *THE NATIONAL GAZETTE*, Jan. 23, 1792, *reprinted in IDEAS OF THE FIRST AMENDMENT* at 234 (Vincent Blasi ed., 2006).

⁴⁰ *See* RICHARD WILLIAM FOGEL & STANLEY L. ENGERMAN, *TIME ON A CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* 33-34 (Univ. Press of America 1984) (stating that slavery was abolished in England in 1772).

⁴¹ *See* OGLETREE, *supra* note 2, at 57 (describing how the harsh “Slave Codes” that prevailed prior to the Civil War revealed a “penchant for valuing white life over black life” indicating that blacks had few rights, formal or informal, during the “peculiar institution” of chattel slavery).

⁴² *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857).

⁴³ OGLETREE, *supra* note 2, at 57.

⁴⁴ *See* Fogel, *supra* note 40.

⁴⁵ *Id.*

⁴⁶ ROBINSON, *supra* note 2, at 15.

⁴⁷ NINA RIVKIND AND STEVEN F. SHATZ, *CASES AND MATERIALS ON THE DEATH PENALTY* 23 (2d ed. 2005).

⁴⁸ *Id.* at 23-24 (“[i]n addition to punishing slave crimes with death, the Black Codes of many southern states differentiated between capital crimes for black slaves and white people. In the 1830’s, Virginia had five capital crimes for whites, but an estimated seventy capital crimes for black slaves. In 1848, the Virginia Assembly passed a law requiring the death penalty for black slaves for any offense punishable by three or more years imprisonment for whites. Racial

discrimination was also codified in Georgia’s rape statutes. In 1816, the death penalty was required for a slave or ‘freeman of colour’ who raped or attempted to rape a white female, and, at the same time, the state reduced the minimum sentence from seven to two years and removed the hard labor requirement for a white man convicted of rape. A white man convicted of raping a slave woman or a free woman of color was punished by a fine and/or imprisonment at the court’s discretion”).

⁴⁹ ROBINSON, *supra* note 2, at 15.

⁵⁰ *See* ROBINSON, *supra* note 2, at 15 (stating that in order to reinforce this message of awesome power, executions “had to be carried out in public, in a large space so that many people could witness it, and during the day”).

⁵¹ *Id.* at 16.

⁵² *See id.* (“burning was reserved only for slaves who committed crimes against their masters or plotted revolts, and women who murdered their husbands. Such offenses were considered disruptive to the social order, meaning burning was a method aimed at maintaining oppressive institutions such as slavery and even marriage”).

⁵³ Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, in *From Lynch Mobs to the Killing State: Race and the Death Penalty in America* 96, 104 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006) (explaining that the Hobbesian pedigree for this similarity is evident when one considers that what these cases have in common is the reversal of the traditional hierarchy of the household. The legal name for such crimes, petit treason, suggests the strength of the analogy contemporaries drew between the household and state. Treason denoted ‘not only offences against the king and government, but also crimes ‘proceeding from the same principle of treachery in private life’. If treason, the subversion of the authority of the state, was the gravest of crimes, then petit treason, the subversion of the authority of the family, had to be punished especially harshly).

⁵⁴ ROBINSON, *supra* note 2, at 17.

⁵⁵ *Id.*

⁵⁶ *See* RIVKIND, *supra* note 47, at 24 (“This first wave of abolitionist activity occurred in the context of the reform movements for temperance, women’s rights, the abolitions of slavery, and better treatment of poor, imprisoned, and mentally ill people.” However, “The campaign against capital punishment lost momentum as slavery grew to dominate the reform agenda, and the anti-gallows movement was halted by the Civil War”).

⁵⁷ *See* ROBINSON, *supra* note 2, at 19 (“In 1837 Maine required a 1-year waiting period between death sentence and execution; after this time, the governor still had to sign a death warrant. The state executed no one between 1837 and 1863. Such laws were also passed in Vermont, New Hampshire, Massachusetts, and New York”).

⁵⁸ *Id.* at 20.

⁵⁹ *Id.*

⁶⁰ *Id.* at 19-20.

⁶¹ *Id.* at 20.

⁶² *Id.* at 22-23 (nothing that this move toward private execution foreshadowed the eventual practice of conducting executions in the middle of the night, either statutorily or by warden’s discretion, and that private executions were also partly necessitated by new inventions such as electrocution and the gas chamber).

⁶³ ROBINSON, *supra* note 2, at 21.

⁶⁴ *See id.* at 19 (“Public executions in early America were meant to amplify fear, reinforce order, and separate illegitimate, unacceptable violence by individuals from legitimate, acceptable violence committed by the state”).

⁶⁵ *Id.* (displaying how the public execution has “a juridico-political function. It is a ceremonial by which a momentarily injured sovereignty is reconstituted. It restores sovereignty by manifesting it at its most spectacular... There must be an emphatic affirmation of power and its intrinsic superiority. And this superiority is not simply that of right, but that of the physical strength of the sovereign beating down upon the body of his adversary and mastering it”).

⁶⁶ GEORGE P. FLETCHER & STEVE SHEPPARD, *AMERICAN LAW IN A GLOBAL CONTEXT: THE BASICS* 182 (Oxford Univ. Press 2005).

⁶⁷ OGLETREE, *supra* note 2, at 57-58.

⁶⁸ ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863-77 at 276-77* (HarperCollins 1988).

⁶⁹ OGLETREE, *supra* note 2, at 57; Foner, *supra* note 68, at 354-55.

⁷⁰ WILLIAM ARCHIBALD DUNNING, *RECONSTRUCTION, POLITICAL AND ECONOMIC: 1865-1867 at 260* (Harper & Row 1962).

⁷¹ Timothy V. Kaufman-Osborn, *Capital Punishment as Legal Lynching? in FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA* 23-24 (Charles J. Ogletree, Jr. & Austin Sarat eds., New York Univ. Press 2006) (“the liberal social contract of the United States has always been underwritten by... ‘the racial contract’, and hence racist practices... are not aber-

rations from this nation's true principles but, rather, manifestations of its abiding commitment to sustain the conditions of racial exploitation... The central purpose of the racial contract is to secure and ratify limitations on the freedoms, rights, and privileges of those whose exploitation is a condition of the freedoms, rights and privileges of the superordinate group. Racial domination, on this account, cannot be understood as an unfortunate departure from a norm of universal equalitarianism, for, from its very inception, the United States has been 'a system for which racially determined structural advantage and handicap are foundational'").

⁷² Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 780 (1980).

⁷³ VIRGIL, THE AENEID 33-34 (Robert Fitzgerald, trans., 1983) (cir. 19 BC).

⁷⁴ *Id.* at 42.

⁷⁵ *Id.*

⁷⁶ *Id.* at 43.

⁷⁷ See generally, MICHAEL PERMAN, THE ROAD TO REDEMPTION: SOUTHERN POLITICS (Univ. of North Carolina Press 1989).

⁷⁸ See generally, FONER, *supra* note 68.

⁷⁹ PERMAN, *supra* note 77.

⁸⁰ *Id.*

⁸¹ See FONER, *supra* note 68, at 577 ("The persistent idea of a vast reservoir of Southern Whigs eager to join the Republican party contained more than a little wishful thinking. But with Reconstruction having demonstrably failed to produce a Republican South, few Northerners could envision an alternative").

⁸² FONER, *supra* note 68, at 578-80.

⁸³ *Id.* at 604.

⁸⁴ HOBBS, *supra* note 16, at 88. The above quotation is a modernized version of the original passage, "Warre, consisteth not in Battell onely, or the act of fighting; but in a tract of time, wherein the Will to contend by Battell is sufficiently known."

⁸⁵ See FONER, *supra* note 68, at 586 ("The federal courts, for example, retained the greatly expanded jurisdiction born of Reconstruction).

⁸⁶ See generally, *id.* at 587-601.

⁸⁷ Plessy v. Ferguson, 163 U.S. 537, 546 (1896) (discussing how the case held that an act of Congress giving all persons within the US have "full and equal enjoyment" of public facilities was unconstitutional because the Fourteenth Amendment did not apply to states).

⁸⁸ See *id.* at 546-47 (explaining that according to the Civil Rights Cases, the states have the exclusive right and the power to regulate the social relations between the races. The federal government may intervene only if the state abuses its authority by entrenching upon principles of due process or violating equal protection of the laws).

⁸⁹ *Id.* at 552.

⁹⁰ FLETCHER, *supra* note 34 at 197.

⁹¹ See Kaufman-Osborn, *supra* note 71, at 26 (describing how some of these laws were more brazen in their contempt for the constitution than others, stating that "[b]arely less transparent than slavery, for example, were those post-Reconstruction laws, which, dispensing with any façade of statutory neutrality, expressly excluded blacks from participation in certain practices definitive of citizenship (e.g., jury duty)." In other contexts, "[s]omewhat less transparent were the various mechanisms devised in the post-Reconstruction South to disenfranchise blacks without technically violating the Fourteenth and Fifteenth Amendments, including poll taxes, grandfather clauses, and literacy tests").

⁹² *Id.*

⁹³ GEORGE P. FLETCHER & STEVE SHEPPARD, AMERICAN LAW IN A GLOBAL CONTEXT: THE BASICS 182 (Oxford Univ. Press 2005).

⁹⁴ See ENCYCLOPEDIA ENCARTA (2008), www.encyclopedia-msn.com (noting that lynching, as a form of punishment for presumed criminal offenses, performed by self-appointed commissions, mobs, or vigilantes without due process of law took place in the United States even before the American Civil War and after all over the nation from southern states to western frontier settlements. The term "lynching" is believed to have originated during the American Revolution when Charles Lynch, a Virginia justice of the peace, ordered extralegal punishment for Tory acts).

⁹⁵ See Kaufman-Osborn, *supra* note 71, at 27.

⁹⁶ *Id.* at 27; See also OGLETREE, *supra* note 2, at 58 ("The treatment of African-Americans became more vicious as the twentieth century dawned," with lynchings taking on a "distinctively black/white racial character").

⁹⁷ Kaufman-Osborn, *supra* note 71, at 28.

⁹⁸ OGLETREE, *supra* note 2, at 58.

⁹⁹ See Kaufman-Osborn, *supra* note 71, at 28 ("By effectively equating the meaning of blackness with the predatory, the savage, the animalistic, the hypersexualized, lynchings demonstrated the patent ineligibility of those so marked to

inhabit the category of citizen, while it simultaneously recertified the identity of those defined not by their degraded corporeality but by their white personhood and so their exclusive occupation of that same category").

¹⁰⁰ See RIVKIND, *supra* note 47, at 25.

¹⁰¹ *Id.* at 31.

¹⁰² See *id.* at 32 ("it was not uncommon for lynching parties to mimic certain of the formal procedures that... are said to distinguish lawful trials from extralegal lynchings." In fact, "a very large number of spectacle lynchings were conducted either with the active participation of police officers (along with other community elites), or with their obvious connivance". These observations underscored "the permeability of the boundary between, on the one hand, the bands of white citizens who typically instigated such lynchings and duly authorized agents of law enforcement, on the other").

¹⁰³ OGLETREE, *supra* note 2, at 60-61.

¹⁰⁴ *Id.*

¹⁰⁵ Kaufman-Osborn, *supra* note 71, at 35.

¹⁰⁶ *Id.* at 33.

¹⁰⁷ ROBINSON, *supra* note 2, at 5.

¹⁰⁸ *Id.*

¹⁰⁹ See *id.* at 5-6 ("Between 1976 and 2005, there were 1,004 executions. Of these, 355 occurred in Texas (35%), 94 in Virginia (9%), 79 in Oklahoma (8%), 66 in Missouri (7%), and 60 in Florida (6%). No other state has executed 50 people since 1976. Of the states that have executed at least 20 people since 1976, all but 2 are in the South (North Carolina and Georgia with 39, South Carolina with 35, Alabama with 34, Louisiana with 27, Arkansas with 27, Arizona with 22, and Ohio with 20). Thus, since 1976, 82% of executions have occurred in the South, followed by 12% in the Midwest and 6% in the West. Only 4 executions have occurred in the Northeast since 1976" Moreover, "[i]n terms of execution rates per capita, the top 15 states most likely to carry out death sentences through the end of 2005 were Oklahoma, Delaware, Texas, Virginia, Missouri, Arkansas, South Carolina, Alabama, Louisiana, Nevada, Georgia, North Carolina, Arizona, Florida and Indiana. Again the South leads the way, as 11 of the top 15 states are in the South").

¹¹⁰ ROBINSON, *supra* note 2, at 5.

¹¹¹ See generally, Ruth E. Friedman, *Statistics and Death: The Conspicuous Role of Race Bias in the Administration of Death Penalty*, 11 LA RAZA L. J. 75 (1999) (analyzing the role of race in contributing in the racial disparity of capital punishment in the United States).

¹¹² See RIVKIND, *supra* note 47, at 25 (challenging the assertion the conventional assertion that the decline in lynching was a victory for law enforcement, instead asserting that the practice was merely driven underground, with public spectacle lynchings being replaced by covert murders).

¹¹³ Kaufman-Osborn, *supra* note 71, at 36-37; RIVKIND, *supra* note 47, at 25.

¹¹⁴ See OGLETREE, *supra* note 2, at 55, 60 ("In the modern era, many have characterized the use of capital punishment in America as 'legal lynching,' due to its historical inseparability from the issue of race").

¹¹⁵ RIVKIND, *supra* note 47, at 25 ("In the South, perfunctory trials often followed by hasty executions replaced lynching and institutionalized racial violence against African-Americans").

¹¹⁶ See MELUSKY, *supra* note 31, at 211.

¹¹⁷ TIME ALMANAC 2005, WITH INFORMATION PLEASE 377 (Borgna Brunner ed., Pearson Education, Inc. 2004).

¹¹⁸ Melusky, *supra* note 31, at 211.

¹¹⁹ FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 37 (Cambridge Univ. Press 1989).

¹²⁰ U.S. Census Bureau, <http://www.census.gov/population/www/documentation/twps0056/tab04.pdf> (last visited Nov. 4, 2008).

¹²¹ FITZPATRICK, *supra* note 36, at 121.

¹²² See Kaufman-Osborn, *supra* note 71, at 23 ("[C]apital punishment, as now conducted in the United States, occludes what lynching accomplished all too well. Whereas lynchings visibly marked the bodies of its victims as black and so reconsolidated the color line that was indispensable to the reproduction of racial subordination, key elements of the contemporary practice of capital punishment veil that line and so render its contribution to racial subordination more difficult to apprehend and so to contest").

¹²³ *Id.* at 48-49.

¹²⁴ FLETCHER, *supra* note 34, at 26.

¹²⁵ See Kaufman-Osborn, *supra* note 71, at 26 ("Today, re-creation of the racial contract in the United States requires ongoing negotiation of the tension between the social contract's formally color-blind principles and the color-coded practices, which, although necessary to white superordination, must now do their work in a state of relative (but not complete) invisibility").

¹²⁶ See *id.* ("the capacity of such invisibility to veil the workings of the racial

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contract is enhanced... by the 'epistemology of ignorance' that is often evinced by those who benefit from the racial contract but whose self-conception renders them unable to recognize, let alone to acknowledge, that they do so," quoting CHARLES MILLS, *BLACKNESS VISIBLE* (Ithaca: Cornell Univ. Press, 1998).

¹²⁷ See *id.* at 47 ("By eliminating the race-specific punishments that persisted in the South well after Reconstruction, the liberal state removes the dissonance generated by the persistence of such punishments, on the one hand, and the social contract's commitment to formal equality under law, on the other").

¹²⁸ *Id.* at 38.

¹²⁹ See *id.* at 24-25 ("Within a liberal political order formally committed to an ideal of equal citizenship, ratification of such subordination has been accomplished... through generation and ongoing activation of a distinction between 'persons' and 'subpersons'. In the United States, perhaps the most obdurate materialization of this distinction has been that between white and black, where racial identity is understood 'as a *politically constructed categorization*,' 'the marker of locations or privilege and disadvantage in a set of power relationships'").

¹³⁰ See Bright, *supra* note 2, at 219 ("Until recently, African-Americans facing the death penalty in Georgia usually appeared before a white judge sitting in front of the Confederate battle flag." The underlying bellicose message cannot

be overlooked, as "Georgia adopted its state flag in 1956 to symbolize its defiance of the Supreme Court's decision in *Brown v. Board of Education*. One federal district judge in Georgia observed that the predominant part of the 1956 flag is the Confederate battle flag, which is historically associated with the Ku Klux Klan").

¹³¹ Austin Sarat, *Capital Punishment as a Legal, Political, and Cultural Fact: An Introduction*, in *THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE* 4 (Austin Sarat, ed., Oxford Univ. Press 1999).

¹³² Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, in *FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA* 100-01 (Charles J. Ogletree, Jr. & Austin Sarat eds., New York Univ. Press 2006).

¹³³ *Gregg v. Georgia*, 428 U.S. 153, 230 (1976) (Brennan, J., dissenting).

¹³⁴ SARAT, *supra* note 35, at 4-5.

¹³⁵ See *id.* at 5 ("It may be that our attachment to state killing is paradoxically a result of our deep attachment to popular sovereignty. Where sovereignty is most fragile, as it always is where its locus is in "the People", dramatic symbols of its presence, like capital punishment, may be most important").



(from left to right) Tanisha James (past Editor-in-Chief for *The Modern American*), Lydia Edwards (past Editor-in-Chief for *The Modern American*), the Honorable Judge Joyce Hens Green (United States District Court for the District of Columbia), Lee Ann O'Neill (past Editor-in-Chief), Mara Giorgio (outgoing Editor-in-Chief for *The Modern American*).