Race on Death Row

Lynchings and Capital Punishment in the US;

a comparison

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Index

Introduction

The United States of America is one of the few countries in the world that still has the death penalty. Death sentences have been carried out in the United States ever since the first colonies started to settle even for crimes such as arson or theft.

White people were sentenced to death in smaller numbers than black people. White people were not treated the same way as slaves or free black people. The list of capital crimes was, especially in the South, longer for black people than it was for white people. This was a result of the idea that black people were inferior to white people, a belief that also supported slavery.

Over the years, the way in which defendants have been executed has changed. Authorities have stressed that executions have to be conducted in a manner that is as humane as possible, and this thinking has eventually led to the use of lethal injection as the most common way in which defendants are nowadays put to death. Also, the list of crimes for which criminals are put to death has shrunk drastically.

One thing that has remained over the past few hundred years, is that death sentences still appear to be carried out in a discriminatory manner. Black people have been sentenced to death for crimes that white people were only given prison sentences for. Black people outnumber white people on death row relative to their share in the population. As Helen Prejean argues in *The Death of Innocents*: "The legacy of slavery is evident not only in the imposition of a disproportionate number of death sentences on African Americans, but also in their mass incarceration in jails and prisons."[1] This has been a thoroughly discussed subject among scholars and it is also one of the main arguments against the death penalty. But even though numerous studies have shown that criminal justice operates within a discriminatory framework, it seems that no changes are made to prevent this from continuing. Even today, African-American criminals receive harsher punishments than white criminals, and a disproportionate number of them is sentenced to death by juries that, in

[1] Prejean, *The Death of Innocents,* 217.

most cases, consist of white people only.[2]

In this thesis I will argue that the way in which the American justice system has tried and executed its criminals between 1930 and 1990, is comparable to the lynchings of black people that took place in the nineteenth and the first two decades of the twentieth century.[3] Another way to formulate my thesis question is: Is capital punishment a form of legal lynching?

In order to answer this question, I will first have to provide a small historical framework. For the most part I will rely on *The Death Penalty* by Stuart Banner, who has done extensive research on the history of capital punishment in America. The first chapter will focus on the history of the death penalty in the United States, on what has changed ever since the people in the first American colonies started executing criminals. I will discuss why abolitionists started to believe that the death penalty should no longer be carried out and what arguments they presented to make their case stand. I will conclude the first chapter with some key statistical facts about the African-American representation on death row.

In the second chapter, I will discuss the lynchings that especially the South of the United States is known for. These gruesome events found their roots in this part of the countries' history of discrimination and the feeling of superiority that white society had. I will discuss the social construction thesis, one of the themes of the Critical Race Theory offered by Richard Delgado and Jean Stefancic. Delgado and Stefancic argue that society often categorizes people on the basis of physical traits and this leads to discrimination.[4] This idea is also supported by scholars like David Gillborn and George M. Fredrickson, who argue that the Critical Race Theory explains why white people feel superior towards black people, because black people are perceived as different. White people felt they needed to protect

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[2] In the sources used for this thesis, the spelling of the word African-American varied. Some sources spell: African American. Merriam-Webster's online dictionary states that the correct way to spell this is word is African-American, both as a noun and as an adjective. I have chosen to follow the spelling of Merriam-Webster. In some quotes the spelling will still be African American, since I have not changed the spelling of the author of the original text.

[3] This time frame was chosen because the capital cases discussed in Chapter 3 fall within this period.

[4] Delgado & Stefancic, *Critical Race Theory,* 3.

their society and they felt superior as a human race. This led to more severe punishments for people of a different race, more specifically, black people.

With the disappearance of public lynchings, the white community found another way to punish black criminals: The death penalty. With this method, they no longer let an angry mob of white people do the killing, but they resort to the legal way to handle this: the criminal justice system.

As will be explained in Chapter 2 and 3, scholars like Michael Melo, and Jesse Jackson, Jesse Jackson Jr. and Bruce Shapiro argue that black defendants often have limited resources, they have poor representation in court and they are often tried by all-white juries. This leads different scholars, among whom Benjamin Fleury-Steiner, to believe that capital punishment is a form of legal lynching.

To judge whether this comparison is justified I will examine three death penalty cases in Chapter 3. Scholars Dan Carter, James Acker and Randall Kennedy all argue that the case of the Scottsboro boys was an example of the American Justice system applied in a discriminatory manner. The same can be said about the Martinsville Seven. The black defendants in this case were guilty of rape and I will examine whether they received a fair trial. The final case which I will discuss received attention because the defendant, Warren McCleskey, proved that his death sentence was the result of racial discrimination. I will also discuss the Baldus Study, a study by David Baldus, that has proven that race plays a significant role in capital trials.

After examining these cases, I will provide an answer to the question: Is capital punishment a form of legal lynching?

1. Capital Punishment: The History and the Facts

Italy abolished the death penalty in 1944. West Germany did the same in 1949. Austria came in 1950 and was followed by Britain (1969), Portugal (1976), Spain (1978) and France (1981). The United States however, still practices capital punishment.

Shaun Gabiddon and Helen Green wonder in *Race and Crime* why America has not followed the lead of its allies. They state that "lynchings between 1889 and 1918 were predominantly carried out in the South (88%). When looking at the executions of the same time, the South predominated with 56% of executions. In a recent period 81% of the executions were in the South. The South has a 'culture of punishment."[5]

This chapter will examine the way in which capital punishment has been carried out in the last few centuries, why authorities felt that death sentences were necessary and what differences can be seen between the northern and southern states. For this chapter I have used *The Death Penalty: An American History* by legal historian Stuart Banner as a key reference. Banner graduated from Stanford Law School, practiced law in several legal firms he has taught a variety of different courses. He has also published various books on American legal history.[6] Many scholars that discuss capital punishment quote Banner's *The Death Penalty* and I have therefore used it as the main background for this chapter.

1.1 A History of Capital Punishment

In the twenty-first century, a death sentence can only be carried out when a murder is committed, but the list for capital crimes has not always been this short. The list of capital crimes in the seventeenth and eighteenth centuries was shockingly long compared to the contemporary one. In the American colonies, treason, murder, manslaughter, rape, robbery, burglary, arson, counterfeiting and theft were all capital crimes according to Banner. The number of capital offenses was greater in the South. Banner explains this as a result of the

[5] Gabiddon & Green, *Race and Crime*, 207-208.
[6] UCLA School of Law. Faculty: Stuart Banner, 2005, http://www.law.ucla.edu/home/index.asp?page=417

more violent English regions that the southerners came from. He also states that southern codes were harsher than codes in the north and that the race dependent capital crimes were created in the southern colonies. He gives a telling example of this: "Georgia accordingly made it a capital offense for slaves or free blacks to strike whites twice, or once if a bruise resulted."[7]

But why was capital punishment even deemed necessary? The main purpose of capital punishment, according to Banner, was prevention of crimes by inflicting fear on a society. By condemning people to death for crimes as innocent as stealing a watch from another person, Americans wanted to prevent potential criminals from committing such crimes.

To inflict this fear and to make sure the message got out to the public, executions were often held in open spaces and during the day, so that spectators could have a good view on what happened to the criminal. This way, the execution could be viewed by a large number of people. Because executions were not a common sight in eighteenth and nineteenth century, they attracted enormous crowds. Anyone who wished to attend was welcomed and often travel arrangements were made to make sure that people who did not live in the area could come and watch the hanging as well.[8]

When crowds were so gigantic, spectators in the back were hardly able to see, let alone hear what was happening on the gallows. This was not the case for people closer to the front; Banner argues that they had "a degree of contact with the condemned person that would be unimaginable today."[9] The people close to the front were even allowed to participate in the ceremony by asking questions to the criminal who already had the rope hanging around the neck. The condemned would sometimes answer the questions and would usually also have a speech prepared of his own. The minister who had to be present would also be addressing an execution sermon. He would often speak not only of the criminal, but he would take this opportunity to look after his own agenda and stress the importance of paying attention to ministers and reinforcing religious authority. Banner states

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7 Banner, *The Death Penalty*, 9.
8 The common way of executing a person was by hanging.
9 Banner, *The Death Penalty*, 26.

that the whole event was often staged in the near vicinity of the spot of where the actual crime had been committed. The purpose of this was to direct the terror of capital punishment to appropriate targets.

The person responsible for acting out the physical steps that would lead to the death of the prisoner was usually the local sheriff. But placing a rope around another person's neck, pulling the lever that releases a trap door and taking down a suffocated corpse were rather gruesome tasks. Some states or counties therefore resolved the problem of finding someone willing to do this by putting the task in the hands of other criminals who were sentenced to death in exchange for a reprieve. Banner gives an example of this: "Isaac Bradford, sentenced to death in Pennsylvania for robbery, was relieved of his own sentence in exchange for hanging two burglars."[10] In general, people approved of the death penalty as being a suitable form of punishment, but the actual steps that needed to be carried out in order to end the life of the criminal, was something that people were very reluctant about.

As mentioned before, until the end of the nineteenth century, hanging was by far the most common method of execution. One of the main advantages was that it required very little equipment. A rope and a steady structure were enough to do the job. Also, compared to burning or dismembering a person, hanging was relatively painless, provided that the hanging went 'well'. The prisoner would die almost instantly if the drop fractured the vertebrae.[11] However, some hangings went wrong and often the defendants died a slow and painful death. If the blood supply to the brains was cut off the prisoner would quickly lose consciousness. A lack of oxygen was worse because this meant that consciousness remained and this could result in horrific scenes of a gasping, bulging eyes, violent leg kicking and urination. In order to make executions less painful and horrific to watch, states later adopted different methods of execution which will be explained in paragraph 1.2.

Banner wonders why the death penalty was carried out in such a public way. He argues that the ceremony "provided a way to amplify the message of terror created by the

[10] Banner, *The Death Penalty*, 37.
[11] This would sever the spinal cord between the second and third vertebrae.

hanging and to broadcast that message to the public."[12] A second reason for this whole charade was to reinforce order, argues Banner.

Most of the prisoners were noted to be drenched with fear when it was time to go to the gallows. The fact that the ceremony in itself was extremely frightening to a condemned person becomes clear when one considers the fact that sometimes the ceremony itself was punishment enough for a criminal. There are records of hangings where the prisoners were only sentenced to standing on the gallows for a certain amount of time, while having the rope around their neck. After that they would be released. A reason could be that the community thought that a death sentence was too harsh a punishment for the crime committed.[13] Instead, the punishment would consist of a half an hour on the gallows, followed by a whipping for example. According to Banner newspaper articles regarding these ceremonies always listed the 'simulated hanging' first, which suggests that this was considered to be the harshest punishment of all. Another reason that the hanging was not carried out could be that the prisoner was given clemency, which sometimes happened at the very last minute. Not having the technological possibilities lawyers and courts have at the present day, it was not unusual that facts that proved the innocence of someone would turn up long after the trial had ended.

While some prisoners were given clemency, others were believed to have committed such a horrible crime, that 'mere' death was not punishment enough. The prisoner would get the death penalty, but would also be sentenced to a punishment even worse than death itself. Sometimes authorities would take on an alternative method to carry out the execution, for example by burning the victim alive. Needless to say this was a more painful death than hanging. Also, the body would be mutilated after burning which was seen as an extra punishment. The denial of being given a proper burial was also seen as an extra harsh punishment and one way to carry this out was to place the body in a public place, for example in a gibbet.[14] An even more horrible way to display a body was when the body was

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12 Banner, *The Death Penalty*, 51.

13 "In the seventeenth and eighteenth centuries the community was understood to play a proper role in deciding which condemned prisoners would die." (Banner, *The Death Penalty*, 62.)

14 An iron cage that was placed above the ground, with enough space between the bars so that the public had a

dismembered. Banner argues that "Maryland accordingly authorized its judges to sentence slaves in cases of murder or arson "to have the right Hand cut off, to be hang'd in the usual Manner, the Head severed from the Body, the Body divided into Four Quarters, and Head and Quarters set up in the most public Places of the County where such Fact was committed."[15] It appears that when the community believed a crime to be really serious, they wanted to punish the defendant even more. This mutilating of a body, or denying the person a proper burial are both common in lynching as well, as will be explained in Chapter 2.

1.2 Changes

In the eighteenth and early nineteenth century, authorities went through great lengths to make the punishment as harsh as possible in cases where they believed the punishment should be severe, depending on the seriousness of the offense. This slowly began to change in the course of the nineteenth century. For example, there was a change in attitude towards the public staging of such a violent act, and of the public display of death. The northern states decided to move hangings into the jail yard, which meant that the executions were no longer visible for such large audiences and were not a spectacle any longer. In the South executions remained a public event. According to Banner the lynchings in the South were the reason southerners were not so sensitive to this public display of violence. The last public execution in the United States was the execution of Rainey Bethea in 1938 in Kentucky. The hanging had more resemblance with a trip to Disneyland than with a death ceremony[16], so the state legislature abolished the practice after that.

When hangings were moved to the jail yard, the crowd that came to witness the execution became smaller and more elite than the crowd at the public hangings. As Banner argues: "The change in location had significant implications for the justifications underlying

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good view of the decomposing body.

15 Banner, *The Death Penalty*, 75.

16 "An estimated ten to twenty thousand spectators came to witness the hanging. The hotels in the town were full, so a lot of people camped out at the hanging site. Hot dog and drink vendors set up near the gallows. Before Bethea had even been pronounced dead, souvenir hunters tore off pieces of the hood that covered his face. The event received a lot of criticism in the national press". (Banner, *The Death Penalty*, 156.)

capital punishment itself. Public hanging had been the paradigmatic deterrent, broadcasting a message of terror as widely as possible, but once executions moved into the jail yard their deterrent influence had to work at second hand."[17] One of the most important ways by which the public could still be part of an execution was through newspapers. Newspapers offered descriptions of crimes and of the execution of the criminals, since journalists were allowed a place at the jail yard. But because the public was no longer made up of spectators who actually witnessed the violent act of death, but rather people who read about it in the comfort of their own home, the deterrent value of capital punishment was called into question. The character of capital punishment changed because of this movement. The punishment was no longer carried out by the people, but by the government. Banner concludes that "[w]ithout all the theater, the death penalty was not the same."[18]

The smaller crowds were not the only thing that were different in executions in the twentieth century. By 1913, fifteen states no longer executed their criminals by hanging, but they had adopted the newest way of putting someone to death: the electric chair. Banner argues that the reason more and more states switched to electricity was that it was believed less painful, and the public seemed to focus more intensely on the suffering of the condemned. Hangings that went wrong, as described in paragraph 1.1, horrified the public, so Americans searched for alternative methods for their executions. Accidents involving electricity seemed to result in a quick and apparent painless death, so a more painless and humane execution could be realized with these means. When a prisoner is executed by means of the electric chair, he or she is tied to the chair, and through a moist sponge an electric jolt of between 500 and 2000 volt is sent through the body. According to Banner the first electric execution took place in New York on August 6, 1890, but was not the 'success' authorities had hoped for. Due to errors in the process, the audience witnessed an execution a lot more gruesome than hanging. The second execution however did go as planned, and the prisoner died almost instantly, in what seemed an almost painless death. Though there

[17] Banner, *The Death Penalty*, 146.
[18] Banner, *The Death Penalty*, 168.

remained skepticism about electricity as a means of killing, even as late as 1938[19], more and more states switched from the gallows to the electric chair. With that, the number of spectators at executions shrank enormously.

Next to the electric chair, there was an even newer method of execution: the gas chamber. This was seen mostly in the southern and western states, because they adopted this method instead of the chair when they abandoned hanging. There are still five states that have the possibility to carry out the death sentence by means of the gas chamber, but all have lethal injection as an alternative method. In an execution by the gas chamber, the prisoner is placed on a chair in an airtight room where hydrogen cyanide gas is released. The prisoner can remain conscious for several minutes and witness accounts show that prisoners in a gas chamber suffer tremendously.[20] As with all other methods there was the debate on whether this was a painless and humane way to die. Banner argues that “[l]ike the electric chair, the gas chamber sometimes inflicted pain, and when it did, the results were just as troubling to watch."[21]

Though the electric chair and the gas chamber are both still optional methods of execution to this day, 35 of the 36 states that have the death penalty use lethal injection when executing a prisoner. When a prisoner is executed by a lethal injection, the inmate is first injected with an anesthetic called sodium thiopental which puts him or her to sleep. Next flows pancuronium bromide, which paralyzes the entire muscle system and stops the inmate's breathing. The final flow, potassium chloride stops the heart.[22]

1.3 Opposition towards the Death Penalty

In the middle of the eighteenth century the death penalty for crimes other than murder started

[19] “Even as late as 1938 *Popular Science Monthly* reported "serious scientific skepticism" about the chair and noted that recent research at Harvard Medical School suggested that the electrocuted person 'may only be shocked into a semblance of death and that the final spark of life is extinguished unwittingly in the autopsy room”. (Banner, *The Death Penalty*, 192.)

[20] Death Penalty Information Center: Description of Execution Methods, http://www.deathpenaltyinfo.org/descriptions-execution-methods

[21] Banner, *The Death Penalty*, 200.

[22] Death Penalty Information Center: Description of Execution Methods, http://www.deathpenaltyinfo.org/descriptions-execution-methods

to get criticized, not just in the United States but in countries worldwide. One of the main opponents of capital punishment was Italian philosopher Cesare Bessaria. In his *Essay on Crimes and Punishment* he presented a two-part critique on the death penalty. The first argument was that the state should not have the authority to condemn criminals to death. The second argument was that according to him, death was a less effective deterrent than imprisonment.[23]

During the second part of the eighteenth century more and more states in the US decided to make murder the sole capital crime. Murder (when committed by a white person) in itself was also divided into degrees. The reason capital punishment was abolished partly for crimes other than murder had two reasons. The first reason was that people felt a certain sense of sympathy for the condemned prisoners. Apart from sympathy, utility also played a big role in the partial abolishment. Banner argues that: "Many of the early American opponents of capital punishment did, in fact, want to punish better, and often to punish more."[24] Death itself was not punishment enough, and life imprisonment seemed 'most painful'.[25]

Though most people approved of the death penalty throughout the seventeenth, eighteenth and nineteenth century, there had always been people advocating for abolishment. The voices of these people became louder and louder in the second half of the nineteenth century and were most prominent in the Northern states. According to Banner the debate focused on the following issues. First, was the death penalty a necessity when it comes to crime determent? Was the death penalty a legitimate act of retribution? And was the death penalty a useful means of reforming the criminal's soul? Banner argues that abolitionists believed that imprisonment would cause greater fear among criminals than death, and would therefore be a better way of punishment. The retentionists on the other hand, thought that death was feared the most and therefore wanted the death penalty to remain. One of the arguments on the side of the abolitionists was that crime was seen as a

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[23] Banner, *The Death Penalty.*

[24] Banner, *The Death Penalty*, 109.

[25] A remarkable reasoning, since death sentences were usually carried out in the least painful manner. Especially nowadays, which shows in the fact that almost all states use a lethal injection to put their criminals to death.

disease. Sick or insane people should not be executed. As the discussion on whether or not criminals were born with defective brains continued, supporters of the death penalty argued that a criminal still had other alternatives than crime to turn to. Another argument that was used by death penalty opponents, an argument that is still used by abolitionists today, was that the system had its flaws and that this resulted in execution of innocent people.

Banner argues that: "There were some inconsistencies in the argument of the abolitionists. Prison, compared to a death sentence, was more severe and therefor more efficacious. But also, it was less severe, and therefor more humane."[26]

By the middle of the nineteenth century, most of the northern states were abolishing capital punishment for felonies like rape, robbery and burglary. Many legislatures were even contemplating an elimination of death sentences entirely. But while abolitionist in the northern states had partial success, the events in the South took a different course.[27] Banner argues that the main reason for this was slavery and the need of the southerners to discipline their workforce. Though there were a few prominent individuals who were in favor of abolishment, unlike in the North, proposed measures were never carried out. This resulted mainly in the executions of blacks. Even though most felonies were capital for both white people and black people, few white people were executed for crimes short of murder. As Banner argues: "The black-white divergence in southern criminal codes was reflected in actual practice. Blacks were hanged in numbers far out of proportion to their percentage in the population."[28] Banner also argues that figures showing the number of executed blacks in the South would be an underestimation of the actual number of black people put to death. Lynchings would not be included in these figures, and the number of slaves sold abroad that would otherwise have been put to death would also not be included. Gabiddon and Green state that of the 5726 persons that were executed from 1890 to 1984, 2915 (54%) were non-whites. The illegal lynchings that took place between the 1880s and the 1960s were for the most part black people, namely 3442 (73%). The apparent influence that race has on capital punishment will

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[26] Banner, *The Death Penalty*, 128.

[27] "Michigan (1846), Rhode Island (1852) and Wisconsin (1853) had abolished the death penalty for murder and five other states established a one-year waiting period between conviction and execution". (Banner, *The Death Penalty*, 134.)

[28] Banner, *The Death Penalty*, 141.

be discussed more thoroughly in paragraph 1.4 and in Chapters 2 and 3.

The trend of differences between the North and the South continued throughout the first half of the twentieth century. Some northern states were abolishing the death penalty, but southern states did not do so. There was a resurgence of the use of the death penalty from the 1920s through the 1940s however. Americans were suffering from the great depression and prohibition and writing of criminologists convinced the public that the death penalty was a necessary social measure.[29]

The number of U.S. executions dropped tremendously in the 1950s. The support for capital punishment reached an all-time low and many allied nations abolished capital punishment.

The biggest change for capital punishment in the United States came in 1972 when the Supreme Court decided that the death penalty was 'cruel and unusual punishment' and therefore unconstitutional. In *Race, Crime and the Law,* Randall Kennedy argues that "[i]n *Furman* v. *Georgia*, a closely divided (5 to 4) Court invalidated most existing state laws authorizing the death sentence on the grounds that they violated the Eight Amendment's prohibition against cruel and unusual punishments".[30] But instead of following the trend of other western countries, many state legislatures enacted new death penalty statutes in order to overcome the Court's objections. Kennedy argues that "[i]n 1976, in yet another case from Georgia, *Gregg* v. *Georgia*, the Supreme Court affirmed the constitutionality of at least some of these new 'improved' capital punishment laws. The Court validated capital punishment as long as it was implemented by procedures that, in its view, 'suitably directed and limited' the discretion of sentencers to preclude arbitrary or capricious punishment."[31] After that, capital punishment in the United States was back. Currently, there are only twelve states in America that do not have the death penalty.[32]

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[29] Death Penalty Information Center. Part 1: History of the Death Penalty. http://www.deathpenaltyinfo.org/part-i-history-death-penalty

[30] Kennedy, *Race, Crime and the Law*, 326-327.

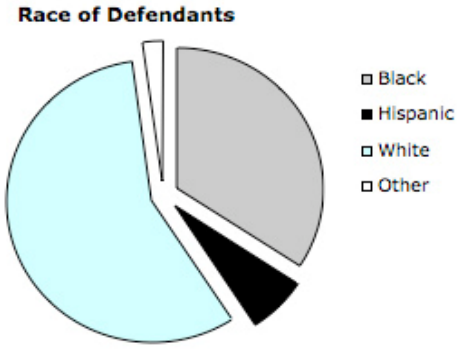
[31] Kennedy, *Race, Crime and the Law*, 327.

[32] Alaska, Hawaii, Iowa, Louisiana, Maine, Mississippi, North Dakota, Oregon, Rhode Island, South Dakota, Vermont, West-Virginia. Death Penalty Information Center. Race of Deathrow Inmates Executed since 1976,

1.4 The Influence of Race on Capital Punishment

Since *Gregg vs Georgia*, 1129 defendants have been executed in the United States.[33] Of these 1129 defendants 385 (34%) were black, 79 (7%) were Hispanic, 641 (57%) were white and the other 24 (2%) had another nationality. African-Americans only make up less than 13% of the population, so they are over-represented relative to their share of the population. This is shown in Figure 1.1. As of January 2008 the population on death row of all the states combined was 3309. The population of African-Americans currently on death row is 1379, which is 41,7% of the total population. These figures show that African-Americans are overrepresented on death row.

Figure 1.1: Race of defendants on Death Row since 1976.



When arguing that race plays a significant role in the outcome of a case, one should not just take into account the race of the defendant, but also the race of the victim. The statistics for victims are shown in Figure 1.2 and they refer to the victims in the underlying murder in cases where an execution has occurred since the restoration of the death penalty in 1976. When looking at the statistics of the victims since 1976 the following numbers can be seen. Out of the 1689 victims in capital cases, 239 (14%) were black, 85 (5%) were Hispanic, 1326 (79%) were white and 39 (2%) had another nationality.

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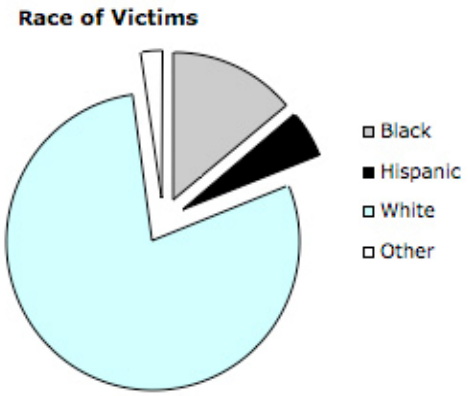
[33] Death Penalty Information Center. Race of Deathrow Inmates Executed since 1976, 01 September 2009, http://www.deathpenaltyinfo.org/race-death-row-inmates-executed-1976.

Figure 1.2: Race of victims of which the defendant has been sentenced to death, since 1976.



According to the Death Penalty Information Center, on November 13, 2008, there had been 24 executions so far that year. All of these executions had taken place in the South. Nine had taken place in Texas, four in Virginia and three in Georgia alone. Since the reinstatement of the death penalty in 1976, about 15 white defendants have been executed for the murder of only black victims. However, there have been about 228 black defendants who were put to death for murdering a white person. In 2008, so far no white defendant had been executed for the murder of only a black victim, but one defendant was put to death for murdering two white victims and one black victim.[34] Though these statistics portray the current racial situation on death row, the same numbers can be seen throughout history. Kennedy argues that "especially in interracial homicide and sex crimes, a decided tendency toward a longer or more severe sentence where the victim was white and a lighter punishment when the victim was colored."[35] In February 1990 the United States General Accounting Office concluded on death penalty sentencing that "[i]n 82% of the studies (reviewed), race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e. those who murdered whites were found more likely to be sentenced to death than those who murdered blacks."[36]

The statistics in research regarding race in capital cases show that black people that murder white people are more likely to be sent to death row than white people that murder

[34] Death Penalty Information Center. Race of Deathrow Inmates Executed since 1976, 01 September 2009, http://www.deathpenaltyinfo.org/race-death-row-inmates-executed-1976.
[35] Kennedy, *Race, Crime and the Law,* 74.
[36] Death Penalty Information Center. Race of Deathrow Inmates Executed since 1976, 01 September 2009, http://www.deathpenaltyinfo.org/race-death-row-inmates-executed-1976.

black people.

Black people are more likely to be sentenced to death than white people. This is not a phenomenon that has developed recently, but rather, it is a something that has been going on for centuries. Some states partially abolished the death penalty at the end of the eighteenth century, but only for free people. Most free people were white, and most slaves were black. So, most black people could still receive the death penalty. Slaves were still subjected to a significant amount of capital offenses. Banner argues that in Virginia for example, slaves were given the death penalty for any crime that free people would serve a prison sentence for of three years or more.[37]

Gabbidon and Green argue that one of the reasons that slaves were subjected to wide-ranging capital statutes in the South, was the society's fear of rebellion. Slaves were subjected to capital crimes on a larger scale than whites, as a means of deterrence. Banner states that: "In Texas slaves but not whites were subject to capital punishment for insurrection, arson, and - if the victim was white- attempted murder, rape, attempted rape, robbery, attempted robbery, and assault with a deadly weapon. Free blacks were subject to capital punishment for all these offenses plus that of kidnapping a white woman."[38]

These are just a few examples, but two hundred years ago, it was very normal for a state to have different criminal laws for white people and black people. This phenomenon continued to exist, even throughout the twentieth century. In 1920 in Kentucky for example, local public hangings were brought back, even though a decade earlier Kentucky had switched to the electric chair. The public hangings were reserved for rape and attempted rape. Banner argues that "[i]n the South rape was in practice a capital crime only when the defendant was black and the victim white."[39]

Though statistics show that race was an important factor in capital punishment, the American justice system did not admit that this was the case. Gabiddon and Green argue that: "The year following the Gregg decision, the Court provided states with further guidance

[37] Banner, *The Death Penalty,* 113.
[38] Banner, *The Death Penalty,* 141.
[39] Banner, *The Death Penalty,* 205.

on the application of the death penalty. Specifically, in *Coker* v. *Georgia* (1977), the Court ruled that sentencing rapists to death was cruel and unusual punishment."[40] Gabiddon and Green state that 405 black men were executed between the 1930s and the 1970s in the southern states. These black men were executed for rape and in that period only 48 white men were executed for the same crime. The authors argue that "it is perplexing that the Court skirted around the racial dynamics of the historical use of executions for rapists. With about 90% of such death sentences being given to Blacks (who presumably had raped white women), one cannot help but see this as a punishment that was historically reserved for Blacks."[41]

To conclude, ever since the beginning of federal law in the United States, the death penalty has been applied in a discriminatory fashion. Black people have always been, and are to this day, more likely to be sentenced to death than white people. This phenomenon of black people being overrepresented on death row has caused many scholars to investigate on the subject more thoroughly. Some have pointed out the similarities between capital punishment and the illegal lynchings that took place mostly at the end of the nineteenth and the beginning of the twentieth century. These findings will be discussed in Chapter 2.

[40] Gabbidon & Green, *Race and Crime*, 201.
[41] Gabbidon & Green, *Race and Crime*, 201.

2. Lynching and its Relation to the Death Penalty

On January 11, 2003, Governor George Ryan of Illinois announced that he was commuting the death sentences of 167 prisoners in his state. In their article *The Role of Victim's Race and Geography on Death Sentencing*, Michael L. Radelet and Glenn L. Pierce argue that race was clearly associated with the imposition of death sentences in the state of Illinois. A study conducted by Samuel Gross and Robert Mauro over a three year period showed that in cases where a black suspect was prosecuted for murdering a white victim, 7.5 percent were sentenced to death, compared to 1.9 percent of the whites killing whites and 0.6 percent of the blacks killing blacks. According to Radelet and Pierce: "None of the 56 whites suspected of killing blacks during the study period were sentenced to death."[42] Governor Ryan was in the possession of a research report based on an examination of more than 5,300 cases over a ten-year period.[43] The cases all involved a conviction for first-degree murder. Governor Ryan announced: "Our own study showed that juries were more likely to sentence to death if the victim were white than if the victim were black.... Our capital system is haunted by the demon of error. Error in determining guilt, and error in determining who among the guilty deserves to die. Because of all of these reasons today I am commuting the sentences of all death row inmates."[44]

The website Patrick Crusade quotes a newspaper article by Jeb Philips titled: *Does race decide who dies?* Philips argues that in Alabama, black district attorney Barrown D. Lankster, the only black district attorney in the 1990s, stated in 2001: "I would be dishonest if I said it doesn't matter if you are African American. It matters in this state, and it matters in this country. It matters because you have individuals who are making the decision to pursue the death penalty, and they bring their own biases to that."[45] As Charles J. Ogletree, Jr. argues in *Making Race Matter in Death Matters*: "The application of death as a punishment

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42 Radelet & Pierce, "The Role," 123.
43 The ten-year period was from 1988 until 1997.
44 Radelet & Pierce, "The Role," 117.
45 Patrick Crusade, 01 September 2009. http://www.patrickcrusade.org/execution_3_5.htm

for black Americans in unique forms throughout American history is undeniable."[46] According to scholars such as Charles J. Ogletree, who have done extensive research on the influence of race on capital punishment, the underlying currents for the application of death as a punishment for black suspects are fear, white supremacy, devaluation of black life, hatred and the desire to control.

Is it correct to state that the American judicial system treats black suspects differently than white suspects? And if that is indeed the case, what could be an explanation for this fact? Why are black people treated differently for the same crime? To provide an answer to this question I will first look at racism in American history. I will then focus on lynchings. What kind of events were lynchings and why do some scholars feel that there is a connection between these events and executions. I will discuss the phenomenon of white supremacy because different scholars have noted a connection between white supremacy and the imposition of the death penalty mainly on black defendants. This chapter will finish with a discussion of the unequal treatment of African-Americans in the justice system.

2.1 A History of Racism

As argued in the first chapter, black people are being discriminated in the American legal system. The statistics show that black people outnumber white people relative to their share of the population. This is not a recent development, but rather a phenomenon that has been around since colonial America. Reverent Jesse L. Jackson, Sr., Representative Jesse L. Jackson, Jr. and Bruce Shapiro from Yale University state in *Legal Lynching: The Death Penalty and America's Future* that African slaves and their descendants were singled out for indiscriminate and large-scale executions, from the very beginning. The colonizers wanted to discipline the slave population. Blacks were seen as irreligious and resistant to redemption. Slaves and free black people were often sentenced to death for crimes that white people would get a less severe punishment for. They were subjected to a separate brand of

[46] Ogletree, "Making," 61.

punishment.

As Kennedy argues: "Slaves, for example, were subjected to capital punishment for a wider range of crimes than any other sector of the population. Virginia, for instance, defined seventy-three capital crimes applicable to slaves but only one - first degree murder- applicable to whites."[47] In Texas, the following crimes were capital for slaves, if the victim was white: attempted murder, rape, attempted rape, robbery, attempted robbery, and assault with a deadly weapon. Free blacks were subjected to the same punishment. And if a free black man were to kidnap a white woman, this would also be a capital crime.[48] When Arkansas banished public hangings, it still carried out public hanging for the crime of rape, which was in practice largely limited to blacks. This was not only the case in Arkansas, but in other southern states as well. Banner argues that "[i]n the South rape was in practice a capital crime only when the defendant was black and the victim white."[49] Also, authorities would go to great lengths to ensure that slaves or free black people would not revolt. Banner states that in Louisiana "it was a capital crime to print or distribute material, or to make a speech or display a sign, or even to have a private conversation that might spread discontent among the free black population or insubordination among slaves."[50]

The examples above and the examples in Chapter 1, show that black people have been discriminated throughout American judicial history. Punishment was always more severe for black people than it was for white people, whether that was actually a law or not. In the twenty-first century, black defendants are brought to death by the American justice system, but there were times when a white community would take matters into their own hands. Instead of having a jury decide whether a person would receive the death penalty or not, they would resort to mob violence and let the person die. These violent acts are called lynchings.

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47 Kennedy, *Race, Crime and the Law*, 77.
48 Banner, *The Death Penalty.*
49 Banner, *The Death Penalty,* 205.
50 Banner, *The Death Penalty,* 112.

2.2 A Definition of Lynching

More and more scholars compare the death penalty to the illegal lynchings that occurred at the end of the nineteenth and beginning of the twentieth century. One of these scholars is Timothy V. Kaufman-Osborn. In *Capital Punishment as Legal Lynching?* he argues that "[b]ecause racism continues to taint the criminal justice system, the contemporary execution of African-Americans and, more particularly, African-American men is akin tot the lynchings that occurred throughout the United States, but especially in the South, in the era roughly delimited by the end of Reconstruction and the onset of World War II."[51]

To evaluate if such a comparison is justified, I first need to establish what lynching is. William Fitzhugh Brundage argues in *Lynching in the New South* that anti-lynching leaders settled on a definition of lynching in 1940 and this definition stated that "there must be legal evidence that a person has been killed, and that he met his death illegally at the hands of a group acting under the pretext of service to justice, race or tradition."[52] The National Association for the Advancement of Colored People (NAACP) defines lynching as: "[A]n illegal killing for which there is evidence, carried out by three or more persons, who claimed that their act served justice or tradition."[53]

Both definitions point out that lynchings were illegal and were carried out without due process of law. Lynchings were public and were by no means small, private events. The killings itself were not 'clean' and pain free, but were harsh and brutal. The victim was denied a fair trial and the people who were responsible for the lynchings were left unpunished. Steelwater argues in *The Hangman's Knot* that lynchings were a "mob killing supported by community feeling."[54] Punishing the people responsible would be a difficult task, since lynchings were not carried out by individuals, but by a mob. They were often well-organized and local authorities played an important part in the lynching.

The definitions above show that capital punishment and lynching are two very

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[51] Kaufman-Osborn, "Capital", 22.
[52] Brundage, *Lynching in the New South*, 17.
[53] Steelwater, *The Hangman's Knot*, 186.
[54] Steelwater, *The Hangman's Knot*, 186.

different things. The biggest difference being that lynchings were illegal and the capital punishment, of course, is not. Lynchings were very violent and the victims often died a very painful death. Authorities have tried to make legal executions as painless as possible. Also, lynchings used to be public, executions are not. At least, not anymore. As explained in Chapter 1, there are usually only a few people present during an execution in the twenty-first century. Kaufman-Osborn however, points out that executions that took place long after public executions and lynchings were common, sometimes still had a public character. The 1951 execution of Willie McGee, a black man accused of raping a woman, is an example of an execution that still had a public character. A large crowd gathered outside the courtroom, in order to witness the humming sound of the portable generator that sent the electricity through McGee's body. Kaufman-Osborn states that: "This execution is located in a quasi-public context, which, quite deliberately, reproduces many of the defining features of a spectacle lynching and, in so doing, ensures that McGee's body, especially upon removal from the courthouse, will serve as a manifest sign that simultaneously regenerates and ratifies the racial boundary that is essential to the perpetuation of white supremacy."[55]

In the second part of the twentieth and the first part of the twenty-first century, executions were carried out in such a way that mutilation was minimal. The physical aspects of a lynching however, are not the main character that scholars focus on when comparing it to the death penalty. Kaufman-Osborn is not alone when arguing that lynching and capital punishment are connected. Scholars note that hatred towards blacks, devaluation of black life, a desire to be in control and a feeling of white supremacy are most important in this comparison. In the following paragraph, white supremacy will be discussed more thoroughly.

2.3 White Supremacy

Before explaining what white supremacy is and in what way it is of importance to this study, I will briefly discuss the Critical Race Theory. The Critical Race Theory is developed by scholars and activists who study the transforming relationship among race, racism and

[55] Kaufman-Osborn, "Capital," 41.

power. The Critical Race Theory places issues that are also considered by civil rights and ethnic studies in a broader perspective. Richard Delgado and Jean Stefancic argue in *Critical Race Theory: an Introduction* that "it not only tries to understand our social situation, but to change it; it sets out not only to ascertain how society organizes itself along racial lines and hierarchies, but to transform it for the better."[56] One of the themes of the Critical Race Theory is the social construction thesis, which holds that race and races are products of social thought and relations. According to Delgado and Stefancic "[r]aces are categories that society invents, manipulates, or retires when convenient."[57] The authors argue that people with common origins share certain physical traits, but they have nothing to do with traits such as personality, intelligence, and moral behavior. Yet, society often ignores this and categorizes people on the basis of their physical traits such as skin color and hair texture. The way in which this translates to this research, is that a white society categorizes people with a black skin color as different. So in other words: black people are thought to have a different kind of personality than white people, a different kind of intelligence than white people and different moral behavior than white people. This is racist thinking and leads to discrimination.

This brings us to the term white supremacy. George M. Fredrickson argues in *White Supremacy: a Comparative Study in American and South African History* that white supremacy refers to "the attitudes, ideologies, and policies associated with the rise of blatant forms of White or European dominance over "nonwhite" populations."[58] In other words, white supremacy is the feeling of superiority that white people have towards people of a different race.

White supremacy has been a phenomenon in the United States since white society started importing slaves from African countries. The presence of slaves in the South and the continuation and growth of the import were a strong foundation for white supremacy. During times of slavery, white people believed black people to be an inferior race and therefore justified the fact that these black people were treated as property. Though slavery has been

[56] Delgado & Stefancic, *Critical Race Theory*, 3.
[57] Delgado & Stefancic, *Critical Race Theory*, 3.
[58] Fredrickson, *White Supremacy*, xi.

abolished since the middle of the nineteenth century, these feelings of superiority towards black people still exist in the American society. As the Critical Race Theory explains, white society categorizes black people as different. David Gillborn argues in *Rethinking White Supremacy* that when looking at white supremacy in the context of the Critical Race Theory (CRT), the interests and perceptions of white people are perceived as normal. This means that interests and perceptions of black people are assumed as abnormal or different.[59]

As explained, slavery and white supremacy are linked together. Feelings of white supremacy are stronger in the South of the United States, the same region where slavery once flourished. Also, the lynchings occurred for the most part in the South of the country, and concerned the black population greater than the white population. The NAACP estimates that 3290 people were lynched in the South between 1889 and 1931, 85 %, or 2789 people, of which were black.[60] Stewart Tolnay, E. Beck and James Massey argue in *Black Lynchings* that "[t]hese killings were not random but rather had an instrumental role in southern society. Lynchings were a mechanism for maintaining white supremacy in the social and economic institutions of southern society."[61] That lynchings were a means of acting out white supremacy is also argued by Brundage: "Rather than punish criminals, lynchers actually sought to crush black economic aspirations, squelch black activism, and perpetuate white hegemony over a cowed and inarticulate black population. Once the myths were discredited, they believed, lynching would be understood for what it was - a crude and brutal tool of white supremacy. Far from a defense of the hallowed traditions of civilization, lynching, blacks insisted, was an indefensible assault on them."[62] It seems that white supremacy was, at least in part, responsible for the lynchings that occurred in the second half of the nineteenth and the first two decades of the twentieth century. So when arguing that capital punishment is a form of legal lynching, white supremacy should be an important factor in capital sentencing.

Fleury-Steiner argues in *Death in "Whiteface"* that to impose the death sentence as a juror in

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59 Gillborn, "Rethinking,".
60 Tolnay, Beck & Massey , "Black Lynching's,".
61 Tolnay, Beck & Massey, "Black Lynching's," 606.
62 Brundage, *Under Sentence of Death*, 5.

a capital case in the contemporary United States one must don a 'white face'. By 'white face', he refers to "the purchase of an ideology or broad belief system grounded in the idea that poor nonwhite or "white trash" others are innately prone to irresponsibility and immorality."[63] The idea that nonwhites are irresponsible and immoral is similar to the idea that whites are superior to other, nonwhite, races. Imposing the death sentence to a black defendant while 'wearing' a white face, is similar to the lynching of black people a hundred years ago. Fleury-Steiner argues that the decision to impose death is a practice inseparable from racial and class domination. Capital sentencing reveals a dehumanization process that is very similar to the lynchings that occurred mainly in the South. He therefore calls the death penalty 'official lynching'. Jurors perform the modern death penalty decision in 'white face' by condemning others to die as everything they are not. Jurors are usually white, middle- or upper-class persons, and the defendants are 'threatening blacks', 'devious Latinos' and 'white trash'.[64] Juries feel that they need to protect society from these threatening, violent defendants. They act out of a feeling of superiority and condemn the suspects out of fear, out of a belief that these suspects are inferior, and out of a desire to remain in control. The underlying current in a death sentence is a feeling of white supremacy.

Bonilla-Silva argues in *Racism without Racists* that whites' racial views "constitute a racial ideology, a loosely organized set of ideas, phrases, and stories that help whites justify contemporary white supremacy; they are the collective representations whites have developed to explain, and ultimately justify, contemporary racial inequality."[65]

According to Fleury-Steiner, white society pictures African-Americans as 'Criminal Black Minstrels'. Politics and media portray black people as lawless criminals which reproduces a pre-Civil Rights ideology. This can be explained in part by the Critical Race Theory. As stated before, Delgado and Stefancic argue that society invents categories of races when convenient. When a crime is committed by a black person and this person is brought before a judge, jurors will be influenced by the fact that the accused is a black person, a person of a race that they believe to be lawless and more violent. As Benjamin

[63] Fleury-Steiner, "Death in "Whiteface," 150.
[64] Definitions by Fleury-Steiner
[65] Bonilla-Silva, *Racism Without Racists*, 178.

Steiner and Victor Argothy argue in *White Addiction*: "By erroneously reinforcing blacks as 'criminal' suburban white identities are erroneously reinforced as 'law-abiding' and 'innocent'. That is to say, although class, race and ethnic status are social and cultural constructions - as opposed to being biological determinants- they speciously become proxies for who is moral and who is immoral."[66] Thus, black people are seen as more criminal and are believed to be immoral, which is racial prejudice. Mona Lynch argues in *Stereotypes, Prejudice, and Life-and-Death Decision Making: Lessons from Laypersons in an Experimental Setting* that "[t]he stereotype of African-Americans as violent and criminally inclined is one of the most pervasive, well-known, and persistent stereotypes in American culture."[67]

To conclude, when scholars argue that capital punishment is a form of legal lynching, they mean that the underlying currents in these two phenomenons are the same. Both capital punishment and lynching are a product of white society's fear and superior feelings towards people of a different race, white supremacy. This leads to discrimination of black people, not only in everyday life but also in the American justice system.

2.4 Justice for the Poor

A major problem a lot of black defendants have is their representation in court, or better yet, lack thereof. Lawyers are expensive and most of the defendants do not have the financial funds to pay for that. As Michael Mello argues in *The Wrong Man*: "Virtually all men and women on death row are and were poor."[68] Being poor in a murder trial can mean lousy lawyering and investigations, ultimately resulting in a death sentence. Jesse Jackson, Jesse Jackson Jr. and Bruce Shapiro argue in *Legal Lynching* that lousy lawyering is a major problem for a lot of black defendants and refer to these cases with the term 'Sleeping Lawyer Syndrome.' For example, George McFarland was a 35 year old black man who was accused of killing Kenneth Kwan. McFarland was arrested after a questionable testimony by his

[66] Steiner & Agothy, "White Addiction," 450.
[67] Lynch, "Stereotypes," 188.
[68] Mello, *The Wrong Man*, 511.

nephew. Even though there was no physical evidence linking McFarland to the crime scene and the only eye witness picked him from a line-up only after she had seen a picture of the defendant, McFarland was sentenced to death. His lawyer, 72 year-old John Benn, might have been able to prevent this, if it were not for the fact that he slept through important parts of the trial. According to *Texas Moratorium Network*, "Benn began nodding off during jury selection and his sleeping got worse as the trial wore on. A *Houston Chronicle* account written on one of the last days of the trial described Benn with his head rolled back on his shoulders, his mouth agape."[69] McFarland is certainly not the only defendant who has seen his life slip between his fingers because his lawyer failed to stay awake during trial. The Texas Court of Appeals, which is the state's highest court has turned down three petitions from death row inmates. All three of them had lawyers who slept through significant parts of their trials. Jackson, Jackson and Shapiro argue that "[i]n Texas, one judge after another has found that sleeping lawyers are no barrier to a fair death-penalty trial."[70]

According to Jackson, Jackson and Shapiro, Stephen S. Bright of the *Southern Center of Human Rights* in Atlanta has documented dozens of hair-raising cases. Both court-appointed and privately hired death penalty trial lawyers are often shockingly inadequate to offer legal representation. Bright argues that "[a] woman was sentenced to death in Alabama at a trial where her lawyer was so drunk that the trial had to be suspended for a day so the lawyer could sober up."[71] Lawyers sometimes show up at a trial drunk, or unable to recite a criminal statute or case. There are also incidents documented where lawyers called their clients 'little nigger boy'. Bright concludes that: "It is not the facts of the case but the quality of representation that determines whether a defendant ends up on death row."[72]

Death by Discrimination, a report published by Amnesty International, tells the story of Bobby Fields, a black man who was executed in 2003 for the murder of an elderly white

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69 Texas Moratorium Network. George McFarland. Houston Chronicle, 14 June 2003, http://www.texasmoratorium.org/mod.php?mod=userpage&page_id=74

70 Jackson, Jackson & Shapiro, *Legal Lynching*, 41.

71 Stephen Bright, "Used Against The Poorest and Most Powerless," *The New Abolitionist*, August 2002, Issue 25, http://www.nodeathpenalty.org/newab025/bright.html

72 Jackson, Jackson & Shapiro, *Legal Lynching*, 42.

woman. Though he did confess to shooting the woman, he always maintained that the murder was not intentional and that the shooting was accidental. Fields' lawyer was inexperienced and had never before handled such a case in her short career. The prosecutor on the other hand was very experienced and was known for pursuing the death penalty aggressively. Fields' lawyer requested co-counsel, but she was never provided with this. The judge ultimately sentenced Fields to death, but the state Pardon and Parole Board later recommended that the death sentence be commuted to life imprisonment without parole, due to the fact that the lawyer admitted her inadequate representation and a ballistics and crime scene expert testified that Fields' gun had in fact gone off accidentally. However, this recommendation was rejected by the Governor and Fields was executed.[73] Though the death penalty was originally to be a form of punishment for criminals who were 'the worst of the worst', it seems that nowadays this has shifted to punishment for criminals who have the worst representation in court. Those people are poor and, often, black. As Jackson, Jackson and Shapiro conclude: "The death penalty is imposed not for the worst crime but for the worst lawyer- and that outcome is usually a matter of economics."[74]

Mello argues in *The Wrong Man* that most death row inmates had lawyers that did not work adequate and investigating at the trial level was poor. According to Mello "[c]ops and prosecutors still hide evidence of innocence from capital defendant and their attorneys. The state still possesses its arsenal of legal technicalities to preclude reviewing courts from even considering newly discovered evidence, and prosecutors still employ that arsenal with a vengeance."[75]

Another explanation for errors that are made in capital cases is that police and prosecutors are pressured by the public to solve these crimes. Especially murders that are thoroughly discussed in the media make a community feel threatened and that is when they turn to authorities to make sure justice will serve.

Black defendants are put at disadvantage in court not only by inexperienced and incapable lawyers, but also through jury selection. For the most part, the inmates on death

[73] Amnesty International (2003)
[74] Jackson, Jackson & Shapiro, *Legal Lynching*, 42.
[75] Mello, *The Wrong Man*, 511.

row throughout the United States were put there by an, almost entirely, white jury. Timothy P. O'Brien was a plaintiff's attorney with a civil practice in Pittsburgh. During a five year period in both state and federal courts, he has represented more than twenty African-American plaintiffs in civil jury trials. In all the cases combined, a total of two African-Americans were selected as jurors. One of them was a woman, who was later excused to care for her children. O'Brien states that: "Thus, in all of the cases which I have tried on behalf of African American plaintiffs in the past five years, a grand total of one African American was involved in the deliberations that determined the outcome of the case. Indeed, in most of the cases, the only African American in the courtroom was my client."[76]

Another example is that of Meryl McDonald and Robert Gordon. Both Jamaicans are on death row in Florida, and both were sentenced to death by an all-white jury. The county in which they were tried had an African-American population of eight percent at the time, but the jury was selected from a pool of fifty people, all of whom were white. The judge's response to the attorney's objection was that the juror pool was randomly selected by a computer, so there was nothing that he could do.[77] In the previous example, the jury was selected from an all-white pool, but there are other examples where African-Americans were deliberately excluded from jury selection. In 1980, a black man named Delma Banks was convicted for murder in Bowie County and received the death penalty. He was convicted by an all-white jury, since the prosecution dismissed the only four African-Americans from the jury pool. A former prosecutor stated that this was common practice at the time and was accepted in Bowie County.[78] The Amnesty International report states that: "Between 1 January 1975 and 30 September 1980, the county's prosecutors had used peremptory strikes to exclude 94 per cent of blacks eligible to sit on juries. As a result, 1.8 per cent of eligible blacks served on the 37 cases tried in that period despite the fact that African Americans accounted for 21 per cent of the population of Bowie County."[79] The *Austin-American Statesman* remarked that the Banks case "from the police investigation through

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[76] *Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System*, 74.
[77] Amnesty International, *Death by discrimination.*
[78] Amnesty International, *Death by discrimination.*.
[79] Amnesty International, *Death by discrimination,* 44.

this trial - has the stench of a lynching."[80]

In the penalty phase, empathy for the defendant is key for avoiding a conviction. But since empathy is influenced by race, both race of the defendant and race of the victim have an influence on the outcome of a capital trial. Juries are predominantly white, and according to the previous statement, empathize more with white victims. The result of this is that killers of whites are more likely to receive death sentences than killers of blacks. Mona Lynch argues that "[t]he death-qualified jury pool ends up disproportionately White, male, older, and more religiously and politically conservative than the broader jury pool from which it was selected, and such demographic characteristics tend to correlate with measures of subtle racism and stereotyped thinking."[81]

This suggests that race remains an important factor in capital sentencing, which is also backed up by the *Death by Discrimination* report published by Amnesty International. The findings published in this report by Amnesty International show that states seek the death penalty when a white person is killed by a black person, but not when a black person is killed by a white person. In South Carolina, according to the report: "The state was 20 times more likely to seek the death penalty in a case involving a black defendant and white victim compared to cases where the victim was African American."[82] In New Jersey the Supreme Court wanted to determine if the state's capital justice system suffered from racial bias. In order to do so, they adopted a monitoring system of which the first report was released in June 2001. It reported "unsettling statistical evidence indicating that cases involving killers of white victims are more likely to progress to a (death) penalty trial than cases involving killers of African-American victims."[83] The examples listed above are just a few in a long list of examples. Amnesty International has done extensive research on this subject and has concluded that African-Americans have a substantially greater risk of receiving the death penalty. Also, cases involving a white victim have a substantially higher chance of resulting in the death penalty than cases where the victim was black.

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[80] Amnesty International, *Death by discrimination,* 45.
[81] Lynch, "Stereotypes," 187.
[82] *Death by discrimination - the continuing role of race in capital cases,* 7.
[83] *Death by discrimination - the continuing role of race in capital cases,* 7.

In this chapter I have argued that African-Americans have been subjected to racism and discrimination, throughout the history of the United States. Though the lynchings that took place mostly in the late part of the nineteenth, and the beginning of the twentieth century, no longer occur in the exact same format, numerous scholars point out similarities between lynchings and capital punishment nowadays. These similarities are that both of them are in large applied to the black, male population, both are carried out in order to maintain white supremacy and both seem to take place under questionable legal circumstances. In the next chapter I will discuss three cases that explain these similarities to a greater extent.

3. Case Studies

This chapter will discuss three significant death penalty cases. The first one is the Scottsboro case, also known as the 'Nigger Rape Case', which drew worldwide attention due to the death sentences that were given despite very questionable evidence and testimonies. Then I will discuss the case of the Martinsville Seven, a rape case in which the seven black defendants have received the death penalty. At first glance the Martinsville Seven seems to have been given a fair trial and I will examine if this is true. The final case that I will examine is the case of Warren McCleskey who, with an extensive study known as the Baldus study, has proven that Georgia's legal system is influenced by race, but was nevertheless executed for shooting an officer.

I have chosen these three trials because they are as much different as they are the same. First of all, the three different cases took place in a different period of the twentieth century. The Scottsboro case took place in the 1930s, the Martinsville in the late 1940s and early 1950s, and the McCleskey case in the 1980s. In the Scottsboro case it was questionable whether the defendants were guilty at all, but in the other two cases it was clear that the defendants were guilty of the crime that they were accused of. These cases appear to be alike because they all involve black defendants being tried by a legal system dominated in large by white people. With an examination of these three trials I will try to establish whether capital punishment in the twentieth century is indeed a form of legal lynching.

3.1 Case: Scottsboro

In *Scotssboro*, Dan Carter describes the events that took place in in this town. The same is done by James Acker, who gives a description of the events in *Scottsboro and Its Legacy*. On the morning of March 25th, 1931, on the Southern Railroad freight train from Chattanooga, Tennessee to Memphis there were several passengers on board who were

'hoboing'.[84] A fight broke out between a couple of white boys and a couple of black boys, and the latter had thrown all but one of the white boys off the train. The boys that were thrown off the train were not happy about this and approached the station master in Stevenson. They said that a few black boys had started a fight and had thrown them off the train. Carter states that they wanted to press charges, therefore the station master called the sheriff in Point Rock, which would be the trains' next stop, and told him to "capture every Negro on the train and bring him to Scottsboro."[85] He gave the sheriff the authority to deputize every black man he could find. The sheriff did as he was told, and was ready to search the train when it stopped in Point Rock.

On board were nine black boys. Four of them were friends and came from Chattanooga: eighteen-year-old Haywood Patterson, eighteen-year-old Andrew Wright and his thirteen-year-old brother Leroy Wright, and Eugene Williams, thirteen as well. The other five boys were from Georgia and were not acquainted with each other and they did not know the boys from Chattanooga. Charlie Weems, twenty, was the oldest of the group, then came Clarence Norris with eighteen, Olen Montgomery who was seventeen, and Ozie Powell and Willie Roberson were both fifteen years old. There were also two white girls on board: twenty-one-year-old Victoria Price and seventeen-year-old Ruby Bates.

The nine black boys were all taken into custody and a deputy told Patterson that they were charged with assault and attempted murder. This was apparently a claim made by the white boys whom they had thrown off the train near Stevenson. According to Carter, while the sheriff was rounding up the boys, Ruby Bates asked to speak to him, and told him that she and her friend were raped by the nine black boys. Acker argues that Bates "either volunteered or responded affirmatively to a sheriff deputy's question that they both had been raped by the gang of blacks while the train made its passage."[86] Ruby had either initiated the comment, or was asked by someone else, and the sheriff took both the girls and all nine of the boys to Scottsboro. He then sent Victoria and Ruby to get a medical examination.

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[84] Hoboing ="*Having hopped the rail in search of employment or simply to move on to wherever the train would take them*." Acker, *Scottsboro and Its Legacy*, 1.)

[85] Carter, *Scottsboro,* 5.

[86] Acker, *Scottsboro and Its Legacy*, 3.

The sheriff was not discreet about the events that morning and word about the alleged rape spread around Scottsboro very fast. Carter argues that with each person adding their own violent details, by the end of the day "'townspeople solemnly asserted that the 'black brutes' had 'chewed off one of the breasts' of Ruby Bates."[87] Local newspapers started printing the story that same afternoon, with headlines like 'Nine Negro Men Rape Two White Girls'. The county had two newspapers which both reported on the event. According to Acker, *The Progressive Age* reported that "[d]etails of the crime coming from the lips of the two girls, Victoria Price and Ruby Bates, are too revolting to be reprinted."[88] The other newspaper, *The Sentinel* did go into detail and described how the black suspects had assaulted and raped the girls. Lloyd Chiasson and Lloyd Chiasson Jr. argue in *The Press on Trial* that: "Both papers reported that the girls had been physically injured by the defendants- which was later contradicted by the examining physician. In subsequent coverage further false details emerged."[89] Both newspapers put an emphasis on the fact that the girls were physically abused by the Scottsboro boys. This shows that the media plays an important part in the way in which society finds out about a crime and forms its opinion. Had the newspapers not covered these details, details that seem to be untrue since the examining physician could not verify the reports of abuse, than the public opinion of the Scottsboro boys might have been a different one.

There was a large crowd gathered outside the jail where the boys were held, and they demanded that the boys be handed over to them. Though the mob clearly wanted nothing more than to lynch the nine blacks, the sheriff would not let this happen and asked the crowd to let the justice system do its work. According to Acker it was not just the nine young, black men who would be at trial. He argues that: "Also at issue was whether justice dispensed in an Alabama rape trial in the 1930s could be impervious to the deeply ingrained social taboo, especially inviolate in the South, against black men engaging in sexual relations with white women."[90]

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87 Carter, *Scottsboro*, 7.
88 Acker, *Scottsboro and Its Legacy*, 7.
89 Chiasson & Chiasson, Jr, *The Press on Trial*, 104.
90 Acker, *Scottsboro and Its Legacy*, 4.

The nine boys were all uneducated and poor, and were far away from their hometown. They did not have the resources to defend themselves against the accusations that were made. Judge Hawkins, well aware that the court was obliged to make sure the defendants were represented by counsel, assigned all seven members of the Scottsboro bar to represent them. But with six of the lawyers withdrawing or being retained, the only one who remained was Milo C. Moody. Carter argues that: "Milo Moody was only two months short of his seventieth birthday and he was, as someone put it charitably, getting a bit forgetful. One person who met him at the time described him as a 'doddering, extremely unreliable, senile individual who is losing whatever ability he once had."[91] Inhabitants of Chattanooga were concerned about the trial of the Scottsboro boys and took action. Ada Wright, mother of Andrew and Leroy helped raise money to pay for an attorney named Stephen R. Roddy, who had taken a few local cases for African-Americans. Carter argues that "Roddy's modest legal abilities were further limited by his inability to remain sober."[92]

The evidence against the Scottsboro boys consisted mainly of the claims made by Victoria Price and Ruby Bates. Kennedy argues in *Race, Crime and the Law* that Ruby later withdrew the accusation and testified for the defendants. Kennedy argues that "[t]he other, Victoria Price, never recanted but told such contradictory and implausible versions of her alleged rape that it is virtually certain that she lied materially about the entire episode."[93] In *The Scottsboro Boys Trial,* Lita Sorensen offers a character description of Victoria Price, that make the claims that she made even more questionable. According to Sorensen Victoria Price was a heavy drinker and she had a questionable character. Sorensen argues that "Price was described during the trials as a 'common street prostitute of the lowest type' who had been overheard asking 'negro men' about the size of their 'private parts."[94]

The Scottsboro nine have been tried on three occasions in the decade after the train

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91 Carter, *Scottsboro*, 18.
92 Carter, *Scottsboro*, 19.
93 Kennedy, *Race, Crime and the Law,* 100.
94 Sorensen, *The Scottsboro Boys Trial*, 10.

ride on that morning in March. They were sentenced to death each time[95], in trials that were, according to Kennedy, 'parodies of due process'. To illustrate in what way the trials were unfair, consider Kennedy's description of one of the trial judges. He states that this judge openly disparaged defense counsel in front of the jury. He favored the prosecution and he gave the jury instructions only relating to a finding of guilt. Kennedy argues that "[t]his same judge rejected the defense counsel's argument that blacks had been wrongfully excluded as jurors despite overwhelming evidence to the contrary, and later, refused to strike certain white jurors for cause even when they readily acknowledged that they believed blacks to be racially inferior to whites."[96]

The first time the boys were convicted for the rape, and were sentenced to death, the U.S. Supreme Court reversed this decision on the grounds that the defendants had been denied due process of law, an injustice that became known as *Powell* v. *Alabama.* Kennedy argues that eight of the boys were convicted and sent to the chair "in a courtroom that one of them described as 'one big smiling white face."[97] After the Supreme Court ruled that the first convictions should be reversed, the boys were tried again. In this second trial, they were sentenced to death as well, but this time, they were saved by their trial judge. As stated before, the allegations made by one of their alleged rape victim, Victoria Price, were literally unbelievable. The judge therefore annulled the convictions of the Scottsboro boys. The boys were then tried for a third time, and this time were sentenced to death once again. Carter argues that this was in part because their prosecutor pressured the jury by saying that they later had to go home and face their neighbors, "while they were supposed to protect 'the sacred parts of the bodies' of white women in Alabama."[98] After the conviction, the Supreme Court intervened again. Kennedy argues that "this time ruling in Norris v. Alabama that the reconvictions obtained were invalid because state officials, for racial reasons, had

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[95] Technically, not all of the nine defendants were sentenced to death in all three trials: "J*uries sentenced the defendants to death on several occasions, although in recognition of the weakness of the prosecution's case, one jury sentenced one defendant to "only" seventy-five years in prison as opposed to execution*".(Kennedy, *Race, Crime and the Law,* 100.)

[96] Kennedy, *Race, Crime and the Law,* 101.

[97] Kennedy, *Race, Crime and the Law,* 102.

[98] Carter, *Scottsboro,* 344.

purposefully excluded Negroes from jury service."[99]

Though Alabama did not execute any of the nine black boys, their road to justice did not end after that third trial. Four of them, were convicted again in what Kennedy calls, tragicomic trials. Some received a prison sentence of seventy-five years, and Clarence Norris was, once more, sentenced to death. Eventually, the rape charges were dropped and Norris' sentence was commuted. After serving a collective 104 years in prison for a crime that had very likely never been committed, the Scottsboro Boys were free of charges in 1950.[100]

As discussed in Chapter 2, lynching can be seen as a means in which white society wanted to control the black people living in that society. It came forth out of a belief that black people were 'less' than white people, and white society felt justified in making sure they dominated everyday life. This hatred towards blacks, a desire to be in control and feelings of white supremacy is seen in the Scottsboro case as well. Even though the statements made by the victims in this rape case are questionable, jury after jury convicted them to the death penalty. As was the case in lynching, white society felt it needed to protect and revenge its people, in this case Ruby Bates and Victoria Price, and therefor wanted to put them to death. In this case the media has played an important role in creating more fear. By printing false details, and exaggerating the crime, white people became more frightened of the black suspects and therefore of black people in general. The jury was told they needed to protect the "sacred parts of the bodies of white women."[101] The black suspects were portrayed as wild 'beasts' and this stimulated the publics need for protection and revenge even more. The community acted out of white supremacy. They felt threatened and needed to remain in control and punish those who were inferior to them and who had done wrong. Though the community did not lynch the boys, the desired result was the same: They wanted the Scottsboro boys to die. Only the community chose not to resort to the illegal way of lynching, but the legal way of capital punishment.

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[99] Kennedy, *Race, Crime and the Law,* 103.
[100] Kennedy, *Race, Crime and the Law*.
[101] Carter, *Scottsboro*, 344.

3.2 Case: Martinsville Seven

In *The Martinsville Seven: Race, Rape and Capital Punishment*, Eric W. Wise describes the events that took place in Martinsville in the late 1940s. On January 8, 1949 thirty-two-year-old Ruby Stroud Floyd entered the neighborhood of Cherrytown, a black neighborhood in east Martinsville, Virginia. Ruby was a white woman, known in the neighborhood for her missionary work for the Jehovah's witnesses. Needing directions to Ruth Pettie's house, who owed her six dollars, she knocked on the door of Dan Gilmer. The man warned her not to walk through this neighborhood this time of day, but when Ruby stated she wanted to go anyway, Dan's eleven-year-old son Charlie accompanied her. They passed a group of four African-American men on the way, and one of them remarked to the others that he thought the lady was very attractive. On the way back, Ruby and Charlie passed the men once more, and this time the man who had commented on her looks did not just let her get away. He grabbed her and dragged her into some nearby woods. One of the three other men gave little Charlie Gilmer a knife and instructed him to stab anyone who would pass. He then gave him a quarter if he kept his mouth shut. Charlie fled the scene. Ruby was then assaulted by the four men who had initially attacked her, and later by three other African-American men who arrived on the scene. All of them tried to have intercourse with her, though it is unclear how many of them actually succeeded. When all seven of the men were finished, Ruby Fletch got away and showed up at the door of Mary Wade. Rise argues that "[s]he had scratches on her arms, her hair was tangled, and her thighs were red-rubbed like. She had bruises on her arms and legs, mud and dirt on her clothes, and pine needles and sticks in her hair."[102]

The police were called and sergeant Barrow was one of the first to respond. After Ruby was questioned, Barrow and additional officers went around the neighborhood in search of the suspects. By morning, six of the seven men were brought in and most of them had already signed a confession. Nineteen-year-old Booker T. Millner and Frank Hairston, Jr. were the first to be brought in. Twenty-one-year-old John Clabon Taylor and twenty-year-old James Luther Hairston were brought in as well and Hairston confessed that all seven of the

[102] Rise, *The Martinsville Seven,* 9.

men had tried to have intercourse with Ruby Floyd. Eighteen-year-old Howard Lee Hairston and thirty-seven-year-old Francis DeSales Grayson, who had five children, were the suspects who were brought in next. The final suspect, nineteen-year-old Joe Henry Hampton was the last one and he arrived at the police station on the morning of January 10. The seven men were not held in the same prison, but were separated at distant locations. According to Rise this was a decision made by sergeant Barrows, in an effort to make it more difficult for people to resort to mob violence. Local citizens were very upset by the nature of the crime. Rise argues that "[t]he Henry County jailer later revealed that he was so affected by the viciousness of the attack that had a mob demanded the key to the jail, he would have relinquished it."[103]

This statement made by the jailer portrays what most people must have felt at that time. One of their own was hurt in a brutal way by these black men, and the white community wanted revenge for that. Had this happened three decades earlier, the black suspects probably would not have lived to see their trial, but they would have been lynched by the white community. The Martinsville Seven however were not lynched, they received a trial.

The seven defendants were not tried together, but all got a separate trial. Rise argues: "By individualizing the cases rather than emphasizing the seven as a group, the attorneys hoped that some of the defendants might be acquitted or receive lighter sentences than the other."[104] The lawyers who were appointed by judge Whittle had varying levels of experience, and according to Rise they all received twenty-five dollars for the three months in which they represented their clients. Judge Whittle emphasized the importance that the defendants were not to be treated differently because of their race. It was of importance that stability within the community remained intact. Rise argues that though a lot of people felt that the seven men would never get a fair trial in Martinsville, the trial was held here nonetheless. With most of the black jurors in the jury pool excused on the grounds that they did not believe in the death penalty, and the prosecutors excluding the remaining prospective jurors, the Martinsville seven were tried by an all-white jury.

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[103] Rise, *The Martinsville Seven,* 18.
[104] Rise, *The Martinsville Seven,* 36.

All of the defendants admitted they had been on the scene, and had raped or had tried to rape Ruby Floyd. Millner however claimed that after Ruby had begged him not to do anything, he had lost the urge to do anything and got up again. They all attempted to make their punishment less severe. Rise argues that "each defendant provided either an excuse or a defense for his actions, all of them based on the explanation that a group of young men, their reason dulled by intoxication, had become caught up in the frenzied activity of the moment."[105] Some of the defendants also testified that they had been unable to 'perform' at the time and therefor had not technically raped the victim. According to Rise the defense also called several character witnesses, to make the jury decide upon a prison sentence, instead of the prosecutions recommended death sentence. The jury however, found all defendants guilty of rape and all seven of them were sentenced to death.

Rise argues that in the two years from the crime up to the execution, the Martinsville Seven had six trials, five stays of execution, ten opportunities for judicial review, and two denials of executive clemency. But the executions of Joe Henry Hampton, Howard Lee Hairston, Booker T. Millner, and Frank Hairston, Jr took place on February, 1951. John Clabon Taylor, James Luther Hairston and Francis DeSales Grayson died in the chair three days later.

At first hand, it seems that the Martinsville case was one done 'by the books'. The police made sure the community could not resort to mob violence, and so all of the defendants died after receiving the death penalty in a trial. Rise states that according to the white citizens of Martinsville, the law enforcement system of their town had restored the racial stability in their community without violence. Rise argues that "[i]n stark contrast to stereotypical notions of southern justice, the community did not rely on crude methods of racial control, such as mob violence or kangaroo courts. The legal system continued to enforce codes of racial behavior but through modern police methods and legal processes that emphasized the preservation of community stability and social order."[106] The African-American people however, did not feel

[105] Rise, *The Martinsville Seven,* 43.
[106] Rise, *The Martinsville Seven,* 23.

the same way. In the *Richmond Afro-American*, a prominent African-American newspaper, the case was compared to the Scottsboro case. Rise argues that:"Admittedly police officers and judges had supervised the capture of the defendants with apparent regard for their due process rights and with a minimum of racial rhetoric. But while Martinsville's law enforcement community had demonstrated that black suspects could be arrested and arraigned in an equitable fashion, the question remained whether they could be tried and punished in a southern courtroom without reinforcing traditional codes of racial behavior."[107]

In *Challenging Racism and Sexism* Ethel Tobach and Betty Rosoff express their doubts concerning the 'fair' way in which the trial was supposedly held. They state that the town was well known for the *Bassett Furniture* company and the *American Furniture Company*. Most of the jurors of the grand jury were on the Board of Directors of the *American Furniture Company*. The judge in the trials was director of six of the town's leading businesses and the prosecutor was a director of *Bassett Furniture*, one of the richest men in town. Tobach and Rosoff state that: "The defendants were saddled with attorney's from the city's power structure, and they conducted the trial before the all-Euro-American jury with a decided lack of zeal. There were other legal curiosities. During the trial the defendants repudiated their extorted confessions, but that cut no ice. Despite the inflamed local atmosphere, the judge refused a change of venue. Two Afro-Americans were stricken from the panel during jury selection because they did not believe in the death penalty for minorities in such cases."[108] According to the authors, the case raised a lot of legal questions on appeal. A change of venue was denied, even though the Martinsville community was emotionally involved in the case. It appeared that confessions were forced upon the defendants and the cross-examinations had been inadequate. The victim, Ruby Floyd had been unable to positively identify some of the defendants, and African-Americans were excluded from the jury.

In this case, there was a white community that wanted justice to serve. The community did

[107] Rise, *The Martinsville Seven,* 24.
[108] Tobach & Rosoff, *Challenging Racism and Sexism,* 214.

not resort to lynching, but gave the Martinsville Seven a trial. The trial was held in the same county as where the rape had happened, and so the people involved in the trial, such as the jurors felt personally involved. The Martinsville Seven were tried by an all-white jury in a white society that wanted revenge on the black defendants that had committed such a violent crime against one of their own, a white middle class women. Lynching was not necessary, as they had a legal way to punish these black people, via the courtroom onto death row.

3.3 Case: McCleskey

David C. Baldus, George Woodworth and Charles A. Pulaski describe in *Equal Justice and the Death Penalty* what happened in the afternoon of May 13, 1978. They argue that four armed men robbed the Dixie Furniture Store in Atlanta. One of them was a black man named Warren McCleskey. McCleskey entered the store in the front, the others in the back. The three men in the back rounded up the employees and tied them up, McCleskey forced the customers to lie face down on the floor. In the meantime, a silent alarm had gone off and had warned police officer Schlatt. Schlatt walked in as the manager was held at gunpoint and was forced to give the robbers the store receipt, his watch and six dollars. Schlatt walked down the aisle of the store and at that point he was shot at two times. One shot hit him directly in the face, which killed him instantly. According to Baldus, Woodworth and Pulaski, McCleskey was arrested for another offense a few weeks later. He denied shooting Schlatt, though he did admit that he had been involved in the robbery of the furniture store. At trial, two witnesses, a codefendant and a neighboring inmate in jail, testified that they had heard McCleskey admit to shooting the police officer. The authors also argue that the gun that McCleskey had carried at the time of the robbery, had been consistent with at least one of the bullets that had struck officer Schlatt. The jury that sentenced him to death for the murder, consisted of one black person and eleven white persons.[109]

Kennedy argues that the appeals that followed were normal for post-conviction

[109] Baldus, Woodworth & Pulaski, *Equal Justice and the Death Penalty*.

proceedings in capital cases, but one aspect made it stand out. McCleskey claimed that the Georgia capital punishment statute violated the Equal Protection Clause of the Fourteenth Amendment. McCleskey argued that race has an influence on Georgia's statute because black suspects are more likely to receive the death penalty. Also, defendants charged with the murder of a white person are more likely to be sentenced to death than defendants charged with the murder of a black person. Kennedy argues that McCleskey was a black defendant and he was charged with the murder of a white person and McCleskey therefore stated that he was being discriminated because of his race and because of his victims race. There is a study that backs McCleskey's argumentation: the Baldus Study. Abraham Davis and Barbara Graham argue in *The Supreme Court, Race, and Civil Rights* that: "In its broadest form, McCleskey's claim of discrimination extends to every actor in the Georgia capital sentencing process, from the prosecutor who sought the death penalty and the jury that imposed the sentence, to the State itself that enacted the capital punishment statute and allows it to remain in effect despite its allegedly discriminatory application."[110]

The Baldus study is a study conducted by David C. Baldus, who according to Kennedy, is "an expert in the application of statistics to legal problems."[111] For this study, more than two thousand murder cases were analyzed, as well as evidence of how state authorities had handled murders. For example, police reports, parole board records, prison files, etc. Of the findings of the Baldus study, three are of importance for the McCleskey case. Kennedy argues that "[f]irst, viewing the evidence on a statewide basis, Baldus found "neither strong nor consistent" evidence of discrimination directed against black defendants because of their race... In their argument to the Supreme Court, however, McCleskey's attorney's clearly subordinated the claim of race-of-the-defendant discrimination to the claim of race-of-the-victim discrimination."[112] A second finding of the Baldus study was that race of the victim was the most influential factor in capital sentencing, compared to other variables such as age, method of killing or strength of evidence for example. As Kennedy argues: "Applying a statistical model that included the thirty-nine nonracial variables believed most

[110] Davis & Graham, *The Supreme Court, Race, and Civil Rights*, 446.
[111] Kennedy, *Race, Crime and the Law,* 328.
[112] Kennedy, *Race, Crime and the Law,* 329.

likely to play a role in capital punishment in Georgia, the Baldus study concluded that the odds of being condemned to death were 4.3 times greater for defendants who killed blacks, a variable nearly as influential as a prior conviction for armed robbery, rape, or even murder."[113] The third finding that is of importance to the McCleskey case is that when a decision can go either way, race has a greater influence on the sentencing decision. With the most aggravated cases, usually the death penalty will be given regardless of race. With the least aggravated cases, it is the opposite, the defendant will usually be spared whether the defendant is black or white. As Kennedy argues: "Racial disparities are greatest in the middle range of aggravated homicides."[114] Since McCleskey's crime fell in the middle range, it is likely that his race has influenced the outcome of his trial.

McCleskey's attorney's argued that in his case, the Fourteenth Amendment's equal-protection clause had been violated due to the way Georgia applied its death-sentencing statute. Baldus, Woodworth and Pulaski argue that Georgia "purposefully discriminated against defendants who were black and defendants whose victims were white."[115] Kennedy argues that U.S. District Judge J. Owen Forrester rejected this claim because he refused to credit the Baldus study and believed it to be statistically invalid. The Court of Appeals for the Eleventh Circuit did assume the validity of the study, but did not agree with McCleskey's attorney's that McCleskey's constitutional rights had been violated. Kennedy argues that the Court of Appeals claimed that for this argument to stand, McCleskey had to prove race was a factor in decision making in his particular case. Justice Powell and the Supreme Court also shared this opinion. They stated that McCleskey had to prove that he himself was purposefully discriminated against on the basis of race during his trial. David Brody, James Acker and Wayne Logan argue in *Criminal Law* that "the justices assumed that the research study on which McCleskey relied was 'statistically valid'. Justice Powell's majority opinion nevertheless rejected the equal protection claim, reasoning that the statewide data showing the dramatic race-of-victim sentencing disparities did not support an inference that

[113] Kennedy, *Race, Crime and the Law,* 329.
[114] Kennedy, *Race, Crime and the Law*, 329.
[115] Baldus, Woodworth & Pulaski, *Equal Justice and the Death Penalty,* 311.

purposeful discrimination was operative in McCleskey's own case."[116] Brody, Acker and Logan further argue that the justices thought there was no proof that McCleskley's death sentence was the result of racial discrimination. The authors of *Criminal Law* do not agree with this however. They argue that "If professor Baldus' study is accepted at face value, it indicates that, after taking into account some 230 nonracial factors that might legitimately influence a sentencer, the jury more likely than not would have spared McCleskey's life had his victim been black."[117]

Warren McCleskey died in the electric chair in on September 25, 1991. Helen Prejean argues in *The Death of Innocents: An Eyewitness Account of Wrongful Executions* that: "The court not only ignored the consequences of the race studies, it did something worse: It legitimized racial discrimination in the application of the death penalty, declaring racial disparities "an inevitable part of our criminal justice system."[118] Warren McCleskey was guilty, there is no question of that. But, the Baldus Study has shown that if McCleskey would have been white, or if his victim would have been black, he probably would not have been sentenced to death. Even though the Baldus Study has proven that race plays a significant factor in capital sentencing, McCleskey's death warrant was not revoked. Though the study clearly demonstrates that black people are being discriminated in the American Justice system, and in particular in capital sentencing, McCleskey was still sentenced to death by a jury that was predominantly white.

[116] Brody, Acker, & Logan, *Criminal Law*, 158.
[117] Brody, Acker, & Logan, *Criminal Law*, 158.
[118] Prejean, *The Death of Innocents*, 214.

Conclusion

Even though most countries have abolished the death penalty, the United States still practices it. Abolitionist have tried to change this but have been unsuccessful thus far. The main reason abolitionists are trying to banish capital punishment, is that mistakes are made and that the death penalty is applied in a discriminatory manner. Statistics show that black defendants are overrepresented on death row. Their share on death row is approximately 35 percent, though the black population in the United States is less than 13 percent. Also, statistics show that a person convicted for murdering a white person is more likely to receive a death sentence than a person convicted for murdering a black person.

The discriminatory manner in which capital punishment is carried out in the United States has led scholars to compare this form of punishment with the lynchings that took place mainly in the South, at the end of the nineteenth and the beginning of the twentieth century. These lynchings were violent acts against suspected criminals and they were in large applied to black males. In this thesis I have examined whether this comparison is justified. I have tried to provide an answer to the question: Is capital punishment a form of legal lynching?

The answer is twofold. There are major differences between the two, mostly in the way they are carried out. But when scholars compare lynchings to the death penalty, they argue that the underlying currents and motives for both events are the same. As argued in Chapter 2, the Critical Race Theory by Delgado and Stefancic explains how one can see people of a different race, as different when it comes to personality, intelligence and moral behavior. People tend to classify their own race as normal and superior to other races. The way in which this translates to the study of lynching and capital punishment, is that white people feel superior towards black people, and feel justified in devaluating black life. This is also called white supremacy. As argued in Chapter 2, white supremacy was one of the main reasons why so many black defendants were subjected to lynchings. White communities felt they

needed to protect themselves against these black people, who they believed to be inferior and more violent. The lynchings came forth out of fear, hatred towards blacks, a desire to be in control and a feeling that white people were superior to black people. Since the purpose of this research is to examine if the comparison between lynchings and capital punishment is justified, these underlying currents for lynchings need to be present in capital punishment as well.

As argued in Chapter 2, there is a stereotypical view that black people are more violent and criminally inclined, when compared to law-abiding white people. This stereotypical thinking has its influence on the outcome of a capital trial. When a jury, consistent of mostly white people, has to decide on the fate of a black defendant, the stereotype of an immoral criminal black person can make them decide that the death penalty should be given. This stereotypical thinking is influenced by the media as well. As argued in Chapter 3, media coverage influences the public opinion of the defendants. In the Scottsboro case the details of the alleged rape were printed in local newspaper. Though the statements in these articles were false, the damage was done: The local community believed that the white girls were brutally attacked by the black men. This raised fear and hatred among the community, and resulted in the fact that the boys received the death penalty in every trial they had. Also, the jury in the Scottsboro trial was told that they needed to protect 'the sacred parts of the bodies of white women', a statement that shows that the community needed to protect itself from these violent, black criminals.

An underlying current of lynching was that a white community wanted to revenge its victims. As can be seen in the case of the Martinsville Seven, the trial was held in the same county where the rape had happened and this has could have influenced the trial as well. People in the community felt personally involved in this crime because it was one of their own who got raped. The jury consisted of white people only and they wanted the black men of the Martinsville Seven punished for their crime.

As explained in Chapter 3, the Baldus Study has shown that both race of the defendant and race of the victim have a significant influence of the outcome of a capital trial. In McCleskey's case, studies have shown that if his victim would have been black, he would

not have been given the death penalty. But McCleskey's victim was white and he was punished severely for this. As explained before, lynchings were often a tool of the white community to revenge white victims. This seems to be the case with McCleskey as well. A jury that consisted mainly of white people has decided that he should receive the death penalty for his act. Had his victim been black, the outcome of the trial could have been different.

When examining the cases described in Chapter 3, it seems that the underlying currents in lynching are present in capital punishment as well. The death sentences seem to have been given because all-white juries, with the exception of one black juror in McCleskey's trial, have decided over the fate of these black defendants. The death sentences were given because the white community had stereotypical racial views of the black defendants and saw them as more violent and criminal, as can be explained by the Critical Race Theory. This racist thinking leads to fear and hatred towards black people, and devaluation of black life. The white jurors in other words, felt superior towards the black defendants and their decision to give them the death penalty is an act that comes forth out of white supremacy. In the nineteenth and the first two decades of the twentieth century, the community would have revenged its victims through the means of lynching. In the cases discussed in this thesis however, revenge was sought through means of capital punishment.

Coming back to my main question: Is capital punishment a form of legal lynching? I would like to argue that this is a justified comparison. Though of course there are major differences between the two, the underlying motives for both events are the same. Lynching and capital punishment are a result of the superiority white people feel towards black people. This feeling of white supremacy leads to hatred and fear towards black people. These underlying currents were a main reason that so many black people were lynched in the nineteenth and beginning of the twentieth century, and so many black people were sentenced to death in capital cases in the second part of the twentieth century.

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