Introduction

*Bifurcated Justice in the Deep South*

On September 25, 1991, Warren McCleskey was executed in the death chamber at the Georgia Diagnostic and Classification Prison. The culmination of a 13-year litigation process that twice reached the United States Supreme Court, McCleskey’s closing moments were as chaotic and discomforting as many of the legal decisions that preceded his death. After a series of last-minute appeals were denied and his legal options exhausted, McCleskey—who at one point had been secured to the death chair only to be removed minutes later while his lawyers tried desperately to delay the execution—refused his last meal and made a final statement: “I pray that one day this country, supposedly a civilized society, will abolish barbaric acts such as the death penalty” (Applebome 1991:A18). With the Georgia Department of Pardons and Parole having denied a clemency petition and the Supreme Court rejecting one final request for a stay, Warren McCleskey was “strapped into the electric chair, electrodes attached to his skull and a final prayer read. . . . A minute later the execution began, and he was pronounced dead at 3:13 [a.m.]” (Applebome 1991).

This book chronicles the journey of Warren McCleskey from an innocuous criminal to the symbolic figure whose legal plight and execution underscores the lingering racial and socioeconomic inequalities endemic to capital punishment in the United States. The modern death penalty as it
exists in the United States has been inexorably shaped by the state of Georgia and the Supreme Court decision in McCleskey v. Kemp (1987)—the legal ruling at the heart of this story—which affirmed institutionalized racial disparities as acceptable components in a functioning capital punishment system. Despite the gravity of Warren McCleskey’s case, he has become an obscure figure in the decades since his death. Yet McCleskey v. Kemp sheds important light on the unwillingness of the judiciary to meaningfully address inequity in the justice system. Although the proverbial color line is deeply embedded in Georgia’s legal institution—serving as a powerful predictor of wrongful conviction and disproportionate sentencing—the Supreme Court in McCleskey chose to overlook compelling empirical evidence revealing the discriminatory manner in which the assailants of black Americans are systematically undercharged and the aggressors of white victims are far more likely to receive a death sentence.

Warren McCleskey might seem like an unlikely candidate to expose the frailties and failures of U.S. capital punishment. He was hardly someone who could be cast as a sympathetic figure, having had a string of arrests prior to that fateful day on May 13, 1978, when he and three accomplices—Ben Wright, David Burney, and Bernard Depree—arrived at the Dixie Furniture Store in Atlanta, Georgia, with the intention of committing armed robbery. As McCleskey entered through the front door and secured the area by forcing anyone present to lie face down on the floor, the others came through a loading dock in the rear of the store, where they searched the premises for cash. Although the robbers tied up all of the employees and customers—even threatening to kill anyone who moved—one had already managed to trigger the silent alarm; police were quickly dispatched to the scene. Officer Frank Schlatt, a five-year veteran on the Atlanta police
force, was the first to respond, parking his patrol car near the store and entering through the front door. According to court records, McCleskey noticed Schlatt arrive and quickly hid behind a couch on the showroom floor. As Schlatt maneuvered his way down an aisle in the middle of the store, McCleskey allegedly leaped up and fired two shots in Schlatt's direction. The first struck the 30-year-old officer in the head, causing his death; the second ricocheted off a cigarette lighter in the left chest pocket of Schlatt's uniform. As McCleskey and his accomplices fled the scene, Officer Schlatt fell to the floor into a pool of his own blood; he was pronounced dead several hours later. McCleskey was eventually arrested for Schlatt's murder a few weeks later, after being apprehended for an unrelated crime (McCleskey v. Zant, 580 F. Supp. 338, 345 (1984)).

It did not take long for the authorities to pinpoint McCleskey as the perpetrator in Officer Schlatt's murder. Two employees of the Dixie Furniture Store identified McCleskey as the robber who had entered through the front door. Although McCleskey's defense attorney, John Turner Jr., offered an unsubstantiated alibi defense during trial (Zant, 580 F. Supp. at 346), McCleskey in his confession statement to police never disputed the fact that he had participated in the crime but adamantly denied being the gunman who had shot and killed Officer Schlatt (see Kirchmeier 2015). Nevertheless, jurors were confronted with damning evidence of McCleskey's guilt: "One of his accomplices, Ben Wright, testified that McCleskey admitted to shooting the officer. A jail inmate housed near McCleskey testified that McCleskey made a ‘jail house confession’ in which he claimed he was the triggerman. The police officer was killed by a bullet fired from a .38 caliber Rossi handgun. McCleskey had stolen a .38 caliber Rossi in a previous holdup" (McCleskey v. Kemp, 753
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F.2d 877, 882 (1985)). The jury of 11 whites and one African American ultimately found McCleskey guilty of first-degree murder and two counts of armed robbery.\(^2\) We may presume that the murder conviction was at least partly influenced by the testimony of accomplice Ben Wright and the jailhouse informant, Offie Gene Evans, both of whom told jurors that McCleskey was the lone gunman, and Wright’s claim that McCleskey had in his possession a .38 caliber silver pistol that matched the bullet used to kill Officer Schlatt (Kirchmeier 2015). Yet not all of the evidence presented during trial was conclusive. Two of the Dixie employees had seen McCleskey enter the store, but neither could identify him as the shooter; and while the gun used to kill Officer Schlatt was linked to McCleskey, it was never found by police and could have been fired by any one of the four offenders present at the time of the crime. In fact, during cross-examination by Turner, Ben Wright admitted to having a .38 caliber revolver, and “when police arrested Wright’s girlfriend, she claimed Wright carried a .38 and McCleskey carried a .45 weapon” (Kirchmeier 2015:22).

None of this is meant to suggest that McCleskey was wrongly convicted, as there was compelling evidence that he did, in fact, fire the bullet that killed Officer Schlatt. Some readers may even wonder why anyone should focus on such a seemingly unsympathetic figure at the risk of trivializing the death and memory of Frank Schlatt, a respected Atlanta police officer, husband, and father whose friends and family are undoubtedly as pained today by his loss as they were in the immediate aftermath of his murder. In truth, this book could be about any one of a number of death-row inmates whom most people have never heard of and whose stories of innocence or guilt do not even register in the public consciousness. But the costs and consequences of the death pen-
alty exist beyond the relative value (or lack thereof) of any single person. Instead, we must place capital punishment in historical context in order to better understand how Warren McCleskey’s particular experience is neither unique nor constitutionally acceptable regardless of whether he was actually guilty of the crime for which he was executed.

Slave Codes, Black Codes, Jim Crow, and Then McCleskey

The murder of a white police officer was a grievous offense that hit squarely in the face of expected racial etiquette in the Deep South and singled out Warren McCleskey as a black man in need of killing. The crime itself also reflected the historical bifurcation of justice administration—one for whites and another for nonwhites—inherent to the sentencing system in Georgia, as argued by McCleskey’s appellate counsel, Jack Boger:

If the State of Georgia had criminal statutes that expressly imposed different penalties, harsher penalties, on black defendants simply because they were black, or on those who killed white victims, simply because those victims were white, the statutes would plainly violate the Constitution. There was a time, of course, when the State of Georgia did have such statutes, before our nation’s Civil War, when free blacks and slaves alike could be given a death sentence merely for the crime of assault on a Georgia white citizen. With the ratification of the Fourteenth Amendment, such criminal statutes came explicitly no longer to be written. Yet the old habits of mind, the racial attitudes of that time have survived, as this Court well knows, into the current century. Today, we are before the Court with a substantial body of evidence indicat-
Boger’s point is that Georgia’s contemporary implementation of capital punishment reflects a continuation of historical attitudes that preceded the Civil War and persist, albeit often unconsciously, “in the minds of prosecutors and jurors” (Poveda 2016:24). The racial beliefs in question reflect a social arrangement tasked simultaneously to protect the lives of whites and to discipline African Americans in the traditional fashion as slave and black codes had operated in the antebellum and Reconstruction periods, respectively. Since the slave-owning colonies were largely arranged along the Atlantic and Gulf of Mexico coastlines, they were adjacent to ready supplies of marketable slaves from the Caribbean Basin and South America, from which millions of slaves were absorbed into the U.S. South.

The ideology and practice of human servitude was a notion prominent in Western civilization since ancient Greece, where its ideal type was socially and politically dead chattel, forcibly removed from kith and kin, bought and sold as one would livestock, with no rights, manners, or thoughts that free citizens were wont to respect. Slaves in Greece and Rome were numerous and vital as agricultural labor engines (familia rustica) but also functioned as educators, managers, physicians, publicans (servus publicus), and helots. In Rome, slaves were often debt bondpeople who worked off their debts and bought their freedom. Epictetus the Stoic was a slave. Aesop was a slave. Seneca advocated for the humane treatment of slaves, which probably influenced Emperor
Nero’s directive that courts receive complaints against unjust masters (Cobb 1858; Stephens 1997), and Antoninus Pius mandated owners who killed their slaves “without cause” to be tried as murderers (Hunt 2018:204). Although there was great variance in the potential life chances of the enslaved, it is widely recognized that slavery was an institution of economic necessity in the Roman Empire.

U.S. slaveholders were keenly aware of slavery’s importance to their own economic well-being, but that fact was the only commonality that the U.S. institution retained as a remnant of the classical world. White southerners perhaps wished to think of slavery in their instance as distinct from that of Greece or Rome, but it was no less harsh and deeply dehumanizing. As the numbers of bondpeople grew with imports from Africa before 1808 and the slave stock realized a natural increase, the U.S. South recognized a need for legal structures governing the control and punishment of slaves, a status increasingly identified with blackness by 1680 and exclusively tied to race by 1700. The governing acts known as slave codes were essentially black slave codes. The Commonwealth of Virginia, being England’s first colony established in North America and the first to import slaves, was a template for many slave codes written later. Although the codification of legal guidelines for slavery seemed to legitimate its existence, more than a few Virginians, even slave owners such as Thomas Jefferson, harbored personal distain of slavery, wished to abolish it, and blamed South Carolinians, Georgians, and some well-placed New Englanders for the stubborn resistance on behalf of slavery when the American Revolution began (Waldstreicher 2009). With the victory of Washington over Lord Cornwallis at Yorktown in 1781, slaves were often considered spoils of war. The British had promised freedom to any slave who took arms against rebels (i.e., their masters), so when the war ended, slaves were
considered emblematic of tyranny and far from any sentiment leading to freedom.

In the ensuing decades, Georgians were securely in favor of slavery and backed the sectionalist parties that it spawned, in part because of their geography, which was located away from any border with a potentially hostile northern state. Jefferson in the final decades of his life implored Virginians to abolish slavery because if a sectional war over it occurred, Virginia would be a battleground in such a conflict. He was correct. His warnings should have been overheard in Georgia. Nevertheless, Georgians were pleased with the Constitution, which protected slavery, and voted to accept it unanimously (Waldstreicher 2009). The geographic center of the black population in bondage was in Georgia and further concentrated in the Deep South, which not coincidentally was also the epicenter of lynching in the decades to come (Klein 1971). The pattern of sentiments pertaining to slavery in Georgia and throughout the Deep South was one of deepening severity punctuated by periods of crisis when rules were liberalized. During the Revolutionary War, when there was an attempt to reconcile slaves to the emerging confederation of states, and in the Civil War, when a movement for humanitarian reform emerged within the Confederacy (Genovese 1972), there were periods of reprieve from the humiliation and cruelty that characterized the day-to-day life for those who were in bondage.

Aside from the haphazard living conditions, precarious family attachments, and rather perilous personal circumstances of black bondpeople, they had considerable value as regenerative commodities in which investments might appreciate in a microeconomic sense. They provided a macroeconomic benefit as well. The great compromise realized by the installation of the three-fifths clause ensured that taxa-
tion would be eased with the addition of slaves to the census and also promised faster and wider expansion into the western territories (e.g., Alabama, Tennessee, Kentucky, and Mississippi). The lands acquired in 1804 beyond the Mississippi River in the Louisiana Purchase and on into the Mexican Cession after 1848 presented a potential for slavery’s expansion that both awed and alarmed abolitionists, most of all in its promise to create a political imbalance in the Congress built around a market in human beings.

Slave Laws of 1682

Considering the large numbers of slaves relative to whites—by 1700 slaves were almost entirely blacks from Africa, the Caribbean, or South America—it seems logical that owners and planters, as well as transporters, wholesalers, and marketers of slaves, would be anxious to regulate their behaviors and relationships with white free populations, as well as settle the uncertainties of people-property in southern society. Although the first Africans brought to North America were considered indentured servants (in that they had a term of service that elapsed), by 1640 those who were imported were considered bondpeople for life and their children the same. Several conventions regarding the keeping of servants and the maintenance of institutional slavery emerged over the period between 1640 and 1682:

- 1662: Children born to black slave women were bonded to their owner.
- 1667: Baptizing slaves as Christians did not alter a slave’s status or that of her children.
- 1669: An owner who killed a disobedient slave would not be tried for committing a felony.
• 1670: Free blacks and Native Americans were prohibited from buying slaves or indentured servants. This rule lapsed, and many Native Americans who owned land were encouraged by European colonists to purchase slaves and participate in the slave trade (Onion 2016).  
• 1680: Slaves were prohibited from carrying weapons and could not leave their owner’s plantation without a written pass.  
• 1682: No master or overseer could permit another person’s slave to remain on his or her plantation for longer than four hours without the permission of the slave’s owner.  
• 1691: If a white man or woman married a black person, mulatto, or Indian, he or she was banished from Virginia and later from Georgia, Florida, and Alabama.

In large part, the rules accompanying slavery grew more rigid and covered every aspect of a slave’s life: “Given this background, the legislation of the nineteenth century would prove in many ways even more detrimental to slave rights than all the preceding enactments of the slave code. For these codes assumed that the Negro was an inferior being, and to maintain him in his docility and obedience, denied him every possible access to independence and avenue for self expression” (Klein 1967:54–55).

Slavery, if not bogged down by sentiment or encumbered by affection or sympathy, could be lucrative, as a slave, both as a unit of labor and as a reproductive entity, held great value (see Genovese 1972). It was necessary to view slaves as entities of production and shares of investment. Living conditions suffered in such an environment. Although the slave codes allowed considerable latitude in regard to conditions under which slave owners might utilize their property—Georgia’s
not being exceptional among them—legal bifurcation usually worked to the disadvantage of bondpeople, in that drivers and masters were negligent, pitiless, or, in more instances than decent people wish to acknowledge, sadistic. However, the codes also allowed slave owners to dictate circumstances under which their property could be used in their absence or held after their deaths. Although uncommon, owners occasionally left explicit instructions for the care and conditions under which a favorite slave could serve, where and with whom particular slaves might be quartered, and what sort of work they might be tasked to complete (Stampp 1956). More often, codification of traditional slavery practices in Georgia as well as in other states spoke to the intrinsic and potential economic value of slaves and the necessity of preserving their life and limb when at all possible.

When slavery and the market for slaves were abolished following the Civil War, both the potential value and the need to protect slaves vanished. Freedpeople were surplus labor existing in an imposed state of ignorance, in large part as a result of slave codes that prohibited even the most rudimentary education, forbade any travel or even passive knowledge of the world, and deprived them of any historical or family legacies outside of superstitions and folklore. It is difficult to bring to mind any one group of people so abruptly thrust on the world in such unprepared, unprotected, and thoughtless circumstances. Freedpeople experienced a reception characterized by violence and terrorism that is comparable to some of the worst examples of human cruelty on record. The treatment of black Americans from the end of Reconstruction through the waning of the civil rights movement is an exemplar for social regression. When Europeans were realizing a rationalization of punishments,
transitioning away from spectacles of cruelty that functioned as both social control and a form of entertainment to the gentler way of punishing through the use of incarceration, rehabilitation, and social hygiene (see Foucault [1977] 1995), black Americans experienced a regime of race-based terrorism so deeply rooted that it marked families indelibly and constructed a gulf of separation so deep that it remains a sore subject today.

The colony of Georgia was ambivalent about the presence of slaves and suspicious of slave trading to a degree that during the 1700s, colonial authorities banned the institution, eventually settling on a slave economy that also became the destination for English, Irish, and Scots exiled from the British Isles. In turn, Florida adopted most of Georgia’s code; Alabama similarly embraced it in 1833. All of those included the following provisions:

- Slaves were forbidden to leave the owner’s property unless accompanied by a white person or with written permission. In the event a slave left his or her owner’s property without permission, every white person was required to chastise them, capture them, or at least report their whereabouts to the civilian posse.
- Any slave attempting to run away and leave the colony (later, the state) received the death penalty, although it was rarely exacted on the offender.
- Any slave who evaded capture for 20 days or more was to be publicly whipped for the first offense, branded with an “R” on the right cheek on the second offense, lose one ear if absent for 30 days on the third offense, and castrated on the fourth offense.
- Owners refusing to abide by the slave code were fined and forfeited their slaves.
• Slave homes were subject to be searched intermittently for weapons, reading/writing materials, or plans for insurrection. Punishment ranged from loss of an ear, branding, and nose slitting to hanging after a repeat offense.
• Although frequently rented out to reliable businesspeople, slaves could not be clerks or work in any capacity that required finer clothing. The fear was that they would be taken for freedpeople.
• Alcoholic beverages were prohibited to slaves.

There were laws punishing whites for harming their slaves, but these were rare and haphazardly enforced or easily avoided. One of the truest forms of legal bifurcation was rape laws in the South. They embodied a race-based double standard that permitted slave women to be victimized at will, while male slaves were sanctioned on the single word of a white accuser; and whereas white men could rape female slaves with relative impunity, black men accused of rape were put to death during the antebellum period.

Black Codes and Bifurcated Justice

It stands to reason that the openly racist bifurcations in antebellum law were manifested and supported by governmental and legal institutions. Still, the Reconstruction decades following the Civil War witnessed changes in Georgia law that effectively created second-class citizenship for black Americans and permitted the erection of a segregated society with a multitiered criminal justice system. After the Civil War, white southerners moved quickly to eliminate black people’s newfound freedom. In order to do this legally, the legislatures of the former Confederate states passed new laws that appeared, on the surface, to be neutral and fair to all races
but were actually designed to repress black people. At the outset of Reconstruction, these laws were called Black Codes because of their similarity to the slave codes that they sought to replace. It is important to remember and continuously recall that racial segregation was not a new thing in Georgia. Antebellum slavery fixed the status and circumstance of most black Americans (whether free or in bondage), leaving little need for statutory measures segregating the races. This pre-Reconstruction slave caste did not survive and was replaced by post–Civil War Black Codes that outraged some people in the North because it seemed that the southern states were creating a form of quasi-slavery to negate the results of the war. After winning large majorities in the 1866 elections, the Republicans put the South under military rule. They held new elections in which freedmen could vote, suffrage was expanded to poor whites, and all the postwar Black Codes were repealed. Moreover, the 14th Amendment’s Equal Protection Clause and extension of due process to state jurisdictions ensured that Black Codes could not reappear in southern lawmaking (Litwack 1998).

By 1877, however, new legislation effectively narrowed the civil rights and liberties of black Americans to circumstances very similar to the conditions of bondage that existed before emancipation. When Union forces that had been occupying Georgia for 12 years left the South following the inauguration of Rutherford B. Hayes as president in March 1877, white Georgians reenacted every aspect of the former Black Codes. The legislation was intended to continue the traditional disparate treatment of black persons, who were excluded from public education, could not vote or serve on juries, and were cut off from professions that potentially might serve whites, including medicine, law, and civil service positions. Even
though discriminatory laws against blacks existed in both northern and southern states from the early 19th century, the term “Black Codes” specifically referred to laws passed by southern state legislatures at the end of the Civil War to control the labor, social behavior, civic participation, and movement of freedpeople. Reflecting the unwillingness of white southerners to accept blacks as equals, the codes reaffirmed the inferior position of freedpeople by establishing a legal system that underscored the color line separating whites and blacks.

These discrepancies were further emphasized following the Supreme Court’s decision to uphold the constitutionality of state laws mandating racial segregation under the doctrine of separate but equal in *Plessy v. Ferguson* (1896), which inspired the ratification of Jim Crow throughout the South. In Georgia, Jim Crow laws were seen as effective tools for controlling freedpeople; and while they were oppressive, they did not address—and by default guaranteed—certain rights, such as legalized marriage, ownership of property, and some access to the courts. However, black Americans could not testify against whites, serve on juries or in state militias, carry knives or firearms unless they were licensed, and vote. Some laws also declared that those who failed to sign yearly labor contracts could be arrested and hired out to white landowners. Several states limited the occupations open to black Americans and barred them from acquiring land, and others provided that judges could impose heavy sentences on black men. Furthermore, black vagrants were fined heavily and, if they could not pay the sum, were hired out to service until the claim was satisfied. The laws were tested initially in *Breedlove v. Suttles* (1937), in which the High Court ruled that a Georgia poll tax permitting the state to disenfranchise
black voters was constitutional. W. E. B. DuBois ([1935] 1992) commented that these Jim Crow–era Black Codes had been enacted to “keep the Negroes in their positions and reduce the numbers of beggars and thieves” (167).

The supposed deficits of black citizens in intellectual, moral, and civil sensitivities were such that many Georgians felt that one uniform code for all persons, white and black, could never be realized (see Talmadge 1955). That opinion prevailed among a vast majority of white Georgians for a century, institutionalizing segregation and permitting unequal subsystems of education, health care, religion, and, importantly, criminal justice that promoted the interests of whites over blacks. Similarly, civil authorities turned a blind eye to white vigilantism intended to discipline, terrorize, and de-moralize black Americans. These circumstances thrived until the late 1960s, when federal intervention enforced a number of civil rights mandates striking down state laws and municipal ordinances outlawing miscegenation and segregating schools, public facilities, and transportation. Nonetheless, the Supreme Court’s decision to allow Georgia to resume executions following *Gregg v. Georgia* (1976) and later to deny relief in *McCleskey v. Kemp* (1987) ignored clear statistical evidence that the civil and legal bifurcations of segregated, Jim Crow Georgia were still a reality.

This was precisely the argument put forth by Warren McCleskey’s lead counsel, Jack Boger, in stating that Georgia’s capital system functions “as if some of those old statutes were still on the books” (*McCleskey*, No. 84-6811, at 1:07). The troublesome nature of the Court’s legal reasoning in *McCleskey*, which is chronicled throughout the book, underscores the undeniable reality that capital punishment has borne a close resemblance to lynching in Georgia, where more extralegal executions of black Americans occurred than in any
other state. “The merger between the two is the phenomenon known as legal lynching,” according to the historian William S. McFeely (1997), who points out that “as killings outside the law declined in the twentieth century South, the infliction of the death penalty by the courts increased.” The well-documented existence of pervasive racial disparities in various phases of the capital punishment process is part and parcel of the Court’s logic in the McCleskey ruling and locates that case in the great and ongoing struggle for ideological ascendancy on issue of race in the United States. As we shall see, the Supreme Court disregarded the detailed and peer-reviewed statistical evidence of disparate treatment of black Americans in Georgia presented by McCleskey’s lawyers, choosing instead to send the message that overt forms of disparity were no longer permitted but less tangible techniques of institutional racism would be tolerated. Notwithstanding that the state of Georgia was caught red-handed applying its laws in a fashion that had always been regarded as discriminatory, the Court effectively “immunized the criminal justice system from judicial scrutiny for racial bias” (Michelle Alexander, on Bill Moyers Journal 2010).

Decades later, the McCleskey decision continues to underscore the lingering racial, socioeconomic, and gendered inequalities endemic to U.S. capital punishment and profoundly reflects the character of our justice system more generally. The case is so important that the distinguished legal scholar Anthony Amsterdam described the ruling as “the Dred Scott decision of our time” (Liptak 2008); and the New York Times labeled it as one of the more troubling Supreme Court rulings of the late 20th century: “Confronted with powerful evidence that racial feelings play a large part in determining who will live and who will die, the Court . . . effectively condoned the expression of racism in a profound
aspect of our law” (Lewis 1987:A31). This duality in justice administration situates Warren McCleskey’s behavior as the black assailant of a white man in relation to both the dominant racial discourse and legal environment that are fundamentally relevant in understanding how the ultimate punishment functions for defendants, for victims, and within the U.S. justice system as a whole.