

**WORKING AGAINST THE PAST:
THE FUNCTION OF AMERICAN HISTORY OF RACE
RELATIONS AND CAPITAL PUNISHMENT IN SUPREME
COURT OPINIONS**

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INTRODUCTION

Memory of the past permeates criminal trials. This is particularly true in capital cases. In such cases, the history of capital punishment in America is ever-present, inevitably intertwined with a history of race relations.¹

Physical trappings of the past can be found in courtroom paraphernalia. A history professor, for example, took the stand in Georgia to recite a history of the Confederate battle flag and racial violence in the South to support the argument that a black defendant, sentenced to death in a courtroom where the flag was displayed, was not given a fair trial.² History finds its way into sentencing. A defendant's background and victim impact statements provide frameworks for sentencing. When the jury deliberates, long-standing biases and prejudice may persist.³ It is unsurprising, therefore, that

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1. See generally Stuart Banner, "Traces of Slavery: Race and the Death Penalty in Historical Perspective," in CHARLES J. OGLETREE, JR. & AUSTIN SARAT, FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 96 (2006).

2. WILLIAM S. McFEELY, PROXIMITY TO DEATH 31 (2000).

3. David B. Wilkins, *Straightjacketing Professionalism: A Comment on Russell*, 95 MICH. L. REV. 795, 808 (1997) ("Three hundred years of demonizing black male sexuality has left its mark on the consciousness of many whites, particularly in cases involving white women.").