

**SENSIBLE POLITICS**

**THE VISUAL CULTURE OF NONGOVERNMENTAL ACTIVISM**

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Still from Liz Garbus's *The Execution of Wanda Jean* (2002).

## Envisioning Abolition: Sex, Citizenship, and the Racial Imaginary of the Killing State

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For most of its history, the academic literature on the U.S. system of capital punishment has concerned itself with policy analyses of death penalty law and its administration. In recent years, however, the traditional policy paradigm has been supplemented (if not displaced) by scholarly investigation of the *cultural* register of death penalty jurisprudence and the regime of “state killing”<sup>1</sup> of which it is a part. At the center of this “cultural turn”<sup>2</sup> in death penalty scholarship is an interest in the symbolic dimension of capital punishment. In the words of one of its most accomplished proponents, the cultural study of the death penalty attends to the ways in which the death penalty “create[s] social meaning and thus shape[s] social worlds.”<sup>3</sup>

If the death penalty is part of a larger cultural imaginary that it helps shape, contemporary advocates for the abolition of the death penalty cannot hope to transform our national conversation about race and capital punishment without first taking the full measure of the *cultural* challenge that the abolitionist movement faces. That challenge, in a word, is this: because the death penalty serves important symbolic functions in the wider culture of the twenty-first-century United States, the continuing, if conflicted civic consensus in favor of state killing is no longer responsive (if it ever was) solely to the logic of the better argument and the persuasive power of empirical proof. If we are honest with ourselves, we have to reckon with the fact that the current terms of the discourse of civil society in this country on race and the death penalty throw us up against the limits of liberal political legalism, with its faith in the well-ordered rhetoric of reason and rule-governed rationality, and above all, in the American political theology of individual constitutional rights.

The popular American discourse on the death penalty operates through cultural mechanisms that do their work at the level of the unconscious, or more specifically, at the level of what might be called the “racial unconscious.” If we are to

envision abolition of the death penalty, what we need, then, is a critical conceptual vocabulary that places the cultural phenomena of racial desire and racial fantasy at the heart of popular American discourse on capital punishment.

To work toward that end, this essay examines the production and circulation of cultural “meanings and symbols and representations”<sup>4</sup> in the capital case of Wanda Jean Allen. Allen, poor, black, mentally impaired, and lesbian, was put to death by the State of Oklahoma on January 11, 2001. The essay pursues two overlapping concerns. The first is an interpretive account of the trial and appellate records in Allen’s case, together with a documentary film about the final three months of her life, *The Execution of Wanda Jean*.<sup>5</sup> I argue that the project of social meaning and social world making in the Allen case proceeded largely through the state’s strategic manipulation of the psychic or “subjective side of social relations,”<sup>6</sup> above all through the deft, unspoken appeal to fantasy and the mobilization of the politics of racial and sexual enjoyment.

The essay’s other mission is methodological. Here, I advance the following propositions. First, the Allen case demonstrates the limits of the “rationalist” or “reformist” understandings of and arguments against capital punishment that have thus far characterized the cultural study of the death penalty. Second, a critical cultural analysis of the “irrational rationality” of the death penalty system should be seen as a crucial task for those of us who are trying to map the complex relationship between race and state killing at the beginning of the twenty-first century, a moment some have argued will be remembered as the dawn of a new era of “postracial” racism. Between and alongside these two, I develop a third argument, which has to do with the productive possibilities of staging an encounter in this theater of analysis between critical race theory, queer theory, and a political conception of psychoanalytic theory.

On December 2, 1988, Wanda Jean Allen shot her lover, Gloria Leathers, during an argument in the parking lot of a suburban police station just outside Oklahoma City, Oklahoma. Four days later, Allen was arrested in connection with the shooting. Shortly afterward, Gloria Leathers died from her wounds. Allen was eventually tried and convicted under Oklahoma law of murder in the first degree and the felonious possession of a firearm after former conviction of a felony. After deliberating for only two hours, the jury recommended that Allen be sentenced to death for the murder of Gloria Leathers and given a ten-year prison sentence for the felonious possession of a firearm. After exhausting her state and federal appeals, Allen sought and was denied clemency by the Oklahoma Pardon and Parole Board. On Thursday, January 11, 2001, Allen was killed by lethal injection at the Oklahoma



Still from Liz Garbus’s *The Execution of Wanda Jean* (2002).

State Penitentiary in McAlester. Wanda Jean Allen was the first woman to be executed by the State of Oklahoma and the sixth woman to be executed in the United States since the administration of the death penalty was resumed in 1977. Allen was the first black woman executed in the United States since 1954, the year the U.S. Supreme Court rendered the landmark *Brown* decision, a fact that, as I will argue, should not be ignored.

In the briefs filed with various courts during the appellate process, a number of arguments were offered on Allen’s behalf. Relying on evidence that Allen had been found as a teenager to have an IQ of 69, Allen’s counsel argued that she was mentally retarded and thus unable to control her actions. The appeals briefs charged, further, that her trial attorney, who had never represented a client in a capital case, had improperly been forced to remain on the case despite his request to have competent counsel appointed. Finally, Allen’s appellate counsel argued that her initial conviction and the jury’s recommendation of the death penalty at the sentencing hearing were the result of prosecutorial misconduct. The briefs placed particular emphasis on what they characterized as the prosecution’s continual “distortion” of evidence regarding the relationship between Allen and Leathers, who had met and become lovers while they were both serving time in prison. These distortions, argued Allen’s lawyers, included the depiction of Wanda Jean as the “dominant”

person in the relationship, testimony by Gloria Leathers's mother that Allen was the "man" in the relationship, the introduction of testimony about greeting cards Wanda Jean had given Gloria on which she had signed her name "G-e-n-e" and other characterizations that, in the words of Allen's counsel, "unduly emphasized that [Allen] was engaged in a homosexual relationship with Leathers" and "tended to humiliate [Allen] in the eyes of the jury."<sup>7</sup>

The tone of Oklahoma Court of Criminal Appeals was typical of the opinions issued by both the state and federal courts that reviewed Allen's conviction. After stating that the first issue before it was "whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor,"<sup>8</sup> the Court of Criminal Appeals concluded, *inter alia*, that the lower court committed no error in allowing presentation of "evidence [that Allen] was the 'man' in her homosexual relationship with the decedent . . . It was used to show [Allen] was the aggressive person in the relationship, while the decedent was more passive." In the words of the presiding judge, "The evidence would help the jury understand why each party acted the way she did both during the events leading up to the shooting and the shooting itself . . . Under these circumstances, its probative value was not substantially outweighed by its prejudicial effect . . . and the evidence was properly admitted."<sup>9</sup> The Court of Criminal Appeals did not address the argument of the lone dissenting opinion, which took exception to the notion that

the majority finding the appellant was the 'man' in her lesbian relationship has any probative value at all. Were this a case involving a heterosexual couple, the fact that a male defendant was the 'man' in the relationship likewise would tell me nothing. I find no proper purpose for this evidence, and believe its only purpose was to present the defendant as less sympathetic to the jury than the victim.<sup>10</sup>

In *The Execution of Wanda Jean*, an assistant Attorney General for the State of Oklahoma, Sandra Howard, defended the verdict and sentence imposed on Allen. After summarizing Oklahoma law on the concept of premeditation, Howard offered the following remarks about Allen:

Wanda Jean was just a very domineering person. Their relationship was very turbulent over the years. Police had been called out numerous times and, you know, there was really no doubt from the testimony at trial that Miss Allen was the dominant person in the relationship. The state introduced into trial two different cards that Wanda Jean had sent to Gloria that were very threatening. One of them looks very innocent on the front, shows someone talking about, you know, being in Wanda's prayers and says also, you're also in most of my confessions. But then Wanda Jean puts the P.S. on the card, "I'm the type of person who will hunt someone down I love and kill them. Do I make myself clear Gloria?" and it's signed "Gene." And then

a second card shows a gorilla on the front, it says, "Patience, my ass, I'm gonna kill something" and when you read the back, Wanda has written to Gloria, "Try and leave and you'll understand this card more. Dig, for real, no joke. Love, Gene" and she signed it "G-E-N-E," Gene. Wanda would sign her name sometimes sign "G-E-N-E." That's when she considered herself to be the male figure in the relationship, if there is such a thing in these types of relationships.<sup>11</sup>

Media accounts, particularly in the gay and lesbian press, seized on Allen's case as evidence of a pattern in capital prosecutions of men and women who are gay or lesbian. In this perspective, the conviction and sentencing of Wanda Jean Allen are a blatant example of homophobia in the criminal justice system generally and in capital cases specifically. In a representative article entitled "Queer on Death Row," journalist and social critic Richard Goldstein lists the Allen case as one of a number of recent capital murder convictions of gay men and lesbians in which "stereotypical beliefs about homosexuals . . . may have sealed their fate."<sup>12</sup>

Although Goldstein concedes that "race, class, and reduced mental capacity all play a major role in capital punishment," the heart of his discussion of Wanda Jean Allen centers on the ways in which "Allen's sexuality was never far from the case."<sup>13</sup> While I agree that the Allen prosecution is a textbook example of the legal uses of homophobia in capital murder cases, I also believe that a standard "lesbigay studies" (to use a term coined by William Eskridge, Jr.) perspective minimizes or risks altogether ignoring another, equally meaningful aspect of the case. This is the obvious, though unacknowledged, significance in the Allen prosecution of race and racism, which, if we hope to understand it, demands a more complex interpretation of the case than is possible through the language of lesbian and gay studies. However, what I have said about the limited value of a conventional lesbigay studies framework also holds true for any approach to the Allen case that uncritically relies on standard post-civil rights understandings of race and racism in U.S. death penalty law. Racial inequality is alive and well throughout the criminal justice system: in the composition of the bench and prosecutorial bar, in the demographics of grand and petit juries, and in the incidence and severity of punishment. Nonetheless, the now regnant ideology (both in and outside the courts) that racism may be said to exist only when consideration of race is explicit and purposeful (and not always then) has all but knocked the political wind out of standard race-based critiques of the criminal justice system, generally, and the administration of the death penalty, in particular.

Given the enfeebled state of the mainstream discourse, then, we can expect little traction in a simple shift of critical attention from something called "sexuality" or "sexual orientation" to something called "race" or vice versa. The intellectual challenge, rather, is to think the questions of race and racism raised by the case around, or, if you prefer, *inside* the axes of sex, sexuality, and sexual orientation.

In the words of Wahneema Lubiano, we might say that the story of Wanda Jean Allen's trial and execution is a story of the "places where race no longer talks about race" precisely and paradoxically by talking about it through something else and elsewhere. "What," asks Lubiano, "might race help us think about that race does not name, but to which it is nonetheless connected?"<sup>14</sup>

Jacques Derrida once famously argued that there is "no racism without a language. The point," he goes on to insist, "is not that acts of racial violence are only words but rather that they have to have a word."<sup>15</sup> My question is this: Does that "word" have to be the word "race"? Are there circumstances in which racial meaning making takes place through recourse to other words or, indeed, through the language of image and symbol, without the use, that is, of any words at all? What does the Allen case tell us about the ways in which race and racial representation figure in the U.S. legal and political discourse on capital punishment in our putatively "postracial" age?

#### THE RACIAL IMAGINARY

The interpretive strategy toward which I am gesturing is suggested in part by Paul Kahn in a brief, but brilliant polemic, *The Cultural Study of Law*.<sup>16</sup> Kahn's stated goal is to outline the program of a scholarly legal method that abandons the reformist ambitions that have historically guided the practice of legal criticism. "The legal academic is the captive of law. If a discipline is to emerge that actually studies law as an object for theoretical description and elaboration, the scholar must first free herself from the law."<sup>17</sup> Kahn issues a call for legal scholarship that undertakes the systematic study of the language and logic of "law's rule." This "cultural discipline of law" aims to elaborate the "genealogy" and "architecture" of law whose chief object is a critical understanding of the "legal imagination": "To understand the power of law," Kahn argues, "we must stop looking so much at the commands of legal institutions and start looking at the legal imagination."<sup>18</sup>

Kahn's urged investigation of the "legal imagination" is provocative and potentially productive. Nonetheless, a thick description of the implication of law and culture in the trial of Wanda Jean Allen demands a more radical and a more radically interdisciplinary understanding of what we mean by the idea of "imagination" than Kahn himself provides. The cultural study of how legal actors and institutions "imagined" the trial and execution of Wanda Jean Allen must find a language to describe the burden of representation that was borne in the Allen case by the "racial imagination" or the racial imaginary.

A first step in the effort to specify the relationship between the legal and racial imaginations might be consider the ways in which the racial imaginary occupies

a region or site in the broader constellation that philosopher and social theorist Charles Taylor has denominated the "social imaginary."<sup>19</sup> For Taylor, the term is meant to capture the ways in which people imagine "their social existence, how they fit together with others, how things go on between them and their fellows, the expectations that are normally met, and the deeper normative notions and images that underlie these expectations."<sup>20</sup> Taylor notes that the work of the social imaginary "is not often expressed in theoretical terms," but is rather conveyed and "carried in images, stories, and legends."<sup>21</sup>

We might say that the raw material of the social imaginary consists of pictures, rather than propositions. This imaginary field reflects and refracts the "largely unstructured and inarticulate understanding of our whole situation, within which particular features of our world show up for us in the sense they have." This understanding "can never be expressed in the form of explicit doctrines because of its unlimited and indefinite nature. That is another reason for speaking here of an imaginary and not a theory."<sup>22</sup>

Although he does not discuss the idea of race, Taylor's concept of the "social imaginary" takes us a step further in mapping the movement of the modern racial imaginary. Extrapolating from Taylor, I would emphasize two distinctive modal dimensions of the social imaginary that is "race." First, the racial imaginary differs from other social imaginaries in the way it emerges from, indeed, may be said only to exist in, a field of vision and visualization that exceeds the boundaries of language and discourse. Second, the racial imaginary operates in and through mental mechanisms that are not only unstructured and inarticulate, but *unconscious*. No deep understanding of the work of the unconscious in and on the racial imaginary is impossible without serious, sustained engagement with psychoanalysis. The psychoanalytic account of "how we acquire our heritage of the ideas and laws of human society within the unconscious mind"<sup>23</sup> offers an indispensable resource for a critical cultural study of the psychic life of race in law.

My point of entry into the intersection of the legal and racial imagination via the psychoanalytic approach is the idea of "racial castration," which David L. Eng has elaborated in a book by the same name. Eng's study offers a sophisticated revision of Freud's theory of fetishism. According to Freud's classic account, fetishism is a story about the trauma of sexual difference. The male fetishist, as it were, disavows what in Freud's theory is thematized as female castration. Instead, he "[sees] on the female body a penis that is not there to see."<sup>24</sup> From the Freudian perspective, this imagined penis is a fetish—a surrogate penis, projected onto the female body or symbolically displaced onto a substitute object, such as a lock of hair, a pair of undergarments, a shoe.

In a probing psychoanalytic reading of David Henry Hwang's play *M. Butterfly*,

Eng offers an account of this psychic process when it is faced with the trauma of racial difference. In Hwang's drama, a French diplomat falls in love with a Chinese opera male diva/transvestite/spy. Instead of seeing on the female body a penis that is not there to see, the French diplomat refuses to see on his lover's male Asian body a penis that most definitely is there. In Eng's account, this "racial castration" of the lover's body "suggests that what is being negotiated in this particular scenario is not just sexual but racial difference." It is a psychic operation that unfolds under the jurisdiction of Orientalist law: an Asian man "could never be completely a man." As Eng reads it, *M. Butterfly* thus demonstrates "the impossibility of thinking about racism and sexism [and I might add homophobia] as separate discourses or distinct spheres of analysis."<sup>25</sup>

As Rey Chow has similarly reminded us, "Race and ethnicity are . . . coterminous with sexuality, just as sexuality is implicated in race and ethnicity. To that extent, any analytical effort to keep these categories apart from one another may turn out to be counterproductive, for it is their categorical enmeshment—their categorical miscegenation, so to speak—that needs to be foregrounded."<sup>26</sup> The challenge is to elaborate a concept of the erotic that remains alert to the social fantasies that animate the psychic life of racial and gender violence. If writers such as Rey Chow and David Eng are right about the need to attend to the "categorical miscegenation" of race, sexuality and ethnicity, we must be prepared to come to grips with the possibility that political fantasies are indistinguishable from psychic realities of the sexual imagination.

Two further points must be emphasized straightaway. First, the acting out of the violent racial and sexual fantasy on whose erotic kernel I have been insisting need not find its aim and end in the experience of pleasure we associate with sex. To the contrary. At its extremity, sexual and racial violence can find satisfaction only in a realm of psychic pain that lies, as it were, "beyond the pleasure principle."

The second point returns to the problem of the death penalty, to a consideration of the ways in which the relationship between *eros* and *thanatos* underwrites the political imaginary of the state and of the law that legitimates state power. The erotic economy is not limited to the social enactment of racial and gender violence commonly categorized as crime. The history of Africans in America is replete with instances in which sex and sexuality have been deployed as tools in the arsenal of racial violence. In this context, the death penalty, particularly, calls for an analysis that seeks to understand how the production of death that is state-sanctioned killing is a kind of "political erotics," a triangulated affair between the state, the citizen, and the condemned.

A critical account of cases such as that of Wanda Jean Allen must place the question of the erotics of racial power and violence at the very center of its

analysis. How does the Wanda Jean Allen case implicate social values and psychic investments in a libidinal economy that is not merely similar to, but parasitic on those we ordinarily associate with the political economy of sex?

In the Allen case, the prosecution pursued a strategy of "lesbian fetishism" (the term comes from Elizabeth Grosz, although I use it in a quite different sense here).<sup>27</sup> Over the course of the trial, Allen's body became the imagined site of a penis "that [was] not there to see." From this perspective, Allen was subjected to a psychic (and cultural) mechanism of social homophobia. Allen's lesbian identity and desire were "masculinized": she was the "dominant figure" in her relationship with Leathers; she was the "husband" to Leathers as wife; she was the woman masquerading as a man who dared to walk around the house with her breasts bared in the company of men, who defiantly refused her given (feminine) name.

I do not mean to deny the force in Allen's case of the prosecutorial uses of the figure of the murderous lesbian, a stock stereotype with an infamous and long pedigree. My intention rather is to indicate why the act of "legal imagination" that animated the prosecution's strategy in the Allen case was not merely or primarily the homophobic projection of lesbian body. It was already also a racist projection, a fantasy of the *black male* body in which Allen's masculinized lesbian body was conscripted to serve as a screen for the dangerous, deadly hypermasculinity that remains the iconic image of the black presence in white America: "She is a hunter when she kills," as the prosecutor put it at Allen's trial. "She hunts her victims down and then she kills them."<sup>28</sup> By the end of the trial, Allen had been remade into the apotheosis of the figure of black "female masculinity," to use Judith Halberstam's phrase.<sup>29</sup> Allen's rage (which the prosecution recounted so frequently during her trial that it became virtually identic) was insistently invested with racial meanings the prosecution never had to articulate explicitly. One might say that the state effectively played the race card; what the prosecutor did in fact was to make racist use of a homophobic hand.

Stereotypical representations of homosexuality operated freely in the Allen trial as a simultaneous point of transfer for psychic processes of sexual and racial fetishism. Sexuality became the site of a kind of surplus semantic value, which made race and racial meanings available as technologies of state power while silently masking the latter's operation. What a reading of the record suggests was a scrupulous adherence to the formal protocols of a putatively color-blind criminal law regime was, in the event, not color-blind at all. In this respect, the Allen trial fits seamlessly into the critical framework of Slavoj Žižek's notion of "ideological fantasy," whose basic logic is disavowal.<sup>30</sup>

I suggested earlier that the field of vision and visibility is an important theater of racial representation. As Kalpana Seshadri Crooks has reminded us, "although

race cannot be reduced to the look," it is nonetheless "fundamentally a regime of looking" or visualization.<sup>31</sup> This visualization is not strictly epidermal or corporeal.<sup>32</sup> In the United States, the fetishistic regime of the racial gaze has long been part of the metaphysical, deep structure of our law. A few examples will suffice to underscore the centrality of this cultural form in the political unconscious of American legal thought. Seen in visual terms, the law of hypodescent (more colloquially known as the "one drop of blood" rule) ascribed a power to the specular field of whiteness, a power that could see past the folds of flesh that cover the black body; Article I, Section 2, clause 3 of the U.S. Constitution could visually amputate three-fifths of the black slave body and ignore the unrepresented remainder; and we are all familiar with the masterful projection of scopic power (I am thinking of Harlan's dissent in *Plessy v. Ferguson*) that declared that the "eyes of our Constitution" could be "color-blind" precisely because "every one knew" that the "dominance" of the "white race" was secure "for all time."

In *The Execution of Wanda Jean*, the continued refusal of the "racial solipsistic"<sup>33</sup> among us to see and thus to know the intersubjective relationship of racial equality is poignantly evident in the clemency hearing granted to Wanda Jean Allen a few months before her death. A viewer of the documentary cannot help but be struck by the defining silence that follows Allen's statement to the clemency board at the end of the hearing. On the standard account, the purpose of a clemency hearing is to provide representatives of the state who are not judges or lawyers to consider the human costs and consequences of the decision to execute a convict who has been sentenced to death.<sup>34</sup> The hearing is not the place to engage in adversarial legal argument (for example, about race-based or sexual-orientation-based discrimination in the administration of capital punishment—arguments that, as I have noted, the U.S. Supreme Court has effectively foreclosed). Rather, its purpose is to stage a performance of abjection by the convicted felon: in short, the purpose, meaning and effects of the contemporary clemency hearing are all directed at the production of affect and emotion (in this regard, they are the flip side of the victim-impact statement that, in recent years, has witnessed such a lively resurgence). With the loss of her voice—a literal loss—Allen is deprived of the communicative means necessary to convey her humanity to the parole board. The progressive and quite literal phonic dematerialization of her voice perversely affirms her inhumanity, to use Paul Gilroy's term.<sup>35</sup>

The Allen clemency hearing reveals another aspect of the racial politics of capital punishment in the United States: the death penalty is not merely about the literal liquidation of the black body, but about its antecedent reduction to the mere biological existence that Giorgio Agamben has called "bare life." The body of the death row inmate stands in effect as a specific instance of the more general

figure of the black civic condition in the contemporary U.S. political order. From this perspective, Negro citizenship is not the active, robust political personhood of Madisonian republicanism, but a species of what Russ Castronovo has aptly denominated "necro citizenship,"<sup>36</sup> a civic status in which political life and identity are constructed on an ideological foundation of death. Again, this death is not always literal: the racial thanatopolitics of the modern "postracial" era concerns not only the actual biological death of black citizens, but the strategic subjugation of living black bodies through the mode of discipline that Michel Foucault has called biopower. The biopolitical practices that consign African-Americans to the liminal sphere of civic half life or virtual death are not primarily material, but symbolic. This is a form of political death dealing that proceeds primarily through the exercise of semiotic state power, for example, the "racist color blindness" that holds that official affirmative reference to or recognition of race in the contemporary postracial moment is by definition racist.

#### RACE, STATE, JOUISSANCE

It would be a mistake, however, to see the Allen prosecution solely as a public staging of the psychic and physical degradation that awaits the bodies of those black and brown ethnic irritants who refuse, in Randall Kennedy's approving phrase, to "the established moral standards of white, middle-class Americans."<sup>37</sup> The suffering and death inflicted on Wanda Jean Allen's imagined male body operates simultaneously as a conduit for organization and the expression of racial and sexual enjoyment.

By "enjoyment," I refer to the English rendering of *jouissance*, a term introduced into the psychoanalytic literature by Jacques Lacan. However, while at one level of meaning, *jouissance* is a cognate of the English word "enjoyment," both in the ordinary language "sense of deriving pleasure from something, and in the legal sense of exercising certain property rights,"<sup>38</sup> for French speakers, *jouissance* conveys a second, specifically sexual connotation, since it is also an idiomatic expression for orgasm. The substance of what I am calling "racial sexual enjoyment" and of the violent political and social fantasies that underwrite it are in many ways indistinguishable from the psychic realities that inform the sexual imagination.

What do the trial and state killing of Wanda Jean Allen tell us about the politics of racial enjoyment? Reading the transcript and opinions in the Allen case or watching the documentary film on her execution, one is struck by the smug, but barely concealed delight Oklahoma officials seemed to take in the abjected figure of Wanda Jean Allen as a "dead citizen" (to adapt Lauren Berlant's vivid phrase).<sup>39</sup> Before she is actually killed, Allen is conscripted to play the role of "dead citizen walking" in a bureaucratic spectacle that enacts her social and civic annihilation.

Slavoj Žižek's account of the "ethnic moment" of the nation as the "surplus" or "leftover" of the universalizing project of the nation is particularly pertinent here. For Žižek, nationalism is "the privileged domain of the eruption of enjoyment into the social field," a materialization of *jouissance* as a collective political fantasy:

What is at stake in ethnic tensions is always the possession of the national Thing: the "other" wants to steal our enjoyment (by ruining our "way of life" and/or it has access to some secret, perverse enjoyment. In short, what gets on our nerves, what really bothers us about the "other," is the peculiar way he organizes his enjoyment (the smell of his food, his "noisy" songs and dances, his strange manners, his attitude to work—in the racist perspective, the "other" is either a workaholic stealing our jobs or an idler living on our labor). The basic paradox is that our Thing is conceived as something inaccessible to the other and at the same time threatened by him; this is similar to castration which, according to Freud, is experienced as something that "really cannot happen," but whose prospect nonetheless horrifies us.<sup>40</sup>

That prospect also fascinates us. This "package deal" of horror and fascination goes some way toward explaining the persistently high level of support for the death penalty in this country. Wanda Jean Allen is the projected representation of the specter of the dangerous black masculinity that threatens the political utopics of a harmonious, "more perfect" (if not perfectible) union. She embodies, by proxy, the long nightmare that haunts the phantasmatic dream of our criminal justice system as an enlightened exercise in rational participatory democracy: the ugly arc of racial antagonism without which there would be no "national Thing."

The trial and execution of Wanda Jean Allen demonstrate that contemporary racism in the United States is characterized by a number of the features David Halperin has observed about American homophobia: it has no fixed propositional content and no determinate discursive form. In the Allen case, the mobilization of homophobia as an alibi for racism ought not obscure the degree to which racial fantasy and the psychic politics of racial enjoyment will remain a critical pillar in the architecture of the emerging "postracial" state. In mapping the relationship in the Allen case between the death penalty and the politics of enjoyment, I align myself with writers such as Michael Taussig, who has called for critical attention to the symbolic economy of state fetishism: "Like the Nation-State, the fetish has a deep investment in death—the death of the consciousness of the signifying function. Death endows both the fetish and the Nation-State with life, a spectral life, to be sure. The fetish absorbs into itself that which it represents, leaving no traces of the represented. A clean job."<sup>41</sup>

Without specifying the role of the racial imaginary in the collective psychic processes by which the U.S. nation-state binds its subjects to the political fantasy

of a "postracial" multicultural citizenship, the play of life and death to which Taussig refers can be only partially understood. The "death of the consciousness of the signifying function" of race in no way entails the death of race itself. To borrow the words of Daniel Patrick Moynihan, the execution of Wanda Jean Allen stands as a case study in "semantic infiltration," a linguistic operation by which racial meanings are secreted through the interstices of language that has nothing to do with race. In order to describe this "splitting off" of racial signifiers and racial signifieds, we must move beyond an abstract, general account of the formal "figure of state fetishism"<sup>42</sup> to consider the "politics and historicity of *jouissance*"<sup>43</sup> that is its material social ground.

In a discussion of the publication by Benetton of a January 2000 book of photographs and interviews of U.S. death row inmates, *We, on Death Row*, Austin Sarat suggested that the Italian clothing company's catalog of portraits of condemned prisoners "misses the mark." Sarat argues that in thinking about the death penalty, "the faces we should be looking at are our own. The question to be asked about state killing is not what it does for us, but what it does to us." For Sarat, to pose this question is to reckon with "the cost of state killing to our law, our politics, our culture." On Sarat's account, "state killing diminishes us by damaging our democracy, legitimating vengeance, intensifying racial divisions, and distracting us from the challenges that the new century poses for America."<sup>44</sup>

Sarat is surely right. The costs of the death-dealing market in capital punishment are great indeed. Yet this rationalist reckoning of the price we pay to have the death penalty tells only part of the story. In making the case for the fundamental irrationality of capital punishment, Sarat's analysis overlooks the political, cultural, and psychic *benefits* of the dance of state death for the U.S. racial and sexual polity. In the Allen case, the production of death that is state killing involves a fetishistic transubstantiation of value. The Allen case involves an irrational rationality in which values are reversed, costs become benefits, and the laws of objective interest and rational calculation give way to the transvaluative law of an irrational, but by no means illusory enjoyment.<sup>45</sup> David Cole has noted that the American criminal justice system "affirmatively depends on [the exploitation] of inequality. Absent race and class disparities, the privileged among us could not enjoy as much constitutional protection of our liberties as we do; and without these disparities, we could not afford the policy of mass incarceration that we have pursued over the past two decades."<sup>46</sup>

The claim that state killing is at odds with America's enlightened democratic self-image is both true and beside the point. A thick-descriptive or normative account of the dance of state death must attend to the libidinal economy of capital punishment, to the miasmatic politics of a racial and sexual enjoyment that eludes



the assumptive logic of rationalist policy analysis. The death penalty in the United States evokes Achille Mbembe's account of the public execution in 1987 of "two malefactors" in Douala, Cameroon. Mbembe suggests that the economy of power in the postcolonial state "is an economy of death—or, more precisely, it opens up a space for enjoyment at the moment it makes room for death, "a space in which power procedurally mediates the transformation of pleasure into a site of death."<sup>47</sup>

#### CONTESTING CRIMINAL JUSTICE AS A RACIAL PROJECT: *MCCLESKEY V. KEMP*

The case of Wanda Jean Allen not only highlights the fetishistic character of state killing and its perverse, peculiar pleasure in the projected figure of the murderous, masculinized, black, lesbian body, the operation of state power in the "post-racial" state in which a growing number of commentators in and outside law have begun to say we now live or must aspire to live. It demonstrates the relevance in understanding the operation of racial power in the "postracial" state of the question "What does the practice of capital punishment do for (some of) us?" Answering that question should remain an urgent task for anyone who is committed to contesting this nation's necrophilic romance with the death penalty.

In my view, abolitionist activists cannot afford to ignore the lesson we should have learned from Justice Antonin Scalia's now infamous memorandum to the Conference in *McCleskey v. Kemp*,<sup>48</sup> a 1987 case that has been described as "the Dred Scott decision of our time."<sup>49</sup> In *McCleskey v. Kemp*, the U.S. Supreme Court was asked to rule on a federal constitutional claim by Warren McCleskey, an African-American who had been convicted and sentenced to die by a Georgia jury for the murder of a white police officer. Relying in part on statistical evidence of systemic interracial and intraracial disparities in the state's administration of the death penalty, McCleskey maintained that Georgia was using capital punishment in a racially discriminatory fashion in contravention of the equal protection clause of the Fourteenth Amendment to the U.S. Constitution.

Replying to an early draft of what would become the majority opinion in the case, Justice Scalia wrote:

I disagree with the argument that the inferences that can be drawn from the Baldus study are weakened by the fact that each jury and each trial is unique, or by the large number of variables at issue. And I do not share the view, implicit in [Justice Lewis Powell's draft language], that an effect of racial factors upon sentencing, if it could be shown by sufficiently strong statistical evidence, would require reversal.<sup>50</sup>

"Since it is my view," continues the memorandum, "that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions

and (hence) prosecutorial [ones], is real, acknowledged by the [judgments] of this court and ineradicable, I cannot honestly say that all I need is more proof."<sup>51</sup>

Much might be said about this extraordinary document. The first and most important observation has to do with Scalia's "breathtaking"<sup>52</sup> admission that race and racism are constituent components of our criminal justice regime. In conceding that racism is an "ineradicable" and (by a strange twist of logic) constitutionally inconsequential fact defining who and how we criminally punish, the Scalia memorandum in effect concedes the extent to which, in Stephen Bright's words, our criminal courts "are the institutions in the United States least affected by the civil rights movement that brought changes to many American institutions in the last forty years."<sup>53</sup> Criminal justice is a racial project; the United States is a racial state.

What chiefly interests me here, however, is the passage in which Justice Scalia traces the roots of these "race effects" to "the *unconscious* operation of irrational sympathies and antipathies."<sup>54</sup> In raising the question of the "unconscious" and "irrational" determinants of the death penalty, Scalia's analysis puts its finger on the very heart of the problem with which opponents of capital punishment must reckon. How might attention to the unconscious and irrational dimensions of the popular discourse on race and the death penalty help the abolitionist movement fashion a strategy to break the current consensus in favor of capital punishment?

First, the Scalia memorandum directs our attention to the way in which, at its core, the question of the relations between race, crime, and capital punishment must be approached from at least two distinct, but related directions: as a legal question, but also as a *political* question. The continued consensus in favor of the death penalty rests on the state's manipulation of racial anxiety and animus in the service of a project that has very little to do with the actual perpetrators or the actual victims of crime. Its central object is to entrench and extend the technology of modern state power that Jonathan Simon calls "governance through crime."<sup>55</sup> We would do well in this regard to remember the legal realist insight that law is the continuation of politics by other means. The fact that the popular public discussion of the death penalty and racial justice continues to be framed with reference to law and the rule-of-law state does not divest that discourse of its political character and consequences.

Moreover, it should be said straightaway that the political dimension that concerns us here is most emphatically *not* the formal institutional politics of reasoned debate and deliberation. This brings me to a second implication of Scalia's argument. To say that the public discourse on and the state practice of capital punishment is riven by unconscious and irrational forces is to argue for a distinctively *cultural* conception of death penalty politics. In its cultural register, political mobilization against or in favor of the death penalty is not only or not primarily about penal

policy and practice. The production and circulation of “meanings and symbols and representations”<sup>56</sup> of crime and punishment addresses the “subjective component of political being”<sup>57</sup> or the “psychic life” of politics.<sup>58</sup> In insisting on the presence and power of the “unconscious” and “irrational,” Justice Scalia is in effect arguing that capital punishment is a political field of image, identification, and association. Like politics generally, the popular politics of the death penalty is a politics “in which the way that people ‘imagine’ themselves occupies a crucial place.”<sup>59</sup>

A number of recent studies have noted the extent to which “the statistical overrepresentation of African Americans among violent offenders and victims provides much less of a basis for white fear than the images of black criminality fostered by the media and other sources.”<sup>60</sup> In the words of one commentator, the U.S. news media has come to play a decisive role in “increasing fear of crime,” in “instilling and reinforcing racial stereotypes,” and in “linking race to crime,”<sup>61</sup> not least through the sensationalist specularization of the black male body. Despite falling crime rates, the media’s racialization of violent crime at the level of the image (despite falling crime rates) has fueled the shift to more punitive policies that has characterized our criminal justice system in the last couple of decades.

The task of the abolitionist movement is to break the imagined connection between black Americans and crime (a connection, I might note, to which African-Americans themselves are by no means immune). The goal, as I see it, is to “manufacture dissent”—to contest the deadly ideological fantasy that underwrites the racial thanatopolitics of the popular discourse on capital punishment. If they are to meet the resistance to abolition on its own ground, activists opposing the death penalty must begin to take political fantasy seriously. Put another way, the strategy of this abolitionist movement should be to produce new images and identifications that, on the one hand, deracialize crime and, on the other, decriminalize race.

Stephen Duncombe comes very close to the argument I am advancing here in his *Dream: Re-imagining Progressive Politics in an Age of Fantasy*. Although he does not explicitly address the politics of capital punishment, Duncombe urges progressive political activists to learn how to “build a politics that embraces the dreams of people and fashions spectacles which give these fantasies form—a politics that understands desire and speaks to the irrational; a politics that employs symbols and associations; a politics that tells good stories.”<sup>62</sup>

Given what I have said about the links between the phantasmatic representation of black masculinity as the very embodiment of the problem of crime and the imagined danger it poses to a U.S. body politic that, more often than not, is figured as white, it seems to me that one of the crucial tasks of abolitionist activism is to mobilize its constituency around a new corporal (punishment) politics.

## NOTES

1. I take this phrase from Austin Sarat, *When the State Kills: Capital Punishment and the American Condition* (Princeton: Princeton University Press, 2001).
2. Benjamin Fleury-Steiner and Victor Argoshy, “Lethal ‘Borders’: Elucidating Jurors’ Racialized Discipline to Punish in Latino Defendant Death Cases,” *Punishment and Society* 6.1, (2004), p. 67; Austin Sarat and Jonathan Simon, “Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship,” *Yale Journal of Law & the Humanities* 13.1, (2001), p. 8.
3. Sarat, *When the State Kills*, p. 22, quoting David Garland, “Punishment and Culture: The Symbolic Dimensions of Criminal Justice,” *Studies in Law, Politics, & Society* 11 (1991), p. 191. See also Austin Sarat (ed.), *The Killing State: Capital Punishment in Law, Politics and Culture* (New York: Oxford University Press, 1999).
4. Garland, “Punishment and Culture,” p. 193.
5. Liz Garbus, *The Execution of Wanda Jean* (2002).
6. Richard Johnson, “What is Cultural Studies Anyway,” *Social Text* 16.1 (Winter 1986–1987), p. 39.
7. *Allen v. State* 1994 ok cr 13 871 P.2d 79, case number: F-89-549, decided: 02/15/1994. *Wanda Jean Allen, Appellant, v. the State of Oklahoma, Appellee*, Oklahoma Court of Criminal Appeals, An Appeal from the District Court of Oklahoma County; Bana Blasdel, District Judge. [871 P.2d 85] <http://law.justia.com/cases/oklahoma/court-of-appeals-criminal/1994/1496.html>.
8. *Allen v. State of Oklahoma*, 871 P. 2d 79 (Okla. Crim. Ct. App. 1994), p. 87.
9. *Ibid.*, p. 95.
10. *Ibid.*, p.105.
11. Garbus, *The Execution of Wanda Jean*.
12. Richard Goldstein, “Queer on Death Row,” *Village Voice*, March 20, 2001, p. 38.
13. *Ibid.*, p. 40.
14. Wahneema Lubiano, “For Race,” keynote address presented at Color, Bone, and Hair: The Persistence of Race in the Twenty-First Century, a conference at Bucknell University, September 25, 2002.
15. Jacques Derrida, “Racism’s Last Word,” trans. Peggy Kamuf, in Peggy Kamuf and Elizabeth Rottenberg (eds.), *Psyche: Inventions of the Other*, vol. 1 (Stanford: Stanford University Press, 2007), p. 379.
16. Paul W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago: University of Chicago Press, 1999).
17. *Ibid.*, p. 30.
18. *Ibid.*, p. 135.
19. Charles Taylor, *Modern Social Imaginaries* (Durham: Duke University Press, 2004).
20. *Ibid.*, p. 23.
21. *Ibid.*
22. *Ibid.*, p. 25.
23. Juliet Mitchell, *Psychoanalysis and Feminism: Freud, Reich, Laing, and Women* (New York: Vintage Books, 1974), p. xiv.
24. David L. Eng, *Racial Castration: Managing Masculinity in Asian America* (Durham: Duke University Press, 2001).
25. *Ibid.*

26. Rey Chow, *The Protestant Ethic and the Spirit of Capitalism* (New York: Columbia University Press, 2002), p. 7. Chow develops this point as part of an argument for the relevance for critical race theory of Michel Foucault's notion of "biopower." Biopolitical logic uses death (or the threat of death) as a form of governance; state killing comes to be seen as a "productive, generative activity" undertaken to preserve and protect the life of collective body politic. *Ibid.*, p. 9. Foucault's innovation lies in the recognition that for biopower, the human body is not merely an instrument or object of governance, but one of its central resources.
27. Elizabeth Grosz, "Lesbian Fetishism?" in Emily Apter and William Pietz, (eds.), *Fetishism as Cultural Discourse* (Ithaca: Cornell University Press, 1993), p. 101.
28. Ron Jenkins, "Wanda Jean Allen Described as a 'Hunter' Who Would Kill Again," *Ardmore, OK, Daily Ardmoreite*, no longer available at [http://www.ardmoreite.com/stories/100800/new\\_allen.shtml](http://www.ardmoreite.com/stories/100800/new_allen.shtml).
29. Judith Halberstam, *Female Masculinity* (Durham: Duke University Press, 1998).
30. Slavoj Žižek, *The Sublime Object of Ideology* (London: Verso, 1989), p. 33.
31. Kalpana Seshadri-Crooks, *Desiring Whiteness: A Lacanian Analysis of Race* (London: Routledge, 2000), p. 7.
32. This draws upon Frantz Fanon, *Black Skin, White Masks* (New York: Grove Press, 1967), p. 111.
33. Maurice O. Wallace, *Constructing the Black Masculine: Identity and Ideality in African American Men's Literature and Culture, 1775–1995* (Durham: Duke University Press, 2002), p. 31.
34. The U.S. Supreme Court has held that the Fourteenth Amendment requires that minimal due process rights be accorded capital convicts in clemency proceedings. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998). The *Woodard* Court did not conclude that state capital punishment systems must make clemency available. For a discussion of *Woodard* in the context of women's capital cases see Elizabeth Rapaport, "Staying Alive: Executive Clemency, Equal Protection, and the Politics of Gender in Women's Capital Cases," *Buffalo Criminal Law Review* 4.2 (2001), pp. 967–1004.
35. Paul Gilroy, *Against Race: Imagining Political Culture beyond the Color Line* (Cambridge, MA: Harvard University Press, 2000).
36. Russ Castronovo, *Necro Citizenship: Death, Eroticism, and the Public Sphere in the Nineteenth-Century United States* (Durham: Duke University Press, 2001).
37. Randall Kennedy, *Race, Crime, and the Law* (New York: Pantheon, 1998), p. 17.
38. Dylan Evans, "From Kantian Ethics to Mystical Experience: An Exploration of Jouissance," in Dany Nobus (ed.), *Key Concepts of Lacanian Psychoanalysis* (New York: Other Press, 1999), p. 1.
39. Lauren Berlant, *The Queen of America Goes to Washington City: Essays on Sex and Citizenship* (Durham: Duke University Press, 1997), pp. 59–60.
40. Slavoj Žižek, *Looking Awry: An Introduction to Jacques Lacan through Popular Culture* (Cambridge, MA: The MIT Press, 1991), p. 165.
41. Michael Taussig, "Maleficium: State Fetishism," in Apter and Pietz (eds.), *Fetishism as Cultural Discourse*, pp. 216 and 246. Taussig shows how Genet's *Thief's Journal* "writes with clarity and beauty the endless story of [the state and its sexuality], its seductive bodily prowess and the sensuous trafficking between rationality and violence as writ into the Law itself." *Ibid.*, p. 246. Taussig argues that Genet "brought the fetish character of the modern state into a clear and sensual focus." *Ibid.*, p. 240.
42. *Ibid.*, p. 218. "It is to the peculiar sacred and erotic attraction, even thralldom, combined with disgust, which the State holds for its subjects, that I wish to draw attention in drawing the figure of State fetishism. . . . By state fetishism I mean a certain aura of might, aesthetic-moralistic rendering of the social structure of might."
43. Fredric Jameson, "Pleasure: A Political Issue," in Fredric Jameson, *The Ideologies of Theory, Essays 1971–1986*, vol. 2, *The Syntax of History* (Minneapolis: University of Minnesota Press, 1988), p. 73.
44. Sarat, *When the State Kills*, p. 250.
45. For a useful line of argument in these terms, but in a different context, see Todd McGowan, *The End of Dissatisfaction?: Jacques Lacan and the Emerging Society of Enjoyment* (Albany: State University of New York Press, 2004).
46. David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* (New York: New Press, 1999), p. 5. "While our criminal justice system is explicitly based on the premise and promise of equality before the law, the administration of criminal law—whether by the officer on the beat, the legislature, or the Supreme Court—is in fact predicated on the exploitation of inequality. My claim is not simply that we have ignored inequality's effects within the criminal justice system, nor that we have tried but failed to achieve equality there. Rather, I contend that our criminal justice system affirmatively depends on inequality." *Ibid.*
47. Achille Mbembe, *On the Postcolony* (Berkeley: University of California Press, 2001), pp. 112–13, 115, 126.
48. 481 U.S. 279 (1987).
49. Anthony G. Amsterdam, "Race and the Death Penalty before and after McCleskey," *Columbia Human Rights Law Review* 39.1 (Fall 2007), pp. 34 and 37.
50. Memorandum to the Conference from Justice Antonin Scalia in No. 84–6811–McCleskey v. Kemp of January 6, 1987. *McCleskey v. Kemp* File, Thurgood Marshall Papers, The Library of Congress, Washington, D.C.
51. *Ibid.*
52. Dennis D. Dorin, "Far Right of the Mainstream: Racism, Rights, and Remedies from the Perspective of Justice Antonin Scalia's McCleskey Memorandum," *Mercer Law Review* 45.3 (Spring 1994), pp. 1035 and 1039.
53. Stephen B. Bright, "Discrimination, Death and Denial: Race and the Death Penalty," in David R. Dow and Mark Dow (eds.), *Machinery of Death: The Reality of America's Death Penalty Regime* (New York: Routledge, 2002), p. 47.
54. Emphasis supplied.
55. Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford: Oxford University Press, 2009).
56. Garland, "Punishment and Culture," p. 193.
57. Jacqueline Rose, *States of Fantasy* (Oxford: Oxford University Press, 1993), p. 10.
58. See Judith Butler, *The Psychic Life of Power: Theories in Subjection* (Stanford: Stanford University Press, 1997).
59. Jacqueline Rose, "Margaret Thatcher and Ruth Ellis," in *Why War?—Psychoanalysis, Politics, and the Return to Melanie Klein* (Oxford: Blackwell, 1993), p. 45.
60. Darnell F. Hawkins, "The Nations Within: Race, Class, Region, and American Lethal Violence," *University of Colorado Law Review* 69.4 (1998), p. 910.
61. Sara Sun Beale, "The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness," *William and Mary Law Review* 48.2 (2006), p. 398.
62. Stephen Duncombe, *Dream: Re-imagining Progressive Politics in an Age of Fantasy* (New York: New Press, 2007), p. 9.