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Statistical studies showing unconscious racial bias in capital selection matter under the Eighth Amendment. In *McCleskey v. Kemp*, the Court appeared to shun such evidence as irrelevant to Eighth Amendment challenges to capital punishment. Yet, this kind of evidence has influenced some of the Justices’ views on the constitutionality of the death penalty and has sometimes caused the Court to restrict the use of that sanction under the Eighth Amendment. My goal, therefore, is to explain why statistical studies concerning racial bias in capital selection simultaneously have both limitations as proof and suggestive power that some death sentences amount to “cruel and unusual punishments.” Ultimately, I address how such studies, despite their limitations, might influence the Court in its regulation of the death penalty in the future.

My project proceeds in five parts. Part I contends that the Eighth Amendment regulates capital selection not, as is commonly asserted, through a consistency mandate but, instead, through a deserts limitation – a mandate that only a person who deserves the death penalty should receive that sanction. Part II shows how the capital selection process allows for multiple opportunities for reprieves of offenders who deserve the death penalty but also provides a two-phase trial to try to ensure that nobody receives a death sentence who does not deserve it. Part III briefly describes the statistical efforts to determine whether racial biases concerning defendants and victims influence decisions along the selection process. Part IV shows, however, why studies that do not focus on the sentencing trial have only limited Eighth Amendment meaning and why even studies that have that focus cannot establish with much certainty that violations
of the deserts limitation frequently occur. Statistical evidence of racial bias even at the sentencing trial might reflect mostly the effect of race in the dispensation of merciful reprieves. Yet, this Part also explains that such evidence can spur our intuitions that some sentencer findings of deserts underlying some death sentences, in addition to some reprieves, are racially influenced. In fact, Part V contends that, despite the Court’s general unwillingness to acknowledge that racial-bias studies reveal that death sentences are sometimes disproportional, the studies have influenced the Court – and will continue to influence it – to confine the use of the death penalty.

I. THE DESERTS LIMITATION IN THE EIGHTH AMENDMENT

Regarding capital selection, the Eighth Amendment imposes one predominant rule: the government can impose a death sentence only on a person who deserves it. For this rule plausibly to support the regulation of capital sentencing, we must conclude that some criminals deserve the death penalty and that our criminal justice system can, at least in some category of cases, determine offenders’ deserts. These notions are somewhat controversial. However, Eighth Amendment doctrine on the use of the death penalty assumes that they are true. In previous articles, I have examined how this deserts limitation can find grounding in the language of the Eighth Amendment and how the Supreme Court’s doctrine on capital sentencing since Furman v. Georgia implements and reveals it. Without repeating that explanation in full, I aim here briefly to address a confounding idea and to elaborate on what a deserts limitation implies.

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6. See, e.g., Margaret Jane Radin, Cruel Punishment and Respect for Persons: Super Due Process for Death, 53 S. CAL. L. REV. 1143, 1168 n.85 & 1181-82 (1980) (“[N]ot much philosophical progress has been made on the issue of how punishment can “fit” crime since Immanuel Kant suggested that rape and pederasty be punished by castration.”); RANDY E. BARNETT, THE STRUCTURE OF LIBERTY 318 (1998) (“Any effort to do so will confront very serious problems of knowledge, interest, and power.”); WALTER KAUFMANN, WITHOUT GUILT AND JUSTICE 64 (1973) (“Not only is it impossible to measure desert with the sort of precision on which many believers in retributive justice staked their case, but the whole concept of a man’s desert is confused and untenable.”); Youngjae Lee, The Constitutional Right Against Excessive Punishment, 91 VA. L. REV. 677, 700 (2005) (describing as “profoundly mysterious” the notion of “a crime having some “fit” with a punishment”).

7. For instances in which the Court’s doctrine reflects doubt about the ability of the criminal justice system to reach accurate deserts assessments on an individual basis, see infra notes 157-64 & 170-78 and accompanying text.

8. 408 U.S. 238 (1972) (per curiam).

There is a widespread belief, based on oft-repeated statements from the Supreme Court, that the Eighth Amendment requires from capital selection something other than a valid finding that a death-sentenced offender deserves death: “consistency” or “non-arbitrariness” or “equality.”\textsuperscript{10} Some of the Justices have even concluded that the inability to achieve consistency in capital selection justifies abolition under the Eighth Amendment.\textsuperscript{11} However, the notion that consistency is required misleads in that it reflects what the Court has said but not what the Court has done. In the realm of deciding who dies, all of the Court’s Eighth Amendment doctrine is best explained as an effort to prevent undeserved death sentences — and this notion of proportionality does not merge with a mandate of consistency.\textsuperscript{12}

We can see the confusion caused by the consistency view by focusing on two questions:

1. Do all factually guilty and death-eligible capital offenders deserve the death penalty, or do some of them deserve only the lesser sanction of imprisonment?

2. Does the Eighth Amendment demand consistency in the distribution of death sentences among those who deserve them or only that the death penalty be reserved for those who deserve it?

Consistency or equality claims tend to focus only on the second question.\textsuperscript{14} These claims often either ignore or concede the answer to the first question.\textsuperscript{15}

\textsuperscript{10} See Howe, 

\textsuperscript{11} Justice Blackmun perhaps most clearly articulated this view in advocating abolition. See, e.g., Callins v. Collins, 510 U.S. 1141, 1147, 1153 (1994) (Blackmun, J., dissenting from denial of cert.) (interpreting Furman v. Georgia, 408 U.S. 238 (1972) (per curiam), to mean that “if the death penalty cannot be administered consistently and rationally, it may not be administered at all”). More recently, Justice Stevens has also advocated abolition under the Eighth Amendment. See Baze v. Rees, 128 S. Ct. 1520, 1551 (2008) (Stevens, J., concurring). However, his argument for abolition appeared to align more with a theory of disproportionality – that there is an unacceptable “risk of error” in capital cases that results from several factors, including the risk of racial discrimination. \textit{Id.}

\textsuperscript{12} See infra note 179 and accompanying text (regarding the main doctrines that comprise the Court’s Eighth Amendment regulation of capital selection). For a view based on the “expressive dimension” of punishment that proportionality could contemplate a requirement of consistency in the use of a sanction, see Lee, supra note 6, at 712-13 (“[A] punishment imposed on a criminal would be ‘undeserved’ if it is more severe than the punishment imposed on those who have committed more serious crimes or crimes of the same seriousness, because the judgment it expresses about the seriousness of the criminal’s behavior would be inappropriate.”).

\textsuperscript{13} By “death-eligible” capital offenders, I mean those factually guilty capital offenders 1) who are not protected from a possible death sentence by one of the Supreme Court’s categorical proscriptions on the use of that sanction, see, e.g., Atkins v. Virginia, 536 U.S. 304 (2002) (protecting mentally retarded offenders); and 2) who have an aggravating circumstance in their case that satisfies the Supreme Court’s requirement for narrowing of the death-eligible group, see Godfrey v. Georgia, 446 U.S. 420, 428-29 (1978) (plurality opinion) (requiring that a state narrow the group).
They assume that the death penalty is not disproportional – or undeserved – for death-eligible and guilty capital offenders. However, they conclude that the Eighth Amendment demands consistency in the distribution of death sentences among the deserving. On this basis, they call for judicial intervention to remedy the statistical evidence of racial discrimination throughout the capital-selection process.

The claim that the Eighth Amendment should require consistency among those who deserve the death penalty is hard to maintain. First, there is a “profound contradiction” in any assertion that a prohibition on cruel and unusual punishments disallows merciful or otherwise undeserved reprieves. Such a claim views the language of the clause in a strange way, holding that the death penalty becomes less “cruel and unusual" when administered under a system demanding unrelenting harshness than under one allowing the sentencer uninhibited freedom to dispense mercy. Also, to the extent that the claim assumes that we should remedy inconsistency by reducing rather than increasing

14. Some persons might reject the assumption that we can answer the first question on grounds that the determination of deserts in the real world is either so elusive or so tied up with comparative analysis that “apparent equal treatment [is] all we can readily rely on to satisfy our aspirations of fairness.” Radin, supra note 6, at 1151 (noting without endorsing the possibility of such a claim). However, the Eighth Amendment explanation for the Supreme Court’s rejection of death penalties that are mandatory upon conviction disintegrates if we believe that deathworthiness cannot be determined on an individualized basis. See infra notes 25-26 and accompanying text. Moreover, we cannot determine whether equality exists without reference to some external substantive measure, which, in this case, is the deserts standard. See Howe, The Troubling Influence of Equality, supra note 9, at 365-76.

15. See, e.g., BALDUS STUDY, supra note 2, at 417 (“Certainly, the imposition of death sentences in such cases may not offend notions of disproportionality or ‘just deserts’. . . .”); id. at 14 (“The problem is not that the defendant’s crime and past record necessarily make a death sentence unthinkable and thereby excessive in the traditional sense . . . .”).

16. BALDUS STUDY, supra note 2, at 14, 417.

17. See BALDUS STUDY, supra note 2, at 417 (“Nevertheless, trying to achieve consistency and rationality in capital sentencing is essential if we wish to maintain as a principle the dignity of the individual (including individuals convicted of capital crimes) and, equally important, to avoid the corrosive effect on society of judicially condoned racial discrimination.”).

18. A claim that not all factually guilty and death-eligible capital offenders deserve the death penalty, but that the Eighth Amendment demands consistency in the distribution of death sentences among those who deserve them, has two problems. First, it fails to explain how a sentencing inquiry could produce an accurate finding of offender deserts and still ensure consistency. See Radin, supra note 6, at 1151 (“We cannot simultaneously maximize the extent to which we satisfy both of these moral requirements.”). Second, it fails to comport with the Supreme Court’s doctrine. The Court has not required consistency of treatment in the overall selection process or at any stage of that process. See, e.g., infra Part II (discussing the Georgia system, which the Court has approved).

19. Daniel D. Polsby, The Death of Capital Punishment? Furman v. Georgia, 1972 SUP. CT. REV. 1, 27 (noting a “profound contradiction” in such a claim, because it means that “a punishment imposed under a system of unmitigated harshness would be less cruel” than one allowing merciful reprieves).

20. See, e.g., Kyron Huigens, Rethinking the Penalty Phase, 32 ARIZ. ST. L.J. 1195, 1202 (2000) (“Equality in death sentencing is not a negligible value, but it is an odd one to pursue under the rubric of cruel and unusual punishment.”).
the number of death sentences, it ignores that those capital offenders who
deserve and receive the death penalty do not deserve death any less simply
because others who also deserve death escape that sanction. 21  As even two
prominent progressive scholars have acknowledged, “our failure to respond
justly in [some death-penalty cases] hardly explains why we should also fail to
do justice in [others].”22

I contend that the answers to both of the questions presented are just the
opposite of those involved in the “consistency” approach. As for the second
question, the Eighth Amendment does not demand “consistency” or “non-
arbitrariness” among those who deserve the death penalty. The Eighth
Amendment demands only that government reserve the death penalty for those
who deserve it.23  At the same time, the answer to the first question is that not all
constitutionally death-eligible and guilty capital offenders deserve the death
penalty.24  For some of them, the death penalty is disproportional.

As the Court has applied it to capital selection, the Eighth Amendment is,
thus, about a substantive rule—the deserts limitation. 25  A call for “consistency”
or “non-arbitrariness” in capital selection makes sense only as a reiteration to
follow that rule. Such a call is not separate from—but rather derives from—the
substantive command. If a person is sentenced to death who does not deserve
that punishment, the sentence is improper because it violates the substantive rule.
We can also say that the sentence is not “consistent” with that governing rule or
that it is “arbitrary” in that it does not accord with that rule. Yet, it is the
substantive rule—the deserts limitation—that gives meaning to the Eighth
Amendment, not a vacuous notion of “consistency” or “non-arbitrariness.”26

21. See, e.g., Barry Latzer, The Failure of Comparative Proportionality Review of Capital
Cases (With Lessons From New Jersey), 64 ALB. L. REV. 1161, 1165-66 (2001) (“Indeed, such a
demand for equal justice is as pernicious as it is pointless, since the remission of deserved
dead sentences undermines retributive justice.”); RANDALL COYNE & LYN ENZTOOTH, CAPITAL
that racial discrimination in no way diminishes either the culpability of the defendants who are
sentenced to death or society’s justification for executing them.”).


23. See Huigens, supra note 20, at 1203 (“The Court’s real concern is not equality in
punishment, but proportionality in punishment.”).

(striking down mandatory death penalty that precluded the sentencer from considering “the
possibility of compassionate or mitigating factors stemming from the diverse frailties of
humankind”).

25. See Howe, Furman’s Mythical Mandate, supra note 9, at 441-56; see also David McCord,
Judging the Effectiveness of the Supreme Court’s Death Penalty Jurisprudence According to the
Court’s Own Goals: Mild Success or Major Disaster?, 24 FLA. ST. U. L. REV. 545, 548 (1997)
(“[T]he Court has had only one primary goal for its regulation of capital punishment: decreasing
overinclusion . . . .”).

(asserting that equality is a vacuous notion because its meaning depends on some external
substantive measure).
At the same time, evidence of racial bias retains significance under this “substantive” view of the Eighth Amendment, although violations are hard to detect and hard to prevent, except through partial or total abolition. The deserts limitation is unidirectional and, thus, while forgiving of unconscious non-rational bias in favor of mercy, is not indifferent when racial bias influences a desert finding in support of a death sentence. The rule has meaning for capital sentencing because of the prevailing view that not every death-eligible and legitimately convicted capital murderer deserves death. This idea means that, as a prerequisite to a death sentence, a state must conduct a capital sentencing hearing at which the offender is entitled to present a broad array of evidence and to argue for his life. The very purpose, under the Eighth Amendment, of the sentencing hearing is to determine, as a prerequisite to a death sentence, whether the offender deserves death. Although we cannot define with precision the factors that should weigh in a deserts calculus, or how much those factors should weigh, we can agree that racial factors should play no part in it. This is true whether the factor is the race of the offender or of the victim. Thus, a death sentence based on a sentencer’s deserts finding influenced by racial bias is unreliable and, in that sense, disproportional.

II. THE CAPITAL SELECTION PROCESS AND THE DESERTS LIMITATION

The capital selection process in every death-penalty state comes much closer to complying with the deserts limitation than to ensuring that all persons who deserve the death penalty receive it. From the moment of arrest to the moment of execution, multiple opportunities exist for actors along the way to spare a

27. See Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (rejecting Ohio “special question” scheme as too mandatory, and declaring that the capital sentencer must remain free to reject the death penalty based on “any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death”).

28. See, e.g., Scott E. Sundby, The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing, 38 UCLA L. REV. 1147, 1178 (1991) (noting that the Court’s wide definition of potentially mitigating evidence in Lockett is “tied to the ultimate issue of whether the defendant deserves the death penalty”).

29. See, e.g., SEIDMAN & TUSHNET, supra note 22, at 150-51 (contending that the Court’s rejection of mandatory death penalties led to “determinism’s slippery slope” and the problem that “we have wildly conflicting and inconsistent intuitions about where to dig in our heels” in judging the deserts of murderers).

30. See, e.g., Richard O. Lempert, Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment, 79 MICH. L. REV. 1177, 1178 n.5 (1981) (“To my knowledge no modern retributivist has argued that unalterable personal characteristics such as race and sex may be properly considered in assessing culpability for crime.”); Sundby, supra note 28, at 1178 (asserting that “no reasonable person would argue that invidious factors like race or poverty . . . properly bear on whether the defendant deserves death”).

31. See, e.g., McCleskey v. Kemp, 481 U.S. 279, 341 (1987) (Brennan, J., dissenting) (“That a decision to impose the death penalty could be influenced by race is thus a particularly repugnant prospect, and evidence that race may play even a modest role in levying a death sentence should be enough to characterize that sentence as “cruel and unusual.”).
defendant who deserves death. Most states make no pretense of trying to stop these non-deserved reprieves. Their goal, instead, is to provide a fair guilt-or-innocence trial followed by a fair sentencing trial, which can help ensure that nobody receives a death sentence who does not deserve it.

The Georgia system, which the Supreme Court first upheld in 1976, exemplifies this deserts-limitation approach to capital selection. In Georgia, a person who commits a homicide may face a death-sentencing trial if he is found guilty of common-law murder. Despite the availability of strong evidence of his guilt of murder, however, a defendant will probably avoid such a trial. The police do not investigate all homicides with maximum intensity, and, in some cases, the police may not feel pressure to develop overwhelming evidence of guilt. For this and other reasons, when an arrest occurs, the prosecutor handling the case might decide to charge the defendant merely with manslaughter or some lesser form of criminal homicide. Assuming the prosecutor charges the defendant with murder, a grand jury might only indict the defendant on a lesser charge. If the grand jury indicts the defendant for murder, the prosecutor can still offer to reduce the charge to manslaughter or to not seek the death penalty if the defendant pleads guilty. If the prosecutor does not offer a plea bargain but instead proceeds to trial, a jury can still “nullify” the law by finding the defendant guilty of a lesser form of homicide. Moreover, even if a jury finds the defendant guilty of murder, the prosecutor can still decline to pursue a death sentence.

Most murder cases do not proceed to a capital sentencing trial even if the defendant is guilty and death-eligible. Usually, a murder charge results in a plea

33. See McCleskey, 481 U.S. at 284 n.1 (discussing the Georgia statute providing the penalty options for murder).
35. Id. at 221 (“Often, the amount of available evidence differs because the local sheriffs and police departments investigate crime in the white community much more aggressively than crime in the black community.”).
37. The United States Supreme Court has concluded that plea-bargaining to avoid the possibility of a death sentence is constitutional. Brady v. United States, 397 U.S. 742 (1970).
38. Jurors have the power to acquit even in the face of overwhelming evidence of guilt. See generally WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE 1027-28 (3d ed. 2000).
39. See BALDUS STUDY, supra note 2, at 106 (“In Georgia, even after the defendant’s conviction for capital murder, a prosecutor who considers a death sentence to be inappropriate or unwarranted may waive the penalty trial.”).
bargain that spares the defendant from death.\textsuperscript{40} Among the small proportion of cases that proceed to trial and result in murder convictions, a capital-sentencing hearing is still not the norm. One post-\textit{Furman} study found that, during one extended period in Georgia, prosecutors declined to pursue the death penalty in a large majority of the murder cases in which a jury had already convicted the defendant of that crime.\textsuperscript{41}

The basis for these reprieves need not have anything to do with the deserts of the defendant. The decision of a prosecutor to spare a defendant from the death penalty is essentially unreviewable absent proof of a conscious purpose to discriminate based on race or some other forbidden basis under the Equal Protection Clause.\textsuperscript{42} Thus, the prosecutor may ground such a decision on considerations related, for example, to his own political career, on the desire to save public resources, on the desire to focus prosecutorial efforts on other offenders or even on unconscious, personal biases regarding the defendant or the victim.\textsuperscript{43} Likewise, jurors at the grand jury stage or at a guilt-or-innocence trial may not indict the defendant for murder or may acquit him on that charge for reasons that have nothing to do with his deserts. The trial jurors may, for example, find him guilty of only a lesser charge because they feel sympathy for the defendant’s family but little kinship with the victim, who was from out-of-state.\textsuperscript{44} A jury’s decision to acquit is also unreviewable.\textsuperscript{45}

Assuming a murder arrest results in a murder conviction and proceeds to a sentencing trial, the jury would still retain broad discretion to spare the offender on grounds having nothing to do with his deserts. In Georgia, at a capital-sentencing hearing, both the defense and the prosecution can present evidence that relates to the offender’s character, record, or crime.\textsuperscript{46} Both parties also can present arguments on whether the offender warrants the capital sanction.\textsuperscript{47}

\textsuperscript{40} \textit{See Welsh S. White, The Death Penalty in the Nineties} 62 (1991) ("Since plea bargaining is widely employed in capital cases, its effect on the selection of those sentenced to death will be pervasive . . . .").

\textsuperscript{41} \textit{See Baldus Study, supra} note 2, at 106 ("[I]n 59 percent of the death-eligible cases, a life sentence was imposed by default when the prosecutor unilaterally waived the penalty trial.").

\textsuperscript{42} \textit{See, e.g., Latzer, supra} note 21, at 1188 ("[E]ven a purposeful selective enforcement policy does not deny equal protection, unless it is based on an invidious standard.").

\textsuperscript{43} \textit{See White, supra} note 40, at 54-57; \textit{see also Latzer, supra} note 21, at 1190 ("To establish an Equal Protection violation, the challenger would have to prove purposeful discrimination on a racial or some other similarly forbidden basis.").

\textsuperscript{44} \textit{See Interview with Alan M. Dershowitz, Professor at Harvard Law School, in Cambridge, Mass. (Mar. 2, 1988), in A Punishment in Search of a Crime} 330, 331 (Ian Gray & Moira Stanley eds., 1989) (asserting that capital sentencing juries favor those who are residents of their area rather than those who are from other regions).

\textsuperscript{45} \textit{See, e.g., Fong Foo v. United States}, 369 U.S. 141 (1962) (per curiam) (concluding that Court of Appeals erred in ordering retrial after trial judge had erroneously instructed jury to acquit defendants and entered judgment of acquittal).

\textsuperscript{46} \textit{See Gregg v. Georgia}, 428 U.S. 153, 163-64 (1976) (plurality opinion) (noting that Georgia statute allowed for the presentation of such evidence by the defense and the prosecution).

\textsuperscript{47} \textit{Id.}
judge instructs the jury that it must find at least one aggravating circumstance from a statutory list as a prerequisite to imposing a death sentence. However, the list of statutory aggravators covers almost all murders, so this requirement rarely poses an obstacle for the prosecution. If the jury finds an aggravating circumstance, it may consider any other evidence that it deems either aggravating or mitigating in determining the sentence. At this final stage, the jury retains “absolute discretion.” Thus, a jury may spare an offender on non-desert grounds. At the same time, the hope is that a jury will render a verdict for a death sentence only if it determines that the offender deserves that sanction.

48. The statutory aggravating circumstances in the post-Furman Georgia statute were as follows:

(1) The offense . . . was committed by a person with a prior record of conviction for a capital felony, or the offense . . . was committed by a person who has a substantial history of serious assaultive criminal convictions.
(2) The offense . . . was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.
(3) The offender by his act . . . knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.
(4) The offender committed the offense . . . for himself or another, for the purpose of receiving money or any other thing of monetary value.
(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor [was committed] during or because of the exercise of his official duty.
(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.
(7) The offense . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.
(8) The offense . . . was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.
(9) The offense . . . was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.
(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.


50. See BALDUS STUDY, supra note 2, at 102-04. For a forceful argument that states should eschew the “one-aggravator-is-sufficient-and-all-are-equal” model in favor of a more nuanced list of depravity factors and a requirement of “an accumulation of them for death-eligibility;” see David McCord, Should Commission of a Contemporaneous Arson, Burglary, Kidnapping, Rape, or Robbery be Sufficient to Make a Murderer Eligible for a Death Sentence? – An Empirical and Normative Analysis, 49 SANTA CLARA L. REV. 1, 2-3 (2009).


52. See, e.g., McKoy v. North Carolina, 494 U.S. 433, 443 (1990) (“[I]t is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant’s
Yet, this final deserts assessment is highly subjective; there are no standards that guide the jury to a verdict.53

If an offender receives a death sentence – which happens in Georgia to only about two percent of those arrested for murder54 – he may still be reprieved for reasons that have nothing to do with his deserts. Appeals may result in a reversal of his conviction or death sentence based on errors that occurred in the trials.55 As a result, the case may be returned to the trial level, and the many prosecutorial and jury decisions would have to be repeated for him to again receive a death sentence. Along the way, the defendant might again gain a reprieve on non-desert grounds.

This kind of system focuses on ensuring deserved death sentences rather than on ensuring deserved reprieves. Consistency of outcomes among all potential murder defendants or even among convicted murderers is not a plausible expectation. Nothing about such a system tends to provide a meaningful basis for distinguishing cases resulting in death sentences from those involving reprieves. Still, if all or virtually all death-sentenced persons deserve that punishment, the system satisfies the deserts limitation.

III. THE STATISTICAL STUDIES OF RACIAL INFLUENCES IN THE SELECTION PROCESS

Given that death-selection systems provide the opportunity for many highly discretionary decisions along the path to a death verdict, the biases of the decision-makers would seem likely sometimes to influence their decisions.56 The presence of these influences does not necessarily refute that those who

character or record or the circumstances of the offense.”) (quoting Penry v. Lynaugh, 492 U.S. 302, 327-28 (1989)).

53. See Zant, 462 U.S. at 874 (noting that “the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty”).

54. See John Blume, Theodore Eisenberg & Martin T. Wells, Explaining Death Row's Population and Racial Composition, 1 J. EMPIRICAL LEGAL STUD. 165, 172 tbl. 1 (2004) (noting that the death sentence rate among murder arrestees in Georgia from 1977-99 was 0.022 (243 death sentences out of 10,912 murder arrests)).


When the Supreme Court first reviewed the post-Furman Georgia statute in Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion), the plurality noted that the Georgia statute called for the Georgia Supreme Court to conduct an appellate review to ensure that a death sentence did not appear disproportionate to the sentences imposed in similar cases. See id. at 198. However, the plurality could not reasonably have placed significant reliance on this feature of the system to ensure consistency. See Howe, Furman’s Mythical Mandate, supra note 9, at 448 n.59.

56. See LINDA E. CARTER, ELLEN S. KREITZBERG & SCOTT W. HOWE, UNDERSTANDING CAPITAL PUNISHMENT LAW 281 (2d ed. 2008).
receive death sentences deserve them. Nonetheless, in a society in which racial biases often operate, one would expect racial biases occasionally to influence capital selection.57

Many published, statistical studies have reached conclusions consistent with this intuition. A few were conducted in the pre-Furman era,58 but the vast majority address post-Furman sentencing schemes.59 The studies vary greatly in their foci, in their thoroughness and in their conclusions. Nonetheless, a large proportion of even the post-Furman studies have found a substantial risk that some racial bias affects one or more stages of the capital selection process in certain jurisdictions.60 The studies have tended to indicate that unconscious discrimination against black capital defendants generally is far less prevalent than in the pre-Furman era.61 At the same time, a significant number have found a risk of unconscious discrimination against those defendants who kill white victims and, especially within that group, some studies have also found a risk of unconscious discrimination against black defendants.62

The most famous of the studies focused on the operation of Georgia’s system in the 1970s and gave rise to the litigation that produced the Supreme Court decision in McCleskey.63 A research team led by Professor David Baldus of the University of Iowa College of Law tried to determine the influence of racial and other illegitimate factors on the death-selection process in Georgia, from indictment through sentencing verdict.64 For all suspects charged with murder throughout the state between 1973 and 1979, the researchers discovered the following death-sentencing rates in four categories of race-of-defendant and race-of-victim combinations:

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57. See id. at 14 (“[O]pponents cite studies that show defendants are more likely to receive the death penalty if the victim is white.”).
59. See, e.g., Howe, The Futile Quest, supra note 9, at 2106-19 (discussing post-Furman statistical studies).
60. See Howe, The Futile Quest, supra note 9, at 2120 (discussing such studies).
61. See Howe, The Futile Quest, supra note 9, at 2120.
62. See Howe, The Futile Quest, supra note 9, at 2120; Ronald J. Tabak, Is Racism Irrelevant? Or Should the Fairness in Death Sentencing Act Be Enacted to Substantially Diminish Racial Discrimination in Capital Sentencing?, 18 N.Y.U. REV. L. & SOC. CHANGE 777, 778 (1990-91) (“[T]he primary emphasis . . . was on the extent to which racial and other illegitimate or suspect case characteristics influenced the flow of cases from the point of indictment up to and including the penalty-trial death-sentencing decision.”).
63. See BALDUS STUDY, supra note 2, at 3 (noting that the study provided the basis for the McCleskey v. Kemp, 481 U.S. 279 (1987) litigation in the Supreme Court over the claim of racial bias).
64. See BALDUS STUDY, supra note 2, at 45 (”[T]he primary emphasis . . . was on the extent to which racial and other illegitimate or suspect case characteristics influenced the flow of cases from the point of indictment up to and including the penalty-trial death-sentencing decision.”).
<table>
<thead>
<tr>
<th>Race of Defendant &amp; Victim</th>
<th>Death Sentencing Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. black defendant/white victim</td>
<td>.21 (50/233)</td>
</tr>
<tr>
<td>2. white defendant/white victim</td>
<td>.08 (58/748)</td>
</tr>
<tr>
<td>3. black defendant/black victim</td>
<td>.01 (18/1443)</td>
</tr>
<tr>
<td>4. white defendant/black victim</td>
<td>.03 (2/60)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>.05 (128/2488)</td>
</tr>
</tbody>
</table>

These figures might hint at the influence of racial bias, but they do not prove it. They reveal that defendants much more often received the death penalty in white-victim cases than in black-victim cases. They also show that, within the white-victim cases, black defendants received the death penalty much more often than white defendants. We might suspect the influence of racial bias based on the country’s long history of racial bias by whites in favor of whites and against blacks.66 Still, one might posit that legitimate factors could coincidentally correlate with the racial factors and thereby explain the disparities on non-racial grounds. To investigate that possibility, the researchers searched for any such factors.67

The researchers did not find latent factors that would explain the racial disparities.68 They investigated 230 variables for each case and defendant, but ultimately focused on a core model of thirty-nine variables.69 Employing cross-tabulations and multiple-regression analysis, the researchers determined that no combination of legitimate variables could come close to explaining the results without the consideration of race.70 Criticisms of their methodologies caused the federal district court to reject the study as flawed,71 but the Supreme Court assumed that the study was statistically valid.72

The Baldus researchers ultimately found that “the race of the victim [was] a potent influence in the system.”73 Among all murder cases, they did not find that

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65. See BALDUS STUDY, supra note 2, at 315 tbl. 50.
67. See BALDUS STUDY, supra note 2, at 46, 316-17.
68. See BALDUS STUDY, supra note 2, at 318 (“[R]ace of the victim has an importance of the same order of magnitude as ‘multiple stabbing,’ ‘serious prior record,’ and ‘armed robbery involved,’ and its effect is larger than several variables of well-recognized importance, such as the victim having been a stranger.”).
69. See BALDUS STUDY, supra note 2, at 317-18.
70. See BALDUS STUDY, supra note 2, at 316-17.
73. BALDUS STUDY, supra note 2, at 185.
black defendants faced greater odds of receiving a death sentence because of their race. However, they concluded that defendants who murdered a white person rather than a black person faced much greater odds of receiving a death sentence. Also, among the white-victim cases, black defendants faced greater odds of receiving a death sentence because of their race. The risk of racial influences operated mostly in cases that the authors classified in the mid-range of defendant culpability. The researchers also concluded that the race effects arose not only from the actions of prosecutors but from the decisions of capital-sentencing jurors.

Many other multiple-regression studies have reached similar conclusions, although they often account for a relatively small number of non-racial factors. Social scientists have conducted these studies in a variety of death-penalty jurisdictions and over a period that includes the current decade. Several reviews of the studies have concluded that racial effects appear in at least some parts of the selection process in many jurisdictions. For example, the U.S. General Accounting Office reviewed twenty-eight studies that were published from 1972 to 1990. Likewise, Baldus and Woodworth reviewed eighteen studies that were published from 1990 to 2003. Both reviews concluded that, while a risk of race-of-defendant bias finds support in only a small minority of the studies, evidence of race-of-victim bias shows up in most of them.

Generalizations about the studies, however, should not mask that, assuming that we accept their methodological validity, their foci and conclusions vary greatly. The findings regarding racial effects are not unanimous. The studies also do not cover some of the most important death-penalty jurisdictions, and attitudes about race have progressed and hopefully will continue to progress.

74. See Baldus Study, supra note 2, at 328.
75. See Baldus Study, supra note 2, at 328.
76. See Baldus Study, supra note 2, at 328.
77. See Baldus Study, supra note 2, at 145.
78. See, e.g., Baldus Study, supra note 2, at 187 tbl. 44.
79. See, e.g., Howe, The Futile Quest, supra note 9, at 2110-19 (summarizing the more prominent studies).
80. See Howe, The Futile Quest, supra note 9, at 2110-19.
84. See David C. Baldus, George Woodworth, Catherine M. Grosso & Aaron M. Christ, Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999), 81 Neb. L. Rev. 486, 500 (2002) (noting that the race disparities “are highly sensitive to locality and vary significantly”).
85. See Scott Phillips, Racial Disparities in the Capital of Capital Punishment, 45 Hous. L. Rev. 807, 808-09 (2008) (noting that good statistical studies have not covered some of the most active death penalty states).
Also, the studies do not all focus on the same parts of the selection process, with some centered on prosecutorial decisions or the overall process, and only a fraction separating out the decisions of sentencers.\textsuperscript{86} Many commentators believe that the studies support a generalized conclusion that racial bias sometimes influences some parts of the capital selection process in some jurisdictions.\textsuperscript{87} The relevant issue under the proportionality view of the Eighth Amendment, however, is whether they reveal that some offenders receive death sentences that they do not deserve. We now turn to that question.

IV. THE EIGHTH AMENDMENT SIGNIFICANCE OF THE STUDIES

Racial-bias studies can have major policy implications, but if the prohibition on cruel and unusual punishments is about proportionality and that idea does not merge with consistency, even excellent studies can only hint that some death sentences infringe the Eighth Amendment. My goal in this part is to explain why statistical studies have limitations as proof that some offenders receive undeserved death sentences,\textsuperscript{88} but why they can suggest that outcome.\textsuperscript{89} In the end, we must rely heavily on our intuitions to conclude that death sentences frequently amount to excessive retribution.\textsuperscript{90}

A. Limitations of Statistical Studies as Proof of Disproportionality

As proof of disproportionality in the use of the death penalty, statistical studies actually pose several problems. I will discuss three of them here. I do not address claims that a study can fail sufficiently to investigate case variables that might legitimately explain racial effects.\textsuperscript{91} This concern bears on whether a


\textsuperscript{87} I have previously asserted as much. See Howe, \textit{The Futile Quest}, supra note 9, at 2120.

\textsuperscript{88} See infra Part IV.A.

\textsuperscript{89} See infra Part IV.B.

\textsuperscript{90} See infra Part IV.B.

\textsuperscript{91} For an article discussing factors other than the race of the defendant or victim that can explain racial effects in sentences, see Kenneth E. Fernandez & Timothy Bowman, \textit{Race, Political
study can even tend to show that racial bias operates within a capital-selection system. I acknowledge at the outset the need for reasonably well-controlled studies. I also do not address claims that a statewide study can fail to analyze data at an intrastate level and, thus, either falsely imply or else mask the existence and degree of racial effects that are occurring within the state. I acknowledge as well the benefits of analysis at both state and intrastate levels.

Assuming a reasonably well-controlled study with intrastate analysis, an initial challenge in establishing disproportionality stems from the benefits of concentrating separately on several phases of the selection process. Studies lose some probative value if they do not focus separately on the sentencing trial, which is where the deserts limitation is enforced. If a sentencing jury has correctly concluded that a guilty and convicted capital murderer deserves the death penalty, his deserts do not change merely because unconscious racial bias


92. See Howe, The Futile Quest, supra note 9, at 2120 (“[I]n about one-fourth of that group [of studies], white defendants rather than black defendants were disfavored, at least on a state-wide basis.”).

93. For example, statewide findings can mask latent variables related to political pressures and racial or socio-economic differences among geographically diverse decision-makers. If counties with largely white populations, as compared with counties with largely black populations, produce a larger proportion of death sentences from among the number of death-eligible defendants, the overall state figures may skew towards more death sentences in white-victim cases. Even after logistic regression analysis, the lack of legitimate distinctions among the cases themselves may appear to suggest unconscious discrimination based on the race of the victim. The reality may be, however, that the disparities have another explanation. They may only reflect that prosecutors in largely white counties feel more political pressure to pursue death sentences than prosecutors in largely black counties. See BALDUS STUDY, supra note 2, at 173-78. The disparities may also reflect that juries from largely white counties are more likely to impose death sentences than juries from largely black counties. Such disparities based on the differing views of prosecutors and juries in racially distinct counties may themselves give ground for concern about the use of the death penalty. However, they would not reflect discrimination based on the race of the victim. See Kent Scheidegger, Peel Off Hype, Examine Data, USA TODAY, Apr. 29, 2003, at 14A (contending that such intrastate variations explain statewide findings of race-of-victim disparities in Maryland study). In the Baldus study in Georgia, however, the researchers examined the data on a localized level and found no basis to believe the racial effects they identified resulted from these effects. See BALDUS STUDY, supra note 2, at 178.

These same sorts of effects may also operate to obscure racial bias in statewide studies, although such bias would stand out in more localized studies. Statewide data, for example, may mask harsh treatment of black defendants in rural regions that is offset by lenient treatment of black defendants in one or more urban areas. See David C. Baldus & George Woodworth, Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception, 53 DEPAUL L. REV. 1411, 1420 (2004).

One of the problems with highly localized studies can be an insufficient number of cases or death verdicts to produce valid statistical conclusions. See, e.g., BALDUS STUDY, supra note 2, at 178 (noting the inability for this reason to separately analyze cases from each judicial circuit in Georgia).

94. See supra Part II.
motivated the prosecutor to pursue the death penalty. If the prosecutor acts with a conscious purpose to discriminate based on race, those actions will violate equal protection principles. See supra note 5.

95. If the prosecutor acts with a conscious purpose to discriminate based on race, those actions will violate equal protection principles. See supra note 5.

96. At the same time, studies that focus only on the sentencing stage are suspect because of their potential for “sample selection bias.” Racial discrimination by decision makers earlier in the selection process can tend to mask the influence of race on the sentencer. See Samuel R. Gross & Robert Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 STAN. L. REV. 27, 46-48 (1984); Justin D. Levinson, Race, Death, and the Complicitous Mind, 58 DEPAUL L. REV. 599, 638-39 (2009).

97. Another potential problem, of course, is that a study may not show significant racial effects at the sentencing stage. Among existing studies that have focused separately on capital-sentencing juries, some have not found significant indications that juries act out of bias against black defendants or against killers of white victims. For example, Professor Scott Phillips found no such evidence in a recent study regarding capital selection in Harris County, Texas, which encompasses Houston. This study is especially important, because Harris County is the source of more executions than any other county in the nation in the post-Furman era. If Harris County were a state, it would rank second in executions, trailing only its home state of Texas. Also, Phillips examined a large number of cases over a long period --all 504 that involved defendants who were indicted for capital murder in Harris County from 1992 to 1999. He also gathered extensive data concerning the victims, defendants and crimes, relying in part on newspaper accounts. Using logistic regression


99. See Phillips, supra note 85.

100. See Phillips, supra note 85, at 809.

101. See Phillips, supra note 85, at 809.

102. See Phillips, supra note 85, at 817.

103. One commentator has noted that, because media accounts could mischaracterize facts in racially biased ways, heavy reliance on media sources for information about cases could unintentionally mask disproportionate treatment based on race. See Levinson, supra note 96, at 632-43.
While Phillips found evidence that black defendants and killers of white victims were disfavored in the overall selection process, the evidence was not similar at all of the selection stages. The concern centered on the Harris County District Attorney’s Office. That office was significantly more likely to pursue death sentences in black-defendant and white-victim cases. Phillips found no indication that capital-sentencing juries in Harris County favored white defendants or killers of black victims. To the contrary, he found a slight racial effect favoring black defendants and killers of white victims. Phillips’s findings arguably support equal protection challenges based on the actions of the Harris County District Attorney’s Office, even after McCleskey. However, the study provides little basis to conclude that juries in Harris County systematically rendered flawed desert findings regarding those who received death sentences.

Some statistical researchers, nonetheless, have obtained results tending to show that race sometimes influences capital-sentencing juries. The Baldus study in Georgia that was the subject of the litigation in McCleskey is one example, and a study by Keil and Vito in Kentucky is another. Likewise, in the late 1990s, Professor Baldus led an investigation that concluded that significant race-of-defendant and race-of-victim effects appeared in a sample of capital cases from Philadelphia. This study examined all phases of the capital selection process for a group of 425 death-eligible defendants who were prosecuted from 1983 through 1993. After gathering detailed information about the cases, the researchers analyzed the data in multiple ways, including

104. See Phillips, supra note 85, at 816-17, 837.
106. See Phillips, supra note 85, at 830.
107. See Phillips, supra note 85, at 830, 834.
108. Phillips incorporated conclusions regarding Hispanic defendants and victims, but he concluded that they were treated no differently than whites by both the District Attorney’s Office and capital sentencing juries. See Phillips, supra note 85, at 830, 834.
109. See Phillips, supra note 85, at 834.
110. See Phillips, supra note 85, at 837.
111. See John H. Blume, Theodore Eisenberg & Sheri Lynn Johnson, Post-McCleskey Racial Discrimination Claims in Capital Cases, 83 CORNELL L. REV. 1771, 1805 (1998) (explaining why county-level statistical studies of prosecutorial decisions are distinguishable from the statewide study found inadequate to support an equal protection claim in McCleskey).
112. Professor Baldus, for example, was appointed by the New Jersey Supreme Court in 1992 as Special Master to conduct a continuing review of capital selection in the state. In 1998, he concluded that cases analyzed from 1989 forward showed both unexplained race-of-victim disparity in prosecutorial decision-making and unexplained and pronounced race-of-defendant disparities in the decision-making by penalty-phase juries. See Baldus et al., supra note 86, at 1664.
113. See supra note 78 and accompanying text; Keil & Vito, supra note 86, at 203 (noting that, at the sentencing stage, in Kentucky, blacks who killed whites faced a higher risk of receiving a death sentence than blacks who killed blacks).
114. See Baldus et al., supra note 86, at 1657-1710.
115. See Baldus et al., supra note 86, at 1667-69.
logistic regression analysis. They concluded that the study indicated bias in the overall process against black defendants and killers of non-black victims. They also concluded that the principal source of the problem was capital-sentencing juries rather than the prosecutor.

A final obstacle in proving disproportionality with a statistical study, however, stems from the difficulty of parsing the bases for decision-makers’ actions. This problem confronts even studies that focus on the sentencing trial and that find racial effects in jury decision-making. The problem is that even these studies cannot distinguish between two kinds of unconscious discrimination at the sentencing trial, one not prohibited under the disproportionality view of the Eighth Amendment and the other prohibited. Evidence of racial bias by sentencing juries does not necessarily prove that they regularly condemn capital offenders to death who do not deserve it. The discrimination could merely reflect that some juries more readily extend mercy or other non-desert based leniency to white defendants than to black defendants and to killers of blacks than to killers of whites. As the McCleskey court implicitly acknowledged in finding the Baldus study inadequate, the Eighth Amendment does not proscribe non-deserved reprieves. Moreover, if the racial discrimination is all about non-desert-based leniency, sentencing jurors are not condemning anyone to death who does not deserve it. There is no violation of the prohibition in the Eighth Amendment.

B. Suggestive Power of the Studies Regarding Disproportionality

While statistical studies cannot offer iron-clad proof that death sentences often rest on flawed findings of desert, they can add to our reasonable suspicions that these tainted findings regularly occur. First, we should consider the studies not in a vacuum but in light of historical and contemporary evidence of racial prejudice. There can be no doubt that “race unfortunately still matters” in

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116. See Baldus et al., supra note 86, at 1684.
117. See Baldus et al., supra note 86, at 1676, 1678.
118. See Baldus et al., supra note 86, at 1715.
119. See supra note 93.
120. Gregg v. Georgia, 428 U.S. 153, 173 (1976) (“[T]he inquiry into ‘excessiveness’ has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime.”) (internal citations omitted).
121. See McCleskey v. Kemp, 481 U.S. 279, 306-07 (1987) (“[A]bsent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, [McCleskey] cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did not receive the death penalty.”) (emphasis in original).
American society.\textsuperscript{122} Despite much progress since the 1960s, racial bias, at least in unconscious form, still seems prevalent.\textsuperscript{123}

Likewise, we cannot ignore the “absolute discretion”\textsuperscript{124} conferred on sentencers at the verdict stage of the penalty trial, even in post-\textit{Furman} systems.\textsuperscript{125} The need to assess deserts individually appears to be the most plausible Eighth Amendment explanation for the Court to require an individualized sentencing inquiry in all capital cases.\textsuperscript{126} However, there is no consensus – certainly not one identifiable by the Court – about how sentencers should assess deserts on an individualized basis, which is perhaps why the Court has not required that jurors receive any instruction that truly directs them in how to make that judgment. Because their ultimate assessment is so subjective,\textsuperscript{127} we have good reason to suspect that their unconscious biases will sometimes influence their conclusions.\textsuperscript{128} Thus, statistical studies only add to the inferences that we already can draw from our existing knowledge of the risk that some of their decisions will reflect racial bias.

In this light, even studies that find a risk that race influences the overall selection process or prosecutorial decisions have relevance to the Eighth Amendment question. Studies that find race effects in an overall selection process raise misgivings that racial bias affects the sentencing stage.\textsuperscript{129} Studies that focus only on prosecutors and find a risk of racial bias also raise reasonable

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{122} Grutter v. Bollinger, 539 U.S. 306, 333, 338 (2003) (upholding affirmative action program for admission of students at University of Michigan School of Law after noting that “race unfortunately still matters” and acknowledging “our Nation’s struggle with racial inequality”).
\item \textsuperscript{123} See, e.g., Steve McGonigle et al., \textit{A Process of Juror Elimination: Dallas Prosecutors Say They Don’t Discriminate, But Analysis Shows They Are More Likely to Reject Black Jurors}, \textit{DALLAS MORNING NEWS}, Aug. 21, 2005, at 1A (finding, based on sophisticated study that included logistic regression analysis, that Dallas prosecutors continued to frequently use peremptory strikes to exclude black prospective jurors because of their race).
\item \textsuperscript{124} Zant v. Stephens, 462 U.S. 862, 871 (1983).
\item \textsuperscript{125} Jurors may not always reach a deserts finding as a prerequisite to a death sentence. The Supreme Court has not required that sentencing juries receive information about the substantive question they ultimately are to answer in deciding whether to impose a death sentence. Consequently, juries generally remain uninformed about whether the central issue concerns offender deserts or a utilitarian question, such as whether a death sentence will deter other potential offenders or at best incapacitate the defendant from committing acts of future violence. Likewise, prosecutors are not prohibited at the sentencing trial from presenting evidence focused on utilitarian issues, such as predictions of the offender’s future dangerousness, or from urging utilitarian arguments for a death sentence, such as the need to deter future offenders. See Howe, \textit{The Failed Case}, supra note 9, at 834.
\item \textsuperscript{126} See Howe, \textit{The Futile Quest}, supra note 9, at 2141-43. However, for a broader view of the function of the hearing, grounded on virtue ethics, that has much to commend and that perhaps could find acceptance as the Eighth Amendment explanation, see Huigens, \textit{supra} note 20, at 1254-57.
\item \textsuperscript{127} See supra notes 51-53 and accompanying text.
\item \textsuperscript{128} See, e.g., Turner v. Murray, 476 U.S. 28, 35 (1986) (“Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected.”).
\item \textsuperscript{129} See \textit{infra} note 131.
\end{itemize}
\end{footnotesize}
suspicion. If law-trained prosecutors often cannot put aside their racial prejudices, we have reason to doubt that sentencing juries will almost always do so.

When we see studies that indicate that race sometimes influences penalty-phase juries, we are also hard-pressed to conclude that the bias is all about mercy. The more intuitive view is that race influences some deserts decisions to condemn, even if we cannot say which ones or how many. Such studies can give us reason to doubt that all or almost all death sentences are deserved.

In the end, statistical studies cannot prove indisputably that people systematically receive death sentences that they do not deserve. Statistical studies can only suggest that outcome. A belief that widespread racially-based disproportionality occurs must rest in part on intuition, which some might call “speculation.” The decision of the McCleskey majority that the Baldus study was inadequate to establish an Eighth Amendment violation is at least plausibly explained from this disproportionality perspective. The decision is not convincingly explained on the view that the Baldus study was statistically valid but failed to establish a serious risk of racially-based decision-making. Nonetheless, one should not infer that the statistical studies have little influence on the Supreme Court’s Eighth Amendment doctrine on capital punishment. The following Part shows why that inference is inaccurate.

V. THE INFLUENCE OF THE STUDIES ON THE SUPREME COURT

Despite their limitations as proof of disproportionality, the statistical studies on race in capital selection have influenced the Supreme Court. After Furman, and even after McCleskey, concerns about racial bias have sometimes played an animating, if unspoken, role in the Court’s effort to manage the death penalty. We might wonder whether the concern about racial bias has largely played itself out. Attitudes about race have advanced and may continue to advance, resulting in progressively more limited racial effects in capital selection. However, one

130. See infra note 131.

131. Regarding studies that identify race effects in prosecutorial decision-making but not in the actions of penalty-phase jurors, we should also be wary of concluding an absence of disproportionality, particularly if the study does not cover many variables in a highly sophisticated way. Racial discrimination by decision makers earlier in the selection process complicates the determinations whether capital sentencers have acted based on race. Bias in the selection of the group subject to sentencer consideration can easily tend to mask the influence of race on the sentencer. See, e.g., Gross & Mauro, supra note 96, at 46-48. For example, if prosecutors, based purely on racial bias, charge certain capital defendants with more contemporaneous felonies, the difference in the number of charged contemporaneous felonies could appear to explain on non-racial grounds the actions of sentencing juries in more frequently sentencing members of that group to death.


133. See id.

134. See infra Part V.A.

135. See infra Part V.A.
can reasonably doubt that the distorting effects will disappear soon. Moreover, I believe that there is a plausible scenario under which a future Supreme Court would be ready to limit the use of the death penalty to a small category of truly extraordinary crimes. If that happens, the many statistical studies that have suggested the existence of unconscious racial discrimination certainly will have contributed to the outcome.

A. The Past

Concern about racial prejudice has played a central role in the Court’s effort to regulate the death penalty under the Eighth Amendment. Anxiety over racial bias helped spur the decision to strike down the death sentences in Furman. The Furman Justices were well aware of earlier statistical studies revealing pronounced racial disparities in capital selection. The brief per curiam opinion in Furman did not address the claims of racial discrimination that the petitioners had raised. However, among the five concurring Justices – who each wrote a separate opinion in which no other Justice joined – Marshall and Douglas referred explicitly to the problem of racial discrimination, and others hinted that the standardless sentencing systems under review presented a dangerous opportunity for racial discrimination. Indeed, many commentators still assert that the decision was about inequality. I believe the correct view, in light of the Court’s subsequent decisions, is that Furman was about disproportionality. Still, Furman was about disproportionality resulting in

136. See, e.g., Graham v. Collins, 506 U.S. 461, 479 (1993) (Thomas, J., concurring) (“Furman v. Georgia was decided in an atmosphere suffused with concern about race bias in the administration of the death penalty . . . .”); Robert A. Burt, Disorder in the Court: The Death Penalty and the Constitution, 85 Mich. L. Rev. 1741, 1795 (1987) (“From its very beginning, the charge of racism in the administration of the death penalty was often the text and always the subtext of the abolitionist litigative campaign.”).

137. Only four years earlier, in Maxwell v. Bishop, 393 U.S. 997 (1968) (granting certiorari limited to questions two and three), the Justices had confronted, but then avoided, a claim supported by a major study showing racial bias in the use of the death penalty in rape cases. See also Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968).


139. See id. at 364 (Marshall, J., concurring) (“Studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination.”); id. at 257 (Douglas, J., concurring) (asserting that capital punishment as then administered was “pregnant with discrimination” against minorities and the underprivileged).

140. See, e.g., id. at 310 (Stewart, J., concurring) (while concluding that “discrimination has not been proved,” agreeing that “[m]y concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race”); id. at 295 (Brennan, J., concurring) (”[O]ur procedures are not constructed to guard against the totally capricious selection of criminals for the punishment of death.”).

141. See Howe, Furman’s Mythical Mandate, supra note 9, at 438-39 (noting some of the commentary).

142. The McCleskey majority later viewed Furman and its progeny in this fashion, even though it rejected the Baldus study as adequate proof of racially-based disproportionality. See McCleskey
part from racial bias, although also from poverty and the human frailties of those charged with administering capital selection. The concern that racial bias systematically tainted decisions to impose death in capital cases did not rest on iron-clad, empirical proof, but on a dose of intuition, based on experience and knowledge of history, combined with fragmentary statistical evidence, particularly strong in rape cases, that suggested systematic poisoning.

Concerns that underlay Furman also continued to influence the Court to manage the use of the death penalty after Furman. The concurring Justices in Furman had hoped that the decision would cause all states to abandon the capital sanction. When the gamble failed, the Court faced a mess in determining how to address the wave of new death-penalty statutes – many of them calling for mandatory death penalties upon conviction – that state legislatures had passed. The Court was unwilling to directly command the abolition of the death penalty but was also unwilling to revert to its pre-Furman position of no regulation. The latter course effectively would have endorsed the draconian mandatory statutes that states had promulgated only in response to Furman. The compromise reached in 1976 was an imperfect effort to promote proportional death sentences. A fractured Court voted to uphold statutes from Georgia, Florida and Texas that allowed the defendant to make a separate sentencing presentation and plea for his life, but to strike down mandatory death penalties from North Carolina and Louisiana. These decisions could not be

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143. See, e.g., Furman, 408 U.S. at 364-67 (Marshall, J., concurring).
144. Justice Stewart noted, for example, that a pre-Furman study sponsored by the Stanford Law Review had found no substantial evidence of racial bias by capital-sentencing juries in California. See id. at 310 (Stewart, J., concurring) (citing Note, A Study of the California Penalty Jury in First-Degree-Murder Cases, 21 STAN. L. REV. 1297 (1969)).
145. See Wolfgang & Riedel, supra note 58, at 123-33.
147. Within four years, thirty-five states had passed new death penalty statutes, and nearly 400 persons had received death sentences under them. See id. at 414-16.
148. See id. at 422-30.
149. See id.
150. See id.
reconciled convincingly with a characterization of Furman as a mandate for consistency in capital selection. However, they could easily be reconciled with a construction of Furman as focused on disproportionality – a disproportionality caused in part by racial bias. The decisions appeared to ensure that each capital offender could try to persuade the sentencer with mitigating evidence and argument that he did not deserve the death sanction. This guarantee at least might lead to more accurate desert assessments than the truncated capital sentencing inquiry – generally in the context of a unitary trial – that prevailed in the pre-Furman era. Hence, the concern about racial bias that underlaid Furman also carried forward to help induce the first of two central requirements in modern capital-sentencing law under the Eighth Amendment: individualized capital sentencing.

Since 1976, the Court has also developed a second important doctrine on capital punishment – concerning categorical disproportionality – which also seemed to stem in part from concerns about racial bias. The ground-breaking case was Coker v. Georgia, in which the Court outlawed the death penalty as categorically disproportional for the rape of an adult victim. The starkest racial disparities in the use of capital punishment in the pre-Furman era had

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152. See Howe, Furman’s Mythical Mandate, supra note 9, at 443-50.

153. See Woodson, 428 U.S. at 304 (invalidating mandatory death penalty upon conviction because it precluded sentencer from considering “the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind”).

154. Once we know not only the kind of offense a person has committed, but the circumstances in which it was performed, whether he did it deliberately, the kind of pressures on him when he did it, his whole psychological “set,” and a host of other factors, we have much more data for deciding what he deserves than when we know only the type of crime he committed and then attempt to correlate the gravity of that type of crime with the gravity of the punishment. John Hospers, Retribution: The Ethics of Punishment, in Assessing the Criminal: Restitution, Retribution, and the Legal Process 181, 190 (Randy E. Barnett & John Hagel III eds., 1977) (emphasis in original).

155. In the pre-Furman era, most death-penalty states employed unitary capital trials, in which a jury resolved the questions of guilt and sentence after a single evidentiary proceeding, and, even in states that had begun to employ bifurcated hearings, the breadth of evidence allowed on the sentencing question was often quite limited. See Scott W. Howe, Reassessing the Individualization Mandate in Capital Sentencing: Darrow’s Defense of Leopold and Loeb, 79 IOWA L. REV. 989, 1061-63 (1994).


157. See id. (describing “the more recent proliferation of categorical exemptions” as the second of the two profound changes caused by the Justices).

existed for rape. Of the 455 men who were executed for that offense from 1930 to 1972, 405, or 89 percent, were black, and virtually all of the victims were white. A study led by Professor Marvin Wolfgang that examined more than two dozen variables in a large sample of the pre-Furman cases also found no latent factors that could explain the racial disparities. Coker was white, and, when he filed his certiorari petition, the Court already had before it certiorari petitions in two other rape cases from Georgia involving death sentences imposed on black co-defendants for raping a white victim. The Court seemed to go out of its way to take the white-defendant case and then to avoid discussing the history of race discrimination in capital rape prosecutions. Despite these efforts at avoidance, however, the evidence of disparities in rape prosecutions was extraordinarily powerful on the question of whether racial bias systematically tainted sentencing decisions to condemn. The Justices could not have failed to appreciate the immediate consequence of their decision in Coker. “Rape had always been the crime for which the race of the defendant made the biggest difference, so Coker instantly wiped away more discrimination than any reform of murder sentencing could have.”

The racial-bias studies have also affected the Court’s rulings on jury selection. Approximately one year after receiving McCleskey’s certiorari petition setting forth the conclusions of the Baldus study and two months before granting it, the Court decided Turner v. Murray and Batson v. Kentucky. Both decisions overruled well-settled precedent. Turner held that a capital defendant charged with an interracial murder can inform potential jurors of the race of the victim and can question them about racial bias. Batson limited the ability of prosecutors in cases involving minority defendants to use peremptory strikes to eliminate prospective jurors of the defendant’s race. The Court did not mention the Baldus study in its opinions in these cases. However, the
timing of the decisions in relation to the presentation of the study to the Justices could hardly have been coincidence.172

The concern about racial bias that helped explain Furman and Coker is also not easily divorced from the Court’s more recent confinement of the death penalty on disproportionality grounds. Since 2002, the Court has issued three disproportionality rulings that have exempted large numbers of offenders from capital punishment. In 2002, the Court protected mentally retarded offenders in Atkins v. Virginia.173 In 2005, juvenile offenders gained protection in Roper v. Simmons.174 In 2008, in Kennedy v. Louisiana, the Court exempted offenders convicted of child rape.175 Before these decisions, jurors were permitted to determine the deserts of capital offenders in these groups through individualized assessment at the capital sentencing trial.176 The Court’s recent rulings reflect its distrust in the reliability of that endeavor, a distrust that is not entirely separate from the Court’s historical concern over racial bias in capital sentencing.177 The Court came closest to acknowledging the connection in Kennedy, in which a five-Justice majority admitted “no confidence” that use of the death penalty to punish child rape could avoid the same problem that confronted the Court in Furman.178

In the end, racial-bias studies have affected the Court in its development of modern Eighth Amendment law governing the use of the death penalty. As Professor Carol Steiker has noted, “[t]he two most profound changes to the practice of capital punishment that have ensued under the Eighth Amendment have been 1) the absolute protection of individualized capital sentencing, and 2) the more recent proliferation of categorical exemptions of groups of offenders and offenses from execution . . . “179 She also has explained that “the intellectual and doctrinal origins of these developments” lie in the Furman decision,180 particularly in the notions of “human dignity” and “excessiveness”

175. 128 S. Ct. 2641 (2008).
176. See supra Part II.
177. No doubt other factors as well, such as the large number of death row inmates exonerated based on DNA evidence beginning in the 1990s, contributed to a revived concern both within American society and within the Court over the use of the death penalty in these cases. See Corinna Barrett Lain, Deciding Death, 57 DUKE L.J. 1, 35-57 (2007).
178. 128 S. Ct. at 2661.
179. See Steiker, supra note 156, at 118. The third doctrine that makes up the Court’s Eighth Amendment regulation of capital selection is the requirement that a state narrow the group of offenders eligible for the death penalty. See, e.g., Godfrey v. Georgia, 446 U.S. 420 (1980). This doctrine has turned out to be of minor significance and lacks a good explanation. However, it is more plausibly explained as an effort to promote proportionality than as an effort to promote consistency. See Howe, The Failed Case, supra note 9, at 833.
180. Steiker, supra note 156, at 118.
developed in the opinions of Justices Brennan and Marshall.181 Both doctrines, as we have seen, appeared to be spurred in part from concerns about disproportionality based on race. One might wish that the Court had more directly and aggressively confronted the problem of racial bias in capital sentencing, starting with *Furman*. Nonetheless, we should not conclude that the Court has been oblivious.

B. The Future

Abolition of the death penalty is probably not imminent, but the Court may well continue to narrow the application of the penalty to exclude the least culpable murderers from death eligibility. Various observers, including Justice Stevens, have long promoted a narrowing of the application of the sanction to the worst murderers as a way to reduce the influence of racial prejudice in the use of the penalty.182 There also remain easily identifiable categories of marginal capital cases for which abolition of the death penalty would promote proportionality and, perhaps, less racial disparity.

Two areas that call for categorical protections immediately come to mind. First, after the Hinckley acquittal,183 several states passed legislation to eliminate the insanity defense.184 Other states narrowed their test of insanity to a point that was even more restrictive than the traditional *M’Naghten* test.185 Given these changes, a risk arises that some offenders who would qualify as insane in most

182. See *McCleskey v. Kemp*, 481 U.S. 279, 367 (1987) (Stevens, J., dissenting) (“If Georgia were to narrow the class of death-eligible defendants to [categories of highly aggravated murders], the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated.”); *Baldus Study*, *supra* note 2, at 386 (“[B]y declining to endorse such a system, the Supreme Court majority acted so as to preserve the ability of the state to impose death sentences in cases in which death sentences usually do not occur.”).
183. John Hinckley was acquitted after wounding President Reagan and several other persons in a failed assassination attempt. The jury acquitted Hinckley because, based on the American Law Institute’s (ALI) instruction on insanity that was required by federal law, there was a reasonable doubt about Hinckley’s sanity during the incident. The ALI standard provides that “A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect, he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.” See Phillip E. Johnson & Morgan Cloud, *Criminal Law: Cases, Materials and Text* 327-28, 323-24 (7th ed. 2002).
184. These states have abolished the insanity defense but allow a defendant to offer evidence of a mental illness or defect to disprove the existence of the mental state required as an element of the crime. See, e.g., *Idaho Code* § 18-207 (2008); *Mont. Code Ann.* § 46-14-102 (2007); *Utah Code Ann.* § 76-2-305(1) (2008).
185. The *M’Naghten* test permits acquittal only when it is proved that, “at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.” *M’Naghten’s Case*, 8 Eng. Rep. 718 (H.L. 1843).

Many states have narrowed their insanity tests even further than the *M’Naghten* test by restricting the types of mental defects and illnesses that would make a defendant eligible for the insanity defense. See, e.g., *Ariz. Rev. Stat.* § 13-502 (2008).
states could suffer both a conviction and a sentence of death. If such a case comes before the Supreme Court, the Justices could easily conclude that an exemption from the death penalty based on disproportionality should apply for offenders who were insane at the time of their crimes under nationally prevailing definitions of insanity.

The Justices could also confine the death penalty to a more restricted category of murders. The Court has done little to protect relatively low-culpability offenders who currently qualify for death eligibility based on the felony-murder doctrine. A small fringe of offenders who are guilty of felony murder only through vicarious-liability doctrines are protected if they did not act recklessly or were not substantially involved in the felony. Yet, many other persons who are guilty of murder and eligible for the death penalty because they committed a contemporaneous felony are of relatively low culpability. Restricting the application of the death penalty to murderers who acted with a premeditated and deliberated intent to kill would help confine the death penalty to a group of the more deserving offenders.

Statistical studies that show racial effects in the decisions of penalty-phase juries in marginal categories might help to support an exemption. For example, cases in which the defendant lacked a premeditated and deliberated intent to kill might involve substantially more race-of-victim discrimination than cases in which the defendant possessed that mental state. If this is so, that kind of evidence could influence the Court, just as statistical studies on racial effects surely influenced the Court in Coker. The Court might not use the study as the principal evidence of disproportionality or even mention it. The evidence also would surely not reflect the virulent discrimination that existed regarding rape in the pre-Furman era. Nonetheless, the evidence could help the Court see the benefits of the categorical protection.

Predicting how far the Court eventually could go in narrowing the use of the death penalty under the Eighth Amendment requires, like predicting judicial abolition, major assumptions about changes in the composition of the Court and continuing change in the states’ use of the sanction. However, the question about narrowing suggests alternative outcomes that the question about total abolition does not. Pursuit of narrowing suggests, for example, that the Court could eventually reject the death penalty as categorically disproportional for


187. See, e.g., McCord, supra note 50, at 3 (noting that the prevailing model of death eligibility “allows prosecutors to push for the death penalty for many relatively commonplace murders, rather than only for the most depraved murders”).

188. For a more nuanced approach that could work well, if states were willing to pursue it on their own, see McCord, supra note 50, at 44-50.

189. See supra notes 157-65 and accompanying text.

190. See Johnson, supra note 159, at 192-93.
aggravated murder but except a category of egregious crimes against the state and against humanity. Such an outcome would avoid arguments, based on language in the Fifth and Fourteenth Amendments contemplating capital punishment,\(^{191}\) that total abolition by the Court is unconstitutional.\(^{192}\) Likewise, it would allow the death penalty to carry real meaning in staking out the “worst of the worst” offenders;\(^{193}\) the act of Timothy McVeigh would fall in a separate class from a robbery of a liquor store gone awry. Finally, it would still answer in a meaningful way the concern about disproportionality based on race and poverty and the human frailties of those who influence capital selection that underlay \textit{Furman}.\(^{194}\)

\textbf{CONCLUSION}

The influence of unconscious racial bias in capital selection remains a serious concern for the use of the death penalty. Claims brought under the Eighth Amendment can express some of this concern. The prohibition on cruel and unusual punishments forbids disproportional death sentences, and evidence that some death sentences rest on deserts findings poisoned by unconscious racial bias amounts to evidence of disproportionality in the use of capital punishment. Because the “deserts limitation” embodied in the Eighth Amendment is unidirectional, however, this kind of claim cannot address all of the racial bias that affects capital selection. Given also the Supreme Court’s conclusion in \textit{McCleskey} that equal protection principles apply only to purposeful discrimination, there remains much room for action by legislatures and state courts interpreting state constitutions to promote greater fairness in capital selection.\(^{195}\) One might wish that the Supreme Court would have done

\begin{itemize}
  \item \textbf{191.} The Fifth Amendment provides in pertinent part:
    \begin{quote}
    No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .
    \end{quote}
    U.S. \textit{CONST. \textit{amend. V.}}
    
    The due process clause in the fourteenth amendment provides: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .” U.S. \textit{CONST. \textit{amend XIV, § 1.}}
  \item \textbf{192.} \textit{See}, e.g., \textit{Baze v. Rees}, 128 S. Ct. 1520, 1552-53 (2008) (Scalia, J., concurring in the judgment) (rejecting argument by Justice Stevens for abolition by the Court and noting that death penalty is “explicitly sanctioned by the Constitution”).
  \item \textbf{195.} The Kentucky Racial Justice Act represents one of the few legislative efforts to promote such fairness. \textit{See KY. REV. STAT. ANN. § 532.300} (West 2009). North Carolina also recently
\end{itemize}
more under the U.S. Constitution. However, we should not conclude that the Court has been unaffected by concerns about racial bias or that it has taken no meaningful action. Particularly through its decisions finding categorical disproportionality, the Court has protected a significant group of offenders from the capital sanction. Some of these decisions bear a strong connection to concerns about disproportionality caused by racial prejudice.

The Court may well continue to narrow the application of the capital sanction. Evidence of racial bias has served as a symptom for a deeper problem with our capital punishment systems. The deeper problem is the risk of disproportionality caused by a variety of circumstances that conspire to prevent accurate desert assessments of those who receive death sentences. These circumstances include not only the numerous biases of the decision makers regarding defendants and victims but the often poor quality of lawyering and judging and the imperfection of witnesses. The existence of these problems calls for a humility in judging criminals, which, in turn, warrants, if not abolition of the death sanction, at least extraordinary restraint in its application.


197. Regarding the problem of poor trial counsel in capital cases, see David R. Dow, Bell v. Cone: The Fatal Consequences of Incomplete Failure, in DEATH PENALTY STORIES, 389, 414 (John H. Blume & Jordan M. Steiker eds., 2009) (“If one is looking for actual cases to demonstrate that the very arbitrariness which led the Court in Furman to strike the death penalty down still rampages through the machinery of death, one need not look much further than [the Court’s cases on ineffective assistance of counsel].”).
THE CONTINUING ROLE OF RACE IN CAPITAL CASES, NOTWITHSTANDING PRESIDENT OBAMA’S ELECTION

Ronald J. Tabak*

Ronald J. Tabak spoke at the Northern Kentucky Law Review’s Fall Symposium: Race and the Death Penalty, which was held on October 17, 2009. The following is based primarily on the speech Mr. Tabak gave during the Symposium.

This speech concerns the implications, both in death penalty advocacy and in representing those facing possible execution, of the now common belief that racism no longer plays a significant role in our capital cases.

I. INTRODUCTION

A. The End of Segregation and the Belief that Racism Was No Longer a Real Problem

I first experienced this belief in the late 1980s, when I was representing a death row inmate from Georgia named Johnny Lee Gates. He had been convicted and sentenced to death in 1977, little more than a decade after

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Because Mr. Tabak did not prepare a conventionally written and footnoted law review article, many of the footnotes that now appear were added by law review members. Mr. Tabak, while providing many footnotes, has not independently reviewed most of the ones that were added by the law review.

enactment of the 1964 civil rights law, by an all-white jury, in a community where African Americans constituted about thirty percent of the population.3

In Gates v. Zant, the federal habeas corpus proceeding, undisputed evidence showed a significant disparity between the percentage of African Americans in the age groups from which jurors could be selected and the percentage of African Americans on the jury rolls from which trial jurors were selected.4 When I represented Mr. Gates in his Eleventh Circuit appeal,5 the court found that we had established a prima facie case of unconstitutional racial disparity in jury composition.6 Thus, if the court had considered the merits of Mr. Gates’ constitutional claim, it would have required the State to rebut the prima facie case by explaining how and why this great disparity came about.7 However, the Eleventh Circuit refused to consider the merits of this constitutional claim8 because his trial lawyer failed to challenge the constitutionality of the jury rolls.9

Mr. Gates’ trial lawyer testified in the state post-conviction proceeding,10 and when asked why he did not object at or before the 1977 trial, he provided two reasons.11 First, he stated that he did not know enough about the constitutional law on racial disparity in jury rolls to have made a challenge.12 Second, he said that even if he had known enough about the constitutional law, he still would not have objected.13 He explained that he and other defense counsel believed that racial disparity relating to jury composition should not be attacked.14 They believed that winning such a claim would do “more harm than

4. Gates, 863 F.2d at 1498 (noting Gates’ argument that if his trial attorney had “researched the matter thoroughly, he would have discovered a statistical disparity of at least 13% between the percentage of blacks in Muscogee County as a whole and the percentage of blacks on the jury list”).
5. See id. at 1492.
6. Id. at 1498 (stating “by making these allegations [the trial attorney] could have stated a prima facie case of jury discrimination”).
8. Gates, 863 F.2d at 1500.
9. Id.
10. Id. at 1497.
11. Id.
12. Gates, 880 F.2d at 294 (Clark, J., dissenting) (noting that in Gates’ trial attorney’s post-conviction deposition, he testified that “[he did] not understand that [percentage disparities] ha[d] ever been held to be basis of setting aside the Grand Jury array or petit jury” (Id. at n.1); concluding that “Cain [the trial attorney] may have been generally aware of the availability of jury composition challenges, but the facts of this case reveal that he was not aware that such a challenge was available in Muscogee County” (Id. at 294); suggesting that Cain’s statements “[demonstrate] that Cain misunderstood the law upon which he could have based a successful prima facie claim of jury discrimination in Gates’ case” (Id. at n.1)).
13. Id. at 295; Gates, 863 F.2d at 1497 (noting Cain’s testimony that “he believed that such a challenge might alienate the jury that eventually would be empaneled to try the case”).
14. Gates, 880 F.2d at 296 (“Cain asserted that he did not challenge the jury composition because it was known among the criminal defense attorneys in the county that it was not ‘the thing
good” because some people who would nonetheless end up on the jury would be prejudiced against the defendant for having exposed the racial disparity.\textsuperscript{15}

At the Eleventh Circuit argument, I pointed out what had occurred during segregation, which had officially ended not long before the 1977 trial.\textsuperscript{16} During that time, when a trial lawyer failed to object due to fear of the resulting prejudice against the defendant – what the courts referred to as a “Hobson’s choice of evils”\textsuperscript{17} – the fact that the lawyer faced that choice was deemed to be a sufficient reason for post-conviction consideration of the merits of the constitutional claim.\textsuperscript{18} But the Eleventh Circuit essentially stated in 1988 that constitutional claims of racial discrimination in jury composition must always be made according to state procedure; no matter how meritorious, they cannot be raised for the first time in post-conviction, even when a fearful trial lawyer faces what he believes to be a Hobson’s choice of evils.\textsuperscript{19}

B. Federal Legislation and Racism in Capital Cases

In the late 1980s and the early 1990s, the belief that courts and legislative bodies no longer had to address issues of racial disparities in the context of capital punishment came to the forefront. In 1991, I testified before the Senate Judiciary Committee a few years after losing Mr. Gates’ appeal.\textsuperscript{20} I spoke on behalf of the American Bar Association\textsuperscript{21} in favor of the proposed federal
Fairness In Death Sentencing Act of 1991 (the “Fairness Act”). Part of what I addressed was the assertion that an effective Racial Justice Act (the earlier title of what became the proposed Fairness Act) was incompatible with a death penalty. I pointed out that the death penalty could continue to exist if the Fairness Act were enacted, if real proportionality review and various other reforms were initiated.

I was dismayed thereafter to read in the Congressional Record that Senator Dixon of Illinois had concluded on the basis of my testimony that he should oppose the Fairness Act. Senator Dixon stated that the legislation was unnecessary because during my testimony I had mentioned various reforms that would address racial discrimination while permitting the continued existence of the death penalty.

Thereafter, when I turned my testimony into a law review article, I argued that Senator Dixon’s logic was akin to saying, in 1963, that the Civil Rights Act of 1964 and the Voting Rights Act of 1965 were unnecessary because the southern states could eliminate segregation if they felt like doing so. But these
states were not going to eliminate segregation without federal legislation.30 Similarly, it was highly unlikely that states would adopt reforms in the absence of either the proposed federal Fairness Act or a state racial justice act.31

So, the belief that courts and legislative bodies were no longer required to address issues of racial disparities in the context of capital punishment continued, and this attitude has become even more pronounced over time, particularly in the wake of President Obama’s election.32

C. The Adverse Effects of President Obama’s Election and Some of His Actions

As Christina Swarns, the leader of the capital punishment and criminal justice practice at the NAACP Legal Defense and Education Fund (“LDF”), has noted, many critical players in the criminal justice system, whether they are legislators, district attorneys, federal prosecutors, defense lawyers or jurors, believe in the post-racial rhetoric.33 And she has noted that this belief has been aggravated by some of what President Obama has himself done.34

For example, as a presidential candidate, Mr. Obama denounced the Supreme Court for holding in Kennedy v. Louisiana35 that it is unconstitutional to have the death penalty for non-homicide crimes committed against individuals.36 As a result, many people will infer that if even President Obama thinks the death penalty is acceptable in such situations, then a serious concern about racial disparities in the context of capital punishment cannot exist.

Furthermore, litigation efforts on behalf of people facing potential execution may be undercut by President Obama’s life experiences. He overcame many obstacles, including living in a single-parent household; being the product of a bi-racial marriage, which would have been illegal at that time in many of our states; and overcoming drug use.37 This success may make it more difficult for

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30. Tabak, supra note 22, at 804-05.
31. Tabak, supra note 22, at 804-05.
32. See Interview by Innocence Project, Inc. with Christina Swarns, Director, Criminal Justice Project, NAACP Legal Defense and Educational Fund, in 5 THE INNOCENCE PROJECT IN PRINT 1, 16-17 (Summer 2009), available at http://www.innocenceproject.org/.../ip_summer2009.pdf [hereinafter In Their Own Words].
34. In Their Own Words, supra note 32.
36. See Jim Geraghty, What Does Obama Think of Kennedy v. Louisiana? (UPDATED), NATIONAL REVIEW ONLINE, June 25, 2008, http://campaignspot.nationalreview.com/post/?q=Y2E3MTc3YTEyY2M0YTQ0OuQ4ZmlxZjk3ZTAwZTA10GM= (last visited Mar. 12, 2010) (quoting then-Sen. Obama: “I disagree with the decision. I have said narrow circumstances for the most egregious of crimes. The rape of a small child, 6 or 8 years old, is a heinous crime and if a state makes a decision that under narrow, limited, well-defined circumstances that the death penalty can be pursued, that that [sic] does not violate the Constitution”).
juries to give proper mitigating weight to evidence regarding defendants with somewhat similar backgrounds to the President, but who failed to overcome their difficult circumstances and instead participated in capital crimes.

However, President Obama’s election actually tends to undercut the claim that we are now a society free from racial discrimination. In several “Deep South” states, he received a lower percentage of the white vote than did Senator Kerry in 2004, even though Senator Kerry nationally received a much lower percentage of both the overall and the white vote than Mr. Obama. A study by Professors Persily, Ansolabehere and Stewart also found that Obama received 75% of the white Democratic vote, as compared to Kerry’s 82%, in states covered by Voting Rights Act Section 5, whereas both Obama and Kerry received 85% of the white Democratic vote in the non-covered states. Therefore, while President Obama’s statements and background may impact racism in the death penalty, his election emphasizes the apparent existence of racial patterns in United States elections.

D. Racial Discord Helps Explain this Country’s Increasing Isolation in Keeping the Death Penalty

A report for the American Law Institute (“ALI”), written by Professors Carol and Jordan Steiker, provides a strong basis for disregarding the post-racial rhetoric, at least in the context of capital punishment. In response to their report about the death penalty, in 2009 the ALI revoked its past standards on the death penalty and decided not to attempt to develop new standards on how to implement the death penalty fairly because it is too fundamentally flawed.

The Steikers’ report states that “broad scholarly literature often highlights . . . racial discord” in this country as an “important explanatory variable” of why the United States continues to be so unusual among Western
democracies with regard to the death penalty. These studies point to the overwhelming percentage of American executions taking place in the South and states bordering the South as evidence of the racial discord. These were the last states to desegregate and were the “most resistant” to civil rights laws. Thus, these states are the most likely to have people affected by the problems occurring in the lynching days that Professor Melynda Price has discussed at this conference and that remain very real to the people who were, and are still, there.

II. THE DEATH PENALTY CONFERENCES AT AIRLIE HOUSE

What I discuss below is not based on original knowledge or my research. Rather, it is based mostly on notes I took at the NAACP Legal Defense Fund’s (“LDF”) annual death penalty conferences at Airlie House in Warrenton, Virginia.

A. Explicit Versus Implicit Bias

First, I address several impacts of racial attitudes on various actors in the judicial system. In that regard, it is important to delineate between explicit bias and implicit bias. Explicit bias is much less likely to occur, either in jury selection or otherwise, because people rarely make overtly racially-biased statements in court.

Bryan Stevenson of the Equal Justice Initiative and NYU Law School has noted that sometimes people will overtly reveal their racial bias, if they feel comfortable or if they respond quickly and automatically to questions. For example, Stevenson discussed an expert witness who was discussing future dangerousness, which is an aggravating factor in some states and is considered as aggravating by jurors in many other states. This expert said that the death
penalty is more appropriate for a black or brown defendant because *ipsa facto* such a defendant is more likely to be dangerous in the future. That is an example of explicit bias.

**B. Implicit Bias and Related Studies**

Research regarding the causes of implicit bias has emerged slowly. Apparently, from around 1980 to 1995, fewer people would openly discuss racism, which caused research of explicit bias to diminish. Thereafter, research increased for several reasons. One was that psychologists discovered a way of researching racism by means of implicit tests.54

1. **Studies in the Context of Employment**

For example, LDF lawyer Matthew Colangelo discussed two studies at the Airlie conference in 2009. In one study, social scientists submitted candidates for employment to employers with identical, false, made-up resumes, with the only difference being that one of them had the name Emily Walsh and the other had the name Lakisha Washington. The study found that the candidate with the name Emily Walsh was 50% more likely to get an interview than Lakisha Washington. That rate differential is the equivalent of having an eight-year difference in experience, even though these hypothetical resumes were the same.

Then, Princeton social scientists Devah Fager and Bruce Western sent prospective employees/testers *not* to the Deep South, but to New York City.
Among the candidates of the same race, those who indicated having criminal records were, not surprisingly, much less likely to get employment. However, a white candidate who indicated that he had just been released from jail was more likely to be hired than an African American with the same qualifications and no criminal record.

2. The Implicit Association Test

I have also heard discussion about the Implicit Association Test. This test measures automatic associations, such as associating black with being bad or white with being good. This test measures quick responses. Of the white Americans who took the test as part of a study, 75-80% had a moderate to strong association of white being good and black being bad. Asian Americans had similar associations. African Americans and Hispanics did not exhibit much of a difference in their attitudes regarding white and black.

Notably, capital defense lawyers (and law students) responded about the same as the general population. They had these same stereotypical attitudes, whether or not they believed they had them. These stereotypes did not appear in what the study referred to as chronic egalitarians. Chronic egalitarians are people who actively work on these issues and are internally motivated or who have very close personal relationships with people of other races.
According to Professor Jerry Kang, “[t]here is now persuasive evidence that implicit bias against a social category, as measured by instruments such as the [Implicit Association Test], predicts disparate behavior toward individuals mapped to that category . . . notwithstanding contrary explicit commitments in favor of racial equality.”

3. Neuropsychological Correlations to Behavior

Another way of assessing implicit bias involves neuropsychological correlations of behavior. Assessments of these correlations indicate which parts of the brain are activated when people do different tasks. In one such study, people were asked to identify someone of another race, which caused much less activity in the part of the brain than is correlated with identification. This level of activity may explain the greater extent of errors that occur in the criminal justice system when somebody of one race purports to identify somebody of a different race.

In these assessments, one analytical group consisted of people with low explicit admissions but high implicit bias. If you asked such people whether they had racial attitudes, they would respond in the negative. However, when these people were asked to shake hands with or touch someone of another race, the revulsion center of the brain reacted significantly. This reaction did not particularly occur in the people who explicitly said they were biased, but it did occur in many of those who did not think they were biased.

4. The Association of African Americans with Being Dangerous

Many presenters at the Airlie Conference reported the result of various studies demonstrating that African Americans are associated with being dangerous. At the 2008 Airlie conference, Dr. Jennifer L. Eberhardt presented the results of a study concerning the association of African Americans as being criminals. She stated that although over eighty percent of white people disclaim having racial-based attitudes, stereotypes of African Americans as criminals appear repeatedly in studies. For example, one study demonstrated

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72. Jennifer L. Eberhardt, Associate Professor of Psychology, Stanford University, Address at the Legal Defense Council’s Annual Airlie Conference (Summer 2008).

that being shown an image of a black face somehow better enabled people to
“see” weapons better.74 In this study, white university students were asked
to say at which side of a computer screen a particular dot appeared.75 They were
either shown all black faces, all white faces, or no faces.76 Then, they were
shown objects and were asked to indicate when they could recognize it.77 Some
of the objects were crime-relevant and some were crime-irrelevant.78 Those who
had been exposed to black faces recognized the crime-relevant objects much
faster than those who had seen white faces and somewhat faster than those who
had seen no faces.79 There was no difference in speed of recognizing crime-
irrelevant objects.80

A speaker at the 2006 Airlie conference discussed similar results from
another study. That speaker referred to a study by Keith Payne in which people
were asked to identify whether the object somebody was holding was a tool or a
weapon.81 Whites and blacks both over-identified the object as being a tool if
the person holding it were white and under-identified it as a tool if the person
holding it were black.82

In her 2008 presentation, Dr. Eberhardt also discussed a study in a video
game setting context. People were faster to “shoot” a black who had a gun than
a white who had a gun and were more likely to “shoot” a black who didn’t have
a gun than a white who did not have a gun.83 This was true of both black and
white community members.84 In another study using a video game, the black
model was more likely to be mistaken as being armed when actually unarmed,
and the white model was more likely to be mistaken as being unarmed when
actually armed.85 The black participants in this video game study showed the
same “shooter bias” as white participants.86

Dr. Eberhardt also discussed a somewhat similar study in which police
officers were primed with crime-related words.87 When errors of recollection

74. Eberhardt et al., supra note 73, at 881.
75. Eberhardt et al., supra note 73, at 879.
76. Eberhardt et al., supra note 73, at 880.
77. Eberhardt et al., supra note 73, at 880.
78. Eberhardt et al., supra note 73, at 880.
79. Eberhardt et al., supra note 73, at 880.
80. Eberhardt et al., supra note 73, at 880.
81. See Kang, supra note 54, at 1525 (citing B. Keith Payne, Prejudice and Perception: The
Role of Automatic and Controlled Processes in Misperceiving a Weapon, 81 J. PERSONALITY &
SOC. PSYCHOL. 181, 183-86 (2001)).
82. Kang, supra note 54, at 1525 (citing Payne, supra note 81, at 183-86).
83. Joshua Correll, et al., The Police Officer’s Dilemma: Using Ethnicity to Disambiguate
84. Id. at 1314; see Kang, supra note 54, at 1525-27 (discussing Correll et al., supra, note 83).
85. Correll et al., supra note 83, at 1315-1317.
86. Correll et al., supra note 83, at 1315-17, 1319, 1325.
87. Eberhardt et al., supra note 73, at 885.
occurred, people recalled seeing a more stereotypically black face than they had actually seen.88

Another study assessed the extent of hostility people would exhibit when a computer crashed.89 Where black faces were subliminally shown before the computer crashed, there was much more hostility about the situation than when no faces were shown before the computer crashed.90

In yet another study, people reviewed two variations of an otherwise identical TV news story.91 In one version, a black suspect was shown for five seconds, and in the other version, the suspect was shown for five seconds with the same facial expression and features except that he was white.92 The participants in the study who saw the crime story believed that everything else about the suspects was the same.93 White participants in the study who saw the black suspect were six percent more likely to support punitive measures than a control group that did not know the suspect’s race.94 White participants in the study who saw the white suspect were only one percent more likely than the control group to support punitive sanctions, a difference that had no statistical significance.95

Mark Bookman, a presenter at the 2007 Airlie conference, discussed a National Basketball Association study about split-second foul calls.96 The study found that under similar circumstances, white referees tended to call more fouls on African Americans, and to a slightly lesser extent, that African American referees tended to call more fouls on white players.97

Clearly, these various studies have implications about lineups, other identifications, and what witnesses remember about what they saw (or what they think they saw) with regard to people having weapons, etc.

88. Eberhardt et al., supra note 73, at 886-888; see also Hamilton, supra note 65, at 89-92 (discussing police-related shooter bias).


90. Id. at 239; see Kang, supra note 54, at 2005 (discussing the Bargh study).


92. Id. at 563.

93. Id.

94. Id. at 568.

95. Id.


97. Id.
5. The Association of African Americans with Apes

Another implicit association that Dr. Eberhardt discussed is the association of African Americans with apes. This association is made mostly by people who would deny having any such belief if explicitly asked. For example, white students who had been primed with great ape words were presented with a hypothetical of police beating a suspect. They were much more likely to say that the beating was justified when they thought the suspect was black than when they thought the suspect was white.

This association of African Americans with apes does not show up merely in a sociological study. The Philadelphia Inquirer newspaper has published articles discussing defendants eligible for the death penalty due to the nature of the crime committed. These articles used animal-related words significantly more often when describing black death penalty-eligible defendants than when describing white death penalty-eligible defendants. Moreover, African Americans who were executed were depicted in such newspapers stories with more ape-like representations than African American defendants who were not executed.

Implicit “knowledge” that comes from sources like the wording of newspaper articles, Tarzan movies, and many other sources is the reason for the association of African Americans with apes. While the existence of such implicit “knowledge” is not dependent on an anti-black prejudice, it can have implications for people who react to actual cases, no matter what their roles are in the criminal justice system.

Indeed such “knowledge” can come into play even when no racial information is provided in a news account. Thus, in a study by Frank Gilliam and Shanto Iyengar, sixty percent of participants in a study “who saw no suspect falsely recalled having seen a photo of a suspect, and of those participants, seventy percent falsely remembered seeing a Black suspect.”

99. Id. at 294.
101. Goff et al., supra note 98, at 304; see also Goff & Eberhardt, supra note 100.
102. Goff et al., supra note 98, at 303-305.
103. Goff et al., supra note 98, at 304.
104. Goff et al., supra note 98, at 303-04; see also Levinson, supra note 67, at 642 (citing the Goff study involving ape-like representations in the Philadelphia Inquirer).
105. Goff et al., supra note 98, at 304.
106. See Eberhardt et al., supra note 73, at 890.
107. Levinson, supra note 67, at 630 (citing Gilliam & Iyengar, supra note 91, at 561-64).
The impact of stereotypical African American features can be seen in *Looking Deathworthy*, a study led by Professor Eberhardt and published in 2006, which concerned Philadelphia men. In the study, people were shown many photographs of death-eligible defendants in a neutral fashion (i.e., nothing good or bad was said about them). Those defendants whose physical characteristics were more stereotypically black-featured, such as thick lips, broad nose, or dark skin, were more likely to be viewed as deserving the death penalty when the victim was white than when the victim was not white.

6. Cross-Racial Identifications

There is substantial literature on cross-racial identifications. Studies show that the ability to make a match, i.e., whether a witness is able to identify the suspect as the individual actually observed, decreases significantly when the observed person’s race is different than the observer’s race. This occurs because race is viewed as highly significant, and witnesses tend to pay less attention to the facial features of a person of a different race than they would to the facial features of a person of their own race.

The impact of this phenomenon apparently is not diminished by using sequential lineups, in which the witness is shown people one by one rather than all together. However, sequential lineups do enhance the accuracy of intra-racial identifications, where somebody is identifying someone of his or her own race. It has also been found that there is greater accuracy in a lineup if the person conducting the lineup is of the same race as the suspect.

C. Some Potential Impacts on Capital Cases of Implicit Bias

Aside from what I already have suggested or discuss below, what are potential impacts in capital punishment cases of implicit bias?

- It can affect how jurors react to assertions that someone acted in self-defense.

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109. Id. at 383-384.
110. Id. at 385.
112. Id. at 208.
It can affect assertions that there was excessive force by the police.

It can affect whether there really is a presumption of innocence -- something that defense counsel really need to go over with a fine tooth comb in voir dire.\(^\text{116}\)

It can affect whether the jury believes that remaining silent, which is a defendant’s constitutional right, is an admission of guilt.

It can even affect how the jury perceives an expert witness who is a person of color.\(^\text{117}\)

A practice-related thought is that these kinds of studies regarding implicit bias need to be used in seeking better voir dire and better jury instructions, and to expand the kind of race-oriented mitigation that is allowed. For example, in terms of mitigation, if there is a situation in which the defendant has been subjected to a history of racial attitudes, he may, as a result, have experienced an adverse psychological impact from living in such a situation.\(^\text{118}\) This is wholly aside from, although related to, the impact of living in a community where there is communal memory of racial violence, such as a notorious lynching or outrageous racial discrimination, even many years after the fact.\(^\text{119}\) This can cause psychic harm to the defendant, in addition to potential jurors, potential witnesses, or others in the community.\(^\text{120}\) If defense counsel does not persuasively argue, pre-trial, that this is a legitimate mitigating factor that should be allowed to be presented, then counsel is being ineffective.\(^\text{121}\) These psychologically traumatic experiences are, in fact, mitigating.\(^\text{122}\)

Also, based on these studies, other courtroom personnel, in addition to the judge, may be sensitized to how the defendant is treated while in the courtroom.\(^\text{123}\) This can include whether the defense’s mitigation specialist, who may be the only other African American in the courtroom besides the defendant, is permitted to be with the defendant during sidebars so that the defendant does not appear to be thoroughly isolated, disinterested, or both.

\(^{116}\) See id. at 417.

\(^{117}\) See Rutledge, supra note 111.

\(^{118}\) See Leona D. Jochnowitz, Missed Mitigation: Counsel’s Evolving Duty to Assess and Present Mitigation at Death Penalty Sentencing, 43 No. 1 CRIM. L. BULL. ART 5 (2007) (discussing what mitigation factors are in relation to how a defendant has been raised, and how those factors affect jurors in the capital punishment setting).

\(^{119}\) Id.

\(^{120}\) Id.

\(^{121}\) American Bar Assoc. Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty Cases, 31 HOFSTRA L. REV. 913, 1021 (2003); see also Jochnowitz, supra note 118, at Sect. IV.; Alycee Lane, “Hang Them if They Have to be Hung”: Mitigation Discourse, Black Families, and Racial Discourse., 12 NEW CRIM. L. REV. 171 (2009) (describing the standards which must be met to show ineffective assistance of counsel based on the failure to properly present mitigation evidence).

\(^{122}\) See Lane, supra note 121; Richard G. Dudley & Pamela Blume Leonard, Getting it Right: Life History Investigation as The Foundation For a Reliable Mental Health Assessment, 36 HOFSTRA L. REV. 963 (2008).

\(^{123}\) See Lane, supra note 121; see also Dudley & Leonard, supra note 122.
1. Defense Counsel’s Problems Arising from Their Limitations Regarding Race

Another pernicious factor can be defense counsel’s difficulties with recognizing his own limitations regarding race.\(^{124}\) Sometimes, counsel may find it difficult to empathize with clients of color. Sometimes, counsel’s attitudes, of which he may often be unaware, may be noticed by the defendant or his relatives. This may impede counsel’s ability to elicit information about mitigation or the crime that would be truly helpful. Indeed, Dr. Richard Dudley, a frequent presenter at the Airlie conference, stated that seventy to eighty percent of the defendants on whose cases he has worked have told him that they believe race negatively impacts their relationship with their attorneys.\(^{125}\)

Diversity within the defense team can increase the likelihood of finding mitigating factors.\(^{126}\) As attorney Maurie Levin\(^ {127}\) has noted, defense teams without such diversity are more likely to miss the very kind of evidence of racism in the community and its history that Dr. Melynda Price has discussed at this conference.\(^ {128}\) Ms. Levin believes that someone on the team must be aware that this kind of evidence can exist, as it does in many communities, and that the team must have the ability to look into it.

Additionally, the frequent lack of diversity in the prosecution team could have adverse impacts. This can particularly affect the discretionary decision regarding whether to seek the death penalty.\(^ {129}\)

2. Implications of Cognitive Psychology with regard to Jurors

Cognitive psychology has the greatest implications with regard to jurors.\(^ {130}\) According to studies of implicit bias, most people cannot easily ignore their implicit beliefs.\(^ {131}\) Accordingly, if the first thing a juror with implicit bias knows about a person is that he or she is African American and the juror later gets more information that might be mitigating, the race information tends to adversely affect how the other information is viewed.\(^ {132}\) Jurors with negative implicit

\(^{124}\) See Eisenberg & Johnson, supra note 67.

\(^{125}\) Dr. Richard Dudley, Remarks at the NAACP Legal Defense Fund Annual Capital Punishment Training Conference (July 11-13, 2008).

\(^{126}\) Scharlette Holdman & Christopher Seeds, *Culture Competency in Capital Mitigation*, 36 Hofstra L. Rev. 883, 906 (2008); see also Eisenberg & Johnson, supra note 67.

\(^{127}\) Maurie Levin is an adjunct professor at The University of Texas at Austin School of Law. Her biography is available at The University of Texas at Austin, Faculty and Administration, http://www.utexas.edu/law/faculty/profile.php?id=ml4477 (last visited March 28, 2010).

\(^{128}\) Price, supra note 67.

\(^{129}\) Eisenberg & Johnson, supra note 67, at 1539.


\(^{131}\) Id. at 185.

\(^{132}\) Id. at 183.
beliefs also pay more attention than is warranted to personal rather than situational factors in deciding why somebody acted the way they acted.\textsuperscript{133}

As defense counsel, it is difficult to decide whether to discuss this openly. I mention below what is known as a “pink elephant” effect: if a juror is told that which is stated in certain pattern jury instructions, \textit{i.e.}, “you are not to consider race,” the juror may end up considering race more than if the juror had not been told to avoid considering race.\textsuperscript{134} This will particularly occur if the juror has a high degree of prejudice.\textsuperscript{135}

However, it is possible that having such an instruction may force jurors to consider and become aware of their biases.\textsuperscript{136} That may be particularly true if a juror has an internal motivation to control his or her prejudice.\textsuperscript{137} It is, in any event, challenging to write an instruction that both minimizes the “pink elephant” effect and permits proper consideration of race in mitigation contexts.\textsuperscript{138} It is important, for example, to avoid writing instructions that could have the effect of limiting consideration of mitigation evidence that comes through a racial lens, such as the racial history of a jurisdiction or the racial context of a particular crime.\textsuperscript{139}

One other point that should be of interest to defense counsel is that people who have less practice in disregarding negative factors are also less likely to shape and to correct their reactions to such factors.\textsuperscript{140} One implication of this is that in \textit{voir dire}, when considering prospective jurors, defense counsel might prefer someone who acknowledges racist attitudes and says he or she is trying to work on this over someone who denies having such attitudes but whom the lawyer suspects to hold such attitudes implicitly.\textsuperscript{141}

\begin{itemize}
\item \textsuperscript{133} Id.
\item \textsuperscript{135} Id.
\item \textsuperscript{137} Id. at 608-09.
\item \textsuperscript{138} David A. Aranson, \textit{Cross Racial Identification of Defendants in Criminal Cases}, 23-SPG CRIM. JUST. 4, 8-11 (2008); see also Cynthia Lee, \textit{Race and Self-Defense: Toward a Normative Conception of Reasonableness}, 81 MINN. L. REV. 367, 488-89 (1996) (discussing the use of “race-switching” jury instructions, in which jurors are told to evaluate how their decision would have come out had the victim and defendant’s races been “switched.”)
\item \textsuperscript{139} See Lane, \textit{supra} note 121 (proposing proper ways to introduce mitigation evidence so as to produce the most useful result).
\item \textsuperscript{140} See Sommers, \textit{supra} note 136, at 607-608.
\item \textsuperscript{141} Sommers, \textit{supra} note 136, at 601-608.
\end{itemize}
3. Studies Regarding the Impact of Jurors’ Implicit Biases on Capital Case Outcomes

A University of California at Berkeley study dated June 24, 2009, by Jack Glaser, Karen Martin and Kimberly Kahn, found that when jurors were told that the most serious sentence for triple murders was life without parole, they were not significantly more likely to convict African American defendants than white defendants.142 But when they were told that the death penalty was the maximum sentence for triple murders, they were significantly more likely to convict African American defendants than white defendants.143

This and some of the other things I address in this article relate to this question referred to during the Northern Kentucky Law Review fall symposium on Race and the Death Penalty by Professor Howe: “Who deserves the death penalty?”144 Some of the implicit attitudes of jurors do seem to affect their views on their fateful decisions, in otherwise identical situations, regarding who deserves the death penalty.145

I noted above the question of how much to discuss the subject of race in the courtroom. One of the speakers at the 2009 Airlie conference, LDF’s Vincent Southerland, said that talking about race can expose these explicit and implicit biases and can sensitize everyone in the courtroom to the issue of race and its potential influence in the courtroom.146 If you can alert jurors to the fact that race could have an impact on their decision-making or on the case in general, this can help them account for their own racial biases.147

4. Impact of Juries’ Racial Compositions on Case Outcomes

Then, there is the question of the racial composition of juries and its impact. There is strong reason to believe that the race of capital jurors affects outcomes.148 LDF’s Vincent Southerland says that study after study of juries by the Capital Jury Project and others show that diversity in jury composition leads to: more defense-favorable outcomes and longer deliberations; fewer inaccuracies that are uncorrected during the longer, less angry jury deliberations;
and more discussion of missing evidence and of case facts than if the jury is not diverse. 149

One such study is Samuel Sommers’s “On Racial Diversity and Group Decisionmaking: Identifying Multiple Effects of Racial Composition on Jury Deliberations.” 150 In this study, diverse groups deliberated longer than the all-white groups. 151 These groups, particularly due to the white participants, discussed more case facts and had “more comprehensive” discussions than the all-white groups. 152 The white jurors in racially heterogeneous groups led these groups to make “fewer factual errors and were more amenable to discussion of race-related issues” than did whites who were part of all-white groups. 153 “Moreover, inaccuracies were more likely to be corrected in diverse groups, and even prior to deliberations, white jurors “were less likely to believe the defendant was guilty when they were in a diverse group.” 154 In a study of jurors who actually served on trials in Indianapolis, Indiana, “the confidence of both black and white jurors about the guilt of a defendant decreased as the number of blacks on the jury increased, regardless of the strength of the evidence.” 155

Studies in which mock juries engage in discussions as to whether to impose the death penalty generally “have shown that white mock jurors have the strongest tendency to impose death as punishment in cases were the defendant is black and the victim is white.” 156 Moreover, a study of actual capital sentencing by juries in Philadelphia, Pennsylvania, found that “death sentences are less likely when black jurors are more numerous” and that the impact of the jury’s “racial composition was greater for black than for white defendants.” 157 Furthermore, the likelihood that black defendants will “be treated more harshly than white ones as the number of whites on the jury increases” is particularly pronounced when a black defendant is accused of killing a white victim. 158 However, the likelihood that black defendants will be “treated more harshly” is

149. Southerland, supra note 146.
150. Sommers, supra note 136, at 597-612.
151. Sommers, supra note 136, at 605 tbl. 2.
152. Sommers, supra note 136, at 608.
153. Sommers, supra note 136, at 606.
154. Sommers, supra note 136, at 608.
155. Sommers, supra note 136, at 607.
157. See Bowers et al., supra note 130, at 184 for a discussion on various studies, including one by Mona Lynch and Craig Haney).
159. Bowers et al., supra note 130, at 188.
diminished when "young black males and middle-aged black females are better represented on the jury."

So, the failure to have diversity in jury composition, which in some court decisions is viewed simply as harmless error under the apparent belief that having an all-white jury does not have a significant prejudicial effect, often greatly increases the risk of an unfair outcome. The studies of both actual juries and simulated juries show that the way that diverse juries view guilt/innocence evidence is different than in non-diverse juries, factual determinations are more accurate in diverse juries, and the very discretionary decisions on who truly deserves the death penalty are greatly affected by jury diversity.

5. The Importance of Identifying Racially Biased People During Jury Selection

How is it that we can so often end up with juries that are far less diverse than the jury-age population? One important factor, discussed above in the context of the Gates case, is the composition of the venire (i.e., the pool of potential jurors) from which a jury is selected. The venire’s composition can be distorted in various ways. For example, if the venire is based solely or principally on voter rolls, it can be distorted if African Americans are less likely to register to vote. People who are in the jury venire may be excluded for cause if, as is far more likely among African Americans, people they know are caught up in the criminal justice system. While I do not think that is a proper “cause” for exclusion, some jurisdictions deem this to be a legitimate “cause”, i.e., the prosecutor does not have to use up a discretionary challenge to exclude such a prospective juror.

In capital punishment cases, the jury’s diversity can also be undermined by the fact that if a prospective juror would never be willing to vote for the death penalty, that juror will be excluded for cause — even from the determination of

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160. Bowers et al., supra note 130, at 188.
161. See Gates v. Zant, 863 F.2d 1492, 1500 (11th Cir. 1989).
162. See Kim Taylor-Thompson, Empty Votes in Jury Deliberations, 113 Harv. L. Rev. 1261, 1276 n.87 (2000) (noting that “the use of registered voter rolls as source lists tends to produce lower numbers of people of color in the venire, given lower voter registration rates among minority populations”).
163. See, e.g., Marc Mauer & Tracy Huling, Young Black Americans and the Criminal Justice System: Five Years Later 1 (1995) (finding that one in three African American men between the ages of twenty and twenty-nine is under criminal justice supervision, as compared to one in fifteen white men of that age and still lower rates among women).
164. See Melynda J. Price, Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection, 15 Mich. J. Race & L. 57, 90, 95 (2009) (noting that “[h]ack men generally entangled in the criminal justice system are characterized as kind of Black ‘Everymen,’ making their stories generally familiar to many in the Black community” and “[t]he removal of African Americans for either familiarity with the criminal justice system or hostility to the state and its agents is, most arguably, not race neutral”).
Because African Americans oppose capital punishment far more than white people, these Witherspoon exclusions aggravate the normal difficulty of achieving diverse juries.

Some prospective jurors might come to realize in advance of being questioned that there are situations in which they would be willing to vote for capital punishment – such as Sirhan Sirhan, the “Hillside Strangler,” Charles Manson, Timothy McVeigh, or a perpetrator of 9/11. But I believe that most potential jurors who generally oppose the death penalty are unaware of answers they could truthfully give that might cause them to qualify for service on a capital jury. So, it stands to reason that Witherspoon questioning excludes African Americans disproportionately.

To be sure, there can be reverse-Witherspoon questioning, in which people who would always vote for the death penalty for capital murder are excluded for cause. But studies suggest that such questioning occurs much less often and much less effectively than Witherspoon questioning. For example, as shown in studies by the Capital Jury Project and others, people who will always vote to impose the death penalty if there is a capital conviction often remain on juries.


169. The “Hillside Strangler” refers to two men, Kenneth Bianchi and Angelo Buono, cousins who were convicted of kidnapping, raping, torturing, and killing women ranging in age from twelve to twenty-eight years old during a four-month period from late 1977 to early 1978 in the hills above Los Angeles, California. The Hillside Strangler, http://www.hillside-strangler.com/ (last visited March 19, 2010).

170. “[O]n Aug. 9, 1969, Manson’s hippie-styled followers, the Manson Family, murdered actress Sharon Tate, wife of director Roman Polanski, and four other visitors to her Los Angeles estate. The murders were gruesome, with numerous stabbings and shootings, and PIG written on the wall in blood. The next night, the group brutally murdered a married couple, Leno and Rosemary LaBianca, in their Los Angeles home, again leaving messages in blood all over the house.” Andrea Sachs, Manson Prosecutor Vincent Bugliosi, TIME, Aug. 7, 2009, available at http://www.time.com/time/nation/article/0,8599,1915134,00.html (last visited March 19, 2010).

171. Timothy McVeigh was “convicted of the bombing of the Alfred P. Murrah Federal Building in Oklahoma City that killed 168 people.” Lois Romano & Tom Kenworthy, McVeigh Guilty On All 11 Counts, WASH. POST, June 3, 1997, at A01.

Such people are also more likely than the average adult population to have racist attitudes.\footnote{173. See James D. Unnever, et al., Race, Racism, and Support for Capital Punishment, 37 CRIME & JUST. 45, 66 (2008) (citing several studies to support the allegation that “racial animosity is one of the most robust and consistent predictors of support for the death penalty”).}

Besides Witherspoon and reverse-Witherspoon questioning, there are other aspects of questioning prospective jurors, \textit{i.e.}, \textit{voir dire}, in capital cases. Steve Bright, the long-time leader of the Southern Center of Human Rights, noted at the 2009 Airlie conference that the Supreme Court’s decision in \textit{Turner v. Murray}\footnote{174. 476 U.S. 28 (1986).} allows capital defense counsel to ask questions about race during \textit{voir dire} if there is an interracial crime.\footnote{175. Stephen B. Bright, Southern Center of Human Rights, Remarks at the NAACP Legal Defense Fund Annual Capital Punishment Training (July 9-12, 2009). For more information regarding this speaker, visit The Law Office of the Southern Center for Human Rights, Staff http://www.schr.org/about/who (last visited March 28, 2010).} Bright added that defense counsel may want the jury to include people who talk honestly about their views about race rather than denying that they have any racial attitudes.\footnote{176. Stephen B. Bright, Southern Center of Human Rights, Remarks at the NAACP Legal Defense Fund Annual Capital Punishment Training (July 9-12, 2009).}

The significance of this potential questioning is highlighted by the conclusion by William Bowers and others involved in Capital Jury Project interviews of actual jurors in post-\textit{Turner} cases.\footnote{177. Bowers, et al., supra note 130, at 263.} These interviews demonstrated that \textit{Turner} had failed “to purge sentencing decisions of race-linked attitudes and their consequences . . . .”\footnote{178. Bowers, et al., supra note 130, at 263.} Bowers concluded that white and black jurors’ different views of “the basic sentencing considerations of lingering doubt, remorse, and dangerousness are most manifest and egregious” in cases involving interracial murders – the very cases in which the questioning authorized by \textit{Turner} is permitted.\footnote{179. Bowers, et al., supra note 130, at 266.} My guess is that defense counsel in those cases did not ask the kinds of questions that Mr. Bright believes should be asked.

LDF’s Vincent Southerland, speaking as did Mr. Bright at the 2009 Airlie conference, said that while defense counsel may be anxious about asking such questions, counsel should look for the people who are uncomfortable talking about race.\footnote{180. Vincent Southerland, Legal Defense Fund, Remarks at the NAACP Legal Defense Fund Annual Capital Punishment Training (July 9-12, 2009).} Their words, their actions, their attitudes, or their facial expressions can demonstrate their racism or bias, and it may affect their decisions.\footnote{181. See id.}

Such questioning does not achieve its purposes as easily as in 1986, when \textit{Turner} was decided, because people are now much less likely to explicitly state their biases.\footnote{182. See Shankar Vedantam, See No Bias, THE WASHINGTON POST, JAN. 23, 2005, at W12.} But, as Mr. Southerland pointed out, even when the ability to
identify biased people is limited, good questioning can raise the jurors’ awareness that race and racial bias can have the “elephant” effect discussed above.\textsuperscript{183} Accordingly, alerting the jury to the danger of acting on the basis of racism can make jurors less likely to do so, and thus can significantly affect the outcome.\textsuperscript{184} Indeed, the Sommers study (discussed above) found that when there was race-relevant \textit{voir dire}, jurors were less likely to vote guilty than when there was race-neutral \textit{voir dire}.\textsuperscript{185} However, as pointed out by Professor Benjamin Fleury-Steiner\textsuperscript{186} of the Capital Jury Project, many jurors are annoyed by questions about racism, which can make their answers unreliable. So, defense counsel must carefully determine what to do.

One final thought about \textit{voir dire} does not specifically deal with race. The Supreme Court has held that you cannot have an automatic death penalty for people convicted of capital murder.\textsuperscript{187} It seems that many jurors do not realize this. That is why reverse-\textit{Witherspoon} questioning is allowed – although I believe that it is conducted far too infrequently.

6. Improper Racially-based Exclusions of Prospective Jurors

As noted above, in \textit{voir dire}, aside from challenges “for cause,” each side is typically permitted to exercise a certain number of discretionary challenges, \textit{i.e.}, challenges for which they do not have to give a reason that disqualifies the juror as a matter of law.\textsuperscript{188} The Supreme Court in \textit{McCleskey v. Kemp}\textsuperscript{189} relied on \textit{Batson v. Kentucky}\textsuperscript{190} as a means of preventing racial discrimination in capital jury selection. In \textit{Batson}, the Court said that if, in a particular case, it appears that a prosecutor may be exercising discretionary challenges to exclude people on a racial basis, the prosecutor can be questioned about the reasons behind these exclusions.\textsuperscript{191} If the judge is persuaded that the prosecution exercised discretionary challenges based on race, then those peremptory challenges cannot

\textsuperscript{183} Southerland, \textit{supra} note 146.
\textsuperscript{184} Southerland, \textit{supra} note 146.
\textsuperscript{185} See Sommers, \textit{supra} note 136, at 606.
\textsuperscript{186} For more information on this author, visit Ben Fleury-Steiner, Ph.D., http://www.benjaminfleurysteiner.com/.
\textsuperscript{187} See Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (plurality opinion) (finding that a death sentence imposed under a mandatory death sentence statute violated the Eighth and Fourteenth Amendments).
\textsuperscript{189} 481 U.S. 279, 296-98 (1987).
\textsuperscript{190} 476 U.S. 79 (1986).
\textsuperscript{191} \textit{Id.} at 100 (remanding the case because the trial court “flatly rejected” the “timely objection of the prosecutor’s removal of all black men on the venire” without making the prosecutor give an explanation for his action).
be honored.\textsuperscript{192} In some cases, this can lead to overturning the entire jury selection or the results of a trial in which such jury selection occurred.\textsuperscript{193}

The Steikers’ report to the ALI says that the Court’s reliance on \emph{Batson} as a way of preventing prosecutors’ racial discrimination in exercising peremptory challenges is “profoundly misplaced.”\textsuperscript{194} In fact, a challenge of discrimination based on \emph{Batson} has never led to a reversal in either North Carolina or Tennessee, and in over 2,000 cases tried to jury since 1997 in Jefferson Parish, Louisiana, only two have been reversed.\textsuperscript{195} The Steikers’ report cites various studies, including one by William Bowers and his colleagues at the Capital Jury Project, which show that requiring prosecutors to justify their discretionary challenges has an “extremely modest” effect in reducing the racially based use of peremptory challenges.\textsuperscript{196} This is largely because prosecutors are very well schooled in coming up with non-racist-sounding rationales for their exclusions.\textsuperscript{197}

However, prosecutors can sometimes make mistakes which reveal the discriminatory challenges. For example, a prosecutor may say that he didn’t like an African American prospective juror because he said he was going to have to miss work. But this rationale may not hold up if the record shows that the prosecutor did not exclude a white prospective juror who also said he was going to have to miss work.\textsuperscript{198} Accordingly, it is sometimes possible to obtain relief on a \emph{Batson} claim.

However, relief will not be granted in all states under such circumstances. As the Equal Justice Initiative stated in a June 2010 report, the South Carolina Supreme Court no longer finds a \emph{Batson} violation when the core of a prosecutor’s purportedly race-neutral explanation for striking an African American prospective juror would also have applied to a white prospective juror whom the prosecutor did not strike.\textsuperscript{199} The report adds: “Indeed, no criminal defendant has won a \emph{Batson} challenge in that state since 1992.”

\textsuperscript{192} \textit{Id.} at 100-102.
\textsuperscript{193} \textit{See, e.g.,} State v. Rosa-Re, 190 P.3d 1259 (Utah 2008).
\textsuperscript{194} \textit{See STEIKER & STEIKER, supra note 41, at 15.}
\textsuperscript{196} \textit{See STEIKER & STEIKER, supra note 41, at 15 (discussing Bowers, et al., supra note 130).}
\textsuperscript{197} \textit{See Brian J. Serr & Mark Maney, Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance, 79 J. CRIM. L. & CRIMINOLOGY 1, 53-54 (1988) (noting that “facially neutral reasons [for exclusion] provide prosecutors with a ‘cover’ for racial discrimination, especially if the trial is in a large city where the burden of unemployment, low income, or poor education is likely to fall disproportionately upon minorities”).}
\textsuperscript{198} \textit{See Dewan, supra note 195.}
\textsuperscript{199} Equal Justice Initiative, \textit{Illegal Racial Discrimination in Jury Selection: A Continuing Legacy} (June 2010), at 26-27, (discussing Sumpter v. State, 439 S.E.2d 842, 844 (S.C. 1994) (finding that a prosecutor did not violate \emph{Batson} by striking an African American prospective juror, purportedly due to a “prior DUI involvement,” while not striking a white juror who had been convicted of DUI, because a different office had prosecuted the white prospective juror); and State v. Dyar, 452 S.E.2d 603, 603-04 (S.C. 1994) (finding no violation of \emph{Batson} where prosecutor
The report goes on to say that in Alabama, no matter what other evidence exists that a prosecutor has engaged in race-based strikes and that his purported race-neutral justifications for the strikes are implausible, *Batson* relief will almost never be granted unless there is also proof that the prosecutor did not strike a similarly situated white prospective juror.\footnote{201}

In any event, the fact that prosecutors base their peremptory challenges on racial grounds is better hidden.\footnote{202} This is clear from highly unusual circumstances in which, for totally unrelated reasons, this race-based prosecutorial misconduct is exposed. Perhaps the most notable, scandalous example of race-based prosecutorial misconduct occurred in Philadelphia, Pennsylvania. We know about this situation only because the incumbent District Attorney Lynne Abraham, who sought the death penalty far more than any other District Attorney in Pennsylvania,\footnote{203} was being opposed for re-election by Jack McMahon, a former Assistant District Attorney.\footnote{204} District Attorney Abraham knew that Mr. McMahon had appeared prominently in an internal training videotape on how to conduct *voir dire*,\footnote{205} which she released publicly because he was running against her.\footnote{206} On the videotape, Mr. McMahon trained Philadelphia prosecutors how to get away with evading *Batson* while still exercising racism in challenging prospective black jurors.\footnote{207} In one example, he said that he would exercise a peremptory challenge solely due to the fact that a prospective juror's name was Reynard Boykin.\footnote{208} Of course, that is not the rationale he would have offered had he been asked why he had challenged that prospective juror.\footnote{209} That videotape exposed the racism in exercising peremptory challenges in Philadelphia.

\footnote{200} Id. at 27.
\footnote{201} Id.
\footnote{202} See Serr & Maney, supra note 197.
\footnote{203} See Adam M. Gershowitz, *Imposing a Cap on Capital Punishment*, 72 MO. L. REV. 73, 95 (2007) (noting that “[t]he long-time district attorney for Philadelphia County, Lynne Abraham, makes it a practice to seek the death penalty whenever it is available”).
\footnote{205} Id.
\footnote{206} Id.
\footnote{207} The full-length training video is available at http://video.google.com/videoplay?docid=-5102834972975877286# (last visited March 22, 2010).
\footnote{208} See id.
\footnote{209} David Lindorff, *The Death Penalty’s Other Victims*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/node/607 (last visited March 22, 2010) (‘‘Ironically, McMahon, now in private practice, has become a vocal critic of the very practice he once championed. ‘The reason district attorneys like Abraham so frequently seek the death penalty is that they get a conviction-prone jury,’ says McMahon, who now defends clients in capital cases. ‘Now they’ll all tell you they don’t do that, but they’re full of crap and they know it. No one who’s
Then, in the case of Thomas Miller-El, who came within hours of being executed, lawyers from LDF found manuals and training materials used during past decades in Dallas, Texas, that similarly trained prosecutors on how to get away with excluding blacks as jurors. 210 Although this did not lead the Texas courts or the Fifth Circuit to grant relief, 211 the Supreme Court ruled in Mr. Miller-El’s favor. 212

The Equal Justice Initiative’s 213 June 2010 report on continuing racial discrimination in jury selection advocates, as one of its many recommendations, that “[c]xcluded jurors, who suffer measurable, real victimization at the hands of government prosecutors, should have access to civil remedies.” 214 In such lawsuits, the relatively few favorable Batson rulings from criminal cases could be used to expose particularly egregious practices.

7. Legal Steps to Create More Diverse Decisionmakers

In a talk at the Airlie conference, Bryan Stevenson, the Equal Justice Initiative’s Executive Director and a Professor at New York University Law School, suggested that counsel should make change of venue motions based on studies mentioned above, which find that certain types of people are likely to view African Americans as prone to engage in criminal conduct; automatic but implicit associations of African Americans with other negative characteristics; and polling data. 215 These studies or polling data would have to be combined with the particular case’s racial dynamics. Furthermore, Prof. Stevenson said that such motions might make particular sense in racially-charged cases, such as cases taking place in communities such as those described elsewhere in the symposium by Professor Melynda Price. 216 For example, defense counsel could argue that the defendant would have to overcome a presumption of guilt for young men of color, and that there cannot be a fair trial unless the jury includes individuals who have had interactions with the two-thirds of young men of color who have not engaged in problematic behavior.

been working in this business would say that if they were honest. The whole process of death-qu1210. See Miller-El v. Dretke, 545 U.S. 231, 235 (2005).
212. Miller-El, 545 U.S. 231.
216. Price, supra note 46.
As Prof. Stevenson has further stated, even if such a motion loses, by making and litigating the motion you may affect the dynamics and the postures, attitudes, and thinking of everybody involved, including the District Attorney and the judge. It also may effect how the voir dire will be conducted, particularly if, when rejecting the change of venue motion, the judge promises not to allow unconscious racism to affect the case. Good defense counsel would try to hold the judge to such a promise.

Moreover, significant under-representation of African Americans in the jury pool or the grand jury pool should be challenged, which did not occur in Johnny Lee Gates’ case.\footnote{Gates v. Zant, 880 F.2d 293 (11th Cir. 1989).} The case law concerning such challenges is often somewhat deficient. Thus, some decisions deny relief if the court can say that the percentage of African Americans in the jury pool is only five percent less than the percentage of African Americans in the population.\footnote{See, e.g., United States v. Carter, 65 F. App’x 559 (7th Cir. 2003) ("disparity between percentage of African Americans in 100-member jury pool, which was 4%, and number of African Americans in the community, which was 6%, was not large enough to show that the jury pool was not a fair cross-section of the community").} But using that statistic of five percent can be highly misleading. If African Americans are twenty percent of the jury pool and twenty-five percent of the population, that five point difference is actually a difference of twenty-five percent, because to increase the percentage in the jury pool to that in the population, you would have to increase from twenty to twenty-five, which is a twenty-five percent increase. To put it another way, in this hypothetical, the jury pool contains one-fourth fewer African Americans than in the population. So, what is relevant is not the raw difference in percentage points, but rather the relative difference. Yet, many court decisions fail to recognize this basic arithmetic that many of us learned in elementary school. For these reasons, the June 2010 Equal Justice Initiative report recommends that “[r]eviewing courts should abandon absolute disparity as a measure of underrepresentation of minority groups and utilize more accurate measures, such as comparative disparity, to prevent the insulation from remedy of unfair underrepresentation.”\footnote{Equal Justice Initiative, supra note 214, at 48; see also id. at 35-37 (discussing this issue and existing case law).}

8. Potential Systemic Attacks on a State’s or a County’s Ability to Use Capital Punishment

Prof. Stevenson has suggested that, in places such as those that Professor Price has discussed in this conference,\footnote{See Price, supra note 46.} which could include (as noted above) Philadelphia, Pennsylvania, the question should be whether a particular state or county should be permitted to seek the death penalty, given its history of racial bias, lynching, or other problems. He has pointed out that a pre-trial motion
seeking to preclude the use of the death penalty in the particular jurisdiction can be used to bring such histories into the litigation, even if the motion does not succeed. Professor Anthony G. Amsterdam pointed out in 2007 at a Columbia Law Symposium that the error at the heart of McCleskey is the notion that we only care when a particular decisionmaker overtly bases his action on discrimination. This idea leads us to ignore “color-coded” results that reflect the prejudices of an entire community.

Prof. Amsterdam’s article suggests a litigation strategy aimed at invalidating a death penalty statute due to its racially discriminatory implementation. If such a litigation strategy succeeded, I do not believe that it would lead directly to abolition, but it would force the legislature to create a non-discriminatory statute – which could include the various kinds of provisions I discussed in my United States Senate Judiciary Committee testimony explaining why if reforms were made, the death penalty could co-exist with the Racial Justice Act. Indeed, the Baldus study presented in McCleskey found, as Justice Blackmun’s dissent noted, that in the most aggravated cases (the ones most often cited by proponents of capital punishment), no pattern of racial disparity existed. However, the pattern of racial disparity did exist in the much larger proportion of cases that are less aggravated.

III. CONCLUSION

Many death penalty proponents ignore the vast majority of capital cases, including ones in which someone becomes involved in a felony that leads to an unanticipated murder and is executed. If you favor the death penalty and do not ignore this fact, you can – if you ignore all the evidence that it does not deter crime and you don’t care about all the extra money capital punishment costs at a time of incredible deficits – adopt the view of the conservative Ninth Circuit

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222. See id.; see also Bryan A. Stevenson & Ruth E. Friedman, Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice, 51 WASH. & LEE L. REV. 509, 525 (1994) (noting that “criminal defendants and the society as a whole are affected by the indifference to racial bias in criminal proceedings).
223. See Amsterdam, supra note 221.
224. See Tabak, supra note 22 and accompanying text.
226. See id.
227. See Richard A. Rosen, Felony Murder and the Eight Amendment Jurisprudence of Death, 31 B.C. L. REV. 1103, 1116 (1990) (explaining that “the felony murder rule has the potential to equate any participant in the felony with the cold-blooded deliberate killer, no matter how unforeseeable the death or how attenuated that defendant's participation in the felony or the events leading to death”).
Justice Alex Kozinski, who says that the scope of the death penalty should be greatly narrowed.228

It is incumbent on those of us who know about the various facts discussed at this symposium to tell courts about them, tell defense counsel about them, tell prosecutors about them, and tell jurors and the general public about them. The public, which overwhelmingly rejects explicitly expressed racism, would be horrified by all the ways that implicit racial attitudes as well as explicit racism continue to permeate our capital punishment system in this country.

Significant progress can be achieved only when this travesty of a justice system is exposed and understood. To be sure, President Obama’s election and his positions on certain issues – as well as the increasing implicit nature of the racial bias – make this task more daunting. Fortunately, the numerous studies discussed herein provide us with a compelling basis for changing the public and judicial discourse on racism and the death penalty.

228. Id. at 29 (explaining that the objective of the death penalty is “to ensure that the very worst members of our society--those who, by their heinous and depraved conduct have relinquished all claim to human compassion--are put to death”).
THE RACIAL JUSTICE ACT IN KENTUCKY

Gennaro F. Vito, Ph.D.*

I. INTRODUCTION

Despite the “super due process procedures” outlined in Gregg v. Georgia,\(^1\) the reinstatement of the death penalty in 1976 did not prevent racial discrimination in capital sentencing. Post-Gregg studies of capital sentencing have consistently demonstrated that the racial makeup of the victim-offender relationship in murder cases has affected the probability of a death sentence. Despite this research evidence, alterations to the capital sentencing system have been less than forthcoming.

II. THE MCCLESKEY DECISION

In McCleskey v. Kemp, the U.S. Supreme Court stated that the Baldus study\(^2\) on the Georgia capital sentencing procedures reviewed in Gregg revealed only “a discrepancy that appears to correlate with race.”\(^3\) The Baldus study presented evidence that blacks charged with killing whites had the greatest likelihood of receiving the death penalty.\(^4\) This research was an attempt to inform the comparative proportionality review process introduced under the Georgia capital sentencing statute passed after the Furman decision.\(^5\) The Baldus study

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* Professor and Distinguished University Scholar, Department of Justice Administration, University of Louisville. Paper presented at the Northern Kentucky University Chase College of Law Fall Symposium: Race and the Death Penalty, Saturday, October 17, 2009, Northern Kentucky University, Highland Heights, Kentucky.

1. See Gregg v. Georgia, 428 U.S. 153 (1976) (holding that punishment of death for the crime of murder did not, under all circumstances, violate the Eighth and Fourteenth Amendments; and that the Georgia statutory system under which the punishment and guilt portions of the trial are bifurcated, with the jury hearing additional evidence and argument before determining whether to impose the death penalty; under which the jury is instructed on statutory factors of aggravation and mitigation; and under which Georgia Supreme Court reviews each sentence of death to determine whether it is disproportionate to the punishment usually imposed in similar cases was constitutional despite the contention that it permitted arbitrary and freakish imposition of the death penalty).

2. David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., Equal Justice and the Death Penalty: A Legal and Empirical Analysis 2-3 (1990). The Baldus study is actually two studies. Both focused on Georgia and examined “whether trial-level reforms . . . can distinguish rationally between those who should live and those who should die,” along with “the ability of state supreme courts to provide the oversight of their death-sentencing systems required to ensure that they operate in a consistent, nondiscriminatory fashion.” Id.


4. Id. at 287.

5. See Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (holding that imposition and carrying out of the death penalty in cases before the Court would constitute cruel and unusual punishment in violation of Eighth and Fourteenth Amendments).
examined the entire Georgia capital sentencing system through the use of multivariate statistical analysis. This method would identify those factors that led to the death penalty being sought by the prosecution and imposed by the jury. The Baldus study determined that blacks who killed whites were nearly three times more likely to be sentenced to death in Georgia than were whites who killed whites. The study did not and indeed could not focus on McCleskey’s case, but he was in the category identified by the research – a black who killed a white police officer during the course of an armed robbery. Therefore, the U.S. Supreme Court found that the study did not demonstrate that race was a factor in his death sentence. The following quotes illustrate the Court’s opinion of the study:

- “Statistics at most may show only a likelihood that a particular factor entered into some decisions.”
- Despite the statistical evidence, “the only question before us is whether in his . . . case the law of Georgia was properly applied.”
- “Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that discretion has been abused.”

Rather than demonstrating a pattern of racial discrimination in capital sentencing, the McCleskey decision requires capital defendants to prove that discrimination existed in their individual cases.

III. The General Accounting Office Report on Death Penalty Sentencing

The Baldus study led to the analysis of the capital sentencing process in other death penalty states. This research was reviewed by the U.S. General Accounting Office ("GAO") as required under the Anti-Drug Abuse Act of 1988. This law sanctioned a review of research on capital sentencing procedures to determine whether either the race of the victim or the defendant influenced the likelihood of a death sentence. The GAO conducted an evaluation synthesis of fifty-three capital sentencing studies and excluded those

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6. See BALDUS ET AL., supra note 2, at 40-79.
7. See BALDUS ET AL., supra note 2, at 40.
8. See BALDUS ET AL., supra note 2, at 315. “The death penalty was assessed in 22% of the cases involving black defendants and white victims; [and] 8% of the cases involving white defendants and white victims.” McCleskey, 481 U.S. at 286.
10. Id. at 279-80.
11. Id. at 308.
12. Id. at 319.
13. Id. at 297.
15. Id.
that “did not contain empirical data or were duplicative.” This process identified twenty-eight methodologically sound studies, including three Kentucky analyses. On this basis, the GAO made the following conclusions:

- In eighty-two percent of the studies, race of the victim influenced the likelihood of a defendant being charged with the death penalty (especially those who murdered whites).
- This evidence was stronger at the earlier stages of this process (e.g., the prosecutorial decision to seek the death penalty or to proceed to trial rather than plea bargain) than in the later stages.
- “Aggravating circumstances” (e.g., prior record, culpability level, heinousness of the crime, and number of victims) were influential but did not fully explain the reason for racial disparity in capital sentencing.
- The evidence for the influence of the race of the defendant was equivocal. The race of the defendant interacted with other factors (e.g., rural versus urban areas and blacks who killed whites).
- More than three quarters of the studies that identified a race-of-defendant effect found that black defendants were more likely to receive the death penalty.

Thus, the GAO research synthesis identified “a strong race of victim influence” on the post-\textit{Gregg} capital sentencing process.

Indeed, recent research confirms that this pattern continues to exist. Baldus and his colleagues have identified eighteen additional “empirical studies published or reported since the GAO report.” The results of these studies were consistent with the findings of the GAO report: two documented no race effects at all; three reported both race-of-victim and race-of-the-offender effects; two identified specific disparities in terms of the cases where blacks were charged.
with the murder of whites;\textsuperscript{28} and the remaining twelve reported race-of-victim effects.\textsuperscript{29}

IV. The Keil & Vito Study in Kentucky

A study of the Kentucky capital sentencing system conducted by Thomas J. Keil and me was included in this review.\textsuperscript{30} A replication of the Baldus study, the research findings identified the factors that prosecutors\textsuperscript{31} and jurors used to seek to impose the death penalty in Kentucky from 1976-1991.\textsuperscript{32} These factors were identical for both prosecutors and jurors, specifically cases where:

- The offender killed more than one victim;\textsuperscript{33}
- The offender killed to “silence” the victim;\textsuperscript{34}
- More than one aggravating circumstance was present;\textsuperscript{35}
- Cases in which blacks killed whites.\textsuperscript{36}

The study concluded that the impact of race on prosecutorial decisions could be justified by the presence of other legitimate factors, and that juries considered the killing of a white by a black more deserving of the death penalty than other offender/victim racial combinations.\textsuperscript{37}

V. The Kentucky Racial Justice Act

In \textit{McCleskey}, the U.S. Supreme Court also stated that the research evidence from the Baldus study was best presented to State and Federal legislatures rather than courts.\textsuperscript{38} Writing for the majority, Justice Powell noted that: “Legislatures . . . are better qualified to weigh . . . and ‘evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.’”\textsuperscript{39} Our study was commissioned by the 1992 Kentucky General Assembly.\textsuperscript{40} In response to the study, Kentucky Senator Gerald Neal of Louisville and Representative Jesse Crenshaw of Lexington

\textsuperscript{28} Id. at 519, 538-40.
\textsuperscript{29} Id. at 519, 536-45.
\textsuperscript{30} See id. at 538-39.
\textsuperscript{31} Another study to determine whether the capital sentencing decisions of Kentucky prosecutors (in cases from 1976-1991) were determined at random or by deliberate factors revealed that the death penalty was most likely to be sought in cases where black offenders killed white victims. Thomas J. Keil & Gennaro F. Vito, \textit{Capriciousness or Fairness? Race and Prosecutorial Decisions to Seek the Death Penalty in Kentucky}, 4 J. ETHNICITY CRIM. JUST. 27, 42 (2006).
\textsuperscript{33} Id. at 22.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id. at 26.
\textsuperscript{38} 481 U.S. at 319.
\textsuperscript{39} Id. (quoting Gregg v. Georgia, 428 U.S. 153, 186 (1976)).
\textsuperscript{40} KY. REV. STAT. ANN. § 17.1531 (West 1992) (repealed 2007).
sponsored\(^{41}\) the Kentucky Racial Justice Act (RJA).\(^{42}\) After vigorous debate\(^{43}\) in both the Kentucky House and Senate, S.B. 171 was passed on February 5, 1998.\(^{44}\)

The law seeks to prevent racial discrimination in capital sentencing, stating that “[n]o person shall be subject to or given a sentence of death that was sought on the basis of race.”\(^{45}\) It permits the introduction of valid statistical evidence of racial bias in Kentucky’s capital sentencing process.\(^{46}\) The defense must claim racial bias at the pretrial conference and bears the burden of proving the claim by “clear and convincing evidence.”\(^{47}\) The prosecution has the opportunity to rebut whatever material and testimony the defense has presented as evidence.\(^{48}\) The legislation was not retroactive and cannot be applied to any person sentenced before July 15, 1998.\(^{49}\)

The Kentucky RJA had some legislative precursors. The U.S. Congress also attempted to pass legislation to deal with racial disparity in capital sentencing. In 1991, the Fairness in Death Sentencing Act\(^{50}\) was proposed in the House of Representatives\(^{51}\) but failed to pass.\(^{52}\) The bill called for research to determine whether racial discrimination is a factor in capital sentencing.\(^{53}\) The act would make it unlawful to execute a defendant whose death sentence was the product of racial discrimination (by race of the defendant or victim).\(^{54}\) The defendant was required to provide proof that the death sentence was a product of racial bias.\(^{55}\) The prosecution could then challenge this evidence or demonstrate that legitimate factors (such as prior record) accounted for the sentence.\(^{56}\) If the defendant prevailed, the death sentence (but not the conviction) would be set aside.\(^{57}\) The Kentucky RJA was a variant of the Congressional legislation of the same title. The one difference is that the Kentucky law authorizes only a pre-trial claim that race was the basis of the decision to seek the death penalty.\(^{58}\)

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\(^{42}\) See Kentucky Racial Justice Act, KY. REV. STAT. ANN. § 532.300-309 (West 1998).

\(^{43}\) See Arnold, supra note 41, at 102.

\(^{44}\) See Arnold, supra note 41, at 102.

\(^{45}\) KY. REV. STAT. ANN. § 532.300.

\(^{46}\) Id.

\(^{47}\) Id.

\(^{48}\) Id.

\(^{49}\) Id. at § 532.305.

\(^{50}\) H.R. 2851, 102d Cong. (1st Sess. 1991).


\(^{52}\) H.R. 2851, 102d Cong. (1st Sess. 1991).

\(^{53}\) See id.

\(^{54}\) See id.

\(^{55}\) See id.

\(^{56}\) See id.

\(^{57}\) See id.

while the proposed Federal legislation also permitted a legal challenge to
discrimination at the sentencing stage.\textsuperscript{59}

On August 11, 2009, North Carolina Governor Beverly Purdue signed a
Racial Justice Act into law.\textsuperscript{60} Like the Kentucky version, the North Carolina
statute provides for the use of statistical or other information by defense to
demonstrate whether the death penalty was sought on the basis of race.\textsuperscript{61}
Contributing to the reason for its passage is the fact that, over a five year period,
five black men on death row were exonerated after spending a collective sixty
years in prison.\textsuperscript{62} Again, the defense has the burden of proof and can use such
evidence as:\textsuperscript{63}

\begin{itemize}
\item Death sentences were sought or imposed significantly more
frequently upon persons of one race than upon persons of another
race.\textsuperscript{64}
\item Death sentences were sought or imposed significantly more
frequently as punishment for capital offenses against persons of one
race than as punishment of capital offenses against persons of
another race.\textsuperscript{65}
\item Race was a significant factor in decisions to exercise peremptory
challenges during jury selection.\textsuperscript{66}
\end{itemize}

The state may rebut any of this evidence with its own data.\textsuperscript{67} If the court
determines that the capital prosecution is the product of race, the death penalty
cannot be imposed.\textsuperscript{68} In sum, the North Carolina RJA is very similar to that of
Kentucky.

\section*{VI. RESPONSE TO THE KENTUCKY RACIAL JUSTICE ACT}

Kentucky prosecutors were less than pleased about the passage of the RJA.\textsuperscript{69}
Although we had no hand in the drafting of the legislation, our study was

\begin{itemize}
\item \textsuperscript{59} See H.R. 2851.
\item \textsuperscript{60} James Romoser, \textit{A Busy Session, Historic Decisions: General Assembly Finally Adjourns a Session That's Been Hard, and Noteworthy}, WINSTON-SALEM J., Aug. 12, 2009, available at 2009
WLNR 15616154.
\item \textsuperscript{61} See id.
\item \textsuperscript{63} North Carolina Racial Justice Act, N.C. GEN. STAT. ANN. §§ 15A-2010 to -2012 (West 2009).
\item \textsuperscript{64} Id. at § 15A-2011(b)(1).
\item \textsuperscript{65} Id. at § 15A-2011(b)(2).
\item \textsuperscript{66} Id. at § 15A-2011(b)(3).
\item \textsuperscript{67} Id. at § 15A-2011(c).
\item \textsuperscript{68} Id. at § 15A-2012(a).
\item \textsuperscript{69} See Susan Fernandez, \textit{Measure on Race and Death Penalty Goes to Governor}, LEXINGTON
HERALD-LEADER, March 31, 1998, at C1 (Prosecutors have argued that it would be wrong to allow
statistics from unrelated cases to be applied in other murder cases. They say that there is already
attacked as the reason for it. A Fayette County Assistant Commonwealth’s
Attorney had this to say when our study was used on appeal by a white death
row inmate who was claiming racial discrimination in capital sentencing:

This is the classic example of . . . lies, damn lies and . . . statistics . . . . 
You look at these studies and anyone can find something to claim he’s
discriminated against, whites and blacks. Everyone will be exempt in
the end.” 70

Although this response is marked by a lack of understanding about the
meaning and limitations of our study, it does raise a legitimate issue about the
ultimate impact of the RJA. Can it actually prevent the impact of racial bias in
capital sentencing?

A sponsor of the RJA, Senator Gerald Neal, conducted a survey of all
Kentucky public defenders to determine how the Act has been implemented. 71
Sixty-four defense attorneys responded. 72 Four said that they had a case that
used the RJA, and an additional eight respondents stated that they knew of others
who had utilized its provisions in murder cases. 73 In one particular case, the
defense cited the RJA and requested information about all the capital cases that
the prosecutor had sought, including why he decided to seek or not seek the
death penalty in each. 74 The public defenders also noted the positive effects of
the law:

It announces the statewide standard that all must follow as a matter of
law whether they agree with it or not. It calls [on] prosecutors to reform
their charging and prosecution process. It calls on judges to ensure that
no prosecutions are done as a product of race discrimination. It calls for
defense attorneys to use this state-created standard to litigate so that no
one is prosecuted illegally. 75

One noted negative effect of the RJA is that prosecutors have adopted
policies to seek the death penalty in every eligible case, rather than making this
decision on a case-by-case basis. 76 This effectively destroys all bias. Yet, it also
is perilously close to making the death penalty mandatory – a process that the

70. John Cheves, If Death Penalty Has Taint of Race, Can Law Remove It?, LEXINGTON
71. Gerald Neal, Not Soft on Crime, But Strong on Justice The Kentucky Racial Justice Act: A
Symbol, a Statement of Legal Principle, and a Commitment to Systemic Fundamental Fairness, 26
72. Id.
73. Id.
74. Id. at 16.
75. Id.
76. Id.
U.S. Supreme Court declared unconstitutional in *Woodson v. North Carolina*. 77 Also, as Louisville, Kentucky Senator Neal notes, this method is an abandonment of prosecutorial discretion and “[t]he people of Kentucky have not elected Commonwealth Attorneys to exercise no discretion.” 78 Neal asserts that “[t]he question is not whether you are for or against the death penalty,” but it “is whether the death penalty should be subject to the same standards of nondiscrimination as any other institution in our state.” 79

One particular use of the RJA was in the case of Nate Wood. Wood, an African American, was charged with kidnapping and killing his former girlfriend in Glasgow, Kentucky (Barren County: 4.5% African American population). 80 Pretrial publicity and community attention were substantially high as the case began. 81 The Commonwealth decided to seek the death penalty against Wood and moved for a limited voir dire where only certain questions would be asked and no others. 82 Under the RJA, the defense asked for several remedies, including a voir dire that would address the issue of racial discrimination and an order directing the Commonwealth to disclose the race of the defendant in all death-eligible murder cases at the time of this case. 83 A request for a change in venue had previously been denied. 84 In response to the RJA motion, the court refused to exclude the possibility of a death sentence but did expand the questions asked in the voir dire. 85 Wood was convicted of wanton murder and capital kidnapping and sentenced to life without parole. 86

This use of the RJA seems both legitimate and effective. It required the prosecution to deal with the potential for racial bias in precisely the class of case that was identified by the research 87 as problematic – those in which a black offender was charged with the murder of a white victim. 88 The RJA is thus proactive in its impact. It gives the defense a method to prevent the potential of racial bias in a capital case while it is being conducted rather than upon appeal.

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81. *Id.*
82. *Id.*
83. *Id.* at 24.
84. *Id.* at 14.
85. *Id.*
86. Sexton, *supra* note 80, at 14.
87. See Keil & Vito, *supra* note 32.
VII. COMPARATIVE PROPORTIONALITY REVIEW: A RECONSIDERATION

Yet the reactive approach of comparative proportionality review also deserves further consideration. Our main research question was: Did the requirements placed by the U.S. Supreme Court in Gregg prevent racial bias in capital sentencing? In keeping with the original Baldus study, can statistical analysis provide information to guide comparative proportionality review? Thus, the Baldus study constituted an evaluation of the effectiveness of the super due process protections approved by the review of the Georgia capital sentencing process in Gregg.89

The Court’s opinion in McCleskey was correct in its identification of the limitations of the Baldus study in the particular case of the defendant.90 Statistical analysis can never provide evidence of discrimination in an individual case. It can only determine whether a broad pattern exists. Our Kentucky study could not determine where the discrimination occurred or who was responsible.91 We found no geographic effect.92 But this research evidence indicated that racial bias did exist in the capital sentencing process, and that is why the Court’s rejection of statistical evidence in McCleskey was in error. The statistical finding regarding the impact of race reflected a major flaw in the system, and the failure of the super due process remedies to prevent it. It was not simply a factor correlated with race or some type of statistical artifact or “ghost.” It was precisely the type of information that state supreme courts could use to guide comparative proportionality review.

Basically, no matter how it is conducted, comparative proportionality review follows three steps.93 First is the selection of a universe of cases.94 Second, the court must select a pool of cases that are similar to that under appeal.95 Finally, the court must determine whether the death penalty case is proportionate to those in that pool.96 Typically, courts rely upon a “precedent-seeking approach” – attempting to identify those cases that are similar in terms of the facts of the case or aggravating factors.97 The Baldus study presented in McCleskey attempted to provide a scientific method to guide this process by examining the factors that distinguished capital cases from other death eligible murder cases that received a different sentence via multivariate statistical analysis.98 This is a “systems approach” to proportionality review:

89. Keil & Vito, supra note 32, at 18-19.
91. See Keil & Vito, supra note 32, at 30.
94. See id.
95. See id.
96. See id.
97. See BALDUS ET AL., supra note 2, at 281.
98. See BALDUS ET AL., supra note 2, at 378.
A systems approach begins with the collection of information on all potential capital cases to analyze aggregate data on intake and exit from the capital case processing system as a whole, regardless of whether that system is viewed as fair. Systems analysis identifies discrete, decision-making stages within capital case processing, and analyzes the characteristics of cases and defendants and how they move through the system at each identified stage.  

The precedent based approach is much more limited in its pool of cases, and, thus, treats the imposition of a death sentence as a single isolated sentencing event.  

Following the Furman and Gregg decisions, over thirty states included comparative proportionality review as a super due process element in their capital statutes. Kentucky is one of twenty-two death penalty states whose capital punishment statute presently requires comparative proportionality review of capital cases on appeal. The U.S. Supreme Court ruled in Pulley v. Harris that this procedure was desirable but not constitutionally required. As Bienen notes, many state courts also used the McCleskey decision as an excuse to refuse to consider constitutional challenges based upon statistical evidence, thus “undermining the entire foundation of proportionality review.” Indeed, the negative messages that McCleskey and Pulley transmitted about the use of statistical information and comparative proportionality review made the Kentucky Racial Justice Act necessary.  

Yet, some states adopted information systems for data collection that are necessary to conduct systematic capital case comparative proportionality review. Under the direction of Professor Baldus as a special master, the New Jersey Supreme Court convened the Proportionality Review Project. This effort identified and collected data on the relevant variables affecting the capital sentencing system (examining it from indictment through sentencing), and analyzed them with the most sophisticated statistical methods available. The report conducted by the Project found that race of the defendant played a significant role in capital sentencing. However, the Project was halted after

100. See id. Our Kentucky analysis was modeled after the Baldus study. We took the additional step of statistically modeling the probability that a case would reach the next stage of the capital sentencing system and including it in the analysis as a covariate.
101. Id. at 140.
102. Id.
103. Id. at 237.
105. Bienen, supra note 99, at 133.
106. See Bienen, supra note 99, at 159-64.
March 12, 1992, when the Governor signed into Law a bill restricting the scope of proportionality review to the pool of cases where the death penalty was imposed.  

Other states have failed to establish an information system and a precise methodology for comparative proportionality review. In Pennsylvania, the process begins with the pool of cases in which the death penalty was sought. Like the New Jersey legal restriction, this decision eliminates an analysis of the factors influencing the prosecutors’ decision to seek the death penalty. In Missouri, Wallace and Sorensen reviewed the state of Missouri’s proportionality review process and concluded that its “enfeebled” process renders a review that “does little more than allow the reviewing court to justify a death sentence.”

Wallace and Sorensen determined that from 1975 through April 1996, appellate comparative proportionality reviews were conducted on fifty-five cases from twelve jurisdictions. Four reversals used only affirmed death sentences in their comparisons. Four additional cases were reviewed featuring selection of a pool by common aggravating factors. The remaining cases were selected by a comparison of the salient features of the case, and the precedent seeking method was also predominant. Florida led the twelve jurisdictions with twenty-six comparative proportionality review reversals, followed by North Carolina (7); Illinois (4); Idaho and Nevada (3); Arkansas, Louisiana, Georgia (2); and Arizona, Mississippi, Missouri, and Oklahoma (1).

Research also has indicated problems with the comparative proportionality process in death penalty states. Kaufman-Osborn reviewed the comparative proportionality review process adopted by the state of Washington. In 1977, the Washington capital statute called for the creation of an information system that required court clerks, within ten days of receipt of the transcript of a death penalty trial, “to transmit that record to the State Supreme Court along with ‘a report prepared by the trial judge . . . in the form of a standard questionnaire


111. See Bienen, supra note 99, at 161.


113. N.J. STAT. ANN. § 2C:11-3(e).

114. See Hartman, supra note 112, at 904.


117. Wallace & Sorensen, supra note 93, at 21.

118. Wallace & Sorensen, supra note 93, at 21.

119. Wallace & Sorensen, supra note 93, at 21-25.

120. Wallace & Sorensen, supra note 93, at 22-24.

prepared and supplied by [that court].”122 In 1981, this process was amended to make certain that the following information was included:

- Information about the chronology of the case; defendant; trial; special sentencing proceeding, if conducted; victim; legal representation provided to the defendant; ‘general considerations’ concerning the race, ethnic, and sexual orientation of the various participants in the trial, including the jury, as well as the demographics of the county in which the trial was conducted; and, finally, ‘general comments of the trial judge concerning appropriateness of the sentence, considering the crime, the defendant, and other relevant factors.’123

The statute required that all of this information be filed in all cases where a person was convicted of first degree murder.124 Kaufman-Osborn examined cases in Washington during the period 1981 to March 2003 when the death penalty was sought in seventy-eight cases and imposed in thirty-one.125 During this time frame, the Washington Supreme Court reviewed twenty cases for proportionality and vacated none of them.126 He found that many of the 259 cases that the courts utilized in this analysis were deficient in the required information.127 The identified deficiencies included: the omission or exclusion of cases that should have been included; reports that were not filed in the timely fashion required by law (62% were late); reports that provided insufficient or inaccurate information; failure to provide basic information about the defendants’ biography and character; lack of information about the victim; lack of information about the aggravating and mitigating circumstances in the case; and lack of information on the race or ethnic origin of the defendant, victim and jury, as well as the demographics of the trial county.128 Without such accurately compiled and submitted information, it is difficult to conduct a comparative proportionality review that is legally accurate and relevant in its assessment of the fairness of a capital sentencing system.

VIII. CONCLUSION

Comparative proportionality review could follow the growing use of evidence-based practice in criminal justice, provided that valid and accurate evidence can be compiled in a statistical information system. The use of statistical information to guide operations has proven to be an efficient and effective method in both corrections and policing. For example, Latessa has noted that correctional research has been used to implement change and improve

122. Id. at 263.
123. Id. at 264.
124. Id.
125. Id. at 265.
126. Id.
127. Id. at 265.
128. Id. at 265-68.
programs while holding both offenders and administrators accountable for performance. Ratcliffe has documented the effectiveness of intelligence-led policing – where data and crime analysis directs operations and targets crime locations and offenders to both prevent and sanction criminal activity. In Tampa, Florida, an intelligence led approach has generated a forty-six percent reduction in major crime categories between 2002 and 2008. Statistical information in such cases provides intelligence in the sense that it directs criminal justice decision makers and operatives to where a problem exists, and where to focus both their effort and their resources. It does not tell them what to do, but rather where to do it and with whom.

In Kentucky, our study identified a problem in the cases where black defendants were charged with the capital murder of white victims. Taking an evidence-based approach, these research findings directed the Kentucky Supreme Court to focus its review on this class of cases – capital convictions where blacks were charged with killing whites. What happened in the process of these cases in terms of the provision of super due process – particularly the conduct of the entire trial process? This information could thus allow the court to concentrate their time and resources on a class of cases that was identified by research to be the source of the problem. Such an approach would be similar to examining “hot spots” of crime by the police. It is important to address the issue of racial bias in such a manner. It affects not only the quality of our courts but also the promotion of respect for the law in general. Taken together, the Kentucky Racial Justice Act and a comparative proportionality review process informed by statistical analysis have the potential to eliminate the impact of racial bias in the capital sentencing process.

132. See Keil & Vito, supra note 32, at 17.
133. See, e.g., Anthony A. Braga & Brenda J. Bond, Policing Crime and Disorder Hot Spots: A Randomized Controlled Trial, 46 Criminology 577 (2008).
134. Bienen, supra note 99, at 144 (noting that insuring racial fairness is a traditional province of the courts in such areas as employment, jury selection, or entitlement to government benefits, and also where such statistical evidence as presented in McCleskey is accepted as evidence by the courts).