RACISM AND RETRENCHMENT IN CAPITAL SENTENCING: JUDICIAL AND CONGRESSIONAL HASTE TOWARD THE ULTIMATE INJUSTICE

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PREFACE

This Article is based upon remarks presented to an audience comprised of a number of lawyers and an even larger number of non-lawyer political and social activists. The objective of the presentation was to inform, to generate discussion, and to provoke responsive action among those persons concerned with the socially harmful policies of the conservative United States Supreme Court as it proceeds forward through the 1990s. In the past several years, the Court has consistently demonstrated its hostility to the rights of people of color. In preparing to address this forum, I deemed it important that social and political activists (and others given to careful thought on such subjects) be aware of the Court's general trend to defer issues, previously afforded constitutional scrutiny, to the legislatures of the states and to Congress. If, as the Court claims, it is a "national consensus" which guides the Court in upholding death penalty statutes and sentences, then the public needs to know how to raise its voice on the issue. In response to the Court's acceptance of racial discrimination in the criminal justice system as inevitable, those unwilling to tolerate racism as a permanent part of the American fabric must effectively channel their demands for change. Otherwise the "national consensus," held so sacred by the Court, will continue to be reached through political deal mak-

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The author acknowledges with gratitude the assistance of the following people in compiling information and in reviewing drafts of this Article: Haywood Burns, Dean, CUNY Law School; Sharon Horn, Associate Professor, CUNY Law School; Mardi Crawford, consultant and former staff attorney, National Legal Aid and Defender Association (NLADA); Mary Broderick, Director, Defender Division, NLADA; Diann Rust-Tierney, Legislative Counsel, ACLU; Ronald Tabak, New York Lawyers Against the Death Penalty. Special appreciation to Wayne Walcott for his patience and support.

ing between the Court and Congress and significant issues will remain shielded from truly public debate.

This Article explores the decision currently facing citizens of our society: whether they will permit their states to use the ultimate sanction — death — when it cannot be guaranteed that the penalty will be applied without regard to the race of the victims or the defendants. The Article also discusses Congress' impending decision of whether to curtail further access to post-conviction appellate review for death-row prisoners. Such action has been demanded by the Reagan and Bush Administrations and engineered by the Supreme Court, yet Congress has made no guarantee of competent legal representation at the trial, appellate, or post-conviction stages.

The efforts by the Court and its conservative allies in Congress and the Administration to eliminate human rights for the poor and people of color threaten to stamp out the gains borne of decades of struggle. This essay is intended to reach those who might apply their energies to stopping this rollback of human rights. It attempts to be practical, explanatory, somewhat rhetorical, and nondoctrinal (except to the extent augmented by footnotes). The remarks here do not attempt to expand death penalty jurisprudence, but rather to translate it, so that theory may be transformed into action.

I.
RACISM IN DEATH SENTENCING: "CONSTITUTIONALLY ACCEPTABLE"

Sie Dawson was a middle-aged, illiterate, mentally retarded, mentally ill, one-legged man who had the misfortune to be a black living in the Florida panhandle. He worked for the Claytons, a poor white family. On April 13, 1960, Mrs. Clayton and her two-year old son were murdered by someone who beat them with a hammer. Dawson was arrested. For over a week, he was driven around the panhandle from jail to jail; during that time, he was not taken before a judge or allowed to see a lawyer. After a week alone with white officials, Dawson confessed to committing the murders. He was tried, convicted, and condemned by an all-white, all-male jury. Except for his confession to the police, Dawson always maintained his innocence. He said that Clayton had killed his own wife and child and threatened Dawson if he told anyone about it. Dawson's version of the events was ignored, however, and he was executed May 12, 1964.[1]

Tom Brooks and Charlie McCray were two black farmworkers who were employed by the same man. In 1933, Brooks killed McCray and was condemned to death.[2] Brooks' employer appealed for clemency: "He just got a little too much bad licker [sic] in him and . . . killed one of his contemporaries." The clerk of the court where Brooks was tried wrote to the parole board:

1. *See* Dawson v. State, 139 So. 2d 408 (Fla. 1962).
2. *See* Brooks v. State, 115 Fla. 243, 156 So. 23 (1934).

"This is just another case of one negro killing another." Brooks not only received clemency, but was later paroled.[3]

> "As long as only Negroes are concerned and no whites are disturbed, great leniency will be shown in most cases. . . . The sentences for even major crimes are ordinarily reduced when the victim is another Negro.
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> . . . . For offenses which involve any actual or potential danger to whites, however, Negroes are punished more severely than whites.
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> . . . . On the other hand, it is quite common for a white criminal to be set free if his crime was against a Negro."[4]

In 1972, the Supreme Court stopped the flood of executions[5] in the United States when it decided *Furman v. Georgia*.[6] In *Furman*, the Court found that a state death penalty statute lacking standards guiding judges and juries in the exercise of their discretion in imposing the death penalty violated the eighth amendment.[7] The statute in question[8] was struck down because it allowed both judges and juries to act arbitrarily and capriciously in imposing the death penalty.[9] This grant of unfettered discretion, the Court found, resulted in racial discrimination impermissibly influencing sentencing decisions.[10] The Court identified this as the chief evil of the Georgia statute.[11] Since *Furman*, thirty-seven states have enacted laws setting forth capital sentencing guidelines for juries.[12] Georgia, whose mandatory penalty statute was

3. Radelet & Vandiver, *Race and Capital Punishment: An Overview of the Issues*, 25 CRIME & SOC. JUST. 94, 95 (1986).

4. McCleskey v. Kemp, 481 U.S. 279, 330 (1987) (Brennan, J., dissenting) (quoting G. MYRDAL, AN AMERICAN DILEMMA 551-53 (1944)) (punctuation in original).

5. Since 1930, nearly 4000 people have been executed in the United States. Since 1976, the year of the reinstatement of the death penalty, 140 people have been put to death. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW, U.S.A. 1 (Sept. 21, 1990) [hereinafter DEATH ROW, U.S.A.].

6. 408 U.S. 238 (1972) (per curiam). "[T]he State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments." *Id.* at 274 (Brennan, J., concurring).

7. *Id.* at 239-40.

8. Furman had been convicted of murder and sentenced to death under Georgia law. GA. CODE ANN. § 26-1005 (Supp. 1971); *see* 408 U.S. at 239.

9. 408 U.S. at 249-57 (Douglas, J., concurring); *id.* at 274-77 (Brennan, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring); *id.* at 364-66 (Marshall, J., concurring).

10. *Id.* at 255-57 (Douglas, J., concurring).

11. *Id.* at 309 (Stewart, J., concurring).

> In a Nation committed to equal protection of the laws there is no permissible "caste" aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.

Id. at 255 (Douglas, J., concurring).

12. *See* McCleskey v. Kemp, 481 U.S. 279, 301 n.23 (1987).

struck down in *Furman*, was the first state to receive approval of its new death penalty scheme in *Gregg v. Georgia*.[13] Statutes from Florida and Texas were also approved that term.[14] Many other states have followed these examples, designing more precise guidelines for juror discretion in considering the imposition of a death sentence.[15] Nevertheless, the specter of discriminatory arbitrariness on the basis of race hovers over the existence of a sentence which permits the state to take the life of a citizen.

In his concurring opinion in *Furman*, Justice Douglas noted vast inequities in the application of the death penalty.[16] His comment, made eighteen years ago, is no less applicable today. Of the over 2200 prisoners on death row, more than 39% are African-American,[17] even though African-Americans constitute only 12% of the nation's population.[18] The remainder of death row inmates awaiting death by electrocution, gas pellets, lethal injection, or other means, is composed of Caucasians (50.43%), Hispanics (6.89%), and native Americans (1.83%).[19] Since 1930, of the nearly 4000 people who have been executed, more than half have been people of color — mostly African-Americans.[20] The disproportionate number of people of color both in prison and on death row presents a strong case for the existence of racial discrimination in capital sentencing.[21]

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13. 428 U.S. 153, 168-87, 198-207 (1976) (holding that the imposition of the death penalty is not per se cruel and unusual punishment in violation of the eighth amendment, and that the Georgia statute eliminated the arbitrariness and caprice of the system struck down in *Furman*).

14. *See* Proffitt v. Florida, 428 U.S. 242, 253 (1976) (plurality opinion); Jurek v. Texas, 428 U.S. 262, 273-74 (1976) (plurality opinion). *But cf.* Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (plurality opinion) (death penalty scheme which narrowly defines categories of murder which require mandatory imposition of death penalty is unconstitutional); Woodson v. North Carolina, 428 U.S. 280, 303-05 (1976) (plurality opinion) (statute with inadequate guidelines resulting in mandatory imposition of death penalty is invalid because it fails to provide individualized sentencing determinations required by the eighth and fourteenth amendments).

15. *See supra* note 12 and accompanying text.

16. " 'The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.' " *Furman*, 408 U.S. at 249-50 (Douglas, J., concurring) (quoting PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (1967)).

17. DEATH ROW, U.S.A., *supra* note 5, at 1.

18. U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS (1990) (the projected figure following the 1990 census is 8.6%).

19. DEATH ROW, U.S.A., *supra* note 5, at 1.

20. *See* BUREAU OF JUSTICE STATISTICS, NAT'L PRISON STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT, 1979 at 18 (1980) (2077 out of the 3894 people who had been executed or condemned to die by the time of the *Furman* decision were African-Americans). No white person has ever been executed for the murder of a black person. DEATH ROW, U.S.A., *supra* note 5, at 4-7 (55 of the 140 people executed since the reinstatement of the death penalty were African-American).

21. Several commentators have explored the issue of racism and racial disparities in sentencing decisions. *See, e.g.*, Austin, *The Court and Sentencing of Black Offenders*, in THE CRIMINAL JUSTICE SYSTEM AND BLACKS 167 (D. Georges-Abeyie ed. 1984); Gibson, *Race as a Determinant of Criminal Sentences — A Methodological Critique and a Case Study*, 12 L. & SOC'Y REV. 455 (1978); Howard, *Racial Discrimination in Sentencing*, 59 JUDICATURE 121 (1975); Jendrek, *Sentencing Length — Interactions with Race and Court*, 12 CRIM. JUST. 567 (1984); Joyner, *Legal Theories for Attacking Racial Disparity in Sentencing*, 18 CRIM. L. BULL.

The theory of differential involvement holds that African-Americans are disproportionately represented in the prison population because they commit certain street crimes at a higher rate than whites.[22] This theory, even if accepted as accurate, only partially explains the racial disparity. The discriminatory exercise of discretion based on racist fears and beliefs pervades every stage of the criminal justice process. As will be seen, the court zealously protects this discretion, and in so doing, institutionalizes the prejudices upon which discretionary decisions are based.[23] Moreover, the vast majority of prisoners, including African-Americans, are poor, suggesting that class, not race, is the determinative factor in crime and arrest rates. The disproportionate concentration of African-Americans at the lower economic strata, the poor quality and high attrition rate at inner-city public schools, the high rates of unemployment among African-American youth and men, and related social factors including drug and alcohol addiction, all substantially contribute to the crime and arrest rates.[24]

Notwithstanding the role that racism against the accused in prosecution and sentencing may play, it is clear that, at least in capital sentencing, prejudice concerning the race of the victim is a strong influence. Patterns of death sentencing demonstrate that when both the defendant and victim are black, a less severe penalty is imposed than when the victim is white, especially where the offender is black.[25] In the latter cases, the penalty frequently has been death.[26] These patterns were analyzed in a recent study by the United States General Accounting Office.[27] Such evidence leads directly to the inference

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101 (1982); Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988); Ogletree, *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938 (1988); Unnever, Frazier & Henretta, *Race Differences in Criminal Sentencing*, 21 SOC. Q. 197 (1980); Wolfgang & Reidel, *Race, Judicial Discretion and the Death Penalty*, 407 ANNALS 119 (1973); *Developments in the Law — Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1603-41 (1988) [hereinafter *Developments in the Law*].

22. *Cf.* Hindelang, *Race and Involvement in Common Law Personal Crimes*, 43 AM. SOC. REV. 93, 94-97 (1978) (attributing black overrepresentation in arrest statistics to differential involvement by blacks in crime rather than differential selection of blacks for arrest by the police); *see also* Blumstein, *On the Racial Disproportionality of United States Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259 (1982); Morris, *Race and Crime: What Evidence is There that Race Influences Results in the Criminal Justice System?*, 72 JUDICATURE 111 (1988).

23. *See infra* notes 57-61 and accompanying text.

24. *See* M. MAUER, YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM (1990); Aiyetoro, *The Criminal Justice System: Racism and Genocide*, NBA MAG., Mar. 1989, at 14.

25. *See infra* text accompanying notes 32-34.

26. *Id.*

27. U.S. GEN. ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES, REPORT TO SENATE AND HOUSE COMMS. ON THE JUDICIARY, 101ST CONG., 2D SESS. (1990). The General Accounting Office study used an evaluation synthesis of 28 empirical studies of post-*Furman* death sentencing from 1972 to 1988. The 28 studies constituted 23 different data sets which covered homicide cases from various geographic regions and several death penalty states. The studies controlled for up to 200 variables, including legally relevant variables (aggravating and mitigating factors such as prior criminal record, culpability level, heinousness of the crime, and number of victims). The find-

that, in the minds of judges and juries, and of the society which spawns them, black life holds less value than white life.[28]

In *McCleskey v. Kemp*,[29] the Supreme Court was presented with statistical evidence of this phenomenon, yet dismissed it as not "constitutionally significant."[30] In a five-to-four decision, authored by Justice Powell, the majority held that the enormous sentencing disparities based upon offender/victim characteristics do not violate a death row prisoner's rights under the United States Constitution.[31] Warren McCleskey is an African-American sentenced to die under Georgia law for the murder of a white police officer. In challenging his sentence, McCleskey, represented by the NAACP Legal Defense Fund, presented to the Court a sophisticated statistical analysis of death penalty sentencing in Georgia conducted by Professor David C. Baldus and his colleagues at the University of Iowa.[32]

The Baldus study combined two sophisticated statistical analyses that examined over 2000 murder cases adjudicated in Georgia in the 1970s. The raw numbers collected in the research indicated that defendants of any race

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ings of the evaluation synthesis showed a pattern of racial disparities in the charging, sentencing, and imposition of the death penalty after the *Furman* decision. "In 82 percent of the studies, race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty. . . . This finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques [and] held for high, medium, and low quality studies." *Id.* at 6 (footnote omitted).

28. *See, e.g.*, Carter, *When Victims Happen To Be Black*, 97 YALE L.J. 420, 440-47 (1988) (arguing that statistics show "massive discrimination against black victims" and that,

> [o]n either model [of justification for capital punishment, deterrence or retribution], the juries that over time punish black people who kill white people far more harshly than black people who kill black people are making statements about the value of black lives. When black people kill white people, something has occurred that must be deterred, something has happened that must be condemned. When black people kill each other, however, deterrence is ignored and retribution is forgotten. When flexible juries use their discretion to impose the ultimate penalty, the lives of victims who happen to be black are simply worth less.

Id. at 444); *see also* Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988); Kennedy, *supra* note 21, at 1391 & n.14 (citing cases and articles in discussion of the ramifications of the "undervaluation thesis"); *id.* at 1394 (Kennedy emphasizes that he does not write out of a concern for black defendants, but rather for the black victim and community); *The Supreme Court — Leading Cases*, 101 HARV. L. REV. 119, 157 (1987) [hereinafter *Leading Cases*] (arguing that the message sent by applying a "cultural meaning test" such as that proposed in Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 355-58 (1987), is that "murderers of whites are more seriously punished than murderers of blacks because white lives are more highly valued than black lives.").

29. 481 U.S. 279 (1987).

30. *Id.* at 313.

31. *Id.*

32. The study was performed by Professors David C. Baldus, Charles A. Pulaski, Jr., and George Woodworth. *See* Baldus, Pulaski & Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); Baldus, Woodworth & Pulaski, *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia*, 18 U.C. DAVIS L. REV. 1375 (1985); *see also* Kennedy, *supra* note 21, at 1391 n.13 (discussing Baldus' race-of-victim analysis of racial discrimination in the imposition of the death penalty).

charged with killing white persons received the death penalty in eleven percent of the cases, but defendants charged with killing blacks were sentenced to death in only one percent of the cases. Scrutinizing the race of the defendants and victims in these cases, Baldus found that the death penalty was assessed in twenty-two percent of the cases involving black defendants and white victims, in eight percent of the cases involving white defendants and white victims, in three percent of the cases involving white defendants and black victims, and in one percent of the cases involving black defendants and black victims. Baldus subjected his data to an extensive multiple-regression analysis, taking account of 230 variables that could have explained the disparities on nonracial grounds. One model concluded that, after taking account of 39 nonracial variables, "defendants charged with killing white victims were 4.3 times more likely to receive a death sentence than defendants charged with killing blacks."[33] The study thus concluded that "nearly six of every 10 defendants who were sentenced to death for killing white victims would not have been sentenced to death had their victims been black."[34]

Despite this overwhelming evidence of racial discrimination, the Court rejected McCleskey's claim that his sentence (and therefore all Georgia death sentences) violated the eighth amendment's guarantee against cruel and unusual punishment.[35] The Court reasoned that because the Georgia sentencing scheme provided for consideration of individualized factors concerning the case and the defendant, McCleskey's sentence was presumptively non-arbitrary, and therefore not disproportionate under the eighth amendment.[36] The Court also noted the historical acceptance of the death penalty as a "proportionate" punishment for murder[37] and the lawfulness of the statutory schemes designed to limit and guide discretion.[38] Moreover, the Court rejected McCleskey's claim, based on the Baldus study, that the Georgia capital punishment system was arbitrary and capricious in its application generally. The Baldus statistics, according to the Court, do not "prove" that race is a factor in capital sentencing decisions. They only demonstrate "a likelihood" that race is a factor,[39] and "a discrepancy that appears to correlate with race."[40] Protecting the role of discretion in the criminal justice system, the Court accepted that "apparent discrepancies in sentencing are an inevitable part of our criminal justice system"[41] and declined to find a "constitutionally unaccept-

33. *McCleskey*, 481 U.S. at 286-87.

34. AMERICAN CIVIL LIBERTIES UNION, RACE AND THE DEATH PENALTY: GEORGIA AND THE NATION 1 (1987) (emphasis omitted).

35. 481 U.S. at 308, 313.

36. *Id.* at 308.

37. *Id.* at 301.

38. *Id.* at 302-03.

39. *Id.* at 308.

40. *Id.* at 312. Professor Kennedy noted that this is "a statement as correct and as vacuous as one declaring, say, that 'at most, studies on lung cancer indicate a discrepancy that appears to correlate with smoking.'" Kennedy, *supra* note 21, at 1415.

41. 481 U.S. at 312.

able" risk of racism.[42] The Court thus held, in effect, that the state does not act in an arbitrary and capricious manner when it values people's lives differently according to their race.[43]

The Court also dismissed McCleskey's claim, based on statistical disparities, of an equal protection violation, finding that the statistics were not sufficient to infer intent to discriminate.[44] McCleskey had to prove, the Court held, that the decisionmakers in his particular case — the arresting officer, prosecutor, judge, and jurors — had acted with a racially discriminatory purpose.[45] The Court reasoned that statistics will not establish a claim for a person sentenced to death, because the decision to impose a capital sentence is unique and incomparable to other contexts in which the Court has accepted statistics as proof of equal protection violations. These other contexts include discrimination in selection of the jury venire[46] and employment discrimination under Title VII of the Civil Rights Act of 1964.[47] The Court in *McCleskey* distinguished those situations, stating that they involve fewer variables in the determination of the existence of a discriminatory purpose than those involved in the death penalty sentencing context.[48] In the jury selection context, for instance, a limited number of factors regarding the qualifications of jurors to

42. *Id.* at 308-09 (citing Turner v. Murray, 476 U.S. 28, 36 n.8 (1986)). Justice Powell went on to describe the history of the Court's engagement in " 'unceasing efforts' to eradicate racial prejudice from our criminal justice system." *Id.* at 309 (quoting Batson v. Kentucky, 476 U.S. 79, 85 (1986)). In this apparent self-justification, the Court attempted to explain that by accepting racism, it is not really condoning it. Such circular reasoning suggests that the Court feared the implications of its own racism. For a provocative, insightful discussion of racism and the *McCleskey* decision, see Johnson, *supra* note 28. *See also* Lawrence, *supra* note 28 (discussing the psychology of unconscious racism and the need to acknowledge it directly in the context of legal analysis).

43. The *McCleskey* decision has been roundly criticized by numerous commentators. *See, e.g.*, Kennedy, *supra* note 21, at 1388-89 & nn.6, 7 & 11 (giving examples of the "sharp criticism, and, in some instances, outright denunciation" of the Court's decision).

Anthony Lewis of the New York Times accused the Court of having "effectively condoned the expression of racism in a profound aspect of our law." *See id.* at 1388 (quoting Lewis, *Bowing to Racism*, N.Y. Times, Apr. 28, 1987, at A31, col. 1). Other critics have compared the decision to past Court sanctions of societal and institutional racism, such as that of Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856), Plessy v. Ferguson, 163 U.S. 537 (1896), and Korematsu v. United States, 323 U.S. 214 (1944). *See* Kennedy, *supra* note 21, at 1389 (citing Bedeau, *Someday* McCleskey *Will Be Death Penalty's* Dred Scott, L.A. Times, May 1, 1987, § 2, at 5, col. 1). Still others have described the decision as "logically unsound, morally reprehensible, and legally unsupportable." *See id.* (quoting *Leading Cases*, *supra* note 28, at 158).

44. 481 U.S. at 297-98. To infer such intent, "McCleskey would have to prove that the Georgia Legislature enacted or maintained the death penalty *because of* an anticipated racially discriminatory effect." *Id.* at 298 (emphasis in original).

45. *Id.* at 297.

46. *Id.* at 294 n.13 (citing Castaneda v. Partida, 430 U.S. 482, 495 (1977), Turner v. Fouche, 396 U.S. 346, 359 (1970), and Whitus v. Georgia, 385 U.S. 545, 552 (1967), as cases in which statistical disparities in venire-selection constituted constitutional violations).

47. *Id.* at 294 (citing Bazemore v. Friday, 478 U.S. 385, 400-01 (1986) (Brennan, J., concurring in part), in which the Court accepted statistics to prove statutory violations under Title VII).

48. *Id.* at 294-95.

serve might easily expose and verify a discriminatory intent.[49] Likewise, in Title VII cases a claimant must prove discriminatory intent where the decision to fire, not to hire, or not to promote was ostensibly based upon factors directly related to the employee's qualifications for the particular job.[50] Proving statewide discrimination in death sentencing, by contrast, requires consideration of innumerable variables, such as the motives guiding each unique group of jurors, who, in turn, consider an unidentifiable number of factors related to the particular case before them.[51] Finally, the Court asserted, as it did in dismissing McCleskey's eighth amendment claim, that discretion on the part of all decisionmakers in the criminal justice process is sanctified and requires the utmost protection.[52] While in the venire-selection and employment discrimination contexts, the decisionmaker's motives may be challenged and defended,[53] public policy prohibits an examination of the rationale behind a jury's verdict or a prosecutor's exercise of charging discretion.[54]

In holding against McCleskey on this ground, the Court imposed upon him, and all other black persons challenging their sentences on equal protection grounds, the nearly impossible burden of proving, by means wholly independent of statistics,[55] intentional racism in his own case.[56] Thus *McCleskey* requires capital defendants to prove that which is widely known yet fiercely denied by the courts and criminal justice officials: that racism infects the criminal justice process through the discretionary decisions made by various actors.[57] Such racism is evident in the treatment of poor and black

49. *Id.* at 295 n.14.

50. *Id.*

51. *Id.* at 295 n.15.

52. *Id.* at 297.

53. *Id.* at 296 (citing Whitus v. Georgia, 385 U.S. 545, 552 (1967), Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981), and McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

54. *Id.* (citing McDonald v. Pless, 238 U.S. 264, 267 (1915), Chicago, Burlington & Quincy Ry. Co. v. Babcock, 204 U.S. 585, 593 (1907), and Imbler v. Pachtman, 424 U.S. 409, 425-26 (1976)).

55. Presumably, the only evidence considered valid after *McCleskey* is that which shows discrimination by the prosecutor in the charging and plea bargaining process, prejudice among the jurors, or bias on the part of the trial judge.

56. "[T]o prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose." *Id.* at 292 (emphasis in original). For an analysis of the Court's departure from the traditional equal protection analysis utilizing statistical evidence to find disparate impact and to infer discriminatory intent, see *Developments in the Law, supra* note 21, at 1614-20, 1625 ("By requiring proof of specific intent, the Court turns its back on reality and slights those subject to unconscious discrimination. The Court, in effect, supports a system permeated by discrimination by refusing to question the motives behind the application of a sentencing statute, despite overwhelming evidence of racial disparities.").

57. *See, e.g.*, Radelet & Vandiver, *supra* note 3, at 108 (arguing that although racism exists among individual decisionmakers, the problem of disparate treatment of black people "is not so much the conscious intent to be racially biased or capricious, but rather a more tacit bias built into the structure of the criminal justice system. . . . [R]emoving bigoted prosecutors, judges, and jurors can only be a partial solution to the problem."); *Developments in the Law, supra* note 21, at 1606-14; *see also* Aiyetoro, *supra* note 24, at 16; Carter, *supra* note 28, at 444; Johnson,

persons by the police, resulting in a greater proportion of arrests in black communities;[58] in the prosecutor's decision to seek the death penalty based on the race of the victim and the defendant;[59] in the jury selection process;[60] and in sentencing.[61]

All of these procedures allow for discretionary decisionmaking, which necessarily reflects the personal prejudices of the individual making the decision. It is this discretion which the *McCleskey* decision so fervently protects.[62] In the Court's view, if challenges to this discretion were to succeed, the criminal justice system would collapse like a house of cards.[63] In order for that

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supra note 28, at 1032 (noting that "[t]he nature of any unconscious process makes absolute proof impossible"). *But see* Blumstein, *supra* note 22, at 1280 (stating his conclusion that although the differential involvement of black people in crime is 80% responsible for the racial disparity in the prison population, at least 20% of the disparity is the result of racism in the criminal justice system); Langan, *Racism on Trial: New Evidence to Explain the Racial Composition of Prisons in the United States*, 76 J. CRIM. L. & CRIMINOLOGY 666 (1985); Morris, *supra* note 22 (noting studies discussed in J. PETERSILIA, RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM (1983) and Blumstein, *supra*).

58. *See* Smith, Visher & Davidson, *Equity and Discretionary Justice: The Influence of Race on Police Arrest Decisions*, 75 J. CRIM. L. & CRIMINOLOGY 234, 248 (1984) (citing the relationship between race and arrest rates as largely influenced by the concentration of blacks in low income communities); *see also* Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983).

59. "Baldus found that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims." McCleskey v. Kemp, 481 U.S. 279, 287 (1987); *see also* Radelet & Vandiver, *supra* note 3, at 101-02 (discussing various ways that prosecutorial discretion is influenced by racial factors in death penalty cases); *Developments in the Law*, *supra* note 21, at 1520-49 (a thorough analysis of the nature of prosecutorial discretion in the charging decision in death penalty cases and of legal challenges to such discretion).

60. *See* Holland v. Illinois, 110 S. Ct. 803, 806 (1990) (Scalia, J.) (rejecting, 5-4, a claim that use of peremptory strikes against members of a race other than the defendant's violates the sixth amendment's fair-cross-section requirement); Batson v. Kentucky, 476 U.S. 79, 100 (1986) (holding that, where the trial court flatly rejects the petitioner's objection to the prosecutor's removal of all black persons on venire, without offering further explanation, the petitioner's equal protection rights are violated); Swain v. Alabama, 380 U.S. 202, 224 (1965) (holding, inter alia, that black defendant is permitted to make a prima facie case of purposeful discrimination if it can be shown that the peremptory challenge system is being perverted, and that the total exclusion of blacks from venires creates an inference of discrimination if accomplished through peremptory challenges); Strauder v. West Virginia, 100 U.S. 303, 310 (1880) (holding that a black person's equal protection rights are violated when members of her own race are purposefully excluded from the jury); *see also* Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985); *Developments in the Law*, *supra* note 21, at 1557-88.

61. *See supra* note 21 and accompanying text.

62. 481 U.S. at 311-13 (defending discretion as "fundamental" to the criminal justice system). Justice Brennan, in his dissent, emphasized that

> [d]iscretion is a means, not an end. Reliance on race in imposing capital punishment . . . is antithetical to the very rationale for granting sentencing discretion. . . .
>
> Considering the race of a defendant or victim in deciding if the death penalty should be imposed is completely at odds with this concern that an individual be evaluated as a unique human being.

Id. at 336.

63. *Id.* at 297, 314-18 (expressing fear that if McCleskey's claims were accepted, the entire criminal justice system would be ripe for challenge). Justice Brennan observed that the Court's

system to remain intact, the Court believes racism must be tolerated. Human beings are, therefore, sacrificed for the greater good of systemic efficiency. If these decisions are made on what the Court historically has acknowledged to be an irrational basis,[64] we must ask how these decisions could be accurate. Furthermore, how could they be considered just?

In finding that the racism demonstrated in McCleskey's case was not constitutionally significant, the Court implied there is no "national consensus" against the discriminatory imposition of the death penalty.[65] Using this evasive tactic, the Court abdicated its power to decide fundamental questions regarding the eighth amendment's proscription of cruel and unusual punishment and the fourteenth amendment's guarantee of equal protection under the laws. *McCleskey* effectively closed the Court's doors to litigants wishing to challenge the constitutionality of capital punishment on the basis of its proven racially discriminatory impact. The ever-present injustice experienced by people of color in America thus continues to be shrouded by "institutional integrity," protection of discretionary decision making, and the preservation of the politically popular practice of death sentencing.

II.
TURNING TO CONGRESS FOR FAIRNESS: THE RACIAL JUSTICE ACT

The Court in *McCleskey* insisted that "McCleskey's arguments are best

concern "seems to suggest a fear of too much justice." *Id.* at 339. For an analysis of this fear as an expression of unconscious racism, see Johnson, *supra* note 28, at 1029.

64. " 'Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administation of justice.' " 481 U.S. at 347 (Blackmun, J., dissenting) (quoting Rose v. Mitchell, 443 U.S. 545, 555 (1979)). "[Prosecutorial decisions] may not be 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.' " *Id.* at 364 (Blackmun, J., dissenting) (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)).

65. In recent years, the Court has determined the constitutionality of the death penalty for certain crimes based on its examination of contemporary values. *Id.* at 300 (citing, *e.g.*, Enmund v. Florida, 458 U.S. 782, 789-96 (1982) (felony murder); Coker v. Georgia, 433 U.S. 584, 592-97 (1977) (rape); Gregg v. Georgia, 428 U.S. 153, 179-82 (1976) (murder)). This analysis assesses whether "the penalty [is in] accord with 'the dignity of man.' " *Id.* (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958) (Warren, C.J.)). The Court is "guided by [Chief Justice Warren's] statement that '[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' " *Id.* (quoting *Trop*, 356 U.S. at 101).

Constitutional decisions, according to the Rehnquist Court, are informed by "contemporary values" which are assessed based on "objective indicia that reflect the public attitude," such as state legislative decisions and the sentencing decisions of juries. *Id.* (quoting *Gregg*, 428 U.S. at 173). The Court sees its role as one of "identify[ing] the evolving standards of decency to determine, not what they should be, but what they are." Stanford v. Kentucky, 109 S. Ct. 2969, 2979 (1989) (plurality opinion) (Scalia, J.). In looking at the "objective indicators" of state laws or jury decisions, the Court determines whether there is a national consensus against the death penalty in a challenged situation. In *Stanford*, for instance, the Court decided that no national consensus existed opposing the execution of juvenile offenders, 16 years of age or more. *Id.* at 2975-76, 2977. The Court held similarly with regard to mentally retarded adults. Penry v. Lynaugh, 109 S. Ct. 2934, 2955 (1989).

presented to the legislative bodies. . . . It is the legislatures, the elected representatives of the people, that are 'constituted to respond to the will and consequently the moral values of the people.' "[66]

When the case was decided, it immediately triggered a strong response by the anti-death penalty and civil rights communities. On the day following the *McCleskey* decision, civil rights organizations held a press conference condemning the decision.[67] Shortly thereafter, in 1988, Representative John Conyers and Senator Edward Kennedy began drafting legislation now known as the Racial Justice Act.[68] The Act would create, pursuant to section five of

66. 481 U.S. at 319 (quoting Furman v. Georgia, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting)). As the *McCleskey* dissenters noted, the *Furman* dissenters' emphasis on deference to the legislature, and judicial restraint, has now become the majority view. 481 U.S. at 320-67 *passim* (Brennan, J., dissenting, joined by Marshall, J., and joined in part by Blackmun & Stevens, JJ.); *see also* Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321 (1989). It appears that the Court is returning to the pre-*Furman* era, where the arbitrary imposition of death on the basis of race is condoned. *See* Casenote, *Coming Full Circle: A Return to Arbitrary Sentencing Patterns in Capital Punishment Cases*, 56 UMKC L. REV. 387 (1988); *see also McCleskey*, 481 U.S. at 328-33 (Brennan, J., dissenting) (describing Georgia's historically dual system of justice for blacks and whites).

Reliance upon "contemporary values" today would reveal a public will, molded by sensationalist media that calls for the death penalty when an upper class white woman is beaten and gang-raped (Central Park jogger case, New York, 1989), *see* N.Y. Times, April 21, 1989, at B1, col. 2; *see also* Ellis, *Rape in the News: Mainly About Whites*, N.Y. Times, May 7, 1989, at D27, col. 1, or murdered (Stuart case, Boston, 1989) allegedly by blacks. The Stuart case was a revealing example of racist hysteria, marked by the terrorization of a black community by police after Stuart, in an effort to mask his own guilt, falsely accused a black man of having shot and killed his pregnant wife. *See* Hays, *Boston Agonizes Over Street Violence*, N.Y. Times, Oct. 28, 1989, at 8, col. 1. If Massachusetts had been a death penalty state, and if Stuart's plan had not been exposed by his suicide, Willie Barnwell may well have been executed, given the political and public pressures to push the case. Corresponding outrage on the part of the white community, or interest on the part of the media, has been notably absent when people of color are killed, raped, or otherwise victimized. *See* Goodrich, *Murder Coverage Draws Concern*, Christian Sci. Monitor, Oct. 31, 1989, at 7, col. 2; Christian Sci. Monitor, Oct. 31, 1989, at 20, col. 3 (editorial); Ellis, *supra*. In the days following the Central Park jogger attack, a young African-American woman was raped and thrown from a roof in Brooklyn, New York. *See* N.Y. Times, April 6, 1989, at 31, col. 3; N.Y. Times, April 5, 1989, at B1, col. 2. The New York Times ran only four articles concerning that rape, in the four-week aftermath of the jogger attack, compared to 56 articles which pertained to the jogger attack.

67. Conversation with Diann Rust-Tierney, Legislative Counsel, American Civil Liberties Union (Apr. 3, 1990).

68. The Racial Justice Act was originally introduced in the House of Representatives by Representative John Conyers (D., Mich.) on April 21, 1988. H.R. 4442, 100th Cong., 2d Sess., 134 CONG. REC. E1174-01 (daily ed. Apr. 21, 1988). Senator Edward M. Kennedy (D., Mass.) proposed a version of the Act as Amendment 3683 to the Omnibus Drug Initiative Act of 1988. *See* 134 CONG. REC. S15,755 (daily ed. Oct. 13, 1988). The amendment was rejected, however, by a vote of 52-35. *See* 134 CONG. REC. D1342-01 (daily ed. Oct. 13, 1988); *see also* Note, *Too Much Justice: A Legislative Response to* McCleskey v. Kemp, 24 HARV. C.R.-C.L. L. REV. 437, 461 n.104 (1989).

The Racial Justice Act has since been proposed to Congress, by Senator Kennedy and cosponsors Senators Mark Hatfield (R., Or.), Paul Simon (D., Ill.), Arlen Specter (R., Pa.), Patrick Moynihan (D., N.Y.), Howard Metzenbaum (D., Ohio) and Carl Levin (D., Mich.), as a separate bill to amend title 28 of the United States Code. S. 1696, 101st Cong., 1st Sess., 135 CONG. REC. S12,152-02 (daily ed. Sept. 28, 1989). It also comprises a section of an anti-crime

the fourteenth amendment,[69] a federal statutory right to be free from discrimination in death sentencing. Premised on analytical studies such as those presented in *McCleskey v. Kemp*,[70] the Racial Justice Act proclaims the following congressional findings:

> (1) section 5 of the fourteenth amendment of the United States Constitution calls upon Congress to enforce the Constitution's promise of equality under law;
> (2) equality under law is tested most profoundly by whether a legal system tolerates race playing a role in the determination of whether and when to administer the ultimate penalty of death;
> (3) the death penalty is being administered in a pattern that evidences a significant risk that the race of the defendant, or the race of the victim against whom the crime was committed, influences the likelihood that the defendant will be sentenced to death;
> (4) the Constitution's guarantee of equal justice for all is jeopardized when the death penalty is imposed in a pattern in which the likelihood of a death sentence is affected by the race of the perpetrator or of the victim;
> (5) the United States Supreme Court has concluded that the Federal judiciary is institutionally unable to eliminate this jeopardy to equal justice in the absence of proof that a legislature, prosecutor, judge, or jury acted with racially invidious and discriminatory motives in the case of a particular defendant;
> (6) the interest in ensuring equal justice under law may be harmed, not only by decisions motivated by explicit racial bias, but also by government rules, policies, and practices that operate to reinforce the subordinate status to which racial minorities were relegated in our society;
> (7) the institutional need of courts to identify invidiously motivated

bill sponsored by Senator Joseph R. Biden, Jr. (D., Del.), Chair of the Senate Judiciary Committee. S. 1970, 101st Cong., 1st Sess. tit. 1, § 107, 135 CONG. REC. S16,681-01 (daily ed. Nov. 21, 1989) [hereinafter Racial Justice Act].

69. U.S. CONST. amend. XIV, § 5; *see* Note, *supra* note 68, at 462 n.106, 487 nn.215-16 (analysis of congressional power to enforce the equal protection clause against the states and the Racial Justice Act as remedial legislation toward that end).

70. 481 U.S. 279 (1987); *see supra* notes 32-34 and accompanying text. Although McCleskey presented the Baldus study as evidence of discriminatory capital sentencing in the state of Georgia, numerous other states have been implicated in similar racially disparate sentencing practices. *See, e.g., Racial Discrimination and the Death Penalty: Hearings on S. 1970 Before the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. 3-6 (Oct. 2, 1989) [hereinafter *Racial Discrimination Hearings*] (testimony of the American Bar Association presented by Ronald J. Tabak, Chair, Death Penalty Comm. of the ABA Section of Individual Rights and Responsibilities) (citing, *inter alia*, Baldus, Pulaski & Woodworth, *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133, 161 n.55, 162 n.58 (1986); Gross & Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 54-55, 93-96 (1984). The most recent statistical analysis of sentencing patterns is the evaluation synthesis conducted by the U.S. General Accounting Office in February 1990. *See supra* note 27.

> perpetrators is not shared by Congress, which is empowered by section 5 of the fourteenth amendment to take system-wide, preventive measures not only to eliminate adjudicated instances of official race discrimination but also to eradicate wide-scale patterns and practices that entail an intolerable danger that persons of different races will be treated differently; and
>
> (8) the persistent racial problems pervading the implementation of the death penalty in many parts of this Nation require the government of the United States to counteract the lingering effects of racial prejudice in order to enforce the constitutional guarantee of equal justice for all Americans.[71]

Designed to curtail the Supreme Court's toleration of racism in the death penalty context, the Racial Justice Act, if passed, would represent the only remaining guarantee of the constitutional right to be free from state-sponsored racial discrimination in sentencing — a right which the Court has declined to protect.

The Racial Justice Act would make it "unlawful to impose or execute sentences of death under color of State or Federal law in a racially discriminatory pattern."[72] The Act provides that if, in challenging his death sentence, a petitioner shows a statistically significant pattern of racially discriminatory imposition of the death penalty in the sentencing state, the burden of proof would shift to the state to prove by clear and convincing evidence that the apparent disparity can be explained by pertinent nonracial factors.[73] Thus, the Racial Justice Act explicitly rejects the Court's requirement in *McCleskey* that a challenger show discriminatory intent, motive, or purpose on the part of a state actor or juror.[74] The Act would require the federal government, as well as states with death penalty statutes, to designate a central agency to collect and maintain information about capital cases in that jurisdiction. The Act would further require that records be kept regarding charging, disposition, and sentencing patterns.[75]

The proposed Racial Justice Act met with hostile reaction from conserva-

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71. Racial Justice Act, *supra* note 68, § 107(b).

72. *Id.* § 107(c). The Act defines "racially discriminatory pattern" as

> a situation in which sentences of death are imposed more frequently (A) upon persons of one race than upon persons of another race; or (B) as punishment for crimes against persons of one race than as punishment for crimes against persons of another race, and the greater frequency is not explained by pertinent nonracial circumstances.

Id.

73. "To rebut a prima facie showing of a racially discriminatory pattern, a State or Federal entity must establish by clear and convincing evidence that identifiable and pertinent nonracial factors persuasively explain the observable racial disparities comprising the pattern." *Id.*; *see also* Note, *supra* note 68, at 464 n.118 (noting that this burden-shifting process has been utilized in the jury selection context, Batson v. Kentucky, 476 U.S. 79 (1986), and in the Title VII context, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981)).

74. *See* Racial Justice Act, *supra* note 68, § 107(c).

75. *See id.*

tive death penalty advocates in Congress[76] and in the Bush Administration.[77] Senator Strom Thurmond called the Act a "killer amendment" that would "kill not only this bill but every state death penalty as well."[78] President Bush has called the Biden bill a "Trojan Horse . . . that will be tougher on law enforcement than on criminals."[79] Alixe Glen, a Bush spokesperson, was quoted as saying that the Democratic bill's exclusion of the mentally retarded and juveniles from the reach of the death penalty[80] and the Racial Justice Act provision outlawing racist patterns in death sentences is "like having no death penalty at all."[81] The Justice Department has stated that it will seek a presidential veto of the legislation containing the Racial Justice Act.[82]

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76. Senator Strom Thurmond (R., S.C.), an arch-conservative adamantly opposed to the Racial Justice Act, has introduced his own crime package, the Violent Crime Control and Criminal Procedures Reform Act of 1989. S. 1971, 101st Cong., 1st Sess., 135 CONG. REC. S16697-01 (daily ed. Nov. 21, 1989). Senator Thurmond's bill contains an expanded death penalty provision as well as harsh restrictions on federal habeas corpus. This legislation is based on Thurmond's previous proposal, the Federal Death Penalty Reestablishment Act of 1989, which received the support of the Bush Administration. S. 32, 101st Cong., 1st Sess., 135 CONG. REC. S289-01 (daily ed. Jan. 25, 1989).

77. The Bush Administration is promoting its own proposal, presented by Senator Thurmond as Title II of the Comprehensive Violent Crime Control Act of 1989, which would institute the death penalty for (1) "major drug kingpins," defined as those currently subject to mandatory term of life imprisonment as leaders of continuing criminal enterprises devoted to the large-scale importation or distribution of controlled substances; (2) "drug kingpins" who attempt to kill in order to obstruct justice; and (3) federal drug felons whose offenses result in death. S. 1225, 101st Cong., 1st Sess., 135 CONG. REC. S7249-04 (daily ed. June 22, 1989); *see* 136 CONG. REC. S9477-02 (daily ed. July 11, 1990) (Senate consideration of related drug kingpin provisions in the Omnibus Crime bill). Thus, the Bush plan does not require that a person have been convicted of killing someone in order to receive the death penalty.

78. Wash. Post, Oct. 18, 1989, at A22.

79. Rosenthal, *Taking Message on the Road, Bush Pushes Crime Bill*, N.Y. Times, Jan. 24, 1990, at A20, col. 4.

80. Senator Biden's bill would counteract the Supreme Court's decisions in Stanford v. Kentucky, 109 S. Ct. 2989 (1989) (permitting executions of persons aged 16) and Penry v. Lynaugh, 109 S. Ct. 2934 (1989) (permitting executions of mentally retarded persons). *See* S. 1970, *supra* note 68, tit. 1, § 102(a) (prohibiting imposition against persons under 18 years of age and exempting mentally retarded persons). These provisions of the bill apply, however, only to federal death penalty convictions. Racial Justice Act, *supra* note 68, tit. 1, § 102.

81. Rosenthal, *supra* note 79.

82. *See* Letter from Carol T. Crawford, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice, to Senator Joseph R. Biden, Jr., Chairman of the Senate Judiciary Committee 2 (November 14, 1989). The Justice Department argues that the Racial Justice Act would permit a quota approach to the death penalty and would "indefensibly predicate findings of racism on statistical disparities." *Id.* Instead, the Justice Department supports a requirement, contained in all pending bills, which specifically requires an instruction to the jury that the race, religion, national origin, and sex of the defendant or victim are not to be considered. Under this proposal, jurors would be required to certify after imposing the death penalty that race was not a factor in reaching their decision. *See* Racial Justice Act, *supra* note 68, § 102(a).

A proponent of the Racial Justice Act counters, however, that "[t]he purpose of the Racial Justice Act is to shift from the impractical inquiry into the minds of judges, juries and prosecutors . . . toward an objective inquiry into their actions on capital sentencing patterns." *Racial Discrimination Hearings, supra* note 70, at 19 (statement of Julius L. Chambers, Director-Counsel, NAACP Legal Defense and Educational Fund, Inc.). In response to the "quota" allegation, Mr. Chambers states that

The Supreme Court's attitude of deferring decisions to the legislature will either forge a true "national consensus" on death penalty issues, or lead to the trade-off of death penalty bill provisions by lawmakers for other legislative gains in the congressional marketplace. Racial Justice Act proponents are organizing a lobbying effort aimed at keeping the Act in the proposed Democratic anti-crime bill. This presents a dilemma for some death penalty abolitionists who find themselves forced by political realities to support a death penalty bill in order to defeat a harsher and more discriminatory one. The Racial Justice Act can be supported by proponents and opponents of the death penalty alike, for, like a civil rights bill, it is a demand for fundamental fairness and elimination of racial discrimination. Over sixty organizations representing the nation's labor, civil and human rights, religious, and legal communities have endorsed the Racial Justice Act — compelling evidence of the existence of a national consensus against racism in capital sentencing.[83]

III.
THE GOVERNMENT'S "SPECIAL PROTECTORATE?": THE DISPARATE IMPACT OF DEATH PENALTY LEGISLATION UPON NATIVE AMERICANS

Racism in the criminal justice system operates against all people of color in this country, including Latino- and Chicano-Americans, Asian-Americans, native Americans, and persons of mixed heritages who are non-white. The

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> [n]o such prospect is either contemplated or required. The Racial Justice Act should not in any way inhibit the lawful behavior of judges, prosecutors or juries at trial. . . . The bill . . . contemplates only restrospective relief; it will not require prosecutors or juries to 'pre-clear' their charging or sentencing decisions at the time of trial.

Id. at 25; *see also* Note, *supra* note 68, at 465-70.

83. The organizations supporting the Racial Justice Act include the AFL-CIO; Amalgamated Clothing and Textile Workers Union; American Baptist Churches, USA; American Bar Association; American Civil Liberties Union; American Jewish Congress; Americans for Democratic Action; Amnesty International, USA; B'nai B'rith Women; Catholic Charities, USA; Church Women United; Evangelical Lutheran Church; Friends Committee on National Legislation; International Union of Electronic, Electrical, Salaried, Machine & Furniture Workers; Japanese American Citizens League; Lawyers' Committee for Civil Rights Under Law; Leadership Conference on Civil Rights; NAACP; NAACP Legal Defense and Educational Fund; National Alliance of Postal and Federal Employees; National Association of Criminal Defense Lawyers; National Black Police Association; National Board of the YWCA of the U.S.A.; National Catholic Conference on Interracial Justice; National Coalition to Abolish the Death Penalty; National Committee Against Repressive Legislation; National Conference of Black Lawyers; National Council of Jewish Women; National Council of Senior Citizens; National Legal Aid and Defender Association; National Urban League; National Women's Political Caucus; Oil, Chemical & Atomic Workers International Union; Presbyterian Church, U.S.A.; Southern Christian Leadership Conference; Southern Poverty Law Center; Synagogue Council of America; Union of American Hebrew Congregations; Unitarian Universalist Association; United Church of Christ Commission for Racial Justice; United Food and Commerical Workers International Union; United Methodist General Board of Church and Society; Women's Legal Defense Fund; and Women's International League for Peace and Freedom. *See* AMERICAN CIVIL LIBERTIES UNION, RACIAL JUSTICE ACT: EQUAL JUSTICE UNDER LAW (Feb. 6, 1990) (available from American Civil Liberties Union, Washington, D.C. office).

statistics cited in Section I demonstrate that people of color are disproportionately overrepresented in prisons and on death row.[84] The previous sections have considered the impact of racially discriminatory capital sentencing practices on African-Americans, a product of this country's shameful legacy of slavery of African-Americans, the "Black Codes" following emancipation, and the era of segregation which formally ended just twenty-five years ago.[85]

This country has also inherited the tragic legacy of the genocide committed against its original inhabitants, native Americans. Centuries of racism, greed, and wanton violence have reduced the numbers of native Americans from several million to 1,479,000, or 0.65% of America's present population.[86] The residual effects of centuries of discrimination have been devastating. Today, many thousands of native Americans live on federal reservations, where they suffer from exorbitant levels of alcoholism and violence, a 70% unemployment rate, and a very high incidence of poverty.[87]

The federal death penalty legislation pending in Congress would have an especially invidious impact on native Americans.[88] The proposed bills, comprising the "Federal Death Penalty Act of 1989," would punish with death those found guilty of, among other crimes, first degree murder occurring on federal land.[89] Native Americans living on federal reservations would be subject disproportionately to the federal criminal code and its proposed modifications.[90] This would result in the execution of native Americans for crimes

84. *See supra* notes 17-21 and accompanying text.

85. *See* McCleskey v. Kemp, 481 U.S. 279, 328-33 (1987) (Brennan, J., dissenting). Justice Brennan wisely noted that the Court's efforts to eradicate racial prejudice from our criminal justice system "signify not the elimination of the problem but its persistence. Our cases reflect a realization of the myriad of opportunities for racial considerations to influence criminal proceedings." *Id.* at 333 (citations omitted).

86. *See Federal Death Penalty: Scope, Procedure and Impact on Native Americans: Hearings on S. 32 Before the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. 1-2 (Sept. 27, 1989) [hereinafter *Native American Hearings*] (testimony of the Federal Defenders presented by Tova Indritz, Federal Public Defender, District of New Mexico) (citing U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1989 at 39 (109th ed.)).

87. *See id.* at 10.

88. Native Americans constitute 1.83% of the persons on death row. DEATH ROW, U.S.A., *supra* note 5, at 1. They therefore receive the death penalty in numbers more than three times their representation in the general population. *See supra* text accompanying note 86. The disproportionate representation of native Americans on states' death rows is actually five or six times their representation in the population, since they are ordinarily not subject to state, but federal jurisdiction, because of residence on reservations. *Native American Hearings, supra* note 86.

89. *See* proposed amendments to 18 U.S.C. in Racial Justice Act, *supra* note 68, § 102(a); S. 1971, *supra* note 76, § 102(a); S. 1225, *supra* note 77, § 2(a). In addition to first degree murder, the proposed federal legislation permits a death sentence for crimes such as attempted assassination of the President, espionage, treason, and other crimes occurring on federal lands. In the statistical year 1988 (July 1, 1987 to June 30, 1988) there were no prosecutions in the entire federal court system for espionage, treason, actual or attempted assassination of the President, killing a foreign official, or bank robbery resulting in death. *See Native American Hearings, supra* note 86, at 2 (testimony of the Federal Defenders).

90. *See infra* note 94.

which, under certain states' laws, would not be punishable by the death penalty.

Incarceration and general concepts of punishment are unknown to the customs and traditions of most native American tribes.[91] The death penalty itself is wholly alien to native American culture. Traditional native American sentencing philosophy relies on the "concept of rehabilitation or bringing a wrongdoer into harmony."[92] The offender's community decides whether or not to take him back, and then agrees to work with him, while he remains on a probationary status with the native American courts. Although native American tribes have the power to enforce their criminal laws against tribal members,[93] these courts have only misdemeanor sentencing power.[94] Chief Justice Tso of the Navajo Nation Judicial Branch argues that were their own courts to have felony sentencing power, appropriate sanctions would be employed to address offenses. Instead, the native American courts are precluded from fully exercising their power as a sovereign government in protecting their own people and their government. The proposed death penalty provision would expand the reach of federal power where it is of questionable value to do so. Maintaining "law and order" on reservations is not solely a federal concern as native Americans "have a significant interest in maintaining orderly relations among their members and in preserving tribal customs and traditions."[95]

Nor does the nature of the crime justify federal jurisdiction. Murders committed by native Americans, unlike killings of foreign or federal officials, or crimes of espionage and treason, do not invoke any special federal interest. There is no apparent reason for treating native American murder cases any differently than homicide cases prosecuted under state law, which, depending on the state, may or may not be capital cases.

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91. *See Native American Hearings, supra* note 86, at 3 (testimony of Hon. Tom Tso, Chief Justice, Navajo Nation Judicial Branch).

92. *Id.* at 4.

93. United States v. Wheeler, 435 U.S. 313, 322 (1978).

94. 18 U.S.C. § 1152 (1988). This Section provides that, except for offenses enumerated in the Indian Major Crimes Act, 18 U.S.C. § 1153 (1988), all crimes committed by native Americans against other native Americans within native American country are subject to the jurisdiction of tribal courts. The prosecution of felonies, listed in section 1153, is within the jurisdiction of the federal courts. The Supreme Court has described section 1153 as constituting a "limited intrusion of federal power into the otherwise exclusive jurisdiction of the Indian tribes." United States v. Antelope, 430 U.S. 641, 643 n.1 (1977) (citing Keeble v. United States, 412 U.S. 205, 209-12 (1973)). This "limited intrusion" has major implications, however, particularly in light of the pending federal legislation. The Federal Death Penalty Act, by providing standards to guide juror discretion in the decision to impose the death penalty, would legalize the death penalty provision of the Indian Major Crimes Act, now unconstitutional pursuant to Furman v. Georgia, 408 U.S. 238 (1972). *See supra* text accompanying notes 5-15. Were the bill adopted as legislation, a native American facing a first degree murder charge, for example, would not only be subject to federal, as opposed to tribal, jurisdiction, but he could ultimately be sentenced to death by a federal judge.

95. *See Native American Hearings, supra* note 86, at 4 (testimony of the Turtle Mountain Chippewa Tribe presented by Faith Roessel, Staff Attorney, Native American Rights Fund) (quoting United States v. Wheeler, 435 U.S. 313, 331 (1978)).

It has been said that the proposed death penalty legislation should be called "The Federal Indian Death Penalty Act."[96] Relevant statistics show that the suggestion is an apt one. In 1988, 64 defendants were prosecuted for first degree murder under federal law. Of those 64, the cases of 40, or 62%, arose on native American reservations.[97] Only one of these defendants was a non-native American (charged with the murder of a native American on a reservation); the rest were native Americans. Between November 1987 and February 1989, 77.8% of all persons sentenced for homicide in the federal courts were native Americans and Alaskan natives.[98] Because of federal jurisdiction over native Americans in many states,[99] the proposed act would have a blatantly discriminatory effect on them: a native American convicted of first degree murder in a non-penalty state[100] could be executed, whereas a non-native American, convicted of the same crime in the same state, could not.

The Supreme Court held in *United States v. Antelope*[101] that a federal court's imposition of a longer sentence on a native American defendant than would be the case in a state court prosecution of a non-native American is not a denial of equal protection. This holding has been interpreted as a declaration that disparate and disadvantageous treatment of a native American is constitutional so long as the different treatment is rational and tied to the federal government's "unique" obligation to native American tribes.[102] Although native Americans may not be able to rely on the Rehnquist Supreme Court to vindicate their right to equal protection in the death penalty context, they may hope that Congress will reconsider the devastating disparate impact posed by the pending legislation. This is a faint hope, however, thus making strong lobbying necessary to defeat this provision of the bills.[103]

In lieu of the Racial Justice Act, conservatives have supported proposals

96. *Native American Hearings, supra* note 86, at 5 (testimony of the Federal Defenders).

97. *Id.* at 4 (citing U.S. SENTENCING COMM'N, ANNUAL REPORT (1988)).

98. *Id.* at 5 (citing U.S. SENTENCING COMM'N, ANNUAL REPORT (1988)).

99. Pursuant to 25 U.S.C. § 1321 (1988), certain states assume state jurisdiction over native Americans. In certain other states, such as Minnesota and Wisconsin, there is federal jurisdiction over some reservations but not others. *See Native American Hearings, supra* note 86, at 7 (testimony of the Federal Defenders).

100. Even in states with a death penalty of limited scope, differential treatment of native Americans would still result. New Mexico's statute, for example, limits its death penalty to certain types of homicides: killing an active duty police officer or prison guard; murder in the course of kidnapping, criminal sexual contact of a minor, or criminal sexual penetration; escape; murder for hire; murder of a witness. N.M. STAT. ANN. § 31-20, A-5 (1981). Thus, native Americans would be subject to a federal death penalty, for example, for murder in the course of burglary, arson, or robbery, but other non-native Americans living off reservations would not. *See Native American Hearings, supra* note 86, at 12.

101. 430 U.S. 641 (1973).

102. *See Native American Hearings, supra* note 86, at 14 (testimony of the Federal Defenders).

103. In September 1989, hearings were held before the Senate Judiciary Committee at which several representatives of the native American community testified concerning the disparate impact of the proposed legislation. *Native American Hearings, supra* note 86. Despite the evidence adduced at these hearings, the provisions for application of the death penalty to native Americans were retained.

which would ostensibly provide insurance against racism in jury death sentencing by mandating that courts instruct juries not to consider the race, color, religious beliefs, national origin, or sex of the defendant or victim.[104] These provisions also would provide that a jury, upon returning a sentence of death, submit a certificate signed by each juror that "consideration of the race . . . of the defendant or any victim was not involved in reaching" each juror's individual decision.[105] In cases against native Americans prosecuted in federal court, one of the elements which must be proven beyond a reasonable doubt in order for the federal court to have jurisdiction over a case in the first instance, is that the defendant be a native American charged with a crime on native American land.[106] The bill's "assurance" that the jury did not consider race is rendered totally meaningless if that same jury must, at the outset, find the defendant's race to be a fact. In any event, it is ludicrous to expect that anyone, when asked, would openly acknowledge her consideration of race as a factor. Despite evidence of these obvious flaws, death penalty proponents have stubbornly supported the provision, and it appears in all relevant pending bills.

The injustice of the proposed federal death penalty legislation is not cured by the Racial Justice Act. Although the Racial Justice Act may address some of the discrimination experienced by native Americans at the state level,[107] it will not protect them from the danger posed by the Indian Major Crimes Act, the *Antelope* decision, and the revival of the death penalty.

IV.
SPEEDING UP EXECUTIONS: JUDICIAL AND CONGRESSIONAL LIMITS ON ACCESS TO THE COURTS FOR DEATH ROW PRISONERS

The partnership of the Court and conservative elements of Congress in speeding up the implementation of the "people's will" is most evident in the various measures proposed to limit access to the courts. The Court has denied the right to post-conviction counsel for death row prisoners,[108] has sharply limited the scope of collateral review,[109] and has severely heightened procedural requirements for bringing post-conviction actions.[110] Conservatives and congresspersons anxious to push their "anti-crime" legislation have pursued the codification of restrictions on the review of convictions and sentences for death row prisoners.

The most commonly relied upon collateral remedy for prisoners con-

104. *See* S. 1225, *supra* note 77, § 2(a) (Bush Administration's bill); S. 1971, *supra* note 77, § 102(a) (Sen. Thurmond's bill); S. 1970, *supra* note 68, § 102(a) (Sen. Biden's bill).

105. *See* provisions cited *supra* note 104.

106. 18 U.S.C. § 1153 (1988).

107. *See supra* note 82.

108. Murray v. Giarratano, 109 S. Ct. 2765 (1989); *see infra* note 118.

109. *See infra* notes 119-21 and accompanying text.

110. *See infra* note 122 and accompanying text.

victed in state courts, including those sentenced to death, is that of habeas corpus, or "federal habeas," embodied in 28 U.S.C. sections 2241-2254. The habeas remedy for persons held in federal prisons is 28 U.S.C. section 2255. A habeas petition is the prisoner's method for requesting reversal of his conviction or sentence on the grounds that it was obtained in violation of the Constitution or federal law. Most states provide collateral review following denial of a convicted person's direct appeal. Where this is the case, review in the state courts must be completed before a prisoner begins the collateral review process in federal court. All three avenues, direct appeal, state collateral review, and federal habeas, can lead to ultimate review in the United States Supreme Court.[111]

The Court, and some members of Congress, exalt the need to retain an efficient capital punishment scheme, marked by unbridled discretion which results in racially discriminatory sentencing, over the fundamental importance of establishing a racially unbiased system of death sentencing. In the area of post-conviction review of death sentences, these same forces are willing to tolerate the execution of persons whose constitutional rights may have been violated, and who may in fact be innocent, in exchange for swift and sure executions. The asserted values underlying this stance, finality of the process, deterrence,[112] and public respect for the criminal justice system,[113] seem empty and cold when weighed against the value of human life and the fundamental right not to be deprived of one's life without due process of law.

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111. *See generally* O. WILKES, FEDERAL AND STATE POSTCONVICTION REMEDIES AND RELIEF (1983); L. YACKLE, POSTCONVICTION REMEDIES (1981).

112. Former Justice Powell and other proponents of reduced access to habeas corpus review of convictions argue that the goal of deterrence is undermined by the lack of finality of sentences and the opportunity for repetitive review by state and federal courts. "[T]he deterrent force of penal laws is diminished to the extent that persons contemplating criminal activity believe there is a possibility that they will escape punishment through repetitive collateral attacks." Powell, *Capital Punishment*, 102 HARV. L. REV. 1035, 1041 (1989) (quoting his own plurality opinion in Kuhlmann v. Wilson, 477 U.S. 436, 452-53 (1986)). It is disingenuous for former Justice Powell and his allies to promote this notion to the public. The convicted person on death row hardly "escapes punishment" during the post-conviction review process. Nor is it plausible that the thought process preceding most homicides, many of which occur in the course of another felony (robbery, burglary, *etc.*), rather than as a result of premeditation, includes consideration of appellate remedies.

The fact is that the number of homicides is not diminished by the existence of the death penalty. *See, e.g.*, NEW YORK LAWYERS AGAINST THE DEATH PENALTY, MEMORANDUM IN OPPOSITION TO S.600/A.1070, at 59-61 (March 18, 1989) [hereinafter MEMORANDUM] (discussing problems with the contemporary use of the death penalty, and showing, in that context, why the New York legislature should not pass its proposed death penalty statute). Claims of the penalty's deterrent effect are thus unfounded. Even former Justice Powell now acknowledges that the death penalty is not a deterrent to homicide and that the system is unworkable. *See infra* text accompanying note 157.

113. The Supreme Court and Congress have determined, based upon public opinion polls, that the "public will" supports the existence of a death penalty. *See* Powell, *supra* note 112, at 1037 n.20. Public opinion polls have also revealed, however, that when presented with the alternative of life imprisonment without parole, those previously favoring the death penalty change their views. NATIONAL COALITION TO ABOLISH THE DEATH PENALTY, PUBLIC OPINION AND THE DEATH PENALTY: WHAT THE POLLS REALLY SAY 7-9 (1990).

The habeas corpus review process for state prisoners on death row has enormous significance. From 1976 to 1983, between 50% and 75% of federal habeas corpus petitions filed by state prisoners facing death have resulted in reversals of convictions and/or sentences.[114] As Professor Richard Wilson notes, these reversals were not based on "mere technicalities,"[115] as a misinformed public frequently labels constitutional violations. Rather, the convictions were overturned due to the flagrant errors of "inexperienced or incompetent counsel, use of improper tactics by prosecutors and police, or the failure of state courts to decide valid federal constitutional questions properly."[116]

The dramatic rise in state and federal prison populations coupled with the varying dimensions of constitutional error in death penalty cases have contributed to an increase over the years in the number of habeas petitions filed.[117] The increased number of petitions filed and reversals won in the federal courts should alert Congress and the Court to the importance of providing adequate legal counsel for death row prisoners at both the trial and post-conviction levels. Instead, the Court has responded by reinforcing its callous view that there is no right to counsel beyond direct appeal.[118]

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114. Wilson & Spangenberg, *State Post-Conviction Representation of Defendants Sentenced to Death*, 72 JUDICATURE 331, 332 (1989). In non-capital cases, by contrast, less than 10% of these petitions were successful. *See also* Murray v. Giarratano, 109 S. Ct. 2765, 2778 (1989) (Stevens, J., dissenting).

115. *See* Wilson & Spangenberg, *supra* note 114, at 332.

116. *Id.* One state appellate judge has said:

> Those new statutes afforded capital defendants procedural and substantive protections well beyond those required for non-capital felons and their proper application proved extremely difficult and complicated, resulting in a high incidence of appellate reversals for trial error — not because of some mere technicality — but because the Constitution of the United States, or the provisions of the death penalty statutes themselves, were violated in a way that mandated that new trials or resentencing hearings will be held.

See id. at 333 (quoting Chief Justice Robert C. Murphy, Maryland Court of Appeals, State of the Judiciary Message delivered to a Joint Session of the General Assembly of Maryland at 12-13 (Jan. 28, 1987)); *see also* Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U.L. REV. 513, 522-30 (1988) (describing egregious injustices exposed in federal post-conviction challenges).

117. As of June 1988, 934 of the more than 2100 prisoners on death row had completed the first mandatory appellate review of their convictions, leaving more than half of all death row prisoners awaiting the outcome of the first stage of review. Approximately 450 of the first group were involved in the lengthy and complex collateral review process. Each year, these numbers are increased by about 250 as more individuals are sent to death row. Wilson & Spangenberg, *supra* note 114, at 332.

118. *See* Murray v. Giarratano, 109 S. Ct. 2765 (1989) (holding that a collateral review procedure for capital convictions which does not provide state-funded counsel to condemned prisoners does not violate their constitutional right to access to the courts). *Murray* is the most recent in a line of decisions restricting a defendant's right to counsel. In 1974, the Court held in Ross v. Moffitt, 417 U.S. 600, that a defendant's constitutional right to counsel at trial and during an appeal does not extend to discretionary appeals. A minimal level of "meaningful access" to the courts was deemed a fundamental right in Bounds v. Smith, 430 U.S. 817 (1977), which required provision of law libraries or "alternative sources of legal knowledge" to prisoners. *Id.* However, in Pennsylvania v. Finley, 481 U.S. 551 (1987), the Court held neither the

The Court has compounded the difficulties of prisoners seeking to challenge their convictions on due process grounds by creating new, restrictive doctines and other procedural barriers to further limit the scope of habeas review. Examples of such restrictions include the doctrines of exhaustion,[119] retroactivity,[120] and cognizable issues.[121] Other procedural bars include rules

due process clause nor the "meaningful access" guarantee of *Bounds* requires a state to appoint counsel for indigent prisoners seeking state post-conviction relief.

Chief Justice Rehnquist's opinion in *Murray* extended the *Finley* holding to death row prisoners. 109 S. Ct. at 2770. He rejected the argument that a different rule should apply in death cases, an argument based on the limited amount of time death row inmates have to prepare and present their petitions to the courts, the complexity and difficulty of the legal work, and the emotional instability of inmates preparing themselves for impending death. *Id.* at 2771. Rehnquist emphasized that state collateral proceedings serve a limited function and that the greater reliability required in death cases can be best assured at the trial stage. Justice Kennedy, in his concurrence, conceded that death row prisoners are unlikely to win collateral attacks without legal assistance due to the complexity of capital jurisprudence. Nonetheless, he asserted that meaningful access may be protected by various means short of the provision of counsel and that substantial deference must be given to solutions offered by state legislatures and prison officials. *Id.* at 2772-73. The dissenters argued that fundamental fairness and due process required the provision of counsel for prisoners facing execution. *Id.* at 2775 (Stevens, J., dissenting, joined by Brennan, Marshall & Blackmun, JJ.). For an extensive, persuasive discussion of the vital need for counsel at the post-conviction stage, see Mello, *supra* note 116.

119. The "exhaustion doctrine" requires that the prisoner first present the substance of his federal claim to the state court out of respect for the ability and judgment of state courts. The exhaustion doctrine is codified at 28 U.S.C. § 2254(b) (1988), which provides that a habeas petition "shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." 28 U.S.C. § 2254(b) (1988); *see* Rose v. Lundy, 455 U.S. 509 (1982) (requiring dismissal of mixed habeas petitions containing both exhausted and unexhausted claims). Some consider this doctrine to be " 'one of the most difficult procedural obstacles for state prisoners to overcome.' " Mello, *supra* note 116, at 534 (quoting Allen, Schachtman & Wilson, *Federal Habeas Corpus and its Reform: An Empirical Analysis*, 13 RUTGERS L.J. 675, 690 (1982)).

120. The retroactivity doctrine, based on an alleged concern for "fairness," forecloses persons whose petitions are pending, but whose convictions are final (usually the situation faced by habeas petitioners) from the benefit of new constitutional decisions. *See* Saffle v. Parks, 110 S. Ct. 1257 (1990); Butler v. McKellar, 110 S. Ct. 1212 (1990). Both cases relied on the Court's decision in Teague v. Lane, 109 S. Ct. 1060 (1989), to further define and restrict the retroactivity doctrine. *Teague* held that no new constitutional rules of criminal procedure would be announced in cases arising on habeas, except rules immunizing "primary, private conduct" or involving due process concerns regarding the fundamental fairness of trials. *Id.* at 1063-64. *Butler* refined *Teague* in the context of a fifth amendment claim on habeas by expanding the definition of a "new rule" to include one whose result was not dictated by a precedent existing at the time the defendant's conviction became final. Under the *Butler* analysis, the fact that a majority of the Court may say that a case is directly "controlled" by prior precedent does not exclude the possibility that the case nevertheless presents a new rule under *Teague*. As long as the case is "susceptible to debate among reasonable minds," it would not be deemed "illogical" to decide that a prior case was not controlling. *Butler*, 110 S. Ct. at 1217. Justice Brennan, in a dissent joined by Justices Marshall, Blackmun, and Stevens, declared that "[u]nder the guise of fine-tuning the definition of 'new rule,' the Court strips state prisoners of virtually any meaningful federal review of the constitutionality of their incarceration. . . . With this requirement, the Court has finally succeeded in its thinly veiled crusade to eviscerate Congress' habeas corpus regime." *Id.* at 1219.

121. *See, e.g.*, Duckworth v. Eagan, 109 S. Ct. 2875 (1989) (conviction for attempted murder reinstated, reversing the Seventh Circuit's holding based on a finding of a *Miranda* viola-

curtailing successive petitions and others mandating procedural default.[122]

In the view of the Court and other proponents of federal habeas restrictions, the principal goal of habeas corpus is to review claims of factual innocence exclusively.[123] Review of any other issues is considered an abuse of the process. This judicial philosophy diminishes the significance of constitutional rights in favor of a mechanical approach bent on simply punishing those found guilty, regardless of constitutional errors that occur in the process. Advocates of this approach utterly disregard the constitutional guarantees supposedly embodied in our legal process, guarantees aimed at ensuring rather than undermining the reliability of convictions and sentences.[124]

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tion). Justice O'Connor, writing a concurrence joined by Justice Scalia, would have refused consideration of the *Miranda* issue on the authority of Stone v. Powell, 428 U.S. 465 (1976), since probative and conclusive evidence of guilt would be otherwise withheld. *Duckworth*, 109 S. Ct. at 2883. O'Connor emphasized the "costs" of federal habeas review, including "disturb[ing] the State's significant interest in repose for concluded litigation, den[ying] society the right to punish some admitted offenders, and intrud[ing] on state sovereignty." *Id.* at 2883 (quoting Justice Kennedy's dissent in Harris v. Reed, 109 S. Ct. 1038, 1053 (1989)). Justice Marshall noted in dissent that Justice O'Connor's comments regarding the bar to habeas review of *Miranda* claims were "uninvited." *Id.* at 2886.

122. The rules against successive petitions or "abuse of the writ," some of which are contained in Federal Rules Governing Habeas Corpus Cases, FED. R. APP. P. 9(b), 28 U.S.C. § 2254 (1988), are accompanied by subsidiary rules concerning, for example, whether failure to raise a claim earlier is attributable to "inexcusable neglect" or "deliberate bypass." *See* Wainwright v. Sykes, 433 U.S. 72, 77 (1977); Sanders v. United States, 373 U.S. 1, 18 (1963). *Wainwright* contains the strict "cause and prejudice" standard requiring a bar to habeas relief unless a petitioner can show "cause" for his failure to follow a state procedure and "actual prejudice" resulting from that failure. 433 U.S. at 84-85. The Supreme Court, in Dugger v. Adams, 109 S. Ct. 1211 (1989), upheld a death sentence and reversed the Eleventh Circuit's finding of "cause." In dissent, Justices Blackmun, Brennan, Marshall and Stevens castigated the Court for "arbitrarily impos[ing] procedural obstacles to thwart the vindication of what apparently is a meritorious Eighth Amendment claim," and "capriciously cast[ing] aside precedent to reinstate an unconstitutionally 'unreliable' death sentence purely for procedural reasons." *Id.* at 1218 (footnote omitted).

The "cause and prejudice" standard is also known as the "procedural default" doctrine and has been noted as one of the most confusing and complex doctrines in habeas law. For a discussion of the impact of this procedural bar and the "abuse of the writ doctrine" in the death penalty context, see Mello, *supra* note 116.

123. Powell, *supra* note 112, at 1043; *see also* Kuhlmann v. Wilson, 477 U.S. 436, 444-54 (1986) (plurality opinion of Powell, J., joined by Rehnquist & O'Connor, JJ., and Burger, C.J.); Schneckloth v. Bustamonte, 412 U.S. 218, 250-75 (1973) (Powell, J., concurring, joined by Burger, C.J., and Rehnquist, J.). Reagan's appointees to the Court appear to advocate a similar approach. *See* Sawyer v. Smith, 110 S. Ct. 2822 (1990) (Kennedy J., joined by Rehnquist, C.J., and White, O'Connor, & Scalia, JJ.); Saffle v. Parks, 110 S. Ct. 1257 (1990) (same); Teague v. Lane, 109 S. Ct. (1989) (O'Connor, J., joined by Rehnquist, C.J., and White, O'Connor, & Scalia, JJ.). For further discussion of the factual innocence standard for habeas review, see Ledewitz, Habeas Corpus as a Saftey Valve for Innocence, 18 N.Y.U. REV. L. & SOCIAL CHANGE (forthcoming publication).

124. *See, e.g.*, *Duckworth*, 109 S. Ct. at 2892 (Marshall, J., dissenting) (emphasizing that *Miranda* claims call directly into question the integrity of the fact-finding process). Lamenting the "evisceration" of federal habeas corpus, Justice Marshall stated that Justice O'Connor's opinion:

> evinces such a palpable distaste for collateral review of state court judgments that it can only be viewed as a harbinger of future assaults on federal habeas corpus. . . . [Her] logic sweeps within its broad compass claims far beyond those based on Mi-

The unholy alliance between the conservatives on the Court and the conservatives in Congress has resulted in a corresponding flurry of congressional activity to restrict the availability of the habeas remedy to death row prisoners. Ronald Reagan invited the initial wave of congressional attacks on habeas in 1987 when he urged Congress to support a bill that would have drastically curtailed the habeas remedy.[125] President Reagan's failed efforts to do away with the habeas remedy have been resurrected in the 101st Congress. The anti-crime proposals of Senator Strom Thurmond,[126] Senator Joseph Biden,[127] and the Bush Administration as part of its "National Drug Control Strategy,"[128] all contain measures designed to gut habeas and speed up executions allegedly in order to promote finality,[129] efficiency, and the harmonizing of federal-state relations. It could just as easily be inferred from the targeting of capital habeas petitioners, however, that Congress' true intention is to thwart the proven success of habeas petitions in the lower federal courts.[130]

At the core of all of these proposals is the "Powell Committee Report," commissioned by Chief Justice Rehnquist in his capacity as chair of the Judicial Conference of the United States, the federal court system's policy-making body. The mission of the Powell Committee was to study alleged delay and inefficiency in the habeas review process in capital cases and to submit a report of its findings to the members of the Judicial Conference for a vote.[131] Chief

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randa. Once the specter is raised that federal habeas review may lead to the release of guilty criminals, it is difficult to imagine any nonguilt-related claim that would be worthy of collateral protection. What Justice O'Connor ignores is that Congress believed that defendants have rights, often unrelated to guilt or innocence, that are worthy of collateral protection despite the apparent costs to society.

Id. at 2892.

125. In a letter to Congress, Reagan stated in part: "As a result of judicial expansions of the habeas corpus remedy, state prisoners are now free to relitigate their convictions and sentences endlessly in the lower federal courts. The bill would curb the abuses of habeas corpus by imposing reasonable limits on its scope and availability." *See* President's Message to Congress Transmitting the Criminal Justice Act of 1987, H.R. Doc. No. 117, 100th Cong., 1st Sess. (1987), *quoted in* Remington, *Post-Conviction Review — What State Trial Courts Can Do to Reduce Problems*, 72 JUDICATURE 53-54 (1988). At that time, Reagan's bill proposed preclusion to all state habeas petitioners where a claim has been "fully and fairly litigated." A one-year statute of limitations for filing petitions was also proposed. *Id.*

126. S. 1971, *supra* note 76 and *infra* text accompanying notes 141-45.

127. Racial Justice Act, *supra* note 68, tit. 2 (Senator Biden's Habeas Corpus Act of 1989 proposes amendments to 28 U.S.C.); *see also infra* text accompanying notes 151-54.

128. S. 1225, *supra* note 77.

129. *See* Powell, *supra* note 112, at 1043 n.50 ("No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved." (quoting Mackey v. United States, 401 U.S. 667, 691 (1971) (concurring opinion of Harlan, J.)). Finality has a deafening sound to the ears of a person facing death and former Justice Powell's reliance on a systemic justification for ending further legal challenges ring hollow when death, rather than continued incarceration, is the ultimate result.

130. *See supra* notes 114-16 and accompanying text.

131. *See* Judicial Conference of the United States, *Report of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases*, 45 Crim. L. Rep. (BNA) 3239 (Sept. 27, 1989) [hereinafter *Powell Committee Report*]. The Committee was chaired by former Justice Lewis F. Pow-

Justice Rehnquist, an ardent opponent of capital habeas review, single-handedly attempted to bypass the Conference's vote by manipulating a dubious procedural mechanism available to him. Under a provision of the Anti-Drug Abuse Act of 1988, the Chief Justice can expedite congressional consideration of habeas proposals from the Powell Committee by forwarding the report to the Senate.[132] The report was submitted to the members of the Conference in early September 1989, but the judges voted to defer consideration of the proposal until their next meeting, held in March 1990.[133] In spite of this vote, and without notifying the Judicial Conference, Chief Justice Rehnquist forwarded the Powell Committee Report directly to the Senate Judiciary Committee, which triggered the expedited timetable for review of the proposal.[134]

Fourteen of the twenty-seven members of the Judicial Conference responded to Rehnquist's surreptitious action with letters to the Secretary of the Conference urging that a request be made of Congress to defer action until the Conference's next meeting in March.[135] Some judges apparently interpreted the Chief Justice's action as an attempt to make an "end-run" around them, following their vote (17-7) to defer consideration.[136] The judges were concerned that their views would not be properly considered by Congress if the Powell Report were rushed through the legislative process. Due to delays occasioned by other legislative matters, and possibly due to Senator Biden's sensitivity to the complaints voiced by the members of the Judicial Conference, the congressional vote on the pending habeas legislation was deferred until April 1990.

At the March meeting of the Judicial Conference, the judges voted to reject the Chief Justice's attempts to force the measures contained in the Powell Committee Report onto the federal judiciary and Congress. Specifically, they voted to modify the Powell Committee Report to include measures contained in Senator Biden's bill which would ensure standards for the appointment of counsel to habeas petitioners and which would extend the statute of limitations for the filing of federal habeas petitions from six months, as proposed by the Powell Committee,[137] to a period of one year. The Conference supported standards for trial, appellate, and post-conviction counsel similar to

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ell, and consisted of Chief Judge Charles Clark of the Court of Appeals for the Fifth Circuit, Chief Judge Paul Roney of the Court of Appeals for the Eleventh Circuit, Chief Judge William Terrell Hodges of the District Court for the Middle District of Florida, and Acting Chief Judge Barefoot Sanders of the District Court for the Northern District of Texas. None of these judges is a member of the United States Judicial Conference and all of them are from "death belt" states. *See* Greenhouse, *Judges Challenge Rehnquist Action on Death Penalty*, N.Y. Times, Oct. 6, 1989, at A-1.

132. Anti-Drug Abuse Act of 1988, § 7323, Pub. L. No. 100-690, 102 Stat. 4467-68.

133. *See* Wash. Post, Oct. 9, 1989, at A19; N.Y. Times, Oct. 6, 1989, at A1; Nat'l L.J., Oct. 16, 1989, at 12.

134. *See* Wash. Post, *supra* note 133.

135. *Id.*

136. *Id.*

137. *See infra* text accompanying notes 141-43.

those recommended by the ABA House of Delegates. In addition, the Judicial Conference recommended more liberal provisions regarding the filing of successive petitions.[138]

If conservative habeas measures, as contained in the Powell Committee Report, are truly reflective of the "public will" or "national consensus," we ought to ask why the Chief Justice attempted to push them through Congress in a manner seemingly designed to evade truly public debate. Moreover, if the bench has genuine concerns about habeas, why exclude input in the debate from the federal judiciary? The answer lies in the fear of exposing the reality of habeas review: it reveals that death sentences are frequently obtained in violation of constitutional rights. The Chief Justice and his conservative allies ignore the fact that factual innocence is often revealed through reversals on constitutional issues. Instead, they willingly sacrifice their judicial integrity to pursue the more politically popular goal of instilling respect for the criminal justice system by executing, without delay, those who "deserve" it.

A myriad of variations exist among the current habeas proposals. Although Senator Biden's proposal goes the farthest towards giving habeas real meaning,[139] due to its liberalization of the statute of limitations and its enunciation of minimum standards for the provision of counsel, it too must be critically examined for flaws. The primary components of each bill deal with: (1) provision for, and compensation of, counsel as well as restrictions on access to counsel; (2) stays of execution and successive petitions; (3) statute of limitations for filing habeas claims; (4) procedural default and exhaustion of state remedies; and (5) retroactivity. There is no reference in the Powell Committee Report to reforms in the latter two areas, leaving the disastrous legal developments of the Supreme Court to govern.[140] Essentially, all proposals would reduce the current multi-tiered review process to one complete round of appeals, considering all claims raised in a single petition.

In an apparent effort to address the fact that counsel is not constitutionally required for habeas review,[141] the Powell Committee Report and the Thurmond bill link their proposals for changes in the statute of limitations and one round of reviews with a condition that states provide counsel for death row prisoners at the state post-conviction review level. Specifically, the Powell Committee proposed that a state concerned with delay in executions may impose a six-month statute of limitations period for filing a post-conviction petition if the state provides counsel on state habeas review.[142] Under current habeas rules, there is no statute of limitations for filing petitions. The six-month time period proposed by the Powell Committee (which can be extended by 60 days for good cause),[143] therefore represents a significant cut-

138. *See* N.Y. Times, Mar. 15, 1990, at A16.
139. *See infra* text accompanying notes 151-53.
140. *See supra* notes 119-20.
141. *See* Murray v. Giarratano, 109 S. Ct. 2765 (1989).
142. *See Powell Committee Report, supra* note 131, at 3240-41.
143. *Id.* at 3244.

back which will not only increase pressures on death row prisoners, but will place an enormous strain on state defender agencies which are already overburdened.[144] The six-month time limit, or any time limit for that matter, is arguably unconsitutional, as violative of the suspension clause of article I of the United States Constitution.[145]

The Powell Report exacerbates these burdens by its failure to provide minimum standards for competency of counsel. Indeed, all of the bills, including that sponsored by Senator Biden, are flawed in this respect. Both the American Bar Association and the National Legal Aid and Defender Association have developed exacting standards for the competency of legal representation in capital cases.[146] None of the bills, however, adopts these standards, which require a certain number of years of experience handling trials or appeals which involve issues as complex as those involved in death penalty trials and appeals. While Senator Biden's bill provides for counsel at the trial and post-conviction level, it incorporates the less stringent standards of the Anti-Drug Abuse Act of 1988, which require only a certain number of years of experience as a felony trial or appellate attorney.[147]

As a result, the provision of counsel under each bill could prove to be a meaningless guarantee. All the bills deny prisoners a federal challenge to the adequacy of their state habeas representation. The Powell Committee's rationale is that, since there is no constitutional right to counsel on post-conviction review, there is no concomitant constitutional right to effective assistance of counsel at that stage.[148] Such an approach would aggravate the already devastating problem of incompetency of representation.[149] The Powell Committee proposal would also limit the scope of federal habeas review on a second or subsequent petition to claims of factual innocence not previously presented due to state action or facts not available at trial or on state appeal. The scope of initial review would be limited to issues raised in the state courts.[150]

144. *See* Wilson & Spangenberg, *supra* note 114, at 333-37 (reviewing current state practices in the provision of counsel in death cases, including compensation, time requirements and other burdens); *see also* MEMORANDUM, *supra* note 112, at 12-20, 32-33.

145. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."); *see* Mello & Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. REV. L. & SOC. CHANGE (forthcoming publication).

146. *See* AMERICAN BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1989); NATIONAL LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1988) (The NLADA standards were adopted by the ABA as guidelines).

147. *See* 21 U.S.C. § 848(q) (1988); Racial Justice Act, *supra* note 68, § 202.

148. *See Powell Committee Report*, *supra* note 132, at 3242; *see also* Strickland v. Washington, 466 U.S. 668 (1984) (standard for effectiveness of counsel defined as that of reasonably effective assistance).

149. *See* N.Y. Times, Oct. 3, 1989, at A22; *see also supra* note 116.

150. *Powell Committee Report*, *supra* note 131, at 3243.

Senator Biden's bill[151] differs unremarkably from the Powell Committee proposal contained in the Republican bills. It expands the statute of limitations for filing state habeas petitions from six months to one year. The extension period allowed for good cause is ninety days, compared with Powell's sixty days.[152] Regarding review of successive petitions, the Biden proposal is broader than the Powell Committee Report, which lays out very specific requirements that must be met before successive review is granted. Senator Biden's bill, on the other hand, would allow a second petition if necessary to avoid a miscarriage of justice. This would allow for any claim that bears on the legality of the death sentence, if such claim was not previously raised due to counsel's ignorance or neglect, or where a miscarriage of justice would result from the failure to consider it.[153]

None of the bills contain recommendations from the report of the American Bar Association Task Force on Death Penalty Habeas Corpus[154] regarding provision of competent legal representation. Under the ABA Task Force Proposal, the provision of qualified counsel, as put forth in the ABA Guidelines,[155] would be a precondition to a state taking advantage of the one-year statute of limitations provision. In addition, absent the provision of competent counsel, the ABA Task Force Proposal would withhold application of certain procedural barriers, including: the exhaustion of state remedies pursuant to 28 U.S.C. section 2254(b) and (c); the rules governing failure to raise a claim in state court at the time or in the manner prescribed by state law; and the presumption of correctness of state court findings of fact set forth in 28 U.S.C. section 2254(d).[156]

All the congressional proposals presently under consideration claim to balance the death row prisoner's interest in fairness of review with the systemic concern for finality and efficiency in the judicial process. However, even a superficial review of the bills reveals that their proponents eagerly tilt the scales in favor of the preservation of a death penalty scheme designed to swiftly and resolutely execute people. A capital punishment system that is racist and fails to provide full, complete review of conviction and sentence with highly competent counsel is certain to be unjust. Of course, were these defects to be cured, either through statutory or other means, the death penalty would still necessarily be an immoral and inhumane form of punishment. There can be no correct, moral, or fair way to kill people. If it is wrong for the offender to kill, it is worse for the state to carry out private revenge by official

151. Racial Justice Act, *supra* note 68.

152. *Id.* § 202.

153. *Id.*

154. *See Toward a More Just and Effective System of Review in State Death Penalty Cases, Recommendations and Report of the American Bar Association Task Force on Death Penalty Habeas Corpus* (Oct. 1989) (approved by the ABA House of Delegates, Feb. 13, 1990) [hereinafter *ABA Task Force Report*].

155. *See supra* note 146.

156. *ABA Task Force Report, supra* note 154, at 9.

killing. Perhaps the difficulty encountered by the lawmakers in crafting an operable system stems from the inherent moral contradiction of finding a just manner to work an ultimate injustice.

Even former Justice Powell, a believer in the constitutionality of putting convicted killers to death, does not personally support the death penalty. In a recent interview, he said:

> I just can't imagine having the job of pulling the switch on someone in the electric chair. . . . [I]t's perfectly clear that if I were in the legislature now, in view of the extended litigation and the ineffectiveness of the way the system operates, I would vote against the death penalty. I would be inclined to vote against it in any event. We are the only Western democracy that still retains the death sentence. . . . We have a system that isn't working, and I doubt very much whether you could ever by law create a system that would work at the present stage of our civilization. . . . The taking of human life is something that I'd rather leave to whomever one thinks of as God.[157]

He, Congress and the Supreme Court should do just that.

157. *Legal Times* (Wash., D.C.), Oct. 2, 1989, at 29.