

# IS RACISM IRRELEVANT? OR SHOULD THE FAIRNESS IN DEATH SENTENCING ACT BE ENACTED TO SUBSTANTIALLY DIMINISH RACIAL DISCRIMINATION IN CAPITAL SENTENCING?\*

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\* This Article is based on testimony submitted on May 3, 1990, by the author, on behalf of the American Bar Association, in support of the proposed Racial Justice Act, before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee. While that testimony, and the author's similar testimony before the Senate Judiciary Committee in October 1989, represented the views of the ABA, this Article represents only the views of the author.

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INTRODUCTION

Numerous studies indicate a widespread pattern of racial discrimination in the imposition of capital punishment.<sup>1</sup> The February 6, 1990, report of the United States General Accounting Office confirms the statistical validity of studies showing that in state after state, a defendant is far more likely to receive the death penalty for a particular capital murder if his victim is white than if his victim is black.<sup>2</sup>

Legislative action to eliminate this discrimination is necessary, in light of the Supreme Court’s decision in *McCleskey v. Kemp*.<sup>3</sup> In *McCleskey*, the Court concluded that legislative action, not a constitutional ruling, is the appropriate way to address the manner in which race improperly affects capital sentencing.<sup>4</sup> There is ample precedent for enacting legislation which deals with racial discrimination even though the Constitution does not itself mandate relief.<sup>5</sup>

The proposed Fairness In Death Sentencing Act<sup>6</sup> could help combat ra-

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1. See *infra* notes 9-33 and accompanying text.  
 2. See U.S. GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (February 1990), reprinted in 136 CONG. REC. S6889-90 (daily ed. May 24, 1990) [hereinafter GAO REPORT].  
 3. 481 U.S. 279 (1987).  
 4. *Id.* at 319.  
 5. See *infra* notes 65-74 and accompanying text.  
 6. The proposed Fairness In Death Sentencing Act of 1991, H.R. 2851, 102d Cong., 1st

cial discrimination in the imposition of capital punishment. The Act provides that a death sentence can be overturned when there is a valid showing of a substantial disparity in capital sentencing which is statistically explicable only by reference to race.<sup>7</sup> This legislation would not eliminate the death penalty, nor would it affect sentencing in other cases.<sup>8</sup> It would, however, substantially reduce the likelihood that a person will be executed on the basis of racial discrimination.

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Sess. (1991), would add a new chapter 177 to Part VI of title 28, United States Code, including a new section 2921, reading as follows:

"§ 2921. Prohibition against the execution of a sentence of death imposed on the basis of race."

"(a) IN GENERAL.- No person shall be put to death under color of State or Federal law in the execution of a sentence that was imposed based on race.

"(b) INFERENCE OF RACE AS THE BASIS OF DEATH SENTENCE.- An inference that race was the basis of a death sentence is established if valid evidence is presented demonstrating that, at the time the death sentence was imposed, race was a statistically significant factor in decisions to seek or to impose the sentence of death in the jurisdiction in question.

"(c) RELEVANT EVIDENCE.- Evidence relevant to establish an inference that race was the basis of a death sentence may include evidence that death sentences were, at the time pertinent under subsection (b), being imposed significantly more frequently in the jurisdiction in question-

"(1) upon persons of one race than upon persons of another race; or

"(2) as punishment for capital offenses against persons of one race than as punishment for capital offenses against persons of another race.

"(d) VALIDITY OF EVIDENCE PRESENTED TO ESTABLISH AN INFERENCE.- If statistical evidence is presented to establish an inference that race was the basis of a sentence of death, the court shall determine the validity of the evidence and if it provides a basis for the inference. Such evidence must take into account, to the extent it is compiled and publicly made available, evidence of the statutory aggravating factors of the crimes involved, and shall include comparisons of similar cases involving persons of different races.

"(e) REBUTTAL.- If an inference that race was the basis of a death sentence is established under subsection (b), the death sentence may not be carried out unless the government rebuts the inference by a preponderance of the evidence. The government cannot rely on mere assertions that it did not intend to discriminate or that the cases fit the statutory criteria for imposition of the death penalty."

The Act, whose principal section is set forth above [hereinafter referred to as the "proposed Fairness In Death Sentencing Act" or "the Act"], was substituted for an earlier proposal in the House of Representatives' version of the 1990 Omnibus Crime Bill by a recorded vote of 218 to 186 on October 5, 1990. See 129 CONG. REC. H9005 (daily ed. Oct. 5, 1990). The Act, which was then called the Racial Justice Act, subsequently survived a motion to delete it from the Omnibus Crime Bill. *Id.* at H9011. Thereafter, Senate and House conferees agreed to set aside the Racial Justice Act provisions, and many other highly contested provisions, of the Omnibus Crime Bill, and enacted a statute without the proposed Act. See Coyle & Lavelle, *Rehnquist Is Still Hoping for Habeas Reform*, Nat'l L.J., Jan. 14, 1991, at 5. The earlier proposal for which the House had substituted the Act in 1990 was reintroduced in the Senate in 1991 as the "Racial Justice Act." S. 1249, 102d Cong., 1st Sess., 137 CONG. REC. S7381 (1991). It was defeated in the Senate on June 20, 1991. See 137 CONG. REC. S8300 (daily ed. June 20, 1991). When the proposal which had been substituted in 1990 in the House was introduced in the House as HR 2851 on July 12, 1991, it was entitled the Fairness in Death Sentencing Act of 1991, in order to distinguish it from the earlier proposal which the Senate had rejected in both 1990 and 1991. On October 22, 1991, the House voted to remove the proposed Act from an omnibus crime bill, H.R. 3371. See Krauss, *House Approves Anti-Crime Bill With Something for Both Camps*, N.Y. Times, Oct. 23, 1991, at A1, A18.

7. See *infra* notes 85-99 and accompanying text (explaining how a claim would be raised and how it might be rebutted under the Act).

8. See *infra* notes 84, 132-40 and accompanying text.

## I.

THERE IS A NATIONAL PATTERN OF RACIAL DISCRIMINATION  
IN CAPITAL SENTENCING BASED ON THE RACE OF  
THE VICTIMA. *Numerous Studies and the GAO's Report Show That This Pattern Exists*

Numerous studies on the imposition of capital punishment under current statutes reveal the same pattern: racial discrimination based on the race of the victim.<sup>9</sup> In state after state, statistical analysis reveals that under otherwise similar circumstances, the killer of a white is far more likely to receive the death penalty than the killer of a black.<sup>10</sup>

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9. See, e.g., D. BALDUS, G. WOODWORTH & C. PULASKI, *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990) [hereinafter *EQUAL JUSTICE*]; S. GROSS & R. MAURO, *DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* (1989) [hereinafter *DEATH AND DISCRIMINATION*]; B. NAKELL & K. HARDY, *ARBITRARINESS OF THE DEATH PENALTY* (1987); Baldus, Woodworth & Pulaski, *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 *STETSON L. REV.* 133 (1986); Barnett, *Some Distribution Patterns for the Georgia Death Sentence*, 18 *U.C. DAVIS L. REV.* 1327 (1985); Bienen, Weiner, Denno, Allison & Mills, *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 21 *RUTGERS L. REV.* 27 (1988) [hereinafter *Prosecutorial Discretion*]; Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Statutes*, 74 *J. CRIM. L. & CRIMINOLOGY* 1073 (1983); Bowers & Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 *CRIME & DEL.* 563 (1980); Ekland-Olson, *Structural Discretion, Racial Bias, and the Death Penalty: The First Decade After Furman in Texas*, 60 *SOC. SCIENCE Q.* 853 (1988); Foley, *Florida After the Furman Decision: The Effect of Extralegal Factors on the Processing of Capital Offense Cases*, 5 *BEHAV. SCIENCES & THE LAW* 457 (1987); Gross & Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 *STAN. L. REV.* 27 (1984) [hereinafter *Patterns of Death*]; Murphy, *Application of the Death Penalty in Cook County*, 73 *ILL. BAR. J.* 90 (Oct. 1984); Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 *LAW & SOC'Y REV.* 437 (1984); Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 *AM. SOC. REV.* 918 (1981); Smith, *Patterns of Discrimination in Assessments of the Death Penalty: The Case of Louisiana*, 15 *J. CRIM. JUST.* 279 (1987); Sorenson & Marquart, *Prosecutorial and Jury Decision-Making in Post-Furman Texas Capital Cases*, 18 *REV. L. & SOC. CHANGE* 743 (1990-91); Vito & Keil, *Capital Sentencing in Kentucky: An Analysis of the Factors Influencing Decision Making in the Post-Gregg Period*, 79 *J. CRIM. L. & CRIMINOLOGY* 483 (1988); Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 *HARV. L. REV.* 456 (1981); Note, *Discrimination and Arbitrariness in Capital Punishment: An Analysis of Post-Furman Cases in Dade Co., Fla. 1973-76*, 33 *STAN. L. REV.* 75 (1980); DeParle, *A Matter of Life or Death*, *New Orleans Times Picayune*, Apr. 7, 1985, at 5; Henderson & Taylor, *Dallas Rate of Convictions in Black Victim Crimes*, *Dallas Times Herald*, Nov. 17, 1985, at A-17; R. Berk & J. Lowery, *Factors Affecting Death Sentencing in Mississippi* (June 1985) (unpublished manuscript on file with author); M. Klemm, *The Determinants of Capital Sentencing in Louisiana: 1979-84* (1986) (unpublished dissertation, Univ. of New Orleans).

10. The overall national pattern of racial discrimination in capital sentencing is also reflected in a nationwide study conducted by Jim Henderson and Jack Taylor, reporters for the *Dallas Times Herald*. That study, encompassing 11,425 capital murders from 1977-1984, revealed "that the killer of a white is nearly three times more likely to be sentenced to death than the killer of a black in the 32 states where the death penalty has been imposed." Henderson & Taylor, *Killers of Dallas Blacks Escape the Death Penalty*, *Dallas Times Herald*, Nov. 17, 1985, at 1. In some states, the disparities have been even higher. The study indicated that in Maryland, killers of whites were eight times more likely to receive the death sentence than killers of

Probably the best-known study was conducted by Professor David Baldus, who analyzed all Georgia homicides between 1973 and 1979.<sup>11</sup> The Supreme Court termed this study "sophisticated" and assumed that it was statistically valid, in deciding *McCleskey v. Kemp*.<sup>12</sup> Professor Baldus examined over 2000 cases and considered 230 non-racial variables. Under his best statistical model, using multiple regression analysis, Professor Baldus found that a Georgia defendant's odds of receiving a death sentence were 4.3 times greater if his victim were white than if his victim were black.<sup>13</sup> To put this in perspective, smokers are 1.7 times more likely to die of coronary artery disease than nonsmokers of similar ages.<sup>14</sup> Thus, while smoking cigarettes greatly increases the risk of dying from heart disease, the impact of smoking is considerably less than the race-of-victim effect on capital punishment.

Another substantial, highly sophisticated study was published by Professors Samuel Gross and Robert Mauro in 1989.<sup>15</sup> Gross and Mauro extensively analyzed homicides from 1976-1980 and, after adjusting for potentially relevant variables, found statistically significant disparities according to the victim's race in Georgia, Florida, Illinois, Oklahoma, North Carolina, and Mississippi.<sup>16</sup> For example, in Georgia, killers of whites were almost ten times as likely to receive the death sentence as killers of blacks; in Florida, they were eight times as likely to get it; and in Illinois, they were six times as likely to get it.<sup>17</sup>

In study after study, similar conclusions have been reached in various death penalty jurisdictions across the country. A 1980 report by William Bowers and Glenn Pierce analyzed death sentencing patterns in Florida, Georgia, Texas, and Ohio for a five-year period after *Furman v. Georgia*,<sup>18</sup> and

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blacks; in Arkansas, they were six times more likely; and in Texas, they were five times more likely to be sentenced to death. *Id.*

11. See EQUAL JUSTICE, *supra* note 9, at 40-46 (discussing sample data and methodology of the Baldus study); see also *McCleskey v. Kemp*, 481 U.S. 279, 286-87 (1987). Professor Baldus has more recently been appointed by the New Jersey Supreme Court to review the effect of racism on capital sentencing in that state. See Order, New Jersey Supreme Court, July 29, 1988, reprinted in *Prosecutorial Discretion*, *supra* note 9, at 371-72.

12. 481 U.S. at 286, 291 n.7 (1987). The Baldus study has been hailed for its methodological sophistication in various quarters other than the United States Supreme Court. The General Accounting Office, alluding to the study in its 1990 Report, referred to it as a "high quality" study. GAO REPORT, *supra* note 2, at S6889. In addition, Senator Brock Adams — a former federal prosecutor and strong supporter of both the death penalty and the Racial Justice Act (as proposed in the Senate) — has referred to the Baldus study as "the most sophisticated study ever done" on racial discrimination in capital sentencing. See 136 CONG. REC. S6873, 6893 (daily ed. May 24, 1990) (statement of Senator Adams).

13. *McCleskey*, 481 U.S. at 287; see also EQUAL JUSTICE, *supra* note 9, at 154.

14. See DEATH AND DISCRIMINATION, *supra* note 9, at 151-52; see also Gross, *Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing*, 18 U.C. DAVIS L. REV. 1275, 1307-08 (1985).

15. See DEATH AND DISCRIMINATION, *supra* note 9.

16. See *id.* at 43-87, 88-94, 235-45; see also PATTERNS OF DEATH, *supra* note 9, at 54-55, 93-96.

17. DEATH AND DISCRIMINATION, *supra* note 9, at 43-87.

18. 408 U.S. 238 (1972). The Supreme Court's decision in *Furman* struck down all then-

found strong race-of-the-victim effects on capital sentencing in each of those states.<sup>19</sup> A separate study by Hans Zeisel showed a very strong race-of-the-victim disparity in Florida death sentencing between 1972 and 1977.<sup>20</sup> The results indicated the likelihood of a death sentence to be thirty-one percent in a white victim case, but only one percent in a black victim case.<sup>21</sup> Raymond Paternoster analyzed South Carolina aggravated homicide cases between 1977 and 1981. Controlling for eight legitimate background variables and the sex of the defendant, he found that race-of-victim discrimination had a statistically significant effect on capital sentencing in that state.<sup>22</sup> A 1985 Louisiana report showed that 14.5% of those who killed whites, as compared to 4.1% of those who killed blacks, were sentenced to die, while none of the whites who killed blacks received a death sentence.<sup>23</sup> Separate statistical studies have also confirmed significant race-of-the-victim effects in North Carolina,<sup>24</sup> Illinois,<sup>25</sup> Mississippi,<sup>26</sup> Louisiana,<sup>27</sup> New Jersey,<sup>28</sup> and Colorado.<sup>29</sup>

After analyzing twenty-eight studies concerning racial discrimination and the death penalty, the General Accounting Office found in its 1990 Report that there is a strong pattern of racial discrimination by race of the victim in the imposition of the death penalty in the United States.<sup>30</sup> The GAO study,

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existing death penalty statutes as unconstitutional. Many states enacted new statutes after *Furman*, in an effort to comply with that decision. Many of those new statutes were upheld as constitutional by the Supreme Court, starting in 1976. See, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976). It is sentencing under these new statutes which the studies cited herein address.

19. See Bowers & Pierce, *supra* note 9.

20. See Zeisel, *supra* note 9; see also Note, *supra* note 9 (death sentences in white-victim cases occurred at approximately twice the rate of death sentences in black-victim cases); Foley & Powell, *The Discrimination of Prosecutors, Judges, and Juries in Capital Cases*, 7 CRIM. JUST. REV. 16 (1982) (reporting racial disparities in death sentencing in Florida between 1972-1978); Radelet, *supra* note 9 (race-of-victim discrimination in capital sentencing increased dramatically where the defendant and the victim were strangers).

21. See Zeisel, *supra* note 9, at 459 (table 1). The Zeisel study also showed that in white-victim cases involving a contemporaneous felony, a black defendant was approximately twice as likely to be sentenced to death as a white defendant. *Id.* at 461 (figure 2). The Zeisel data was reanalyzed in 1983 by William Bowers. Controlling for fourteen legitimate background variables, Bowers found that race-of-victim discrimination in Florida affected both the likelihood of an indictment for capital murder and the likelihood of a conviction at the guilt stage of the trial, as well as the likelihood of a death sentence at the penalty phase. See Bowers, *supra* note 9.

22. See Paternoster, *supra* note 9, at 451; Paternoster, *Race of Victim and Location of Crime: A Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754 (1983). The Paternoster results from South Carolina parallel the Georgia findings of the Baldus study. See EQUAL JUSTICE, *supra* note 9, at 257.

23. See DeParle, *Executions Aren't News, Why They Should Be*, Wash. Monthly, Mar. 1986, at 19.

24. See B. NAKELL & K. HARDY, *supra* note 9, at 108-09.

25. See Murphy, *supra* note 9, at 93.

26. See Berk & Lowery, *supra* note 9.

27. See M. Klemm, *supra* note 9.

28. See *Prosecutorial Discretion*, *supra* note 9, at 170-71.

29. See EQUAL JUSTICE, *supra* note 9, at 262-63.

30. See GAO REPORT, *supra* note 2, at S6889-90. For other surveys of the literature on race-of-victim discrimination in capital sentencing, see DEATH & DISCRIMINATION, *supra* note 9, at 17-27; Kleck, *Life Support for Ailing: Modes for Summarizing the Evidence for Racial*

which was mandated by federal statute,<sup>31</sup> found a remarkable consistency in data sets, data collection techniques and the quality of the studies.<sup>32</sup> The GAO concluded that there is a "pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty" in jurisdictions throughout the country.<sup>33</sup>

*B. Several Recent Examples Illustrate How Racial Discrimination Infects Particular Death Penalty Cases*

The reason why the GAO and others have found pervasive racial discrimination in the current implementation of capital punishment is that racism permeates so many recent cases. One egregious example is the case of Johnny Lee Gates.<sup>34</sup> Gates, a black man, was sentenced to death in Columbus, Georgia, in 1977 by an all-white jury for the rape and murder of a white woman. At the time of his trial, a series of murders and rape-murders of white women, allegedly by black men, had deeply affected the local community.<sup>35</sup>

Although the county in which the trial took place had an approximately thirty-percent black population, the sixty-person venire from which Gates' all-white jury was selected included only three or four black people,<sup>36</sup> all of whom were peremptorily struck from the jury by the prosecutor.<sup>37</sup> During the voir dire, which was not conducted in an individual, sequestered fashion, Gates' appointed trial counsel did not ask the potential jurors any questions concerning racial prejudice.<sup>38</sup> Moreover, even though the county in which the trial took place had previously been held to violate the Constitution through racial discrimination in jury selection,<sup>39</sup> Gates' counsel failed to investigate, or object

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*Discrimination in Sentencing*, 9 LAW & HUM. BEH. 271, 272 (1985); Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783 (1981); *Prosecutorial Discretion*, *supra* note 9, at 118-57.

31. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988); see also GAO REPORT, *supra* note 2 (noting statutory mandate).

32. The GAO Report concluded that "the body of research concerning discrimination in death penalty sentencing is both of sufficient quality and quantity to warrant" the conclusions reached by the Report. GAO REPORT, *supra* note 2, at S6889.

33. *Id.*; see also Statement by Lowell Dodge, Director of Administration of Justice Issues, General Accounting Office, *Hearings of the Subcomm. on Civil and Constitutional Rights, House Comm. on the Judiciary*, 101st Cong., 2d Sess. (May 3, 1990).

34. The author represented Mr. Gates in his federal habeas corpus appeals and continues to represent him.

35. Deposition of William Cain, at 28, in *Gates v. Zant*, Civ. No. 4646, Superior Court of Butts County, Ga.; see also Einhorn, *NAACP Hits Police, Coroner*, Columbus Ledger, Feb. 19, 1978, at B1, col 5. The Columbus Police Department has had a long history of racial discrimination and police misconduct which has now been well documented. See Bork, *Chief to Take Panel Decision to City Council*, Columbus Ledger, Dec. 29, 1978, at B1, col. 3; see also *infra* at notes 123-31 and accompanying text (discussing case of William Brooks).

36. *Gates v. Zant*, 880 F.2d 293, 293-94 (11th Cir. 1989) (Clark, J., joined by Hatchett, J., and Johnson, J., dissenting from denial of rehearing en banc).

37. *Id.* at 293-94.

38. Trial transcript at 20-214, *State v. Gates* (August 30, 1977) (Crim. No. 38335).

39. See *Vanleeward v. Rutledge*, 369 F.2d 584, 586 (5th Cir. 1966); cf. *Peters v. Kiff*, 407

to, the racially discriminatory jury selection processes used by the county and the prosecutor.<sup>40</sup> The Eleventh Circuit later concluded, on the basis of evidence presented by subsequent volunteer counsel in state post-conviction and federal habeas corpus proceedings, that Gates' trial counsel "could have stated a *prima facie* case of [unconstitutional] jury discrimination," if he had made such a claim. However, the federal appeals court denied relief, on the grounds that Gates' trial counsel had irrevocably waived the claim.<sup>41</sup>

The Eleventh Circuit made this holding even though it knew that Gates' court-appointed trial counsel, William Cain, had testified that the reason why he had not objected to the jury selection process was that the local defense bar had decided it was not "the thing to do,"<sup>42</sup> because such challenges to racial discrimination would do "more harm than good."<sup>43</sup> Cain stated:

[S]ome of these challenges that are suggested to be made in each of these instances — and time and time again in my professional opinion — would only alienate the juror [sic] and the whole judicial system in the community so that your chances, in my opinion, of getting a fair trial are less than if you did not do it.<sup>44</sup>

Gates, therefore, was forever bound by his lawyer's resigned decision to accept a racially discriminatory jury rather than face a biased jury, although under either option racial discrimination would have egregiously harmed Gates' chances of avoiding conviction and imposition of the death penalty.

The Eleventh Circuit's decision in 1989, which the Supreme Court decided not to review,<sup>45</sup> means that a black man accused of killing a white woman can be executed through an unconstitutionally racially discriminatory jury selection system which results in an all-white jury, where defense counsel does not object because he is faced with a "Hobson's choice of evils:" an all-white jury or a biased jury.<sup>46</sup>

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U.S. 493 (1972) (permitting white defendant to press claim of racial discrimination in jury selection in same Georgia county).

40. *Gates*, 880 F.2d at 294.

41. *Gates v. Zant*, 863 F.2d 1492, 1498 (11th Cir.), *cert. denied*, 110 S. Ct. 353 (1989).

42. *Gates*, 880 F.2d at 296.

43. *Id.*

44. *Id.*

45. *Gates v. Zant*, 110 S. Ct. 353 (1989) (denying certiorari, despite *amicus curiae* support of Gates' certiorari petition by a broad coalition consisting of the National Urban League, the Southern Christian Leadership Conference, the American Jewish Congress, the Asian-American Legal Defense and Education Fund, the Puerto Rican Legal Defense and Education Fund, the Commission for Racial Justice of the United Church of Christ, and the Unitarian Universalist Association).

46. As three members of the Eleventh Circuit recognized in their opinion dissenting from denial of rehearing in *Gates*, the predecessor of that same federal appeals court had acknowledged twenty-five years earlier that an attorney should not be held to have waived his client's claim of unconstitutional racial discrimination, when the attorney faced such a "Hobson's choice." See *Gates v. Zant*, 880 F.2d at 295 (discussing *Whitus v. Balkcom*, 333 F.2d 496 (5th Cir.), *cert. denied*, 379 U.S. 931 (1964)). Ironically, and in further illustration of the fortuity and arbitrariness of the current capital punishment system, a different panel of the Eleventh Circuit subsequently granted relief in a non-death case raising essentially the same claim as



Numerous other cases illustrate various ways in which racial discrimination continues to infect capital cases. For example, in an Alabama capital case, all twenty-six black persons qualified for jury service were struck by the prosecutor, who, it was later shown, had "ranked" the potential jurors as "strong," "medium," "weak," and "black."<sup>47</sup> In a Georgia case, the state courts have upheld the prosecutor's decision to strike all ten potential black jurors, where the prosecutor's articulated reasons for these challenges included the following: "he appears to have the intelligence of a fence post," "he looked a little slow," and "he looked like the [black] defendant."<sup>48</sup>

In 1989, a federal district judge in Georgia denied relief for Wilburn Dobbs, a black man accused of killing two white people, whose death sentence was obtained through strikingly overt racial discrimination. The trial judge in Dobbs' case had consistently voted in support of racial segregation as a Georgia legislator, prior to his becoming a judge.<sup>49</sup> During the trial, the judge and the defense lawyer referred to the defendant as "colored" and "colored boy," while the prosecutor referred to the defendant by his first name.<sup>50</sup> The attitudes of the defense attorney — the person responsible for seeking to save Dobbs' life — were described as follows by the federal district court judge (who nevertheless refused to grant Dobbs relief):

Dobbs' trial attorney was outspoken about his views. He said that many blacks are uneducated and would not make good teachers, but do make good basketball players. He opined that blacks are less educated and less intelligent than whites either because of their nature or because "my granddaddy had slaves." He said that integration has led to deteriorating neighborhoods and schools and referred to the black community in Chattanooga as "black boy jungle." He strongly implied that blacks have inferior morals by relating a story about sex in a classroom. He also said that when he was young, a maid was hired with the understanding that she would steal some items. He said that blacks in Chattanooga are more troublesome than blacks in Walker County [Georgia].<sup>51</sup>

Racial discrimination by prosecutors in selecting those defendants for whom they will seek the death penalty — and those who have committed

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Gates'. See *Hollis v. Davis*, 912 F.2d 1343, 1350 (11th Cir. 1990) (if counsel "did not object to the racial composition of the county's jury list out of fear of community reaction or loss of practice," such failure does not create an irrevocable waiver of the jury discrimination claim).

47. See Statement of Bryan A. Stevenson on H.R. 2466: Racial Justice Act, *Subcomm. on Civil and Constitutional Rights, House Comm. on the Judiciary*, 101st Cong., 2d Sess. (May 3, 1990), at 7 [hereinafter Statement of Bryan Stevenson] (on file with author) (discussing the Alabama trial of Albert Jefferson); see also Harrington, *How Can Anyone Do Anything Else?*, Wash. Post Magazine, Jan. 6, 1991, at 12, 15.

48. Harrington, *supra* note 47, at 17; see also Statement of Bryan Stevenson, *supra* note 47, at 8.

49. *Dobbs v. Zant*, 720 F. Supp. 1566, 1577 (N.D. Ga. 1989).

50. *Id.* at 1578.

51. *Id.* at 1577.

similar crimes for whom the death sentence will *not* be sought — accounts for much of today's racial discrimination in capital sentencing.<sup>52</sup> An egregious example is Joe Briley, one of Georgia's elected district attorneys (all of whom are white and have complete discretion in deciding whether to seek the death penalty in any potential capital murder case).<sup>53</sup> Since taking office, District Attorney Briley, of the Ocmulgee Judicial Circuit, has sought the death penalty in twenty-eight cases, in twenty-two of which the defendant was black.<sup>54</sup> It was eventually discovered that District Attorney Briley had written a memorandum describing how jury commissioners could underrepresent black citizens on the jury rolls in a way that would avoid detection and judicial review.<sup>55</sup> The federal district court which considered the case "found that the memorandum was intentionally designed to underrepresent black people and women on grand and traverse juries."<sup>56</sup> While the fortuitous discovery of the memorandum — by counsel in a completely unrelated civil case — has led to the reversal of at least one conviction and death sentence,<sup>57</sup> District Attorney Briley remains in office and continues to seek the death penalty aggressively.<sup>58</sup>

## II.

### LEGISLATION IS NEEDED TO AFFORD REDRESS FOR RACIAL DISCRIMINATION IN CAPITAL SENTENCING

Racial discrimination in criminal cases "strikes at the fundamental values of our judicial system and our society as a whole."<sup>59</sup> Claims of racial discrimination which affect *capital* sentencing determinations are "especially serious in light of the complete finality of the death sentence."<sup>60</sup> Accordingly, Congress should not tolerate the significant pattern of racial discrimination in capital sentencing.

Legislative action, such as enactment of the proposed Fairness In Death Sentencing Act, is an appropriate way to address racial discrimination in capital sentencing. In *McCleskey*,<sup>61</sup> while rejecting claims concerning such discrimination which were asserted directly under the Constitution's eighth and fourteenth amendments, the Supreme Court stressed that the arguments about this discrimination "are best presented to the legislative bodies."<sup>62</sup> It said that

52. See generally EQUAL JUSTICE, *supra* note 9, at 398-99.

53. The discussion herein of District Attorney Briley relies heavily on the Statement of Bryan Stevenson, *supra* note 47, at 8.

54. *Id.*

55. See *Amadeo v. Zant*, 486 U.S. 214, 217-18 (1988).

56. See *id.* at 218.

57. See *id.* at 224.

58. Statement of Bryan Stevenson, *supra* note 47, at 9.

59. *Rose v. Mitchell*, 443 U.S. 545, 556 (1979).

60. *Turner v. Murray*, 476 U.S. 28, 35 (1986) (plurality opinion by White, J.); see also *Ford v. Georgia*, 111 S. Ct. 850 (1991) (Souter, J.) (black capital defendant stated equal protection claim where prosecutor used 9 of his 10 peremptory strikes to remove potential black jurors from the panel).

61. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

62. *Id.* at 319.

legislative entities are better able than the Supreme Court to take action in light of such statistical studies<sup>63</sup> as Professor Baldus' "sophisticated" study of race-of-the-victim effects in capital sentencing.<sup>64</sup>

Legislation designed to provide redress where there is a racially discriminatory pattern of capital sentencing would thus be completely consistent with the Supreme Court's decision in *McCleskey*. Indeed, the Supreme Court has held that statutes designed to provide redress against racial discrimination may constitutionally be enacted in the wake of Supreme Court decisions holding that that *same* redress is not directly mandated by the Constitution.<sup>65</sup> In such cases, Congress validly exercises its power under section five of the fourteenth amendment to pass remedial legislation aimed at ensuring equal protection under the law.

The Supreme Court said in one such case that Congress is better able than the judiciary to "assess and weigh the various conflicting considerations" that are involved in developing a proper remedy for discrimination.<sup>66</sup> It reiterated this in *McCleskey*.<sup>67</sup> Hence, legislative action designed to provide the redress which the Court declined to order in *McCleskey* would clearly be constitutionally valid.<sup>68</sup>

Indeed, the constitutional propriety of legislative action here is strongly supported by the history of the enactment of the fourteenth amendment. "The one point upon which historians of the Fourteenth Amendment agree, and, indeed, which the evidence places beyond cavil, is that the Fourteenth Amendment was designed to place the constitutionality of the Freedman's Bureau and civil rights bills, particularly the latter, beyond doubt."<sup>69</sup> At the time that Congress approved the fourteenth amendment in 1866, the one civil rights law (in addition to the Freedman's Bureau bill<sup>70</sup>) which it had enacted

63. *Id.*

64. *Id.* at 291 n.7.

65. *See Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding legislation suspending the use of literacy tests in all state and federal elections), and *Katzenbach v. Morgan*, 384 U.S. 641, 649-50, 657-58 (1966) (upholding section of Voting Rights Act which invalidated New York's English literacy requirement), both of which were decided in the wake of *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959) (state literacy requirements do not violate the equal protection clause); *see also Thornburg v. Gingles*, 478 U.S. 30, 43-44 (1986) (applying amendment to Voting Rights Act making it unlawful for an electoral system to have a discriminatory effect), decided in the wake of *Mobile v. Bolden*, 446 U.S. 55 (1980) (plaintiffs suing directly under the fourteenth amendment must prove discriminatory intent).

66. *Katzenbach*, 384 U.S. at 653.

67. 481 U.S. at 319.

68. *See Note, Too Much Justice: A Legislative Response to McCleskey v. Kemp*, 24 HARV. C.R.-C.L. L. REV. 437, 501-08 (1989) (discussing constitutionality of legislation designed to redress racial disparities shown by disparate impact); *see also* Letter from Lawrence H. Tribe to Senator Edward M. Kennedy (November 1989), reprinted in 136 CONG. REC. S6873, 6891 (daily ed. May 24, 1990) ("On any of the theories of congressional power under the Fourteenth Amendment . . . the Racial Justice Act is an appropriate exercise of Congress' authority.").

69. *See* J. TEN BROEK, EQUAL UNDER LAW 201 (1965).

70. The Freedman's Bureau bill was designed to allow the President to extend "military protection and jurisdiction" over any case in which a person's civil rights were denied because of race. It would have allowed criminal prosecution of anyone who so deprived a person of

was the Civil Rights Act of 1866.<sup>71</sup> That legislation imposed specific sanctions against state actors who discriminated on the basis of color or race (a) in victimizing black citizens by depriving them of their rights or (b) in imposing criminal punishment. Thus, the 1866 Civil Rights Act provided:

Sec. 2 *And be it further enacted.* That any person who, under color of any law, statute, regulation or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties . . . by reason of his color or race than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.<sup>72</sup>

Some 135 years after the Thirty-Ninth Congress enacted the Civil Rights Act of 1866, the 102nd Congress can begin to remedy a situation in which, as in 1866, blacks are being treated substantially different from whites in the imposition of the most severe criminal punishment. Here, the context is discrimination in capital sentencing on the basis of the victim's or the defendant's race. The proposed Fairness In Death Sentencing Act, in dealing with present-day discrimination in criminal sentencing, would be as valid under section 5 of the fourteenth amendment as was the Civil Rights Act of 1866, the constitutional legitimacy of which the fourteenth amendment was designed to "place . . . beyond doubt."<sup>73</sup>

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these rights. See E. McPherson, *The Political History of the United States of America During the Period of Reconstruction* 72 (1871). The bill was enacted by both houses of Congress, but the Senate failed to override the President's veto. See also *Jones v. Mayer Co.*, 392 U.S. 409, 455-57 (1968) (Harlan, J., dissenting).

71. 14 Stat. 27 (1866). The Civil Rights Act of 1866 was enacted before the fourteenth amendment was even proposed, and rested on the enabling clause of the thirteenth amendment. See Brooks, *Use of the Civil Rights Acts of 1866 and 1871 to Redress Employment Discrimination*, 62 CORNELL L. REV. 258, 261-62 (1986). The Act was reenacted by Congress in 1870, two years after ratification of the fourteenth amendment. See *Jones v. Mayer Co.*, 392 U.S. at 422 n. 28, 436-37 (discussing section 18 of the Enforcement Act of 1870, Act of May 1, 1870, c. 114, § 18, 16 Stat. 144, which reenacted the Civil Rights Act of 1866). Section 1 of the 1866 Act has evolved into 42 U.S.C. § 1981 and § 1982. See *id.* at 422; Brooks, *supra*, at 261. Section 2, quoted above, has evolved into 18 U.S.C. § 242. See *Jones v. Mayer Co.*, 392 U.S. at 424 n. 32 (noting that 18 U.S.C. § 242 evolved from 18 U.S.C. § 52); *Screws v. United States*, 325 U.S. 91, 98-99 (1944) (discussing evolution of 18 U.S.C. § 52 from section 2 of the Civil Rights Act of 1866); see also S. Rep. No. 721, 90th Cong., 2d Sess., reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 1837 (1968).

72. 14 Stat. 27 § 2 (1866).

73. See J. TEN BROEK, *supra* note 69, at 201.

## III.

THE PROPOSED FAIRNESS IN DEATH SENTENCING ACT WOULD  
EFFECTIVELY DEAL WITH RACIAL DISCRIMINATION  
IN THE IMPOSITION OF CAPITAL  
PUNISHMENT

Legislation providing that a challenge to a death sentence can succeed when a valid statistical showing indicates a substantial disparity in capital sentencing according to the races of either victims or defendants could readily be implemented by the courts. This could be done without providing relief for *all* death row inmates. And it would encourage states to take a variety of actions designed to eliminate substantial race-based disparities in their death penalty systems.<sup>74</sup> Since such legislation could validly be confined to capital cases, it would not create confusion in the criminal justice system as a whole, as the Supreme Court feared a different holding in *McCleskey* might have done.<sup>75</sup>

*A. The Courts Could Implement Such Legislation in the Same Way as in Dealing With Racially Discriminatory Effects in Other Contexts*

The proposed Fairness In Death Sentencing Act would not, by allowing a claim to be based on valid statistical evidence, create an unprecedented task for the courts. There are other types of claims for which racial discrimination is established through the use of statistical evidence to show a significant racially discriminatory effect, and relief is granted in such cases in the absence of effective rebuttal of the statistical evidence. In these contexts, the courts can and do consider the validity of the statistical studies presented to them before granting relief. The same could be done in the context of capital sentencing.<sup>76</sup> Indeed, the proposed Fairness In Death Sentencing Act would explicitly require the courts to do so.<sup>77</sup>

One situation in which a claim of racial discrimination can be established through statistical evidence, without directly proving an intention to discriminate, involves jury selection. A criminal defendant can state a meritorious jury discrimination claim by showing a substantial statistical disparity between the percentage of a racial or ethnic minority in the population and the percentage of that minority in the pool from which his grand jury or trial jury was selected.<sup>78</sup> Moreover, the courts have granted relief in these other contexts in which a racially discriminatory effect has been shown, without direct proof of a discriminatory purpose or motive: voting rights,<sup>79</sup> prosecutors' per-

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74. See *infra* notes 100-21 and accompanying text (describing actions states could take to eliminate racial discrimination in capital sentencing).

75. See *McCleskey v. Kemp*, 481 U.S. 279, 314-18 (1987).

76. See *infra* notes 85-91 and accompanying text (discussing quality of evidence required under the proposed Act).

77. See proposed Fairness In Death Sentencing Act, *supra* note 6, § 2921(d).

78. See *Gibson v. Zant*, 705 F.2d 1543, 1546 n.4, 1548-49 (11th Cir. 1983); see also *Castaneda v. Partida*, 430 U.S. 482, 494-95 (1977).

79. See *Thornburg v. Gingles*, 478 U.S. 30 (1986).

emptory challenges to black trial jurors,<sup>80</sup> and employment discrimination.<sup>81</sup>

It would be equally appropriate to grant relief in the context of capital sentencing, in which the broad discretion given to, *inter alia*, the prosecutor and the jury affords "a unique opportunity for racial prejudice to operate but remain undetected."<sup>82</sup>

*B. The Proposed Legislation Could Substantially Diminish the Effect of Racial Discrimination on Death Sentencing But Would Not Interfere With a State's Ability to Carry Out a Death Sentence Not Affected by Racial Discrimination*

The proposed Fairness In Death Sentencing Act<sup>83</sup> could, if enacted, substantially diminish the impact of racial discrimination on capital punishment. It would not, however, interfere with the carrying out of valid death sentences which were not infected by racial discrimination.

The proposed statute has been carefully drafted by, among others, strong proponents of capital punishment,<sup>84</sup> to achieve only the limited purpose of substantially lessening racial discrimination in capital sentencing — not the abolition of the death penalty. Under the proposed Act, a death-sentenced inmate could raise a successful claim only under the circumstances discussed below.

*1. The Death Row Inmate Would Have the Affirmative Burden of Demonstrating That Racial Discrimination Affected His Case*

Under the proposed Act, a death row inmate would have the burden of demonstrating that racial discrimination has affected his case.<sup>85</sup> This could be done, as in various other claims of racial discrimination,<sup>86</sup> through the presentation of a "valid" and "relevant" statistical study.<sup>87</sup>

In order to be valid and relevant, such a study would have to meet a variety of criteria. For example, it would have to take into account factors other than race which could have affected the outcome of the death row in-

80. *See* *Batson v. Kentucky*, 476 U.S. 79, 96-98 (1986); *see also* *Ford v. Georgia*, 111 S.Ct. 850 (1991).

81. *See* *Bazemore v. Friday*, 478 U.S. 385, 398 (1986) (relying on multiple regression analysis to show racial discrimination under Title VII).

82. *Turner v. Murray*, 476 U.S. 28, 35 (1986) (plurality opinion by White, J.) (referring to discretionary power of juries in capital sentencing).

83. *See supra* note 6.

84. *See infra* note 132 (citing statement by Congressman Hughes in support of legislation in 1990 identical to the Act).

85. *See* proposed Act, *supra* note 6, § 2921(b).

86. *See supra* notes 76-81 and accompanying text.

87. Proposed Fairness In Death Sentencing Act, *supra* note 6, § 2921(b) and (c). The legislation states that an inference of discrimination may be established only upon a showing of "valid evidence" that race was a "statistically significant factor" in death sentencing "at the time the death sentence was imposed" and "in the jurisdiction in question." *Id.* § 2921(b).

mate's case, such as the brutality of the crime, whether the inmate concurrently committed other crimes, and whether the inmate had been previously convicted of violent crimes.<sup>88</sup> In addition, the study would have to encompass the period during which the death row inmate's sentence was handed down,<sup>89</sup> and would have to show a pattern of racial discrimination during that time frame within the jurisdiction in which the inmate was sentenced.<sup>90</sup> Moreover, even if such a valid and relevant study is introduced, the inmate must show that his death sentence was *part of* the indicated pattern of racial discrimination.<sup>91</sup>

Unless the death row inmate establishes all this, he will not carry his burden of creating an inference of racial discrimination. In such situations, his claim under the Fairness In Death Sentencing Act can be dismissed without the state's doing anything at all.

## 2. *The State Could Defeat the Inmate's Claim by Accurately Attacking the Quality and Nature of the Inmate's Evidence*

Even if all of the above *is* done, the inmate would *not* automatically get relief from his sentence. Indeed, the death row inmate's claim could still be rejected without the state's presenting any independent evidence in rebuttal. The state could prevail by accurately attacking, through cross-examination and legal argument, the validity or relevance of the inmate's evidence.<sup>92</sup>

For example, the state could attack, through cross-examination and argument, methodological aspects of the inmate's statistical evidence — such as the sample size, how the sample was selected, and the time period covered. If the inmate's evidence does not cover the relevant time period, or does not adequately evaluate racial discrimination in capital sentencing during that time period, the inmate will not have carried his burden. And if the statistical evidence does not adequately account for factors other than race which, if they *were* accounted for, would eliminate any inference of racial discrimination in the death row inmate's case, that inmate's claim will fail.<sup>93</sup>

Moreover, wholly aside from challenging the validity of the death row inmate's overall statistical evidence, the state may attack the inmate's purported showing that his sentence was part of the indicated statistically valid pattern of racial discrimination. If the inmate's sentence was not part of that pattern, and was instead based on valid non-racial factors, the inmate's claim would fail.<sup>94</sup>

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88. *Id.* § 2921(d) (stating that evidence "must" take into account factors other than race).

89. *Id.* § 2921(b) and (c).

90. *Id.*

91. *Id.* § 2921(d).

92. *See id.*

93. *See id.* § 2921(d) and (e).

94. If the death sentence being challenged falls into a subcategory of death sentences based on, e.g., certain aggravating factors, relief would not be granted on the basis of statistical evidence if there is no statistically valid pattern of racial discrimination within that subcategory of

### 3. *The State Could Also Defeat the Inmate's Claim Through Rebuttal Evidence*

If the death row inmate does come forward with sufficient evidence to meet his initial burden, and an inference of racial discrimination is created and survives cross-examination and argument, then — and only then — would the state have the burden of coming forward with rebuttal evidence. At this point, the state could put forward its own statistics, present expert evaluations of the death row inmate's statistics which reach different conclusions, or put forward any other relevant proof.

The proposed Act would place only two limitations on the state's rebuttal of an inference of racial discrimination. First, the state could not rebut the petitioner's evidence merely by stating or "proving" that it did not subjectively "intend" to discriminate.<sup>95</sup> This would be nothing novel. Such subjective intent evidence is not permitted in the other areas in which racial discrimination is shown by statistical disparities.<sup>96</sup> The reason for this is very simple, as explained by Congressman William Hughes, a former prosecutor who supports the death penalty, who in 1990 was the principal House sponsor of legislation identical to the proposed Act: "[I]t would be naive to believe that a prosecutor or other charging entity would admit their prejudice or their intent to discriminate. We all know that racial discrimination does not work like that."<sup>97</sup>

Secondly, the state may not rebut the death row inmate's claim of racial discrimination merely by showing that his case "fit[s] the statutory criteria for imposition of the death penalty."<sup>98</sup> Obviously, if a death penalty case does not fit those criteria, mechanisms of review *other than* the proposed Act would be available to correct such an error.<sup>99</sup> It is precisely discrimination which occurs *within* the defined parameters of capital punishment that the proposed Act is intended to correct.

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cases, even if an *overall* pattern of racial discrimination is shown in the relevant jurisdiction at the time the sentence was handed down. The proposed Act specifically requires consideration of aggravating factors and similar cases. *See Proposed Fairness In Death Sentencing Act, supra* note 6, § 2921(d); *see also* *McCleskey v. Kemp*, 481 U.S. 279, 367 (1987) (Stevens, J., joined by Blackmun, J., dissenting) (there exist certain categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender).

95. *See Proposed Fairness In Death Sentencing Act, supra* note 6, § 2921(e).

96. *See supra* notes 78-81 and accompanying text.

97. Congressman Hughes voted against an earlier version of the legislation in the House Judiciary Committee. But he proceeded to introduce and support a substitute version in the full House. 136 CONG. REC. H9001 (daily ed. Oct. 5, 1990) (statement of Rep. Hughes). Congressman Mazzoli, who also had opposed the House Judiciary Committee's 1990 version of the Act, supported the modified version proposed by Congressman Hughes. *See, e.g.*, 136 CONG. REC. H9003 (daily ed. Oct. 5, 1990) (statement of Congressman Mazzoli).

98. *See Proposed Fairness In Death Sentencing Act, supra* note 6, § 2921(e).

99. *See generally* *Gregg v. Georgia*, 428 U.S. 153 (1976).



C. *The Proposed Legislation Would Encourage States to Change Their Capital Punishment Systems, So As to Eliminate the Substantial Pattern of Racial Discrimination*

The substantial pattern of racial discrimination in capital sentencing need not persist.<sup>100</sup> States could take various measures designed to prevent substantial racial disparities among their capital cases.

For example, states could provide clearer guidance to prosecutors as to when it is appropriate to seek the death penalty.<sup>101</sup> Currently, the states generally provide no such guidance, and prosecutorial discretion remains entirely unchecked. Unfortunately, many prosecutors (who are generally locally elected) have discriminated based on the race of the victim in deciding when to seek the death penalty for capital murders.<sup>102</sup> Patterns of such discrimination by prosecutors have been statistically shown to exist in several states.<sup>103</sup> Indeed, Professor Baldus has concluded that racially biased exercise of prosecutorial discretion "is the principal source of the race-of-victim disparities observed in the [capital punishment] system."<sup>104</sup>

States could also take various measures to make it less likely that juries will act in a racially discriminatory manner. For example, states could take steps to make trial attorneys more likely to ask potential jurors questions "on the issue of racial bias." In *Turner v. Murray*,<sup>105</sup> the Supreme Court held that an attorney who wishes to ask such questions in an interracial capital case must be permitted to do so.<sup>106</sup> As the plurality opinion explained, "[m]ore subtle, less consciously held racial attitudes," such as "[f]ear of blacks . . . might incline a juror to favor the death penalty."<sup>107</sup>

However, attorneys who represent capital defendants often do not ask such questions, for at least two reasons. First, many attorneys would not want to ask such questions in the presence of all prospective jurors, for fear that a

100. Justices Blackmun and Stevens recognized this, in dissenting in *McCleskey*. See 481 U.S. 279, 365 (Blackmun, J., dissenting); *id.* at 367 (Stevens, J., dissenting).

101. The State Attorney of Montgomery County, Maryland, got so frustrated with the complete absence of any guidelines that he wrote an article in his state's bar journal, pleading for the courts to give him guidance on how to exercise his tremendous discretion in seeking the death penalty. Sonner, *Prosecutorial Discretion and the Death Penalty*, Md. B.J., Mar. 1985, at 6.

102. Professor Baldus has shown that race of the victim has an even greater likelihood of influencing prosecutors to seek the death penalty than it does of influencing jurors to return a death sentence. See EQUAL JUSTICE, *supra* note 9, at 166-67; see also *supra* notes 53-58 and accompanying text.

103. See, e.g., EQUAL JUSTICE, *supra* note 9, at 1402-03 (Georgia); Bowers & Pierce, *supra* note 9, at 609 table 7 (Florida); Paternoster, *supra* note 9 (South Carolina).

104. EQUAL JUSTICE, *supra* note 9, at 403. This biased exercise of discretion may arise at least partly from the fact that district attorneys in most areas are elected, and thus face tremendous political pressures in cases where a black defendant is charged with killing a white victim. See Statement of Bryan Stevenson, *supra* note 47, at 8.

105. 476 U.S. 28 (1986).

106. *Id.* at 36-37.

107. *Id.* at 35 (plurality opinion of White, J.) (footnote omitted).

single racially oriented remark would influence the remaining veniremen.<sup>108</sup> Second, many attorneys would not ask such questions under any circumstances, either because they fear community reproach for raising a racial issue, or because they are otherwise ineffective.<sup>109</sup>

The states could deal with these problems by (1) requiring trial judges to ask defendants on the record whether they would like the questioning envisioned in *Turner* to occur, (2) permitting the type of individual questioning envisioned in *Turner* to occur (under the trial judge's supervision) outside the presence of the other prospective jurors, and (3) implementing the ABA's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.<sup>110</sup> Under the ABA Guidelines, each capital defendant would be provided with two qualified trial counsel who have substantial experience and who have received training which has specifically focused on the trial of capital cases.<sup>111</sup>

Implementing the ABA Guidelines would make it more likely that counsel would utilize the various existing protections against racial discrimination. More qualified counsel would also be less likely to waive valid claims of racial discrimination in, for example, the composition of the venires from which grand and petit jurors are chosen in capital cases.<sup>112</sup>

Another action which states could take which would diminish the likelihood of undetected racism in jurors would be to require private, individualized voir dire of each prospective juror in capital cases on *all* questions related to possible bias or prejudice, even in situations not covered by *Turner*. Many state courts routinely use only *en masse* questioning to determine whether any prospective juror is biased or prejudiced.<sup>113</sup> Yet, as the Mississippi Supreme Court has recognized, "[e]lementary principles of group psychology, as well as empirical findings, make clear that, where questions are put to the panel as a whole, the average potential juror will be extremely reluctant to disclose his biases."<sup>114</sup>

108. See generally Tabak, *The Death of Fairness*, 14 N.Y.U. REV. L. & SOC. CHANGE 797, 813-14 (1986).

109. See *Goodwin v. Balkcom*, 684 F.2d 805-10 (11th Cir. 1982) (counsel held ineffective, in part because, out of fear of community reproach, he did not challenge a jury selection method that discriminated against blacks and women), *cert. denied*, 460 U.S. 1098 (1983); see also Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 326-27 (1983); *supra* notes 34-46 and accompanying text (discussing the case of Johnny Lee Gates).

110. American Bar Association, Guidelines for the Appointment and Performance of Counsel In Death Penalty Cases (Dec. 1988) [hereinafter "ABA Guidelines"] (approved by the ABA House of Delegates, Resolution 122, Feb. 1989).

111. Under the ABA Guidelines, counsel's performance would be monitored by an independent appointing authority, counsel would be provided reasonable compensation for time and expenses, and counsel would be assisted by investigators and expert witnesses. *Id.*

112. See *supra* notes 34-46 and accompanying text (discussing the case of Johnny Lee Gates).

113. See Tabak, *supra* note 108, at 813-14.

114. *Fisher v. State*, 481 So. 2d 203, 221 (Miss. 1985). Unfortunately, the United States Supreme Court recently held that even when most jurors indicate that they have been exposed

Another important failsafe against racial discrimination in capital sentencing would be true proportionality review in which a state appeals court would, in appropriate cases, change death sentences to life sentences.<sup>115</sup> True proportionality review would consider *not only* cases in which the sentence was death *but also* capital murder cases in which a life sentence, or a lesser penalty, was imposed. This would provide an important safeguard against discrimination by race of the victim, where such discrimination is not substantially eliminated by the other types of measures which a state may adopt.<sup>116</sup> However, even states, such as Georgia, which have purported to engage in proportionality review have generally used a "mechanical, almost ritualistic approach,"<sup>117</sup> in which they do not consider cases in which life (or lesser) sentences have been imposed.<sup>118</sup>

A final protection against racism in the imposition of capital punishment would be clemency proceedings in which race-of-victim discrimination would be a basis for granting clemency. In the past two decades, almost no one has been granted clemency in the states in which most executions have taken place, even when a compelling presentation in support of clemency has been made.<sup>119</sup> Clemency proceedings were far more meaningful in the past,<sup>120</sup> and

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to massive pretrial publicity, the Constitution requires neither individualized voir dire nor that such jurors be asked which publicity they saw, heard, or read. *Mu'Min v. Virginia*, 111 S. Ct. 1899 (1991). The states could nevertheless decide to conduct individualized, sequestered, and thorough voir dire.

115. See generally Tabak & Lane, *The Execution of Injustice*, 23 LOY. L.A.L. REV. 59, 81-82 (1989).

116. See *supra* text accompanying notes 101-15; *infra* text accompanying notes 119-20.

117. See Liebman, *Appellate Review of Death Sentences: A Critique of Proportionality Review*, 18 U.C. DAVIS L. REV. 1433, 1440-41, 1445, 1458 (1985).

118. See EQUAL JUSTICE, *supra* note 9, at 205 ("[w]hen selecting 'similar' cases, it appears that the Georgia court systematically overlooks life-sentences that are comparable to the case under review. As a consequence, death sentences that our analysis may identify as excessive appear to be evenhanded."); see also *id.* at 283; Tabak, *supra* note 108, at 823-24. Professor Baldus has been asked by the New Jersey Supreme Court to study the proportionality review mechanisms of that state's capital system, and to determine if race plays a role in sentencing. See *Prosecutorial Discretion*, *supra* note 9, at 371-72.

119. The effective absence of state clemency as a means of avoiding unjust executions is dramatically illustrated by the May 1990 execution of Dalton Prejean. Prejean, a black man, was convicted and sentenced to death by an all-white jury for killing a white Louisiana state trooper at the age of 17. See Shapiro, *A Life in His Hands: Only Governor Buddy Roemer Could Block Dalton Prejean's Execution*, TIME, May 28, 1990, at 23. The case for clemency for Prejean was so strong that the European Parliament — along with Amnesty International, the ACLU, and numerous other organizations — appealed to Governor Buddy Roemer to commute the sentence to life, partly on the ground that Prejean was mentally retarded. See *Protests Fail to Stop Louisiana Execution*, Chicago Tribune, May 19, 1990, at 6. In a statement that indicated the current impotence of executive clemency, Governor Roemer commented, "I'm never happy with these things, but I do not, as a representative of the people, have a choice." Governor Roemer actually *did* have a choice. But he chose not to follow the recommendation of the state pardon and parole board that he grant clemency. See *Man Executed in La.*, New York Newsday, May 19, 1990, at 9; see also Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255 (1990-91); Tabak, *supra* note 108, at 844-45 (discussing the general refusal of governors to grant clemency in the post-Furman years).

they could become so again.<sup>121</sup>

That racial discrimination need not so permeate capital proceedings is illustrated by the ultimate result — thanks to a variety of fortuitous circumstances — in another case arising in the same county as the Johnny Lee Gates case discussed above.<sup>122</sup> Another black man, William Brooks, was tried and sentenced to death in racially inflamed Columbus, Georgia, in 1977 at approximately the same time as Gates, also for the rape and murder of a white woman. Like Gates, Brooks was represented by appointed trial counsel and was sentenced to death by an all-white, improperly selected jury. In 1985, the Eleventh Circuit granted Brooks a retrial, not because of racial discrimination or anything having to do with the death-sentencing proceeding, but rather because the trial court's final instructions to the jury during the guilt phase of the trial improperly shifted to the defendant the burden of persuasion on the question of intent to kill.<sup>123</sup>

Brooks was retried in early 1991. At the retrial, counsel requested and was granted a transfer of venue to another county, where there was far less likely to be extensive pretrial publicity which would affect the outcome.<sup>124</sup> The jury pool from which Brooks' second jury was chosen included a proportion of blacks consistent with the percentage of blacks in the adult population of the county.<sup>125</sup> As a result, despite the prosecutor's use of all ten of his peremptory strikes against blacks, the prosecutor was unable to prevent eight blacks, along with four whites, from being selected to sit on the jury.<sup>126</sup> Individualized, sequestered voir dire was conducted as to each juror.<sup>127</sup> During that questioning, defense counsel asked most of the prospective jurors questions about racial bias,<sup>128</sup> consistent with *Turner v. Murray*.<sup>129</sup>

In these circumstances, in which relatively straightforward jury selection procedures eliminated much of the risk of racial prejudice in the jury composition, the jury, although deciding that enough evidence was presented to find Brooks guilty of the crime,<sup>130</sup> also unanimously decided that his case did not

120. See Bedau, *supra* note 119, at 259-66; DiSalle, *Comments on Capital Punishment and Clemency*, 25 OHIO ST. L.J. 71 (1964); Note, *Executive Clemency In Capital Cases*, 39 N.Y.U. L. REV. 136 (1964).

121. See generally Bedau, *supra* note 119.

122. See *supra* notes 34-46 and accompanying text.

123. See *Brooks v. Kemp*, 762 F.2d 1383 (11th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986). The reversal was based on the Supreme Court's decision in *Francis v. Franklin*, 471 U.S. 307 (1985).

124. See DEATH PENALTY INFORMATION CENTER, CHATTAHOOCHEE JUDICIAL DISTRICT: BUCKLE OF THE DEATH BELT 6-7 (July 1991) [hereinafter BUCKLE OF THE DEATH BELT].

125. Telephone interview with George H. Kendall (Feb. 8, 1991). Kendall was one of Brooks' attorneys.

126. BUCKLE OF THE DEATH BELT, *supra* note 124, at 7.

127. Telephone interview with George H. Kendall, *supra* note 125.

128. *Id.*

129. 476 U.S. 28 (1986).

130. Brooks' counsel maintain that the judge at the retrial improperly failed to charge the jury, during the guilt phase, as to possible lesser included offenses, in violation of *Beck v. Ala-*

warrant the death penalty. Accordingly, the jury sentenced him to life in prison.<sup>131</sup>

The Brooks case dramatically illustrates how certain basic safeguards against discrimination can serve to yield a result less likely to be racially biased. It must be emphasized, however, that there would never have been a retrial in that case had there not been totally fortuitous circumstances. Had the federal appeals court not reversed the conviction on grounds completely unrelated to either racial discrimination or the death sentence, Brooks, like Gates, would remain on death row despite the fact that such discrimination had infected his trial. Moreover, had Brooks not had the good fortune of having been represented by many experienced counsel at his retrial, the outcome of that retrial might have been as flawed by racial prejudice as the original proceeding.

Gates, whose case was deeply infected with racial discrimination, remains on death row — unable, so far, to secure any relief. Even if Gates were to be granted a retrial, however, there are currently no adequate state mechanisms to ensure that racial prejudice would not equally infect his second trial, and he would be left to hope for the fortuities that benefited Mr. Brooks in his second trial. The proposed Fairness In Death Sentencing Act is needed to force states to substantially eliminate racial discrimination in capital sentencing, as they have been forced to do in other areas.

*D. The Proposed Legislation Would Neither Eliminate the Death Penalty Nor Affect Non-Capital Cases*

The proposed Fairness In Death Sentencing Act would not eliminate the death penalty.<sup>132</sup> It would affect only cases in which (a) a valid statistical showing is made of racial discrimination in the imposition of the death penalty and (b) the death row inmate shows that his case fits the proven pattern of racial discrimination and is not explainable by other, nonracial factors.<sup>133</sup> Thus, entire categories of cases would continue to exist in which a death sentence was based on valid, nonracial factors. These cases would not be affected by the proposed Act.<sup>134</sup>

Moreover, as discussed in the preceding section, there are many ways in which racial discrimination can be combatted while retaining capital punish-

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bama, 447 U.S. 625 (1980). Had a proper charge been given, defense counsel believe it likely that the jury would have acquitted Brooks of murder. Telephone interview with George H. Kendall, *supra* note 125.

131. Telephone Interview with George H. Kendall, *supra* note 125.

132. Congressman Hughes, who sponsored legislation identical to the proposed Act in 1990, stated the following during the floor debate concerning the legislation: "Opponents . . . claim that [this legislation] is a Trojan Horse, designed to shut down the death penalty in the United States. I assure you that I would not support any such effort, or any bill which might have that effect." 136 CONG. REC. H9002 (daily ed. Oct. 5, 1990) (statement of Rep. Hughes).

133. See *supra* notes 85-99 and accompanying text.

134. See *infra* notes 152-58 and accompanying text.

ment.<sup>135</sup> If these safeguards were adopted — as the proposed Act would encourage — the likelihood that any death sentences would be infected by racial discrimination would be greatly reduced and there would be few instances in which the Act would apply.

Accordingly, supporters of the death penalty can, and many of them do, support the Fairness In Death Sentencing Act.<sup>136</sup> Indeed, Congressman Hughes, who in 1990 introduced legislation identical to the proposed Act in the House, stated: “if I thought for one minute it would eliminate capital punishment, I would oppose it.”<sup>137</sup> These legislators know that by implementing simple, straightforward measures to prevent racial discrimination from infecting the capital trial, states would be assured that their death sentencing systems would continue to operate — and would do so with a much greater degree of accuracy and fairness.

The proposed Fairness In Death Sentencing Act, which has been specifically drafted to cover only capital sentencing, would have no effect on non-capital cases. Unlike the Supreme Court’s constitutional decisions, which are based on principles whose applicability it may be difficult to limit, a legislative body can limit the scope of the laws it enacts as long as there is some rational basis for its doing so.<sup>138</sup> In balancing the competing policy issues, it would be rational for a statute to limit relief for racial discrimination in sentencing to capital cases. To do so would be in keeping with the principle, repeatedly recognized by the Supreme Court, that the death penalty, because of its finality and irrevocability, is qualitatively different from any other criminal penalty.<sup>139</sup> Hence, the enactment of legislation whose applicability is limited to capital cases would not present the danger which the Supreme Court pointed to in *McCleskey* when it rejected the *constitutional* claim presented therein, *i.e.*, that if that constitutional claim were granted, the Court “could soon be faced with similar claims as to other types of penalty,” which could “throw[] into serious question the principles that underlie our entire criminal justice

135. See *supra* notes 100-31 and accompanying text.

136. See, *e.g.*, 136 CONG. REC. H9009 (daily ed. Oct. 5, 1990) (statement of Rep. Slattery) (“I have voted for three amendments to the legislation before us [the Omnibus Crime Act] that will increase the applicability of the death penalty. . . . I am convinced the [1990 legislation identical to the proposed Act] will not abolish the death penalty.”); *id.* (statement of Rep. Durbin) (“I support the death penalty, but I cannot countenance racial discrimination in the imposition of this sentence”); see also 136 CONG. REC. S6893 (daily ed. May 24, 1990) (statement of Sen. Adams) (“As one who supports the imposition of the death penalty under certain circumstances, I am in strong support of including the [earlier version of the proposed] Act in the Omnibus Crime Act of 1990.”); *id.* at S6894 (statement of Sen. Bradley) (“efforts to determine if discrimination exists are not, as many opponents of the [earlier version of the proposed] Act allege, to get rid of the death penalty; rather they are to make capital punishment work by reducing the risk of racial bias”); *id.* at S6903 (statement of Sen. Biden) (“I support the [earlier version of the proposed] Act . . . as a supporter of the death penalty.”).

137. See 136 CONG. REC. H9010 (daily ed. Oct. 5, 1990).

138. See Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 113-14.

139. See, *e.g.*, *California v. Ramos*, 463 U.S. 992, 998-99 (1983).

system."<sup>140</sup>

#### IV.

#### CRITICISMS OF THE FAIRNESS IN DEATH SENTENCING ACT ARE UNFOUNDED

The proposed Fairness In Death Sentencing Act is a carefully drafted piece of legislation which would grant relief only under specific, limited circumstances where racial discrimination is shown to have affected the outcome in a death penalty case. Yet, congressional opponents of the proposed Act have articulated criticisms which proceed from fundamental misunderstandings of the proposed Act. The final section of this Article will address some of those arguments, and the reasons why they are unfounded.<sup>141</sup>

##### A. *It Is Not True That Statistical Evidence Is Invalid in Proving Racial Discrimination*

One criticism voiced by several opponents of the proposed Act concerns the use of statistical evidence to prove racial discrimination in capital sentencing. Under the proposed Act, statistical evidence may not be used to prove racial discrimination unless that evidence is "valid" and "relevant,"<sup>142</sup> and the court is *required* to review the statistical evidence to determine *specifically* whether it meets various criteria.<sup>143</sup>

Most of the criticisms of the use of statistical evidence under the Act proceed from a fundamental misunderstanding of the nature of modern statistical research in general. The use of valid statistical evidence to prove claims of racial discrimination has long been well-recognized, both by experts in the field and the courts.<sup>144</sup>

The kind of statistical study which has been conducted in the capital sentencing area is a type of "multi-variate statistical analysis" commonly referred to as "multiple-regression analysis."<sup>145</sup> In this type of study, minority and majority group persons who are deemed to be equally qualified (for, e.g., the death penalty), but are affected by a discretionary selection process, are com-

140. *McCleskey v. Kemp*, 481 U.S. 279, 315 (1987) (footnote omitted).

141. Insofar as the following material refers to Senators' criticisms of the Racial Justice Act — the earlier version of the Fairness In Death Sentencing Act — it should be noted that the text of the Racial Justice Act considered by the Senate is different from the text of the Fairness In Death Sentencing Act discussed herein and quoted *supra* in note 6. The Fairness In Death Sentencing Act is a compromise which has weaker anti-discrimination provisions than the Racial Justice Act (as rejected by the Senate in 1990 and 1991 and as approved in 1990 by the House Judiciary Committee). Accordingly, some Senators might have different views if presented with the Fairness In Death Sentencing Act. For the text of the Racial Justice Act which has been defeated in the Senate in 1990 and 1991, see 136 CONG. REC. S12160 (daily ed. Sept. 28, 1989); S. 1249, 102d Cong., 1st Sess., 137 CONG. REC. S7381 (1991).

142. See Proposed Fairness In Death Sentencing Act, *supra* note 6, § 2921(c) & (d).

143. *Id.* § 2921(d).

144. See generally EQUAL JUSTICE, *supra* note 9, at 375-79 (discussing multiple regression analysis in general).

145. *Id.* at 378.

pared to determine disparities in selection.<sup>146</sup> Where subjective selection criteria exist, so that the possibility remains that the various minority and majority group members were not “equally qualified,” any study, in order to be valid, must account for those factors. In order to show that selection was based on majority or minority group status — that is, that discrimination existed — the study must demonstrate that the selection did not result from the nonracial factors.

As Professor Baldus has stated, “[t]he probative force of the statistical evidence in such a case depends upon its ability to eliminate alternate explanations besides purposeful discrimination for the observed disparity.”<sup>147</sup> That is what multiple-regression analysis does; and that is why Professor Baldus’ study, which accounted for well over 200 such nonracial variables, is very strong proof indeed. As Professor Baldus has observed:

As proof of classwide discrimination, the persistence of a statistically significant racial disparity of the magnitude estimated in *McCleskey* — after adjusting for all plausible background variables that would be expected to be an influence in the system — is commonly accepted as proof that race is an influence in a highly discretionary selection-process system and that race was the decisive factor in some decisions. . . . The same logic and methodology has been used not only to establish the now generally accepted fact that cigarette smoking causes cancer, but also to quantify the number of lung cancer deaths annually that are the product of cigarette smoking.<sup>148</sup>

The same type of analysis was conducted in many of the other studies evaluated by the General Accounting Office in preparing its 1990 Report.<sup>149</sup> In that report, the GAO concluded that:

researchers used appropriate statistical techniques to control for legally relevant factors, *e.g.*, prior criminal record, culpability level, heinousness of the crime, and number of victims. The analyses show that after controlling statistically for legally relevant variables and other factors thought to influence death penalty sentencing (*e.g.*, region, jurisdiction), differences remain in the likelihood of receiving the death penalty based on race of the victim.<sup>150</sup>

The ability of modern, sophisticated statistical methods to account for virtually every significant factor influencing a decision makes it a superb form of “circumstantial evidence.”<sup>151</sup> The suggestion that such evidence does not

146. *Id.*

147. *Id.*

148. *Id.* at 378-79.

149. See GAO REPORT, *supra* note 2.

150. *Id.* at S6890.

151. See EQUAL JUSTICE, *supra* note 9, at 379 (“circumstantial evidence — of which multiple-regression analysis is, basically, a sophisticated, quantified variation — can be as probative as direct evidence”). The Supreme Court recently reemphasized the relevance of evidence of a



constitute valid proof of discrimination ignores modern realities long accepted by courts, as well as by statisticians and social scientists.

*B. It Is Not True That All Death Row Inmates Would Benefit from the Fairness In Death Sentencing Act*

Some opponents of the proposed Fairness In Death Sentencing Act have asserted, in arguing against its enactment, that it would grant relief to all death row inmates. For example, in arguing against legislation identical to the proposed Act, Congressman Douglas stated that unless the House struck it from the Omnibus Crime Bill, it would "effectively end the justice that 2,350 sentenced convicts have received from juries and appellate courts in this country. You [will] have commuted their death sentences."<sup>152</sup> Senator Strom Thurmond argued that if the earlier version of the Act were passed and "a study is presented to the court which shows the death penalty is applied in a disproportionate manner," then "[e]very death sentence . . . would be overturned."<sup>153</sup> These statements are incorrect in several respects.

First, a statistical showing of an absolute racial disparity would not, under the Act, be sufficient evidence to carry the petitioner's burden of proof.<sup>154</sup> Even if a death row inmate were to present a statistically valid study showing that the death penalty is applied in a racially discriminatory manner, and that study were to survive a challenge by the state, the inmate would still not have stated a claim under the proposed Act. This is because a petitioner would meet only half of his initial burden by presenting valid, relevant evidence concerning the same time and place and showing a substantial statistical disparity only explainable by race. To state a claim, the petitioner would also have to show that *his case* fits the pattern. If his death sentence is explainable by factors other than race, the state could simply show this and thereby rebut the inmate's evidence.<sup>155</sup>

As noted by Justice Stevens in his opinion in *McCleskey*, there are entire categories of cases in which death sentences have been imposed based on non-

pattern of discriminatory use of peremptory strikes as "circumstantial evidence" of racial discrimination. See *Ford v. Georgia*, 111 S. Ct. 850, 854-55 (1991) (Souter, J.).

152. 136 CONG. REC. H9007 (daily ed. Oct. 5, 1990) (statement of Rep. Douglas).

153. 136 CONG. REC. S6888 (daily ed. May 24, 1990) (statement of Sen. Thurmond).

154. See proposed Fairness In Death Sentencing Act, *supra* note 6, § 2921(c)(2). Congressman McCollum, in opposing legislation identical to the proposed Act, made the following pertinent but erroneous remarks, which incorrectly characterize the proposed Act:

[F]or us to come today and to say that because statistically that more people of one race commit crimes than others of another race, and more people are sentenced to death in one race than of another race, and say that somehow because of that there has to be an inference of discrimination . . . is an absurd situation.

136 CONG. REC. H9004 (daily ed. Oct. 5, 1990) (statement of Rep. McCollum).

155. For example, if the death row inmate's evidence covers a five-year period, in the final year of which his sentence was handed down, the state could effectively rebut the petitioner's evidence through a valid study of the five-year period *commencing* with the year of the petitioner's sentence, if no pattern of discrimination is found in that period.

racial factors, such as the severity of the crime.<sup>156</sup> Professor Baldus has likewise noted, based on his own research, that many cases would fall outside the overall pattern of racial discrimination he has found.<sup>157</sup> Those cases would not be affected by the proposed Act, because in any case in which the state could show that the death sentence fell into a category for which there was no racial disparity, the death row inmate could not get relief under the proposed Act.<sup>158</sup>

*C. It Is Not True That the Fairness In Death Sentencing Act Would Create a "Quota" System*

Critics have also argued that only "mathematical precision" — or a "quota system" — would allow a state to avoid application of the Act. Thus, Senator Bob Graham argued that the earlier version of the Act would require "mathematical precision as applied on a race-by-race basis."<sup>159</sup> Senator Strom Thurmond repeatedly referred to the earlier version of the Act as a "racial quota provision."<sup>160</sup> And Congressman Sensenbrenner stated that legislation identical to the proposed Act would "effectively require a death-by-the-numbers system of quota justice."<sup>161</sup> However, far from making race "the basis of the decision on capital punishment," as Congressman McCollum has suggested,<sup>162</sup> the proposed Act would serve exactly the opposite purpose of *removing* race from such decisions.

A "quota system" would be the most obvious *violation* of the Act. For example, if  $X$  percentage of those who killed whites and  $X$  percentage of those who killed blacks were selected by the state for indictment for capital murder, or were sentenced to death, without taking account of the other factors of each case, the state would clearly be discriminating on the basis of race. Such action would violate the proposed Fairness In Death Sentencing Act.

The essential purpose of the proposed Act is to induce states to be "color-blind" in their capital charging and sentencing decisions. If the proposed Act is enacted, a state would have a strong incentive to give adequate guidance concerning the exercise of prosecutorial discretion in capital cases and to provide other safeguards against racial discrimination — including proportionality review to rectify any substantial disparities that are due to race. If all these measures were to fail to eliminate significant racial discrimination in capital

156. *McCleskey v. Kemp*, 481 U.S. 279, 366-67 (1987) (Stevens, J., joined by Blackmun, J., dissenting).

157. See EQUAL JUSTICE, *supra* note 9, at 3.

158. Of course, if the inmate could offer direct proof that intentional discrimination affected his particular case, he would get relief under the equal protection clause. See *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) ("to prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose" (emphasis in original)).

159. 136 CONG. REC. S6892 (daily ed. May 24, 1990) (statement of Sen. Graham).

160. *Id.* at S6887-88 (statement of Sen. Thurmond).

161. 136 CONG. REC. H9002 (daily ed. Oct. 5, 1990) (statement of Rep. Sensenbrenner).

162. *Id.* at H9004 (statement of Rep. McCollum).

sentencing, the state would still be able to correct the discrimination — through use of the clemency power. Only if all these measures were somehow to fail to correct significant racial discrimination could anyone possibly get relief under the proposed Act in such a state; and relief would not be granted unless racial discrimination is the only explanation for the remaining substantial disparities.

Many Congressmen do understand that the proposed Act is the diametric opposite of a quota bill. For example, Congressman Edwards commented that:

What we are hearing from the opponents of this measure is the same old rhetoric about quotas that we always hear whenever we bring a civil rights measure to the floor. There are no quotas in this bill. It is intended to eliminate quotas, and that is what it would do.<sup>163</sup>

*D. It Is Not True That the Fairness In Death Sentencing Act Would Eliminate the Death Penalty*

Many members of both houses of Congress, in arguing against the Fairness In Death Sentencing Act, and the earlier legislation entitled the Racial Justice Act, have claimed that such a law would abolish the death penalty. For example, Congressman Sensenbrenner argued that legislation identical to the proposed Act “will have the practical effect of eliminating the death penalty in the United States.”<sup>164</sup> Congressman McCollum argued that “it will effectively nullify capital punishment.”<sup>165</sup> Congressman Douglas stated, after legislation identical to the proposed Act was approved by the House, that “we have effectively ended the death penalty in the United States.”<sup>166</sup> Similarly, in the Senate, Senator Thurmond stated that if the Racial Justice Act were passed, “the death penalty would be rendered ineffective and impossible to impose.”<sup>167</sup> Senator Graham referred to the Racial Justice Act as “the Death Penalty Abolition Act.”<sup>168</sup>

These arguments misrepresent both the workings and effects of the proposed Act (and the earlier version thereof). The general thrust of these misstatements is exemplified by the comments of Senator Graham, who stated that:

An inmate must only show that death sentences are being imposed disproportionately on members of one race or on persons who commit crimes against members of one race by using “ordinary methods of statistical proof.” Once that occurs, the burden of proof shifts to

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163. *Id.* at H9003 (statement of Rep. Edwards).

164. *Id.* at H9002 (statement of Rep. Sensenbrenner).

165. *Id.* at H9004 (statement of Rep. McCollum).

166. *Id.* at H9006 (statement of Rep. Douglas).

167. 136 CONG. REC. S6887 (daily ed. May 24, 1990) (statement of Sen. Thurmond).

168. *Id.* at S6884 (statement of Sen. Graham).

the State.<sup>169</sup>

That is simply not true. First, as repeatedly noted above, the inmate would have to show far more than a simple racial disparity. He would have to establish that that disparity was not explainable by any other legitimate factors, such as the heinousness of the crime, etc. Then, he would further have to show that his case fits the discriminatory pattern. As Professor Baldus has noted, "many death sentences are imposed each year in highly aggravated cases in which racial features play no role whatever."<sup>170</sup> If the Fairness In Death Sentencing Act were enacted, and a study of the order of the Baldus study were presented, whole categories of cases would exist which would not fit an overall discriminatory pattern, or would be explainable by other factors, so that no relief would be granted under the Act.<sup>171</sup> Clearly, then, the Fairness In Death Sentencing Act would not abolish the death penalty.

*E. It Is Not True That States Will Act to Correct Racial Discrimination Without the Fairness In Death Sentencing Act*

During floor debate in 1990 on the Racial Justice Act — the earlier version of the proposed Act — Senator Dixon, referring to the testimony on which this article is based, made the following remarks:

Mr. President, I read with interest the testimony of Mr. Ronald J. Tabak, Chairman of the American Bar Association's Death Penalty Committee of the ABA Section of Individual Rights and Responsibilities. [Mr. Tabak] offers a number of interesting ideas as to how the states can reduce the opportunity for race to play a factor [sic] in these cases, without the adoption of the Racial Justice Act. It seems to me that if the States adopted the suggestions Mr. Tabak makes, there would not be a need for the Racial Justice Act.<sup>172</sup>

On this basis, although he stressed that he was opposed to racial discrimination in capital sentencing, Senator Dixon concluded that "we should not adopt the Racial Justice Act."<sup>173</sup>

While the author is grateful to Senator Dixon for his praise of the author's testimony on behalf of the ABA as to how states might eliminate racial discrimination in capital sentencing, it is respectfully submitted that Senator Dixon entirely missed the author's and the ABA's most fundamental point. The plain fact is that virtually all states have not adopted, and will not adopt, the various measures mentioned above and in the ABA's congressional testimony unless strongly induced to do so by congressional action. Unless the proposed Act is passed, the capital punishment system will continue to be

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169. *Id.*

170. EQUAL JUSTICE, *supra* note 9, at 3.

171. See *infra* notes 152-58 and accompanying text.

172. See 136 CONG. REC. S6908-09 (daily ed. May 24, 1990) (statement of Sen. Dixon).

173. *Id.*

permeated with racial prejudice. Occasional fortuities, such as William Brooks' 1991 retrial, where racial discrimination was largely eliminated,<sup>174</sup> will remain isolated instances which will illustrate the continuing arbitrariness and capriciousness of the system.

To suggest now that the Fairness In Death Sentencing Act is not needed because the ABA has identified how states *could* take measures to correct racial discrimination in capital sentencing is like suggesting, in 1963, that because someone had pointed out that states "could," if they chose to, allow blacks to vote freely along with whites and have equal access to public accommodations, the Voting Rights Act of 1965 and the Civil Rights Act of 1964 were not necessary pieces of legislation. Then, as now, such a suggestion would have ignored the reality that most states will not take the necessary actions to deal with racial discrimination in the absence of federal legislation. Accordingly, those Senators and Congressmen who share Senator Dixon's expressed opposition to racial discrimination in capital sentencing should all support the proposed Fairness In Death Sentencing Act.

#### CONCLUSION

Regardless of how one feels about the death penalty in general, racial discrimination in its application is clearly unacceptable. No lawyer should ever have to tell her client, as Justice Brennan noted that a candid lawyer would have had to tell Warren McCleskey, that:

few of the details of the crime or of McCleskey's past criminal conduct were more important than the fact that his victim was white . . . [and] that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks . . . [and] that it was more likely than not that the race of McCleskey's victim would determine whether he received a death sentence: 6 of every 11 defendants convicted of killing a white person would not have received the death penalty if their victims had been black . . . [and] that among defendants with aggravating and mitigating factors comparable to McCleskey's, 20 of every 34 would not have been sentenced to die if their victims had been black . . . [and] that cases involving black defendants and white victims are more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim.<sup>175</sup>

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174. See *supra* text accompanying notes 123-31.

175. *McCleskey v. Kemp*, 481 U.S. 279, 321 (1987) (Brennan, J., dissenting). After having been denied relief once again by the United States Supreme Court in a decision which judicially rewrote Congress' habeas corpus legislation, see Tabak & Lane, *Judicial Activism and Legislative "Reform" of Federal Habeas Corpus*, 55 ALB. L. REV. (1991) (forthcoming) (discussing *McCleskey v. Zant*, 111 S. Ct. 1454 (1991)), Warren McCleskey was denied clemency and was executed by the State of Georgia on September 25, 1991. See Applebome, *Georgia Inmate Is Executed After 'Chaotic' Legal Move*, N.Y. Times, Sept. 26, 1991, at A18, col. 1.

The proposed Fairness In Death Sentencing Act is a compromise measure which nevertheless provides a workable mechanism for dealing with such racial discrimination where it can be adequately proven by valid and relevant statistical evidence. The proposed Act has been carefully drafted to accommodate various criticisms made by those who opposed earlier versions of it. The proposed Fairness In Death Sentencing Act could substantially diminish racial discrimination in capital sentencing, without affecting the ability of states to seek and carry out death sentences in a non-discriminatory way.

It is, therefore, extremely unfortunate that the proposed Act was defeated in the House of Representatives in October 1991 and replaced with a prohibition on the use of statistical evidence to deal with racial discrimination in capital sentencing.<sup>176</sup> Hopefully, the congressional conference committee will remove the prohibition from the 1991 crime bill. Thereafter, Congress should enact the Fairness In Death Sentencing Act as soon as possible.

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176. See Krauss, *supra* note 6.