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## The Futile Quest for Racial Neutrality in Capital Selection and the Eight Amendment Argument for Abolition Based on Unconscious Racial Discrimination

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# THE FUTILE QUEST FOR RACIAL NEUTRALITY IN CAPITAL SELECTION AND THE EIGHTH AMENDMENT ARGUMENT FOR ABOLITION BASED ON UNCONSCIOUS RACIAL DISCRIMINATION

SCOTT W. HOWE\*

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## INTRODUCTION

The modern effort to regulate capital sentencing grew largely out of concerns about racial discrimination.<sup>1</sup> Since 1963, when three Justices dissented from the denial of certiorari in *Rudolph v. Alabama*,<sup>2</sup> through *Furman v. Georgia*<sup>3</sup> and beyond, the specter of racial prejudice animated the agenda for reform.<sup>4</sup> Efforts within the Supreme Court to promote racial neutrality in death sentencing coincided with larger efforts in the wake of the *Brown v. Board of*

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1. See, e.g., STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 247 (2002) ("The idea of mounting a systemic constitutional challenge to the death penalty was an outgrowth of the civil rights movement."); Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1795 (1987) ("From its very beginning, the charge of racism in the administration of the death penalty was often the text and always the subtext of the abolitionist litigative campaign.").

2. 375 U.S. 889 (1963) (Goldberg, Douglas & Brennan, JJ., dissenting from the denial of certiorari). This opinion explicitly raised only the question of whether death was an appropriate punishment for rape, *id.* at 889-91, but was originally inspired in part by concern over racial prejudice in capital sentencing. See, e.g., Interview with Alan M. Dershowitz, Professor at Harvard Law School, in Cambridge, Mass. (Mar. 2, 1988) [hereinafter Dershowitz Interview], in *A PUNISHMENT IN SEARCH OF A CRIME* 330, 331 (Ian Gray & Moira Stanely eds., 1989) (noting that Justice Goldberg, for whom Dershowitz was clerking that year, was primarily concerned about racial disparities in the use of the death penalty). The opinion also spurred lawyers at the NAACP Legal Defense Fund to raise constitutional challenges to death sentences in rape cases based on racial disparities. See generally MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 28-36 (1973) (asserting that the *Rudolph* dissent helped motivate this strategy); Eric L. Muller, Note, *The Legal Defense Fund's Capital Punishment Campaign: The Distorting Influence of Death*, 4 YALE L. & POL'Y REV. 158, 164-68 (1985) (asserting that the *Rudolph* dissent was one factor among others that influenced lawyers at the NAACP Legal Defense Fund to raise the racial-discrimination claims).

3. 408 U.S. 238 (1972) (*per curiam*).

4. See, e.g., Burt, *supra* note 1, at 1795 (noting that racism was a central concern behind the efforts at reform); David McCord, *Judging the Effectiveness of the Supreme Court's Death Penalty Jurisprudence According to the Court's Own Goals: Mild Success or Major Disaster?*, 24 FLA. ST. U. L. REV. 545, 548 (1997) ("[T]he Court has had only one primary goal for its regulation of capital punishment: decreasing overinclusion, with particular interest in minimizing invidious overinclusion due to racial bias."); Comment, *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1473, 1608 (1988) ("In *Furman*, the risk of racial discrimination underlay the concern about arbitrary and capricious application of death sentencing statutes.").

Education decision<sup>5</sup> to stem racial discrimination throughout public institutions.<sup>6</sup>

The quest in the capital sentencing context has failed,<sup>7</sup> although the primary concern has changed from race-of-defendant to race-of-victim discrimination.<sup>8</sup> Numerous studies conducted in many states indicate that a defendant is much less likely to receive a death sentence for the capital murder of a black victim than for the same murder of a white victim.<sup>9</sup> While the results vary with the study and the state, they reveal a widespread problem. The Supreme Court's post-*Furman* decisions on capital sentencing have done little to control the influence of unconscious racial biases.<sup>10</sup>

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5. 347 U.S. 483 (1954).

6. See David C. Baldus et al., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of Its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359, 361 (1994) (noting that the civil rights revolution during the years after 1954 "manifested itself in a series of judicial decisions and legislative enactments directed toward the elimination of discrimination from most major governmental institutions"); see also ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 165 (Levinson ed., 3d ed. 2000) ("Whether because of the pressure of the race-relations cases, including *Brown v. Board of Education*, or because of a more general cultural interest in egalitarianism, the Court in the 1960's would engage in the most systematic exploration of the meaning of equality in American history.").

7. See Scott W. Howe, *The Failed Case for Eighth Amendment Regulation of the Capital-Sentencing Trial*, 146 U. PA. L. REV. 795, 820-23 (1998) (discussing the evidence of race-of-victim discrimination in murder cases in Georgia in the late 1970s and concluding that the Court's post-*Furman* capital-sentencing doctrine had failed "to promote substantial consistency in the distribution of death sentences among all factually guilty capital offenders or even among those actually convicted of capital crimes").

8. The importance of race-of-victim bias in murder cases was perhaps not appreciated in the pre-*Furman* era as much as it is today. Also, some reduction may have occurred in race-of-defendant discrimination in murder cases in certain regions between the 1960s and the 1980s. See, e.g., David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133, 161 (1986) ("[T]he available statistics do not reveal the strong and systematic bias against black defendants characteristic of pre-*Furman* sentencing patterns in the South.") (footnote omitted).

9. See generally Ronald J. Tabak, *Is Racism Irrelevant? Or Should the Fairness in Death Sentencing Act Be Enacted To Substantially Diminish Racial Discrimination in Capital Sentencing?*, 18 N.Y.U. REV. L. & SOC. CHANGE 777, 778 (1990-91) ("[I]n 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.") (footnote omitted); see also *infra* Part II.

10. According to Carol and Jordan Steiker,

The Supreme Court's death penalty law, by creating an impression of enormous regulatory effort while achieving negligible regulatory effects; effectively obscures the true nature of our capital sentencing system, in which the pre-*Furman* world of unreviewable sentencer discretion lives on, with much the

Nonetheless, the Court largely abandoned further efforts toward a solution with its opinion in *McCleskey v. Kemp*,<sup>11</sup> in which it rejected claims based on a study that revealed a high risk that racial prejudice influenced capital selection in Georgia.<sup>12</sup>

The failure to pursue serious remedial actions<sup>13</sup> in the death-penalty arena has no easy explanation.<sup>14</sup> The federal government has made substantial efforts to limit racial discrimination in many areas, such as voting, housing, employment, and public education.<sup>15</sup> Some commentators have argued that the weak effort to remedy the

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same consequences in terms of arbitrary and discriminatory sentencing patterns.

Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 436 (1995). See also Charles L. Black, Jr., *Foreword—The Death Penalty: A National Question*, 18 U.C. DAVIS L. REV. 867, 869 (1985) (“The situation—cosmetically embellished, if you think solemnity in easily penetrable false pretense to be an embellishment—is just the same as the one the Court faced and found intolerable in *Furman*.”). But see McCord, *supra* note 4, at 593 (concluding that the Court’s post-*Furman* regulatory efforts have been neither an “ineffective disaster” nor a “complete success,” but rather have caused a mild reduction in racial discrimination) (emphasis omitted).

11. 481 U.S. 279 (1987).

12. *Id.* at 313. A description of the study that provided the basis for the challenge in *McCleskey* appears in DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY* 40-228, 306-69 (1990).

13. The decisions in *Turner v. Murray*, 476 U.S. 28 (1986), and *Batson v. Kentucky*, 476 U.S. 79 (1986), may have reduced the disparities slightly. *Turner* held that a black capital defendant charged with an interracial murder is entitled to advise prospective jurors of the race of the victim and to inquire about their racial prejudices. See *Turner*, 476 U.S. at 36-37. *Batson* and subsequent cases prohibited the prosecution and the defense from using peremptory strikes to eliminate prospective jurors on racial grounds. See *Batson*, 476 U.S. at 96-98. The effect of *Turner* is limited by the reluctance of prospective jurors to confess racial prejudice. The force of *Batson* is limited by the ability of lawyers to skirt its mandate with a nonracial reason for a strike.

14. The evidence of disparities continues to raise public controversy. See, e.g., Frank Green, *Bias on Death Penalty?: Landmark '87 Ruling Hasn't Stilled Debate*, RICH. TIMES-DISPATCH, Apr. 23, 2001, at B1 (noting that Elisabeth Semel, of the American Bar Association, asserted that “[t]he numbers, when you look at them ... they are shameful”); see also Bob Herbert, *Pull the Plug*, N.Y. TIMES, Apr. 24, 2003, at A31 (contending that the death penalty, based in part on racial bias in capital selection, is a “rotten edifice” that should be abolished); Scott Turow, *To Kill or Not To Kill: Coming To Terms with Capital Punishment*, NEW YORKER, Jan. 6, 2003, at 40, 44 (criticizing the use of the death penalty in Illinois in part based on racial bias in the selection of those to be executed).

15. See, e.g., Baldus et al., *supra* note 6, at 361 (pointing to the “series of judicial decisions and legislative enactments directed toward the elimination of discrimination from most major governmental institutions—voting, employment, housing, public education, and the delivery of other public services”).

racial disparities in the capital sentencing context is aberrational in light of these advances.<sup>16</sup> Although the Supreme Court has not been alone in failing to act,<sup>17</sup> a few commentators have even said that history will rank *McCleskey* with *Dred Scott*<sup>18</sup> as among the worst majority opinions in Supreme Court history.<sup>19</sup> Of course, some deny that the study supporting the challenge in *McCleskey* sufficiently established the influence of racial prejudice,<sup>20</sup> just as they deny that any statistical study can adequately prove racial discrimination in a context as complicated as capital selection.<sup>21</sup> Critics of the disparities commonly contend, however, that these views build on unrealistic demands for certainty.<sup>22</sup> Indeed, the

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16. See *id.* ("One institution that lags behind in this regard, however, is the criminal justice system, particularly as it applies to capital punishment.").

17. Since *McCleskey*, Congress also has eschewed remedial efforts. See *id.* at 403-04 (noting that two federal legislative proposals, the Racial Justice Act and the Fairness in Death Sentencing Act, were each defeated on multiple occasions). Likewise, the legislatures of death-penalty states have rarely required reform.

In 1998, however, Kentucky became the first state to pass legislation to allow death-row inmates to attack their death sentences based on statistical evidence of racial discrimination. It remains to be seen how Kentucky courts will apply the law. Entitled the Kentucky Racial Justice Act, the law does not apply retroactively, requires the capital defendant to attack his prosecution before trial, requires the defendant to prove by clear and convincing evidence that "race was the basis of the decision to seek the death penalty" in his case, and allows the prosecution to rebut the defendant's case with evidence that the prosecution is not based on race. KY. REV. STAT. ANN. §§ 532.300-.309 (Michie 1999).

18. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

19. See, e.g., Hugo Adam Bedau, *Someday McCleskey Will Be Death Penalty's Dred Scott*, L.A. TIMES, May 1, 1987, at Pt. II, 5 ("I predict that in the future, historians will look back on *McCleskey* and judge it to be yet another of the Court's great failures—along with *Dred Scott* ...."); see also Michael Mello, *Executing Rapists: A Reluctant Essay on the Ethics of Legal Scholarship*, 4 WM. & MARY J. WOMEN & L. 129, 197 (1997) ("Someday, perhaps, the Supreme Court will bury *McCleskey* the way it buried another racist opinion from another era, *Dred Scott* ....") (footnote omitted).

20. See, e.g., *McCleskey v. Zant*, 580 F. Supp. 338, 379 (N.D. Ga. 1984) (concluding that the data base was flawed and that the statistical methods used to analyze the data were unreliable).

21. In opposing the proposed federal Racial Justice Act, for example, Senator Orrin Hatch argued that "[a]uthoritative studies simply do not support the conclusion ... that racial animus is distorting the capital sentencing system." 136 CONG. REC. 12,281 (1990), quoted in Baldus et al., *supra* note 6, at 379 n.95. See also Stanley Rothman & Stephen Powers, *Execution by Quota?*, PUB. INT., Summer 1994, at 3, 8 ("On the basis of the available research, one simply cannot conclude that racial discrepancies are a function of racism.").

22. See, e.g., BALDUS ET AL., *supra* note 12, at 370 (contending that, by suggesting in *McCleskey* that "classwide statistical evidence alone was not relevant to the issue of discrimination in an individual defendant's case[,] ... the Court ... created a nearly insuperable barrier to proof").

accumulated research now strongly implies that unconscious racial bias influences capital selection on a widespread basis, a conclusion sufficient to raise questions about the lack of more serious remedial action.<sup>23</sup>

This Article asks what the Supreme Court might have done differently to achieve racial neutrality in capital selection, but concludes that the goal is unattainable as a practical matter, except through abolition. Many commentators who have criticized the Court for inaction have avoided the question of how to achieve racial neutrality.<sup>24</sup> Other critics have argued that states could attain racial neutrality, without seriously reducing levels of death sentencing, by employing monitoring systems grounded in sophisticated statistical techniques.<sup>25</sup> Likewise, Professor Randall Kennedy, who has written one of the more prominent scholarly criticisms of the disparities, has argued that states could actually "level-up,"<sup>26</sup> meaning that they could increase the number of death sentences in racial categories where the sanction is less utilized, particularly black-on-black murders, while maintaining existing levels of death sentencing in other racial categories.<sup>27</sup> In contrast to these

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23. See *infra* Part II.

24. See, e.g., *The Supreme Court, 1986 Term—Leading Cases*, 101 HARV. L. REV. 119, 155 (1987) (criticizing the *McCleskey* Court for choosing "to uphold the status quo rather than remedy injustice" but not specifying what remedial action the Court should have ordered).

25. See, e.g., Baldus et al., *supra* note 6, at 361-64, 402-05, 418 (arguing for the use of statistical monitoring and evaluation techniques in accordance with basic approaches suggested by proposed federal legislation and concluding merely that these reforms could be implemented "without unduly interfering with the entire capital sentencing process").

26. See Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1436 (1988) ("[T]he level-up solution ... rests on the assumption that put to a choice, jurisdictions committed to capital punishment would opt to increase the level of capital sentencing for black-victim murders rather than abolish capital punishment or lower the level of capital sentencing for white-victim murders.") (footnote omitted); *id.* at 1436-39 (arguing that the level-up remedy is a viable solution); see also RANDALL KENNEDY, *RACE, CRIME AND THE LAW* 344-45 (1997) (reiterating that leveling up is feasible); cf. David Dolinko, *Supreme Court Review—Foreword: How To Criticize the Death Penalty*, 77 J. CRIM. L. & CRIMINOLOGY 546, 582 (1986) (asserting that, even if the statistical studies reveal racial prejudice, "such bias may be eliminable without abandoning capital punishment altogether").

27. Retentionists have not seriously pushed leveling-up as a remedy but have sometimes used the idea to try to counter arguments for abolition based on racial discrimination. See, e.g., H.R. REP. NO. 103-458, at 14 (1994) (dissenting views on Racial Justice Act, H.R. 4017) (asserting that if the proposed law were truly aimed at eliminating racial disparities in capital sentencing, "the solution would be to seek the death penalty in more cases in which



positions, I conclude that federal efforts to ensure racial neutrality in capital selection, other than through abolition, could succeed only by causing both a near meltdown in the use of capital punishment and an administrative morass for the federal courts.<sup>28</sup>

In light of this first conclusion, the Article also reexamines the Eighth Amendment argument that racial discrimination justifies abolition. The problem of racial prejudice informed the petitioners' Eighth Amendment arguments for abolition in *Furman* and its companion cases<sup>29</sup> and certainly influenced the *Furman* decision

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black defendants murder black victims"); John McAdams, *It's Good, and We're Going to Keep It: A Response to Ronald Tabak*, 33 CONN. L. REV. 819, 827 (2001) (arguing that no basis exists to prefer abolition rather than leveling-up as a remedy for racial disparities, so that "the racial disparity argument is a pretext, not a genuine reason for opposing the death penalty"); Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1665 n.14 (1986) [hereinafter van den Haag, *The Ultimate Punishment*] ("For most abolitionists, the discrimination argument ... is nondecisive: they would favor abolition even if there could be no racial discrimination.") (citation omitted); cf. Ernest van den Haag, *The Death Penalty Once More*, 18 U.C. DAVIS L. REV. 957, 960-61, 961 n.23 (1985) (arguing in a footnote that "the discrimination against black victims is invidious and should be corrected" while asserting in the text that the race-of-victim discrimination favors black murderers so as to undermine the grounds for complaint). However, they have also repeatedly opposed federal legislation requiring racial neutrality in capital selection, which suggests that they do not believe that leveling-up or re-selection is practical. See, e.g., KENNEDY, *supra* note 26, at 347 ("The inference [opponents of the Racial Justice Act] draw is that the total neglect of the leveling-up alternative by supporters of the [Act] evidences a concern not so much with racial justice as with impeding the administration of capital punishment by all available means.").

28. As a matter of theory, of course, leveling-up can eliminate racially disproportionate distributions. See, e.g., Howe, *supra* note 7, at 860 ("[T]he disproportionately low distribution of capital sentences against killers of black victims could be solved through increased use of the death penalty in black-victim cases.") (footnote omitted); Scott W. Howe, *The Troubling Influence of Equality in Constitutional Criminal Procedure: From Brown to Miranda, Furman and Beyond*, 54 VAND. L. REV. 359, 443 n.410 (2001) ("[A] proportionate distribution according to the race of the victim can be achieved through increasing the use of the death penalty in black victim cases ...."). We will see, however, that all proposed remedies to eliminate the disparities are impractical, see *infra* Part III, and, further, that the disparities themselves are only symptoms of a deeper Eighth Amendment problem that leveling-up would not address. See *infra* Part IV.B.

29. See Brief for Petitioner at 54, *Aikens v. California*, 406 U.S. 813 (1972) (No. 68-5027), reprinted in 73 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 401 (Philip B. Kurland & Gerhard Casper eds., 1975) ("Whether it happen by accident or design that penalties of this sort fall most furiously upon the poor and friendless and upon racial minorities, the supposed 'acceptance' of the penalty is nonetheless a product of the outcast nature of those who bear the brunt of it."); MELTSNER, *supra* note 2, at 269 (noting Professor Anthony Amsterdam's argument in *Aikens* that the proper measure of Eighth Amendment constitutionality should focus on whether society

striking down capital punishment as it then existed.<sup>30</sup> All but two of the Justices in *Furman* rejected abolition,<sup>31</sup> however, and the Court subsequently has declared consistently that procedural safeguards can satisfy constitutional demands for nonarbitrariness in capital selection.<sup>32</sup> The racial-discrimination argument for Eighth Amendment abolition was never developed extensively and is now largely forgotten.<sup>33</sup>

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would accept a death penalty administered in consistent fashion).

30. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 364 (1972) (Marshall, J., concurring) (noting that studies suggested race-based discrimination as one reason for a high level of executions among black defendants).

31. Only Justices Brennan and Marshall concluded that the death penalty was altogether unconstitutional. See *Furman*, 408 U.S. at 305 (Brennan, J., concurring) ("The punishment of death is ... 'cruel and unusual,' and the States may no longer inflict it as a punishment for crimes."); *id.* at 359 (Marshall, J., concurring) ("There is no rational basis for concluding that capital punishment is not excessive. It therefore violates the Eighth Amendment.") (footnote omitted). The three other Justices who concurred in the majority decision each found then-existing systems of capital selection inadequate but did not declare capital punishment *per se* unconstitutional. See *id.* at 256-57 (Douglas, J., concurring) ("[T]hese discretionary statutes are ... pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments."); *id.* at 309-10 (Stewart, J., concurring) ("[O]f all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.") (footnotes omitted); *id.* at 313 (White, J., concurring) ("[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and ... there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.").

32. In *McCleskey*, the Court stated,

Because McCleskey's sentence was imposed under Georgia sentencing procedures that focus discretion 'on the particularized nature of the crime and the particularized characteristics of the individual defendant,' ... we lawfully may presume that McCleskey's death sentence was not 'wantonly and freakishly' imposed ... and thus that the sentence is not disproportionate within any recognized meaning under the Eighth Amendment.

*McCleskey v. Kemp*, 481 U.S. 279, 308 (1987) (citations omitted); see also *id.* at 313 ("Despite these imperfections, our consistent rule has been that constitutional guarantees are met when 'the mode [for determining guilt or punishment] itself has been surrounded with safeguards to make it as fair as possible.'") (alteration in original) (citation omitted).

33. During the post-*Furman* era, the argument for Eighth Amendment abolition based on racial discrimination was sometimes presented, though in truncated form, by Justices Brennan, Marshall, and Blackmun. Discussion about judicial abolition has generally been sparse, with some noteworthy exceptions regarding arguments both favoring and opposing an abolitionist interpretation of the Eighth Amendment. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA* 213-14 (1990) (contending that the abolitionist argument is defeated by language in other amendments indicating that the original understanding was that capital punishment was not cruel and unusual punishment); RONALD DWORKIN, *FREEDOM'S*

This Article explains why the racial-discrimination problem should challenge prevailing thought about judicial abolition. The Eighth Amendment measure for when a punishment will be constitutionally banned focuses heavily on whether a societal consensus has developed against the sanction.<sup>34</sup> The argument against the death penalty faces difficulty under this test because many states still strongly support capital punishment.<sup>35</sup>

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LAW 301 (1996) (contending that language in other amendments contemplating capital punishment "merely confirms what the framers themselves thought" and "cannot assist judges any more than the fact that the framers of the Fourteenth Amendment accepted segregated schools assists in understanding the equal protection clause"); ANTONIN SCALIA, A MATTER OF INTERPRETATION 145 (1997) ("[I]t is entirely clear that capital punishment, which was widely in use in 1791, does not violate the abstract moral principle of the Eighth Amendment."); LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF 154 (1996) ("Capital punishment might violate the Constitution's general prohibition even if its authors did not recognize this fact.").

34. See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (plurality opinion) (rejecting challenge to the use of the death penalty against those who murder when sixteen or seventeen years of age and pointing to insufficient evidence of a societal consensus against such application of the sanction).

Polling data regarding support for the death penalty has been summarized as follows:

Between 1977 and 1998 the percentage of those polled who favored the death penalty for murder fluctuated between 66 and 76 percent. The percentage who opposed the death penalty fluctuated between 19 and 28 percent. (Some people report no opinion, so the percentages do not add to 100.) This was a degree of support consistently higher than at any time since the first polls on the issue were taken in the 1930s. After a long period of growing skepticism, public opinion had quickly and decisively swung back toward capital punishment.

BANNER, *supra* note 1, at 275; see also Samuel R. Gross, *Update: American Public Opinion on the Death Penalty—It's Getting Personal*, 83 CORNELL L. REV. 1448, 1449 (1998) (noting that the best annual public opinion poll indicates that support for the death penalty for murder ranged from 70% to 76% between 1982 and 1996 and that these figures "represent[] a very high level of support for the death penalty and a great increase over earlier decades").

35. As of January 30, 2004, the total number of executions since 1976 and the death-row populations for each of the relevant U.S. jurisdictions were as follows:

|                | Executions<br>Since 1976 | Current<br>Death Row |
|----------------|--------------------------|----------------------|
| 1) Texas       | 321                      | 458                  |
| 2) Virginia    | 90                       | 27                   |
| 3) Oklahoma    | 73                       | 106                  |
| 4) Missouri    | 61                       | 60                   |
| 5) Florida     | 58                       | 381                  |
| 6) Georgia     | 34                       | 114                  |
| 7) N. Carolina | 31                       | 205                  |
| 8) S. Carolina | 29                       | 76                   |

The racial-discrimination argument, however, views the evidence of societal acceptance of capital punishment as itself molded by unconscious racial biases and denies that such evidence can be the measure of constitutionality. Instead, the racial-discrimination argument contemplates that the decision about abolition must confront the discrimination problem openly. According to this view, the appropriate question is whether the Supreme Court can implement and enforce measures to ensure that capital selection, even in the aggressive death-penalty states, will be essentially free of the influence of racial biases. This Article shows why that task is not feasible.

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|                   |    |     |
|-------------------|----|-----|
| 9) Alabama        | 28 | 196 |
| 10) Louisiana     | 27 | 92  |
| 11) Arkansas      | 26 | 40  |
| 12) Arizona       | 22 | 128 |
| 13) Delaware      | 13 | 21  |
| 14) Illinois      | 12 | 8   |
| 15) Ohio          | 11 | 213 |
| 16) Indiana       | 11 | 39  |
| 17) California    | 10 | 634 |
| 18) Nevada        | 10 | 89  |
| 19) Utah          | 6  | 10  |
| 20) Mississippi   | 6  | 69  |
| 21) Washington    | 4  | 11  |
| 22) Maryland      | 3  | 12  |
| 23) Nebraska      | 3  | 7   |
| 24) Pennsylvania  | 3  | 237 |
| 25) Federal       | 3  | 28  |
| 26) Kentucky      | 2  | 37  |
| 27) Montana       | 2  | 5   |
| 28) Oregon        | 2  | 31  |
| 29) Colorado      | 1  | 3   |
| 30) Idaho         | 1  | 21  |
| 31) New Mexico    | 1  | 2   |
| 32) Tennessee     | 1  | 104 |
| 33) Wyoming       | 1  | 1   |
| 34) New Jersey    | 0  | 15  |
| 35) Connecticut   | 0  | 7   |
| 36) Nebraska      | 0  | 7   |
| 37) U.S. Military | 0  | 7   |
| 38) New York      | 0  | 5   |
| 39) South Dakota  | 0  | 4   |
| 40) Kansas        | 0  | 7   |

See DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 2-3, *available at* <http://www.deathpenaltyinfo.org/FactSheet.pdf> (last updated Mar. 30, 2004).

This Article also provides a larger theory about the Eighth Amendment to explain why racial discrimination in capital selection matters. The explanation builds on a deserts-limitation principle. The core restriction that the Eighth Amendment imposes on the use of capital punishment is that only offenders who deserve death should receive that sanction.<sup>36</sup> The Supreme Court's capital-sentencing doctrine builds on this principle, although the Court has usually avoided any suggestion that the Eighth Amendment speaks to the substantive standard that defines who is death eligible. The Court has stated that *Furman* and its progeny simply call for "reasonable consistency" or "nonarbitrariness" in the use of capital punishment.<sup>37</sup> This empty mandate has not been taken seriously even as a proscription against racial prejudice, perhaps in part because it does not clarify *why* unconscious racial bias should matter enough to reverse death sentences. After all, as commentators have frequently noted, murderers who deserve death do not deserve death any less simply because other similarly situated murderers are spared.<sup>38</sup> Yet, when the Eighth Amendment is

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36. See *infra* text accompanying notes 85-86; see also Howe, *supra* note 7, at 829-35 (explaining why this principle comports with the Eighth Amendment and best explains the Supreme Court's capital-sentencing doctrine); Howe, *supra* note 28, at 438-42.

37. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 222 (1976) (White, J., concurring) (asserting that, after *Furman*, a death sentencing scheme must "result in death sentences being imposed with reasonable consistency"); *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (plurality opinion) (asserting that *Furman* had mandated that states replace "arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death"); WELSH S. WHITE, *THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* 135 (1991) ("*Furman* invalidated a system of capital punishment that produced arbitrary results."); Stephen P. Garvey, *Death-Innocence and the Law of Habeas Corpus*, 56 ALB. L. REV. 225, 228 (1992) ("[T]he evil condemned in *Furman* has subsequently come to be identified with inconsistency in the way the penalty was administered.") (footnote omitted).

38. See, e.g., RANDALL COYNE & LYN ENTZEROTH, *CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS* 198 (2001) ("Death penalty supporters respond to arguments of racial bias in capital cases by arguing, principally, that society's interest in retribution, justice and concern for the victims of the crime and their families trump equal protection concerns."); SEIDMAN & TUSHNET, *supra* note 33, at 160 (asking, "[i]f Allen [an African American] really deserves to die, why should he be spared simply because Bob [a white man] has wrongly beaten the system?" and concluding that "[s]paring Allen in these circumstances seems to violate the schoolyard maxim that two wrongs don't make a right"); Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177, 1178-79 (1981) ("Retributivists justify the death penalty despite substantial evidence that it has been inequitably applied by arguing that inequitable application is not

understood to impose a deserts limitation on the use of capital punishment, it becomes clearer why unconscious racial discrimination matters greatly. If we recognize the capital-sentencing inquiry itself as an effort mandated by the Eighth Amendment to ensure that death-sentenced offenders deserve death, the evidence of racial discrimination reveals the pervasive inability of decision makers to determine deserts appropriately. The claim that those who receive death sentences deserve them no longer trumps concern about racial discrimination.<sup>39</sup>

This Article proceeds in four stages. Part I explains the central characteristics of post-*Furman* capital selection that promote the influence of racial bias. Part II summarizes the evidence that racial bias has continued to widely plague capital selection despite the Supreme Court's post-*Furman* efforts. Part III asks whether the Supreme Court should have pursued an alternative regulatory approach, but concludes that racial discrimination in capital selection is ineradicable by federal regulation except through methods that would cause both minimal use of capital punishment and an administrative nightmare for the federal courts. Part IV then develops the argument that unconscious racial prejudice in capital selection justifies judicial abolition. The Article concludes that the racial-discrimination problem can justify abolition under the Eighth Amendment.

## I. CHARACTERISTICS OF POST-*FURMAN* CAPITAL SELECTION THAT PROMOTE THE INFLUENCE OF RACIAL BIAS

Capital selection in the post-*Furman* era still lends itself to the influence of racial discrimination by decision makers who are almost all white.<sup>40</sup> Four factors play a central role: (1) the broad

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inherent in the penalty, and that it is better that some receive their just deserts, however biased the sample executed, than that none do."); van den Haag, *The Ultimate Punishment*, *supra* note 27, at 1663 ("Maldistribution of any punishment among those who deserve it is irrelevant to its justice or morality.").

39. See Lempert, *supra* note 38, at 1178 ("[T]he just desert theory [does not] allow personal characteristics such as sex, race, or national status to dominate indicia of moral culpability in determining punishment.") (footnote omitted).

40. See Jeffrey J. Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 CORNELL L. REV. 1811, 1817 tbl.1 (1998) (noting that the percentage

application of the death penalty to non-negligent homicide; (2) the decentralized decision making exercised by prosecutors and capital-sentencing juries; (3) the extreme deference that courts extend to prosecutors on basic matters such as charging and plea bargaining; and (4) the expansive discretion given to capital sentencers. This Part briefly explores how these four factors combine to create a system in which unconscious racial discrimination may easily affect decisions, and sets the stage for later discussion showing why racial influences in capital selection elude control.

### *A. Broad Applicability of Death Penalty*

The broad applicability of the death penalty promotes the influence of racial prejudice by extending discretionary decision making to cases in which the propriety of the death penalty is unclear. Under Supreme Court doctrine, the death penalty can apply to most criminal homicides, and death-penalty states typically make the death penalty a possibility for most murders.<sup>41</sup> The result is significant variation in the propriety of the death penalty among potential capital cases. Making the death penalty possible where its propriety is unclear creates the potential that racial bias will affect outcomes.

By historical standards, the death penalty is now constitutional for only a small group of crimes.<sup>42</sup> The Supreme Court has outlawed the sanction for typical, nonhomicidal felonies, such as rape or robbery, where no one dies.<sup>43</sup> The Justices have also proscribed the

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of death-penalty decision makers who were white in all death-penalty states except New Mexico was well over 90% and, in most, was 100%); see also Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 454-57 (1995) (noting that capital-sentencing juries are often entirely white).

41. See *infra* text accompanying note 52.

42. See BANNER, *supra* note 1, at 5 (noting that Colonial America employed the death penalty for a large variety of crimes which are not punishable by death today).

43. In *Coker v. Georgia*, 433 U.S. 584 (1977), a plurality of four justices concluded that death is always a disproportionate punishment for "a rape not involving the taking of life." *Id.* at 599 (plurality opinion). Three other Justices agreed with the judgment, two on broader grounds and one on narrower grounds. Justices Brennan and Marshall each separately concurred on grounds that the death penalty is altogether unconstitutional. See *id.* at 600 (Brennan, J., concurring); *id.* (Marshall, J., concurring). Justice Powell concluded that the death penalty was not always unconstitutional for rape, although it was excessive on the

penalty for a small number of defendants who fall within the fringes of the felony-murder rule through vicarious liability doctrine.<sup>44</sup> The Court has also banned the execution of previously death-sentenced inmates who are insane,<sup>45</sup> defendants who were under sixteen at the time of their offenses, except in extraordinary circumstances,<sup>46</sup> and only recently, those who are retarded.<sup>47</sup>

States must also further reduce the group subject to the death penalty, but this further narrowing is often minimal.<sup>48</sup> State legislatures must reduce the group by articulating "aggravating circumstances," at least one of which a jury must find as a prerequisite to a death sentence.<sup>49</sup> However, the Court has not prohibited states from specifying a long list of aggravating factors that together cover almost all murders.<sup>50</sup> Hence, this narrowing mandate does not confine the use of the death penalty to a small subsection of the worst murderers.<sup>51</sup>

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particular facts in *Coker*. See *id.* at 603 (Powell, J., concurring in part and dissenting in part).

44. In *Enmund v. Florida*, 458 U.S. 782 (1982), the Court outlawed the death penalty for felony murderers who did not intend to, attempt to, or actually kill. See *id.* at 797 (concluding that death is excessive punishment "for the robber who, as such, does not take human life"). On the other hand, in *Tison v. Arizona*, 481 U.S. 137 (1987), the Court authorized the death penalty for those within the *Enmund* exception who demonstrated reckless indifference to human life and were major participants in the underlying felony. See *id.* at 158 (holding that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement").

45. See *Ford v. Wainwright*, 477 U.S. 399 (1986).

46. The Court has not articulated an age below which a state may never execute a minor. In *Thompson v. Oklahoma*, 487 U.S. 815 (1988), however, Justice O'Connor's decisive, concurring opinion concluded that the death penalty was excessive for fifteen-year-old offenders where a state's legislation failed to specify an intent to execute such young offenders. See *id.* at 857-58 (O'Connor, J., concurring in judgment) (reasoning that those who were under sixteen when they offended should not be executed where it was not apparent that the legislature had carefully considered the application of the death penalty to them). The Court has upheld the execution of sixteen- and seventeen-year-old offenders. See *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) ("We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age.").

47. See *Atkins v. Virginia*, 536 U.S. 304 (2002).

48. See, e.g., *Steiker & Steiker*, *supra* note 10, at 384 (concluding that the special circumstances in the California statute do not significantly narrow the availability of the death penalty in murder cases).

49. See *Howe*, *supra* note 7, at 808-10 (discussing the narrowing requirement).

50. See *id.* at 816-17 ("[T]he Court has never demanded through the narrowing mandate that capital-sentencing systems substantially circumscribe the group subject to execution.").

51. See, e.g., *Steiker & Steiker*, *supra* note 10, at 384 (noting that neither the Georgia nor



Most death-penalty states allow the capital sanction for a very broad array of murders. Some differences exist in the definitions of capital crimes.<sup>52</sup> For example, in Georgia, any person convicted of simple murder may face a death-sentencing hearing,<sup>53</sup> while in Louisiana, the capital statute includes only certain aggravated murders.<sup>54</sup> Nonetheless, in general, "death eligibility remains remarkably broad—indeed, nearly as broad as under the expansive statutes characteristic of the pre-*Furman* era."<sup>55</sup>

The broad application of the capital sanction probably encourages the influence of racial bias, because racial bias probably matters most in cases that are not on the extremes.<sup>56</sup> Although categorizing

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the California statutes, which the Court has upheld, limit the death penalty to a "small subclass").

52. State laws also vary in such matters as whether the jury must find the existence of an aggravating factor unanimously and what standard of proof should apply in deciding whether the factor exists. For a summary of variations among states on these and other aspects of the capital sentencing decision, see McCord, *supra* note 4, at 561-67.

53. See GA. CODE ANN. § 16-5-1(d) (2003) (defining murder and stating that a person convicted of murder "shall be punished by death or by imprisonment for life").

At a sentencing hearing in Georgia, the jury need only find one aggravating circumstance from a list that covers virtually all murders. The list includes ten possible aggravating factors, several of which are extremely broad. See GA. CODE ANN. § 17-10-30 (2003). This statute has remained essentially unchanged since its enactment shortly after *Furman*, and the Baldus Study concluded that "more than ninety percent of the pre-*Furman* death sentences [in Georgia] were imposed in cases whose facts would have made them death-eligible under Georgia's post-*Furman* statute." BALDUS ET AL., *supra* note 12, at 102.

54. See LA. REV. STAT. ANN. § 14:30 (2003) (defining first-degree murder as the "killing of a human being" committed in one of seven specified circumstances).

At a sentencing hearing in Louisiana, however, the jury need only find at least one of twelve aggravating factors that together will cover most capital offenses. See LA. CODE CRIM. PROC. ANN. art. 905.4 (2003) (setting forth twelve aggravating circumstances).

55. See Steiker & Steiker, *supra* note 10, at 373.

56. See, e.g., Baldus et al., *supra* note 6, at 366 (noting that the results of the Baldus Study in Georgia revealed that "among the moderately aggravated cases—the so-called 'mid-range' of cases—in which the facts neither called out strongly for life ... nor for death ... the race-of-victim disparities were much greater") (footnote omitted); Arnold Barnett, *Some Distribution Patterns for the Georgia Death Sentence*, 18 U.C. DAVIS L. REV. 1327, 1350 (1985) (concluding that race-of-victim effects are strongest in mid-range cases after classifying cases in the Baldus data set based on three principal criteria).

the “deathworthiness”<sup>57</sup> of capital offenders is highly subjective,<sup>58</sup> some researchers have contended that in cases they view as being in the mid-range of aggravation, racial disparities are pronounced.<sup>59</sup> However, in cases they classify as being in the most-aggravated and the least-aggravated ranges, racial disparities are diminished.<sup>60</sup> Thus, they have contended that the influence of racial bias will most often matter where the proper outcome is not otherwise clear.<sup>61</sup>

### *B. Decentralized Decision Makers*

Capital selection also involves highly decentralized decision making, which generally forecloses a sense of responsibility by individual arbiters for system-wide racial disparities. The most important decision makers are the prosecutors who determine whether to pursue the death penalty and the sentencers who ultimately decide whether to impose that sanction.<sup>62</sup> These actors operate in local contexts and with minimal, if any, coordination, which gives them little perspective or control regarding state-wide sentencing patterns.

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57. See Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 *FORDHAM L. REV.* 21, 26 (1997) (“Deathworthiness is broad enough to include all of the factors relevant to the sentencing decision: the defendant’s culpability for the crime, as well as his character, record, and background, and the circumstances and character of the murder.”).

58. See *infra* Part I.D.

59. See, e.g., Baldus et al., *supra* note 6, at 410 (“As was the case in our Georgia study, the New Jersey data also show a concentration of race effects in the mid-range of cases in which the ability to exercise discretion is the greatest.”) (footnote omitted).

60. See BALDUS ET AL., *supra* note 12, at 145 (“[W]e found that, when the crime involved was either extremely aggravated or comparatively free from aggravating circumstances, the choice between a life and a death sentence was relatively clear; and, regardless of racial factors, Georgia prosecutors and juries responded accordingly.”).

61. See, e.g., *id.* (reiterating the theory of Kalven and Zeisel that “juries were most influenced by legally irrelevant or impermissible considerations when the evidence of guilt was ambiguous and the case was close”); Kennedy, *supra* note 26, at 1430-31 n.196 (“Officials feel most ambivalent with respect to this [mid-range] category, thus providing an opening for racial bias to enter.”).

62. See Hans Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 *HARV. L. REV.* 456, 466 (1981) (“[T]he prosecutor has overpowering control over the flow of offenders to death row.”); *infra* Part I.D. (discussing sentencers).

District Attorneys in death-penalty states usually serve at the county level or in an area that includes only a few counties. For example, in Georgia, there are 46 District Attorneys; in Missouri, there are 115; and, in Texas, there are 148.<sup>63</sup> These officials have enormous influence over which potential capital defendants will proceed toward a death sentence and which will be spared. They decide whether to charge a supposed murderer with a capital crime, whether to allow a charged capital defendant to plead guilty to a lesser, noncapital offense, and whether to continue to seek the death penalty after a conviction on a capital charge.<sup>64</sup> In making these decisions, local District Attorneys act with great independence.<sup>65</sup>

Sentencers in capital cases also differ for each case and act independently. Juries rather than judges serve as the capital sentencer in most death-penalty jurisdictions, and the Constitution now guarantees a capital defendant that a jury will determine the existence of the aggravating circumstances defining death eligibility.<sup>66</sup> Juries represent a local community and, even in large urban areas, rarely include members who have served on another capital case.

Localized, independent decision making reduces the odds that the arbiters will know the details of system-wide sentencing patterns or care about them. In deciding how to proceed in a capital case, a prosecutor will lack the information needed to compare the case to all other potential capital prosecutions in the state. Even if the prosecutor could make such a comparison, he probably would not weigh the information heavily because he would likely view his

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63. See Pokorak, *supra* note 40, at 1817 tbl.1.

64. See Zeisel, *supra* note 62, at 466 (discussing these "three crucial opportunities" for the prosecutor "to intervene in the criminal process").

65. Some states provide by statute that the state Attorney General has general supervisory authority over District Attorneys, but the parameters of that authority typically are unclear. See, e.g., Criminal Justice Act of 1970, N.J. STAT. ANN. § 52:17B-98, 103 (describing the New Jersey Attorney General as "chief law enforcement officer of the State" and authorizing her to "maintain a general supervision over ... county prosecutors with a view to obtaining effective and uniform enforcement of the criminal laws").

66. In *Ring v. Arizona*, 536 U.S. 584 (2002), the Supreme Court held that the Constitution guarantees the capital defendant a jury determination regarding the existence of any facts defining death eligibility. Of the thirty-eight death-penalty states, judges had served, until recently, as the sentencers in nine of them. See *id.* at 608 n.6.

small subset of cases as contributing little to any state-wide patterns.<sup>67</sup> A sentencing jury is even less likely to know the details of state-wide, death-sentencing patterns or to feel responsible for them.<sup>68</sup> The result is a system in which the actual decision makers lack a sense of ownership, if they even have awareness, of the problem that their collective decisions produce.

### *C. Prosecutorial Discretion*

The great deference shown by courts to the decisions of prosecutors on whether to pursue the death penalty also promotes the influence of racial biases.<sup>69</sup> A prosecutor need not seek a death sentence whenever the evidence would support it, which explains why the vast majority of death-eligible defendants each year are spared.<sup>70</sup> In addition, in death-eligible cases where the prosecutor pursues the death penalty, the courts will not invalidate the

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67. There are exceptions. For example, the Harris County, Texas, District Attorney's Office, which encompasses Houston, is responsible for prosecuting many of the cases resulting in death sentences in Texas. See Bright, *supra* note 40, at 434 & n.10 (noting that Harris County, Texas, has sentenced more people to death and prosecuted more cases resulting in executions than most states).

68. Evidence about state-wide racial disparities is not relevant to the capital sentencer's decision in a particular case. See Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (holding that a defendant is entitled to present any evidence concerning his character, record, or crime).

69. See, e.g., Gregg v. Georgia, 428 U.S. 153, 199 (1976) (plurality opinion) (upholding post-Furman Georgia capital selection system against claim by defendant that the system is arbitrary, in part, because "the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them").

70. See, e.g., James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2052 (2001) ("Since *Furman*, an average of about 300 of the approximately 21,000 homicides committed in the United States each year have resulted in a death sentence.") (footnote omitted).

Prosecutors are free to charge a defendant with a noncapital crime although the evidence might support a capital charge. See, e.g., Pokorak, *supra* note 40, at 1813 (noting that prosecutors "enjoy almost complete freedom" not to charge a death-eligible defendant with a capital crime). They may also agree to allow a charged capital defendant to plead guilty to a charge that will avoid a death sentence. See, e.g., WHITE, *supra* note 37, at 55 (discussing the widespread practice of allowing most capital defendants to plead guilty to a noncapital offense). They are also free in many jurisdictions to decline to seek a death sentence after a defendant has been convicted of a capital crime. The Baldus Study revealed, for example, that in Georgia in the late 1970s, prosecutors decided not to pursue the death penalty in two-thirds of the cases after securing a conviction on a capital offense. See BALDUS ET AL., *supra* note 12, at 327 tbl.56.

conviction or sentence simply because the prosecutor has pursued a selective enforcement policy that reprieves other offenders who may seem similarly situated.<sup>71</sup>

Judicial deference to basic prosecutorial decisions, such as whether to pursue the death penalty, stems from the belief that courts are ill-equipped to decide such questions. As the Supreme Court has noted, "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake."<sup>72</sup> This judicial deference means that prosecutors may reprieve a defendant from a potential death sentence for a plethora of reasons, including merely the desire to show mercy.<sup>73</sup> Because the decisions fall to the subjective judgment of the prosecutor, potential abounds for unconscious racial biases to influence outcomes.

The Equal Protection Clause ostensibly prohibits racial discrimination by prosecutors, but defendants almost never succeed in challenging a prosecutor's decisions on this basis. To prevail, the defendant must prove purposeful discrimination based on race or a similarly odious ground.<sup>74</sup> A claim of unconscious discrimination will not suffice.<sup>75</sup> Most defendants lack any direct evidence that a prosecutor had a purpose to discriminate based on race. Only through a presumption grounded on the prosecutor's decisions in various cases could these defendants make headway in establishing a discriminatory purpose. However, in part because of the many accepted grounds for selective prosecution, courts have declined to find a presumption of racial discrimination even where a pattern of

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71. See Barry Latzer, *The Failure of Comparative Proportionality Review of Capital Cases (With Lessons From New Jersey)*, 64 ALB. L. REV. 1161, 1188 (2001) ("[E]ven a purposeful selective enforcement policy does not deny equal protection, unless it is based on an invidious standard.") (footnote omitted).

72. *Wayte v. United States*, 470 U.S. 598, 607 (1985).

73. See *Gregg*, 428 U.S. at 199 (plurality opinion) ("Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution.")

74. See, e.g., Latzer, *supra* note 71, at 1190 ("To establish an Equal Protection violation, the challenger would have to prove purposeful discrimination on a racial or some other similarly forbidden basis.") (footnote omitted).

75. See, e.g., Kennedy, *supra* note 26, at 1404 ("The Court insists that only 'purposeful' discrimination violates the equal protection clause.") (footnote omitted).

prosecutorial decision making in the same county produces racially disparate outcomes.<sup>76</sup> Consequently, prosecutors can make decisions influenced by unconscious, racial empathies, or even purposeful racial discrimination, if kept secret, without fear of reversal.

#### *D. Sentencer Discretion*

Capital sentencers also have great discretion, which promotes the influence of racial biases in their decisions. In all states, a jury must find the defendant's guilt and the presence of an aggravating factor as prerequisites to a death verdict.<sup>77</sup> However, Supreme Court doctrine requires no further guidance to the sentencer regarding whether to impose a death sentence.<sup>78</sup> Although states vary on what further guidance they provide, some give virtually none.<sup>79</sup> The sentencer's discretion about how to choose between death and life imprisonment is essentially "unbridled."<sup>80</sup> Even in states that purport to provide guidance, the directions are little more than vague commands to weigh aggravating against mitigating factors.<sup>81</sup>

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76. See generally John H. Blume et al., *Post-McCleskey Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771, 1794-97 (1998) (discussing various decisions in which lower courts declined to find a presumption of racial discrimination, despite single-county studies showing racially disparate outcomes from prosecutorial decisions in capital cases).

77. See, e.g., *Zant v. Stephens*, 462 U.S. 862, 877 (1983) (concluding that the requirement that the jury find an aggravating circumstance in addition to guilt served to "genuinely narrow the class of persons eligible for the death penalty and ... reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder").

78. See *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988):

In *Zant v. Stephens* ... we upheld a sentence of death imposed pursuant to the Georgia capital sentencing statute, under which "the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty."

*Id.* (citation omitted) (quoting *Zant*, 462 U.S. at 874).

79. An example is Georgia's system, which is discussed in *Zant*, 462 U.S. at 865-74.

80. *Id.* at 875; see, e.g., *Steiker & Steiker, supra* note 10, at 390 (noting that "all death-penalty schemes presently permit unconstrained consideration of mitigating evidence").

81. See, e.g., *Proffitt v. Florida*, 428 U.S. 242, 248 (1976) (noting that the Florida statute provides that "[a]t the conclusion of the hearing the jury is directed to consider '[w]hether sufficient mitigating circumstances exist ... which outweigh the aggravating circumstances found to exist; and ... [b]ased on these considerations, whether the defendant should be

While states can limit a sentencer's discretion to choose death, Supreme Court doctrine requires that the capital sentencer retain expansive discretion to reject death. In *Lockett v. Ohio*,<sup>82</sup> the Court ruled that a capital sentencer must remain free to reject the death penalty based on any evidence that the defendant presents relating to his character, record, or crime.<sup>83</sup> The *Lockett* rule ensures not only that the sentencer has the discretion to choose a life sentence but that the defendant can present a broad array of evidence to try to persuade the sentencer in his favor.<sup>84</sup> Any evidence about the defendant's background or crime that helps explain why he might have committed the offense or why he otherwise should live falls within the rule.<sup>85</sup> The only kinds of death-sentencing systems that can enable sentencers to reject the death penalty based on all such evidence presented are those in which the jury retains essentially unbridled power to reject the death penalty at a final stage of decision making.<sup>86</sup>

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sentenced to life [imprisonment] or death.").

82. 438 U.S. 586 (1978) (plurality opinion).

83. *Id.* at 604 (plurality opinion) ("[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.") (footnotes omitted); see also *id.* at 620-21 (Marshall, J., concurring) (noting that the Ohio statute "wholly fails to recognize the unique individuality of every criminal defendant").

84. Professor Louis Bilonis has provided examples of mitigating evidence under *Lockett*:

Mitigating evidence might include, for instance, evidence that a death sentence would be unjust because the defendant's personal responsibility for the offense is lessened by youth, stunted intellectual and emotional growth, mental retardation or impaired capacity, mental or emotional disturbance, provocation by others, insanity, the influence of alcohol or drugs at the time of the offense, or shared or limited participation in the actual crime. *Lockett's* definition of mitigating evidence also would embrace evidence in support of a claim that the defendant suffered tragic or horrible circumstances in his or her formative years, such as abuse, neglect, poverty, or domestic turbulence ....

Louis D. Bilonis, *Moral Appropriateness, Capital Punishment, and the Lockett Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283, 302-04 (1991) (footnotes omitted).

85. See, e.g., WHITE, *supra* note 37, at 76 ("According to defense attorneys who specialize in capital cases, the best way to be successful at the penalty stage is to present a dramatic psychohistory of the defendant to the jury.").

86. See Howe, *supra* note 28, at 409 ("The kinds of systems that will pass muster are those, like the general sort maintained in Georgia and Florida, that require essentially standardless capital sentencing.").

The conferral of expansive and essentially standardless sentencer discretion on predominantly white sentencers<sup>87</sup> gives substantial room for the influence of racial bias.<sup>88</sup> Without fairly precise guiding standards, sentencers must rely on their own subjective judgments in deciding when to reprieve a capital defendant. Although sentencers may not typically harbor conscious racial prejudices, they may often subconsciously hold negative preconceptions about minorities<sup>89</sup> or at least have greater empathy for members of their own race than members of other races.<sup>90</sup> The existence of these preconceptions can easily influence judgments that call for decision makers to exercise discretion.

Broad sentencer discretion may also exacerbate the tendency of prosecutors to consider race in deciding when to pursue the death penalty. Prosecutors know that capital sentencers have expansive discretion. They also recognize that this discretion allows the racial preconceptions of sentencers to influence sentencer choices. Because prosecutors often weigh the odds that a sentencer will vote for death, their perceptions of sentencer biases will tend to influence their decisions about when to pursue death.<sup>91</sup> Hence, the discretion

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87. On the predominance of white jurors among capital sentencing juries, see Bright, *supra* note 40, at 454-57. See also Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 108 (1984) (noting that "the great majority of jurors are white").

88. See Gross & Mauro, *supra* note 87, at 108-09 (discussing social-science evidence that individuals empathize more with members of their own race than with members of other races).

89. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 339 (1987) ("[T]here is considerable commonsense evidence from our everyday experience to confirm that we all harbor prejudiced attitudes that are kept from our consciousness.").

90. See Gross & Mauro, *supra* note 87, at 108 ("In a society that remains segregated socially if not legally, and in which the great majority of jurors are white, jurors are not likely to identify with black victims or see them as family or friends.").

For a somewhat different but not inconsistent conclusion, see Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26, 47 (2000) (concluding from a study of views of capital-sentencing jurors from South Carolina that black jurors are "more likely to find defendants likable as people, white and black defendants alike" and, "when the defendant was black ... also more likely ... to have imagined being in the defendant's situation and even to have imagined actually being like the defendant").

91. See, e.g., Gross & Mauro, *supra* note 87, at 109-10 (1984) (asserting that prosecutors will be motivated in their charging decisions by their predictions of likely jury behavior, including illegitimate behavior); Gennaro F. Vito & Thomas J. Keil, *Capital Sentencing in Kentucky: An Analysis of the Factors Influencing Decision Making in the Post-Gregg Period*,



that promotes the operation of sentencer biases can also influence prosecutors in earlier phases of capital prosecutions.

In the end, the central characteristics of modern capital selection approximate those prevailing when the Supreme Court struck down capital-selection processes in *Furman*. The death penalty no longer applies to ordinary crimes that do not involve the taking of human life, like rape, robbery, and burglary, or even to the least culpable criminal homicides.<sup>92</sup> States also now allow both defendants and prosecutors, at a separate sentencing hearing, to present a broad array of evidence regarding the defendant's character and background, which was not true in most death-penalty states immediately before *Furman*.<sup>93</sup> However, broad application of the death penalty to murder cases, decentralized decision making, and expansive discretion regarding prosecutorial and sentencing decisions continue to characterize the capital-selection process. The perpetuation of these factors helps explain why racial prejudice can easily infect the post-*Furman* world of capital sentencing.<sup>94</sup>

## II. STATISTICAL EVIDENCE OF RACIAL DISCRIMINATION IN CAPITAL SELECTION

Many studies tend to confirm that unexplained racial disparities have plagued capital-selection systems in the post-*Furman* era. The

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79 J. CRIM. L. & CRIMINOLOGY 483, 502 (1988) (positing that prosecutors may conclude that it is easier to obtain a conviction when the victim is white rather than black).

92. See *supra* note 43 and accompanying text.

93. When *Furman* was decided, most states did not allow a broad presentation of mitigating and aggravating evidence beyond that necessary to determine the guilt question. See generally Scott W. Howe, *Reassessing the Individualization Mandate in Capital Sentencing: Darrow's Defense of Leopold and Loeb*, 79 IOWA L. REV. 989, 1063 (1994) ("[T]he nature of the capital sentencing inquiry before 1972, while expanding, remained too unsettled to establish a clear societal consensus about the need to conduct a broad [sentencing] inquiry.") At that time, most death-penalty states employed unitary hearings in capital cases, in which the sentencer resolved guilt and sentencing issues together. See *id.* at 1062. This approach tended to stifle the presentation of evidence relevant to sentencing but prejudicial to the guilt determination. See *id.* at 1062 n.415, 1063 n.420. From the late 1950s through 1972, however, a few states enacted legislation mandating bifurcated hearing procedures in capital cases, although the rules about what evidence was relevant to sentencing varied and were generally unsettled. See *id.* at 1062 n.415, 1062-63.

94. See, e.g., Steiker & Steiker, *supra* note 10, at 436 (asserting that post-*Furman* and pre-*Furman* capital sentencing are similar and have "much the same consequences in terms of arbitrary and discriminatory sentencing patterns").

studies suggest a strong race-of-victim bias, although they are more equivocal regarding race-of-defendant bias. Significant variations exist among death-penalty states regarding the capital statutes defining death eligibility,<sup>95</sup> the number of death sentences imposed annually,<sup>96</sup> and the number and nature of statistical studies that have implied racial discrimination.<sup>97</sup> Nonetheless, the vast majority of studies have found unexplained race-of-victim disparities and many also have found unexplained disparities against black defendants. These studies also have taken place in enough states to undermine confidence that capital selection is generally free of racial bias.

#### A. *The Baldus Study in Georgia*

The most prominent of the statistical studies focused on Georgia murder cases from the mid- to late-1970s. A team of researchers led by Professor David Baldus of the University of Iowa Law School tried to assess the influence of race and other illegitimate factors on the selection of murder suspects for death sentences.<sup>98</sup> The researchers conducted the study at the behest of abolitionists from the NAACP Legal Defense and Educational Fund, recognizing that they would likely use it to challenge the Georgia system in the

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95. See *supra* notes 52-55 and accompanying text.

96. See generally William S. Lofquist, *Putting Them There, Keeping Them There, and Killing Them: An Analysis of State-Level Variations in Death Penalty Intensity*, 87 IOWA L. REV. 1505 app. B at 1552-56 (2002) (detailing, among other things, new death sentences by year and by state).

97. For a relatively recent summary regarding states in which researchers have reported empirical findings regarding race-of-victim or race-of-defendant discrimination in capital selection, see David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 app. B at 1742-45 (1998).

98. See BALDUS ET AL., *supra* note 12, at 45 ("[T]he primary emphasis of the [study] was on the extent to which racial and other illegitimate or suspect case characteristics influenced the flow of cases from the point of indictment up to and including the penalty-trial death-sentencing decision.").

courts.<sup>99</sup> The study became the basis for the litigation in *McCleskey v. Kemp*.<sup>100</sup>

For all suspects charged with murder in Georgia between 1973 and 1979, the Baldus group found the following death-sentencing rates in various categories of race-of-defendant and race-of victim combinations:

| Race of Defendant & Victim      | Death Sentencing Rate         |
|---------------------------------|-------------------------------|
| 1. black defendant/white victim | .21 (50/233)                  |
| 2. white defendant/white victim | .08 (58/748)                  |
| 3. black defendant/black victim | .01 (18/1443)                 |
| 4. white defendant/black victim | .03 (2/60)                    |
| TOTAL                           | .05 (128/2484) <sup>101</sup> |

These statistics show that, if the victim was white, the death sentencing rate was much higher than if the victim was black. Within the white victim cases, moreover, black defendants received death sentences at a much higher rate than white defendants. There was no overall disparity favoring white defendants over black defendants; on the whole, black defendants received death sentences less often than white defendants. However, this outcome stemmed from the predominance of black-on-black murders and the tiny proportion of death sentences in that category.

These unadjusted outcomes may themselves seem highly suspicious. The intuition that the unadjusted racial disparities stemmed at least in major part from racial prejudice finds support in the long history in the United States of widespread racial bias by whites in favor of whites and against blacks, particularly in the context of the criminal justice system.<sup>102</sup> Nonetheless, the possibility that legiti-

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99. See *id.* at 44 ("[W]e undertook the ... [s]tudy in 1980 at the request of the NAACP Legal Defense and Educational Fund Inc. (LDF) with the expectation that the results might be used to challenge the constitutionality of Georgia's death-sentencing system ....").

100. 481 U.S. 279 (1987).

101. See BALDUS ET AL., *supra* note 12, at 315 tbl.50.

102. See, e.g., *McCleskey*, 481 U.S. at 332 (Brennan, J., dissenting) (noting the history of discrimination and asserting the need to weigh such evidence in determining the plausible explanations for the racial disparities); DAVID COLE, NO EQUAL JUSTICE (1999) (discussing evidence of racial discrimination in the modern administration of criminal justice); Kennedy, *supra* note 26, at 1411-13 (noting the racist administration of criminal law in the South up to the present); cf. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2344 (2003) (noting that the country

mate variables could coincidentally correlate with racial variables means that the results did not *prove* that race matters. Therefore, the Baldus researchers set out to search for any latent, legitimate variables that could explain the outcomes.

After extensive research and sophisticated analysis, the authors found no latent factors that could fully or even substantially explain the racial disparities. To try to find such rationales, the researchers collected information from the Georgia Board of Pardons and Parole and the records of the Georgia Supreme Court on approximately 230 variables for each case and each defendant.<sup>103</sup> They then employed multivariate regression analysis to test the influence of each of the variables on case outcomes.<sup>104</sup> The researchers determined that no combination of the variables could explain the results without the consideration of race.<sup>105</sup>

The study also confirmed that race strongly influenced case outcomes. Based on the regression analysis, the researchers estimated that a defendant was 4.3 times more likely to receive the death penalty solely because his victim was white rather than black.<sup>106</sup> As for race-of-defendant discrimination, the researchers found that black defendants had a modest advantage over white defendants when all cases were considered.<sup>107</sup> However, within the white-victim cases, the researchers found that a defendant was 2.4 times more likely to receive a death sentence simply because he was black rather than white.<sup>108</sup> The authors noted that the racial influences seemed to operate mostly in cases that the authors viewed in the mid-aggravation range of defendant culpability.<sup>109</sup>

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has struggled with racial inequities and that racial discrimination has not been eliminated).

103. See BALDUS ET AL., *supra* note 12, at 46.

104. The authors of the study concluded that a 39-variable model that included racial factors best explained the observed sentencing patterns. See *id.* at 316. According to the authors, the 39-variable model was more accurate than the 230-variable model because of the problem of "redundant variables." This problem arises when the large number of factors articulated makes it impossible to avoid overlaps of information among them. When several variables include similar information, their individual influence on outcomes evades accurate measure. See *id.* at 457-58.

105. See *id.* at 316.

106. See *id.*

107. See *id.* at 328.

108. See *id.*

109. Within these supposed mid-range cases, the disparities are significantly larger than for all cases in the category. See *id.* at 145 (asserting that, for cases in the extreme ranges,

The Baldus study tended to show that racial bias skewed the post-*Furman* capital selection process in Georgia. Many have denied that the study actually proved the existence of racial discrimination. However, the Baldus researchers simply looked for alternative explanations for the huge and undeniable racial disparities that history and intuition already suggested were explained by racial bias.<sup>110</sup> The inability of the researchers to find an alternative explanation, after substantial investigation and sophisticated analysis, helps to eliminate the possibility that such an explanation exists. Perhaps nonracial variables that the study failed to examine could still explain some of the disparities, but the arguments are highly conjectural.<sup>111</sup> The Baldus researchers certainly offered the most thorough examination of the role of race in capital selection that has ever been conducted.

### *B. Other Studies*

Many other studies in a variety of death-penalty jurisdictions and during more recent eras also imply the race-of-victim discrimination suggested by the Baldus study, although they are more equivocal regarding race-of-defendant discrimination. Published studies do not cover all death-penalty states, and the results of a few studies diverge from the findings of the Baldus researchers. However, the combined results of other studies give reason to believe that racial discrimination often infects capital selection.

Based on capital cases during the first decade after *Furman*, many researchers conducted studies both in Georgia and in several other death-penalty states that implied race-of-victim influences. For example, Bowers and Pierce studied capital sentencing in homicide cases in Florida, Texas, and Georgia from the late 1970s

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decision makers more often reached the same conclusions).

110. On this point, Justice Brennan offered a compelling argument in his *McCleskey* dissent that "[e]valuation of McCleskey's evidence cannot rest solely on the numbers themselves. We must ask whether the conclusion suggested by those numbers is consonant with our understanding of history and human experience." *McCleskey v. Kemp*, 481 U.S. 279, 328 (1987) (Brennan, J., dissenting).

111. For a plausible argument regarding a variable that might explain a minor amount of the race-of-victim disparities but that was not accounted for by the Baldus researchers, see *infra* note 184 and accompanying text.

and found a high risk of powerful white-victim bias in all three states.<sup>112</sup> Likewise, Paternoster and Kazyaka found significant white-victim bias in the use of the death penalty for homicides committed between 1977 and 1981 in South Carolina.<sup>113</sup> Nakell and Hardy found a strong risk of white-victim prejudice in capital sentencing for homicides committed between June 1, 1977, and May 31, 1978, in North Carolina.<sup>114</sup> In each of these studies, the researchers covered the various stages of decision making in capital selection by both prosecutors and sentencers. Although not as thorough as the Baldus study, each of the studies also controlled for several legitimate case characteristics that could have explained the racial disparities.<sup>115</sup>

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112. See William J. Bowers and Glenn L. Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563, 599 (1980).

113. See Raymond Paternoster & Ann Marie Kazyaka, *The Administration of the Death Penalty in South Carolina: Experiences over the First Few Years*, 39 S.C. L. REV. 245, 405-06 (1988).

114. See BARRY NAKELL & KENNETH A. HARDY, *THE ARBITRARINESS OF THE DEATH PENALTY* 93-161 (1987).

115. See, e.g., *id.* at xiv (concluding that "the judicial district in which the case was processed and the race of the defendant" influenced decision making at pretrial stages and "the race of the victim" influenced outcomes "at the verdict stage"); Bowers & Pierce, *supra* note 112, at 629 (noting that the effect of the race-of-victim variable remained important in explaining outcomes after accounting for several other potentially explanatory factors); Paternoster & Kazyaka, *supra* note 113, at 407 ("Substantial instances of both racially based discrimination and arbitrariness remain.").

A variety of other studies from several states during this same era produced similar conclusions. See, e.g., Barnett, *supra* note 56, at 1327-30 (finding unexplained, race-of-victim disparities in the Baldus data set from Georgia after using a grouping system for classifying similar cases based on crime and offender characteristics); Sheldon Ekland-Olsen, *Structured Discretion, Racial Bias, and the Death Penalty: The First Decade After Furman in Texas*, 69 SOC. SCI. Q. 853 (1988) (finding unexplained, race-of-victim disparities in capital cases from Texas in first decade after *Furman*-induced reforms); Michael L. Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918 (1981) (finding, among 637 homicide indictments in twenty Florida counties during 1976 and 1977, that those who killed whites were substantially more likely to receive a death sentence after controlling for several nonracial factors that might be thought to explain the racial differences); Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587, 612 (1985) (finding that among Florida homicide cases from a random sample of twenty-one counties, prosecutors were most likely to pursue the death penalty in cases in which the victim was white); M. Dwayne Smith, *Patterns of Discrimination in Assessments of the Death Penalty: The Case of Louisiana*, 15 J. CRIM. JUST. 279, 285 (1987) (finding unexplained, race-of-victim disparities in 504 death-eligible cases from 1977 to 1982 in Louisiana); Zeisel, *supra* note 62, at 459-61 (finding, for post-*Furman* Florida cases through 1977, that those who murdered whites were much more likely to be sentenced to

Another study that was noteworthy for covering a broad range of jurisdictions also found race-of-victim biases.<sup>116</sup> Professors Samuel Gross and Robert Mauro looked at all homicides reported to the FBI from January 1, 1976, through December 31, 1980, in eight states: Arkansas, Florida, Georgia, Illinois, Mississippi, North Carolina, Oklahoma, and Virginia.<sup>117</sup> Initially, they found race-of-victim disparities in capital sentencing in all eight jurisdictions.<sup>118</sup> They also looked for nonracial variables that might explain the differences. Their information came from standardized police reports, known as Supplementary Homicide Reports, that are filed with the Uniform Crime Reporting section of the FBI,<sup>119</sup> along with data gathered by the NAACP Legal Defense and Educational Fund through its ongoing census of death-row inmates.<sup>120</sup> From these sources, the researchers were able to gather data about each case on several variables, including the race and sex of the victim(s) and killer, the relationship between the victim(s) and killer, the number of victims, the location of the homicide, the criminal record of the killer, the weapon employed in the killing, and whether the killing was committed during a felony.<sup>121</sup> The researchers also "classified the homicides by the number of major legitimate aggravating factors reported for each case"<sup>122</sup> and "examined the racial patterns in capital sentencing separately at each level of aggravation."<sup>123</sup> In addition, they conducted a series of regression analyses to test for racial effects while controlling for the effects of various combinations of nonracial variables.<sup>124</sup> Although the study was not as well controlled as the Baldus Study, the researchers identified "a

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death than those who murdered blacks and that the large differences remained for cases in which the murder was committed during another felony).

116. See generally Gross & Mauro, *supra* note 87.

117. See *id.* at 49.

118. See *id.* at 56 tbl.2 (detailing the death-sentencing rates by racial category in Georgia, Florida and Illinois); *id.* at 94 tbl.30 (providing the rates by racial category in Oklahoma, North Carolina, Mississippi, Virginia, and Arkansas).

119. See *id.* at 49.

120. See *id.* at 50.

121. See *id.* at 51-52.

122. *Id.* at 69.

123. *Id.*

124. See *id.*

remarkably stable and consistent" pattern of racial discrimination in the imposition of the death penalty in all eight states.<sup>125</sup>

In a well-controlled study of capital sentencing in Kentucky that included cases decided well into the 1980s, Vito and Keil also found unexplained racial disparities.<sup>126</sup> They examined all cases between December 22, 1976, and October 1, 1986, in which a grand jury issued an indictment for murder.<sup>127</sup> Initially, they found that those who killed whites were much more likely to be sentenced to death than those who killed blacks.<sup>128</sup> After conducting a regression analysis that controlled for a variety of factors concerning the aggravation level of the crime and the prior criminal history of the defendant, they concluded that Kentucky prosecutors had been influenced by racial factors. They identified no racial effects in the final sentencing decisions of juries.<sup>129</sup> However, the decisions of prosecutors about when to pursue the death penalty were heavily influenced by both the race of the victim and the race of the defendant.<sup>130</sup> Racial discrimination by prosecutors also significantly affected the overall distribution of death sentences.<sup>131</sup>

A complex and well-controlled study of prosecutorial discretion conducted in New Jersey also found pronounced race-of-victim and race-of-defendant disparities that could not find explanation in nonracial variables.<sup>132</sup> This study, by Bienen and others, focused on 703 cases in which a formal charge for a homicide offense was lodged during the three years after the effective date of the

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125. *See id.* at 105.

126. *See* Vito & Keil, *supra* note 91, at 503 (concluding that the Kentucky capital-sentencing system had produced the same racially discriminatory outcome as revealed in many studies in other death-penalty states).

127. *See id.* at 494-95.

128. *See id.* at 499 tbl.3.

129. *See id.* at 501 ("Rather than reacting to the combination of the race of the victim and the race of the accused in imposing sentence, Kentucky juries may react to the objective heinousness of the murder cases brought before them.").

130. *See id.* at 502 ("[T]he pattern of effects demonstrated by the race of the victim-race of the offender combination indicates that, controlling for differences in the objective heinousness of the offense, prosecutors are more likely to seek the death penalty when a black kills a white than in other homicide cases.").

131. *See id.* at 503 (concluding that the racial discrimination in the decisions by prosecutors is "not eliminated" in the latter stages of the capital selection process").

132. *See* Leigh B. Bienen et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 *RUTGERS L. REV.* 27 (1988).



reenactment of capital punishment in New Jersey in 1982.<sup>133</sup> The researchers gathered data on over one hundred potentially relevant variables concerning the offender and the circumstances of the crime.<sup>134</sup> They found pronounced discrepancies in the treatment of cases by prosecutors based on both the race of the victim and the race of the defendant.<sup>135</sup> Even after a regression analysis controlling for other variables, the researchers found that "the odds that a homicide involving a white victim would go to trial were nearly three times greater than for the Hispanic comparison category and more than five times greater than for the black comparison category."<sup>136</sup> Among the trial cases and after controlling for nonracial factors, the odds were also much greater that a prosecutor would pursue the death penalty in white-victim cases than in black-victim cases, and greatest of all among the white-victim cases in which the defendant was Hispanic or black.<sup>137</sup>

Not all studies of capital selection have identified race-of-victim discrimination. For example, Arkin studied 350 cases from Dade County, Florida, in which a grand jury issued an indictment for first-degree murder between 1973 and 1976.<sup>138</sup> He found initial disparities in death-sentencing rates that correlated with both the race of the victim and the race of the defendant.<sup>139</sup> He concluded, however, that the differences arose from the more aggravated nature of cases involving white victims<sup>140</sup> and that, once the focus

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133. See *id.* at 36-37.

134. See *id.* at 327.

135. See *id.*

136. *Id.* at 230 (footnote omitted).

137. The researchers noted that white defendant/Hispanic victim cases presented the greatest odds that the prosecutor would pursue the death penalty but also noted that the number of such cases (four death-penalty prosecutions out of five trials) was "too small ... to establish a meaningful pattern." See *id.* at 240 n.710. Among the other cases, the probabilities were "Hispanic/white, .31; black/white, .31; black/Hispanic, .22; black/black, .15; white/white, .13; Hispanic/black, .08; Hispanic/Hispanic, .04; and white/black, .03." See *id.* at 240.

138. See Steven D. Arkin, Note, *Discrimination and Arbitrariness in Capital Punishment: An Analysis of Post-Furman Murder Cases in Dade County, Florida, 1973-1976*, 33 STAN. L. REV. 75, 86 (1980).

139. See *id.* at 87 tbl.2 (revealing that, while only 1% of the black-on-black murders and 0% of the white-on-black murders resulted in a death sentence, 3% of the white-on-white and 7% of the black-on-white murders resulted in the capital sanction).

140. See *id.* at 100-01 ("The significantly greater proportion of felony murders in interracial killings and the predominance of white victims in these killings explains apparent

was on only felony-murder cases, the disparities correlating with race became insignificant.<sup>141</sup> Although some differences existed in death sentences correlating with race within the felony-murder cases,<sup>142</sup> Arkin determined that they were statistically insignificant in light of the small number of actual death sentences imposed.<sup>143</sup> Thus, he found that the data revealed no conclusive evidence of racial discrimination.<sup>144</sup>

A study from California also found no evidence of racial discrimination in capital sentencing. Klein and Rolph studied homicides committed in California after August 10, 1977, for which the offender had been sentenced to death or was under a sentence of life imprisonment without parole as of March 1, 1984.<sup>145</sup> They found that death sentences resulted more frequently in white-victim murders than in non-white-victim murders.<sup>146</sup> Using a complex system for classifying cases, however, they found that the apparent racial disparities were actually explained by the interaction of legitimate, nonracial variables.<sup>147</sup>

While many of the studies implying racial bias are imperfect, both the Arkin study from Miami and the Klein and Rolph study from California had particularly serious limitations. Arkin looked only at cases that a prosecutor had already decided warranted indictment for first-degree murder, and his sample included only

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disparities in capital sentencing.”).

141. See *id.* at 88-89, 89 tbl.4 (“Table 4 demonstrates that if the 350 cases are separated into the categories of felony murders and nonfelony murders, outcomes for the four offender-victim categories are quite similar.”) (footnote omitted).

142. For the cases in which the killing occurred during a separate felony and in which the defendant was found guilty of first-degree murder, the sentencing rates for the various racial categories was: black-on-black, 17% (1/6); white-on-black, 0% (0/0); white-on-white, 16% (4/25); and black-on-white, 19% (5/26). See *id.* at 89, tbl.4.

143. See *id.* at 90 (“[T]he sample size becomes too small to infer racial discrimination even though cases with black defendants and white victims resulted in death sentences slightly more often than other felony murder cases.”).

144. See *id.* at 100 (asserting that the data “reveals no conclusive evidence of racial discrimination when the difference between felony murders and nonfelony murders is taken into account”).

145. See Stephen P. Klein & John E. Rolph, *Relationship of Offender and Victim Race to Death Penalty Sentences in California*, 32 JURIMETRICS J. 33, 37 (1991).

146. See *id.* at 37-38. Klein and Rolph do not subdivide the nonwhite category into black persons and other nonwhite persons.

147. See *id.* at 42 (noting that “the death sentencing rate for white victim cases did not differ in a statistically significant way from the rate for nonwhite victim cases”).

ten death sentences,<sup>148</sup> which was too small to provide definitive conclusions.<sup>149</sup> Klein and Rolph studied a larger sample of cases but, like Arkin, only at the final stage of decision making by a capital sentencer.<sup>150</sup> The narrow focus of both studies excluded important segments of the overall capital selection process and created a significant potential for "sample selection bias."<sup>151</sup> This problem arises when the sample of cases has itself resulted from biased decision making that may obscure or influence the patterns of decision making observed at the stage under study.<sup>152</sup> Hence, these studies were not very helpful in deciding whether racial bias influenced the overall capital-selection process or even the late stages actually examined.<sup>153</sup>

In 1990, moreover, an evaluative synthesis by the federal General Accounting Office (GAO) of all then-existing post-*Furman* studies concluded that race influenced the charging and sentencing

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148. See Arkin, *supra* note 138, at 86 (noting that the study "analyzes 350 murder cases presented to the grand jury in Dade County, Florida, for a first-degree murder indictment" and that only ten cases from the sample resulted in a death sentence that was not reduced to life imprisonment).

149. See, e.g., Gross & Mauro, *supra* note 87, at 43 (concluding that "the small size of his sample—ten death penalties in all—precludes a definite conclusion on the existence of racial discrimination") (footnote omitted).

150. See Klein & Rolph, *supra* note 145, at 44 ("We did not examine possible bias at earlier stages such as police investigation and arrest practices, prosecutor charging decisions, case preparation, jury verdicts regarding guilt or innocence, and prosecutor requests for the death penalty.").

151. See Gross & Mauro, *supra* note 87, at 46.

152. Gross and Mauro aptly describe the concern:

Sample selection bias can have various effects. It can create a false appearance of discrimination, or it can change the apparent magnitude of a real discriminatory practice, but the most likely effect in this context is the one illustrated: Discrimination of a particular type at an early stage of the criminal justice process may conceal, or partially conceal, discrimination of the same type at a later stage.

*Id.* at 47 (footnote omitted).

153. A pre-*Furman* study from California also found no racial discrimination at the last stage of decision making by the capital sentencer. In 1969, the *Stanford Law Review*, as a special project, studied 238 cases from 1958 through 1966 in which juries had decided whether to sentence to death persons convicted of first-degree murder. See *A Study of the California Penalty Jury in First-Degree—Murder Cases*, 21 STAN. L. REV. 1297 (1969). After analyzing many variables, the researchers found no race-of-defendant or race-of-victim discrimination. See *id.* at 1368-76. Because of the narrow focus on the final sentencing decision, this study also suffers from the same limitations as the Klein and Rolph study.

decisions in death-penalty cases.<sup>154</sup> In reaching this conclusion, the GAO experts initially identified fifty-three studies that were relevant.<sup>155</sup> From this group, twenty-five were excluded because they were deemed of poor quality or involved duplicative research published by the same authors in another study.<sup>156</sup> The GAO experts then rated the remaining twenty-eight studies according to research quality and statistical competence.<sup>157</sup> After reviewing the various studies, the experts concluded that they demonstrated that racial factors generally influenced capital selection. They noted that “in 82 percent of the studies, race of victim was found to influence the likelihood” that a murderer would receive a death sentence.<sup>158</sup> They also noted that “[t]his finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques” and that it “held for high, medium, and low quality studies.”<sup>159</sup> The experts also noted that many of the studies found a race-of-defendant influence, although this factor was not as “clear cut” and that it “varie[d] across a number of dimensions.”<sup>160</sup>

Subsequent studies also tend to confirm the GAO conclusions. Professor Baldus, joined by others, has published results from more recent studies outside of Georgia that reach the same basic conclusions as the original Georgia study. For example, in 1992, Professor Baldus was appointed Special Master for the New Jersey Supreme Court in the conduct of an ongoing review of capital sentencing in New Jersey.<sup>161</sup> The study covered all death-eligible defendants, regardless of how their cases were charged.<sup>162</sup> In 1997, Professor Baldus concluded that the New Jersey system in the period from 1989 showed some unexplained, race-of-victim disparity in prosecutorial decision making, although less than that identified

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154. See GAO, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990) [hereinafter GAO STUDY].

155. See *id.* at 2.

156. See *id.*

157. See *id.*

158. *Id.* at 5.

159. *Id.*

160. *Id.* at 6.

161. See *State v. Marshall*, 613 A.2d 1059, 1063 (N.J. 1992) (noting the order appointing Professor Baldus).

162. See Baldus et al., *supra* note 97, at 1667.

in the original Georgia study.<sup>163</sup> He also found that the New Jersey system revealed strong, unexplained, race-of-defendant discrimination by sentencing juries against black defendants, much stronger than the comparative level of discrimination against blacks revealed in the Georgia study.<sup>164</sup>

Another recent study led by Professor Baldus also found significant race-of-victim and race-of-defendant discrimination in capital cases from Philadelphia.<sup>165</sup> This study covered all phases of the capital selection process for a large proportion of all death-eligible defendants prosecuted from 1983 through 1993.<sup>166</sup> The researchers gathered information about each of the resulting 524 cases from a variety of sources, including jury verdict sheets, appellate records, trial records and even newspaper accounts.<sup>167</sup> Upon analyzing the data in several ways, including regression analysis, the researchers found substantial disparities against killers of nonblack victims<sup>168</sup> and even stronger race-of-defendant bias against black defendants.<sup>169</sup> The researchers noted that the Philadelphia results differed from those reached in their earlier Georgia project in that the primary source of the racial disparities in Philadelphia was the jury rather than the prosecutor.<sup>170</sup> Nonetheless, the disparate outcomes of the cases were also egregious.

Numerous other recent studies also have implied that race influences capital selection. A complex and well-controlled study of capital selection in Maryland between 1978 and 1999, commissioned in 2000 by then-Governor Parris Glendening,<sup>171</sup> found pronounced bias against killers of white victims and, within the

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163. *See id.* at 1662-64 & n.79.

164. *See id.* at 1664. Professor Baldus concluded that some race-of-defendant discrimination in Georgia may have been "obscured because of the less-detailed data that were available" from Georgia. *Id.* at 1665.

165. *See id.* at 1675-1710.

166. *See id.* at 1667, 1669.

167. *See id.* at 1671.

168. *See id.* at 1714-15.

169. *See id.* at 1713-14.

170. *See id.* at 1715.

171. *See* RAYMOND PASTERMASTER ET AL., AN EMPIRICAL ANALYSIS OF MARYLAND'S DEATH SENTENCING SYSTEM WITH RESPECT TO THE INFLUENCE OF RACE AND LEGAL JURISDICTION (2003), available at <http://www.urhome.umd.edu/newsdesk/pdf/finalrep.pdf> (last visited Apr. 8, 2004).

white-victim cases, additional bias against black offenders.<sup>172</sup> A less-well-controlled study of cases ending in first-degree murder convictions in Illinois between 1988 and 1997<sup>173</sup> also concluded that those who killed white victims were much more likely to receive a death sentence than were killers of black victims.<sup>174</sup> Although this Illinois study focused on only the sentencing stage and controlled for a relatively small number of variables, the findings at least raise questions about the racial neutrality of the Illinois selection process.<sup>175</sup> Likewise, an in-depth and well-controlled study of race and the death penalty in North Carolina, focusing on 502 homicides that occurred from 1993 to 1997,<sup>176</sup> concluded that defendants whose victims were white were 3.5 times more likely to be sentenced to death than defendants whose victims were nonwhite.<sup>177</sup>

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172. The study found:

[G]iven that a homicide is death eligible, blacks who kill whites are two and one-half times more likely to be sentenced to death than are whites who kill whites (.043 vs. .017), three and one-half times more likely than are blacks who kill blacks (.043 vs. .012), and almost eleven times more likely to be sentenced to death than "other" racial combinations (.043 vs. .004).

*Id.* at 36.

173. See Glenn L. Pierce & Michael L. Radelet, *Race, Region, and Death Sentencing in Illinois, 1988-1997*, 81 OR. L. REV. 39 (2002).

174. See *id.* at 62-63 ("Specifically, 3.8% of the first-degree murder cases where the [murder] victim(s) was white resulted in a death sentence, versus 1.1% of the cases where the murder victim(s) was black, and 1.5% of the cases where the victim(s) was Hispanic.") (footnote omitted).

175. The authors of the study note:

Critics of this study who point to its limited scope and limited number of variables should realize that the addition of more data could very well *increase* the power of non-legal explanatory variables. Baldus et al., for example, point to nine states where both well-controlled and less-well-controlled studies of death sentencing have been conducted. In two-thirds of these states, the racial disparities were *stronger* in the well-controlled studies than in the less complex work.

*Id.* at 66-67 (footnote omitted).

176. See Isaac Unah & Jack Boger, *Race and the Death Penalty in North Carolina: An Empirical Analysis: 1993-1997*, (2001), at <http://www.deathpenaltyinfo.org/article.php?scid=19&did=246> (last visited Apr. 8, 2004).

177. See *id.*

*C. A Summary View*

From a national perspective, the available research implies that racial bias, particularly race-of-victim bias, influences capital selection on a widespread basis.<sup>178</sup> There are sufficient studies from a sufficient number of states finding unexplained race-of-victim disparities to undermine confidence in the neutrality of capital selection nationally. The relatively small number of studies that have failed to imply race-of-victim bias also have focused on narrow segments of a jurisdiction's capital selection process and, thus, have failed to measure whether bias affected the larger system.<sup>179</sup>

The studies also provide evidence that race-of-defendant bias in capital selection is still prevalent, though not as consistent across all jurisdictions or even throughout single jurisdictions and not as strong in the South as in the pre-*Furman* era.<sup>180</sup> More than half of the studies have found an unexplained race-of-defendant influence on outcomes.<sup>181</sup> However, in about one-fourth of that group, white defendants rather than black defendants were disfavored, at least on a state-wide basis.<sup>182</sup> Nonetheless, several studies that have found no bias against black defendants on a system-wide basis have identified such bias in discrete contexts, such as in white-victim cases.<sup>183</sup> Likewise, a significant number of studies remain in which researchers have found generalized bias against black defendants. Thus, the studies do reveal grounds for concern about race-of-defendant bias even if those grounds are not as clear as with race-of-victim bias.

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178. The findings of the GAO in its 1990 study support this conclusion. See GAO STUDY, *supra* note 154, at 5 ("Our synthesis of the 28 studies shows a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty ....").

179. See *supra* text accompanying notes 148-53.

180. See, e.g., Baldus et al., *supra* note 6, at 158-61 (noting that "by and large, the evidence of race-of-defendant discrimination, particularly the most recent evidence, is neither strong nor consistent" and that there was a "strong and systematic bias against black defendants [in the] ... pre-*Furman* sentencing patterns in the South") (footnotes omitted).

181. See GAO STUDY, *supra* note 154, at 6 (stating that "more than half of the studies found that race of defendant influenced the likelihood of being charged with a capital crime or receiving the death penalty") (footnote omitted).

182. See *id.* (noting that of the studies that found a race-of-defendant effect, almost one-fourth found that "white defendants were more likely to be sentenced to death").

183. See, e.g., BALDUS ET AL., *supra* note 12, at 328.

Are the studies implying racial bias flawed? Even the most complex of the studies do not control for every conceivably relevant variable. For example, commentators have suggested that lesser support within the black community for capital punishment could account for reduced pressure on prosecutors and jurors to seek and impose the death sentence in black-victim cases.<sup>184</sup> The post-*Furman* studies have not examined whether the disparities are partially explained on this basis. However, the bias against black defendants who kill whites revealed in several studies indicates that this theory could not explain all of the racial disparities or even all of the race-of-victim differences. More importantly, retentionists have failed to offer good evidence that this or any other omitted variable actually explains the racial disparities. A conclusion that omitted-variable problems undermine the studies should itself require significant support.

In the end, the sociological studies provide valuable evidence that racial bias influences capital selection. As Justice Brennan noted in his dissenting opinion in *McCleskey*, the studies should be considered in conjunction with the historical and contemporary evidence of racial prejudice in the United States.<sup>185</sup> Fair assessment of the question requires recognizing "our Nation's struggle with racial inequality"<sup>186</sup> and that "race unfortunately still matters."<sup>187</sup> The studies also should be considered with an understanding of the limited protections against racial discrimination that appear in

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184. See, e.g., Zeisel, *supra* note 62, at 467. The argument may be particularly relevant to the prosecutorial decision:

If, as Justice Blackmun's dissent indicates, district attorneys are not seeking the death penalty in black-victim cases, it may be in part because there is not enough public pressure to do so. How can there be, when the leaders of the black community are dedicated heart and soul to the total abolition of capital punishment? How can any leader denounce capital punishment as barbaric one day and pound on the prosecutor's desk the next, demanding that very punishment for the white killer of a black victim? He cannot, without looking like a complete hypocrite. The result is a tragic loss of advocacy for the black victim.

Kent S. Scheidegger, *Capital Punishment in 1987: The Puzzle Nears Completion*, 15 W. ST. U. L. REV. 95, 125-26 (1987).

185. See *supra* note 110.

186. *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (upholding affirmative action program for admission of students at University of Michigan School of Law).

187. *Id.* at 335.



post-*Furman* capital-punishment systems.<sup>188</sup> The relevant question is not whether the studies definitively prove racial discrimination when considered in a vacuum but whether they provide additional evidence of what our existing knowledge already implies about capital selection.

The studies, considered as a group, imply racial discrimination. They demonstrate major disparities along racial lines in unadjusted, capital sentencing rates and then rule out possible innocent explanations for those disparities. As noted, the studies vary regarding quality and thoroughness, and, in some states, no studies have been reported.<sup>189</sup> Likewise, results of past studies will not replicate across all periods in precisely the same way. Nonetheless, the disparities are too pronounced and too consistent across studies, states, and time to ignore.<sup>190</sup>

Even some staunch proponents of capital punishment have conceded the prevalence of race-bias in capital selection.<sup>191</sup> Justice Scalia is a notable example. In a private memorandum to the other Justices in 1987, later exposed when the late Justice Marshall's papers were made public, Justice Scalia acknowledged the influence of racial bias.<sup>192</sup> The memorandum was written as the Court considered whether the evidence from the Baldus Study made out

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188. See *supra* Part I.

189. Differences also exist among death-penalty states regarding the demographics of the citizenry, the history of race relations, and the use of the capital sanction, which likely affects the level of racial discrimination in capital selection. See, e.g., Gross & Mauro, *supra* note 87, at 48 (noting that "racial factors may have different effects on capital sentencing at different times and in different places"); see also Lofquist, *supra* note 96, at 1510 ("[H]istorical practices of executions ... and underlying patterns of social relations rooted in slavery, are at least as important as contemporary measures of social conditions in shaping death penalty intensity.").

190. Some commentators urge, however, that the studies implying racial bias provide no basis for concern because they do not adequately prove discrimination. See Rothman & Powers, *supra* note 21, at 3; see also Dolinko, *supra* note 26, at 581 (asserting that "[t]here is reason to doubt not only the strength of the statistical evidence but also [because of the omitted variable problem] the cogency of the inferences drawn from it").

191. See, e.g., John C. McAdams, *Racial Disparity and the Death Penalty*, LAW & CONTEMP. PROBS., Autumn 1998, at 153, 166 ("There is a general and quite robust bias against black victims ...").

192. See, e.g., Dennis D. Dorin, *Far Right of the Mainstream: Racism, Rights, and Remedies From the Perspective of Justice Antonin Scalia's McCleskey Memorandum*, 45 MERCER L. REV. 1035, 1037-38 (1994) (discussing the disclosure of Justice Scalia's memorandum when the Library of Congress made public the papers of Justice Marshall).

a constitutional violation in *McCleskey*.<sup>193</sup> Justice Scalia wrote: "Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this Court, and ineradicable, I cannot honestly say that all I need is more proof."<sup>194</sup> Justice Scalia's statement underscores that there is nothing radical in accepting the statistical studies as grounds to doubt that capital selection is race neutral. To the contrary, the studies support the view that racial prejudice frequently influences who dies.

### III. ALTERNATIVE REGULATORY APPROACHES AND THE FATED FAILURE OF SUPREME COURT EFFORTS TO SECURE RACIAL NEUTRALITY IN CAPITAL SELECTION

Given the evidence that existing doctrine has failed to achieve racial neutrality in capital selection, this Part asks whether the Supreme Court could have achieved neutrality through alternative regulatory approaches. The alternatives that have been suggested all fall into one of four categories: (a) imposing "super due process" requirements on the imposition of capital sentences; (b) forcing the reintroduction of mandatory death sentencing for aggravated murder; (c) forcing a narrowing of death eligibility to a small category of the very worst murders; and (d) reversing all death sentences in contexts in which statistical evidence reveals a reasonable likelihood that racial bias influenced the outcomes. This Part demonstrates why none of these alternative approaches provide true solutions, except to the extent that they thwart the use of capital punishment, thereby further undermining the moral case for the penalty, and mire federal courts in continual death-penalty challenges. In sum, this Part concludes that racial bias in capital selection is ineradicable, as a practical matter, through federal regulation.

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193. See Henry J. Reske, *Behind The Scenes*, 79 A.B.A. J. 28 (1993) (quoting *Memorandum to the Conference from Justice Antonin Scalia* in No. 84-6811—*McCleskey v. Kemp*, Jan. 6, 1987, in *McCleskey v. Kemp* File, THURGOOD MARSHALL PAPERS, The Library of Congress, Washington, D.C.).

194. *Id.* (internal quotation marks omitted).

A. *"Super Due Process" Regulation*

Imposing "super due process" protections on the use of capital punishment is not a plausible approach for achieving racial neutrality. Procedural reforms could impede the use of the death penalty in general, which would reduce the number of persons subject to racially biased death sentences. However, actually eliminating racial bias by this approach would likely produce something close to abolition.

Some commentators have noted that procedural reforms could help ensure equal outcomes for equally situated defendants.<sup>195</sup> Suggestions have focused, for example, on doing more to ensure the fairness of capital juries,<sup>196</sup> on improving the minimum quality of legal representation provided to capital defendants<sup>197</sup> and on expanding the possibility for merits review in state and federal habeas proceedings.<sup>198</sup> These kinds of reforms surely would help ensure the legitimacy of all capital sentences and would also safeguard against certain kinds of inequality. However, they would not directly reduce the influence of racial prejudice.

Procedural reforms like those suggested could deter the use of the death penalty in general and, therefore, reduce the overall number of persons subject to racially biased death sentences. For example, assume that the Supreme Court decided that no potential jurors would be disqualified from resolving the guilt issue in a capital case simply because they could not also vote for a capital sentence. Under the Sixth Amendment, states presently may select a single

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195. See, e.g., Steiker & Steiker, *supra* note 10, at 421-25 ("A more encompassing 'heightened reliability' requirement would insist on *affirmative* (or 'proactive') efforts on the part of states to ensure that similarly-situated defendants have roughly equal chances of prevailing at trial and vindicating their constitutional rights.").

196. See, e.g., Lockhart v. McCree, 476 U.S. 162, 203-04 (1986) (Marshall, J., dissenting) (contending that the Constitution should be understood to require the use of separate juries at the guilt and sentencing phases of capital cases).

197. See Steiker & Steiker, *supra* note 10, at 421-23; see also Celestine Richards McConville, *The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 WIS. L. REV. 31, 36 (arguing that "the government's decision to provide capital postconviction counsel triggers a constitutional obligation to provide *effective assistance of counsel*") (footnote omitted).

198. See Steiker & Steiker, *supra* note 10, at 423-25.

capital jury to resolve both the guilt-or-innocence and sentencing questions<sup>199</sup> and may disqualify all potential jurors whose views on the death penalty “would prevent or substantially impair” their ability to consider imposing the death penalty at sentencing.<sup>200</sup> By eliminating this ground for disqualification, the Supreme Court could effectively require separate juries for the guilt-or-innocence and sentencing trials. This “super due process” rule would make pursuing a death sentence slightly more costly than under current doctrine and, therefore, probably would deter prosecutors in a few cases from pursuing capital punishment.

The difficulty with such procedural protections, however, is that they generally are not closely related to reduced racial discrimination. Conviction-prone juries, poor counsel, and restrictive habeas review, for example, would not necessarily prejudice capital defendants more often in black-victim cases than in white-victim cases. Consequently, protections aimed at addressing those problems, while making the death penalty more difficult to obtain in a certain run of cases, could not be expected to reduce racial prejudice directly. Imposition of such protections might reduce the proportion of death sentences as much in black-victim cases as in white-victim cases, with no net reduction in the sentencing-rate disparity between the two categories. On that assumption, any reduction in racially biased capital sentences would arise only as the random consequence of a larger reduction in the overall number of death sentences.<sup>201</sup>

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199. In *Lockhart*, 476 U.S. at 165, the Court concluded that:

The Constitution [does not] prohibit the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial.

200. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (internal quotation marks omitted) (footnote omitted).

201. Any theory that such protections could more greatly deter pursuit of death sentences in racial categories in which the death penalty is less utilized would involve unwarranted assumptions that the protections would have a direct correlation to reduced race bias. One might posit, for example, that all severe procedural burdens would make prosecutors avoid pursuing the death penalty except in the most egregious cases, which might also be the cases where racial bias would not matter. Unless the protections confronted racial discrimination directly, however, they would not prevent racial bias from influencing perceptions about which murders clearly warranted the death penalty.

Using indirect protections that would reduce the use of the death penalty to near abolition levels would also create as much trouble as it would solve. One of the principal complaints about capital punishment in practice has been that its sparse usage undermines the retribution and deterrence arguments<sup>202</sup> that support it.<sup>203</sup> Because states impose the death penalty on murderers rarely and rather arbitrarily, it does not seem likely to deter murders.<sup>204</sup> Likewise, the penalty cannot find support in retributive theory if almost nobody from the group thought to warrant execution receives the sanction.<sup>205</sup> Yet, thwarting the use of the death penalty to near abolition levels only further undermines the moral argument for the death penalty.<sup>206</sup>

Identifying procedural safeguards to confront racial bias directly also has met with little success. Some safeguards against juror bias have been tried, such as requiring jurors to certify that race has not

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202. See Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 397 (1996) ("The usual justifications advanced for the death penalty are retribution and deterrence.") (footnote omitted).

203. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring) ("I cannot avoid the conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice."); Jack Greenberg, *Against the American System of Capital Punishment*, 99 HARV. L. REV. 1670, 1675-78 (1986) (contending that the infrequent, random, and erratic nature of executions undermines the arguments for capital punishment based on deterrence and retribution); Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 4 (1995) ("Whatever purposes the death penalty is said to serve—deterrence, retribution, assuaging the pain suffered by victims' families—these purposes are not served by the system as it now operates."); McAdams, *supra* note 27, at 836 (lamenting that "many jurisdictions that have the death penalty on the books rarely or never execute anybody" although "[m]ost sensible models of human behavior suggest that people will not be much influenced by a punishment that is not actually imposed").

204. See, e.g., *Furman*, 408 U.S. at 312 (White, J., concurring) ("Most important, a major goal of the criminal law—to deter others by punishing the convicted criminal—would not be substantially served where the penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others."). Regarding whether the death penalty deters murders, see also *infra* note 351.

205. See, e.g., Lempert, *supra* note 38, at 1182 ("If inconsistent sentencing prevents the derivation of a socially validated principle, the person who applauds the execution of the murderer is applauding what is literally unprincipled state action.").

206. This conclusion applies obviously in aggressive death-penalty states, but also in those states that currently only rarely apply the sanction. In those less-aggressive states, retentionists can argue, though not forcefully, the possibility of increased use of the sanction. These arguments lose all force in the face of a deliberate strategy that is expected to minimize the use of the death penalty.

influenced their sentencing verdict.<sup>207</sup> Given the unconscious nature of much racial bias,<sup>208</sup> however, and the tendency of those with conscious bias to camouflage it, this remedy seems ineffectual even regarding juries,<sup>209</sup> and it does not directly address racial bias by prosecutors.<sup>210</sup> The Supreme Court has also long made efforts in all criminal cases to ensure that members of minority groups are not purposefully excluded on racial grounds from jury pools<sup>211</sup> and actual juries.<sup>212</sup> These strategies also have failed, however, to eliminate racial bias in capital selection.<sup>213</sup> In the end, procedural protections appear unlikely to ensure racial neutrality except to the extent that they thwart the use of capital punishment.

### *B. Mandatory Death Sentencing*

The imposition of mandatory death sentences on all offenders found guilty of capital crimes also would not work. The Supreme

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207. The Anti-Drug Abuse Act of 1988 imposed such a requirement in federal court in cases in which the prosecution seeks the death penalty in drug-related killings.

The jury shall return to the court a certificate signed by each juror that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or the victim was not involved in reaching his or her individual decision, and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant, or the victim, may be.

Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(o)(1) (2002).

208. Regarding the unconscious nature of much racial bias, see generally Lawrence, *supra* note 89, at 317 (describing the author's particular experience of being the only black child in his private elementary school reading group).

209. See, e.g., Bright, *supra* note 40, at 464-65 (asserting that the protection will do little to prevent discrimination even by jurors, because many will be unaware of their own racial prejudice, and of those who are, few will allow the certification to stop them from discriminating).

210. See *id.* at 464 ("By the time the jury is selected, racial prejudice may have already influenced the prosecutor's decisions to seek the death penalty, to refuse a plea bargain for a non-capital sentence, and to strike minority jurors.").

211. See, e.g., *Neal v. Delaware*, 103 U.S. 370, 396-97 (1881) (concluding that the absence for ten years of even one African American on the jury rolls in a county with a fifteen percent African American population provided *prima facie* evidence of intentional discrimination); *Strauder v. West Virginia*, 100 U.S. 303, 309-11 (1880) (striking down on equal protection grounds a state statute that explicitly barred African Americans from jury service).

212. See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 85-88 (1986); *Turner v. Murray*, 476 U.S. 28, 36-38 (1986).

213. See *supra* note 13 (discussing *Batson* and *Turner* decisions).

Court declared such an approach unconstitutional long ago.<sup>214</sup> Commentators have asked whether the Court should rescind this prohibition to spur more capital sentences in black-victim cases.<sup>215</sup> The Court rejected mandatory death penalties, however, in part because they would not solve the potential for arbitrary or discriminatory outcomes.<sup>216</sup> The mandatory system would control results only at the final sentencing stage. Racially discriminatory reprieves by prosecutors and juries could still occur at earlier stages<sup>217</sup> and might even grow given the decision maker's knowledge that reprieves could not occur at sentencing.<sup>218</sup> The results under a mandatory system would, therefore, likely remain highly discriminatory.<sup>219</sup> This argument may have provided little reason for the Court to ban mandatory death penalties in favor of discretionary capital sentencing.<sup>220</sup> The rationale does explain, however, why mandatory death penalties would not likely produce the

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214. See *Roberts v. Louisiana*, 428 U.S. 325, 334 (1976) (plurality opinion) (rejecting Louisiana's post-*Furman* mandatory system); *Woodson v. North Carolina*, 428 U.S. 280, 302-05 (1976) (plurality opinion) (rejecting the post-*Furman* mandatory death penalty in North Carolina).

215. See, e.g., Kennedy, *supra* note 26, at 1434 ("Another possible remedial response to race-of-the-victim disparities would be for the Court to retract its rejection of mandatory death sentences.") (footnote omitted).

216. See *Roberts*, 428 U.S. at 334 ("Louisiana's mandatory death sentence statute also fails to comply with *Furman*'s requirement that standardless jury discretion be replaced by procedures that safeguard against the arbitrary and capricious imposition of death sentences."); *Woodson*, 428 U.S. at 303 ("Instead of rationalizing the sentencing process, a mandatory scheme may well exacerbate the problem identified in *Furman* ....").

217. See, e.g., Kennedy, *supra* note 26, at 1435 ("[S]uch laws would do nothing to constrain the prior exercise of prosecutorial discretion."); Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1714 (1974) [hereinafter *Discretion and Constitutionality*] ("Regardless of whether sentencing discretion is restricted, enormous pressures and incentives exist for prosecutors and pardoners to exercise discretion, thus creating a substantial risk of inconsistent results.").

218. See *Discretion and Constitutionality*, *supra* note 217, at 1714-15 ("Furthermore, the desire to achieve individualization of sentencing—a goal of prosecutors and judges alike—and to alleviate the harshness of legislatively prescribed criminal penalties provides a strong incentive for the exercise of discretion in capital cases.") (footnote omitted).

219. See, e.g., SEIDMAN & TUSHNET, *supra* note 33, at 160-61 ("Even a mandatory system does not eliminate prosecutorial and police discretion, jury nullification, or bias built into the definitions of the underlying crimes.").

220. See Scott W. Howe, *Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation*, 26 GA. L. REV. 323, 367 (1992) ("[T]o the extent that the other statutes preserved discretion at the sentencing phase, they left great potential for arbitrariness.").

leveling-up needed to eliminate racial disparities in capital selection.<sup>221</sup>

### C. Forced Narrowing

Limiting the use of the death penalty to a subset of highly aggravated murders also has seemingly insurmountable problems. The notion that states could attack racial bias by restricting the use of the death penalty to narrow categories of murder has appeared most notably in opinions by Justice Stevens.<sup>222</sup> The theory behind the approach is that racial disparities will fall if the death penalty is only available for the very worst murders—those in which prosecutors and jurors would usually favor the death penalty regardless of racial factors. The Court has already forced some narrowing of death eligibility through its proportionality rulings, particularly *Coker v. Georgia*,<sup>223</sup> which proscribed the death penalty for rape and thereby eliminated a source of much racial discrimination in the use of the sanction.<sup>224</sup> Nonetheless, as a strategy for eliminating rather than reducing racial disparities, the approach appears unworkable.

First, a forced narrowing approach would require states to codify irrational distinctions. Substantial narrowing would spare many murderers, although the community would view them as even more deserving of death than many others who could and would receive a death sanction.<sup>225</sup> The worst murderers, according to community

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221. Even more important in the final analysis, mandatory death penalties would fail to acknowledge that many capital offenders do not deserve death. We will see that the central protection that the Eighth Amendment imposes on the use of capital punishment is a mandate that only those who deserve death should receive that sanction. See *infra* notes 289-91 and accompanying text.

222. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 367 (1987) (Stevens, J., dissenting) ("If Georgia were to narrow the class of death-eligible defendants to [categories of highly aggravated murders], the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated.").

223. 433 U.S. 584, 600 (1977).

224. *Id.*; see also Carol S. Steiker, Commentary, *Things Fall Apart, But the Center Holds: The Supreme Court and the Death Penalty*, 77 N.Y.U. L. REV. 1475, 1487 (2002) (noting that the decision eliminated from death eligibility a crime for which the penalty was imposed in patterns reflecting pronounced racial discrimination).

225. See, e.g., Steiker & Steiker, *supra* note 10, at 416 ("The central drawback to such forced narrowing is that it might force states to exclude factors from their definitions of



standards, seem to fall into a broad array of different types of murder that elude description in narrow and objective terms.<sup>226</sup> A substantially narrowed class would inevitably underinclude those deemed deserving of death, which is precisely why states have not defined death eligibility in narrow and objective terms.<sup>227</sup>

A more overriding flaw with the approach lies in the Supreme Court's inability to implement narrowing, short of abolition (or near abolition), to solve the racial-discrimination problem. The Court cannot describe all murders in which race is irrelevant.<sup>228</sup> States themselves have proven unable even to limit death eligibility to categories in which prosecutors usually seek the death penalty, much less categories in which the offenders so clearly warrant death that racial bias will not matter. The legal system cannot identify with objective standards the group of death-worthy cases in which race bias is irrelevant.<sup>229</sup>

The Supreme Court could try to force narrowing without specifying which murderers merit death.<sup>230</sup> The Court could simply order states to narrow to a degree that one-in-five or one-in-ten eligible offenders received a death sanction.<sup>231</sup> This approach would

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capital murder that actually do capture the worst offenses and offenders.").

226. For an insightful warning against efforts to regularize capital sentencing through objective standards, see *McGautha v. California*, 402 U.S. 183, 204 (1971), in which Justice Harlan noted that "[t]o identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."

227. This point suggests why arbitrariness in the use of the death penalty is impossible to avoid. See Steiker & Steiker, *supra* note 10, at 416 ("If this is true, though, it is not merely an indictment of the strategy of forced narrowing; it is a concession that administration of the death penalty is inevitably arbitrary.").

228. The Baldus researchers only noted that there were categories that could be identified with combinations of numerous variables in which race seemed not to matter. See BALDUS ET AL., *supra* note 12, at 399-400. The researchers' conclusion does not mean, however, that the categories would accord with relatively simple statutory language defining death eligibility.

229. See, e.g., Kennedy, *supra* note 26, at 1431 ("The one thing upon which death penalty deregulators and death penalty abolitionists agree" is that identifying with objective measures those who should get the death penalty is not a realistic expectation of the legal system.).

230. See Steiker & Steiker, *supra* note 10, at 415-17 (discussing the advantages and disadvantages of this approach).

231. See *id.* at 415 ("Thus, if experience over the past two decades reflects that one percent of all murders results in a death sentence, the class of the death-eligible should not be

avoid embroiling the Court in precisely defining death eligibility while also allowing states some room to disagree about which murderers should face possible execution.

Unfortunately, this proportional-rule strategy also founders as a way to eliminate racial disparities. The Court would have no basis to know what ratio between the number of death sentences and the number of death-eligible offenders would produce a near-zero level of racial disparities. The ratio would likely depend on numerous factors that vary over time and across jurisdictions. Relevant factors might include the nature of the statutory aggravators used to define death eligibility, the eccentricities and relative aggressiveness of the prosecutors in charge of capital cases, the levels of public funding available to support death-penalty prosecutions, and the level of public concern about crime during a particular period. In addition, no adequate method would exist for determining whether the proportion chosen in a particular state was working. The litigation that would arise over how to set the ratio and how to measure outcomes in different states over time would greatly burden the courts and largely thwart executions.<sup>232</sup>

These problems disqualify forced narrowing as a plausible strategy to eliminate racial bias in capital selection. Of course, the Supreme Court could simply make up a moderately demanding narrowing rule, declare the problem solved, and ignore the realities. In the fashion of its *McCleskey* opinion, the Justices could decline to allow proof that the rule chosen did not succeed.<sup>233</sup> At a price of

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tremendously greater than, say, five or ten percent of all murders" rather than the current ratio, which is "closer to ninety-to-one than five- or ten-to-one.").

232. The Court also could not circumvent the problems by overcompensating so as to minimize the chances of including cases in which race could matter. This strategy itself risks producing near abolition. Also, the Justices would still not know how to define even this extreme level of narrowing—except that the death-eligible group should be tiny. Further, even if the Justices could decide initially on a rule of death eligibility, they would have no definitive way to know whether the rule chosen was working. The additional morass of litigation stalling executions and occupying courts would remain.

233. In *McCleskey* the Court stated:

Because *McCleskey's* sentence was imposed under Georgia sentencing procedures that focus discretion "on the particularized nature of the crime and the particularized characteristics of the individual defendant," ... we lawfully may presume that *McCleskey's* death sentence was not "wantonly and freakishly" imposed ... and thus that the sentence is not disproportionate within any recognized meaning under the Eighth Amendment.

forcing states to codify irrational distinctions and of substantially reducing the use of capital punishment, this strategy might reduce somewhat the racial disparities. The strategy, however, would not constitute a true solution to the racial-bias problem.

#### *D. Mandated Near-Zero Disparity Outcomes*

The final approach, involving Supreme Court rejection of death sentences shown by statistical evidence to reflect racial bias, would also founder. This approach contemplates that states would find their own ways to eliminate the disparities when faced with Supreme Court demands for neutrality and, if not, that the federal courts would step in. Problems again arise, however, from the inability to eliminate racial disparities without severely undermining the use of capital punishment and from the inability of the federal courts to avoid an administrative morass.

##### *1. The Futility of State Efforts to Achieve Racial Neutrality Without Undermining the Use of the Death Penalty*

The first problem with the theory of mandated near-zero disparity outcomes is that states themselves can pursue the goal only by curtailing the use of the death penalty. Efforts to “level-up”—to increase the proportion of death penalties in racial categories where death sentences are less utilized—could not succeed.<sup>234</sup> Neither could efforts to “re-select”—to maintain current levels of death sentencing while promoting proportionate levels of death selection in the various racial categories. Consequently, aggressive death-penalty states face serious disincentives to rectify racial disparities in their selection systems.

Leveling-up or re-selection efforts would not work principally because states lack sufficient control over the main arbiters in

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McCleskey v. Kemp, 481 U.S. 279, 308 (1987); *id.* at 313 (“Despite these imperfections, our consistent rule has been that constitutional guarantees are met when ‘the mode [for determining guilt or punishment] itself has been surrounded with safeguards to make it as fair as possible.’”) (alteration in original) (citation omitted).

234. KENNEDY, *supra* note 26, at 341 (“[I]t would be better to remedy the problem ... by leveling up—increasing the number of people executed for murdering blacks—rather than leveling down—abolishing capital punishment altogether.”).

capital selection.<sup>235</sup> As we have seen, the most important decisions in capital selection are made by dozens of local District Attorneys' offices and by juries, all acting independently.<sup>236</sup> This diffused decision making conflicts with the centralized state control required to manipulate with some precision the number of death sentences in various racial categories.<sup>237</sup> Without the means to generate more death sentences in targeted categories—generally black-victim cases—states could not make these plans work.<sup>238</sup>

States also could not feasibly implement reforms to enable them to achieve the control necessary to level-up or re-select. A requirement that all decisions to pursue a capital sentence funnel through a central state agency for approval would not suffice. This approach would only allow a veto of a decision to seek death, which might help promote racial neutrality, but through leveling down rather than leveling-up or re-selection. Only by reestablishing the prosecutorial function in homicide cases in a central state agency could a state hope to pursue such a plan. This kind of fundamental reorganization, however, would involve great cost and controversy and, in the end, would not necessarily eliminate the influence of racial bias by prosecutors.<sup>239</sup> The state would still lack a solution to

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235. Moreover, when properly understood, the Eighth Amendment problem that the evidence of racial discrimination reveals is not solved by leveling-up proposals or by the imposition of mandatory death penalties. Such proposals would treat the symptom, but not the problem itself. The true Eighth Amendment concern is the inability of capital sentencers issuing death sentences to find deserts appropriately. *See infra* text accompanying notes 289, 293.

236. *See supra* text accompanying notes 65-66.

237. Commentators who have advocated leveling-up or re-selection have not articulated specific remedial plans. For example, Professor Randall Kennedy, a mild abolitionist, has advocated the general notion of leveling-up as a way that states might meet a federal demand for racial neutrality. KENNEDY, *supra* note 26, at 345 n.\* ("I oppose capital punishment ... [but] am not ... a fervent abolitionist."); *see also* Kennedy, *supra* note 26, at 1436-38. He has also asserted that, if the effort failed, leveling down or abolition is an acceptable alternative. *See* KENNEDY, *supra* note 26, at 344 (asserting that states could "[e]ither respond as vigorously to the murders of blacks by condemning perpetrators of such crimes to death (as is done to murderers of whites), or relinquish the power to put anyone to death"). Of course, the practicalities of leveling-up or re-selection take on much more importance to those who would not want a plan to fail than to those willing to accept disintegration of the effort into abolition.

238. Retentionists generally do not believe that such plans would work. *See supra* note 28.

239. The Justice Department has provided some top-down review regarding death-penalty decisions in homicide prosecutions in the federal system. Serious doubt remains, however, that those efforts have eliminated the influence of unconscious racial bias, in part because

the discretion exercised by juries, since the capital defendant's right to jury decisions is constitutionally enshrined.<sup>240</sup>

Even if states could control the death-selection decisions by prosecutors and juries adequately to level-up or to re-select,<sup>241</sup> the efforts would probably violate the Equal Protection Clause.<sup>242</sup> Unlike the unconscious racial bias that currently infects capital selection,<sup>243</sup> a state plan to level-up or to re-select would amount to conscious discrimination. Proponents could push such a plan as an

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the review has covered only those death cases in the federal system in which a death sentence was actually sought. See, e.g., Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 489 (1999):

But if unconscious racial empathy is affecting decisions in the field to decline or accept certain murder cases as federal cases, or to later accept non-death pleas or not, Main Justice reviewers must be aware of the entire universe of cases in which such unconscious effects might manifest themselves before they can address them.

*Id.* (footnote omitted). The Justice Department under Attorney General John Ashcroft recently has altered the federal protocols to give more control to main Justice Department officials over all death-penalty decisions in the federal system. However, the effort appears focused on ensuring more geographical equity in federal decisions regarding death rather than on reducing the influence of racial bias. See, e.g., Dan Christensen, *Federal Prosecutors Ordered to Seek Death Penalty*, BROWARD DAILY BUS. REV., Jan. 29, 2003, at A1.

240. See *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (holding that a capital defendant is entitled to a jury determination regarding the existence of any facts defining death eligibility); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (holding that the right to trial by jury on guilt-or-innocence questions in felony cases is "fundamental to the American scheme of justice" and thus is applicable to the states through the Fourteenth Amendment).

241. Some have suggested that, faced with an alternative of leveling-up or re-selection versus leveling-down or abolition, states would find a way to encourage prosecutors and juries to level-up. See Kennedy, *supra* note 26, at 1436 ("This plan would encourage state officials to change the sentencing habits of prosecutors, juries, and judges because, unless they did so, the state would be precluded permanently from executing anyone."). The specific methods by which states could encourage the substantial and targeted increases by prosecutors are hard to imagine. How states could successfully encourage white juries to put aside their tendencies to empathize more with white victims than with black victims is even more mysterious. See Stephen L. Carter, Comment, *When Victims Happen To Be Black*, 97 YALE L.J. 420, 445 (1988) ("But in a society where racialist categorizations survive, there is no sensible way to finish the sentence. People will bring preconceptions to the jury box as long as preconceptions exist.").

242. See Steiker & Steiker, *supra* note 10, at 420 ("[I]t is doubtful whether state actors can constitutionally attempt to compensate for anticipated sentencer discrimination by reacting differently to murders based on the race of the victim.").

243. Regarding the constitutional issues raised by the unconscious racial bias that currently affects capital selection, see *supra* text accompanying notes 211-13.

effort to remedy past discrimination.<sup>244</sup> They could argue that reversing past white-victim bias would benefit black citizens who previously have received a short share of a public service.<sup>245</sup> Unlike permissible governmental efforts to remedy past discrimination, however, the notion that criminal penalties benefit particular racial groups is itself debatable. Also, unlike permissible efforts to remedy past discrimination, leveling-up or re-selection would impose an extreme penalty on persons who would not otherwise have suffered it and who bear no connection to the previous wrongs.<sup>246</sup> Consequently, these efforts, even if not otherwise unworkable, would probably fail on legal grounds.<sup>247</sup>

Death-penalty states surely could pursue leveling-down methods that would help reduce racial disparities. The methods might include imposing more procedural protections in capital cases, narrowing death eligibility to a tiny category of the very worst murders, or reversing death sentences that statistical evidence suggests are racially biased.<sup>248</sup> However, these approaches tend to thwart states' ability to use the death penalty, and aggressive death-penalty states would generally not pursue them

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244. See Steiker & Steiker, *supra* note 10, at 420 ("Of course, the Court might regard some 'affirmative action' efforts in capital sentencing as the appropriate corrective to longstanding prosecutorial and sentencer indifference to the plight of minority victims.").

245. See Kennedy, *supra* note 26, at 1394 (portraying the issue of white-victim bias in capital selection "as an instance of racial inequality in the provision of public goods").

246. See KENNEDY, *supra* note 26, at 344 ("[E]ven those who favor, or at least tolerate, race-conscious remedies in some contexts reach a point where they find that such remedies are simply too severe to impose upon individuals who themselves played no direct part in inflicting the initial injury.").

247. See Steiker & Steiker, *supra* note 10, at 420.

248. Some researchers, most notably Professor David Baldus, have argued for the latter approach. He has advocated the use of statistical monitoring systems by appellate courts to detect and eliminate racially biased death sentences. See Baldus et al., *supra* note 6, at 359 ("With proper procedures and firm enforcement of proscriptions against racial discrimination, we argue, capital sentencing systems can be largely purged of the discrimination that currently exists.").

voluntarily.<sup>249</sup> This point leads to the second problem with the theory of mandated near-zero disparities.

## *2. The Problems for the United States Supreme Court in Enforcing Near-Zero Disparity Levels*

The Supreme Court could not feasibly enforce a mandate of near-zero disparities. First, the Justices have no more ability than the states to spur near-zero disparities without also causing severe leveling-down in the use of capital punishment. Second, serious efforts by the Supreme Court to force the result would spur never-ending litigation that would greatly tax the federal judiciary and virtually ensure a long and widespread breakdown in the use of capital punishment.

The Supreme Court could not avoid the reality that achieving near-zero disparities would require reversing a significant percentage of all death sentences. The disparities between capital sentencing rates in white-victim and black-victim cases typically have been large. For example, in the Baldus study from Georgia, the researchers concluded that a defendant was 4.3 times more likely to receive a death sentence simply because his victim was white rather than black.<sup>250</sup> Attempts to identify racial discrimination on an individualized basis are also fraught with subjectivity, even speculation.<sup>251</sup> Avoiding those problems might require reversing a large portion of the death sentences issued in white-victim cases, which could also mean a significant portion of all death sentences handed down.<sup>252</sup>

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249. Kentucky and New Jersey have taken steps beyond any required by federal law to address the potential for unconscious racial discrimination in capital selection. The Kentucky statute provides little protection to capital defendants, however, *see supra* note 17 (discussing the limitations to a racial-bias challenge imposed by the Kentucky statute), and New Jersey does not qualify as an aggressive death-penalty state. *See supra* note 35 (noting that, by the end of March, 2004, New Jersey had not executed a single person in the post-*Furman* era and had only fifteen persons on death row).

250. *See* BALDUS ET AL., *supra* note 12, at 154.

251. The Baldus researchers contended that subsets of cases that they classified as falling in the mid-range of aggravation accounted for most of the unexplained racial disparities. *See, e.g., id.* at 154 tbl.32. However, the researchers' mid-range of cases in which the racial disparities existed constituted a very significant percentage of all the cases. *See id.* at 153-54. Also, the authors of the Baldus Study concede that there is a variety of ways to classify cases as similar. *See id.* at 84-97.

252. In many other death-penalty states, achieving parity would require a similarly large

Additional reversals required to remedy race-of-defendant discrimination would cause further erosion.<sup>253</sup>

The Court could make half-hearted efforts, but punt the problem, by requiring defendants to prove by a high standard that discrimination influenced their death sentences. This approach would allow a conclusion in many cases that discrimination was not proven, given the highly speculative nature of efforts to identify racial bias in individual cases.<sup>254</sup> The approach would not solve the discrimination problem, as statistical studies would likely continue to show system-wide racial disparities.

A serious approach would involve recognizing a presumption of racial discrimination based on system-wide statistical evidence, which the state could attempt to rebut. Under this approach, many intractable issues would arise over how to measure racial discrimination. The methodologies of the system-wide studies would face attack,<sup>255</sup> and questions would also arise over how to assess racial discrimination in particular cases.<sup>256</sup> The issues would produce disagreements among the federal circuits, and ultimately would require resolution by the Supreme Court. Until these questions were resolved, numerous stays of execution would issue regularly, thwarting executions.

A Supreme Court decision on a methodological issue would likely also have limited precedential value. Claims from other states based on different studies would often raise different problems. Even in the same state, a different case might present new or

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number of reversals. *See supra* Part II.B.

253. The Baldus Study from Georgia found that, within the white-victim cases, a black defendant was 2.4 times more likely to receive a death sentence simply because he was black rather than white. *See* BALDUS ET AL., *supra* note 12, at 141.

254. *See* Scott W. Howe, *The Constitution and Capital Sentencing: Pursuing Justice and Equality*, 60 *FORDHAM L. REV.* 749, 774-75 (1992) (discussing the inherent problems of any "individualized approach to determining appropriate relief").

255. For example, it is unapparent whether the proper group measures from which to infer discrimination in individual cases should focus on state-wide results or on smaller categories, such as all urban and all rural cases. Likewise, there are no generally agreed upon time frames for group measures. The number and nature of variables to be assessed and controlled in the governing statistical model are also not self-evident. How the facts in individual cases should be determined also raises controversies, particularly given the need to include cases in which there is no trial and, thus, no evidentiary record. *Id.* at 772-78.

256. *See, e.g., id.* at 774-75 (discussing the "unresolvable problems" of attempting to individualize relief).



somewhat different methodological issues. Also, a new study in the same state focusing on expanded or different periods could imply racial discrimination even after rejection of discrimination claims based on a prior study. The continuing litigation would tax the federal courts heavily and likely stall most executions for years.

In the end, racial neutrality in the use of the death penalty carries more than a heavy price. Critics of the Court's capital-sentencing decisions are prone to imply that the Supreme Court was not serious after 1976 about the *Furman* ideal of equality.<sup>257</sup> The more insightful point is one made by Justice Scalia in his private memorandum to the other Justices during the *McCleskey* litigation.<sup>258</sup> Racial discrimination in capital selection appears ineradicable, as a practical matter, through federal regulation.<sup>259</sup>

#### IV. THE EIGHTH AMENDMENT ARGUMENT FOR ABOLITION BASED ON UNCONSCIOUS RACIAL DISCRIMINATION

The conclusion that only abolition can remedy the racial discrimination problem raises the question whether the abolition remedy can find justification in the Constitution. Since the *1976 Cases*,<sup>260</sup>

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257. See, e.g., Howe, *supra* note 7, at 861 (noting that the Court's stated goal of "nonarbitrariness" or "consistency" in the use of the death penalty ... does not describe what the Court has actually accomplished, for capital sentencers can be—and are—given virtually as much discretion under the Court's Eighth Amendment doctrine as they were given in the pre-*Furman* era.").

258. See *supra* text accompanying notes 193-94.

259. See Charles J. Ogletree, Jr., *Black Man's Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 37 (2002) ("[A]t some point we must conclude that perhaps the problem cannot be remedied.").

260. In a famous quintet of cases decided on July 2, 1976, the Court upheld the capital sentencing systems of Georgia, Florida, and Texas, but struck down as overly mandatory the systems of North Carolina and Louisiana. See *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding a Georgia statute that required the jury and judge to consider aggravating and mitigating factors in deciding whether to impose the death penalty on a convicted murderer); *Proffitt v. Florida*, 428 U.S. 242 (1976) (upholding a Florida statute requiring the trial judge, after a jury recommendation, to weigh aggravating factors against mitigating factors in deciding whether to impose a death sentence on a convicted murderer); *Jurek v. Texas*, 428 U.S. 262 (1976) (upholding a Texas statute that required the jury to answer three special questions affirmatively as a prerequisite to the imposition of a death sentence on one convicted of certain forms of aggravated murder); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (striking down a North Carolina statute mandating the death penalty for those convicted of first-degree murder); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (striking down a Louisiana statute mandating the death penalty for persons convicted of certain aggravated

scholarly attention has not focused on this question. The dearth of commentary finds some explanation in the Supreme Court's rejection of abolition after *Furman* and its later rejection in *McCleskey* of calls based on racial discrimination to invalidate Georgia's capital-selection system. The Court's post-*Furman* and post-*McCleskey* decisions on capital sentencing, however, suggest a theory for understanding why racial discrimination justifies abolition under the Eighth Amendment. This Part develops the explanation in three stages. First, it explains why we should understand the Eighth Amendment to embody a substantive limitation on the use of capital punishment—that only those who deserve the death penalty should suffer death. Second, it explains why the evidence of racial bias in capital selection reveals widespread violations of the deserts limitation, regardless of whether the decision makers acted with discriminatory purpose. Finally, it explains why abolition is an appropriate solution to the problem, taking account of probable arguments not already addressed favoring preservation of the capital sanction.

#### *A. The Deserts Limitation on the Use of the Death Penalty*<sup>261</sup>

An important key to the racial-discrimination argument for abolition lies in recognizing that the Eighth Amendment speaks to the issue of who can receive a death sentence and does so in terms that should govern the capital sentencer. The Supreme Court has rationalized its capital sentencing rules as an effort to promote consistency in capital selection.<sup>262</sup> A consistency principle does not explain the Court's decisions on capital punishment, however, and makes no sense under the Eighth Amendment. The principle that best explains the Court's rulings and that gives plausible meaning to the Cruel and Unusual Punishment Clause is the deserts

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murders).

261. I have developed the ideas presented in this section more extensively elsewhere. See, e.g., Howe, *supra* note 7, at 811-23, 829-35; Howe, *supra* note 28, at 403-11, 438-43.

262. See, e.g., *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) ("A capital sentencing scheme must, in short, provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.'") (alteration in original) (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1976) (White, J., concurring)); see generally, Howe, *supra* note 28, at 403-11 (recounting the development of this consistency principle beginning with *Furman*).

limitation—that only those who deserve death should receive that sanction.

The deserts limitation aims at avoiding retributive excess. The limitation means that capital sentencers should base decisions for death on the deserts of the offender rather than on utilitarian concerns. A capital sentence should not rest, for example, on judgments that death would incapacitate a particularly dangerous offender, cost less than life imprisonment, or deter other potential murderers. A jury might view a seventeen-year-old capital murderer as short-sighted and impulsive and thus especially dangerous. Nonetheless, if judged not to deserve death because of his youth, he should not receive a death sanction.<sup>263</sup> Likewise, correctly or not, some might think a death sentence for a contract killing could help deter other similar murders. If the killer does not deserve death due to mitigating factors such as childhood abuse,<sup>264</sup> however, the capital sentencer should opt for life imprisonment.<sup>265</sup>

The Supreme Court's decisions on proportionality in capital sentencing reflect this deserts limitation. The Court has rejected the death penalty as too severe under the Eighth Amendment in certain circumstances. In reaching these decisions, the Court has looked for evidence of a societal consensus that the death penalty is not widely employed in the relevant context. The Court has

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263. Cf. *Stanford v. Kentucky*, 492 U.S. 361, 374-75 (1989) (holding that states can execute offenders who were sixteen or seventeen when they committed their crimes in part because the individualization doctrine allows consideration on a case-by-case basis of whether they warrant a death sentence).

The number of sixteen- and seventeen-year-old offenders who are later executed is small in absolute terms and relative to the number who commit murder, suggesting a widespread sense that they generally do not deserve capital punishment. See Victor L. Streib, *Excluding Juveniles from New York's Impendent Death Penalty*, 54 ALB. L. REV. 625, 658 (1990) (stating that only about 2.4% of all executions are of persons who committed offenses when under age eighteen).

264. See, e.g., Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C. L. REV. 1141, 1179 (1999) ("A history of childhood abuse is paradigmatic of mitigating evidence because it has the potential to transform how a juror perceives the defendant and his commission of the murder.").

265. An individualized judgment at sentencing about the moral deserts of retarded capital murderers decided their fate until the Supreme Court recently prohibited the death penalty for such offenders. See, e.g., *Atkins v. Virginia*, 536 U.S. 304 (2002) (prohibiting the death penalty for retarded offenders); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (setting forth the pre-*Atkins* view that, while the death penalty is not prohibited for retarded offenders, the sentencer must be free to reject the death penalty based on the reduced culpability of the offender due to retardation).

ultimately applied its own judgment to the excessiveness question,<sup>266</sup> however, and that judgment has been grounded on notions of deserts. For example, in *Coker v. Georgia*,<sup>267</sup> the Court rejected the death penalty for the rape of an adult woman where no life was taken. Coker unquestionably posed a future danger, so executing him would have served utilitarian ends.<sup>268</sup> He had escaped from prison to commit the charged capital rape while serving multiple life sentences for an earlier murder of one rape victim and the near murder of another.<sup>269</sup> Rejection of the death penalty in those circumstances necessarily implied that the death penalty is inappropriate when not deserved for the charged offense.<sup>270</sup> Likewise, the Court's subsequent proportionality decisions on capital punishment have continued to reflect the deserts limitation, although the Justices have also asked whether objective evidence reveals a societal consensus against the death penalty in the relevant context.<sup>271</sup>

The Court's Eighth Amendment decisions regulating capital sentencing trials also serve this prohibition against retributive excess.<sup>272</sup> The central requirement of capital sentencing, beyond

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266. See, e.g., *Atkins*, 536 U.S. at 312-13 (asserting that, where a consensus exists, the Court will ask whether there is a basis to disagree); *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion) (asserting that questions as to the propriety of the death penalty under the Eighth Amendment are ultimately up to the Justices' own judgment).

267. *Coker*, 433 U.S. at 597 (plurality opinion).

268. See, e.g., Herbert L. Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1079-80 (1964) (asserting that the death penalty for rape is no more questionable than the death penalty for murder if death sentences can be justified on incapacitation or general deterrence rationales).

269. See *Coker*, 433 U.S. at 605 (Burger, C.J., dissenting) (noting Coker's escape from prison for his prior offenses and the brutal nature of the prior crimes and the charged offense).

270. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 45 (2d ed. 1995) (stating that the *Coker* opinion revealed that "Justice White applied a strictly retributive conception of proportionality").

271. See, e.g., *Atkins*, 536 U.S. at 318 (prohibiting the death penalty for retarded offenders on grounds that they generally lacked the "personal culpability" to justify that sanction); *Penry v. Lynaugh*, 492 U.S. 302, 336 (1989) (plurality opinion) (quoting the language from *Tison*); *Tison v. Arizona*, 481 U.S. 137, 149 (1987) (emphasizing that the question is one of appropriate retribution, which focuses on "the personal culpability of the criminal offender").

272. I have elsewhere rejected on prudential grounds a role for the Supreme Court in regulating capital sentencing under this desert limitation. At the same time, I have argued, as I do here, that the desert limitation appropriately translates the Eighth Amendment as it applies to capital punishment, best rationalizes the Court's capital sentencing doctrine,

the minimal narrowing rule,<sup>273</sup> is the individualization mandate of *Lockett v. Ohio*,<sup>274</sup> which holds that a capital sentencer must remain free to reject the death penalty based on any evidence that the offender presents regarding his character, record, or crime.<sup>275</sup> This mandate could only build on the deserts limitation. Individualized consideration would lack justification if utilitarian goals, such as deterring other potential murderers or avoiding the perceived costs of imprisoning an offender, could support a death sentence. Categorical approaches to sentencing, determined in advance by the legislature, could serve utilitarian ends.<sup>276</sup> In contrast, there is now a societal consensus that myriad individual factors bear on deserts,<sup>277</sup> so that a finding of guilt alone cannot automatically render a death sentence deserved, even when the legislature defines the capital crime in highly aggravated terms.<sup>278</sup> The desert assess-

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and best describes the capital sentencer's normative role under the Eighth Amendment. See generally Howe, *supra* note 7, at 835-43.

273. See *supra* notes 48-51 and accompanying text.

274. 438 U.S. 586 (1978) (plurality opinion).

275. In *Lockett* the Court stated:

[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

*Id.* at 604 (footnotes omitted); see also *id.* at 620-21 (Marshall, J., concurring) (noting that the Ohio statute "wholly fails to recognize the unique individuality of every criminal defendant").

276. That some relevant utilitarian questions concerning the use of the death penalty call for individualized consideration also would not justify the individualization rule as an Eighth Amendment mandate. For example, individualized consideration could help resolve the utilitarian question whether to execute to negate future harm by an offender. No apparent Eighth Amendment theory would explain, however, why a state should focus on one utilitarian question rather than another.

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Once we know not only the *kind* of offense a person has committed, but the circumstances in which it was performed, whether he did it deliberately, the kind of pressures on him when he did it, his whole psychological 'set,' and a host of other factors, we have much more data for deciding what he deserves than when we know only the type of crime he committed and then attempt to correlate the gravity of that type of crime with the gravity of the punishment.

John Hospers, *Retribution: The Ethics of Punishment*, in *ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS* 181, 190 (1977) (Randy E. Barnett & John Hagel III eds., 1977).

278. See, e.g., *Sumner v. Shuman*, 483 U.S. 66, 82-85 (1987) (rejecting mandatory death penalty for murder by an inmate serving a life term); *Roberts v. Louisiana*, 431 U.S. 633, 637-38 (1977) (rejecting a statute mandating death penalty for the murder of a police officer).

ment requires a capital-sentencing hearing at which the capital sentencer can weigh a broad array of information. The inquiry allows a nuanced determination to help ensure that no person receives a death sentence who does not deserve it.<sup>279</sup>

The deserts limitation also provides sensible meaning to the language in the Eighth Amendment. The relevant clause prohibits punishments that are "cruel and unusual." Since *Furman*, only about 300 of the roughly 21,000 homicides committed annually in this country have ended with a death sentence.<sup>280</sup> Given the low absolute number of death sentences and the low proportion of death sentences for homicides, capital sentences can readily be thought unusual. More importantly, the imposition of an undeserved death sentence can itself be thought unusual and, certainly, it is cruel. The idea comports with basic notions of justice.<sup>281</sup> The Supreme Court has not applied so stringent a rule regarding long prison terms,<sup>282</sup> but they are not as absolute and irrevocable as an execution. When applied to the death penalty, the deserts limitation provides a fair reading of the Eighth Amendment.

Eighth Amendment restrictions on capital punishment are not justified on the theory that they promote consistent treatment of

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279. The minimal narrowing rule also finds explanation as an effort to ensure that only the deserving receive death. Reducing even marginally the group subject to the death penalty, by requiring the finding of an aggravating circumstance, reduces the chances that an undeserving offender will receive a death sentence. In contrast, the narrowing requirement does little, if anything, to ensure consistency in the disposition of capital offenders. See Howe, *supra* note 7, at 815, 833.

280. See Liebman, *supra* note 70, at 2052 ("Since *Furman*, an average of about 300 of the approximately 21,000 homicides committed in the United States each year have resulted in a death sentence.") (footnote omitted).

Recently, for reasons that are unclear, the number of persons sentenced to death has dropped well below historical averages. Only 155 defendants received death sentences in 2001, and an even lower number did in 2002. See, e.g., *For First Time Since 1976, Drop in Inmates on Death Row*, N.Y. TIMES, Dec. 16, 2002, at A20 (noting the low numbers of death sentences in 2001 and 2002 compared with prior years).

281. See Hospers, *supra* note 277, at 183 (asserting that most people believe that treating criminals according to their deserts is the embodiment of justice); Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1429 n.1 (2001) (noting that lay persons generally believe that desert principles should justify criminal punishments).

282. In noncapital cases, the Court has deferred to state legislative judgment except on finding gross disproportionality. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 997-98 (1991) (plurality opinion) (upholding mandatory sentence of life imprisonment for possession of 650 or more grams of cocaine).

offenders. First, this theory does not explain the Court's capital-sentencing decisions. The Court's work in modestly narrowing the application of the death penalty and in requiring individualized consideration at the capital-sentencing stage does little to promote equal treatment of all those who are potentially subject to the death penalty. Opportunities remain throughout the capital selection process for arbitrary reprieves of death-eligible offenders by police, prosecutors, trial judges, juries, and state executives. Even among those actually convicted of capital crimes, the Court's regulatory efforts do little to promote consistency. After a capital conviction, prosecutors and capital sentencers retain nearly as much discretion to reprieve offenders arbitrarily as in the pre-*Furman* era.<sup>283</sup> The basis for separating those who receive death from those who are spared continues to appear irrational.

Consistency also does not provide sensible meaning to the Eighth Amendment. A consistency command assumes that the Eighth Amendment imposes no particular substantive limits on the use of the death penalty. It assumes that distributing death sentences according to various substantive standards can suffice as long as states consistently apply the chosen standard. This view would mean that even harsh rules, if consistently followed, would become acceptable. A state could then disallow capital offenders the opportunity to obtain merciful reprieves from death sentences on grounds that doing so would protect them from cruel and unusual punishment. Of course, this outcome stands the cruel and unusual punishments prohibition on its head.<sup>284</sup> The Eighth Amendment aims to prevent execution of the undeserving, not to ensure that all who meet a particular standard receive that punishment.

The consistency theory also fails to explain why racial bias in capital sentencing should matter very much. The theory contains no substance.<sup>285</sup> Even without knowing the substantive measure that

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283. See, e.g., Steiker & Steiker, *supra* note 10, at 436 (asserting that "the pre-*Furman* world of unreviewable sentencer discretion lives on, with much the same consequences in terms of arbitrary and discriminatory sentencing patterns"); see also *supra* Part I.C (discussing the limited role of Supreme Court doctrine in controlling prosecutorial discretion).

284. See, e.g., Daniel D. Polsby, *The Death of Capital Punishment? Furman v. Georgia*, 1972 SUP. CT. REV. 1, 27 (asserting that pursuing nonarbitrariness in capital selection as an Eighth Amendment goal involves a "profound contradiction").

285. Consistency, like equality, is an empty prescription in that it fails to provide a

should govern capital sentencing, we might think that racial discrimination exemplifies inconsistent treatment.<sup>286</sup> Absent the substantive measure, however, it remains unclear why unconscious racial discrimination should matter enough to invalidate death sentences. Unless those sentenced to death are treated unjustly, they should not necessarily escape that punishment simply because others who appear similarly situated escape. If the point is only that there is inconsistency, we should feel badly, but mostly for the victims whose convicted killers were spared.<sup>287</sup> Unconscious racial discrimination in capital sentencing clearly matters enough to invalidate death sentences only if we recognize that the purpose of the sentencing hearing is to resolve a substantive question of justice on which race has no bearing.

### *B. Racial Discrimination as a Violation of the Deserts Limitation*

When we recognize that the Eighth Amendment embodies a desert limitation on capital selection, racial discrimination in capital selection matters greatly. The race of a capital offender or of his victim has no relevance in determining the moral deserts of the offender for the capital crime.<sup>288</sup> Because the

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measure by which to judge when persons have been treated equally or differently. *See, e.g.,* Howe, *supra* note 28, at 368-76. Except in extraordinary circumstances, judgments about equality become possible only in relation to a standard external to equality. Compare Christopher J. Peters, *Equality Revisited*, 110 HARV. L. REV. 1210, 1232-54 (1997) (contending that nonegalitarian justice is what controls even when equality is asserted as guiding the decision on appropriate treatment of persons), and Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 559-77 (1982) (contending that equality alone does not lead to a method for deciding what is appropriate treatment of people), with Kent Greenawalt, *How Empty is the Idea of Equality?*, 83 COLUM. L. REV. 1167, 1178-79 (1983) (contending that there may be a few cases, exemplified by parents' treatment of their children, in which equality itself has normative force).

286. *See, e.g.,* Bandes, *supra* note 202, at 397 ("[T]aking an easy example, the law ought not to condone punishment of a defendant that varies according to the social class or the race of his victim.").

287. *See, e.g.,* H.R. REP. NO. 103-458, at 14 (1994) (asserting that "the solution would be to seek the death penalty in more cases in which black defendants murder black victims"); Scheidegger, *supra* note 184, at 126 ("Instead of demanding leniency for those who murder whites, it is time to demand justice for all murder victims, white or black."); van den Haag, *The Ultimate Punishment*, *supra* note 27, at 1663 ("The ideal of equal justice demands that justice be equally distributed, not that it be replaced by equality.").

288. *See, e.g.,* Lempert, *supra* note 38, at 1178 (asserting that "the just desert theory" does not permit race "to dominate indicia of moral culpability in determining punishment")



Eighth Amendment function of the capital sentencer is to ensure as a prerequisite to a death sentence that the offender deserves death, consideration of race renders the sentencing judgment improper. When capital sentencers rely on inappropriate factors like race, the death sentences they issue are not deserved.<sup>289</sup>

Acknowledging the deserts limitation also undermines the common argument that racial discrimination in capital selection, while unfortunate, does not support abolition or any level-down remedy. The deserts limitation makes irrelevant the argument that those who deserve death do not deserve death any less, simply because others who should also receive death are spared.<sup>290</sup> That argument assumes that those who have received death sentences deserve them. A death sentence is not deserved, however, if racial discrimination influenced the sentencer.<sup>291</sup>

Evidence that the principal problem in capital selection is race-of-victim rather than race-of-defendant discrimination also does not ameliorate the constitutional concern. Racial discrimination in capital sentencing invalidates the deserts finding that justifies a death sentence whether the discrimination stems from white-victim bias, black-defendant bias, or other racial bias. If the problem were mere inconsistency in the treatment of those deserving death,

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(footnote omitted).

289. See *id.* at 1178 n.5 ("To my knowledge no modern retributivist has argued that unalterable personal characteristics such as race and sex may be properly considered in assessing culpability for crime.").

290. See, e.g., SEIDMAN & TUSHNET, *supra* note 33, at 160 (suggesting than an offender who deserves to die should not be reprieved merely because another defendant who deserves death has avoided that sanction); McAdams, *supra* note 191, at 167 ("The fact that you parked illegally and did not get a ticket does not relieve me of paying the fine when I do get a parking ticket."); van den Haag, *The Ultimate Punishment*, *supra* note 27, at 1663 ("Maldistribution of any punishment among those who deserve it is irrelevant to its justice or morality.").

291. We have already seen that the finding of guilt of a capital crime would not suffice to conclude that the offender deserved death. Eighth Amendment doctrine reveals that a deserts assessment sufficient to support a death sentence should build on a nuanced examination at the sentencing stage of the offender's character, record, and crime. See *supra* notes 273-79 and accompanying text. This requirement reflects state practices, started in the early nineteenth century, of rejecting mandatory death penalties in favor of a discretionary judgment by the jury. See *Woodson v. North Carolina*, 428 U.S. 280, 290-93 (1976) (plurality opinion) (noting the consistent trend away from mandatory death statutes, even for homicide, beginning in the early 1800s); Douglas A. Berman, *Foreword: Addressing Capital Punishment Through Statutory Reform*, 63 OHIO ST. L.J. 1, 1-2 (2002) ("The late nineteenth and early twentieth centuries also saw states ... move away from mandating death ....").

certainly the black victims whose killers were reprieved would have a greater claim to our sympathy than the killers of white victims who were condemned.<sup>292</sup> The true problem, however, is the invalidity of the deserts findings in a significant portion of the cases in which death sentences have issued, and, on that score, all forms of racial discrimination are equally subversive.<sup>293</sup>

The unconscious nature of racial discrimination also does not eliminate the Eighth Amendment problem. Deserts assessments become unreliable when influenced by racial bias regardless of whether the decision maker has a purpose to discriminate on racial grounds. To make out an equal protection violation, the Supreme Court has required proof of purposeful discrimination.<sup>294</sup> Unbounded by its own substantive standards, the equal protection mandate demands judicial confinement, and requiring proof of purposeful discrimination at least serves that larger goal. No similar rationale, however, would justify a distinction between purposeful and nonpurposeful discrimination in applying the Eighth Amendment. To recognize only purposeful discrimination as

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292. See, e.g., KENNEDY, *supra* note 26, at 341 ("[I]t would be better to remedy the problem ... by leveling up—increasing the number of people executed for murdering blacks—rather than leveling down—abolishing capital punishment altogether."); Dolinko, *supra* note 26, at 583 ("If one takes the discrimination argument seriously, the primary victims of unfair discrimination are not the persons who are put to death for killing whites, but the class of black citizens, whose lives are being implicitly devalued."); Carter, *supra* note 241, at 446 ("The problem is one of fairness to victims ....").

293. Evidence of racial discrimination in capital selection is likely only the most visible portion of a much wider problem with irrationality in decisions to impose death. Many irrelevant factors probably distort these decisions. One commentator has noted, for example, that the reaction of capital-sentencing jurors will often differ depending on whether the offender is from their town or another area. See Dershowitz Interview, *supra* note 2, at 331 (contending that large disparities arise surrounding whether the victim and defendants are residents of the same town as the sentencing jury). Others have suggested that capital-sentencing jurors may empathize more, for example, with those who have attractive facial characteristics or who are otherwise physically attractive. See *McCleskey v. Kemp*, 481 U.S. 279, 317 (1987). These points suggest that we should understand racial discrimination as only revealing a broader irrationality—that capital sentencers generally have more empathy for the victims and the offenders they view as most like them or like those they find physically appealing than for those they view as different or ugly. See Dershowitz Interview, *supra* note 2, at 331 ("We value the life most of those who we are most like."). Even this notion may not adequately express the breadth of irrelevant factors that influence sentencers deciding who will die.

294. See, e.g., *McCleskey*, 481 U.S. at 299 (rejecting *McCleskey's* equal-protection claim on grounds that the statistical evidence did not establish purposeful discrimination).

a violation of the Eighth Amendment is simply to undermine the substantive rule embodied in the prohibition.

The socially-constructed nature of deserts judgments does not undermine the view that racial discrimination in capital selection violates the Eighth Amendment. In part because desert notions are not eternally fixed, the Supreme Court faces difficulty defining precisely when a capital offender warrants death for Eighth Amendment purposes. Societal consensus about deserved punishment changes over time and often eludes accurate description. Nonetheless, we know that the race of the offender or of the victim should not bear on whether a capital offender deserves death. The socially constructed nature of deserts determinations does not prevent that conclusion.

Evidence of racial discrimination throughout the capital selection process also remains relevant to proving that capital punishment violates the Eighth Amendment. Perhaps not every act of racial discrimination that occurs in capital selection in a death case should violate the deserts limitation. Racial discrimination at any stage, if purposeful, violates equal protection principles. In contrast, the Eighth Amendment deserts limitation only requires an assurance that the offender deserves death. If sentencing juries based death sentences on valid deserts determinations, unconscious racial discrimination at other stages would not matter. A jury validly would have found each person sentenced to death to deserve that sanction. We lack assurance, however, that capital sentencers determine deserts appropriately.<sup>295</sup> To ensure that death-sentenced

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295. Sociological studies strongly imply that racial discrimination occurs at the final capital-sentencing stage on a fairly widespread basis. The statistical evidence is less consistent and compelling, however, than the evidence of racial discrimination in capital sentencing overall. Several studies in particular jurisdictions have concluded that the most pronounced racial discrimination occurs at this stage of the process. *See, e.g., supra* notes 165-70 and accompanying text (Baldus study in Philadelphia); *supra* notes 173-75 and accompanying text (Pierce and Radelet study in Illinois). In contrast, researchers in some jurisdictions have not identified racial bias at the sentencing stage. *See, e.g., supra* notes 138-44 and accompanying text (Arkin study in Miami); *supra* notes 145-47 and accompanying text (Klein and Rolph study in California). In some cases, researchers have not identified discrimination at the sentencing stage even when they have found evidence of racial discrimination by prosecutors at earlier stages. *See, e.g., supra* notes 126-31 and accompanying text (Vito and Keil study in Kentucky). The conclusions to be drawn from these latter studies are unclear. Racial discrimination by decision makers earlier in the selection process can make very difficult the determinations whether capital sentencers have

offenders deserve death, we arguably should conclude that the Eighth Amendment requires racially neutral decisions at all stages of the process.<sup>296</sup> Even if we focus only on the sentencing stage, evidence of racial discrimination throughout capital selection adds to our doubts that capital sentencers issuing death sentences act properly.

### *C. Justification for the Abolition Remedy*

The question remains whether abolition is an appropriate solution to the problem of improper desert findings. We have already seen that the Supreme Court cannot, as a practical matter, regulate away the racial disparities in capital selection.<sup>297</sup> The remedial problem remains once we understand the Eighth Amendment problem as impropriety in the deserts decisions supporting death sentences (rather than mere racial inconsistency among those deserving death).<sup>298</sup> The only plausible remedy is abolition. Nonetheless, retentionists would argue against abolition despite the undeserved nature of many death sentences. The next section sets forth the most important arguments that retentionists would offer and shows why they are weak reasons to preserve capital punishment.

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acted fairly, since bias in the selection of the group subject to sentencer consideration may tend to mask racial discrimination by the sentencer. *See supra* Part I.C.

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When a state cannot act consistently in such an important matter as determining who shall die, those who invoke moral philosophy to demand that the state be allowed to make that determination should be able to point to a consensually validated principle which assures us that the inconsistency is benign.

*See, e.g.,* Lempert, *supra* note 38, at 1182 (footnote omitted).

297. *See supra* Part III.

298. The level-up proposals actually become inappropriate for another reason once we understand the Eighth Amendment problem. Those proposals treat the racial disparities without remedying the real problem of death sentences resting on improper desert findings. The racial disparities are symptoms of this deeper Eighth Amendment concern.

*1. The Language of Other Constitutional Provisions Indicates That the Prohibition on Cruel and Unusual Punishments Does Not Call for Abolition of Capital Punishment*

Commentators frequently have contended that several clauses in the Fifth and Fourteenth Amendments bear on whether the prohibition on cruel and unusual punishments in the Eighth Amendment should proscribe the death penalty. The Fifth Amendment includes two provisions, governing grand-jury indictment and double jeopardy, that protect capital defendants explicitly and, thus, contemplate the use of capital punishment.<sup>299</sup> The Due Process Clauses in both the Fifth and Fourteenth Amendments also protect against governmental taking of "life."<sup>300</sup> Retentionists argue that these provisions reveal the original intent or understanding of the Eighth Amendment as not prohibiting the death penalty and, thus, mean that capital punishment cannot violate the Eighth Amendment today.<sup>301</sup>

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299. The Fifth Amendment provides in pertinent part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ....

U.S. CONST. amend. V.

300. The Due Process Clause in the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law...." *Id.* amend. XIV.

301. See, e.g., RAOUL BERGER, *DEATH PENALTIES* 47 (1982) ("[S]pecial safeguards in application of the death penalty were provided by the Fifth Amendment precisely because the Framers postulated that the death penalty was unaffected by the Eighth Amendment."); BORK, *supra* note 33, at 213 ("[T]he Bill of Rights threw protections around the imposition of the punishment and thus clearly showed that the death penalty itself was constitutionally acceptable.") (footnote omitted); SCALIA, *supra* note 33, at 146 ("[P]rovision for the death penalty in a Constitution that sets forth the moral principle of 'no cruel punishments' is conclusive evidence that the death penalty is not (in the moral view of the Constitution) cruel."); Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 34 (1987) (asserting that capital punishment does not violate the Eighth Amendment in part because the sanction is presupposed by clauses in the Fifth and Fourteenth Amendments).

Some who oppose capital punishment have at times also found the language in the Fifth and Fourteenth Amendments to pose an obstacle to judicial abolition under the Eighth Amendment. See, e.g., Sanford Levinson, *Wrong But Legal?*, NATION, Feb. 26, 1983, at 249

The central answer to the originalist charge is that the specific intentions or understandings of how the Eighth Amendment would apply to the death penalty at the time of its adoption need not prevent effectuation of the broader principles embodied in the Eighth Amendment now.<sup>302</sup> One of the central challenges involved with efforts to interpret the Constitution according to original understandings is the inability to know the level of generality at which to identify those understandings. We have seen that the prohibition on "cruel and unusual punishments," as a linguistic matter, can imply a deserts limitation on the use of the death penalty.<sup>303</sup> This interpretation also comports with originalism. No serious dispute exists that the Eighth Amendment originally permitted the death penalty for murder and a wide variety of other crimes.<sup>304</sup> Capital offenders at that time, however, were generally thought to deserve death,<sup>305</sup> a perspective consistent with the mandatory nature of the death sanction in the late eighteenth century.<sup>306</sup> What has changed during the last two centuries is not the general principle but the results of its application. American society has progressed in its views about the deserts of offenders, as reflected in the narrowing of the crimes subject to the death penalty and in the movement away from mandatory death sentences.<sup>307</sup> The decisions of the Supreme Court on proportionality in

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(contending, despite personal opposition to the death penalty, that the specific acknowledgment of the use of capital punishment in the Fifth and Fourteenth Amendments poses a serious obstacle for the view that the Eighth Amendment can proscribe the sanction).

302. See, e.g., SEIDMAN & TUSHNET, *supra* note 33, at 154 (contending that capital punishment could violate the "general prohibition" in the Eighth Amendment "even if its authors did not recognize this").

303. See *supra* text accompanying notes 280-81.

304. See, e.g., DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801*, at 93-96 (1997) (noting that, in 1789, Congress enacted a comprehensive statute defining numerous federal crimes and provided for the death penalty for many of them, including a provision that allowed a federal court "after imposing a death sentence for murder to order 'that the body of [the] offender ... be delivered to a surgeon for dissection'").

305. See generally, BANNER, *supra* note 1, at 13-16 (discussing the generally accepted belief in America in the seventeenth and eighteenth centuries that the death penalty was just retribution); *id.* at 23 ("[C]apital punishment was accepted as a legitimate act of retribution directed at a person responsible for his own actions.").

306. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976) ("At the time the Eighth Amendment was adopted in 1791, the States uniformly followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses.") (footnote omitted).

307. See, e.g., *id.* at 289-93 (discussing the historical trend away from expansive

the use of capital punishment and on individualization and narrowing in capital sentencing also best find explanation in this deserts-limitation idea.<sup>308</sup> A view that the Eighth Amendment now proscribes capital punishment would rest simply on the recently accumulated evidence that regulatory efforts cannot satisfy the deserts limitation.<sup>309</sup>

Contending that the Eighth Amendment should apply in the specific way that it applied when promulgated poses severe problems for constitutional construction generally. Any approach to constitutional understanding that fails to accommodate the decision in *Brown v. Board of Education*<sup>310</sup> cannot claim descriptive or prescriptive credibility.<sup>311</sup> Hence, even ardent originalists have described *Brown* as consistent with originalism.<sup>312</sup> However, the

application of the death penalty and away from mandatory death penalties even for murder).

308. See *supra* Part IV.A.

309. This contention warrants a caveat. Three members of the current Supreme Court believe, on originalist grounds, that the Eighth Amendment prohibits certain modes of punishment but does not proscribe punishments merely because they are thought overly severe for the crime committed. See, e.g., *Graham v. Collins*, 506 U.S. 461, 488 (1993) (Thomas, J., concurring) ("[T]he better view is that the Cruel and Unusual Punishments Clause was intended to place only substantive limitations on punishments ...."); *Harmelin v. Michigan*, 501 U.S. 957, 976 (1991) (Scalia, J., joined by Rehnquist, C.J.) ("[T]he Clause disables the Legislature from authorizing particular forms or 'modes' of punishment ...."). The Court has long viewed the Eighth Amendment, however, as prohibiting punishments that are deemed disproportional. In 1910, in *Weems v. United States*, 217 U.S. 349 (1910), the Court struck down as inappropriate for a minor crime a sentence that involved at least twelve years of hard labor, indefinite supervision, and the forfeiture of civil rights. The Court stated: "Such penalties for such offenses amaze those who ... believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense." *Id.* at 366-67. Some have contended that *Weems* could find explanation in the prohibition on certain modes of punishment. See, e.g., Packer, *supra* note 268, at 1075-76 (contending that the nature of the punishment rather than a disproportionality analysis may actually have explained the decision). In more modern times, however, the Court has followed the view that the Eighth Amendment prohibits gross disproportionality in the use of noncapital punishment, see, e.g., *Solem v. Helm*, 463 U.S. 277 (1983) (invalidating life sentence without parole for habitual offender who passed a bad check for one hundred dollars), and disproportionality in the use of capital punishment. See, e.g., *Coker v. Georgia*, 433 U.S. 584, 599 (1977) (declaring death penalty excessive for rape of adult woman where no life was taken).

310. 347 U.S. 483 (1954).

311. See DWORKIN, *supra* note 33, at 300 (contending that the ability to explain the *Brown* decision is "a test any constitutional theory must now pass").

312. See, e.g., BORK, *supra* note 33, at 81 (asserting that "[i]t is clear that [*Brown*] can be rested" on "the original understanding of the equal protection clause of the fourteenth amendment").

Equal Protection Clause doubtless was not originally understood to require integration in public schools or public institutions generally.<sup>313</sup> To avoid the problem created by this reality, originalists have asserted that we should understand the Equal Protection Clause at the general level of assuring black equality.<sup>314</sup> They then contend that, while originally segregation was viewed as consistent with black equality, the two notions later came to be viewed as conflicting, requiring the proscription of segregation.<sup>315</sup> By the same logic, choosing the original general principle over the original specific application allows a construction of the Eighth Amendment as imposing a deserts limitation on capital punishment and, ultimately, as proscribing that sanction. If the Eighth Amendment had to implement the original understanding at the most specific level, equal protection would also have to permit publicly sanctioned segregation.<sup>316</sup>

The clauses in the Fifth and Fourteenth Amendments also do not themselves forbid the prohibition of capital punishment. The Due Process Clauses in the Fifth and the Fourteenth Amendment merely prohibit denials of "life" without due process, and would apply in noncriminal contexts even if the death penalty disappeared.<sup>317</sup> Moreover, the references to capital cases in the Grand Jury and Double Jeopardy Clauses do no more than contemplate the use of the death penalty. They reveal at most that capital punishment in 1791 did not infringe the general principle embodied

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313. See DWORKIN, *supra* note 33, at 294 (noting that the promulgators of the Fourteenth Amendment "shared the view ... that racial segregation of public schools did not violate the clause" and that "[n]one of them even considered the possibility that state institutions would one day adopt affirmative action racial quotas designed to repair the damages of past segregation").

314. See, e.g., BORK, *supra* note 33, at 81 (asserting that "those who ratified it intended black equality").

315. See, e.g., *id.* at 82 ("Since equality and segregation were mutually inconsistent, though the ratifiers did not understand that, both could not be honored.").

316. See generally DWORKIN, *supra* note 33, at 294-301 (asserting that the writings of Robert Bork fail to assume a consistent position regarding the level of abstraction at which to identify the original understanding when applying the Equal Protection Clause to public segregation and the Cruel and Unusual Punishments Clause to capital punishment).

317. Imagine, for example, a victim of an aggravated assault who, as a result, was in a coma and on extraordinary life support in a state hospital, but with no chance of recovery. Suppose that the state wanted to disconnect the life support to allow the victim to die so that the assailant could be charged with murder. The state could not deprive the victim of life without due process of law.



in the Eighth Amendment, which, as we have seen, does not bar a different conclusion about whether capital punishment infringes that general principle today. The references would become irrelevant but not insensible if all the states and the federal legislature decided to abolish capital punishment. Likewise, they would become merely irrelevant but not insensible if the Supreme Court abolished capital punishment under the Eighth Amendment.

*2. The Death Penalty Does Not Violate the Eighth Amendment Because Societal Consensus Favors Its Use*

The Supreme Court has concluded that the prohibition on cruel and unusual punishments builds on "the evolving standards of decency that mark the progress of a maturing society."<sup>318</sup> On this view, the provision can proscribe punishments that states used commonly at the time of the founding.<sup>319</sup> The approach also contemplates, however, limits on the ability of the Court to strike down punishments. Widespread statutory endorsement of the death penalty and its occasional imposition<sup>320</sup> imply that a societal consensus has not developed against it.<sup>321</sup> For this reason, retentionists can argue that the punishment does not violate the Eighth Amendment.<sup>322</sup>

This contention simply turns a blind eye to racial discrimination in the imposition of death penalties. Evidence that a majority of the society supports the death penalty should not determine its constitutionality if odious prejudices mar its use. Professor

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318. *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)) (internal quotation marks omitted); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion) (quoting *Trop*).

319. See, e.g., SCALIA, *supra* note 33, at 39-40 (noting that the Eighth Amendment standard exemplifies that "what the Constitution meant yesterday it does not necessarily mean today").

320. See *supra* note 35 and accompanying text.

321. See, e.g., Posner, *supra* note 301, at 34 (noting that the death penalty "has been supported continuously by the vast majority of the people of the United States from the founding of the nation up to the present day").

322. See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 378-79 (1989) (plurality opinion of Scalia, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.) (asserting that societal opposition to the death penalty must be reflected objectively through laws and sentencing verdicts and, based on that standard, the death penalty is permissible for those whose offenses occurred when they were at least sixteen).

Amsterdam noted this point in his argument before the Supreme Court in *Aikens v. California*,<sup>323</sup> a companion case to *Furman*.<sup>324</sup> He urged that the proper question under the Eighth Amendment was "whether a punishment *if evenhandedly applied* would be unacceptable to contemporary standards of decency."<sup>325</sup> Of course, Professor Amsterdam concluded that society would reject a fair death penalty.

The Supreme Court would confront the problem more directly by acknowledging that racial discrimination in capital sentencing violates the deserts limitation and then simply ask about the remedy. The question posed by Professor Amsterdam ingeniously connected the racial-discrimination problem to the Court's then-existing Eighth Amendment pronouncements. The answer to the question, however, was not as clear as Professor Amsterdam indicated. Faced with an imaginary choice between racially neutral application and abolition, society might well choose racially neutral application. This conclusion should not matter. The crucial question is not what society would choose if forced to choose, but whether the Supreme Court can force states to choose. We have seen that the Court cannot feasibly impose such a choice. The Court can only solve the problem through abolition.

Although not essential to the argument, asking directly about the remedy also would not seriously extend the Court's past approach to resolving abolition questions. A societal consensus exists against imposing the death penalty on the undeserving; the Court's post-*Furman* application of the Eighth Amendment to capital punishment implicitly builds on this notion.<sup>326</sup> In abolishing the death penalty, the Court would give force to society's aspirations at this higher level of generality. The Court would confront objective evidence that the death penalty is still widely allowed and occasionally imposed for murder, just as the death penalty was still widely allowed and occasionally imposed on retarded offenders when the Court recently rejected the death penalty for retarded murderers in *Atkins v. Virginia*.<sup>327</sup> The inability to cure the racial discrimination

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323. 406 U.S. 813 (1972).

324. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

325. MELTSNER, *supra* note 2, at 269.

326. See *supra* notes 272-79 and accompanying text.

327. 536 U.S. 304 (2002). As Justice Scalia noted in dissent in *Atkins*, using even a flawed counting method employed by the majority, at least twenty states still allowed the death

that infects deserts findings underlying many death sentences provides grounds to reject the death penalty just as the belief that some retarded offenders who received death sentences did not deserve that sanction explained the decision in *Atkins*.<sup>328</sup>

*3. A Requirement of Racial Neutrality in the Use of Capital Punishment Would Also Have to Apply to the Use of All Criminal Punishment and Would Undermine the Criminal Justice System*

In *McCleskey*, the Supreme Court concluded that the petitioner's Eighth Amendment challenge to his death sentence actually attacked "our entire criminal justice system."<sup>329</sup> *McCleskey* claimed that racial discrimination in Georgia's capital selection system made his death sentence arbitrary and capricious in violation of the Court's prior Eighth Amendment rulings on capital sentencing.<sup>330</sup> The Court noted that a variety of irrelevant factors beyond race could also influence capital sentencing, including "membership in other minority groups," "gender," or "any arbitrary variable, such as the defendant's facial characteristics, or the physical attractiveness of the defendant or the victim."<sup>331</sup> Likewise, the Court noted that irrelevant factors relating to other actors in the criminal justice system, such as defense attorneys or judges, could influence sentences.<sup>332</sup> Most importantly, the Eighth Amendment applies not only to capital punishment but to all criminal penalties. Hence, the

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penalty for retarded offenders when *Atkins* came before the Court. *See id.* at 342 (noting that only "18 States—less than half (47%) of the 38 States that permit capital punishment" had enacted statutes that in some way restricted the execution of the retarded).

328. In *Coker v. Georgia*, 433 U.S. 584 (1977), the Court also abolished the death penalty for rape despite the absence of convincing evidence of a societal conclusion that the death penalty was virtually always too much punishment for rape. While noting relevant legislation and the actions of jurors, the *Coker* plurality ultimately concluded that, "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Id.* at 597. The *Atkins* Court also cited this language from *Coker*. *See Atkins*, 536 U.S. at 312.

329. *McCleskey v. Kemp*, 481 U.S. 279, 315 (1987).

330. *See, e.g.*, Brief for Petitioner at 44, *McCleskey* (No. 84-6811), reprinted in 171 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 597 (1988) ("[N]othing could be more arbitrary within the meaning of the Eighth Amendment than a reliance upon race in determining who should live and who should die.").

331. *McCleskey*, 481 U.S. at 316-17 (footnotes omitted).

332. *See id.* at 317.

Court concluded that granting McCleskey's claim would logically require granting corresponding claims in the noncapital context, which would effectively shut down our criminal justice system.<sup>333</sup>

The answer to this fear of "too much justice"<sup>334</sup> is simply that the Court could limit the Eighth Amendment challenge to capital selection. The *McCleskey* majority's effort to suggest an unavoidable slippery slope into noncapital cases was vacuous. All slippery slope arguments warrant skepticism because they are themselves not strictly logical.<sup>335</sup> The slippery slope claim rests "on the risk of mistakes in interpreting the meaning of an opinion in the instant case resulting from problems like linguistic imprecision in the formulation of rules and limited comprehension by subsequent decisionmakers."<sup>336</sup> As long as an understandable line can be drawn across the spectrum of cases involved, future decision makers would likely comprehend it. In the Eighth Amendment context, there is an easily defined line between capital and noncapital cases that future courts would not likely misinterpret.

The Supreme Court could also easily justify the distinction.<sup>337</sup> The Court has often noted the uniqueness of death as a punishment both because of its severity and finality from the perspective of the defendant, and because of the difficult moral questions it raises from the perspective of society.<sup>338</sup> The distinction explains, among

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333. See *id.* at 314-15 ("McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system.").

334. *Id.* at 339 (Brennan, J., dissenting).

335. See Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 382 (1985) ("It is true that the phenomenon of the slippery slope is not strictly logical and that a slippery slope effect is always in logical and linguistic theory eliminable.").

336. Scott W. Howe, *Jury Fact-Finding in Criminal Cases: Constitutional Limits on Factual Disagreements Among Convicting Jurors*, 58 MO. L. REV. 1, 23 (1993) (footnote omitted).

337. But see Dolinko, *supra* note 26, at 582 (asserting that "the discrimination argument has nothing to do with any special features of death as a punishment").

338. In *Beck v. Alabama*, the Court stated:

[D]eath is a different kind of punishment from any other which may be imposed in this country.... From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

447 U.S. 625, 637-38 (1980) (internal quotation marks omitted).

Regarding the moral complications raised by the involvement of the state in the process

other things, why the Eighth Amendment requires an individualized sentencing hearing in capital cases but not in other criminal cases,<sup>339</sup> and why a more stringent proportionality rule applies in the capital as opposed to the noncapital context.<sup>340</sup> As we have seen, these decisions reflect a strict deserts limitation in the capital context that does not apply elsewhere,<sup>341</sup> which also explains why racial discrimination in capital sentencing warrants a more serious response. Racial discrimination undermines the desert determinations that are crucial in capital sentencing. Precisely because death sentences, induced in part by racial prejudice, infringe the deserts limitation, they violate the Eighth Amendment.<sup>342</sup>

*4. Perfection in Capital Sentencing Is Impossible, and the Eighth Amendment Should Be Understood to Make Reasonable Allowance for the Influence of Racial Bias and Other Improper Factors*

A system of capital selection involving human arbiters inevitably will reflect somewhat the irrational biases of those actors.<sup>343</sup>

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of capital selection and execution, see generally Lempert, *supra* note 38, at 1185-87 (noting that, because of the long and divisive public process that precedes them, "[s]tate executions not only destroy our consensus as to what fate is deserved, but they also eliminate the possibility of honor.").

339. See, e.g., *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (opinion of Scalia, J.) (plurality opinion) (noting that although individualized consideration is not required at the sentencing stage in a noncapital case, "[w]hen the choice is between life and death, the risk [of failing to consider relevant mitigating circumstances] is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments"); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) (noting that "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two" and, consequently, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case").

340. See *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) (asserting that, because death is different, proportionality review would occur in capital cases although not in noncapital cases); *Dressler*, *supra* note 270, at 43-50 (describing the different proportionality analyses the Court has applied in the two contexts).

341. See *supra* Part IV.A.

342. Cf. *Latzer*, *supra* note 71, at 1175 (noting that if a death sentence were deserved, the uniqueness of death sentences would not matter because "[a] rarely enforced, but otherwise deserved, death sentence is no more cruel than a rarely enforced life sentence").

343. See *COYNE & ENTZEROTH*, *supra* note 38, at 198 ("death penalty proponents claim that racial discrimination is inevitable").

Realism forecloses perfection in the use of capital punishment.<sup>344</sup> Consequently, one could argue that the Eighth Amendment must allow reasonable levels of racial discrimination. Some retentionists have implied further that the levels of racial discrimination that currently exist are reasonable.<sup>345</sup>

This contention fails, however, to suggest any basis for imposing a constitutional limit. The argument is nothing more than an *apologia* for racial discrimination. In the past, opponents of change did not prevail with arguments that racial prejudice was “‘inevitable’ or not ‘constitutionally unacceptable’ in education, housing, [or] employment.”<sup>346</sup> In the criminal context, the argument did not rationalize racial discrimination in the selection of jurors.<sup>347</sup> The widespread nature of racial prejudice in American society is simply not a reason in itself to accept racism as reasonable.<sup>348</sup>

The contention also fails to account for the special nature of capital punishment. In capital sentencing, we should permit less error than in virtually all, if not all, other contexts. As we have seen, the Supreme Court has acknowledged that the death penalty is qualitatively different in its severity, finality, and moral implications from any other punishment imposed by the criminal justice system.<sup>349</sup> Also, retentionists cannot establish that the punishment has any special penological value over incarceration.<sup>350</sup>

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344. See, e.g., Steven Semeraro, *Responsibility in Capital Sentencing*, 39 SAN DIEGO L. REV. 79, 96 (2002) (“Given that individuals organize their thoughts through the generalizations of language, it is possible that we cannot even really imagine what a *truly* consistent or individuating system would be like, much less actually create one.”) (footnote omitted).

345. See, e.g., Rothman & Powers, *supra* note 21, at 7 (contending that the condemnation of current selection systems based on racial discrimination builds in part on “the belief that extra-legal variables must be entirely absent from the ... system for it to be legitimate”); van den Haag, *The Ultimate Punishment*, *supra* note 27, at 1664 (asserting that “the Supreme Court has ... provided for ... equality as much as possible” and that “[s]ome inequality is indeed unavoidable in ... any system”).

346. See Bright, *supra* note 40, at 474.

347. See *supra* notes 211-12 and accompanying text (discussing Supreme Court decisions on preventing racial discrimination in jury composition).

348. See, e.g., Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509, 527 (1994) (“[I]t is ... necessary and essential to the moral authority of the law and the courts that such an expectation” that society will “eliminate racial bias in its justice system ... be articulated and enthusiastically pursued.”).

349. See *supra* notes 338-40 and accompanying text.

350. While retentionists are accustomed to arguing that the absence of utilitarian benefits

The available social-science evidence fails to indicate that capital punishment helps to deter crime.<sup>351</sup> Its non-use in many states alone casts doubt on its deterrent value. As for its retributive function, the very existence of race discrimination undermines many of the deserts judgments that supposedly justify death sentences as appropriate retribution.<sup>352</sup> These concerns about the propriety of capital punishment weigh against accepting much racial discrimination in its application.

The racial disparities in capital selection are also quite pronounced, which makes overlooking them unpalatable. For example, the Baldus Study from Georgia revealed that, on average, a defendant's chances of receiving a death sentence grew by 4.3 times if his victim was white rather than black.<sup>353</sup> The magnitude of this effect finds useful comparison with the effect of smoking cigarettes on coronary heart disease, a relationship now widely accepted as causal and strong. The social-science evidence indicates that, controlling for age, smokers are only "1.7 times more likely to die of coronary artery disease than nonsmokers."<sup>354</sup> The race-of-victim effect identified in the Baldus study is not accurately thought of as marginal in light of this information. The Baldus finding and those from a variety of other studies revealing pronounced levels of racial

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from the death penalty is unproven, the burden of proof should shift where the question is whether to overlook flaws in the administration of the sanction. Retentionists should prove, seemingly by compelling evidence, that capital punishment serves a critical function if we are to accept serious racial discrimination in its application. Retentionists cannot meet this burden. See, e.g., Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1797 (1970) (asserting that "when the burden of justification is shifted to the state," the state is unable to show a "compelling reason to believe that a legitimate purpose of the criminal law is more effectively served by the death penalty than by a less severe punishment").

351. See generally Lempert, *supra* note 38, at 1196-1224. See also *id.* at 1223 ("It may never be possible for social scientists to be certain that the death penalty does not deter homicide, but there is now enough research that fails to reveal deterrence that for purposes of moral argument one must proceed as if the death penalty does not deter.") (footnotes omitted); cf. McAdams, *supra* note 27, at 839 ("[T]here is a reasonable basis for believing that executions deter murders, but the evidence is far short of solid.").

352. See Lempert, *supra* note 38, at 1224 ("Retribution, despite an honest appeal to human emotion, cannot justify a system of state executions inevitably tainted by mistake, bias, and caprice.").

353. See *supra* note 106 and accompanying text.

354. Samuel R. Gross, *Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing*, 18 U.C. DAVIS L. REV. 1275, 1307 (1985) (footnote omitted).

discrimination make irrelevant the theoretical point that we should accept some marginal levels of discrimination.

*5. Nationwide Abolition of the Death Penalty Would Prevent the Use of the Sanction in Some States Where Little Racial Discrimination Arises in the Use of Capital Punishment*

A nationwide prohibition on the death penalty would respond categorically to a racial-discrimination problem that varies among jurisdictions. Death-penalty states differ significantly in the aggressiveness with which they pursue death sentences<sup>355</sup> and, therefore, in the number of undeserved death sentences that they impose. While some have issued many death sentences and executed dozens of persons, others maintain only a handful of prisoners on death row and have not executed a person in decades.<sup>356</sup> In this latter group, unwarranted death penalties are, by definition, rare. Retentionists could argue that imposing nationwide abolition on grounds of racial discrimination would inappropriately foreclose the threat of the death penalty in states where racial bias matters little.

This complaint would not justify avoiding nationwide abolition. The decision about abolition appropriately centers on the practicalities of eliminating irrational discrimination from capital sentencing in all states rather than on the theoretical possibility of racially neutral selection systems or on whether an acceptable system might exist somewhere. An extremely limited application of capital punishment might produce sufficiently neutral selection. Yet, states that impose the vast majority of death sanctions are not likely to soon adopt such minimal-use plans voluntarily. Moreover, the Supreme Court cannot feasibly enforce racial neutrality in capital selection.<sup>357</sup>

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355. See generally Lofquist, *supra* note 96 (establishing a concept of death penalty intensity to examine how aggressively states handle death penalty situations).

356. See *supra* note 35.

357. See *McCleskey v. Kemp*, 481 U.S. 279, 367 (1987) (Stevens, J., dissenting) (arguing for an individualized approach to determining the propriety of remedy); *id.* at 365 (Blackmun, J., dissenting) ("Like Justice Stevens, I do not believe acceptance of *McCleskey's* claim would eliminate capital punishment in Georgia.").



In proceeding on a state-by-state basis, the Court would face great difficulty in articulating and enforcing decisional rules. The Court would have to draw fairly arbitrary lines regarding when a racial-discrimination problem was actionable versus only marginal. Rulings against a state would imply, by definition, the possibility of a remedy, which would create continual litigation over whether remedial efforts sufficed. Rulings for a state would also lack permanency because a state's pattern of death sentencing within murder cases could continually evolve. More importantly, the logic of the argument for a state-by-state approach would seem to carry on down to a racial-category by racial-category approach and, ultimately, to a case-by-case approach. This result would raise all of the difficulties previously discussed regarding efforts to identify individual cases in which the offender deserves death.<sup>358</sup> The same kinds of arguments to be made for resisting this individualized approach by pursuing a categorical approach at the level of each state would seem also to justify a categorical approach at the national level.

A state-by-state approach would also either produce near abolition or fail to achieve racial neutrality, neither of which is desirable. On one hand, preserving the death penalty in a few states in which it is virtually never used would tend to undermine any claim that the sanction serves a valid penological purpose.<sup>359</sup> On the other hand, if the state-by-state approach did little to reduce the nationwide use of the death penalty, it would also not likely reduce the problem of unfounded deserts judgments influenced by racial prejudice.<sup>360</sup> Categorical abolition would avoid these problems.

*6. The Problem of Racial Discrimination in Capital Selection has Ameliorated Since the Pre-Furman Era and with More Time Will Largely Disappear*

Hope remains that racial discrimination will abate in American society. Few would deny that improvements in race relations have

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358. See *supra* text accompanying notes 251-59.

359. See *supra* notes 350-52 and accompanying text.

360. See *supra* Part IV.B.

occurred since the *Brown* decision. In the capital-sentencing context as well, the levels of racial discrimination have improved in some areas since the pre-*Furman* era. The Baldus researchers, for example, noted reduced racial discrimination against black defendants in Georgia between pre- and post-*Furman* periods.<sup>361</sup> Some of the changes are the result of Supreme Court rulings, particularly abolition of the death penalty for rape in *Coker*.<sup>362</sup> Some of the improvements, however, seem to have resulted more from changing attitudes among the populace than from regulation of capital sentencing by the courts.<sup>363</sup> Retentionists could argue that continuing improvements in race relations in the larger society will further reduce the racial discrimination problem in the decades ahead, foreclosing the need for abolition.

Hope for a color-blind society, however, is not a reason to ignore racial discrimination in the use of the death penalty.<sup>364</sup> Predictions about the future of race relations are highly speculative, and the racial disparities may well not decline significantly. Even if race relations in the larger society progressed, the process of advancement and its translation to reduced racial prejudice in capital selection would not likely proceed rapidly. Some retentionists have acknowledged this reality.<sup>365</sup> As we have seen, even relatively recent

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361. See BALDUS ET AL., *supra* note 12, at 182 (noting a statewide decline in Georgia in discrimination against black defendants between the pre- and post-*Furman* periods).

362. See, e.g., Steiker, *supra* note 224, at 1487.

Because black men who raped white women were extraordinarily more likely to receive the death penalty than any other racial combination, *Coker's* elimination of the death penalty for rape, although formally premised entirely on grounds of proportionality, managed to eliminate the most racially disproportionate use of capital punishment at the same time.

*Id.* (footnote omitted); see also McCord, *supra* note 4, at 548 (noting from the Baldus study that the post-*Furman* Georgia system, as compared to the pre-*Furman* Georgia system, "operat[es] less arbitrarily with respect to both overinclusion and underinclusion, and that this improvement is likely due in significant part to the Court's regulatory efforts") (footnotes omitted).

363. See, e.g., BALDUS ET AL., *supra* note 12, at 182-84 (attributing the reduction in discrimination against black defendants largely to a shift among Georgians toward more equal treatment of blacks rather than to post-*Furman* statutory changes in capital selection).

364. Also, I have noted that racial discrimination in capital selection is likely only symptomatic of a broader tendency to rely on inappropriate factors in capital selection. Waiting for an end to racial disparities will not mean that death sentences that are issued are deserved.

365. See, e.g., Scheidegger, *supra* note 184, at 124 ("Racism is a cancer that infects all aspects of government, including the criminal justice system. It will exist until the day the

studies of capital selection have identified pronounced, unexplained racial disparities.<sup>366</sup> Given the clear indications of the inability of the courts to restrict racial discrimination in capital selection after three decades of regulation, expecting the problem soon to disappear is far-fetched.<sup>367</sup> Because death sentences influenced by racial discrimination are undeserved, such hopes should not postpone a solution.

### CONCLUSION

The efforts of the Supreme Court to regulate capital sentencing have failed to remedy the problem of racial discrimination. Numerous studies from a variety of states indicate that racial bias continues to plague capital selection. The studies show consistent and pronounced patterns of prejudice against those who kill white victims. A significant percentage of the studies reveal additional bias against black defendants. Variations exist among states regarding the number of death sentences imposed each year and the number and quality of studies that imply racial discrimination. The studies together, however, reveal unexplained disparities correlating with race that are too pronounced and consistent to ignore. When considered in light of the country's unfortunate history of racial discrimination and the minimal safeguards in current capital-selection schemes, the studies give reason for concern.

The federal courts are also ill-equipped to remedy the discrimination through regulation. All of the regulatory solutions that commentators have suggested fail either because they assume a level of centralized state control over capital selection that is

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last bigot dies, a day not within the foreseeable future.").

366. See *supra* notes 161-77 and accompanying text.

367. Hope for improvement could, nonetheless, cause the Supreme Court to avoid the argument for abolition. Cf. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2347 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest [of diversity in higher education] approved today."). Given the present state of the law under *McCleskey*, the lower courts justifiably can deny litigants the opportunity to introduce evidence of racial discrimination in capital selection. The Supreme Court, likewise, can deny certiorari on claims that would provide the opportunity to reconsider racial discrimination as a grounds for abolition under the Eighth Amendment. Hence, the argument for abolition based on racial discrimination is not likely to receive an airing in the federal courts without a sympathetic Supreme Court.

unattainable, or because they excessively thwart the use of capital punishment and impose an administrative morass on the federal courts. Remedies that aim to level-up or re-select so as to increase or maintain current levels of use of capital punishment assume untenable degrees of control over individual arbiters in the capital-selection process.<sup>368</sup> Level-down remedies would mire the federal courts in a morass of continuous litigation and produce *de facto* near-abolition, further undermining the moral justification for capital punishment. As a practical matter, only abolition could feasibly solve the racial-discrimination problem.

Prevailing Eighth Amendment discourse has not clarified, however, why unconscious racial discrimination in capital selection should matter enough to justify abolition. The Supreme Court has asserted that the Cruel and Unusual Punishments Clause requires “consistency” or “nonarbitrariness” in capital selection, but this declaration does not lead to compelling arguments that racial inconsistency warrants reprieving murderers who would otherwise receive capital punishment.<sup>369</sup> As retentionists have frequently noted, a just death sentence becomes no less just because others who also warrant that punishment are spared. If mere racial inconsistency among those deserving death sentences were the problem, we should feel badly for those murder victims whose killers escape death, not the death-sentenced murderers who receive their just deserts. On this view, the inconsistency would not easily justify preventing even a single death sentence although no other approach can remedy the inconsistency.

The problem with the prevailing discourse—and the reason racial discrimination matters enough under the Eighth Amendment to reverse death sentences—is that death sentences influenced by racial bias are not deserved. Persons who are guilty of capital murder do not for that reason alone warrant the death penalty. The very purpose of the capital sentencing hearing required by the Eighth Amendment is to ensure that all capital murderers who receive death sentences deserve them. Although the Supreme Court usually has avoided any suggestion that the Eighth Amendment

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368. These level-up or re-selection proposals, including mandatory death sentencing, also merely treat the racial-disparity symptoms without addressing the true problem of death sentences based on ill-founded deserts findings.

369. *See supra* note 37.

speaks to the substantive measure defining death eligibility, its doctrines governing the use of capital punishment find explanation in this deserts-limitation idea.<sup>370</sup> This theory also helps us understand why racial discrimination invalidates death sentences whether the discrimination is purposeful or unconscious, and whether the discrimination is against black defendants, black victims, or both. Neither the race of the victim nor of the offender bears on the deserts of the capital defendant. Where racial discrimination of any sort helps produce a death sentence, the offender does not deserve death.

Abolition is justified as the only feasible remedy. Many retentionists would argue that abolition is inappropriate although no other remedy can succeed. They would claim, for example, that abolition ignores the original understanding of the Eighth Amendment,<sup>371</sup> the current societal consensus favoring capital punishment,<sup>372</sup> and the possibility of future improvements in race relations that could abate racial discrimination.<sup>373</sup> All of the important arguments that retentionists offer, however, assume that the problem is mere racial inconsistency among those deserving death sentences. These arguments lose their power once we understand racial discrimination as widely undermining the deserts findings required by the Eighth Amendment to justify capital punishment.

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370. See *supra* Part IV.

371. See *supra* note 33.

372. See *supra* note 34.

373. See *supra* Part IV.C.6.