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Volume 53
Issue 4 *Summer 2004: Symposium - Race to Execution*

Article 4

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David C. Baldus

George Woodworth

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Recommended Citation

David C. Baldus & George Woodworth, *Race Discrimination and the Legitamacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DePaul L. Rev. 1411 (2004)
Available at: https://via.library.depaul.edu/law-review/vol53/iss4/4

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RACE DISCRIMINATION AND THE LEGITIMACY OF CAPITAL PUNISHMENT: REFLECTIONS ON THE INTERACTION OF FACT AND PERCEPTION*

*David C. Baldus***
*George Woodworth****

INTRODUCTION

This Article focuses on the interaction between the empirical evidence of racial discrimination in the administration of the death penalty, community perceptions of the existence of such discrimination, and the impact of those perceptions on the perceived legitimacy of capital punishment.

Our analysis builds on the usual distinction between race-of-defendant and race-of-victim discrimination.[1] Both forms of discrimination violate the principle of "comparative justice," which requires comparable treatment of offenders who are similarly situated in terms of criminal culpability and deathworthiness.[2] Racially discriminatory administration of the death penalty violates comparative justice because it: (a) differentiates among offenders on the basis of morally and legally irrelevant factors, and (b) results in the similar treatment of offenders who materially differ in terms of their criminal culpability.[3]

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* We acknowledge with thanks the many helpful suggestions and comments on an earlier draft of this Article by Catherine M. Grosso, Robert F. Schopp, Gerald B. Wetlaufer, and David Zuckerman. Beau Brindley, Jeffrey L. Powell, and Ryan S. Struve provided valuable research assistance. We are also grateful for data and advice from Dale Jones, Mark H. Friedman, and Vance Hagins for the New Jersey segment of the Article and from Susan Balliet, Joseph Hood, Edward C. Monahan, and Bette Niemi for the Kentucky segment of the Article.

** Joseph B. Tye Professor, College of Law, University of Iowa

*** Professor, Statistics and Actuarial Science, University of Iowa

1. Race-of-defendant discrimination refers to the more punitive charging and sentencing decisions of black or Hispanic offenders because of their race or ethnicity, while race-of-victim discrimination refers to the more punitive treatment of offenders whose victims are white.

2. Robert F. Schopp, *Justifying Capital Punishment in Principle and in Practice: Empirical Evidence of Distortions in Application*, 81 NEB. L. REV. 805, 826-27 (2002) ("Dissimilar treatment" of similarly situated offenders constitutes "comparative injustice," as does "similar treatment of those" who materially differ in terms of their criminal culpability and deathworthiness.). In contrast to comparative justice, "noncomparative justice requires that each individual receive treatment appropriate to that individual's merit or desert." *Id.* at 826.

3. Schopp, *supra* note 2, at 827. Schopp stated:

This Article also builds upon the distinction between purposeful discrimination (conscious and unconscious) and the differential treatment of defendants flowing from the evenhanded application of race-neutral policies and practices.[4] In the controlling law, purposeful discrimination is known as "disparate treatment," while noninvidious racial disparities are characterized as "disparate impact."

In terms of proof of discrimination, our focus is on statistical evidence of systemic patterns and practices of discrimination, which would not appear in the data in the absence of race-based disparate treatment in a significant number of cases. The absence of systemic evidence of disparate treatment does not mean, however, that a system is free of all purposeful discrimination. It means only that to the extent race-based disparate treatment does exist, it is not sufficiently pervasive to be detected as a significant factor in a statistical analysis.

In terms of community perceptions of the death penalty, we distinguish between the general public, which perceives death penalty issues only dimly, if at all, and the attentive public of judges, prosecutors, politicians, academics, activists, and other observers who follow these issues more closely.[5] These two populations differ principally in terms of their motivation to understand the system and their knowledge about how it actually functions.

There are five main themes in this Article. The first is that empirical evidence generally suggests that the United States death penalty system is no longer characterized by the systemic discrimination against black defendants that existed in many states before *Furman v. Georgia*.[6] It reveals that while the discriminatory application of the death-penalty against black defendants (and defendants whose victims are white) continues to occur in some places, it does not appear to be inherent in the system—in other words, race-of-defendant discrimination is not an inevitable feature of all post-*Furman* death sentencing

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> [I]t is precisely because comparative justice requires consistent application to the standards of noncomparative justice that either dissimilar treatment of relevantly similar cases or similar treatment of relevantly dissimilar cases violates comparative justice. Either pattern reveals a failure to consistently apply the relevant criteria of justice, and either pattern thus reveals a failure to accurately apply the criteria of noncomparative justice to at least some of the cases.

Id.

4. Washington v. Davis, 426 U.S. 229 (1976).

5. This distinction resonates in the political science literature. *See* C. JOHN ZALLER, THE NATURE AND ORIGINS OF MASS OPINION 6 (1992) (contrasting the general public with political "elites," defined as "politicians, higher-level government officials, journalists, some activists, and many kinds of experts and policy specialists"). *See also* V.O. KEY, PUBLIC OPINION AND AMERICAN DEMOCRACY 1-3 (1961); V.O. KEY, THE RESPONSIBLE ELECTORATE 2 (1966).

6. 408 U.S. 238 (1972).

systems. Notwithstanding this evidence, the general public continues to believe that the pre-*Furman* pattern of widespread race-of-defendant discrimination continues in the post-*Furman* period. This perception does not, however, materially affect the perceived legitimacy of capital punishment in the eyes of the general public.

Our second theme is that the attentive public, which generally perceives race-of-defendant discrimination to be both immoral and unconstitutional, correctly perceives the decline of systemic race-of-defendant discrimination in the post-*Furman* period. This post-*Furman* improvement adds legitimacy to the current system. Moreover, in the few instances in which race-of-defendant discrimination has been documented, that evidence has generated calls for reform to ameliorate the problem.

Our third theme is that the empirical evidence supports a judgment that race-of-victim discrimination, which characterized many pre-*Furman* systems, *also* appears to characterize many, but not all, post-*Furman* systems. Although this form of discrimination is unknown to the general public, it is generally understood among the attentive public.

However, there are conflicting opinions among prosecutors, courts, scholars, and other observers about the significance of the race-of-victim disparities documented in the literature. Some people, including the authors of this Article, believe that, when established, its persistence significantly impairs the legitimacy of a system. Others believe that such discrimination cannot be reliably established, or that it is not a matter of moral or serious constitutional concern. Yet others believe that tolerance of race discrimination, particularly race-of-victim discrimination, is a necessary evil required to preserve the benefits of capital punishment (the "necessity hypothesis"). Two beliefs underlie this hypothesis. The first is that race discrimination is inevitable and widespread in the system. The second is that all efforts to prevent or remedy the effects of race discrimination will eviscerate the use of capital punishment.

The fourth theme of this Article is that the available evidence from the post-*Furman* period draws into serious question the validity of both these beliefs. As noted above, the post-*Furman* evidence is quite inconsistent with the inevitability hypothesis. In addition, the post-*Furman* experience indicates that a number of procedures have the capacity to reduce the risk of discriminatory application of the death penalty without eviscerating capital punishment.

Our final theme concerns the moral implications of ignoring the risk of discrimination in a death penalty system. Experience has shown

that the only way to determine if a risk of race discrimination exists in a given death-sentencing jurisdiction is through the conduct of a well-controlled study of its capital charging and sentencing system. In the absence of results from such a study documenting the absence of any risk of race discrimination, a cloud of moral uncertainty hangs over the system and its legitimacy depends significantly on the extent to which it applies procedures to limit death sentencing to the most aggravated cases and provides defendants the opportunity to present race claims for adjudication under reasonable standards of review.

Part II summarizes the empirical evidence of race discrimination in the administration of the death penalty before and after *Furman v. Georgia*. Part III examines the impact of that evidence on the perceived legitimacy of the death penalty before and after *Furman*. We also develop the argument that, when it exists, race-of-victim discrimination is both unconstitutional and immoral. In Part IV, we rethink the "necessity" of tolerating race discrimination through an analysis of evidence from the post-*Furman* period, which undermines the argument that such toleration is a necessary evil required to maintain the benefits of capital punishment. Part V presents our conclusions, while Part VI summarizes in detail the Article's principal findings and conclusions. The Appendix provides additional information on the empirical findings reported in Part II.

II. Evidence of Race Discrimination in the Use of the Death Penalty Before and After *Furman v. Georgia* (1972)

In this section, we summarize the evidence of race-of-defendant and race-of-victim discrimination in the administration of the death penalty before and after *Furman v. Georgia*. For both forms of discrimination, we distinguish between race disparities in actual executions and in the imposition of death sentences, many of which will never be executed.

Readers who are familiar with the evidence of race discrimination in the use of the death penalty may elect to pass over this section and pick up our analysis of the impact this evidence has on the perceived legitimacy of capital punishment, which commences in Part III.

The short story of this section is that pre-*Furman* there was evidence of widespread race-of-defendant and race-of-victim discrimination, particularly in the South. The evidence from the post-*Furman* period tells a different story. It reveals that while the discriminatory application of the death penalty continues to occur in some places, it

does not appear to be inherent in the system, in other words, it is not an inevitable feature of all post-*Furman* death-sentencing systems.

A. *Race-of-Defendant Discrimination*

1. *Pre*-Furman

Prior to *Furman,* 49% (1630/3334) of the murder defendants executed in the United States were black; in southern jurisdictions, the percentage of blacks among those executed reached 70%. Moreover, 89% (405/455) of the persons executed for the crime of rape were black.[7]

There was a similar pattern in the imposition of death sentences, which can be seen in the best-controlled pre-*Furman* study of death sentencing in murder prosecutions in a southern jurisdiction.[8] It covered the three-year period in Georgia before *Furman.* The results

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7. *See Furman*, 408 U.S. at 364-65 (Marshall, J., concurring). From 1930 to 1968, the year of the last pre-*Furman* execution, blacks represented 49% (1630/3334) of defendants executed for murder and 89% (405/455) of defendants executed for rape. U.S. Bureau of Prisons, *Execution: 1930-68*, NAT'L PRISONER STAT. BULL., Aug. 1968, at 11 (Of the 2,306 individuals executed in the South from 1930-1968, 72% were blacks.). Evidence of race-of-defendant disparities is also documented in the most extensive database on executions. Developed by Watt Espy, it documents over 18,000 executions since the founding of the nation. In the South during that time, 67% of those executed for murder (n = 2703) were black and 90% of those executed for rape (n = 678) were black. VICTORIA SCHNEIDER & JOHN ORITZ SMYKLA, *A Summary Analysis of Executions in the United States, 1608-1987: The Espy File*, in THE DEATH PENALTY IN AMERICA: CURRENT RESEARCH 12 tbl. 1.5 (Robert M. Bohm ed., 1991).

From 1900 to 1950, the percentage of blacks executed for murder in the South ranged from 80% in the first decade to 71% in the 1940s. In the 1950s it declined to 57%. *Id.* As indicated in Table 2 *infra*, since *Furman*, in the eleven southern states that have carried out executions, the proportion of blacks among those executed is 40%. Only Alabama has more than 50% black among those executed—64% (16/25). For the other southern states (Texas, Virginia, Missouri, Florida, Georgia, South Carolina, Louisiana, Arkansas, North Carolina, and Mississippi), the range is from 21% to 48%. *Id.*

In the rest of the nation (North and West) throughout the nation's history, blacks constituted 19% of those executed for murder (n = 634) and 63% of those executed for rape (n = 36). As indicated in Table 1.5 of Schneider & Smykla, *supra*, in the post-*Furman* period, the average proportion of blacks executed in northern and western states (Arizona, California, Colorado, Delaware, Idaho, Illinois, Indiana, Kentucky, Maryland, Montana, Nebraska, Nevada, New Mexico, Ohio, Oregon, Pennsylvania, Tennessee, Utah, Washington, and Wyoming) for murder is 16%. The range is from 0% to 67%.

8. DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 141 tbl. 26 (1990). Pre-*Furman* studies from individual southern jurisdictions in the 1930s and 1940s also supported the perception of race-of-defendant discrimination. *Id.* at 248-53. A major exception to the trend of documentation found in the pre-*Furman* studies is documented in Special Issue, *A Study of The California Penalty Jury in First-Degree Murder Cases*, 21 STAN. L. REV. 1297, 1368-78 (1967) (no evidence of race-of-defendant or race-of-victim effects in an analysis of 238 penalty trials between 1958 and 1966).

shown in Table 1 document a strong black-defendant "main" effect.[9] The unadjusted data shown in Part A of the Table indicate that, among death-eligible defendants convicted in jury trials, blacks were twice as likely as whites to be sentenced to death—19% versus 8%—an outcome that reflected both prosecutorial decisions to seek and jury decisions to impose death sentences.[10] Part C of Table 1 indicates that

TABLE 1. PRE-*FURMAN* UNADJUSTED RACE-OF-DEFENDANT AND RACE-OF-VICTIM DISPARITIES IN GEORGIA STATEWIDE DEATH-SENTENCING RATES: 1969-72[a]

A. Race of Defendant	
Black	.19 (35/182)
White	.08 (9/112)
Difference	11 pts.
Ratio	2.4
B. Race of Victim	
White	.18 (32/179)
Black	.10 (12/115)
Difference	8 pts.
Ratio	1.8
C. Defendant/Victim Racial Combination	
1. Black defendant/white victim	.31 (24/77)
2. White defendant/white victim	.08 (8/102)
3. Black defendant/black victim	.10 (11/105)
4. White defendant/black victim	.10 (1/10)

[a] Source: BALDUS ET AL., *supra* note 8, at 141 tbl. 26.

black on white killings were treated most severely (31%). Nevertheless, black on black murders were at higher risk of a death sentence (10%) than the average white defendant murder (8%). In a multivariate logistic regression analysis, which controlled for the criminal

9. A "main" effect operates more or less uniformly across all classes of cases, in other words, the magnitude of the effect is roughly the same regardless of the other facts of the cases. Thus, a black defendant main effect would be characterized by a higher death sentencing risk for black defendants than the risk faced by similarly situated white defendants, without regard for race of the victim. Under such a system, we would see, as we do in the pre-*Furman* data, a higher risk of a death sentence for black defendants with black victims than the risk faced by white defendants whose victims are white.

10. "Unadjusted" disparities reflect differences in charging and sentencing rates for different racial groups of offenders without regard to other factors or determinants that may influence sentencing outcome, such as the aggravating and mitigating circumstances in the cases. "Adjusted" disparities, in contrast, compare disparities after taking into account or controlling for other important outcome determinants in "multivariate" statistical procedures such as crosstabular and multiple regression analyses.

culpability of all of the defendants, the average black offender's odds of receiving a death sentence were twelve times higher (p =.002) than the odds faced by a similarly situated white defendant.[11] Appendix Figure 3 provides additional detail on the multivariate results.

2. *Post*-Furman

a. The Unadjusted Data

Table 2 presents an overview of executions by states in the post-*Furman* period. The bottom line indicates that 35% of those executed since *Furman* have been black. Forty-three percent of those now on death row are black.[12] These are much lower numbers than we saw in the pre-*Furman* period.

Compared to the 13% of the total United States population that is black, the 35% figure seems high. This is a spurious comparison because well over 50% of the death-eligible population in most states with large numbers of homicides is black.[13] For example, in Georgia from 1973 through 1980, 67% of the death-eligible population was black, and in Maryland from 1978 through 1999, the figure was 74%.[14] Given the composition of the death-eligible population, does the 35% figure suggest that white defendants are being treated more punitively than black defendants? If that is not the case, what explains the apparent "under-representation" of blacks on death row? The answer is the prevalence of race-of-victim discrimination. If one controls for the race of the victim in a multivariate analysis along with the culpability of the defendants, the data typically indicate that blacks, as a group, are treated the same as whites or slightly more harshly, although the black-defendant disparities are not statistically significant.[15] Appen-

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11. BALDUS ET AL., *supra* note 8, at 599 col. A ("Odds Multiplier").

12. NAACP LEGAL DEF. & EDUC. FUND, DEATH ROW U.S.A. 1, 7 (2002), *available at* http://www.naacpldf.org/pdfdocs/deathrow_%20fall2002.pdf (last visited Apr. 19, 2004).

13. A homicide is death-eligible if it meets the culpability requirements for capital murder (generally common-law murder or first-degree murder) and one or more statutorily defined aggravating circumstances is present in the case. Those factors include circumstances, such as a police officer victim, a contemporaneous felony (e.g., a robbery, rape, burglary, or murder-for-hire), or circumstances that are heinous, atrocious, and cruel. Nationwide, blacks constitute more than 50% of those arrested for murder and nonnegligent manslaughter. *See, e.g.*, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1999, at 354 tbl. 4.10 (1999).

14. BALDUS ET AL., *supra* note 8, at 562 (Georgia); RAYMOND PATERNOSTER & ROBERT BRAME, AN EMPIRICAL ANALYSIS OF MARYLAND'S DEATH SENTENCING SYSTEM WITH RESPECT TO THE INFLUENCES OF RACE AND LEGAL JURISDICTION 45 fig. 2 (2003) (Final Report), *available at* http://www.urhome.umd.edu/newsdesk/pdf/finalrep.pdf (last visited Apr. 19, 2004).

15. See *infra* notes 23 and 138 for an explanation of how race-of-victim discrimination biases downward the death-sentencing rate for black defendants.

TABLE 2. POST-*FURMAN* EXECUTION BY RACE OF DEFENDANT: 1976-2002[a]

A State	B Black Defendant Percentage
1. Texas	34% (97/289)[b]
2. Virginia	48% (42/87)
3. Missouri	37% (22/59)
4. Oklahoma	24% (13/55)
5. Florida	31% (17/54)
6. Georgia	42% (13/31)
7. South Carolina	41% (11/27)
8. Louisiana	48% (13/27)
9. Alabama	64% (16/25)
10. Arkansas	21% (5/24)
11. North Carolina	26% (6/23)
12. Arizona	0% (0/22)
13. Delaware	46% (6/13)
14. Illinois	42% (5/12)
15. California	10% (1/10)
16. Indiana	33% (3/9)
17. Nevada	0% (0/9)
18. Mississippi	50% (3/6)
19. Utah	33% (2/6)
20. Ohio	40% (2/5)
21. Washington	0% (0/4)
22. Nebraska	67% (2/3)
23. Maryland	67% (2/3)
24. Pennsylvania	0% (0/3)
25. Kentucky	0% (0/2)
26. Montana	0% (0/2)
27. Oregon	0% (0/2)
28. U.S.	0% (0/2)
29. Colorado	0% (0/1)
30. Idaho	0% (0/1)
31. New Mexico	0% (0/1)
32. Tennessee	0% (0/1)
33. Wyoming	0% (0/1)
TOTAL	34.27% (281/820)

[a] The jurisdictions are listed in order of the total number of executions.
[b] The denominator is the number of executions. The numerator is the number of blacks executed.
Source: NAACP LEGAL DEF. & EDUC. FUND, DEATH ROW U.S.A. 8-9 (2003), *available at* http://www.naacpldf.org/content/pdf/pubs/drusa/deathrow_winter2003.pdf (last visited June 4, 2004).

dix Table 1 provides more detail on the unadjusted post-*Furman* death-sentencing rates in Georgia and Maryland.

b. The Adjusted Data

Over twenty post-*Furman* studies have focused on race-of-defendant discrimination in the use of the death penalty. Much of the research is not well controlled, and the results appear to be very dependent on local politics, crime rates, public opinion about crime and punishment, jury selection procedures, capital charging and sentencing processes, and the presence or absence of measures developed to limit the risk of racial discrimination. Nevertheless, none of the studies document a statewide main black-defendant effect among all death-eligible cases, which one would see if blacks were systemically treated more punitively than similarly situated white defendants. On the issue of race-of-defendant discrimination, a 1990 General Accounting Office (GAO) study concluded:

> The evidence for the influence of the race-of-defendant on death penalty outcomes was equivocal. Although 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, the relationship between race-of-defendant and outcome varied across studies. For example, sometimes the race-of-defendant interacted with other factors. In one study, researchers found that in rural areas black defendants were more likely to receive death sentences, and in urban areas white defendants were more likely to receive death sentences. In a few studies, analyses revealed that the black defendant/white victim combination was the most likely to receive the death penalty. However, the extent to which the finding was influenced by race-of-victim rather than race-of-defendant was unclear.[16]

The results of the empirical research since 1990 are comparable.[17] These findings may come as a surprise to some, but they hold over a long period of time in places as diverse and southern as Mississippi, Florida, Georgia, South Carolina, North Carolina, Missouri, Texas, and Virginia, as well in such states as Maryland, New Jersey, Illinois, Nebraska, and California.[18] They will not, however, support a conclu-

16. U.S. GEN. ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 6, (GAO/GGD – 90 – 57, 1990) [hereinafter GAO REPORT].

17. David Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194 (2003).

18. BALDUS ET AL., *supra* note 8, at 254-65 (pre-1990 studies); Appendix Figure 4 (reporting a core finding of the Georgia research); Baldus & Woodworth, *supra* note 17, at 215-25 (post-1990 studies); Glen L. Pierce & Michael L. Radelet, The Impact of Legally Inappropriate Factors on Death Sentencing in California: 1990-1999 (2004) (unpublished manuscript, on file with authors).

sion that race-of-defendant effects do not exist in these systems. For one thing, to the extent their findings are based on statewide data, which most are, they may be masking black-defendant effects in some regions of the state that are offset by white-defendant effects in other parts of the state.[19] In addition, reports of experienced practitioners, particularly in southern jurisdictions, document many instances of racial insensitivity and outright bigotry, especially in the selection of juries in capital cases.[20]

A handful of studies suggest that, statewide, black defendants with white victims are treated more punitively than all defendants with different defendant/victim racial combinations.[21] The question is the extent to which the disparities in those cases are driven by race-of-victim or race-of-defendant discrimination. Appendix Figure 2 and the text accompanying it explore the issue in further detail.

The only strong black-defendant main effect in the states has been detected in Philadelphia County penalty trials—and there it is principally seen in the weighing stage of the jury penalty trials.[22] Appendix

19. *See, e.g.*, BALDUS ET AL., *supra* note 8, at 180 tbl. 42 (Post-*Furman* Georgia data from the 1970s documents black-defendant disparities in charging and sentencing decisions in rural areas, which are offset in a statewide analysis by the more lenient treatment of black defendants in urban areas.). Similarly, the race-of-defendant effects that we document for Philadelphia County at the final weighing stage of penalty trial decision making (Baldus et al., *infra* note 22) would likely be offset by an analysis of death sentencing statewide in Pennsylvania.

20. *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, 512 (1994) (quoting a Florida judge: "Since the nigger mom and dad are here anyway, why don't we go ahead and do the penalty phase today. . . ."). The literature suggests that race discrimination is most deeply embedded in jury selection practices that are designed to hold black jurors to a bare minimum. *Id.* at 515-27. Race discrimination in the use of peremptories is not limited to Southern jurisdictions. See, *e.g.*, David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3 (2001) (documenting pervasive evidence of race discrimination in the use of peremptory challenges in 317 post-*Furman* Philadelphia capital murder trials).

21. Thomas J. Keil & Gennaro F. Vito, *Race and the Death Penalty in Kentucky Murder Trials: 1976-1991*, 20 AM. J. CRIM. JUSTICE 1(1995); PATERNOSTER & BRAME, *supra* note 14, at 65 tbl. 7C, 88-96 tbls. 13A-13G (Maryland). *See also* Appendix Figure 2 (Maryland).

22. See *supra* note 9 for a description of a main statistical effect. However, nationwide there have been only ten well-controlled studies (adjustment for 15 or more controls) (California, Georgia, Kentucky, Maryland, Mississippi, Nebraska, New Jersey, North Carolina, Philadelphia, Pennsylvania, and South Carolina). Less well-controlled (from 4 to 10 controls) but very informative studies have also been conducted in Arkansas, California, Colorado, Florida, Illinois, Missouri, Oklahoma, Virginia, and Texas. SAMUEL R. GROSS & ROBERT MAURO, DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING (1989) (Arkansas and Oklahoma); Baldus & Woodworth, *supra* note 17, at 215-26 (Florida, Illinois, Missouri, and Texas). There are also race-of-defendant and race-of-victim disparities reported with no adjustment or adjustment for only a single control variable (over varying time periods of time). Baldus & Woodworth, *supra* note 17, at 217, 224-25 (Indiana and the federal death sentencing system) and David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era:*

Figure 3 and the text accompanying it present more detail on these findings. In a multivariate analysis of these data, which controls for all of the statutory aggravating and mitigating circumstances, the odds of the average black defendant receiving a death sentence were 3.8 times higher than the odds faced by a similarly culpable nonblack defendant. A comparison of the adjusted probabilities indicates that the black defendants were two to three times more likely to be sentenced to death.

Interestingly, the race-of-defendant effects that we documented in Philadelphia are the product of jury decision making. Our analysis of prosecutorial decision making in Philadelphia revealed no race-of-defendant effects at all. This is the clear national pattern, although, as the data from Maryland make clear, in some states, among white-victim cases, black defendants run a higher risk of being capitally charged and sentenced to death than white defendants.

These data suggest that in the post-*Furman* period, from a systemic perspective, substantially equal treatment of black and nonblack offenders is now the rule rather than the exception.[23] One explanation for this change may be that prosecutors are striving for equal treatment. Indeed, the level of sensitivity on this issue on the part of prosecutors is suggested by evidence from Kentucky that some defense counsel there are reluctant to raise claims of race-of-defendant discrimination under the state's Racial Justice Act in prosecutorial charging decisions.[24] The reluctance arises from the deep resentment such claims produce on the part of prosecutors and a fear that the claims may damage defense counsel's long-term relationships with the prosecutors with whom they must work on a daily basis.[25] There are at

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An Empirical and Legal Overview, with Recent Findings from Philadelphia, 83 CORNELL L. REV. 1638, 1742-45 app. B (1998) (Alabama, Connecticut, Delaware, Indiana, Louisiana, Nevada, Ohio, Oklahoma, Tennessee, Texas, and Washington).

23. We noted above, *supra* note 19, however, that statewide data may mask race-of-defendant discrimination in certain locales that is offset when it is included in a larger statewide analysis. Also, when the evidence is limited to unadjusted race-of-defendant disparities, in many jurisdictions, the race effects are biased in the direction of suggesting less punitive treatment of black defendants because of the impact of race-of-victim discrimination on the unadjusted disparities. That bias disappears when controls for defendant criminal culpability are introduced into the analysis. Those analyses generally show, in the aggregate, no race-of-defendant effects. *See infra* note 139.

24. Gerald A. Neal, *Not Soft on Crime, but Strong on Justice: The Kentucky Racial Justice Act*, THE ADVOCATE, Mar. 2004, at 9 (reporting the results of a survey of sixty-four Kentucky public defenders on the use of the state's 1998 Racial Justice Act), *available at* http://dpa.ky.gov/library/advocate/mar04/mar04.htm (last visited Apr. 19, 2004).

25. This prosecutorial sensitivity appears to reflect what Randall Kennedy refers to as "[o]ne of the great achievements of social reforms in American history . . . the stigmatization of overt racial prejudice . . . [and] the sense that racial discrimination is a terrible evil . . . . " Randall L.

least three other possible explanations for the apparent decline of race-of-defendant discrimination in the system. First, it may reflect increased participation of African Americans in the criminal justice system as prosecutors, judges, and jurors.[26] Second, indigent black capital defendants may be receiving better legal representation. Increasingly, public defenders are assuming larger homicide caseloads and bringing institutional expertise and resources to the job that are not available to court-appointed, private counsel. Finally, prosecutorial discretion may be reflecting a perception in many jurisdictions that, unless a black-defendant/black-victim case is highly aggravated, it is likely to result in a jury verdict of life imprisonment, thus prompting the prosecution to rethink the effort and expense.

The only exception to the absence of a black-defendant effect in prosecutorial decision-making is in the federal death penalty. Data from Janet Reno's years as Attorney General (AG) indicate that among the cases in which she approved a death sentence, white defendants were twenty percentage points (47% (24/51) versus 27% (28/105)) more likely than black defendants to obtain a pretrial waiver of the death penalty by virtue of a plea agreement with the local United States Attorney.[27] Although this is an unadjusted race effect, it appears to have been of sufficient concern to prompt Attorney General John Ashcroft to amend departmental rules to require that once he has authorized a capital prosecution, the death penalty may not be waived thereafter by the local United States Attorney without his prior approval.[28]

Kennedy, McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court,* 101 HARV. L. REV. 1388, 1418 (1988). This transformation leads legal philosopher Michael Moore to conclude that "[s]ome emotions such as racial prejudice have negative moral worth in the sense that to have them is to be a morally worse (less virtuous) person." MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 119 (1997). Stigmatization concerns also deter judges from "finding" purposeful discrimination "in all but the clearest circumstances." Kennedy, *supra,* at 1418. Blume et al., *infra* note 91, documents a similar reluctance of both state and federal judges to find discrimination on the part of prosecutors.

26. See BALDUS ET AL., *supra* note 8, at 183-84 (analysis of declining levels of race-of-defendant discrimination in Georgia after *Furman v. Georgia*, beginning in urban areas and spreading later to rural areas).

27. U.S. DEP'T OF JUSTICE, SURVEY OF THE FEDERAL DEATH PENALTY SYSTEMS: 1988-2000, at 34-35 tbl. 2A (2000), *available at* www.usdoj.gov/dag/pubdoc/dpsurvey.html (last visited Apr. 19, 2004).

28. U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTAL DATA: ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW 17-19 (2001), *available at* http://www.usdoj.gov/gag/pubdoc/deathpenaltystudy.htm (last visited Apr. 19, 2004). The report states, however, that the disparity is not evidence of disparate treatment because a consideration of all of the U.S. Attorney decisions indicates that "noncapital treatment" occurs for 74% of the white defendants and 81% of the black defendants. *Id.* at 18.

B. Race-of-Victim Discrimination

1. *Pre*-Furman

Before *Furman*, the issue of race-of-victim discrimination attracted little attention. In the popular mind, race discrimination meant one thing—more punitive treatment of black defendants. Nevertheless, the pre-*Furman* research also documents strong race-of-victim effects (i.e., killers of whites were at far greater risk of a death sentence than killers of blacks). For example, in the pre-*Furman* Georgia research noted above in Table 1, the unadjusted death-sentencing rate in white-victim cases was 18% compared to 10% in the black-victim cases.[29] Moreover, in a multivariate logistic regression analysis, the data suggested that defendants' odds of receiving a death sentence were 4.3 times higher if their victims were white than the odds faced by similarly situated defendants with black victims.[30]

2. *Post*-Furman

Table 3 presents nationwide race-of-victim data on the murder defendants executed post-*Furman*. The bottom line indicates that 81% of the executed defendants had white victims. The proportion of white-victim cases among all death-sentenced, as contrasted to executed, defendants is also known in eight states for the period from 1977 through 2000.[31] With the exception of Pennsylvania, the average white-victim rate among death-sentenced offenders is 83% and ranges from 85% in Arizona to 82% in Virginia, while the percentage of white-victim cases among all murder and nonnegligent manslaughter cases averaged 45% and ranged from 31% in Georgia to 73% in Nevada.

In Pennsylvania, in contrast, the white-victim rate among death-sentenced offenders is 54% compared to a rate of 43% among all murder and nonnegligent manslaughter cases. The much lower unadjusted race-of-victim effect in Pennsylvania reflects the high death-sentencing rate in Philadelphia's black-defendant/black-victim cases.[32] Na-

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29. *See* Table 1.

30. BALDUS ET AL., *supra* note 8, at 143. See Appendix Figure 1 and accompanying text for more detail on the pre-*Furman* race-of-victim effects in Georgia. Studies in other states during the 1930s to the 1960s reported unadjusted race-of-victim effects in North Carolina and New Jersey. *Id* at 249-51.

31. John Blume et al., *Explaining Death Row's Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165, 197 (2004) (Arizona, Georgia, Indiana, Maryland, Nevada, Pennsylvania, South Carolina, and Virginia).

32. *See supra* note 22 and accompanying text. Philadelphia accounts for 54% (124/229) of the state's current death row population, *see* PERSONS SENTENCED TO EXECUTION IN PENNSYLVANIA AS OF MAY 4, 2004, *available at* http://www.cor.state.pa.us/Execution%20list.pdf (last

TABLE 3. POST-*FURMAN* EXECUTIONS BY RACE OF VICTIM: 1976-2002[a]

A State	B White Victim Percentage
1. Texas	79% (229/289)[b]
2 Virginia	80% (70/87)
3. Missouri	78% (46/59)
4. Oklahoma	78% (43/55)
5. Florida	80% (43/54)
6. Georgia	94% (29/31)
7. South Carolina	64% (18/28)
8. Louisiana	81% (22/27)
9. Alabama	76% (19/25)
10. Arkansas	92% (22/24)
11. North Carolina	87% (20/23)
12. Arizona	86% (19/22)
13. Delaware	69% (9/13)
14. Illinois	75% (9/12)
15. California	80% (8/10)
16. Indiana	89% (8/9)
17. Nevada	100% (9/9)
18. Mississippi	67% (4/6)
19. Utah	100% (6/6)
20. Ohio	80% (4/5)
21. Washington	100% (4/4)
22. Nebraska	100% (3/3)
23. Maryland	100% (3/3)
24. Pennsylvania	67% (2/3)
25. Kentucky	100% (2/2)
26. Montana	100% (2/2)
27. Oregon	100% (2/2)
28. U.S.	0% (0/2)
29. Colorado	100% (1/1)
30. Idaho	100% (1/1)
31. New Mexico	100% (1/1)
32. Tennessee	100% (1/1)
33. Wyoming	100% (1/1)
TOTAL	80.88% (1007/1245)

[a] The jurisdictions are listed in the order of the total number of executions.

[b] The denominator is the total number of executions. The numerator is the number of executed defendants with one or more white victims in their cases.

Source: NAACP LEGAL DEF. & EDUC. FUND, DEATH ROW U.S.A. 8-9 (2003), *available at* http://www.naacpldf.org/content/pdf/pubs/drusa/deathrow_winter2003.pdf (last visited June 4, 2004).

tionwide, the proportion of white-victim cases among all murder and nonnegligent manslaughter cases has ranged between 51% and 56% since 1976.[33] These data strongly suggest that defendants with white victims are at a significantly higher risk of being sentenced to death and executed than are defendants whose victims are black, Asian, or Hispanic.

In post-*Furman* multivariate studies designed to explain this white-victim phenomenon, the introduction of controls for offender criminal culpability and geography generally reduces the magnitude of the race-of-victim effects, but it does not explain it away completely. For example, in the recent Paternoster and Brame study of the rates that Maryland prosecutors gave notice of an intention to seek a death sentence in the cases, the unadjusted race-of-victim disparity of twenty-six percentage points remained at ten points after adjustment for offender culpability and geography.[34]

The GAO's synthesis of research prior to 1990 offered the following assessment of the empirical findings:

> In 82% of the studies, race-of-victim was found to influence the likelihood of being charged with capital murder or receiving a death sentence, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks. This finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques. The finding held for high, medium, and low quality studies.
>
> The race-of-victim influence was found at all stages of the criminal justice system process, although there were variations among studies as to whether there was a race-of-victim influence at specific stages. The evidence for the race-of-victim influence was stronger for the earlier stages of the judicial process (e.g., prosecutorial decision to charge defendants with a capital offense, decision to proceed to trial rather than plea bargain) than in later stages. This was because the earlier stages were comprised of larger samples allowing for more rigorous analyses.[35] However, decisions made at every stage of the process necessarily affect an individual's likelihood of being sentenced to death.[36]

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visited May 8 2004). In the Georgia 1973-1980 data referred to above, among all death-eligible cases, the proportion of white-victim cases was 40% and in the Maryland study referred to above, the figure was 45%. BALDUS ET AL., *supra* note 8, at 564 (Georgia); PATERNOSTER & BRAME, *supra* note 14, at 47 fig. 4 (Maryland).

33. U.S. DEP'T OF JUSTICE, *supra* note 13, at 301 tbl. 3.142.

34. PATERNOSTER & BRAME, *supra* note 14, at 86 tbl. 12G.

35. In our judgment, this is one possible explanation, but it is also possible and plausible that discrimination is greater in prosecutorial decisions because they are less constrained and less visible than jury penalty trial decisions.

36. GAO REPORT, *supra* note 16, at 5-6.

A recent survey we conducted of the research since 1990 reaches the same conclusion.[37] The reported studies, with varying levels of sophistication and controls, document race-of-victim effects in Arizona, California, Florida, Illinois, Indiana, Maryland, Missouri, North Carolina, and Texas.[38]

The literature is clear that when race-of-victim disparities exist, the most common source is prosecutorial charging decisions. However, recent studies in Nebraska and Philadelphia showed no statistically significant race-of-victim effects in these decisions.[39] In New Jersey, the data suggest a race-of-victim effect in prosecutorial decisions, but a claim based on them was rejected by the New Jersey Supreme Court.[40] Appendix Figure 4 and accompanying text present additional detail on race-of-victim effects in our post-*Furman* Georgia research.

III. Race Discrimination and the Perceived Morality and Legitimacy of the Death Penalty

A. The Conceptual Framework

To analyze the impact of race discrimination on the perceived morality and legitimacy of the death penalty, we turned to a multidisciplinary body of research that addresses the legitimacy of legal institutions and policies. Much of this research focuses on the extent to which perceptions of the legitimacy of laws affect citizen compliance with them.[41] Our focus, in contrast, is on whether the law is per-

37. Baldus & Woodworth, *supra* note 17, at 202.

38. *Id.* at 215-26. Prosecutorial white-victim disparities were also documented in New Jersey and Virginia in multivariate analyses, but they were not statistically significant in Virginia, *id.* at 524, or considered sufficiently strong to justify judicial relief in New Jersey, *infra* note 250. A 20-percentage point white-victim disparity (33% versus 19%) in death sentencing rates in the major urban counties of Nebraska has been documented but it is not statistically significant. David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999)*, 81 Neb. L. Rev. 486, 582-83 fig. 13 (2002).

39. Baldus et al., *supra* note 38, at 553 tbl. 4 (results of logistic multiple regression analysis of Nebraska data); Baldus et al., *supra* note 22, at 1679 tbl. 2 (unadjusted disparities and regression analyses showed no effects in Philadelphia).

40. State v. Morton, 757 A.2d 184, 268 (N.J. 2000) (considering a statewide race of victim claim in prosecutorial decisions to seek death based on a 20-percentage point (50% to 30%) unadjusted race-of-victim disparity and the results of regression models documenting statistically significant effects, but holding that the data did not "relentlessly document systemic racial discrimination"). But see *infra* note 247 for a dissenting Justice's view of the significance of the findings. *See also* Judge David S. Baime, *Comparative Proportionality Review: The New Jersey Experience*, 39 Crim. L. Bull. 227 (2003).

41. This is known as the "sociological" notion of legitimacy. Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 Duke L.J. 703, 711 n.25 (1994).

ceived as legitimate by the public and elites "when judged against criteria of fairness and morality."[42] A straightforward approach from this perspective is offered by political scientists Robert Dahl and Charles Lindblom. In their view, the perceived legitimacy of a governmental policy and its consequences reflects the extent to which they are approved or regarded as "right."[43] The norms that inform these judgments range from "conscious, articulated, logically structured" legal norms to norms with "less logical structure" that support a "feeling" of what is "right and wrong in a given instance."[44]

This theory suggests that perceptions of the legitimacy of public policies are affected by the salience of the moral and legal values implicated by the evidence. With respect to capital punishment, race discrimination implicates important costs and benefits at two levels—those associated with the existence of racial discrimination and those associated with its prevention and cure.

With respect to the existence of racial discrimination, costs come in two forms. The first concerns threats to principles of comparative justice and equal protection.[45] The second concerns the extent to which discrimination impairs the protection of innocent life and retribution—the two most significant justifications of capital punishment in principle. Race-of-defendant discrimination undermines the principle of retribution for white defendants, and it diminishes the protection afforded their victims and the communities in which they reside, all of which are predominantly white. When discrimination adversely affects defendants whose victims are white (i.e., race-of-victim discrimination) it undermines the principle of retribution for defendants whose victims are black and it diminishes the protection afforded their

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42. This is known as the philosophical notion of legitimacy. *Id.*

43. ROBERT A. DAHL & CHARLES E. LINDBLOM, POLITICS ECONOMICS AND WELFARE 114-15 (1963). A similar sense of the legitimacy of public policy was offered by legal realist Thurman Arnold in the 1920s: "[L]egal institutions project values, these values are accepted by the population because they converge with their own values, and the acceptance of these values in turn legitimates the entire order." *See* Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WISC. L. REV. 379, 413.

44. DAHL & LINDBLOOM, *supra* note 43, at 115. *See also* PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 1 (1995) (The average citizen's view of whether an outcome in the criminal justice is just is not normally based on principles of "moral philosophy" but rather is based "not only on the speaker's personal view but on an intuitive but grounded notion of justice that the speaker believes is shared by the community of moral individuals.").

45. Race discrimination in the administration of the death penalty violates both the Equal Protection Clause of the Fourteenth Amendment (forbidding purposeful race discrimination) and the Eighth Amendment (race discrimination is a form of arbitrariness because decisions are based on irrelevant factors). McCleskey v. Kemp, 481 U.S. 279 (1987).

victims and the communities in which they reside, all of whom are predominantly black.[46]

There are also costs and benefits associated with the prevention of discrimination, and its cure, when it is shown to exist. If the costs of prevention and cure come at too high a price in terms of the justification for capital punishment in principle, from a moral standpoint, tolerance of discrimination may appear to be a more acceptable alternative than either its prevention or cure. However, if prevention and cure do not materially impair the goals of capital punishment, tolerance of discrimination may significantly impair the legitimacy of a system that tolerates race discrimination. The issue, therefore, is the extent to which strategies designed to prevent and cure discrimination (a) achieve those objectives, (b) undermine retribution and the protection of innocent life, and (c) introduce additional threats to principles of comparative justice and equal protection.[47]

Our approach to the issue assumes the legitimacy of the theories offered to justify capital punishment in principle. If one were to reject their legitimacy, evidence of race discrimination in a death penalty system would make a bad system worse and offer little to the normative analysis.[48] Similarly, if one rejects the legitimacy of Fourteenth and Eighth Amendment values of comparative justice and nonarbitrary application of the death penalty, evidence of race discrimination will have no impact at all on one's perception of the legitimacy of the death penalty.

Perceptions of legitimacy are also influenced by legal discourse and doctrine, particularly in the United States Supreme Court, which, in the eyes of different publics, may be seen as approving existing social practice and public policy.[49] For example, Alan Freeman presents a convincing argument that much of the Supreme Court's interpretation

46. A comparable model underlies Justice Blackmun's analysis in *Callins v. Collins,* 510 U.S. 1141 (1994) (Blackmun, J., dissenting), wherein he concluded that the costs associated with distortions in the application of the death penalty (miscarriages of justice, unreliability, and discrimination) outweigh the justifications for capital punishment, which he continued to accept as legitimate. Scott Turow reached a similar conclusion in which he accepted the validity of the goals of capital punishment but concluded that the costs associated with distortions in application, including but not limited to race discrimination, overwhelmed the benefits associated with it in cases where it was clearly justified in the interests of retribution. *See* SCOTT TUROW, ULTIMATE PUNISHMENT 113-15 (2003).

47. *See* Schopp, *supra* note 2 (reporting a formal analysis of this conceptual framework); RANDALL KENNEDY, RACE, CRIME, AND THE LAW 348 (1997) (evaluating the Racial Justice Act on the basis of whether the "benefits of capital punishment outweigh the costs created by racial distortions in its administration").

48. *See* Schopp, *supra* note 2, at 837.

49. Carol S. Steiker & Jordan S. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment,* 109 HARV. L. REV. 355, 430-31 (1995).

of antidiscrimination law facially appears to offer meaningful justice for racial minorities in the areas of employment, education, and voting rights, while in fact legitimating racial inequalities in those areas of American life.[50] In a similar vein, Professors Carol S. Steiker and Jordan S. Steiker argue that the Supreme Court's Eighth Amendment jurisprudence developed since 1976 has made "actors within the criminal justice system more comfortable with their role by inducing an exaggerated belief in the essential rationality and fairness of the system."[51] They also consider it "probable that death penalty law makes members of the public at large more comfortable with the use of capital punishment than they would be in the absence of such law."[52]

B. *The General Public*

Polling data and an informal survey we conducted clearly indicate that the general public perceives only one form of race discrimination in the use of the death penalty—race-of-defendant discrimination,[53] a perception that mirrors the common understandings of the pre-*Furman* system. In a 1991 poll, on the specific question of whether blacks are at greater risk of being sentenced to death, 73% of the black respondents and 41% of the white respondents answered in the affirmative.[54] Yet, 67% of all respondents, and nearly 50% of black

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50. Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052 (1978).

51. Steiker & Steiker, *supra* note 49, at 433.

52. *Id.* We agree with this perception and believe that the legitimization and approval of the entire post-*Furman* system by the Supreme Court and the state supreme courts have greatly contributed to the popular support for capital punishment in America since 1976.

53. In a survey we conducted in the Fall of 2003, eighty-two first-year University of Iowa law students were asked to explain what they understood by "race discrimination in the administration of the death penalty in America." Ninety-three percent (76/82) of the students described such discrimination strictly as race-of-defendant discrimination. The following is a typical response: "[T]here are disproportionately more racial minorities executed than whites. This reflects an apparent bias in the justice system or a willingness to prosecute, convict, and execute minorities." Of the six students who referred to the race of the victim, it was solely with respect to the more punitive treatment of blacks whose victims were white. Only two students referred to race discrimination in terms of the differential treatment of defendants on the basis of the victim's race alone.

54. The response for all respondents was 45% in agreement and 50% in disagreement. Alec Gallup & Frank Newport, GALLUP POLL MONTHLY, June 1991, at 40, 41. Nationally, in response to a question about whether the death penalty "is applied fairly or unfairly in this country today," 53% of respondents believed that the system is applied fairly, while 40% disagreed. When broken down by race, African Americans perceive far more inequity in the administration of the death penalty. Nationally, 72% of African Americans—compared to only 36% of whites—believe that the system is unfair. U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2001, at 145 (Kathleen Maguire & Ann L. Pastore eds., 2002).

respondents, "believe in" the death penalty.[55] These data are consistent with the results of opinion polls that explore the reasons given for opposition to capital punishment. In the most recent national poll (2003), only 4% of opponents listed concerns about "unfair application" as a reason for their opposition.[56] Moreover, a 2000 poll reports that of the 41% of the respondents who perceived its application as unfair, 44% supported capital punishment.[57] Moreover, in a 2001 Pennsylvania poll that explored the basis of perceptions that the death penalty is "not applied fairly," only 24% of the respondents saw the problem of unfairness to lie in the disproportionate application of the penalty to blacks and the poor.[58]

However, these polling results contain two levels of ambiguity. First, it is unclear from the wording of the questions asked whether the respondents who believe the death penalty is unfairly applied, but support it, are expressing support for the death penalty as currently practiced, or the death penalty in principle. Second, the questions about race discrimination and unfairness are strictly descriptive, in that they speak only to the existence of unfairness and not whether the unfairness is wrong.[59]

The polling data raise two questions. First, what explains the gap between the post-*Furman* empirical data documenting only spotty evidence of race-of-defendant discrimination and the public perceptions of its widespread pervasiveness in the current system? Second, what

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55. U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2002, at 145 tbl. 2.47 (Kathleen Maguire & Ann L. Pastore eds., 2003) (The figures were 73% for whites, 46% for blacks, and 63% for Hispanics.). *See also* Samuel R. Gross, *Update: American Public Opinion on the Death Penalty—It's Getting Personal*, 83 CORNELL L. REV. 1448, 1458-59 (1998) ("Obviously many Americans do not consider discrimination by race or wealth a sufficient reason to oppose capital punishment."). Public support for the death penalty has waned slightly in recent years. Overall, 77% of whites and 47% of blacks are in favor of the death penalty. U.S. DEP'T OF JUSTICE, *supra* note 54, at 144. Each demographic has changed in its support for the death penalty over the last few years, from a recent high of 78% of whites and 56% of blacks supporting the death penalty in 1990, to recent lows of 69% and 42%, respectively, supporting the death penalty in 2000. *Id.* at 143.

56. U.S. DEP'T OF JUSTICE, *supra* note 55. In a 1991 poll, "unfairness" was cited by 6% of the respondents. *Id.* The most important reasons for opposition were, for example in the 2003 poll: "wrong to take a life" (46%) and "person may be wrongfully convicted" (25%).

57. Jeffrey M. Jones, *Slim Majority of Americans Think Death Penalty Applied Fairly in This Country*, GALLUP POLL MONTHLY, June 2000, at 64 (Among the respondents who believe the system is fairly applied, 86% supported capital punishment.).

58. PENNSYLVANIANS UNITED AGAINST THE DEATH PENALTY, 2001 MORATORIUM POLL SUMMARY AND RESULTS 6 (2001), *available at* http://www.pa-abolitionists.org/mora_poll.html (last visited Apr. 19, 2004).

59. In contrast, polling questions about racial profiling in the stopping and searching of motorists speak directly to the morality of the practices. *See infra* note 77 and accompanying text.

explains the apparent indifference of the public to race discrimination in the use of the death penalty?

1. *The Gap Between the Scientific Evidence and Public Perceptions Concerning Race-of-Defendant Discrimination*

We have gained insight on this issue through the lens of knowledge utilization theory,[60] which, among other things, focuses on how people cling to strongly held beliefs based on "ordinary knowledge" and reject specialized knowledge to the contrary that is produced by social science professionals. A very helpful synthesis of the field is Charles Lindblom and David Cohen's book entitled, *Usable Knowledge*.[61] A main theme of this book concerns the extent to which specialized social science knowledge can change ordinary knowledge on which the decisions and perceptions of most citizens and decisionmakers are based.

Ordinary knowledge is derived from many sources that most citizens would find difficult to identify. It is not directly informed by specialized knowledge and quantitative research produced by social science. When consistent with ordinary knowledge, specialized findings of social science tend to enhance the validity of ordinary knowledge. However, when specialized findings are inconsistent with ordinary knowledge, they are generally ignored or dismissed as unreliable or irrelevant.[62] Gaps between specialized and ordinary knowledge are common phenomena in other areas of criminal law[63] and in many other public policy areas.

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60. Richard Lempert, *"Between Cup and Lip": Social Science Influences on Law and Policy*, 10 LAW & POL'Y 167, 184-85 (1988).

61. *See, e.g.*, CHARLES E. LINDBLOM & DAVID K. COHEN, USABLE KNOWLEDGE: SOCIAL SCIENCE AND SOCIAL PROBLEM SOLVING (1979).

62. *Id.* at 45 (noting the "many irrational and nonrational human resistances to believing what [professional scientific inquiry], or scientists generally, say). A substantial body of research evaluating the impact that social science evidence has on beliefs about the death penalty is to the same effect. This literature tests the "Marshall hypotheses" posited by the late Supreme Court Justice. It was his firm belief that if average citizens properly understood how the death penalty actually functioned, most of them would reject it. The literature generally fails to support his expectation. Moreover, it documents that "knowledge or information" can have an entirely different effect by polarizing opinions instead of changing them because of a process known as "biased assimilation" in which "subjects interpreted evidence so as to maintain their initial beliefs." Specifically, the relevant data "are not processed impartially" and the perceived validity of the data are "biased by the apparent consistency of [the] evidence with the perceiver's theories and expectations." Robert M. Bohm et al., *Knowledge and Death Penalty Opinion: A Test Of The Marshall Hypotheses*, 28 J. RES. IN CRIME & DELINQUENCY 360, 365 (1991) (summarizing the literature with special reference to the work of C.G. Lord, L. Ross, and M.R. Lepper).

63. Deborah W. Denno, *The Perils of Public Opinion*, 28 HOFSTRA L. REV. 741, 754, 789 (2000) (stating that "common public misperception[s]" relate to such matters as whether crime

The persistence of ordinary knowledge in the face of new evidence to the contrary is particularly strong if the process or mechanism to which the ordinary knowledge relates is widely understood. This is particularly relevant with respect to race-of-defendant discrimination in capital sentencing. African Americans widely believe that strident racism in the criminal justice system flows from overt hostility to blacks or the belief that blacks are more dangerous than nonblacks. Many whites widely share these perceptions and can easily understand how they would adversely affect black defendants in capital litigation.[64]

Ordinary knowledge on this issue is also enhanced by arguments, statistical and otherwise, sometimes offered to sustain the belief in widespread discrimination against black defendants. First is the superficial appeal of the commonly repeated argument that because blacks constitute 13% of the population and 40% of the death-sentenced offenders, the system is racially discriminatory.[65] The flaw in the argument is its failure to commence the analysis with the fact that blacks constitute more than 50% of persons arrested for death-eligible homicide in most parts of this country. However, these statistics are neither easily accessible nor easily interpretable.

Also important are the anecdotes of criminal law practitioners who routinely report quite plausible examples of discrimination in the capital cases they handle. Of course, as noted above, it is clearly possible for race-of-defendant discrimination to occur in a nonsystemic manner that cannot be detected in a statistical analysis. This is one of the big limitations of social science research. Our claim is only that race-of-defendant discrimination is clearly not systemic throughout the country or we would see it in the data just as we saw it in the pre-*Furman* data.

A third possible explanation may be that reports of studies finding "race discrimination," albeit race-of-victim discrimination, sustain

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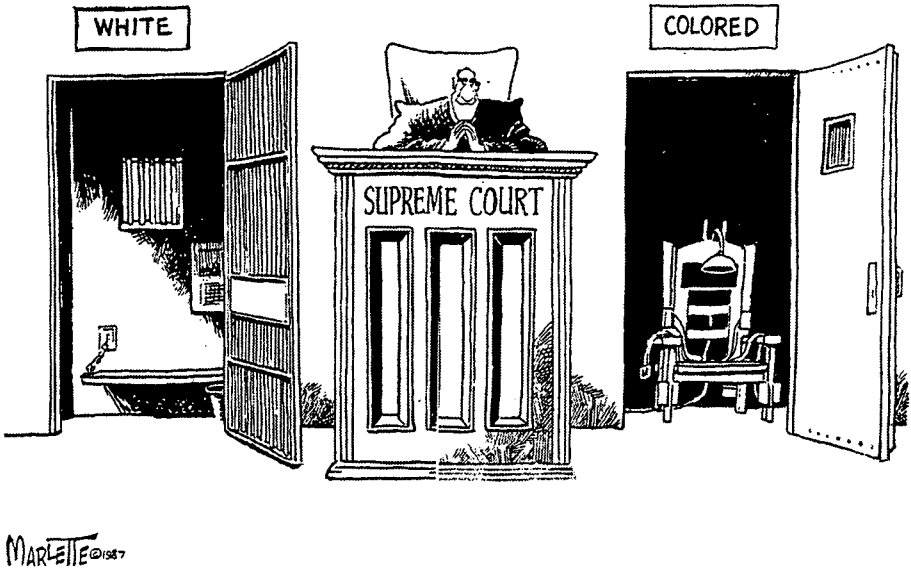
rates are declining, stabilizing, or increasing, the rates at which parolees become repeat offenders, and "the severity of punishment that the legal system actually imposes").

64. In contrast, empirical research documenting a deterrent effect of capital punishment is often disregarded because of a perceived implausibility that most killers conduct the kind of cost-benefit analysis assumed by the deterrence hypotheses.

65. John C. McAdams, *Racial Disparity and the Death Penalty*, 61 LAW & CONTEMP. PROBS. 153, 154 (1998) characterizes this as "[t]he 'mass market' racial disparity argument," which asserts that "the criminal justice system is tougher on black offenders than white offenders, and particularly is more inclined to execute blacks than whites. This argument is simple, palatable, and easy to see."

preexisting beliefs of discrimination against black defendants.[66] A theory in psychology known as "pattern recognition" gives this explanation credibility. The idea is that all manner of things, people, tastes, colors, concepts, and evaluations are recognized on the basis of mentally inventoried prototypes.[67] When something new comes along, it is compared to mentally inventoried prototypes to see if they match. When a new study reports that "racial discrimination" is still at work in the death penalty system (albeit on the basis of the victim's race), it is understandable that it may be considered a match to the earlier evidence of race-of-defendant discrimination. A striking example of such a mismatch, shown in Figure 1, was contained in a political cartoon that appeared in Atlanta, Georgia shortly after *McCleskey v. Kemp* was decided in 1987. Even though the evidence of "race discrimination" in *McClesky* was strictly on the basis of the race of the victim, the cartoon depicted the *McCleskey* decision as squarely approving race-of-defendant discrimination.

FIGURE 1. POST-*MCCLESKEY V. KEMP* POLITICAL CARTOON, *THE ATLANTA JOURNAL* AND *THE ATLANTA CONSTITUTION* (APRIL 1987)



66. *See* JULIAN V. ROBERTS & LORETTA J. STALANS, PUBLIC OPINION, CRIME, AND CRIMINAL JUSTICE 4 (1997) ("Although attitudes are formed and modified by direct and indirect experiences, in the area of crime and justice, the news media are predominant.").

67. *See* Dan K. Kahan, *Lay Perceptions of Justice vs. Criminal Law Doctrine: A False Dichotomy?*, 28 HOFSTRA L. REV. 793, 794 (2000).

Finally, there is compelling evidence of pockets of systemic race-of-defendant discrimination. We see it in Philadelphia penalty trials and in some parts of the federal system, findings which some may generalize across the nation.[68] Also, the finding that black-defendant/white-victim cases are treated more punitively than all other classes of offenders in some states[69] clearly reinforces the belief that blacks are routinely treated more punitively than similarly situated whites.

2. *Public Support for Capital Punishment in the Face of the Perceptions of Widespread Race-of-Defendant Discrimination*

One possible explanation is that race discrimination is perceived to be morally acceptable in all contexts. However, the documented public concerns about racial profiling, noted below, suggest this is not the case. A more plausible explanation is a belief that such discrimination is an inevitable part of any system of justice in this country and that any resulting harms to black victims of such discrimination are clearly outweighed by the benefits and protections provided by the use of capital punishment;[70] moreover, little can be done to ameliorate it, and remedies like affirmative action will only make matters worse.[71]

In 1986, Justice Antonin Scalia presented a similar hypothesis in a memorandum to the other members of the Court (the "conference") while *McCleskey v. Kemp* was under consideration. In it he 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

68. *See supra* note 22 and accompanying text.

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

70. This perception was reflected in a 1987 assessment of then Criminal Justice Legal Foundation Director, Kent S. Scheidegger. *See* Kent S. Scheidegger, *Capital Punishment in 1987: The Puzzle Nears Completion*, 15 W. ST. U. L. REV. 95, 124 (1987). Scheidegger approves of the *McCleskey* decision because "acknowledgement that some degree of racial influence is tragically inevitable, that we must do everything we can to reduce that impact, but that amputating portions of our criminal justice system is neither a necessary not a proper treatment for the disease . . . . Racism is a cancer that infects all aspects of government, including the criminal justice system. It will exist until the day the last bigot dies, a day not within the foreseeable future." *Id.*

71. Public perception of discrimination in society remains high. Sixty-seven percent of whites and 82% of blacks answered in 1999 that at least some "discrimination against blacks" exists in American society. ABC News/Lifetime Poll: Racial Discrimination (Oct. 19, 1999) (on file with authors). However, the public in general does not see racial discrimination as a problem to correct, as evidenced by low percentages of support for affirmative action and quota programs. *See* Richard Morin & Sharon Warden, *Americans Vent Anger at Affirmative Action*, WASH. POST, Mar. 24, 1995, at A1 (noting that three out of four Americans opposed affirmative action programs); *see also* John Cocchi Day, *Retelling the Story of Affirmative Action: Reflections on a Decade of Federal Jurisprudence in the Public Workplace*, 89 CAL. L. REV. 59, 64 n.15 (2001) (noting strong public opposition to broad-based "quota" affirmative action programs).

of this court, and ineradicable, I cannot honestly say that all I need is more proof."[72] The core of Justice Scalia's hypothesis is twofold—inevitability and ineradicability, with a clear implication that toleration of race discrimination was acceptable given the perceived benefits of, and public support for, the death penalty.[73] From this perspective, the distortion of race discrimination is but one factor to consider in assessing the legitimacy and constitutionality of a death-sentencing system.

Another likely reason for public indifference about race-of-defendant discrimination is the difficulty people have in seeing highly culpable killers as "victims" of anything, combined with the belief that any concerns one might have about such discrimination are trumped by the importance of delivering justice in capital cases. The following paraphrased statement by a black sheriff from Florida at a 2001 public meeting on the issue of race and the death penalty illustrates this point:

> If a black man is guilty of capital murder and deserving of the death penalty, it is of no concern to me that other similarly situated white offenders avoid the death penalty. All I care about is that justice is done in the cases that deserve the death penalty. Any relief for such a killer on racial grounds would merely frustrate his just deserts.[74]

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72. David C. Baldus et al., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Improbability" of Its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359, 371 n.46 (1994).

73. Justice Powell's opinion reflected this theme as well. McCleskey v. Kemp, 481 U.S. 279, 312 (1987) ("Apparent disparities in sentencing are an inevitable part of our criminal justice system.").

74. Florida Task Force on Capital Cases, Tallahassee, Florida (Mar. 31, 2000) [hereinafter Florida Task Force] (Professor Baldus attended and participated in a day-long meeting of the fifteen member panel appointed by Governor Jeb Bush, January 7, 2000.). Some intellectuals partially share these sentiments. For example, the late Ernst Van den Haag, a philosopher, argued that race discrimination is "irrelevant" to the morality, justice, and utility of the death penalty. Ernest Van den Haag, *In Defense of the Death Penalty: A Practical and Moral Analysis*, *in* THE DEATH PENALTY IN AMERICA 323-24 (Hugo Adam Bedau ed., 3d ed. 1982) ("[I]f the death penalty is morally just, [which he believes it is], however discriminatorily applied to only some of the guilty, it remains just in each case in which it is applied .... Unequal justice also is morally repellant. Nonetheless unequal justice is still justice."). What appears to distinguish the Florida sheriff from Van den Haag is that the sheriff sees no immorality in the unequal treatment while Van den Haag, although willing to tolerate it to ensure that justice is done in individual cases, sees a significant injustice when a white defendant receives a life sentence while a similarly situated black offender is sentenced to death. McAdams, *supra* note 65, at 168 ("Between an inequitable death penalty and no death penalty, I would prefer an inequitable death penalty .... I say this because I think it likely that executions deter murders, and it is clear that a majority of Americans—white and black—think that justice requires executions for the most heinous crimes.").

From this perspective, the only problem with race-of-defendant discrimination is that it enables white defendants to avoid their just deserts, thereby undermining a principal justification for capital punishment.[75] These sentiments stand in sharp contrast to public attitudes about racial profiling practices, which put innocent black motorists and pedestrians at risk of police stops and arrest strictly on the basis of their race. National polls show that 60% of adults believe racial profiling is widespread[76] and that over 80% believe the practice is wrong.[77]

The indifference of the general public about race and the death penalty is reinforced by the apparent indifference of elected public officials and the courts to the issue. To our knowledge, only one high-visibility public official, former Maryland Governor Parris Glendening, has expressed public concern about the issue when he declared a moratorium on executions until the issue could be studied.[78] The principal source of publicly stated concerns about the issue has been various black legislative caucuses, black leaders, and abolitionists whose claims and expressions of concern appear to carry little weight.[79]

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75. This position is stated with force by Van den Haag. *See* Van den Haag, *supra* note 74, at 323-24.

76. Gallup Poll, Sept. 24, 1999-Nov. 16, 1999, Public Opinion Online, The Roper Center at the University of Connecticut, *available at* LEXIS, News Library, Rpoll file (59% of adults eighteen and over believed that racial profiling is widespread).

77. Levels of distaste for discrimination, as well as support for remedial measures, increases when the perceived victims of the discrimination are noncriminals. An overwhelming percentage of the public thinks that racial profiling is bad. *See* Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1413-14 & n.1 (2002) (noting that over 80% of Americans disapproved of racial profiling in 1999, and most still disapprove even after the September 11, 2001 attacks).

78. Editorial, *Finally, a Moratorium*, BALT. SUN, May 10, 2002, at 22A. As soon as successor, Governor Robert L. Ehrlich, Jr., was installed, he announced his intent to lift the moratorium. Susan Levine, *Md. Gears Up for Execution*, WASH. POST, Jan. 21, 2003, at A1. The United States Congress, when confronted with evidence suggesting a risk of race discrimination in the administration of the federal death penalty, declined to impose a moratorium, but did direct funding to the National Institute of Justice to conduct a study of the federal system. *See infra* note 124 and accompanying text.

79. For example, protests of the Florida legislative black caucus about the influence of race in Florida's system prompted Governor Jeb Bush to convene a task force to study the issue. Linda Kleindienst & John Kennedy, *On Death Row, Inmates' Choice*, FT. LAUDERDALE SUN-SENTINEL, Jan. 7, 2000, at 1A ("[A]ware of the political implication of appearing insensitive to black concerns, Bush hastily signed an executive order . . . creating a task force to study the issue . . . .") The claims were diminished and no meaningful action was recommended. An exception to this pattern occurred in Kentucky where concerns about race resulted in a legislatively funded study, whose results were the basis for a legislative adoption of the country's only Racial Justice Act. Edward C. Monahan, *Racial Justice Act Becomes Law: Not Soft on Crime, but Strong on Justice,* THE ADVOCATE, July 1998, at 5-7.

Indifference and tolerance for race discrimination has been further enhanced by the response of the judiciary to claims of discrimination. Most important in that regard is the 5-4 decision of the United States Supreme Court in 1987, *McCleskey v. Kemp*. It held that statistically based evidence of a pattern and practice of race-based disparate treatment in the administration of the death penalty would not establish a cognizable claim under either the Eighth Amendment or the Equal Protection Clause of the Fourteenth Amendment. To obtain relief under the Constitution, a claimant must establish purposeful race discrimination on the part of the prosecutor or the jury in the case, independent of any evidence of a pattern and practice of discrimination in the system. Because this burden of proof is impossible to meet, *McCleskey* effectively removed the issue from the jurisdiction of the federal courts. Justice Lewis Powell's opinion also intimated that an important reason for the Court's refusal to recognize the cognizability of claims of systemic race discrimination was the difficulty of preventing or correcting such discrimination, short of a substantial impairment or complete abolition of capital punishment. That said, Justice Powell suggested that the more appropriate forum for the consideration of race and the death penalty is the legislative branch.

McCleskey takes on added significance in historical context. In the pre-*Furman* period, race-of-defendant discrimination was perceived to be an important problem in the use of the death penalty.[80] In the 1960s, these concerns gathered support against the background of the civil rights movement and declining support for capital punishment in general.[81] Such concerns were also supported by data on death sentencing and executions, especially in southern jurisdictions, that supported the generally held belief that race-of-defendant discrimination in the use of the death penalty was widespread.[82] Indeed, pre-*Furman* expressions of concern about race discrimination were far more prominent than concerns about the arbitrariness in death sentencing that the Court condemned in *Furman v. Georgia*.[83]

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80. *See, e.g.*, Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1792-93 (1970) ("Most commentators describe the imposition of the death penalty as not only haphazard and capricious but also discriminatory . . . it is very unlikely that the essentially arbitrary and discriminatory imposition of capital punishment can be halted.").

81. STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 240 (2002) (In 1966, "opponents outnumbered supporters: 47 to 42 percent"; support was weaker in the South and Midwest than it was in the East and West.).

82. *See supra* note 7.

83. BANNER, *supra* note 81, at 247-50; Kennedy, *supra* note, 47, at 324.

The political and legal context of *McClesky* was quite different. By 1987, the issue of race-of-defendant effects was perceived to be much less serious than it had been in 1972,[84] public support for capital punishment had nearly doubled since *Furman* (a fact well known to the Court),[85] and the Court's membership was slightly more conservative on criminal law issues.[86] Moreover, not only had the energy of the civil rights movement abated, but the nation also had experienced a widespread feeling that the civil rights movement may have gone too far in providing "quotas" and other forms of favorable treatment for black citizens.[87] It appears that in the Court's view, it was now best left to Congress and the states if there was a problem in need of attention.

In retrospect, it is clear that *McCleskey* has significantly legitimated tolerance for race discrimination. This effect, which was anticipated by Randall Kennedy within a year of the decision, has several dimensions. First, as Professor Kennedy points out, *McCleskey* obscures the subtle manner in which race influences death penalty decision making in the post-*Furman* period.[88] The core holding condemns as unconstitutional only blatant violations of equal protection driven by a desire to harm individuals or groups because of their race. The forms of discrimination we see today, in contrast, are "untainted by conscious intent to harm blacks."[89] Rather, the roots of today's race-of-defendant discrimination are largely unconscious, and the roots of race-of-victim discrimination are not race-based hostility, but race-based empathy. *McCleskey* completely ignores this reality and views with concern only gross forms of discrimination that characterized pre-*Furman* systems, particularly in the South. The impact of *McCleskey's* perception of

84. The empirical record had made that fact quite clear by 1987, including the Georgia race-of-defendant discrimination findings presented to the court in *McCleskey*. Justice Powell stated to his biographer that, with respect to race-of-defendant discrimination, the *McCleskey* record "suggests no such effect." JEFFRIES, *infra* note 110, at 439.

85. In *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court noted the surge of support for the death penalty it saw in the post-*Furman* state legislation. *See* JESSIE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 160 (1980) ("By both words and action, the Court itself has long recognized that heightened judicial activism contrary to popular sentiment may weaken its authority to continue."). Justice Goldberg's 1962 suggestion to his colleagues that the death penalty was unconstitutional infuriated many Court members out of fear that the mere suggestion of such an idea "would turn public opinion against the [c]ourt and thus indirectly encourage defiance of controversial decisions in other areas, especially desegregation." BANNER, *supra* note 81, at 250.

86. Recall that both *Furman* and *McCleskey* were 5-4 decisions, with Justice Douglas replaced by Justice Stevens, Justice Burger by Justice Scalia, and Justice Stewart by Justice O'Connor.

87. *See supra* note 81.

88. *See supra* note 25.

89. *Id.*

the "problem" is reflected in a recent Pennsylvania editorial that drew explicitly on *McCleskey*: "But even if further study indicates that, in general, blacks convicted of murder are more likely to receive the death penalty than whites, it doesn't prove that any *particular* death sentence is tainted by racism."[90]

As noted above, *McCleskey* entirely removed the issue of race from the federal courts.[91] Its holding has also justified and legitimated the failure of state courts to consider the issue.[92] Indeed a number of state courts have cited *McCleskey* as the basis for their refusal to hear claims under state law.[93]

The refusal of the courts to consider race claims in a meaningful way also reinforces the impression that race discrimination is not a serious problem; if it were, the argument goes, judicial action would have been taken to remedy it. This logic was recently stated by a spokesperson for Pennsylvania's Attorney General in an effort to refute the significance of evidence of race discrimination in Philadelphia's capital punishment system: "The Supreme Court already has not only the power, but the duty to overturn a death sentence if it finds evidence that race played a role in the sentence. That hasn't

90. Editorial, *Executing a Prejudice/Disparities Don't Necessarily Mean Discrimination*, PITTSBURG POST-GAZETTE, Mar. 11, 2003, *available at* http://www.post-gazette.com/forum/2003011eddeath0311p1.asp (last visited May 10, 2004).

91. John H. Blume et al., *Post*-McCleskey *Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771, 1807 (1998). ("It is remarkable that in ten years of post-*McCleskey* litigation, not a single claimant has prevailed. In any discrimination case, judges are reluctant to find intentional discrimination by state officials."). In contrast to the statewide approach in *McCleskey*, the more recent claims allege "county level selective prosecution." *Id.* at 1806. The personal experience and research of Blume et al., *id.* at 1773, document that some state and federal courts misconstrue *McCleskey* as barring all claims of racial discrimination in the administration of the death penalty not just those based solely on statistical evidence. They also impose unrealistic methodological requirements (e.g., faulting the sample size of cases and the number of control variables compared to the *McCleskey* evidence). *Id.* at 1799-1802. In his opinion, a major basis for the judicial reluctance to "discuss or even describe evidence of racial bias in criminal cases" is a "[f]ear of labeling state officials racist." *Id.* at 1809.

92. New Jersey is the principal exception. *See infra* note 119.

93. *See, e.g.*, Foster v. State, 614 So. 2d 455 (Fla. 1993) ("Foster . . . claims a violation of the Equal Protection Clause of the Florida Constitution. Art I, § 2, Fla. Const. Despite the principles adopted in *Traylor v. State*, 596 So.2d 957 (Fla. 1992), establishing the primacy of the Florida Constitution, the majority completely ignores Foster's state constitutional challenge.") (Barkett, C.J., concurring in part, dissenting in part); State v. Patterson, 482 S.E.2d 760 (S.C. 1997) (rejecting a claim brought under art. 1, § § 3, 14, and 15 of the South Carolina Constitution). *See also supra* note 91, at 1781-98 (discussing state court challenges rejected upon the authority of *McCleskey*.).

been happening in Pennsylvania."[94] Since no judicial action has been taken, one can only assume there is no problem.

McCleskey has also undermined efforts to implement Justice Powell's suggestion that "*McCleskey*'s arguments are best presented to the legislative bodies"[95] by stiffening the resistance of Congress and state legislatures to meaningful consideration of the issue. Specifically, *McCleskey* has strengthened three arguments against corrective legislation, such as the Racial Justice Act. The first argument is that statistical proof is irrelevant to the issue of racial justice,[96] the second is that race discrimination is inevitable and irremediable, and the third is that the only possible remedy would eliminate capital punishment in Georgia.[97] This trio of arguments underscores the claim that tolerance of race discrimination is "necessary" to preserve the death penalty and that the recognition of race claims would "erase" the death penalty as we know it.[98] With the exception of Kentucky, no remedial legislation has been adopted, further enhancing the perception that race is not a problem.[99]

C. *The Attentive Public*

Close observers of the death penalty in practice are keenly aware of the difference between race-of-defendant and race-of-victim discrimination.

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94. Quoted in a 2003 Associated Press story on the final report of the Pennsylvania Supreme Court's Committee on Racial and Gender Bias in the Justice System, *available at* http://venus.soci.niu.edu/~archives /ABOLISH/apr03/0131.html (last visited Apr. 10, 2004).

95. McCleskey v. Kemp, 481 U.S. 279, 319 (1987).

96. *See, e.g.*, Richard Seven, *Racism Charged in Death-Penalty Filing-Victim's Color Is Key, Says Defense*, SEATTLE TIMES, June 20, 1994, at B1 (Characterizing the defendant's statistics as "meaningless and misleading," Prosecutor Craig Peterson stated that "[t]he U.S. Supreme Court has rejected statistical analysis because no death-penalty case is the same . . . . They all have different facts, different victims, different defendants. You can't compare them like they have.")

97. *McCleskey*, 481 U.S. at 312, 314-15 (1987) (Powell, J.); *id* at 365-66 (Stevens, J., and Blackmun, J., dissenting) (disputing the claim).

98. The congressional floor debates, which bristled with these claims, are heavily grounded in the language and tone of Justice Powell's opinion. David C. Baldus et al., *supra* note 72, at 380-83. The irremediability argument draws on Justice Powell's skeptical critique of the remedies proposed by Justice Stevens and supported by Justice Blackmun in their dissenting opinions. *McCleskey*, 481 U.S. at 318-19 n.45.

99. The adoption of Kentucky's Racial Justice Act in 1998 was widely seen as recognition that race was a problem in the administration of capital punishment in the state. Neal, *supra* note 24, at 17 (One public defender stated, "The RJA is recognition that we in Kentucky have engaged in racial discrimination when it comes to the death penalty and that we pledge not to do it anymore."). Race claims have also been authorized by the New Jersey Supreme Court. *See supra* note 40. In *infra* subpart IV(B)(2), we examine the extent to which the authorization of race claims has erased or materially impaired the use of the death penalty.

1. Race-of-Defendant Discrimination

All jurists who have publicly addressed the issue have condemned purposeful race-of-defendant discrimination in the administration of justice in general, and in the use of the death penalty in particular. Legislatures have also condemned such discrimination.[100]

No scholars to our knowledge have sought to justify race-of-defendant discrimination in the administration of the death penalty.[101] Most supporters of capital punishment follow the courts in condemning race-of-defendant discrimination while insisting that it has not been shown to be a problem in the system or that all proposed remedies would unreasonably impinge on the enforcement of the death penalty.[102]

With no leadership or pressure from the Supreme Court, Congress and state legislators have had little incentive to address the issue.[103] However, concern about the risk of race-of-defendant discrimination has produced some reaction. For example, the New Jersey Supreme Court, when presented with evidence that race may be a factor in its penalty trial decisions, announced a willingness under the New Jersey Constitution to go beyond *McCleskey* and deal with the issue under the New Jersey Constitution if such discrimination was proven.[104] Nevertheless, the evidence presented to the New Jersey Supreme Court has never been sufficiently compelling to convince it that a serious problem existed.[105] In 1998, the Kentucky Legislature, with leadership from its black caucus, adopted a limited Racial Justice Act in response to a legislatively funded study that documented a signifi-

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100. *See, e.g.*, 18 U.S.C. § 3593(f) (2000) (instructing federal juries not to return a death sentence unless they conclude they would impose a death sentence "no matter" what race the defendant and victim may be). New York's criminal procedure statutes also explicitly provide for race-conscious proportionality review. *See* N.Y. CRIM. PROC. § 470.30(3)(b) (MCKINNEY 1995) (stating that the Court of Appeals should determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases by virtue of the race of the defendant or a victim of the crime"); N.Y. JUD. CT. ACTS § 211-a (MCKINNEY 1995) (tasking the Court of Appeals with responsibility for creating a database of death eligible homicides "with the purpose of assisting the court . . . in determining . . . whether a particular sentence of death is disproportionate or excessive . . . .").

101. Van den Haag, *supra* note 74, deems race discrimination unjust but not sufficiently so to justify the abolition of capital punishment.

102. *See, e.g.*, Scheidegger, *supra* note 70, at 124 ("Racism is a cancer" and although "tragically inevitable" in the "capital punishment arena," we "must do everything we can to reduce that impact.").

103. Congress, for example, which first considered the Racial Justice Act in 1989, rejected it finally in 1994. Baldus et al., *supra* note 72, at 426-30 (presenting the history of Congress's consideration of the Racial Justice Act).

104. *See infra* note 119.

105. *See supra* note 40.

cantly higher risk of a death sentence for black defendants with white victims than all other defendants.[106]

In 2001, concerns about race-of-defendant discrimination appear to have motivated Attorney General Ashcroft to limit U.S. Attorneys' plea bargaining discretion after he personally authorized a capital prosecution.[107] Similar concerns in 2003 appear also to have motivated a blue ribbon panel of lawyers and citizens in Pennsylvania to recommend a moratorium on executions in that state, the adoption of a racial justice act, and the appointment by the supreme court of a special master to create a database of death-eligible cases and to evaluate the data for evidence of race-based disparate treatment.[108]

2. *Race-of-Victim Discrimination*

As we noted in Part II above, the evidence of race-of-victim discrimination is considerably more pervasive than the evidence of race-of-defendant discrimination. It is, however, perceived by some observers to present much less of a moral issue than race-of-defendant discrimination.[109] Evidence of this perception is Justice Powell's suggestion, post-retirement from the Supreme Court, that he would have viewed McCleskey's case quite differently if his evidence had documented a comparable pattern of race-of-victim rather than race-of-defendant discrimination.[110] In this section, we explore the basis for

106. KY. REV. STAT. ANN. § 532.300(4) (MICHIE 1998) (Kentucky Racial Justice Act). The statute authorized pretrial challenges to prosecutorial decisions to seek death sentences on the basis of the race of the defendant or victim. For background of the enactment, see Monahan, *supra* note 79.

107. Under the new rule, after a capital prosecution has been authorized by the Attorney General, plea bargains involving a waiver of the death penalty must be approved by the Attorney General. *See* U.S. DEP'T OF JUSTICE, *supra* note 28 and accompanying text.

108. PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM, FINAL REPORT 219-21(2003), *available at* http://www.courts.state.pa.us/Index/Supreme/BiasReports.htm (last visited Apr. 18, 2004) (Chapter 6 is devoted to capital punishment.).

109. The formal law, stated in *McCleskey v. Kemp*, draws no legal distinction between the two forms of discrimination. 481 U.S. 279, 292 & n.8 (1987).

110. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 439 (1994) ("[Justice Powell] also did not know what constitutional weight to give to the statistical effect of the *victim's* race . . . . '[O]ne would expect that if there were race-based sentencing, the Baldus study would show a bias based on the *defendant's* race,' but the 'study suggests no such effect . . . .' Differential treatment of defendants based on the race of their victims was hard to understand as racial bias against defendants.") (quoting Justice Powell's remarks in an interview with Professor Jeffries). Justice Powell's biographer later stated: "For what it's worth, I do think he [Justice Powell] would have viewed the case differently had the data shown large race-of-defendant disparities." E-mail from John Jeffries to David Baldus (Jan. 8, 2004) (on file with authors). Similar views concerning the significance of race-of-victim discrimination were expressed by a Florida circuit (trial) court judge at a recent task force meeting on race and the death penalty. *See supra* note 74. She

this distinction and argue that race-of-victim discrimination is not only unconstitutional but also sufficiently immoral to justify government action to prevent it and remediate its effects when they are documented.

Since *Brown v. Board of Education*,[111] the unconstitutionality of race-of-defendant discrimination has never been in doubt despite the absence of a judicial decision affording a black defendant relief on such a claim.[112] Claims of race-of-victim discrimination have a weaker legal pedigree. In fact, the claim was unknown to the law before the late 1970s.[113] Moreover, until *McCleskey*, there remained an issue of whether such a claim was legally cognizable.[114] *McCleskey*, however, held that it was on the ground that the imposition of a death sentence on the basis of the victim's race would: (a) violate the Equal Protection Clause of the Fourteenth Amendment;[115] and (b) be "excessive" under the Eighth Amendment "because racial consideration may influence capital sentencing decisions in Georgia" and, therefore, race may have been a factor in the defendant's case.[116] Nevertheless, in his litany of the Supreme Court's efforts to "eradicate racial prejudice from our criminal justice system," Justice Powell focused exclusively on examples of discrimination that adversely affected criminal defendants because of *their* race.[117]

A handful of state supreme courts have expressed a willingness to address the race discrimination issue[118] but the New Jersey Supreme

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stated flatly that (*McCleskey v. Kemp* to the contrary notwithstanding,) she saw no problem whatsoever with race-of-victim discrimination. *Id.*

111. 347 U.S. 483 (1954).

112. Maxwell v. Stephens, 348 F.2d 325, 329 (8th Cir. 1965) (For a claim of race-of-defendant discrimination in the administration of the death penalty in rape cases, we "recognize . . . that a statute's discriminatory administration or enforcement, dictated solely by considerations of race, runs afoul of the equal protection clause.").

113. *See* Spinkellink v. Wainwright, 578 F.2d 582, 612-15 (5th Cir. 1978) (Race-of-victim discrimination raises both Eighth Amendment arbitrariness and Fourteenth Amendment Equal Protection claims that were considered but denied for insufficiency of proof.); Smith v. Balkcom, 671 F.2d 858, 859 (5th Cir. 1982) (Equal Protection claim considered but denial of a hearing was appropriate because of insufficiency of proof.).

114. In *McCleskey*, the State argued that McCleskey lacked standing to raise claims of "third persons" such as the "black murder victims in general." 481 U.S. at 291-92 n.8. The Court rejected this argument and recognized McCleskey's standing on the basis of his claim that race-of-victim discrimination would violate the Equal Protection Clause of the Fourteenth Amendment for a "State to base enforcement of its criminal law on and "unjustifiable standard such as race, religion, or other arbitrary classification." *Id.*

115. *Id.* at 292.

116. *Id.* at 308.

117. *Id.* at 308 & n.30.

118. Other states have similarly followed suit to aggressively oppose any hint of racism in criminal trials. *See* White v. State, 726 A.2d 858, 869 n.6 (Md. Ct. Spec. App. 1999) ("Nothing can be more central to a criminal trial than the right of a defendant to be judged fairly, without

Court is the only one to have adjudicated such a claim.[119]

Most legal commentators have condemned race-of-victim discrimination in the same terms as race-of-defendant discrimination—as a race-based distortion of the system that offends not only the Constitution but also basic principles of comparative justice.[120] However,

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racial prejudice, and all involved in the trial of a criminal case should conscientiously work to avoid such appeals."); State v. Cobb, 663 A.2d 948, 961-62 (Conn. 1995) (holding that claims of race discrimination may be raised on direct appeal and in a petition for a writ of habeas corpus). The New Jersey Supreme Court has shown not only a willingness to hear such claims but also a willingness to step outside the strict constraints of *McCleskey*:

> The *McCleskey* Court reasoned that although the statistical data showed a discrepancy that may correlate with race, "disparities in sentencing are an inevitable part of our criminal justice system." The Court held that *McCleskey's* equal-protection claim must fail because there was no showing of purposeful discriminatory intent. It shrank from recognizing *McCleskey's* claim because "taken to its logical conclusion, [it] throws into serious question the principles that underlie our entire criminal justice system." The Court feared that if it accepted *McCleskey's* claim that racial bias impermissibly tainted the capital-sentencing decision, it "could soon be faced with similar claims as to other types of penalty." Carrying the parade of horribles to its extreme, the Court posited that it would have to study any set of arbitrary variables such as the defendant's physical characteristics or those of the victim that "some statistical study indicates may be influential in jury decisionmaking." This Court cannot refuse to confront those terrible realities. We have committed ourselves to determining whether racial and ethnic bias exist in our judicial system and to "recommend ways of eliminating it wherever it is found." Hence, were we to believe that the race of the victim and race of the defendant played a significant part in capital-sentencing decisions in New Jersey, we would seek corrective measures, and if that failed we could not, consistent with our State's policy, tolerate discrimination that threatened the foundation of our system of law.

State v. Marshall, 613 A.2d 1059, 1110 (N.J. 1992) (citations omitted).

119. The court has denied relief on claims of both race-of-defendant discrimination, *Marshall*, 613 A.2d at 1102, and race-of-victim discrimination, State v. Morton, 757 A.2d 184, 268 (N.J. 2000). *See also infra* note 250.

120. *See, e.g.*, Kennedy, *supra* note 25, at 1389 (Speaking from a retentionist perspective with respect to legitimacy capital punishment in principle, Professor Kennedy states that the *McCleskey* "ruling and the way it was articulated are grievously flawed. Professor [Hugo] Bedau does not exaggerate when he compares *McCleskey* to *Plessy* and *Korematsu* . . . . [It] repressed the truth and validated racially oppressive official conduct"); Anthony G. Amsterdam, *Race and the Death Penalty,* 7 CRIM. JUST. ETHICS 2, 86 (1988) (speaking from an abolitionist perspective with respect to the legitimacy of capital punishment in principle, the author states that "there can be no justice in a system which treats people of color differently from white people, or treats crimes against people of color differently than crimes against white people . . . . [A contention that the] power to discriminate on grounds of race is necessary to protect society from crime . . . refers to protecting only white people"); DAVID L. FAIGMAN, LEGAL ALCHEMY THE USE AND MISUSE OF SCIENCE IN THE LAW 117 (1999) (The data documented a "substantial risk that punishment will be inflicted in an arbitrary and capricious manner" and the *McCleskey* Court rendered "statistical proof irrelevant."); NORMAN J. FINKEL, COMMONSENSE JUSTICE JURORS' NOTIONS OF THE LAW 186 (1995) (The documented race disparities "were due to race and unconstitutional" and the Court demanded proof "that could not be provided" unless a prosecutor or juror publicly admitted "[w]e got the black man."); Charles J. Ogletree, Jr. *Black Man's Burden: Race and the Death Penalty in America* 81 OR. L. REV. 15, 32 (2002) ("In light of the continued racial imbalance in the application of the death penalty, the burden that the Supreme Court's decision in *McCleskey* places on blacks continues to operate at a number of levels.").

there are others willing to tolerate such discrimination as a price worth paying to retain the benefits of capital punishment.[121] The willingness of the *McCleskey* majority to tolerate such systems is consistent with that position. However, not all Members of the *McCleskey* Court shared that view.[122]

Further, there is evidence in some jurisdictions that concern about race-of-victim discrimination has motivated public policy. In Maryland, such a concern produced a short-lived gubernatorial moratorium on executions.[123] Similar concerns partially motivated Congress to support a study of the federal death penalty system by the National Institute of Justice.[124] Government bodies have also commissioned or required research on the issue in Arizona,[125] Maryland,[126] New York,[127] New Jersey,[128] Illinois,[129] Indiana,[130] Nebraska,[131] and Vir-

121. *See* McAdams, *supra* note 65, at 168; Van den Haag, *supra* note 74, at 323-24.

122. There were four dissenting votes in *McCleskey* who found the problem sufficiently serious to justify a legal remedy. In *Callins v. Collins,* 510 U.S. 1141, 1148 (1994), Justice Blackmun dwelt at length on the race issue.

123. *See supra* note 78. In states with strong evidence of race-of-victim discrimination, such as Florida, Georgia, Illinois, and Maryland, we estimate that one quarter to one third of death-sentenced defendants with white victims would have avoided the death penalty if their victims had been black. We base these estimates on an application of the death-sentencing rates for black-victim cases to white-victim cases with comparable levels of culpability on a culpability scale and contrast the disparity in the number of death sentences imposed at each level on the scale. For example, if, at a given level on the scale, the adjusted death-sentencing rate is .20 (5/20) for the white-victim cases and .05 (5/100) for the black-victim cases, there would have been one rather than five death sentences imposed in the white-victim cases had the .05 black-victim rate been applied to the white-victim cases at the same level of culpability. We sum the expected shortfall at each level on the scale to estimate the total number of death sentences we would likely have seen if the standard applied to the black-victim cases had been applied to the white-victim cases.

124. NAT'L INST. OF JUST, RESEARCH INTO THE INVESTIGATION AND PROSECUTION OF HOMICIDE: EXAMINING THE FEDERAL DEATH PENALTY SYSTEM (2001), *available at* http://www.ncjrs.org/pdffiles1/nij/sl000490.pdf (last visited Apr. 10, 2004).

125. PEG BORTNER & ANDY HALL, ARIZONA CAPITAL CASE COMMISSION, ARIZONA FIRST-DEGREE MURDER CASES SUMMARY OF 1995-1999 INDICTMENTS: DATA SET II RESEARCH REPORT TO ARIZONA CAPITAL CASE COMMISSION (2002).

126. PATERNOSTER & BRAME, *supra* note 14.

127. New York's death penalty statute requires the Court of Appeals to collect data for use in its reviews of cases for race effects. *See supra* note 100.

128. DAVID BAIME, REPORT TO THE NEW JERSEY SUPREME COURT: SYSTEMIC PROPORTIONALITY REVIEW PROJECT (2001); DAVID WEISBURD & JOSEPH NAUS, REPORT TO SPECIAL MASTER BAIME: RE SYSTEMIC PROPORTIONALITY REVIEW (2001).

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

130. MARY ZIEMBA-DAVIS & BRENT L. MYERS, IND.CRIMINAL JUST. INST., THE APPLICATION OF INDIANA'S CAPITAL SENTENCING LAW: A REPORT TO GOVERNOR FRANK O'BANNON AND THE INDIANA GENERAL ASSEMBLY (2002), *available at* www.in.gov/cji/lawstudy/law_book.pdf (last visited Apr. 8, 2004).

131. David Baldus et al., *supra* note 38, at 486.

ginia.[132] However, in no jurisdiction has a court granted relief on a claim of race-of-victim discrimination.[133]

We also consider two arguments advanced to diminish the significance of race-of-victim discrimination. The first is that there is insufficient evidence of purposeful (conscious or unconscious) race-of-victim discrimination to be a matter of concern (the factual claim). Second, even if purposeful discrimination does exist, it is sufficiently distinguishable from race-of-defendant discrimination on moral grounds to be tolerable (the moral claim).

At the outset, it is useful to focus on what race-of-defendant and race-of-victim discrimination have in common. What they share is decision making based on irrelevant case characteristics—the race of the defendant or victim—which constitute "a failure of the institutional structure to conform to the principles that justify that structure."[134] This common feature is the basis for the Supreme Court's holding that both forms of discrimination violate the Fourteenth and Eighth Amendments.[135]

a. The Factual Claim—Challenges to the Sufficiency of the Evidence of Purposeful Race-of-Victim Discrimination

The claim that the race-of-victim disparities documented in the literature are not a product of invidious discrimination rests on a number of assertions.[136] One source of skepticism on the issue is uncertainty about the mechanism that would produce the race-of-victim discrimination documented in the literature. Most people can understand why black defendants may be treated more punitively than white defendants; however, most people have never thought about a process that would incline prosecutors or juries to discriminate con-

132. JOINT LEGISLATIVE AUDIT AND REVIEW COMM. OF THE VA. GEN. ASSEMBLY, REVIEW OF VIRGINIA'S SYSTEM OF CAPITAL PUNISHMENT (2002), *available at* http://jlarc.state.va.us/reports/rpt274.pdf (last visited Apr. 8, 2004).

133. Blume et al., *supra* note 91, at 1807.

134. Schopp, *supra* note 2, at 826 (Both forms of discrimination represent "a failure of the institutional function of disciplining the manner in which the state exercises coercive force against its citizens.").

135. McCleskey v. Kemp, 481 U.S. 279, 291 n.8 (1987) (A "statutory classification cannot be 'wholly irrelevant to the achievement of the State's objective.'") (quoting McGowan v. Maryland 366 U.S. 420, 425 (1961)).

136. As used here, the concept "invidious" does not refer to a conscious intent to harm an individual offender or a class of offenders because of their race; rather, it refers to differential treatment of offenders whose victims are white that cannot be explained by legitimate case characteristics, such as offender culpability, and variations in charging practices among different counties. As Professor Kennedy notes and we explain below, race-of-victim discrimination is largely a product of racially selective "empathy" rather than "hostility." Kennedy, *supra* note 25, at 1420.

sciously or unconsciously on the basis of the victim's race in a capital prosecution.

Skepticism may also be enhanced by the claim that race-of-victim discrimination or, for that matter, race-of-defendant discrimination in a capital punishment system cannot be detected through statistical analyses even if they factor in the system. This is a popular argument of opponents of the Racial Justice Act.[137] However, whatever the limitations of statistical analysis may be, there is simply no other alternative to identifying systemic discrimination in the death penalty system. The Chief Justice of the New Jersey Supreme Court, formerly Attorney General of the state, acknowledged that fact:

> The study of system-wide discrimination requires the use of statistical techniques in complex political settings. The process is far more complicated than counting the number of defendants by race and the number of death penalties meted out, although it certainly includes such elementary comparative analyses . . . we know of no other means by which the relationship, if any, between race and the death penalty system in New Jersey may be reviewed. The importance of understanding whether racial discrimination infects our system of capital punishment requires that we make this effort.[138]

Another source of skepticism is a perception that race-of-victim disparities are a naturally occurring outcome of an evenhanded race-neutral decision-making process. A number of nonracial rival hypotheses have been advanced to explain away the clearly documented race-of-victim effects. Our review of the literature and the media has identified seven such explanations. Virtually all of these hypotheses build on perceived stereotypical differences between white and black victims that are widely accepted as ordinary knowledge in the white community. Following is the list of perceived race-neutral explanations:

1. Black victims are more likely to have lower "moral character" than white victims. For example, black drug dealer victims are less appealing to juries than white shop owner victims.[139]

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137. Baldus et al., *supra* note 72, at 381 (U.S. Senator Orin Hatch stated: "[S]tatistics have no place in the criminal justice equation. Murderers must be judged and sentenced without regard to statistics.").

138. *In re* Proportionality Review Project (II), 757 A.2d 168, 171-72 (N.J. 2000). In the New Jersey court's review of individual cases for comparative excessiveness, it places only minimal reliance on the results of statistical analyses because, in contrast to the analysis of systemic race effects, they are not necessary to conduct such reviews. *See, e.g.*, State v. Papasavvas, 790 A.2d 798 (N.J. 2002).

139. TUROW, *supra* note 46, at 72-73. Turow stated:

> No one would be surprised to see otherwise identical murders result in the death penalty when the victim was a beloved schoolteacher who was the mother of three young children, and a lesser sentence if the person killed was a crack-addicted drug dealer. On the face of it, race plays no part in these judgments, but because wealth, power, and

2. White-victim cases are more culpable because they are more likely to involve felony murders and other contemporaneous offenses.[140]

3. In the eyes of white jurors, white victims and their families are perceived to be more sympathetic figures than black victims and their families because of their race and higher socioeconomic status.[141]

Well designed empirical studies have tested the plausibility of these rival hypotheses by estimating race-of-victim effects after controlling for the presence of contemporaneous crimes and the socioeconomic status of the victims.[142] It is clear that the combination of these factors reduces somewhat the magnitude of the race-of-victim effects, but they clearly fail to explain away those effects.[143] However, this spe-

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status in the United States are still so unevenly distributed along racial lines, there would inevitably be a race effect, even if we were all color-blind. Furthermore, it is also fair to note that in a city like Chicago about half of the murders are gang-related. Race is obviously part of the picture when we talk about gangs, but it is also significant in deciding whether capital punishment is appropriate in a given case that the victim, in messing with gangs, voluntarily placed himself in harm's way.

Id.

140. *See, e.g.,* Bob Levenson & Debbie Salamone, *Prosecutors See Death Penalty in Black and White*, ORLANDO SENTINEL, May 24, 1992, at A1 (reporting findings of an empirical study of 283 prosecutorial charging decisions in six central Florida counties (1986-91) conducted by the newspaper with a 13-percentage point white-victim effect (27% to 14%) that prosecutors explained on the ground that white-victim cases "are more often the victims of carefully planned killings that may include other crimes, such as rape or robbery: blacks are more often the victims of less heinous, unplanned killings during domestic quarrels and bar fights."); DISSENTING VIEWS ON RACIAL JUSTICE ACT, House Comm. On the Judiciary, 103d Cong. H.R. Rep. 103-458, at 14 (1994) ("While it may be true that killers of white victims are more likely to receive the death penalty than killers of blacks, this statistical disparity is easily explained by the presence of mitigating or aggravating factors, which account for the differences in sentences."). Kennedy, *supra* note 47, at 348, cites and takes issue with this claim.

141. This is the "racially based empathy" theory stated by Professor Kennedy, *supra* note 47, and elaborated on by Samuel R. Gross and Robert Mauro. *See* GROSS & MAURO, *supra* note 22, at 113-15. Gross and Mauro wrote:

> 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 to see them as family or friends. Thus jurors are more likely to be horrified by the killing of a white than of a black, and more likely to act against the killer of a white than the killer of a black. This reaction is not an expression of racial hostility but a natural product of the patterns of interracial relations in our society. It is simply an emotional fact . . . . [Prosecutors in deciding what cases to prosecute capitally are] "influenced by their predictions of the jury's likely reaction" [to the case and in the words of Justice White in *Gregg v. Georgia*, "the likelihood that a jury would impose the death penalty if it convicts."

Id. at 114.

142. *See* DAVID BALDUS ET AL., *supra* note 8, at 319-20, 667 (controls for contemporaneous offenses); *id.* at 588-89, 596-97 (controls for low-status victim) (Georgia); PATERNOSTER & BRAME, *supra* note 14, at 81 tbl. 11E (controls for contemporaneous crimes) (Maryland).

143. See PATERNOSTER & BRAME, *supra* note 14.

cialized evidence appears to have had little impact on the widely accepted ordinary knowledge that underlies these beliefs.[144]

4. White-victim effects are the product of legitimate differences in prosecutorial charging practices between center cities (where one sees significant numbers of black-victim cases and very lenient charging practices), and the suburbs (with significant numbers of white-victim cases and much more punitive charging practices).[145]

5. White-victim cases attract greater attention in the media than black-victim cases, which produces pressure on prosecutors to adopt a more punitive approach to white-victim cases.

6. Law enforcement is more difficult in black than in white communities because witnesses in black communities are more reluctant to cooperate[146] with the authorities because of suspicions about the police or fear that witnesses who cooperate may be harmed.[147] This, the theory continues, results in weaker evidence in the black-victim cases, which generally occur in black communities, thereby making a capital prosecution less likely.

7. Support for capital punishment is substantially lower in black communities than it is in white communities.[148] Thus, to the extent

144. TUROW, *supra* note 46.

145. *See, e.g.,* Susan Levine & Lori Montgomery, *Large Racial Disparity Found [in] Study of Md. Death Penalty*, WASH. POST, Jan. 8, 2003, at A1. Maryland prosecutor, Ann Brobst expressed skepticism about the meaning of race-of-victim disparities in PATERNOSTER & BRAME, *supra* note 14, because of differences in policy and practice between jurisdictions: "If you have one jurisdiction which seeks the death penalty in every eligible case and two massively larger jurisdictions that never do, ever, yet have the vast majority of African American victims—well, you see the problem." *Id.* However, the Paternoster and Brame study estimated statistically significant statewide race-of-victim effects after controlling for place of prosecution (a 3.3 white-victim odds multiplier). PATERNOSTER & BRAME, *supra* note 14, at 87 tbl. 12E. Moreover, separate analyses within Baltimore County (predominantly white) and Baltimore City (predominantly black) show race-of-victim effects in both places (for death sentencing rates among all death-eligible cases, the white victim disparity in Baltimore City is 0.06 versus 0.005 and 0.25 versus 0.13 in Baltimore County) (analyses on file with authors). Research from Georgia in the 1970s shows strong race-of-victim effects in both rural and urban areas generally and in Atlanta, in particular. DAVID BALDUS ET AL., *supra* note 8, at 178-81, 332-40. Data on prosecutorial charging decisions in New Jersey is to the same effect, but the statewide disparity is not considered sufficiently strong to justify relief. *See supra* note 128 and accompanying text.

146. In explaining a white-victim disparity in a central Florida study, prosecutors "said that black witnesses often are more reluctant to cooperate with authorities." Levenson & Salamone, *supra* note 140.

147. One concern is the perception that convictions are less frequent and sentences are lighter in black-victim cases, which may put the killer back onto the street with an opportunity to retaliate or confederates of the offender may retaliate on their own motion or at the instigation of the offender.

148. Total public support for the death penalty has waned slightly in recent years. Overall, 77% of whites and 47% of blacks are in favor of the death penalty. U.S. DEP'T OF JUSTICE, *supra* note 54, at 144. Each demographic has changed in its support for the death penalty over the last few years, from a recent high of 78% of whites and 58% of blacks supporting the death penalty

that prosecutors take into account the views of the victim's family, the request for a capital prosecution is likely to be higher when the victim is white.

Moreover, because most prosecutors are white, the families of white victims are more likely to meet with the prosecutor and press their views on the death penalty.[149] For the reasons stated above, as well as a long history in this country of discounting the importance of black-defendant/black-victim crimes, we consider it highly plausible that the statistically significant race-of-victim effects documented in the literature reflect a devaluing (conscious or unconscious) of black murder victims. Our view on this matter is shared by two methodologically sophisticated supporters of capital punishment,[150] including former prosecutor Scott Turow.[151]

b. Moral Distinctions Between Race-of-Victim and Race-of-Defendant Discrimination

In terms of morality, race-of-defendant and race-of-victim discrimination are distinguished on a number of levels. One ground for the distinction is differences between the victims and beneficiaries of the two forms of discrimination. The victims of race-of-defendant discrimination are easy to identify—black defendants. The adverse effects of race-of-victim discrimination are more subtle. Within the black community, there are two levels of victimization. First are the black victims (and their families), whose losses are undervalued because they are treated less seriously than the losses of white victims and their families.[152] Second, race-of-victim discrimination results in unfair treatment of the black community because it undermines for it, the goals of retribution and deterrence that justify the use of capital

in 1990, to recent lows of 69% and 42%, respectively, supporting the death penalty in 2000. *Id.* at 143.

149. This may be a product of prosecutorial policy or reflect choices of victims' families.

150. *See* McAdams, *supra* note 65, at 166 ("There is a general and quite robust bias against [imposing the death penalty in cases involving] black victims .... [T]he notion that prosecutors and judges are less willing to expend the scarce resources of the criminal justice system to convict and execute the murderers of blacks is all too plausible. In fact, it is clearly the case."); WILLIAM WILBANKS, THE MYTH OF A RACIST CRIMINAL JUSTICE SYSTEM 120 (1987) (With respect to the impact of race in sentencing generally: "Race of victim may be a better predictor of sentence than race of defendant. This is certainly true for the death penalty cases. . . ."). Similar considerations convinced Professor Randall Kennedy that the race-of-victim effects documented in the literature reflect real effects in the cases. *See* KENNEDY, *supra* note 25, at 1396 n.27; Kenedy *supra* note 47, at 348.

151. Turow sees race-of-victim disparities as an inevitable consequence of differentials in the "wealth, power, and status" of white and black victims. *See* TUROW, *supra* note 46, at 72-73.

152. Schopp, *supra* note 2, at 824, 830.

punishment.[153] Both of these harms are significant in terms of disrespect and a denial of public services to the black community. They are akin to the failure of municipalities to provide paved, well-lit streets and good schools for black neighborhoods. Race-of-victim discrimination sends an unseemly message that the overriding objective of capital punishment in America is the protection of white people. This has a real and direct racial edge.[154]

The third class of victims, who are predominantly white, are the defendants whose victims are white who would have received a life rather than a death sentence if their victims had been black. How do their injuries compare to the victims of race-of-defendant discrimination? From a comparative justice perspective, neither class of defendants bears any responsibility for, or has any control over, the manner in which the decision-making process is distorted by racial considerations. Also, for both forms of discrimination, race (of either the defendant or the victim) is a "but for" cause of what may be a fatal charging or sentencing outcome.

However, when one introduces the traditional goal of antidiscrimination law—the protection of minorities from adverse treatment because of their race—the picture changes. In the case of black defendants sentenced to death because they are black, their race is a "but for" cause of their death sentences, which clearly implicates the goal of antidiscrimination law. In contrast, race-of-victim discrimination does not harm a minority defendant because of his or her race. Indeed the defendant's race, as noted above, is most commonly white.

The issue of racially discriminatory government policy that harms white citizens has also arisen in the context of racial gerrymandering. In *Shaw v. Reno*,[155] a racial redistricting case, a congressional district was drawn solely with the purpose of ensuring the election of a black representative. When challenged, the defense was that "racial gerrymandering poses no . . . constitutional difficulties when district lines are drawn to favor the minority, rather than the majority."[156] In a 5-4 decision, the Supreme Court rejected the argument on the ground that "equal protection analysis 'is not dependent on the race of those bur-

153. KENNEDY, *supra* note 47, at 345.

154. However, the perceived salience of the harm is ameliorated somewhat by the lower level of support for capital punishment in the black community—about 20-percentage points less support. *See supra* note 148 and accompanying text. Also, as Randall Kennedy has noted, demand for more law and order including capital punishment in some black communities is tempered by "fear [of] racially prejudiced misconduct by law enforcement officers" if the law were enforced more aggressively. *See* KENNEDY, *supra* note 47, at 75.

155. 509 U.S. 630 (1993).

156. *Id.* at 650.

dened or benefited by a particular classification.'"[157] This holding certainly runs against any suggestion that race-of-victim discrimination is unobjectionable because it comes principally at the expense of white defendants.

A difference in perceived harm to the two classes of defendant victims (in race-of-defendant and race-of-victim discrimination) also flows from the control each defendant exercises over his or her predicament. The core of black defendants' claims of race-of-defendant discrimination is that they are being punished for a factor over which they have no control—their race. For defendants claiming race-of-victim discrimination, their heightened risk of a death sentence is the product of a characteristic of the victims *they* selected.[158] This distinction is legally irrelevant. We also view it as morally irrelevant because it in no way addresses the core concerns about the immorality of race-of-victim discrimination.

It is also useful to consider the "beneficiaries" of the two forms of discrimination. The beneficiaries of race-of-defendant discrimination are nonblack, generally white, offenders who receive more favorable treatment than their black counterparts. In contrast, the beneficiaries of race-of-victim discrimination are most commonly black defendants whose victims are black. Indeed, these defendants represent the largest pool of death-eligible offenders.[159]

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157. *Id.* at 650-51 (quoting City of Richmond v. J. A. Croson, 488 U.S. 469, 494 (1989)). The *Shaw* Court further added: "Indeed racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally." *Id.* at 651.

158. Professor Schopp states: "It is difficult to sympathize with murderers who had the opportunity to protect themselves from such discrimination simply by refraining from committing murder." Schopp, *supra* note 2, at 825. (However, this argument proves too much because a defendant discriminated on the basis of his own race could similarly have avoided such discrimination by refraining from committing murder.)

159. *See, e.g.,* Appendix Table 1, Part C, which indicates that in our post-*Furman* Georgia research, black-on-black homicide constitutes 58% (1443/2484) of the cases. In PATERNOSTER & BRAME, *supra* note 14, at 47 fig. 4, the figure is 48%. From a retributive perspective, the beneficiaries have merely avoided their just deserts.

In terms of the impact of race-of-victim discrimination on black offenders, our Georgia research documents that if defendants in black-victim cases had been sentenced to death at the same rate as in similarly situated white-victim cases, two things would have occurred. First, the number of death sentences would have increased substantially. Second, the proportion of black defendants on death row would have increased by 20% to 25%. Alternatively, if an evenhanded Georgia system had sentenced to death white-victim cases at the same rate as black-victim cases, the total number of death sentences would have been significantly reduced. But in this situation, as well, the proportion of black defendants on death row would have increased. Thus, it is clear that race-of-victim discrimination redounds to the benefit of black defendants whose victims are black even though it diminishes the black community's share of the retribution and deterrence that may flow from capital punishment.

It is also possible to view as beneficiaries of race-of-victim discrimination supporters of capital punishment, who on the basis of unadjusted disparities, note with approval the apparent absence

In summary, we consider quite unpersuasive arguments, which seek to minimize the moral implications of race-of-victim discrimination by seeking to distinguish it from race-of-defendant discrimination on the basis of characteristics of the victims and beneficiaries of the two forms of discrimination. We believe these distinctions are unpersuasive because they fail to address the underlying sources of the immorality of race-of-victim discrimination, which are: (a) its undervaluation of black lives, (b) its distortion of the decision-making process on the basis of race, (c) the fact that race is a but for cause of many death sentences and executions, (d) the unfairness it visits upon black communities, and (e) the unseemly message it sends that the overriding objective of capital punishment in America is the protection of white people.

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of black defendant discrimination in the current system. For these observers, race-of-victim discrimination has an important and positive side effect because it enhances the perceived legitimacy of the current system. The reason it does is that in a system characterized by significant race-of-victim discrimination, the unadjusted data on the comparative treatment of black and white defendants is biased in a legitimating direction. Specifically, the unadjusted data suggest such systems treat white defendants more punitively than black defendants. For example, nationwide, the proportion of blacks on death row (40%) and the proportion of those executed (35%) is significantly lower than the proportion of blacks among persons arrested for capital murder (55% to 65%), suggesting that if there is any bias in the system, it is against white rather than black defendants. *See* Table 1.

However, the adjusted data, which control simultaneously for the race of the defendant and the victim, uniformly indicate that this is not the case. The downward biasing of unadjusted race-of-defendants effects arises from the fact that the death- sentencing rate for the white defendants is biased upward (because their victims are predominately white), while the death-sentencing rate for the black defendants is biased downward (because the vast majority of victims in black defendant cases are black). In this way, race-of-victim discrimination diminishes the overall perception that black defendants are the victims of discrimination. For example, in his June 2001 review of race-of-defendant effects in the federal death penalty system, Attorney General Ashcroft was at pains to point out that a smaller proportion of death-eligible blacks were capitally charged by the attorney general than were the death-eligible whites. U.S. DEP'T OF JUSTICE, *supra* note 28, at 16-17 ("Decisions to seek the death penalty have been recommended and approved in lower proportions of cases involving black or [H]ispanic defendants than white defendants. There is nothing in these finding that suggests that the system involves racial or ethnic bias against minorities."). Our preliminary analysis of the federal death-sentencing data clearly suggests that the unadjusted race-of-defendant disparity, which is favorable to black defendants, as pointed out by the AG, is strictly an artifact of race-of-victim discrimination in the system. For a similar suggestion of bias against white defendants, see Stanley Rothman & Stephens Powers, *Execution by Quota*, PUB. INT., Summer 1994, at 3 ("[S]ome findings suggest that blacks may actually be treated more leniently than whites. If the legal system still discriminates against blacks, why do they make up for a higher percentage of those charged with murder than those executed for murder.").

IV. RETHINKING THE "NECESSITY" FOR TOLERATING RACE DISCRIMINATION

In spite of our society's commitment to race-neutral decision-making and the rule of law, the nation has substantially acquiesced in the toleration of race discrimination in the administration of the death penalty. The acquiescence is justified on the ground that it is "necessary" to preserve the benefits of capital punishment. This justification, which is strongly implicit in Justice Powell's majority opinion in *McCleskey v. Kemp*, rests on two beliefs.[160] The first is that race discrimination in the use of the death penalty is inevitable and widespread (the inevitability claim). The second is that race discrimination is ineradicable, which means that the prevention and correction of race discrimination is impossible without the complete evisceration of capital punishment or a material impairment of its benefits (the evisceration claim). From this perspective, if federal law were to provide a vehicle to present and adjudicate race claims, the death penalty systems of thirty-eight states would be brought to their knees under an onslaught of race claims. Far better, the logic goes, to tolerate a less than perfect system than to eviscerate capital punishment nationwide in the name of equal justice. A decade ago, we examined how these arguments and beliefs were effectively used to defeat the Racial Justice Act in Congress.[161] They persist as a part of the conventional wisdom offered to justify the toleration of race discrimination. From this perspective, the impact of race discrimination on the legitimacy of capital punishment is dismissed as de minimus. In this section, we argue that post-*Furman* research draws into serious question the validity of both the inevitability and evisceration premises of the necessity hypothesis.

160. Randall Kennedy believes that *McCleskey* was principally driven by a perception that tolerance of discrimination was necessary because the remedies required to cure the problem carried too high a price in terms of the continuing viability of the death penalty. Kennedy, *supra* note 25, at 1414 ("The Justices have made the violations they are willing to recognize dependent upon the remedies they are willing to provide. They have tailored declarations of rights to fit their perceptions of acceptable remedies. Unpersuaded in *McCleskey* that an acceptable solution could be found, the Court obviated the remedial question simply by declining to find a constitutional problem."); Blume et al., *supra* note 91, at 1778 (Thus, the Court feared that ruling for McCleskey . . . would threaten the validity of a large class of capital cases throughout Georgia.") Others are even more explicit. *See, e.g.*, Scheidegger, *supra* note 70.

161. Baldus et al., *supra* note 72, at 378-85. They also featured prominently in the Kentucky debates over the Racial Justice Act in the late 1990s. *See infra* note 163 and accompanying text.

A. *The Belief that Discrimination is Widespread and Inevitable*

Much of the post-*Furman* debate about the capacity of the law to prevent and correct race discrimination has been based on a pre-*Furman* perception of systemic racial discrimination as widespread and inevitable. This premise underlies Justice Scalia's memo to the Court during the *McCleskey* litigation, and it appears to have been accepted by a majority of the Court. However, a considerable body of research suggests that the reality of the post-*Furman* system is quite different in that: (a) the problem is much less pervasive geographically than generally understood; (b) systemic race-of-defendant discrimination is very much the exception rather than the rule; and (c) while systemic race-of-victim discrimination continues to exist in a number of places, it is far from universal.[162]

B. *The Belief that Efforts to Prevent or Remedy the Effects of Race Discrimination Will Erase or Materially Impair the Use of the Death Penalty*

The evisceration claim has two premises. The first is a belief that procedures designed to prevent race discrimination will materially impair the utility of capital punishment. The second is that procedures authorizing the adjudication of race claims will either "erase the death penalty" altogether[163] or result in a distortion of the process that is far

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162. As Robert Schopp properly points out, we know post-*Furman* that race discrimination is neither universal nor inevitable. He makes the point in a discussion of the relative capacity of legislatures and courts to eliminate race discrimination in public education compared to their capacity to do so in the administration of the death penalty:

> We have no obvious reason . . . to think that our abilities to reduce discrimination in application differ across the two institutions . . . . Arguably, we have good reason to believe that this claim . . . is not true . . . . Early evidence, for example, provided evidence of discrimination in capital sentencing by race of perpetrator. Later studies did not find evidence of such discrimination by race of perpetrator, but these studies did find evidence of discrimination by race of victim. A more recent study did not reveal evidence of discrimination in capital sentencing by race of perpetrator or of victim, but it did find evidence suggesting discrimination by socioeconomic status of victim. This study also found evidence to support the interpretation that changes in the relevant statutes and court practices had produced improvement in the consistency of sentencing practices. This pattern of evidence across studies does not decisively demonstrate that discrimination in capital sentencing can be eliminated, but it provides good reason to doubt the contention that capital sentencing practices are not susceptible to improvement.

Schopp, *supra* note 2, at 822.

163. Neal, *supra* note 24, at 14 (discussing an argument in the Kentucky legislature against the Racial Justice Act in 1996); *see also* Baldus et al., *supra* note 72, at 380 (In debate over the Federal Racial Justice Act, U.S. Senator Charles Grassley stated: "You cannot support the availability of capital punishment while supporting the Racial Justice Act."). According to the de-facto abolition scenario, relief would be forthcoming for every black defendant and every defen-

worse than the existing system. The record of the last decade in New Jersey, Florida, Kentucky, and the federal death penalty system draw into serious question both of these beliefs. The post-*Furman* record also suggests that such procedures are likely to increase the even-handedness of the system.

1. Prevention

It has been known for some time that the most effective means of reducing the risk of race discrimination in the use of the death penalty is a limitation of death sentencing to the most culpable offenders.[164] This was recognized in *McCleskey v. Kemp*,[165] and a substantial body of research in the last decade has confirmed the fact that race effects are most prominent in cases with low- and mid-range aggravation levels.[166]

Limiting death sentencing to the most aggravated cases also reduces the risk of arbitrariness in death sentencing in general. The importance of this goal is clear in the jurisprudence of the United States

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dant with a white victim, a totally unworkable prospect, which would deter prosecutors from seeking death in any death-eligible cases. *Id.* at 380-81. An alternative scenario anticipates massive changes in prosecutorial charging practices to produce statistical parity in death-sentencing outcomes, without regard to the merits of the cases. One approach would involve the use of quotas to ensure that equal numbers or proportions of black-victim and white-victim cases are charged capitally. *Id.* at 383 (U.S. Senator Gordon J. Humphrey stated in the RJA debate: "The only way [the states] could possibly [use the death penalty] would be to deliberately use race as the decisive factor in choosing to seek the death penalty or not in each case."). *See also* Rothman & Powers, *supra* note 159, at 3 (summarizing arguments against the RJA). Another prosecutorial approach would be to charge all death-eligible cases capitally and refuse to negotiate life sentence pleas in capital cases with the goal of producing the level of statistical parity required to defend against race discrimination claims.

164. These offenders are often referred to as the "worst of the worst."

165. McCleskey v. Kemp, 481 U.S. 279, 365, 366 (1987) (Stevens, J., dissenting). Justice Stevens did not dispute the goal of limiting death sentencing to the worst cases. He stated merely that he did not believe the remedy was feasible on methodological grounds. *Id.* at 319 n.45.

166. For examples of analyses based on regression-based measures, see Appendix Figure 1 (pre-*Furman* Georgia race-of-victim effects), Appendix Figure 4 Part II (post-*Furman* Georgia race-of-victim effects), and Appendix Figure 3 (Philadelphia—1978-2000—race-of-defendant effects). For examples employing the number of statutory aggravating circumstances as the measure of criminal culpability, see Baldus et al., *supra* note 38, at 595 fig. 19 (Nebraska 1973-1999, race-of-defendant effects concentrated in one and two aggravator cases); David C. Baldus & George Woodworth, Race of Victim and Race of Defendant Disparities in the Administration of Maryland's Capital Charging and Sentencing System (1978-99): Preliminary Findings, at 7A fig. 3 (Feb. 15, 2001) (unpublished manuscript on file with the authors) (race-of-victim effects concentrated in cases with one or two statutory aggravating circumstances); at 7B fig.4 (black-defendant/white-victim effects concentrated in cases with one or two statutory aggravating circumstances).

Supreme Court[167] and has been the focus of a considerable literature.[168] This was also a motivation behind Attorney General Reno's 1995 creation of a federal system of prosecutorial review of all death-eligible cases[169] and the recommendations of the Illinois task force on capital punishment to limit sharply the number of death-eligible crimes under Illinois law.[170]

In terms of retribution, limiting death sentencing to the most aggravated cases would retain capital punishment for the "most deserving" crimes. Moreover, research indicates that these death sentences are the most likely to be affirmed[171] and carried out with an actual execution.[172] Limiting the death penalty to the most aggravated cases, therefore, has only a marginal impact on the goals of capital punishment while dramatically reducing the risk of race discrimination and arbitrariness in the system.

Feasibility has three dimensions—methodological, substantive, and political. First, do the decisionmakers have the methodology required for the task? Second, do the decisionmakers have the competence to limit death sentencing to the worst cases in a meaningful way? Third, do the decisionmakers have the political room required for the task?

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167. Atkins v. Virginia, 536 U.S. 304, 319 (2001) (Stevens, J.) ("Thus pursuant to our narrowing jurisprudence, which seeks to ensure that on the most deserving of execution are put to death, an exclusion of the mentally retarded is appropriate.")

168. Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run on Sentence*, 46 CASE W. RES. L. REV. 1 (1995) (concern about cost and burden on the judicial process given the few executions that are actually carried out); JAMES S. LIEBMAN ET AL., WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT: A BROKEN SYSTEM, PART II (2002), *available at* http://justice.policy.net/proactive/newsroom/release.vtml?id=26641&PROACTIVE_ID=cecfc6cecdcbcbc8c6c5cecfcfcfc5cececbcec8c8c7c8cbc8c5cf (last visited Apr. 10, 2004) ("Heavy use of the death penalty extending beyond highly aggravated homicides substantially increases the risk of serious capital error.").

169. Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role,* 26 FORDHAM URB. L.J. 347, 503-04 (1999). "[T]he Department is, in my view, unconsciously but inevitably giving effect to some version of the 'aggravated cases' solution advocated by Justice Stevens in *McCleskey*." *Id.* at 502-03.

170. TUROW, *supra* note 46, at 121-22 ("The commission unanimously [favored narrowing death eligibility for murder] to a simpler and narrower group of eligibility criteria . . . two or more [victims, police, fire, and correctional officers, obstruction of justice or torture]"). This concern also motivated a recent legislative recommendation in Nebraska by Senator Brashear to limit death sentencing to cases with two or more statutory aggravating circumstances of the "heinous, atrocious, and cruel" aggravator. Baldus et al., *supra* note 38, at 682-83 n.412.

171. *See, e.g.,* BALDUS ET AL., *supra* note 8, at 214 (Among Georgia death-sentenced cases sorted by criminal culpability, the death sentence vacation rates in the Georgia Supreme Court were 32% (11/34) for the least aggravated half of the cases and 18% (11/62) of the most aggravated half of the cases.).

172. In a study of legal error in death sentence cases from 1973 through 1995, 18% of the defendants with vacated death sentences were resentenced to death. JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATE IN CAPITAL CASES, 1973-1995, at pt. i (2000), *available at* http://justice.policy.net/cjedfund/jpreport (last visited Apr. 7, 2004) (executive summary).

a. Methodological Feasibility

In *McCleskey v. Kemp*, Justice John Paul Stevens recommended that death sentencing be limited to categories of cases in which "prosecutors consistently seek, and juries consistently impose the death penalty without regard to the race of the victim or the offender."[173] His proposal, quite simply, was to apply a death sentencing "frequency" test designed to limit death sentencing to the most aggravated cases.

Justice Powell rejected Justice Stevens's proposal as "unconvincing," on two methodological grounds.[174] The first was his belief that the application of Justice Stevens's frequency test required a substantial database and statistical analysis that "focused particularly on the community in which the crime was committed."[175] Justice Powell's second argument focused on the difficulty of identifying, with regression-based measures of culpability, the category of "death-eligible" cases to which the charging and sentencing frequency standard would be applied.[176]

There is some force to Justice Powell's concern about relying on regression-based scales to identify the most culpable offenders.[177] However, research conducted since *McCleskey* indicates that a much more straightforward measure of offender culpability—the number of statutory aggravating circumstances in the cases—provides a very good means of identifying the cases in which death sentences are quite consistently sought and imposed.[178] The number of statutory aggravators is highly correlated with the offender's overall culpability and correlates strongly with regression-based measures of culpability.

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173. 481 U.S. at 1781, 1806.

174. *Id.* at 279 n.45. Kennedy, *supra* note 25, at 1414, argues that the *McCleskey* Court's failure to perceive a remedy that would not seriously impair the utility of capital punishment was the principal motivation for the Court's refusal to recognize *McCleskey*'s substantive rights.

175. *McCleskey*, 481 U.S. at 381 n.45.

176. *Id.* These concerns have been noted by others. *See, e.g.,* Kennedy, *supra* note 25, at 1432.

177. These concerns have been noted by others. *See, e.g.,* Kennedy, *supra* note 25, at 1432.

178. *See, e.g.,* BALDUS ET AL., *supra* note 8, at 111 tbl. 16 (documenting, among Georgia cases, a strong similarity in death sentencing "frequencies" when criminal culpability is measured in terms of the number of statutory aggravating circumstances and a regression-based scale); Baldus et al., *supra* note 38, at 552 fig. 3; *id.* at 559 fig. 6 (documenting the relationship in Nebraska cases between the number of statutory aggravating circumstances and a regression-based scale as measures of criminal culpability). *See also supra* note 166 (discussing alternative measures of criminal culpability) and *see* text accompanying Appendix n.271 (discussion of the interaction between offender criminal culpability and the risk of race discrimination).

Drawing lines on this basis requires neither large databases nor complicated statistical analyses.[179]

Since *Furman v. Georgia*, the utility of this measure has been documented in two systems of comparative proportionality review. The first is the system of comparative proportionality review applied by the Florida Supreme Court, which uses the number of statutory aggravating and mitigating circumstances as the principal measure of offender culpability.[180] During the 1990s, the court vacated 19% (32/170) of the death sentences it reviewed on grounds of disproportionality.[181] The principal defining measure in this review process was the number of aggravating circumstances found by the sentencing judge.[182] Almost exclusively, the vacated death sentences were based on one or two aggravating circumstances.[183]

The second example is the proportionality review procedure conducted by Nebraska trial courts.[184] A recent study of this process over a twenty-five-year period documented that the number of statutory aggravators in the cases is clearly the most important factor in explaining who is sentenced to death.[185] The cases in which comparative culpability was the principal basis for the imposition of a life sentence overwhelmingly involved a single statutory aggravator.[186]

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179. Another alternative is to limit death eligibility to cases with multiple aggravators and single aggravator cases with levels of culpability comparable to cases with two or more aggravators. Baldus, *supra* note 38, at 680-82.

180. *See generally* Ken Driggs, *The Most Aggravated and Heart Mitigated Murders: Capital Proportionality Review in Florida,* 11 ST. THOMAS L. REV. 207 (1999) (overview by a public defender with extensive experience in Florida).

181. This analysis is limited to cases in which the court reached the proportionality issue. Cases vacated on procedural grounds were not included in this study.

182. Philip L. Durham, "Review" in Name Alone: The Rise and Fall of Comparative Proportionality Review of Capital Sentences by the Florida Supreme Court (2004) (unpublished manuscript, on file with authors).

183. The vacation rates from 1989 through 1999 were as follows: One statutory aggravator—55% (12/22); two aggravators— 37% (17/46) and three or more aggravators—3% (3/107). Among the less aggravated cases, the number of mitigating factors also had an influence. *Id.* at 26 fig. 5.

184. Nebraska is the only state in which trial courts rather than appellate courts conduct comparative proportionality reviews of death sentences.

185. Baldus et al., *supra* note 38, at 553 (in a logistic multiple regression analysis, the odds that death-eligible defendants would be sentenced to death were enhanced by a factor of 12 with presence of each additional statutory aggravating circumstance).

186. We also provide below more details on the Nebraska review process, *infra* note 208 and accompanying text.

b. Substantive and Political Feasibility

We focus here on courts and prosecutors that sought to limit death sentencing to the worst cases during the 1990s.[187] That experience suggests that the effectiveness of such procedures depends on four features of the process: (a) the richness of the available data;[188] (b) the perceived reasonableness of the review standards; (c) transparency of the database and the process of decision; and (d) the visibility and political risk associated with the process. That experience also indicates that rich data, reasonable standards, and transparency give the system legitimacy. Transparency also provides a feed back mechanism to inform prosecutorial charging decisions. Low visibility and minimal interference with death sentences imposed by courts and juries minimizes political risk.[189]

i. New Jersey

In 1992, the New Jersey Supreme Court adopted a system of comparative proportionality review with a rich transparent database accessible to the parties, an extensive conceptual framework and process of decision, and a one-way channel of communication with the prosecutorial community through its judicial opinions.[190] Although

187. There may well be more such efforts, but we are limited in our inquiry to the systems on which we have data.

188. Richness refers to comprehensiveness.

189. We first developed this framework in David Baldus, *When Symbols Clash: Reflections on the Future of Proportionality Review of Death Sentences,* 26 SETON HALL L. REV. 1582, 1583-85 (1996).

190. State v. Marshall, 613 A.2d 1059, 1063 (N.J. 1992). Leigh B. Bienen, *The Proportionality Review of Capital Cases By State High Courts After* Gregg*: Only "The Appearance of Justice"?* 87 J. CRIM. L. & CRIMINOLOGY 130, 196-97 (1996) (describing the process through which the court in its opinions urged the adoption or guidelines to guide prosecutorial charging decisions and the joint decision of the county prosecutors association and the Attorney General to adopt such guidelines). The New Jersey system has a *McCleskey*-like database that embraces each death-eligible case in the system. *Id.* at 190-94 (describing the process of record gathering).

Although the court applies some statistical methods, its core comparative proportionality analyses are based on common sense lawyer like case-by-case comparisons. *In re* Proportionality Review Project (I), 735 A.2d 528, 543 (N.J. 1999) ("To sum up, one of the participants has observed that conducting proportionality review is not like completing the Human Genome Project. We are identifying and then sorting, by very familiar characteristics, about thirty to thirty-five cases per year."). *See also* State v. Papasavvas, 790 A.2d 798 (N.J. 2002) (a recent application). This stands in contrast to the court's efforts to scrutinize its system for race discrimination, for which it employs a variety of statistical approaches. *See supra* note 138.

In its individual case reviews, the court utilizes the services of a special master, commonly a retired judge, who, for each case to be reviewed, prepares a report that pulls together detailed information on the most relevant measures of criminal culpability and comparison cases. The masters have also prepared reports on methodological issues raised by the parties and the master. *In re* Proportionality Review Project (II), 757 A.2d 168, 177 (N.J. 2000); *see also* David S. Baime, *Comparative Proportionality Review: The New Jersey Experience,* 39 CRIM. L. BULL.

the New Jersey court is highly respected, it has been criticized for its high standards in the review of death cases, which allegedly causes delays in executions,[191] and the proportionality review procedures it has applied, in part against the wishes of the legislature.[192] In response, the court adopted conservative substantive standards to guide its reviews and has vacated only one death sentence as disproportionate in twelve years.[193] In our judgment, the most important feature of

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227 (2003) (report of the current master on the history and role of the special master); JUDGE DAVID S. BAIME, SPECIAL MASTER, REPORT OF THE SPECIAL MASTER ON PROPORTIONALITY REVIEW: STATE V. CHARLES REDDISH (2002) (master's report on *State v. Reddish*).

191. *Proportionality Review (I)*, 735 A.2d 528 at 541.

192. In 1992, the New Jersey Legislature directed the New Jersey Supreme Court to limit the universe of cases it uses in its proportionality review to death-sentenced cases. The court has ignored this direction and continues to embrace within its universe of comparison cases all factually death-eligible defendants. *Proportionality Review (I)*, 735 A.2d at 535-36, 543-44. Nevertheless, it has not confronted the legislature directly by declaring the legislation unconstitutional. State v. Papasavvas, 790 A.2d 798 (N.J. 2002) (continuing to apply the broader group of comparison cases); Barry Latzer, *The Failure of Comparative Proportionality Review of Capital Cases (with Lessons from New Jersey)*, 64 ALB. L. REV. 1161, 1196 (2001). However, the limits of the court's political space on death penalty issues are symbolized by two constitutional amendments (initiated by the state legislature) that overruled two rulings of the court that had been based on the New Jersey constitution. The first amendment overruled the court's holding that intent to cause serious bodily injury, in the absence of intent to kill, could not sustain a capital murder conviction; the second constitutional amendment overruled the court's ban on the use of victim impact statements in criminal cases generally. John B. Wefing, *The Performance of the New Jersey Supreme Court at the Opening of the Twenty-First Century: New Cast, Same Script*, 32 SETON HALL L. REV. 769, 773 (2003). *See also* Bienen, *supra* note 190 at 207-12 (chronicling long standing tensions between the Supreme Court and the Legislature and the Governor on a variety of issues among which the court's capital punishment jurisprudence was prominent).

193. *Papasavvas*, is the sole death sentence vacated on the ground of comparative excessiveness. Since 1992, the court appears to have abandoned concerns about consistency (i.e., the frequency with which death sentences are imposed among similarly situated defendants.) The reason appears to be that the level of death sentencing among most categories of New Jersey cases is so low that a faithful following of the reasoning of *Furman v. Georgia* (in which the Georgia death-sentencing system, which the Court held to be excessive, yielded an average death-sentencing rate of about 0.15) would compel the New Jersey court to vacate a substantial proportion of New Jersey's post-*Furman* death sentences as comparatively excessive. *Proportionality Review (I)*, 735 A.2d 528 at 530 ("Because New Jersey jurors have been sparing in their imposition of the death sentences, it will never be the case that death would be 'generally received' or 'received in a defined preponderance of cases' . . . we have recognized that 'death need not be normal or general to be a licit sentence.'") Instead, as is clear in *Papasavvas*, the court's principal focus is on the selectivity of the system (i.e., whether death sentences being limited to the most aggravated cases). Death sentences not so limited are characterized as "aberrational," a judgment which often turns on quite subjective comparative culpability judgments, as contrasted with the more empirically based judgments that underlie a consistency analysis. *Id.* at 544-48 (Handler, J., dissenting) (critique of the court's evolving standards). Justice Handler's dissenting opinions in proportionality review cases in the 1990s give one an idea of the impact those reviews would have had if the court had strictly applied the reasoning of *Furman v. Georgia*; there is little support on the court for such strong judicial intervention. Indeed, the *Papasavvas* decision, that vacated a death sentence as excessive, split four to three. Wefing, *supra note* 192, at 778 "The opinions of this closely divided court [in *Papassavas*] illustrate the great difficulty the court encounters in conducting a proportionality review." *See supra* note 119.

New Jersey's proportionality review system is its feedback mechanism with the prosecutorial community,[194] which, over time, appears to have developed a fairly conservative approach to capital charging. For example, between the early 1980s (1983 to 1987) and the later 1980s (1988 to 1991), the rate that death-eligible cases advanced to penalty trial declined 35% (20/62)—from 62% (95/154) in the earlier period to 40% (37/92) in the later period.[195] Over this same time period, the jury death-sentencing rate declined 60%—from 35% (1983 to 1987) to 14% (1988 to 1991).[196] Both sets of changes reduced the death-sentencing rate among all death-eligible cases from 22% (34/154) in the earlier period to 5% (5/92) in the later period.[197]

Since 1992, the rates of capital charging and jury death sentencing are unknown.[198] However, we do know that the absolute number of death sentences has further declined since 1992, although the reasons for the decline are less clear.[199] Moreover, since 1992, prosecutors appear generally to have made significant efforts to limit capital prosecutions to the most aggravated cases.[200] In terms of visibility, the New

194. Gerald J. Russello, *The New Jersey Supreme Court: New Directions?*, 19 ST. JOHN'S J. LEGAL COMMENT. 655, 688 (2002) (a former law clerk on the New Jersey court stating that "[ov]erall . . . the Court seems committed, at least for now, to follow its precedents. . . . The effects of . . . proportionality review are still unclear, but may represent confidence to let the state authorities proceed at their own pace with less intensive oversight from the judiciary.")

195. This decline appears principally to reflect the impact of the New Jersey court's efforts to narrow the scope of death eligibility in terms of the *mens rea* required for capital murder and breadth of individual statutory aggravating circumstances. Specifically, in eighteen successive decisions between 1987 and 1990, the New Jersey court vacated or reduced a death sentence or reversed a capital murder conviction on the basis of legal error. Because of these decisions, 17% (5/29) of the death sentences imposed in the early years (1983-1987) were later deemed to have been imposed in cases that were not even death-eligible. SPECIAL MASTER DAVID C. BALDUS, FINAL REPORT TO THE NEW JERSEY SUPREME COURT: DEATH PENALTY PROPORTIONALITY REVIEW PROJECT, tbl. 2 (1991).

196. *Id.* at tbls. 2, 3.

197. These rates are computed from data. *Id.* at tbls. 1, 3.

198. These rates are unknown because the New Jersey court no longer requests the master for proportionality review to compute and report this information in his periodic reports.

199. In terms of raw numbers of death sentences, we know that in the first six years of the system (1983-1988), the average number was six. In the following three years (1989-1991) the annual average number dropped to 1.3. *Id.* at tbls. 1, 2. That level continued immediately after the introduction of proportionality review in 1992 (1992-1994). After a slight increase in the 1995-1997 period (three per annum), the rate leveled off at one per year (1998-2003). E-mail from Mark Friedman, New Jersey Assistant Deputy Public Defender, to David Baldus (Mar. 4, 2004) (on file with authors). One possible explanation for the drop in death sentences in the last five years may be a decline in jury death sentencing rates (perhaps motivated by heightened concerns about miscarriages of justice) and continuing selectivity in prosecutorial charging.

200. This opinion is based in part on the judgment of New Jersey public defenders Dale Jones and Joseph Krakora who recently stated: "We believe that one of the very apparent trends in New Jersey capital litigation is the greater selectivity on the part of county prosecutors as to the cases they are making capital. There are only twenty or so open cases in the state, three of which

Jersey court has distinctly avoided an aggressive top down intervention review process involving the routine vacation of death sentences.[201] It has essentially opted for a process of communication that informs the exercise of prosecutorial discretion. A compelling argument can be made that this enterprise has enjoyed a reasonable measure of success in limiting death sentencing to highly aggravated cases.[202]

ii. Florida

In the early 1990s, the Florida Supreme Court, a highly visible institution, especially with respect to its death penalty jurisprudence, developed a meaningful system of comparative proportionality review that relied on a rich and transparent database with well reasoned opinions.[203] As noted above, during the 1990s, the court vacated 19%

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are multiple defendant cases. We believe that the large majority of the pending cases are highly aggravated in the sense that there seemed to be little or no room to question why the death penalty was being sought." E-mail to David Baldus (Mar. 5, 2004) (on file with authors).

Our opinion is also based on a review of the aggravation levels of the cases in which juries have returned death sentences since 1994. For the eighteen death sentenced cases for which we have data, *State v. Fortin*, 843 A.2d 974 (N.J. 2004); *State v. Josephs*, 803 A.2d 1074 (N.J. 2002); *State v. Nelson*, 803 A.2d 1 (N.J. 2002); *State v. Koskovich*, 776 A.2d 144 (N.J. 2001); *State v. Timmendequas*, 773 A.2d 18 (N.J. 2001); *State v. Feaster*, 757 A.2d 266 (N.J. 2000); *State v. (Ambrose) Harris*, 757 A.2d 221 (N.J. 2000); *State v. Morton*, 757 A.2d 184 (N.J. 2000); *State v. Papasavvas*, 751 A.2d 40 (N.J. 2000); *State v. Simon*, 737 A.2d 1 (N.J. 1999); *State v. Harvey*, 731 A.2d 1121 (N.J. 1999); *State v. Chew*, 731 A. 2d 1070 (N.J. 1999); *State v. Cooper*, 731 A.2d 1000 (N.J. 1999); *State v. Hightower*, 680 A.2d 239 (N.J. 1996); *State v. DiFrisco*, 662 A.2d 442 (N.J. 1995); *State v. Mejia*, 662 A.2d 308 (N.J. 1995); *State v. Martini*, 651 A.2d 949 (N.J. 1994); and *State v. Brown*, 651 A.2d 19 (N.J. 1994), in only three (*Chew*, *Feaster*, and *Mejia*) did the Government appear to rely on a single statutory aggravating. Overall, for these eighteen cases, the state alleged an average of 2.3 statutory aggravator. Also, a recent study of New Jersey death sentencing in the 1980s suggests that the system was reasonably selective before the court's proportionality review process was adopted in 1992. Baldus et al., *supra* note 38, at 656-58 (comparing the selectivity and consistency of New Jersey and Nebraska death-sentencing outcomes).

201. *See supra* note 192 and accompanying text on the court's political space in death penalty cases. On this issue, it is useful to contrast the New Jersey with the Florida systems *see infra* note 203 and accompanying text (Florida); *supra* note 190 and accompanying text (New Jersey).

202. There are, however, less sanguine views of the New Jersey experience. *See, e.g.*, Joseph R. McCarthy, *Implications of County Variance in New Jersey Capital Murder Cases: Arbitrary Decision-Making by County Prosecutors*, 19 N.Y.L. SCH. J. HUM. RTS. 969, 994 (2003) (The New Jersey system has "allowed prosecutors to exercise virtually unbridled discretion in capital murder cases. Without standards [on which] to base their decisions and without a higher authority to hold them accountable, county prosecutors continue to apply the capital murder laws of New Jersey in a freakish and arbitrary manner. Special Master Baimes's study has confirmed that the capital murder laws in New Jersey operate very much like being struck by lightning.").

203. *See* Driggs, *supra* note 180; Durham, *supra* note 182. The Florida court's system of proportionality review has seen no equal in the post-*Furman* period. It was explicitly motivated by the objective of limiting death sentencing to highly aggravated cases with no or few mitigating circumstances. The database for the project consists of all prior comparative review decisions of

(32/170) of the death cases it reviewed on this issue,[204] although the overall impact of this policy on systemic consistency and the risk of race discrimination is unknown. However, the practice was scaled back dramatically in 2000 after the Florida court came under severe political attack[205] from the Governor and the Republican-controlled legislature for allegedly slowing unreasonably the pace of the executions in state.[206] The 19% vacation rate on the proportionality issue in the 1990s dropped to 3% (3/97) between 2000 and 2003.[207] The message from the experience of the Florida court is clear. Whatever a court's commitment to selective and consistent death sentencing may be, top-down, highly visible, and aggressive review practices may carry distinct political risks.

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the Florida court, all of which were available to the parties. The proportionality opinions of the court were fully explained and documented with respect to comparison cases.

204. Driggs, *supra* note 180, at 274-75 ("While I have my own strenuous disagreements with the [court] in individual proportionality cases, I have to acknowledge that they take this aspect of their death penalty jurisprudence seriously.").

205. Baldus, *supra* note 189, at 1583 (discussing "the tolerance for resistance to the death penalty by public officials," which varies greatly from place to place).

206. The long-standing issue that drew the court into a power struggle with the legislature and Governor Jeb Bush was the perceived frequency with which the court vacated death sentences and its toleration of excessive delays in the execution of death sentences arising from the filing of state post-conviction claims and appeals. In the view of one observer, the bottom line was that the Governor and a number of legislators were "envious that Texas, Missouri, and Virginia are executing more death row inmates and taking less time at it." Marvin Dyckman, *Playing Death-Penalty Politics*, ST. PETERSBURG TIMES, Jan. 4, 2000, at 9A. To address this problem, legislative leaders and the Governor developed a two-prong legislative and constitutional strategy. The first was the enactment of legislation to limit the number, timing, and grounds for death penalty appeals. To no one's surprise, the Florida Supreme Court unanimously held the law to be an unconstitutional encroachment on its rule making authority. Allen v. Butterworth, 756 So. 2d 52, 59 (Fla. 2000) (legislation violates the separation of powers doctrine of the Florida Constitution); Randolph Pendleton, *Court Voids Death Appeals Laws: Justices Will Pass Rules To Speed Process*, FLORIDA TIMES-UNION, Apr. 15, 2000, *available at* http://www.jacksonville.com/tu-online/stories/041500/met_2793441.html (last visited May 10, 2004).

Anticipating this decision, the Governor and a number of legislators proposed constitutional amendments that would permit the legislature to write the procedural rules controlling death penalty appeals. Randolph Pendleton, *Slowdown on Expediting Appeals*, FLORIDA TIMES-UNION, Dec. 2, 1999, *available at* http://www.Jacksonville.com/tu-online/stories/120299/met_1406451.html (last visited May 10, 2004). There were also legislative proposals to give the Governor substantially more power over the appointment of appellate judges. Randolph Pendleton, *GOP Seeks New Rules for Courts*, FLORIDA TIMES-UNION, Mar. 28, 2000, *available at* http://www.Jacksonville.com/tu-online/stories/ 032800/met_2585696.html (last visited May 10, 2004).

207. For five justices who served during the entire period from 1900 through 2003, Durham, *supra* note 182, at 46 figs. 26-27, documents sharp declines (for the 2000-2003 period) in the proportion of one and two aggravating circumstances cases in which they voted to vacate death sentences as comparatively excessive. During the 1990s, the court was sharply divided on its proportionality review practices. Thus, it required only a few converts to alter the trend of the court's proportionality review decisions. Also, the two Jeb Bush appointees to the court during the later period, Raoul G. Cantero, III (2002) and Kenneth B. Bell (2003), did not vote to vacate a death sentence as excessive in the few cases they heard. *Id.* at 47 n.111.

iii. Nebraska and the federal government

In contrast to the New Jersey and Florida systems of proportionality review, the review systems in Nebraska (trial court proportionality review) and the federal government (centralized pretrial Main Justice screening for proportionality) are characterized by low visibility and low political risk. The Nebraska system has low visibility because the proportionality reviews are conducted by trial court sentencing judges *before* sentence is imposed, thereby avoiding the costly choice of overriding a death sentence already imposed by a judge (Florida) or jury (New Jersey).[208] The Nebraska review process is reasonably rich in data and quite transparent, giving prosecutors a good sense of the outcomes they can expect in capital cases. Overall, the Nebraska system appears to have been reasonably successful in minimizing the risk of arbitrariness and race discrimination in charging and sentencing.[209]

The federal review system screens death-eligible cases to identify candidates who are ultimately approved by the Attorney General for capital prosecution.[210] The AG's decisions are based on recommendations of a panel of prosecutors in Main Justice who screen all cases in the system. The process has low visibility because participation and

208. As noted above, post-*Furman* death sentencing in Nebraska has always been a trial court judicial function in which the trial courts conduct proportionality review. In that task they have the help of various files of case listings and descriptions to inform those judgments. Each decision is in the public domain but not easily accessible statewide. Moreover, the opinions vary widely in terms of the facts of the review and comparison cases as well as the quality of the reasoning supporting the final proportionality review decision. The upshot of the system is a reasonably consistent pattern of death sentences that is quite comparable to New Jersey's.

Unlike the New Jersey Supreme Court, the Nebraska Supreme Court does not monitor its system for race effects. Nevertheless, a recent well-controlled study of Nebraska case law reveals no significant evidence of race-of-defendant or race-of-victim discrimination in charging and sentencing decisions. (However, it does show pronounced disparities based on the socioeconomic status of the victims.) Baldus et al., *supra* note 38, at 607-23. Also, because Nebraska's proportionality reviews are conducted *before* the judges impose sentence, the process has very low visibility and appears to create no political risk for the sentencing judges who are required to stand for a retention election every six years.

209. *Id.* at 643-61 (quantitative and qualitative analyses of consistency and selectivity in Nebraska death sentencing).

210. In 1995, Attorney General Reno established a capital punishment review process at Main Justice in which every death-eligible case is screened to see if it is among the most aggravated and deserving of a capital prosecution. The review panel does not appear to engage formally in a comparative analysis of each case, but, because the panel's members serve for extended periods, they have familiarity with a vast number of cases that provide the basis for their comparative judgments. The standards used by the panel are unknown beyond a desire to limit death sentencing to the worst federal cases. Defense counsel are generally permitted to participate in the proceeding, but they do not have access to the database of cases available to the panel members. The procedure screens out a very large percentage of the cases with the result that fewer than 25% of the death-eligible cases are authorized for capital prosecution by the AG. U.S. DEP'T OF JUSTICE, *supra* note 27.

knowledge of the process beyond the review panel is limited to the U.S. Attorneys and defense counsel. While the AG's system does not employ a systemic database known to the parties, the review panel considers hundreds of thoroughly documented cases, giving its members a good sense of the relative culpability of the homicides it reviews. The recommendations and decisions of the panel and the AG provide U.S. Attorneys with good feedback on the AG's perception of the most culpable offenders. Although the facts of the federal cases are normally known to the public only when they result in a death sentence, compared to the state court cases of which we are aware, the capitally charged cases in the federal system appear to be quite aggravated. On the issue of race, the review process in Washington is race-blind, but the decision-making processes of the U.S. Attorneys and the law enforcement personnel, who identify and charge defendants capitally, are not.[211] It is partly for this reason that the National Institute of Justice has undertaken a study of the impact of race in the federal system.[212]

In sum, these case studies suggest that prosecutors are in the strongest position to limit death sentencing to the worst cases with low political risk. This result appears to hold whether the prosecutorial screening process is informal (New Jersey and Nebraska) or formal (the federal review system). The evidence also suggests that courts have the capacity to influence prosecutorial decision making through informal feedback mechanisms based on systems of proportionality review that are data rich, well reasoned, and transparent. However, when proportionality reviews are conducted at the appellate level, decisions to overturn death verdicts imposed by juries and judges must be tempered by the state's political environment with respect to capital punishment.

C. Adjudicating Claims of Discrimination

We also have experience in the 1990s with two procedures (New Jersey and Kentucky) designed to adjudicate claims of discrimination. The New Jersey court scrutinizes its system for evidence of systemic discrimination, while the Kentucky system, under its Racial Justice

211. Little, *supra* note 169, at 411-12. Rory Little, *What Federal Prosecutors Really Think: The Puzzle of Statistical Race Disparity Versus Specific Guilt and the Specter of Timothy McVeigh*, 53 DEPAUL L. REV. 1591 (2004) ("The line prosecutor and lead investigators often have a large, if not primary, influence on the charging and sentencing contours of potential federal death penalty cases . . . . [If race effects exist in the system, they] occur at the earliest stages: case investigation and prosecutorial intake.").

212. *See supra* note 124.

Act, focuses on prosecutorial charging decisions in individual cases. According to the evisceration claim, the application of such systems will result in the de facto abolition of the death penalty, substantially impair its utility, or result in the use of racial quotas; this theory further asserts that, with respect to race-of-victim discrimination, such remedies will result in a dramatic increase of death sentencing in black-victim cases, which will increase the proportion of black defendants on death row. The experience of the last decade in Kentucky and New Jersey provides a basis for assessing the validity of such claims.

1. Kentucky's Racial Justice Act

Kentucky's Racial Justice Act (RJA), adopted in July 1998, is modeled after the Federal Racial Justice Act, which Congress rejected in 1994. The evidentiary framework under the Kentucky law is based on models of proof used to challenge the discriminatory use of peremptory strikes under *Batson v. Kentucky*.[213] The Kentucky statute permits a capital murder defendant to bar a penalty trial in his or her case on the ground that "race was the basis of the decision to seek" a death sentence "in his or her case."[214] The Act appears to contemplate the presentation of evidence solely from the county of prosecution[215] and the claim must be established by "clear and convincing evidence."

In this section, we present the results of a 2002 survey of Kentucky public defenders that gathered their perceptions of the impact and significance of the statute;[216] we also present an analysis of death-sentencing trends before and after the effective date of the statute that sheds light on its impact.

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213. 476 U.S. 79 (1986).

214. Kentucky Racial Justice Act, KY. REV. STAT. ANN. § 532.300-532.309 (Michie 2004). The Kentucky statute is distinguishable from the federal proposal in its exclusive focus on the prosecutorial charging decision ("No person shall be subject to or given a sentence of death that was *sought* on the basis of race.") (emphasis added)), as contrasted to the federal proposal, which forbids "the execution of a sentence that was imposed based on race." Baldus et al., *supra* note 72, at 424-25.

215. There is, however, ambiguity on the geographic scope of the authorized proof. Section 2 of the Kentucky Racial Justice Act speaks of proof that race "was a significant factor in decisions to seek the death penalty *in the Commonwealth*" (emphasis added) implying that statewide evidence of discrimination is relevant, while Section 4 requires proof that race was a factor in the "decision to seek a death sentence in his or her case" suggesting that proof is limited to evidence concerning charging decisions in the defendant's judicial district.

216. Neal, *supra* note 24. The questionnaire was administered by the Kentucky Department of Public Advocacy to provide a basis for advising Senator Neal on how the legislation was implemented. It was sent to over 275 attorneys. E-mail from Edward C. Monahan, Deputy Public Advocate, Department of Public Advocacy to David Baldus, (Mar. 5, 2004) (on file with authors).

Of the sixty-four survey respondents, four had filed RJA claims and eight were aware of others having done so, but no direct relief (as contrasted to discovery and related orders) had been granted on any RJA claim.[217] The responses of the public defenders address several topics. The first topic concerns the evidentiary and judicial impediments to defense counsel's use of the statute. A major impediment is the limitation of proof to the prosecutor's judicial district.[218] Even in a large judicial district like Jefferson County (City of Louisville), with defendants and victims of different races, the number of death-eligible cases is too small to obtain statistically significant results with respect to a given prosecutor, and the local courts have not authorized funds for a statewide analysis.[219] Another impediment is the refusal of many judges to grant discovery motions requesting an order that would require the prosecutor to: (a) reveal general "office policy" on capital charging, or (b) explain on a case-by-case basis, the factual criteria the prosecutor has used historically to decide which cases were and were not capitally charged.[220] The problem is that the matter is strictly within the discretion of the trial courts that apply their discretion narrowly out of an apparent concern with stigmatizing prosecu-

217. Nor has any direct relief been granted on a RJA claim since 2002.

218. In the words of one defender: "The requirement of showing race-based-decision-making in one particular case is a MAJOR burden. I had thought that the RJA would relieve us of that burden rather than codify it." Neal, *supra* note 24, at 19.

219. Bette Niemi, Manager, Department of Public Advocacy, Capital Trial Branch, reports that "we couldn't get any statistician to analyze" the Louisville data because the "relatively small number of cases would not produce a statistically significant result. Everyone we spoke to was of the opinion that the only statistically significant result would come from a state wide analysis that would cost hundreds of thousands of dollars and take several years to complete." E-mail from Bette Niemi to David Baldus via Susan Balliet (Mar. 9, 2004) (on file with authors) [hereinafter Niemi E-mail]. The refusal of the courts to authorize a statewide study is regrettable given the excellent foundation that Professors Keil and Vito's statewide study, *supra* note 21, would have provided for such an effort. Another defender referred to the "virtually gargantuan" difficulty (in cost and expertise) of developing a meaningful database and the lack of generally accepted measures of offender culpability that can be used to identify and match similarly situated cases. Neal *supra* note 24, at 19.

220. Bette Niemi reports that "[n]ot one judge in Jefferson County [Louisville] required disclosure." *Id.* *See also* Neal *supra* note 24, at 13 (reporting details of two judicial denials of defense counsel requests to "discover the policy" and for evidentiary hearings.). However, in at least one district, a discovery motion produced an order requiring a prosecutor to provide detailed information about all of the death-eligible cases he had prosecuted during his tenure, and explain for each case why he did or did not seek a death sentence. Although the prosecutor's testimony revealed nothing that appeared inappropriate, a plea offer was forthcoming and defense counsel was of the opinion that the "RJA was one factor leading to a favorable settlement." *Id.* There is also an expectation among many defense counsel that even if prosecutors are required to disclose the bases of their charging decisions in individual cases, most judges would accept at face value any reasons offered to justify those decisions.

tors with any suggestion that race may be a factor in their charging decisions.

Another consequence of trial court limitations of the evidence to individual judicial districts is that communities with no or very few minority defendants and victims (which includes the bulk of Kentucky's counties) are beyond the effective reach of the legislation.[221] Moreover, the legislation's exclusive focus on prosecutorial charging decisions impairs its potential for identifying significant overall race effects in the system beyond the charging decision. The reason for this is that Professors Keil and Vito's research documented significant race effects in both prosecutorial charging decisions *and* jury sentencing decisions. Limiting the focus of the law to race effects in prosecutorial decisions may be overlooking an important source of the problem. The most useful approach would commence with a separate focus on the charging and sentencing decisions that is supplemented with an analysis of the combined effects of the two decision points, which documents race disparities in the imposition of death sentences among all death-eligible cases.[222]

A final but important impediment to defense counsel's use of the RJA appears to be concern about stigmatizing and thereby antagonizing prosecutors merely by raising a claim. The following are two explanations:

1. The claim that a prosecutor is racist is explosive and produces a fear that he or she will retaliate against defense counsel in this or other cases;[223] and
2. "Arguing in a high-profile case that the local prosecutor is applying the law in a racist manner does not foster positive relationships in that particular case or in the thousands of case[s] between the defender's office and the Commonwealth. There could be dire consequences on the success of counsel in the immediate case and perhaps scores of other case[s], while the prosecutor cools down from being called a racist in the local paper."[224]

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221. One defender notes: "Almost without exception, my cases involve white defendants, charged with killing white victims, in jurisdictions which are 95+% white, where no member of a minority race has been charged with murder, or has been a murder victim, within anyone's memory." Neal, *supra* note 24, at 18-19.

222. A focus on charging and sentencing decisions as well as on the combined impact of both prosecutorial and jury decisions is characteristic of death penalty research in Georgia—Baldus et al., *supra* note 8; New Jersey—Baldus &Woodworth, *supra* note 17, at 221-22; Maryland—PATERNOSTER & BRAME, *supra* note 14; Philadelphia—Baldus et al., *supra* note 22; and Nebraka—Baldus et al., *supra* note 38.

223. Neal, *supra* note 24, at 18.

224. *Id.* These reactions are understandable given the stigmatizing effects of racist labels. *See supra* note 25. The costs of such labels are particularly high for prosecutors seeking political advancement in interracial communities where RJA claims are most likely.

Respondents also suggest that the stigmatizing effect of RJA claims underlies the frequent judicial reluctance to recognize such claims.[225]

In spite of these problems, a number of the defense counsel respondents perceived some value from the RJA. One is the symbolic effect of the law. Most defenders perceive it as legitimating claims of race discrimination by representing a state acknowledgement that bias is possible and the state is trying to rectify the situation.[226] A minority view is that the statute gives a misleading impression that "we have a fair and even handed judicial system."[227]

A number of respondents also perceived a positive influence on some prosecutors. One defender's view is that, because of the law's symbolic effect, it brings the issue out into the open. Some defenders also perceive a deterrent effect in that, with the expectation of additional scrutiny of their charging decisions, some prosecutors are likely to examine more closely the basis of these decisions.[228] Also, in some cases, a prosecutor's desire to avoid the necessity of justifying his or her decisions has helped induce, particularly in close cases, plea offers or unilateral death notice withdrawals without the necessity of filing an RJA claim. The evidence suggests, therefore, that the fear of stigmatization, which inhibits the exercise of judicial discretion, in some cases influences the exercise of prosecutorial discretion in a positive direction.

In addition, several defense counsel perceived a negative influence in prosecutorial decisions also arising from a fear of stigmatization.[229]

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225. Claims of "any form of racism" do not sit well with judges "who know and in most cases respect the prosecution." Neal, *supra* note 24, at 19. In spite of apparent judicial resistance to the RJA, the circumstances of a 2003 case suggest it very likely had a positive effect in jury selection for the trial of a black male defendant in a district where blacks constitute only about 4.5% of the population. At the outset, the Commonwealth moved for a "severely limited individual voir dire." Defense counsel filed an RJA motion, which included a request for "individual voir dire sufficient to deal with the reality of racial discrimination." The court denied the RJA request to bar a capital prosecution but permitted a three and one-half week voir dire that was "searching and deliberate." The jury convicted the defendant of capital murder but rejected the Commonwealth's request for a death sentence and sentenced him to life without parole. Rob Sexton, *Racial Justice Act: Capital Trial of African American in Barren County Results in Life Without Parole Sentence,* THE ADVOCATE, Sept. 2003, at 14, *available at* http://dpa.ky.gov/library/advocate/ sept03/racialjustice.htm (last visited May 10, 2004).

226. One defender stated: "[T]he RJA gives credence to racial arguments we make. I have had racial issues arise before the [A]ct where it would have been nice to have the [A]ct as a back up." Neal, *supra* note 24, at 16.

227. *Id.* at 17.

228. "[T]he prosecutors are aware now that their actions will be monitored more closely. Thus, they do not even want the possible perception that the death penalty is being sought based upon the race of the defendant." *Id.* at 18.

229. In the view of one defender, "I think the Attorney General's office, for example, is very careful to avoid the 'Racist' label . . . ." *Id.* at 16.

There is a belief, especially in large interracial counties, with murder defendants and murder victims of different races, that the statute creates an incentive for prosecutors to: (a) file death notices in all death-eligible cases; and (b) refuse negotiated plea overtures, all as a way of ensuring racial balance in their charging statistics.[230] The opinion of another defender is that the bottom line has been an increase in the number of death sentences sought and imposed.[231]

The second part of our Kentucky inquiry focused on death-sentencing outcomes before and after the effective date of the RJA (July 15, 1998). The results indicate that after that date prosecutors and juries continued to charge and impose death sentences. Indeed, during the five years before the Act was adopted, an average of 2.6 sentences per annum were imposed (n = 13), while in the five-year post-Act period, the figure was 2.8 (n = 14),[232] an 8% (1/13) increase in the total number of death sentences imposed.[233] If one limits the before and after comparison to "initial" prosecutions, THERE WAS AN INCREASE OF 3 post-Act death sentences, which REPRESENTS A 33% (3/9) increase.[234]

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230. "[P]rosecutors have adopted policies of pursuing death in every eligible case, rather than making a case by case determination." *Id.* at 16.

231. *Id.* at 16.

232. The pre-Act period embraces 1993 through 1997 and 1998 through July 14, 1998, while the post-Act period includes the remaining five months of 1998 and 1999 through 2003. In contrast, during the fifteen-year period 1977 through 1992, the annual number was 3.6 (n = 54). The thirteen death sentences imposed in the five years before the RJA were: Ralph Baze, Sammy Fields, Robert Foley (first murder), Robert Foley (second murder), Randy Haight (retrial), Benny Lee Hodge (retrial), Dan Johnson, John Mills, Ernest Rogers, Vince Stopher, Frank Tamme (retrial), W. Eugene Thompson (retrial), and Gerald Young. DEP'T OF PUB. ADVOCACY, PERSONS IN KENTUCKY WHO HAVE BEEN SENTENCED TO DEATH AS OF MAY 6, 2004 (2004) (on file with authors).

233. The Fourteen death sentences (with Kentucky Supreme Court citation if available) imposed in the five years post-Act were: *Caudill and Goforth v. Commonwealth*, 120 S.W.3d 635 (KY. 2003) (death sentenced co-defendants); Epperson (retrial); *Furnish* v. *Commonwealth*, 95 S.W.3d 34 (KY. 2003) (first trial); *Garland v. Commonwealth*, 2003 WL 22429532 KY (KY. 2004); Gary McKinney; *Osborne v. Commonwealth*, 43 S.W. 234 (KY. 2001); *Parrish v. Commonwealth*, 121 S. W.3d 198 (KY. 2003); David L. Skaggs (retrial); Michael St. Clair (first murder); Michael St. Clair (retrial for first murder); Miguel Soto; *Wheeler v. Commonwealth*, 121 S. W.3d 173 (KY. 2003); and Robert K. Woodall. Two death sentences have also been imposed in 2004—Fred Furnish (retrial) and Sammy Fields (retrial). DEP'T OF PUB. ADVOCACY, *supra* note 232.

234. There were nine initial prosecutions in the pre-Act period and twelve in the post-Act period. Bette Niemi of the Department of Public Advocacy argues that in Kentucky, retried capital cases (after judicial vacation of the first death sentence) may be at greater risk of resulting in a death sentence because Kentucky jurors in the second trial sometimes have knowledge of the first death sentence imposed in the case. Niemi E-mail, *supra* note 219. The pre-Act sample referred to in the text included four retrials, whereas only two of the fourteen post-Act death sentences were retrials (Epperson and Skaggs).

Therefore, regardless of the data one examines, the RJA clearly did not "erase" capital punishment in Kentucky.[235]

It is interesting to note, however, that the post-Act increase of death sentences from nine to twelve among initial prosecutions is significantly explained by a greater willingness of prosecutors and juries in the state's two largest judicial districts (Jefferson and Fayette)[236] to seek and impose death sentences in black-victim cases, an outcome that is consistent with the perceptions of the public defenders surveyed in 2002.

Historically, death sentencing in both of these circuits has been infrequent and substantially limited to white-victim cases. During the period 1977 through 1998, fifteen death sentences (80% with white victims) were imposed in Louisville and six were imposed in Lexington (all with white victims). It is noteworthy, therefore, that in the five years after the RJA became effective, the only two death sentences imposed in Lexington involved *white defendants with black victims*.[237] Furthermore, from 1977 through 1998, Louisville saw a total of only two death sentences imposed in black on black crimes (which constitutes 13% (2/15) of the total, while in the five years after the RJA became law, the only two death sentences imposed in Louisville involved black on black murders.[238] The data are also consistent with the perceptions of defenders in smaller, overwhelmingly white communities. Specifically, in the five years post-RJA, all of the death sentences imposed outside Lexington and Louisville (n = 12) involved white victims.

Although the sample sizes in this analysis are small, the consistency between the perceptions of the public defender respondents and the before and after data suggest, that in the large communities with both black- and white-victim cases, the RJA is producing more evenhanded results, while in the smaller, predominantly white communities, the law appears to have had little or no effect on the frequency of death sentencing in white-victim cases.[239] However, as predicted by some

235. Kentucky has seen only two executions since 1977, Eddie Lee Harper (white) and Harold McQueen (white), but there is no way to attribute the small number of executions or the race of those executed to the RJA.

236. These are the two Kentucky cities with populations greater than 250,000.

237. *Caudill*, 120 S.W.3d 635. Also, the post-Act period saw no Louisville death sentences imposed in black-on-white killings, which accounted for 33% (5/15) of the death sentences imposed there between 1977 and 1998 in cases with known race data.

238. *Parrish*, 121 S.W.3d 198; *Wheeler*, 121 S.W.3d 173.

239. What we cannot tell from these data is whether the outcomes in the metropolitan areas reflect more evenhanded treatment of similarly situated white and black victim death-eligible cases or disproportionately more punitive charging practices in black-victim cases, without regard to the comparative culpability of the white- and black-victim cases. We would hope that the

public defenders, the state's two large interracial circuits (Louisville and Lexington) have seen an increase in the number of death sentences imposed in black-victim murders.

Overall, the impact of Kentucky's RJA is mixed. It has certainly not ended the death penalty in the state; in fact, the number of death sentences has increased slightly. Nor has it produced judicial orders barring capital prosecutions. In Louisville and Lexington, where there are both black and white defendants and victims in the death-eligible cases, the small number of such cases has limited the potential of statistical proof; in the rest of the state there are even fewer death-eligible cases and they typically involve white defendants and white victims. It also appears that judicial resistance and concern about stigmatizing prosecutors has limited the capacity of defense counsel to obtain discovery orders requiring prosecutors to: (a) disclose office charging policy, and (b) explain on a case-by-case basis the factual basis of their prior prosecutorial charging decisions. Concerns about the stigmatizing effect of even raising an RJA claim have also deterred some defense counsel from using the legislation.

Nevertheless, the RJA appears to have had positive effects as a symbolic condemnation of race discrimination and a commitment of the state to maintain a race-neutral decision-making process. There is also evidence that the symbol has sensitized some prosecutors to race issues; for some prosecutors, the possibility of their charging practices being viewed as "racist," or even disclosed to the public, has had a deterrent effect by creating incentives for race-neutral decision making. Such perceptions may partly explain why all four post-RJA death sentences imposed in Lexington and Louisville have involved black victims. Moreover, post-RJA, statewide, no death sentence has been imposed in a black-defendant/white-victim case.

Kentucky's experience with its RJA has five policy lessons. The first is that concerns about the stigmatization of individual prosecutors would be considerably reduced if the issue under the statute were not whether the prosecutorial decision in a defendant's case was racially motivated, but rather whether: (a) all of the evidence in the case established that there is a risk that the decision-making "practices" in

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"evenhanded treatment" hypothesis explains the outcomes, but a test of that hypothesis requires data that would enable one to compare the criminal culpability of defendants in black- and white-victim cases in these two counties. Also, the facts of the four black-victim cases are consistent with the evenhanded treatment hypothesis, because two of the cases involved two victims (*Wheeler* and *Parrish*) and the two codefendants sentenced to death in Louisville (*Caudill* and Goforth) violently murdered a helpless seventy-three-year-old victim. If the post-Act outcomes in Lexington and Louisville reflect a change of policy, the source of the change is most likely in prosecutorial charging decisions rather than jury sentencing decisions.

the prosecutor's office were influenced by racial consideration, and (b) the decision in the defendant's case was consistent with those practices.[240]

The second lesson is that statistical evidence, except in extremely large counties (of which there are few in this country), has limited power as a basis for inferring discriminatory charging practices. Coherent scrutiny of decision making in a given jurisdiction requires a statewide analysis, as background, to determine if the local decision-making practices are consistent with the statewide pattern. Regularly updated statewide analyses also enable the courts and the state legislature to identify structural features of the system and specific case categories that may be the source of any race effects identified in the system.[241]

The third lesson from Kentucky is that maintenance of a database and the provision of the expertise required to document statewide charging patterns are beyond the capacity of defense counsel. This responsibility should be the obligation of a state agency, such as the state supreme court or a state commission on law enforcement and criminal justice.[242]

The fourth lesson from Kentucky is that prosecutorial incentives to deliver evenhanded justice will be enhanced if defendants have, in pretrial discovery, an absolute right to depose prosecutors about office charging policies and the factual bases of their prior charging decisions—whenever there exists a statistically based race disparity either in the local jurisdiction or statewide, regardless of its statistically significance, or there is other evidence that suggests a risk of discriminatory charging practices, or both circumstances exist. This right would enhance the transparency of the charging process and keep the issue of evenhanded justice foremost in the minds of responsible prosecutors.[243] The court's final inference of whether there is a risk that a

240. This is the model proposed by Florida Chief Justice Barkett in *Foster v. State*, 614 So. 2d 455, 468 (Fla. 1992) (Barkett, C.J., concurring in part, dissenting in part) (The question is whether the defendant has established that "discrimination exists [in the office of the prosecutor] and that there is a strong *likelihood* it has influenced the State to seek the death penalty" in the defendant's case.). Also, the New Jersey Supreme Court, in its "systemic" reviews focuses on the "*risk* of racial disparity in the imposition of the death penalty." State v. Marshall, 613 A.2d 1059 (N.J. 1992) (emphasis added). *See infra* note 249.

241. Such analyses may reveal that jury decision making as contrasted to prosecutorial decision making is the source of a problem that has been identified or that the race effects are located among cases with only one or two statutory aggravating circumstances. *See supra* note 166 and accompanying text.

242. Two state supreme courts, New Jersey and New York, currently provide this support.

243. This right of discovery would be analogous to the right of a defendant challenging the use of peremptory challenges as racially motivated, who creates a prima facie case based on race

discriminatory charging policy exists, therefore, would be informed by statistical evidence, local and statewide, the prosecutor's testimony about the office's charging policy and the basis for prior charging decisions, and any other evidence suggesting that a discriminatory policy may exist.

The final lesson from Kentucky is that oversight of a capital sentencing system, (through the enforcement of an RJA or systemic reviews by a state supreme court), should monitor the effects of *both* prosecutorial charging and jury sentencing decisions.[244] This will enhance the likelihood that death-sentencing outcomes among all death-eligible cases are evenhanded.

2. *New Jersey's System of Systemic Oversight and Review*

We discussed above[245] the New Jersey Supreme Court's efforts to limit death sentencing to the most aggravated cases through proportionality reviews in individual cases, a process that is also likely to reduce significantly the risk of race discrimination. The court has gone beyond prevention, however, and announced in 1992 its willingness to adjudicate claims of systemic race discrimination in the system.[246] The court's system of oversight is based on the database that it uses in its proportionality reviews and is informed by the analyses of its special master for proportionality review, who prepares periodic reports[247] based on the results of statistical analyses prepared for him by expert consultants.[248] These systemic review procedures provide the New Jersey court with good oversight of the operation of its system and the basis for meaningful review of claims of systemic race

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disparities in the use of peremptories in his case. Upon this showing, the prosecutor must explain the basis of all strikes challenged in the cases.

244. This is the approach in both the New Jersey and New York systems.

245. *See supra* note 190 and accompanying text.

246. *Marshall*, 613 A.2d 1059.

247. Proportionality Review (II), 757 A.2d 168 (2000). Recent reports include DAVID C. BAIME, REPORT TO THE NEW JERSEY SUPREME COURT: SYSTEMIC PROPORTIONALITY REVIEW PROJECT 2002-2003 TERM (2003). Similar reports were issued by Judge Baime for the 2001-2002 term, July 8, 2002, and for the 1999-2000 term, December 1, 1999.

248. The special master's consultants, since 1993, have been Professor David Weisburd, Hebrew University of Jerusalem, and Professor Joseph Naus, Rutgers University. They routinely submit a "Technical Appendix" to the master's report, which includes the results of their statistical analyses with supporting data. The special master also has the benefit of expert reports submitted from time to time by experts engaged by the Attorney General and the Office of the Public Defender. In addition, the special master, working with the staff of the Administrative Office of the New Jersey Courts, periodically updates the court's database, which is made available to the parties for further analysis. *See also* Baime *supra* note 190, at 263-314 (providing an excellent overview of death penalty race issues in the New Jersey court including an extensive presentation of data and analysis).

discrimination that have been presented to it.[249] Although no race claims have been upheld,[250] the review process symbolizes the court's commitment to evenhanded justice and is likely to sensitize conscientious prosecutors to the factual bases of their charging decisions, thereby minimizing the risk of race discrimination.

In the eleven years that the New Jersey court has monitored its system for evidence of race discrimination, including the adjudication of discrimination claims, the death penalty has not been erased in New Jersey. To be sure, as noted above,[251] the number of death sentences has declined since 1992, but the most plausible explanation for this trend is enhanced selectivity in prosecutorial charging decisions. So far as we can tell, the court's willingness to hear race claims has had no impact whatever on the number of death sentences imposed.[252]

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249. Since *State v. Marshall* first addressed the racial issue in 1992, the question has been whether the claimant has established a "risk of racial disparity in the imposition of the death penalty." The focus of this inquiry has been on both prosecutorial charging and jury sentencing decisions. What appears to have changed during the 1990s is the burden of proof required to establish an actionable "risk" of systemic discrimination. The original requirement, which called for proof of a "substantial discriminatory effect," evolved into a requirement that the claimant must "relentlessly document" the risk of discrimination. There is disagreement in the court about whether this more recent formulation merely calls for multiple and different controls for offender culpability or whether it represents a "slow but steady movement from the notion of risk to the notion of certainty in terms of the quantum of evidence necessary to prove race effect." *Proportionality Review (II)*, 757 A.2d at 180 (Long, J., dissenting). Certainly, one plausible interpretation of the cases is that relief is not likely to be forthcoming short of evidence with inferential force comparable to petitioner's proof in *McCleskey v. Kemp*.

250. The first critique of jury death sentencing, which embraced the pre-1991 cases, produced some suggestion of race-of-defendant and race-of-victim discrimination, BALDUS, *supra* note 195, at tbls. 18, 18A. In addition, the reports of successor masters for proportionality review have documented some race effects in the system, but the court has not considered them to be sufficiently strong to require corrective action. However, because of the methodological limitations of the evidence thus far presented and the mixed substantive findings in those data, the court has not given the system a clean bill of health: "Our implementation of this monitoring system does not imply either the presence or the absence of a race effect in capital sentencing. No reliable demonstration has been made to date that racial discrimination improperly affects the administration of the death penalty in this state." *Proportionality Review (II)*, 757 A.2d at 179. The justices do not unanimously share this view, however. Justice Handler believes that a "constitutionally impermissible risk" of race discrimination has been established (State v. Harvey, 731 A.2d 1121, 1161 (1999); State v. Cooper, 731 A.2d 1000, 1069 (1999)) and Justice Long believes that there is a "sufficient question about race effect in white victim cases, although not enough to meet the relentless documentation standard" to justify a judicially imposed moratorium on executions until statistics are "compiled to the point of relentlessness." *Proportionality Review (II)* 757 A.2d at 182.

251. *See supra* note 195 and accompanying text.

252. There have been no executions in New Jersey during the eleven years since the New Jersey court fully affirmed *State v. Marshall* in 1992. The delay in Marshall's execution and in the executions of the numerous other defendants whose death sentences have been finally approved by the New Jersey Supreme Court since 1992, are the product of state postconviction and federal habeas appeals; they are completely unrelated to the court's oversight of the New Jersey system for evidence of race discrimination.

Moreover, there is no evidence of the use of quotas or the adoption of blanket charging to improve prosecutorial charging statistics. Indeed, throughout the decade, the data have continued to reveal race-of-victim effects in charging decisions, but not sufficiently strong to warrant judicial relief.[253]

The experiences of New Jersey and Kentucky clearly indicate that the practice of hearing and adjudicating race claims has not meant the end of capital punishment or a material impairment of its use. Nor has the practice dramatically changed the racial composition of death row through the application of quotas or the adoption of blanket charging practices designed to improve the charging statistics.[254]

The experiences also reveal definite limits on the capacity of courts to address racial issues. A major constraint is political, particularly at the trial court level, at which concerns about stigmatization affect all of the key actors.[255] The New Jersey and Kentucky experiences vividly demonstrate the important role that rich data play in informing judicial oversight and the exercise of prosecutorial discretion in communities where race is an important issue. Only with good data can conscientious prosecutors assess whether race (consciously or unconsciously) is a factor in their decision making. This process of learning and evaluation offers significant promise of inducing race-neutral prosecutorial decision making. The Kentucky and New Jersey experiences also suggest the importance of systemic approaches based on

253. *See supra* note 145. These race-of-victim disparities would not persist under a quota-driven system designed to minimize race-of-victim effects in the special master's charging statistics.

254. It is not clear what would occur if courts routinely sustained race claims, which would place prosecutors under considerably greater pressure to maintain a more evenhanded system than currently exists in either Kentucky or New Jersey. Nevertheless, the experience of these two states in the 1990s supports the belief that recognition of a legal right may have salutary effects even in the absence of an "active remedy." Kennedy, *supra* note 25, at 1436 (Recognition of a legal right without a meaningful remedy may: (a) provide the "basis for criticizing a given social practice," (b) "serve as a magnet around which to organize dissatisfaction," and (c) "catalyze, in unforeseen ways, the remedial capabilities of other sectors of the society."). Similar effects are perceived to flow from the International Covenant of Human Rights, which articulates rights but provides no means for their implementation. Burns Weston, *Human Rights*, ENCYCLOPEDIA BRITANNICA (15th rev. ed. 2002) at 13, *available at* http:www.britannica.com/eb/article?eu=109242&tocid=0 &query = human%20rights ("The Universal Declaration . . . is not a treaty. It was meant to proclaim 'a common standard of achievement for all peoples and all nations' rather than enforceable legal obligations. Nevertheless, [it] has acquired a status juridically more important than originally intended, and it has been widely used, even by national courts, as a means of judging compliance with human rights obligations under the UN Charter.").

255. Blume et al. *supra* note 91, reports a similar experience in the presentation of post-*McCleskey* claims of discrimination in state and federal courts. The political aspect of these cases is what most clearly distinguishes them from the judicial review of claims of race discrimination in civil settings, such as employment and housing.

good statewide data under the scrutiny of appellate courts that are removed from the personal relationships that burden the process at the local level. Systemic remedies also avoid the stigmatization and political risks associated with findings that individual charging and sentencing decisions were based on racial considerations.

V. CONCLUSIONS

The record of empirical research, since *Furman v. Georgia* was decided in 1972, documents four important points about race discrimination in the use of the death penalty that bear on the legitimacy of capital punishment today.

First, race discrimination is not inherent in the institution of capital punishment despite widespread perceptions to the contrary. However, among the general public, perceptions of the widespread existence of discrimination do not appear to affect adversely the perceived legitimacy of the system nationwide.

Second, well-controlled studies have documented race discrimination in a number of individual jurisdictions. However, among the attentive public, which closely observes the operation of death penalty systems and is aware of the empirical evidence on the issue, there is disagreement about its legal and moral significance, especially as it relates to race-of-victim discrimination.

Third, the only way to determine if a risk of race discrimination exists in the death penalty of a given jurisdiction is through the conduct of a well-controlled study of its application. In the absence of results from such a study, which document the absence of significant adjusted race effects, a cloud of uncertainty hangs over the system. For people who view race discrimination as unlawful and immoral, this uncertainty impairs the legitimacy of a death penalty system. The removal of such uncertainty has been the motivating force behind publicly financed studies (and requests therefore) in a number states and in the federal government. If a study documents a risk of discrimination in a system, in our judgment, the legitimacy of the system is impaired if action is not taken to prevent it or correct it, or both.

Fourth, the evidence suggests that procedures to prevent and correct race discrimination can be applied without erasing or materially impairing the use of capital punishment. Preventive measures exist in New Jersey, Florida, Nebraska (comparative proportionality review), and in the United States Department of Justice (prosecutorial screening of death-eligible cases). One purpose of these review procedures is to limit death sentencing to the worst cases, which the evidence suggests can be done without materially impairing the use of the death

penalty. In our judgment, the successful application of such procedures enhances the legitimacy of their respective death penalty systems.

Another way to remove the cloud of uncertainty over a death penalty system is to authorize race claims for adjudication under reasonable standards of review. The systemic review procedure in New Jersey and the system of individual case review in Kentucky represent important steps in this direction and appear to reduce the risk of race discrimination. Moreover, they neither erase nor materially impair the use of the death penalty. In our judgment, therefore, the legitimacy of a given death penalty system depends in important part on the extent to which it provides defendants the opportunity to present race claims for adjudication under reasonable standards of review.

VI. SUMMARY OF PRINCIPAL FINDINGS AND CONCLUSIONS

A. *Race Discrimination Pre-*Furman[256]

Before *Furman v. Georgia* was decided in 1972, the legitimacy of capital punishment in America was significantly impaired by a perception of widespread discrimination against black defendants, particularly in the South. That perception was consistent with the available evidence, which also revealed race-of-victim discrimination. It was a perception shared by both the general public and the attentive public. The images and understanding from this period also appear to have shaped perceptions of death sentencing in the post-*Furman* period.

B. *Race Discrimination Post-*Furman[257]

The evidence from the post-*Furman* period tells a different story. It reveals that while the discriminatory application of the death penalty continues to occur in some places, it does not appear to be inherent in the system, in other words, it is not an inevitable feature of all American death-sentencing systems. Specifically, the post-*Furman* data reveal only spotty evidence of systemic black-defendant discrimination. However, we do find in a few of the jurisdictions for which data are available that black defendants with white victims are at greater risk than are white defendants with white victims and all defendants whose victims are black. We also find, in a number of jurisdictions, but clearly not all, that the pre-*Furman* pattern of race-of-victim discrimination persists in the post-*Furman* period, principally the product of prosecutorial charging decisions.

256. *See supra* pp. 1415-17, 1423.
257. *See supra* pp. 1417-26.

C. *The General Public's Perception of Discrimination*[258]

In spite of this post-*Furman* evidence, the general public perceives only one form of discrimination—that against black defendants—and believes it is widespread. There are several reasons for this misperception. Most important is the power of pre-*Furman* inspired "ordinary knowledge," which is reinforced by the common belief that most of our institutions discriminate on the basis of race. The literature clearly suggests that statistical studies to the contrary, no matter how well executed, are unlikely to change such widely held beliefs.

There are at least four additional explanations for the gap between the findings of the specialized research and public perceptions. One is the ease with which both black and white citizens are able to understand why such discrimination exists. Another is the superficial appeal of data advanced by death penalty abolitionists, comparing the 40% representation rate of blacks on death row with the 13% black share of the general population. A third reason is the mistaken belief that commonly reported evidence of race-of-victim discrimination is, in fact, further evidence of the existence of race-of-defendant discrimination. Finally, there are occasional credible studies documenting black-defendant discrimination and frequent reports by practitioners that such discrimination exists, all of which reinforce the popular understanding of widespread race-of-defendant discrimination.

D. *The General Public's Indifference to Race Discrimination*[259]

The public's perception of discrimination against black defendants does not appear, however, to impair materially the public's perception of the legitimacy of capital punishment, although public opinion polls on the issue are not entirely clear. One possible explanation for this is that the public is indifferent to all forms of race discrimination. This seems implausible given the public's concern about racial profiling in police stops of drivers and pedestrians. For citizens who generally perceive real costs associated with race discrimination in society, more plausible reasons for indifference in the death penalty context are: (a) a difficulty of seeing condemned killers as "victims," (b) a resignation to the inevitability of the discriminatory practices and a belief that any remedy for the problem may enable black offenders to escape their just deserts, and (c) a belief that tolerance of discrimination is an acceptable price to pay in order to preserve the benefits of capital pun-

258. *See supra* pp. 1426-34.

259. *See supra* pp. 1434-40.

ishment. In short, race discrimination, even if unfortunate, is perceived to be a necessary evil required to deliver justice.

The public's indifference to race discrimination in the use of the death penalty is enhanced by the conduct of the public officials who are responsible for dealing with such issues. An understandable response of the average citizen is that the role of race in the use the death penalty is no problem if elected officials and courts do not consider the issue a matter of concern. In contrast, reports of the condemnation of race discrimination by courts and state attorneys general in employment and racial profiling commonly highlight the importance of evenhanded treatment in these areas.

The Supreme Court's 1987 decision in *McCleskey v. Kemp* has had a significant impact in this regard. First, the court's opinion obscures the subtle manner in which systemic unconscious discrimination occurs. It also trivializes the significance of discrimination based on racial "empathy" as contrasted to racial "hostility." Second, it has removed the issue entirely from the federal courts and has greatly reduced the willingness of state courts and legislatures to address the issue.

E. The Attentive Public's Perception of Race Discrimination[260]

The attentive public recognizes the distinction between race-of-defendant and race-of-victim discrimination. These observers generally perceive race-of-defendant discrimination as both unconstitutional and immoral and they correctly perceive it as far less of a problem than it was pre-*Furman*. Indeed, the post-*Furman* decline of race-of-defendant discrimination has generally enhanced the perceived legitimacy of the system. However, in the few situations in which race-of-defendant discrimination has been reasonably well established, the evidence has been taken seriously (for example, by an official Pennsylvania commission, which called for a moratorium on executions), although, thus far, not by any courts.

In contrast to the spotty evidence of systemic race-of-defendant discrimination, there is convincing evidence of a pattern and practice of race-of-victim discrimination in a number of states. Most legal commentators have condemned race-of-victim discrimination in the same terms as race-of-defendant discrimination—as a race-based distortion of the system that offends not only the Constitution but also basic principles of comparative justice. In spite of the unconstitutionality of

260. *See supra* pp. 1440-46.

race-of-victim discrimination, in the eyes of some prosecutors, courts, scholars, and other observers, it does not present a serious problem.

F. Arguments Advanced to Diminish the Significance of Race-of-Victim Discrimination[261]

Three arguments have been advanced to diminish the significance of race-of-victim discrimination. One claim is that there is insufficient evidence of either conscious or unconscious race-of-victim discrimination to be a matter of concern. Some argue that because of the complexity of the decision-making processes involved, such discrimination is impossible to detect. Others argue that the documented race-of-victim disparities are a naturally occurring outcome of an evenhanded race-neutral decision-making process. We believe that race-of-victim discrimination can be detected in properly controlled empirical studies and that the disparities documented in a number of such studies are the product of conscious or unconscious racial empathy by largely white prosecutors and jurors, who view crimes against black victims as less aggravated than similar crimes against white victims.

It is also argued, that for three reasons, race-of-victim discrimination is less objectionable on moral grounds than race-of-defendant discrimination. The arguments turn on distinctions between the victims and beneficiaries of the two forms of discrimination. The first claim is that because race-of-victim discrimination is not triggered by the defendant's race, it does not implicate the traditional goal of antidiscrimination law, which is to protect minorities from adverse treatment because of their race. The second claim is that victim-based race discrimination is less objectionable because the beneficiaries of it are principally black, rather than white, defendants. The third claim is that a defendant in a white-victim case who is sentenced to death because of his victim's race has no moral ground to object because he freely choose his victim.

We consider these arguments unpersuasive because they do not address the core bases of the immorality of race-of-victim discrimination, which are: (a) its undervaluation of black lives, (b) its distortion of the decision-making process on the basis of race, (c) the fact that the victim's race is a "but for" cause of many death sentences and executions, (d) the unfairness it visits upon black communities, and (e) the unseemly message it sends that the overriding objective of capital punishment in America is the protection of white people.

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261. *See supra* pp. 1446-53.

G. *The Claim That Tolerance of Discrimination is Necessary to Protect and Maintain the Benefits of Capital Punishment*[262]

It is also argued that even if both race-of-defendant and race-of-victim discrimination are morally objectionable, it is "necessary" to tolerate them in order to maintain the benefits of capital punishment. In short, acquiescence, although regrettable, is justified on the ground of necessity. This justification, which is strongly implicit in Justice Powell's majority opinion in *McCleskey v. Kemp*, rests on two beliefs. The first is that race discrimination in the use of the death penalty is inevitable and widespread. The second is that race discrimination is ineradicable, which means that the prevention and correction of race discrimination is impossible without erasing or materially impairing the benefits of capital punishment. From this perspective, if federal law were to provide a vehicle for capital defendants to present and adjudicate race claims, the death penalty systems of thirty-eight states would be brought to their knees under an onslaught of race claims. Far better, the logic goes, to tolerate a less than perfect system than to eviscerate capital punishment nationwide in the name of equal justice. We believe that the evidence from the post-*Furman* period draws into serious question each of the beliefs on which the necessity claim is based.

1. *Evidence of the Inevitability of Discrimination*[263]

The first belief underlying the necessity claim is that race discrimination is widespread, inevitable, and irremediable. However, the evidence suggests that, in the post-*Furman* period: (a) systemic race-of-defendant discrimination is very much the exception rather than the rule, and (b) while race-of-victim discrimination continues to exist in a number of places, it is far from universal. The literature clearly establishes that systemic race discrimination is not inherent in all post-*Furman* death penalty systems. Whether or not it exists depends on the racial composition of the defendants and victims in death-eligible cases, local culture, jury selection processes, charging and sentencing procedures, and the presence or absence of procedures designed to limit the risk of discrimination.

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262. *See supra* p. 1454.

263. *See supra* pp. 1455-56.

2. *Evidence that Meaningful Efforts to Prevent and Correct the Effects of Race Discrimination Will Erase or Materially Impair the Use of the Death Penalty*

With respect to the second premise of the necessity argument, post-*Furman* research suggests that the risk of race discrimination can be substantially reduced without eviscerating capital punishment. We have examined two approaches that bear on this issue. First are judicial and prosecutorial procedures designed to limit death sentencing to the worst cases. Second are judicial and legislative procedures that permit the presentation and adjudication of race claims.

a. Limiting Capital Punishment to the Most Aggravated Cases[264]

It has been known for some time that the most effective means of reducing the risk of race discrimination is a limitation of death sentencing to the most culpable offenders. Moreover, research indicates that these death sentences are the most likely to be affirmed and carried out with an actual execution. Limiting the death penalty to the most aggravated cases, therefore, has only a marginal impact on the goals of capital punishment while dramatically reducing the risk of race discrimination in the system. The attainment of this goal raises three issues of feasibility—methodological, substantive, and political.

Methodological feasibility concerns the ability of prosecutors and judges to identify the most aggravated cases. Prosecutors, of course, have a vast body of experience on which to base such judgments. Moreover, recent experience in the Florida Supreme Court and in the Nebraska trial courts suggests that the number of statutory aggravating circumstances provides a very good straightforward measure for courts to use in identifying the most aggravated cases.

On the issue of substantive and political feasibility, we have evidence from the comparative proportionality review systems in the supreme courts of New Jersey and Florida and in the trial courts of Nebraska. We also have evidence from the United States Department of Justice's procedures for the systematic screening of death-eligible cases. The experience in these jurisdictions suggests that the effectiveness of such procedures depends on four things: (a) the richness of the available data, (b) the perceived reasonableness of the review standards, (c) the transparency of the database and the process of decision, and (d) the visibility and political risk associated with the review process. These case studies suggest that prosecutors operating with low visibility are in the strongest position to limit death sentencing to

264. *See supra* pp. 1456-66.

the worst cases with low political risk. This result appears to hold whether the prosecutorial screening process is informal (New Jersey and Nebraska) or formal (the federal review system). The evidence also suggests that reviewing courts, at both the trial and appellate court levels, have the capacity to influence prosecutorial decision making through informal feedback mechanisms based on systems of proportionality review that are data-rich, well reasoned, and transparent. These features give the review process legitimacy. When proportionality reviews are conducted at the appellate level, which gives them high visibility, the number of death sentences actually vacated as excessive is tempered by the state's political environment with respect of capital punishment.

b. Evidence on the Adjudication of Race Claims[265]

We also have experience in the 1990s with two state procedures (New Jersey and Kentucky) designed to adjudicate claims of discrimination. The New Jersey court scrutinizes its system for evidence of systemic discrimination, while the Kentucky system, under its Racial Justice Act, focuses on prosecutorial charging decisions in individual cases. The evidence from these states does not support the belief that the application of such systems will erase the death penalty or substantially impair its utility. The evidence also fails to support the belief that such oversight procedures will result in either the use of quotas or the adoption of blanket charging practices applied without regard to the criminal culpability of defendants, for the purpose of improving prosecutorial charging statistics. In both jurisdictions, the courts have applied conservative standards in evaluating discrimination claims apparently out of concerns with the stigmatizing effects and political repercussions that a finding of race discrimination would produce. No judicial relief has been granted in either state on such a claim.

Nevertheless, the review systems appear to have had positive effects, first at a symbolic level as a condemnation of race discrimination and a commitment of the state to maintain a race-neutral decision-making process. The systems may also have had a deterrent effect by sensitizing some prosecutors to race issues. The possibility of their charging practices being viewed as "racist," or even disclosed to the public, may have created incentives for race-neutral charging practices.

The Kentucky and New Jersey experiences also demonstrate the importance of focusing the review process on a systemic statewide "risk"

265. *See supra* pp. 1466-78.

of discrimination (both systemically and in individual cases), rather than on the fact of discrimination in individual cases, which is almost impossible to prove. The risk approach, especially if applied by an appellate court on a statewide basis, reduces the stigmatization associated with charging an individual prosecutor with race discrimination. The New Jersey and Kentucky systems also demonstrate the importance of a statewide publicly funded database that is available to the parties. Defense counsel lack the financing to develop such a resource. Also, when the law limits the court's focus to charging and sentencing decisions in a single county, or judicial district, statistical analysis is possible in only massive urban areas (which would have a sufficient sample size). Moreover, the single county approach effectively excludes from the review process the great bulk of counties in which defendants and victims are virtually all Caucasian.

H. The Implications of Ignoring the Issue of Race Discrimination for the Legitimacy of Death Sentencing Systems[266]

Experience has shown that the only way to determine if a risk of race discrimination exists in a given death-sentencing jurisdiction is through the conduct of a well-controlled empirical study of the application of its capital charging and sentencing system. In the absence of results from such a study documenting the absence of any risk of race discrimination, a cloud of moral uncertainty hangs over the system.

The evidence also suggests that procedures to prevent and correct race discrimination can be applied without erasing or materially impairing the use of capital punishment. Therefore, unless a well-controlled study documents that a death penalty system carries no risk of discrimination, its legitimacy depends in important part on the extent to which it applies procedures to limit death sentencing to the most aggravated cases and provides defendants the opportunity to present race claims for adjudication under reasonable standards of review.

266. *See supra* pp. 1478-79.

APPENDIX

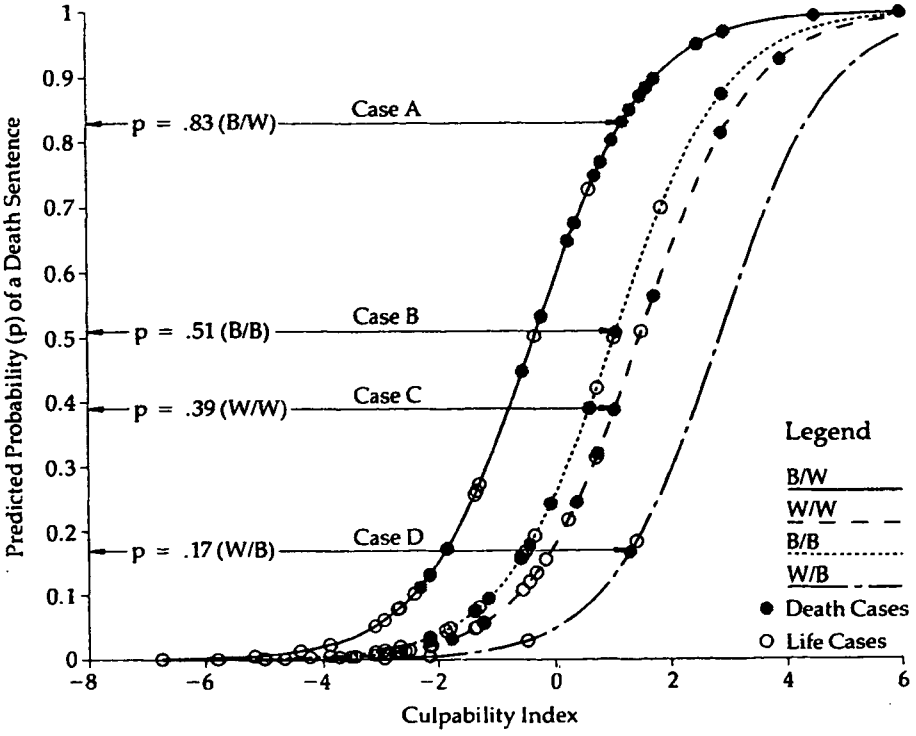
This Appendix provides additional statistical evidence on race-of-defendant and race-of-victim disparities in the pre- and post-*Furman* periods.

I. PRE-*FURMAN* RACE DISPARITIES

Appendix Figure 1 presents four plots estimated in the logistic regression analysis of the pre-*Furman* data described in the text.[267] The horizontal (x) axis represents the culpability level of the cases, and the vertical (y) axis indicates the estimated likelihood of a death sentence being imposed for each case. Each plot presents the estimates for a different defendant/victim racial combination of cases. For example, the highest risk of a death sentence is in the black-defendant/white-victim category of cases (B/W) while the lowest risk is in the white-defendant/black-victim category (W/W). The black and white dots represents a life or death sentence imposed in a case. The Figure also identifies four cases—A, B, C, and D—which have comparable levels of criminal culpability on the x axis. Both black defendants, A and B, had a higher estimated probability receiving a death sentence (0.83 and 0.51) than both the white defendants, C and D (0.39 and 0.17).

267. *Supra* note 11 and accompanying text.

APPENDIX FIGURE 1
LOGISTIC MODEL OF RACE EFFECTS IN PRE-*FURMAN* GEORGIA



Source: David C. Baldus et al., *supra* note 8, at 142 fig. 20.

II. POST-*FURMAN* RACE DISPARITIES

Appendix Table 1 presents post-*Furman* unadjusted race-of-defendant and race-of-victim death-sentencing rates for Georgia (Part I) and Maryland (Part II). For both Parts, Panel B shows the unadjusted race-of-defendant disparity, while Panel A shows the unadjusted race-of-victim effects. Panel C indicates that most crime is intraracial. Because blacks kill mainly blacks, the lower death-sentencing rate in black-victim cases (Panel C) draws down the overall death-sentencing rate for the black-defendants shown in Panel B of both Parts.

APPENDIX TABLE 1

Part I Unadjusted Race-of-Victim and Race-of-Defendant Disparities in Death-Sentencing Rates, among All Murder and Voluntary Manslaughter Cases (Post-*Furman* Georgia)

		Rates and Disparities
A.	*Race-of-victim disparity*	
	White-victim cases (WV)	.11(108/981)
	Black-victim cases (BV)	.0133 (20/1, 503)
	Difference (WV–BV)	10 pts.
	Ratio (WV/BV)	8.3
B.	*Race-of-defendant disparity*	
	Black-defendant cases (BD)	.04 (68/1, 676)
	White-defendant cases (WD)	.07 (60/808)
	Difference (BD-WD)	-3 pts.
	Ratio (BD/WD)	.57
C.	*Defendant/victim racial composition*	
	1. Black defendant/white victim (B/W)	.21 (50/233)
	2. White defendant/white victim (W/W)	.08 (58/748)
	3. Black defendant/black victim (B/B)	.01 (18/1443)
	4. White defendant/black victim (W/B)	.03 (2/60)
	All cases	.05 (128/2484)

Source: BALDUS ET AL., *supra* note 8, at 315 tbl. 50.

Part II Unadjusted Race-of-Victim and Race-of-Defendant Disparities in Death-Sentencing Rates among all Death-Eligible Cases (Maryland, 1978-1999)

		Rates and Disparities
A.	*Race-of-victim disparity*	
	White-victim cases (*WV*)	.12
	Black-victim cases (BV)	.02
	Difference (WV–NWV)	10 pts.
	Ratio (WV/NWV)	6.0
		(n=1,291)
B.	*Race-of-defendant disparity*	
	Black-defendant cases (BD)	.05
	Non-Black-defendant cases (NBD)	.07
	Difference (BD-NBD)	-2 pts.
	Ratio (BD/NBD)	.71
		(n=1,291)
C.	*Defendant/victim racial composition*	
	1. Black defendant/white victim (B/W)	.14
	2. White defendant/white victim (W/W)	.09
	3. Black defendant/black victim (B/B)	.03
	4. White defendant/black victim (W/B)	.05
	All cases	.06 (76/1311)

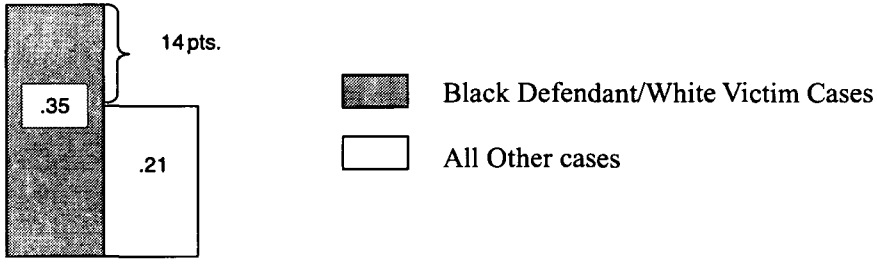
Source: PATERNOSTER & BRAME, *supra* note 14, at 88-96 tbls. 2F, 3G, 4G.

As noted in the text, a handful of studies suggest that, statewide, black-defendants with white-victims are treated more punitively than all defendants with different defendant/victim racial combinations.[268] The question is the extent to which the disparities in those cases are driven by race-of-victim or race-of-defendant discrimination. The Maryland data in Appendix Figure 2 sheds some light on that issue. Part IA documents an unadjusted 14-percentage point black-defendant/white-victim disparity. However, Part IB reveals a 12-point white victim disparity, suggesting that the 14-point disparity in Part IA is mainly driven by the 12-point white-victim disparity shown in Part IB.

APPENDIX FIGURE 2
BLACK DEFENDANT/WHITE VICTIM (PART IA), WHITE VICTIM (PART IB), AND BLACK DEFENDANT (PART II) DISPARITIES IN MARYLAND CAPITAL CHARGING AND SENTENCING OUTCOMES

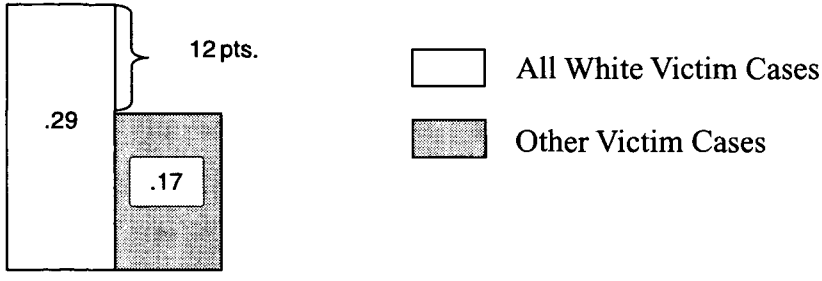
Part I Unadjusted Race Disparities in Death Sentencing Rates Among Death-Noticed Cases: Maryland, 1979-1999

A.



n = (101) (199)

B.

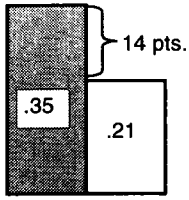


n = (203) (98)

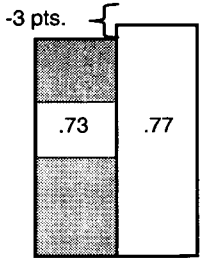
268. *Supra* note 21 and accompanying text.

Part II Adjusted Race of Defendant Disparities in Charging and Sentencing Outcomes Among All Death Eligible White-Victim Cases: Maryland, 1978-1999

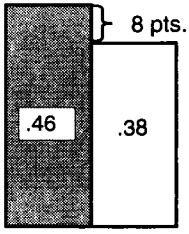
1. Death Notice Filed by Prosecutor



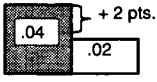
2. Cases Advances to Trial with the State Seeking a Death Sentence

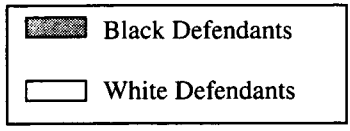


3. Penalty Trial with Death Sentence Imposed



4. Death Sentence Imposed Among All Death-Eligible Cases





Sources: Part 1: Baldus & Woodworth, *supra* note 166, figs. 3, 4.
Part II: PATERNOSTER & BRAME, *supra* note 14, tbl. 4G.

Part II of the Figure is helpful because it focuses exclusively on the white-victim cases and compares adjusted outcomes for the white and black-defendants whose victims were white. The bottom line in Row 4 shows that the adjusted death-sentencing rate among all death-eligible white-victim cases, although low, is twice as high for the black defendants as it is for the white defendants. Those two figures can be usefully compared to the adjusted rate for all black victim cases, which is 1%.

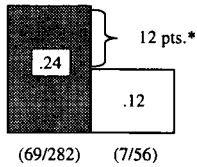
As noted in the text, a strong black-defendant main effect has been documented in Philadelphia County penalty trials, principally in the weighing stage of those trials.[269] Part I of Appendix Figure 3 documents an unadjusted 12-percentage point race-of-defendant disparity in death-sentencing rates at the weighing stage of 338 penalty trials over a 22-year period. The risk of a death sentence is twice as high (.24/.12) for the black defendants as it is for the non-black defendants.

269. *Supra* note 22 and accompanying text.

APPENDIX FIGURE 3

RACE-OF-DEFENDANT DISPARITIES IN JURY WEIGHING DECISIONS: PHILADELPHIA 1978-2000

Part I: Unadjusted Black-Defendant Disparity



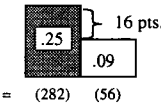
Part II: Adjusted Black-Defendant Disparities

A. Odds Ratio/Multiplier from Logistic Regression Analysis:

3.8*

B. Comparison of Adjusted Rates:[1]

1. Difference in Rates

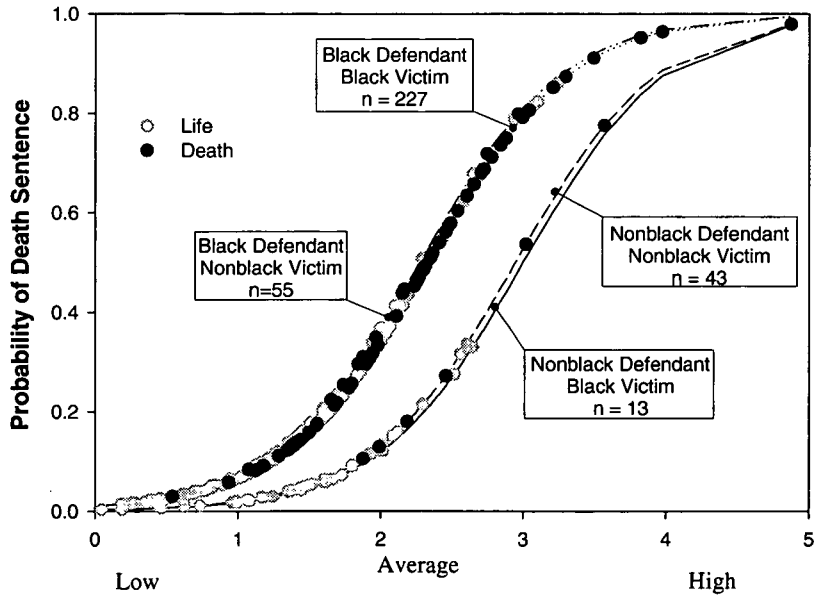


2. Ratio of Adjusted Rates (relative risk):

.25/.09 = 2.8

Legend: Black-Defendant Cases; Other Cases

Part III: A Plot of Race-of-Defendant and Race-of-Victim Effects Estimated Among Jury Weighing Decisions: Philadelphia 1978–2000



Significance of Disparity: * = .05

[1] Death sentencing rates adjusted with a logistic regression-based scale of defendant culpability.

Source: Baldus & Woodworth, *supra* note 17, figs. 4, 5.

Parts II and III of Appendix Figure 3 present the results of a multivariate analysis of these data, with controls for all of the statutory aggravating and mitigating circumstances. In that analysis, on average, the odds of the average black defendant's receiving a death sentence were 3.8 times higher ($p = .05$) than the odds faced by a similarly culpable non-black defendant. To estimate the practical impact of the black-defendant disparities, we computed on each level of a culpability scale the number of death sentences that would have been imposed against black defendants if the rate documented for the non-black defendants at that culpability level had been applied to the black defendants. That analysis suggests a substantial proportion of the weighing stage death sentences imposed against blacks would have been life sentences if the black defendants had been sentenced at the same rates as similarly situated non-black defendants.

Interestingly, the race-of-defendant effects that we documented in Philadelphia are principally the product of jury decision making. Our analysis of prosecutorial decision making there revealed no race-of-defendant effects at all. This is consistent with the national pattern, although as the Maryland data noted above make clear, in some states black defendants with white victims are at a higher risk of being sentenced to death than white defendants with white victims.

III. Race Disparities and Offender Culpability Interactions

The data in Appendix Figure 1 show a strong interaction effect between the criminal culpability of the defendants and both race-of-defendant and race-of-victim effects. For each category of cases, both race effects are largest in the mid range of cases between culpability levels 0 and 2 on the horizontal x axis.

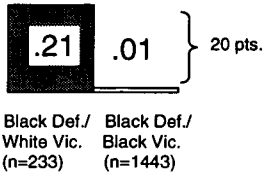
A similar pattern holds for the race-of-victim effect documented in post-*Furman* Georgia. Appendix Figure 4 contains the Georgia data on this issue that was presented in *McCleskey v. Kemp* in 1987.[270] These data support the belief that the problem is mainly in the mid range. However, more recent research suggests that when the measure of offender culpability is the number of aggravating circumstances, the race effects are most prominent among all of the weakly and moderately aggravated cases, for example., those with one or two aggravating circumstances.[271]

270. *Supra* note 165.
271. *Supra* note 166.

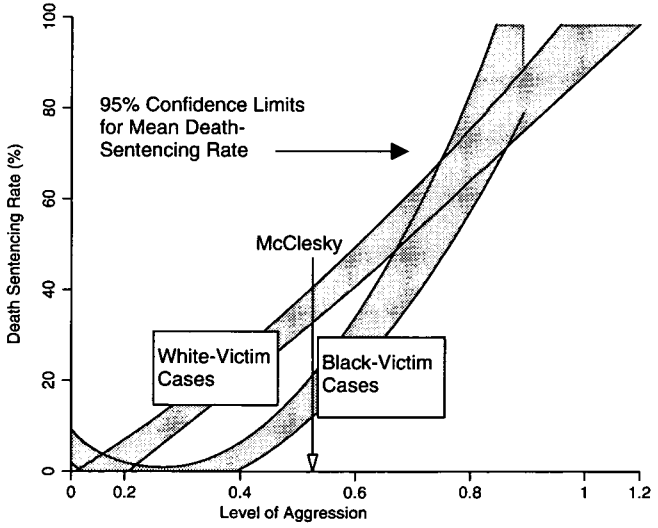
APPENDIX FIGURE 4

RACE-OF-VICTIM DISPARITIES IN BLACK DEFENDANT CASES, GEORGIA CHARGING AND SENTENCING STUDY, 1973-1979

Part I: Unadjusted Race-of-Victim Disparity



Part II: Race-of-Victim Disparities After Adjustment for Defendant Culpability in a Multiple Regression Analysis*



*The curves represent 95% confidence limits on the average death-sentencing rate at increasing levels of aggravation (redrawn from computer output). EJDP, *supra* note 14 at 321, fig. 32.

Source: BALDUS ET AL., *supra* note 8, at 315 tbl. 50, 321 fig. 32.