

# A Death Penalty Wake-Up Call: Reducing the Risk of Racial Discrimination in Capital Punishment

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In Ernest Gaines's novel *A Lesson Before Dying*, Gaines tells the story of Jefferson, a young African-American man convicted of murdering a white grocery store owner in a small Louisiana town in the late 1940s.<sup>1</sup> The public defender, trying to arouse sympathy for the defendant, refers to Jefferson as a dumb animal—a “hog.”<sup>2</sup> The lawyer implores the jurors to “look at the shape of this skull, this face as flat as the palm of my hand.”<sup>3</sup> Surely this “thing,” his argument continues, could not plan a murder.<sup>4</sup> In Gaines's story, the all-white jury convicts Jefferson of murder, and the judge, seeing no reason Jefferson should not “pay for the part he played in this horrible crime,” sentences him to death by electrocution.<sup>5</sup>

The story's poignancy comes from the questions it provokes concerning whether we have progressed beyond the 1940s capital punishment system it describes. Today, presumably, neither side's counsel would refer to an African-American defendant as a “hog.” However, as demonstrated herein, racial discrimination continues to permeate death penalty decisions. In *Green v. Texas*,<sup>6</sup> of the four people responsible for a murder, the petitioner, an African-American, was the only one charged with capital murder.<sup>7</sup> Two African-American accomplices plea-bargained for prison sentences on aggravated robbery charges, and the fourth accomplice, a Caucasian, was not

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1. ERNEST J. GAINES, *A LESSON BEFORE DYING* (1993).
2. *Id.* at 8.
3. *Id.* at 7–8.
4. *Id.*
5. *Id.* at 9.
6. 934 S.W.2d 92 (Tex. Crim. App. 1996).
7. *Id.* at 102.

charged with any crime.<sup>8</sup> The Texas court summarily rejected petitioner's argument that the prosecutor was biased,<sup>9</sup> thus allowing the likely racial discrimination influencing the outcome to go unchecked.

This Article revisits the academically underemphasized racial bias in capital punishment, illustrating the problem, describing efforts to remedy it, and offering a novel solution: model state legislation to tackle the problem of racial bias in the administration of capital punishment. Today the *risk* of race-of-defendant discrimination<sup>10</sup> and well-documented race-of-victim discrimination<sup>11</sup> persist in our capital punishment system. A capital defendant who murders a white victim (especially a minority capital defendant) is much more likely to be sentenced to death than a capital defendant who kills an African-American victim.<sup>12</sup> Racism in capital punishment violates the Equal Protection Clause of the Fourteenth Amendment and the Eighth Amendment; my analysis is thus framed around these constitutional provisions.<sup>13</sup>

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8. *Id.*

9. *Id.* at 103.

10. See Janet Hoefel, *Risking the Eighth Amendment: Arbitrariness, Juries, and Discretion in Capital Cases*, 46 B.C. L. REV. 771, 823 (2005). In her article, Hoefel uses the term "risk" of arbitrariness in capital sentencing when describing the Court's shift in *Gregg v. Georgia*, 428 U.S. 153 (1976), away from the prohibition against arbitrary imposition of the death penalty established in *Furman v. Georgia*, 408 U.S. 238 (1972). Hoefel, *supra*, at 774–80. In *Turner v. Murray*, 476 U.S. 28 (1986), the Court discussed the significance of a "risk" of racism impacting sentencing, stating that they found "the risk that racial prejudice may have infected petitioner's capital sentencing unacceptable in light of the ease with which the risk could have been minimized." *Id.* at 36. According to David C. Baldus, who has extensively studied the impact of race on capital punishment in this country, although numbers have improved since the 1980s, commentators agree that the numbers reflect bias in the federal death penalty system. David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1466 (2004). Since 1988, the Attorney General has authorized 211 death penalty prosecutions. End to Capital Punishment Movement, Federal Death Penalty, [http://www.ecpm-us.org/issues\\_federal\\_death\\_penaly.shtml](http://www.ecpm-us.org/issues_federal_death_penaly.shtml) (last visited on Aug. 23, 2007). Seventy-five percent of these were against minority defendants. *Id.* The Justice Department released a study conducted at President Clinton's request in September 2000, which found numerous racial disparities in the federal death penalty system. U.S. DEP'T OF JUST., THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW (2001), <http://www.usdoj.gov/dag/pubdoc/deathpenaltystudy.htm>.

11. Charles J. Ogletree, Jr., *Making Race Matter in Death Matters*, in FROM LYNCH MOBS TO THE KILLING STATE 55, 64 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006); Michael L. Radelet & Glenn L. Pierce, *The Role of Victim's Race and Geography on Death Sentencing: Some Recent Data from Illinois*, in FROM LYNCH MOBS TO THE KILLING STATE 117, 137 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006).

12. Ogletree, *supra* note 11, at 64. Studies also suggest that jurors are influenced not only by the defendant's race but by the defendant's racial characteristics as well. In cases involving Caucasian victims, African-American capital defendants who appear more "stereotypically Black" are more likely to receive a death sentence than defendants who "look less stereotypically Black." Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 383 (2006).

13. Scholars may disagree about not only whether racial discrimination exists in capital punishment but also whether, if discrimination exists, it impacts the constitutionality of the

I propose a model state statute designed to assist courts in ferreting out racial discrimination in capital sentencing. Under the statute, standardized points are assigned to various offenses and to mitigating and aggravating circumstances. The trial court reviews a defendant's points, comparing them to point values in like cases to determine if there is a reasonable inference that race played a role in the outcome. The statute would ensure that the state treats like crimes alike, regardless of the race of the defendant and victim.

My goal in this Article is not to advocate abolishing the death penalty but rather to contribute to and invigorate the voices that have previously challenged racial discrimination in capital sentencing.<sup>14</sup> In light of changing public perceptions regarding the death penalty,<sup>15</sup> some states may now be willing to remedy this critical flaw in our criminal justice system. I propose a state legislative remedy because several death penalty states have demonstrated willingness to research and address this problem, whereas the Supreme Court has historically tolerated<sup>16</sup> racial discrimination in capital punishment.

Part I uses empirical data to describe and illustrate the racial bias in our criminal justice system explored herein. Part II explains why racial discrimination in capital punishment poses constitutional problems under the Eighth and Fourteenth Amendments. Part III describes congressional and state judicial and legislative efforts to remedy discrimination in capital punishment. Part IV sets forth my proposed statutory remedy, a law aimed at reducing the risk of racial discrimination in capital sentencing. This section also anticipates likely challenges to the proposed law, thus aiming to invigorate death penalty discourse and address the reality of systemic racial discrimination in capital punishment.

This Article will show that our system has not progressed far enough from

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punishment. I join those who would argue that a capital sentence influenced by racial discrimination violates the Equal Protection Clause. *See, e.g., Furman*, 408 U.S. at 310 (Stewart, J., concurring). In addition, racial discrimination in capital sentencing theoretically violates the Eighth Amendment mandate that human dignity underlies punishment. *See id.* at 305 (Brennan, J., concurring).

14. This Article does not advocate abolishing the death penalty, though some have argued this is only the solution for removing racial bias from the system. *See, e.g., Lucy Adams, Death by Discretion: Who Lives and Dies in the United States of America*, 32 AM. J. CRIM. L. 381, 383 (2005).

15. Gallup poll evidence shows that support for capital punishment is lower than in the past. In response to the question "Are you in favor of the death penalty for persons convicted of murder?" the 2006 data shows that 67% of those polled answered "yes." U.S. DEP'T OF JUST., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, tbl.2.52.2006 (2006). In 1994, 80% of Americans supported the death penalty. Lydia Saad, *Racial Disagreement over Death Penalty Has Varied Historically*, GALLUP NEWS SERV., July 30, 2007, available at <http://www.galluppoll.com/content/?ci=28243>.

16. Stephen B. Bright uses the term "tolerance" to describe the Court's handling of this issue. Stephen B. Bright, *Discrimination, Death, and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, in FROM LYNCH MOBS TO THE KILLING STATE 211 (Charles J. Ogletree, Jr. and Austin Sarat eds., 2006).

the late 1940s, when a lawyer could conceivably refer to his African-American client, on trial for murdering a white man, as a “hog.” Systemic racial discrimination, though arguably more subtle than in the past, still plagues our capital punishment system. Courts and legislatures should continue to explore remedies, aiming, if not for a perfect solution, for progress toward fairness for capital defendants.

I. RACIAL DISCRIMINATION IN CAPITAL PUNISHMENT: DEATH SENTENCES  
BASED ON THE ILLEGITIMATE FACTOR OF RACE

Racial discrimination in capital punishment exists when a capital defendant receives a death sentence influenced by racial bias. Two types of discrimination plague our capital punishment system: (1) a capital sentence influenced by the defendant’s race (race-of-defendant discrimination) and (2) a death sentence impacted by the victim’s race (race-of-victim discrimination). In the first category of cases, racial bias by a judge, jury, or prosecutor against the capital defendant makes him more likely to be sentenced to death. Race-of-victim discrimination typically occurs when racial bias by a judge, jury, or prosecutor renders the capital defendant more likely to be sentenced to death because the defendant is a minority and the victim is white.

Part I.A defines racial discrimination more specifically within the context of capital punishment. Part I.B provides state and national empirical data illustrating the existence of racial discrimination in our capital punishment system.

A. *Defining Racial Discrimination in Capital Punishment*

Thirty-six years ago, Arthur Goldberg and Alan Dershowitz described capital punishment as “unusual” under the Eighth Amendment prohibition against cruel and unusual punishment, saying, “Most commentators describe the imposition of the death penalty as not only haphazard and capricious, but also discriminatory.”<sup>17</sup> Noting that capital punishment impacts “disadvantaged minorities,”<sup>18</sup> Goldberg and Dershowitz delivered a prescient message:

Even if the Supreme Court decides . . . that legislatures must provide standards for application of the death penalty, *it is very unlikely that the essentially arbitrary and discriminatory imposition of capital*

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17. Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1792 (1970). Arthur Goldberg was Associate Justice of the United States Supreme Court from 1962–1965. Justice Goldberg dissented from the Court’s denial of certiorari in *Rudolph v. Alabama*, 375 U.S. 889 (1963), a case involving capital punishment for rape. *Id.* at 889 (Goldberg, J., dissenting). Justice Goldberg posed a series of questions in his dissenting opinion, including whether capital punishment for the crime of rape comports with evolving standards of decency. *Id.* at 890.

18. Goldberg & Dershowitz, *supra* note 17, at 1792. From 1930 until 1967, of 2306 individuals executed in the South, 72% were black. *Id.*

*punishment can be halted.* There is too much play in the joints of the criminal process. Prosecutorial discretion at one end of the process and executive clemency discretion at the other may be enough to preserve the capricious character of capital punishment.<sup>19</sup>

Thirty-six years later, judges,<sup>20</sup> lawyers, and defendants continue to oppose the death penalty on grounds that discrimination based on race, gender,<sup>21</sup> and sexual orientation<sup>22</sup> plagues the system. Commentators complain that racial bias and arbitrariness<sup>23</sup> infect the system at almost every stage: arrest, prosecution, jury selection, conviction, sentencing, appellate review, and clemency.<sup>24</sup>

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19. *Id.* at 1793 (emphasis added).

20. Justices Harry Blackmun and Lewis Powell changed their minds about the constitutionality of the death penalty. Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1, 27–28 (2002). Justice Powell, who dissented in *Furman*, later expressed regrets about upholding the constitutionality of capital punishment. *Id.* Kirchmeier also describes other judges' negative reactions to handling capital cases. *Id.* at 31–36. Both Justices Sandra Day O'Connor and Ruth Bader Ginsberg have also expressed doubts about the death penalty's fairness, given problems with competency of counsel. *Id.* at 30–31.

21. Women are much more likely to escape the death penalty than men who commit the same crime. Andrea Shapiro, *Unequal Before the Law: Men, Women and the Death Penalty*, 8 AM. U. J. GENDER SOC. POL'Y & L. 427, 431 (2000). According to Shapiro, one in fifty-three, or 1.9%, of defendants sentenced to death are women. *Id.* at 447. Shapiro argues this disparate impact is based on purposeful and knowing discrimination and thus capital punishment as currently administered in the United States is unconstitutional. *Id.* at 431.

22. See, e.g., Aaron M. Clemens, *Executing Homosexuality: Removing Anti-Gay Bias from Capital Trials*, 6 GEO. J. GENDER & L. 71 (2005). After describing "pervasive and dangerous societal prejudices" against homosexuals, Clemens argues "courts should be at least as careful to prevent anti-gay bias from infecting a juror's view of a capital case as they are to prevent racism or sexism from infecting a juror's decision." *Id.* at 78.

23. 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, 496–97 (2002). Although a distinct concept, 'arbitrariness' is closely linked to 'discrimination.' 'Arbitrariness' typically refers to a lack of consistency in applying punishment for any reason, such as different jurisdictions or inadequate counsel. In *Furman*, for example, the Court held the death penalty was arbitrary because it was meted out rarely and without consistent standards. 408 U.S. 238, 238 (1972) (per curiam); see also Hoeffel, *supra* note 10, at 789 (discussing what 'arbitrariness' means when imposing a death sentence). However, a punishment may certainly be arbitrary or capricious because of racial discrimination. See, e.g., *Getsy v. Mitchell*, 456 F.3d 575, 582 (6th Cir. 2006) ("The Eighth Amendment arbitrariness standard generally prohibits the infliction of a death sentence discriminatorily on the basis of illegitimate and suspect factors, such as the race or socioeconomic status of the defendant and the victim, and its inconsistent or random imposition.") (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 111 (1982)).

24. See, e.g., Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 WM. & MARY L. REV. 2083, 2095–96 (2004). Howe lists the four factors that influence racial discrimination in capital sentencing: "(1) the broad application of the death penalty to non-negligent homicide; (2) the decentralized decision making exercised by prosecutors and capital-sentencing juries; (3) the extreme deference that courts extend to prosecutors on basic matters such as charging and plea bargaining; and (4) the expansive discretion given to capital sentencers." *Id.*

In theory, the death penalty is reserved for only the most culpable offenders, regardless of the race of the defendant or victim. If an African-American defendant and a Caucasian defendant are both guilty of heinous murders involving similar aggravating and mitigating circumstances, their culpability and thus 'deathworthiness' should not differ. Accordingly, if an African-American who murders a Caucasian is sentenced to death while a Caucasian who kills a Hispanic victim receives life imprisonment, the likelihood that racial discrimination influenced sentencing should be addressed.

### B. *The Statistics*

This Article draws on both national and state-specific statistics regarding the intersection of race and the death penalty with regard to the imposition of the death penalty.<sup>25</sup> The national statistics come largely from the work of Professor David C. Baldus, who provided the empirical evidence in *McCleskey v. Kemp*<sup>26</sup> and whose research methods are described therein and in countless law review articles.<sup>27</sup> The state data portion includes statistics from California and Texas because these states lead the nation in the number of death-row inmates and executions, respectively, and from Florida and Maryland to provide a sample from randomly selected death penalty states.

#### 1. *Nationwide Data*

In the United States, 1090 people were executed from the beginning of 1976 to August 16, 2007.<sup>28</sup> Blacks accounted for 370 of those executed; 621 were white.<sup>29</sup> In 80% of these cases, the victims were white,<sup>30</sup> even though blacks and whites are murder victims in approximately equal numbers.<sup>31</sup> Twenty-three of the thirty-six people sentenced to death under the federal death penalty statute in 2005 were African-American.<sup>32</sup> As of January 1, 2007, 45% of those on death row in the United States were white, 42% were African-

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25. Analyzing the research methods underlying this empirical data is beyond this Article's scope.

26. 481 U.S. 279, 286 (1987).

27. Professor Baldus is the Joseph B. Tye Professor at University of Iowa Law School. His numerous articles concerning the impact of race on capital punishment are cited throughout this paper. Though I have never spoken to Professor Baldus, I am grateful to him for his extraordinary work in this area.

28. DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY (Aug. 16, 2007), <http://www.deathpenaltyinfo.org/FactSheet.pdf>.

29. *Id.* Seventy-five were Hispanic and twenty-four were "other." *Id.* I used the same terms to describe the races as those used by the Death Penalty Information Center.

30. *Id.*

31. AMNESTY INT'L, UNITED STATES OF AMERICA: DEATH BY DISCRIMINATION—THE CONTINUING ROLE OF RACE IN CAPITAL CASES (2003), <http://web.amnesty.org/library/index/engamr510462003>.

32. Bright, *supra* note 16, at 228.

American, and 11% were Hispanic.<sup>33</sup> Also, of the 113 individuals convicted of capital offenses, sentenced to death, and then exonerated, the ratio of black to white is 3:2.<sup>34</sup>

According to Professors Baldus and George Woodworth, current statistics reflect that, *systemically*, race-of-defendant discrimination has decreased since 1972<sup>35</sup> (when the Supreme Court denounced the death penalty as unconstitutional in *Furman v. Georgia*<sup>36</sup>).

[W]hile 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* sentencing systems.<sup>37</sup>

The Baldus and Woodworth study revealed “only spotty evidence of systemic black-defendant discrimination.”<sup>38</sup> However, their research relates to only systemic discrimination—discrimination so pervasive that it becomes significant through statistical analysis.<sup>39</sup>

Race-of-victim discrimination continues to exist and is easier to detect: “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.”<sup>40</sup> This type of discrimination<sup>41</sup> is akin to race-of-defendant discrimination in that race (here of the victim) influences capital decision-making.<sup>42</sup> In *McCleskey*, the

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33. DEATH PENALTY INFO. CTR., *supra* note 28.

34. Adam Hine, *Life or Death Mistakes: Cultural Stereotyping, Capital Punishment, and Regional Race-Based Trends in Exoneration and Wrongful Execution*, 82 U. DET. MERCY L. REV. 181 (2005). The statistical differences in race also reflect a regional component. *Id.* at 189–97. Blacks are more likely to be wrongfully sentenced and then exonerated in Southern states than whites in the same region. *Id.*

35. Baldus & Woodworth, *supra* note 10, at 1412, 1417–18.

36. 408 U.S. 238, 239–40 (1972) (per curiam).

37. Baldus & Woodworth, *supra* note 10, at 1412.

38. *Id.* at 1479.

39. *Id.* at 1412 (“The absence of systemic evidence of disparate treatment does not mean, however, that the 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.”).

40. *Id.* The literature abounds with information regarding the source of the discrimination, whether prosecutors, judges, or juries. See, e.g., Adams, *supra* note 14; David V. Baker, *Criminal Profiling: Purposeful Discrimination in Capital Sentencing*, 5 J. L. & SOC. CHALLENGES 189 (2003). Professor Isaac Unah of the University of North Carolina-Chapel Hill and attorney Michael Songer researched the death penalty in South Carolina from 1993 to 1997 and found that prosecutors were 5.8 times as likely to seek the death penalty against those suspected of killing white victims as against those suspected of killing black victims. Michael J. Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decision to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161, 189 (2006).

41. Baldus and Woodworth describe race-of-victim discrimination as having “a weaker legal pedigree.” Baldus & Woodworth, *supra* note 10, at 1443.

42. See *id.* at 1423–26. Professor Randall Kennedy argues that the equal protection claim

Court recognized a capital defendant's standing to raise a claim of race-of-victim discrimination.<sup>43</sup> Though rejecting the claim for insufficient proof, the Court acknowledged that race-of-victim discrimination, if proven, would create an unconstitutional classification—one that is “an irrational exercise of governmental power.”<sup>44</sup>

## 2. *Statewide Data*

Individual states vary substantially regarding the number of executions, number of defendants on death row, and racial disparities in capital punishment.<sup>45</sup> I describe four states—California, Texas, Maryland, and Florida—to show statistics from different regions of the country and from both high-volume and low-volume death penalty states. The states differ substantially in their commitment to researching and remedying racial discrimination in capital punishment.

### a. *California*

California has 652 people on death row, the largest death row population in the country.<sup>46</sup> In 2005, California's population was 77.0% white and 6.7% African-American.<sup>47</sup> People on death row, however, were 39% white and 36% African-American.<sup>48</sup> From 1990 to 1997, defendants who killed whites were more than three times as likely to be sentenced to death than those who killed African-Americans.<sup>49</sup> Eighty percent of executions in California from 1990 to 1999 were for murders of whites, though only 28% of homicide victims in

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regarding race-of-victim discrimination involves unfairness to the victim as well as to the defendant. Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1391 (1988). By discriminating in this way, the state denies the African-American community “equal treatment with respect to those who kill its members.” *Id.*; see also Charles J. Ogletree, Jr., *Black Man's Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 32 (2002).

43. 481 U.S. 279, 291 n.8 (1987) (stating that “[i]t would violate the Equal Protection Clause for a State to base enforcement of its criminal laws on ‘an unjustifiable standard such as race, religion, or other arbitrary classification’”) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

44. *Id.*

45. Much of this variation is, of course, due to differences in terms of population size and minority make-ups.

46. See DEATH PENALTY INFO. CTR., STATE BY STATE INFORMATION (2006), <http://www.deathpenaltyinfo.org/state/> (data for California); DEATH PENALTY INFO. CTR., *supra* note 28; see also Glenn L. Pierce & Michael L. Radelet, *Empirical Analysis: The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990–1999*, 46 SANTA CLARA L. REV. 1, 6 (2005).

47. U.S. CENSUS BUREAU, STATE AND COUNTY QUICKFACTS, CALIFORNIA (2006), <http://quickfacts.census.gov/qfd/states/06000.html>.

48. Pierce & Radelet, *supra* note 46, at 7.

49. *Id.* at 21. Pierce and Radelet opined that in California, those who killed non-Hispanic African-Americans were almost 60% less likely to receive the death penalty than those who killed non-Hispanic whites. *Id.* at 37–38.



California during that time were white.<sup>50</sup>

*b. Texas*

Texas leads the country in the number of death row inmates actually executed.<sup>51</sup> As of August 2007, 402 of the 1090 people put to death in the United States since 1976 had been executed in Texas.<sup>52</sup> Texas Department of Criminal Justice (“TDCJ”) statistics reflect that as of July 30, 2007, black males accounted for 41.2% of death row offenders.<sup>53</sup> Of the 365 people who were executed from 1982 to 2007, the TDCJ reported that 49.2% (196) were white, 34.7% (138) were black, and 15.6% (62) were Hispanic.<sup>54</sup> When compared with the population of Texas—which was 83.2% white, 11.7% black, and 35.1% “Hispanic or Latino” in 2005<sup>55</sup>—disparities emerge. Other data reveals that approximately three-quarters of the victims of those sentenced to capital punishment from December 1982 to April 2003 were white.<sup>56</sup>

*c. Maryland*

In contrast to the number of executions in Texas, the State of Maryland has executed only five people since 1976.<sup>57</sup> A report commissioned in 2000 by Maryland’s governor concluded that, while race-of-defendant discrimination

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50. Vanessa Hua, *Death Penalty Study Finds Racial Imbalance: Killers of Whites More Likely to Face Execution*, SAN FRANCISCO CHRON., Sept. 22, 2005, at B-3. The same study found that someone convicted of first-degree murder in a predominately white county—Napa or King—was more than three times as likely to receive a death sentence as someone convicted of a similar crime in a diverse, urban county. *Id.*

51. Since 1976, Texas has led the nation in the number of people put to death. Texas Dep’t of Crim. Just., *Death Row Facts*, <http://www.tdcj.state.tx.us/stat/drowfacts.htm> (last visited Aug. 23, 2007).

52. DEATH PENALTY INFO. CTR., *supra* note 46 (data for Texas).

53. Texas Dep’t of Crim. Just., *Gender & Racial Statistics of Death Row Offenders (2007)*, <http://www.tdcj.state.tx.us/stat/racial.htm>.

54. *See* Texas Dep’t of Crim. Just., *Executed Offenders (2007)*, <http://www.tdcj.state.tx.us/stat/executedoffenders.htm>. The TDCJ listed two offenders as “other” under the “race” heading. *Id.*

55. U.S. CENSUS BUREAU, *STATE AND COUNTY QUICKFACTS, TEXAS (2006)*, <http://quickfacts.census.gov/qfd/states/48000.html>. The Census includes “persons of Hispanic or Latino origin” in one category. *Id.*

56. AMNESTY INT’L, *supra* note 31 (Of 301 prisoners executed in Texas from December 1982 to April 2003, 78% were executed for crimes involving white victims.). In an article published in 2000, commentators noted that the ratio of death sentences to arrests in Texas for whites who killed whites was 1.5:1. Deon Brock, Nigel Cohen & Jonathan Sorenson, *Arbitrariness in the Imposition of Death Sentences in Texas: An Analysis of Four Counties by Offense Seriousness, Race of Victim, and Race of Offender*, 28 AM. J. CRIM. L. 43, 68 (2000). The ratio for Hispanics who killed whites was nearly 2.5:1, and the ratio for African-Americans who killed whites was 4:1. *Id.* These commentators argued “prospective candidates for execution are screened and selected to a large extent on the basis of race,” describing that as “one of the most enduring and tragic consequences of capital punishment in the United States.” *Id.* at 70.

57. DEATH PENALTY INFO. CTR., *supra* note 46 (data for Maryland). Maryland currently has eight inmates on death row. *Id.*

was not significant, the race of the victim played a substantial role in whether or not prosecutors sought the death penalty.<sup>58</sup> The study determined that black defendants who killed white victims were 2.5 times more likely to be sentenced to death than white defendants who killed white victims, and 3.5 times more likely to be sentenced to death than black defendants with black victims.<sup>59</sup>

As of April 2003, twelve inmates populated Maryland's death row, eight of whom were black and four of whom were white.<sup>60</sup> Thus, approximately 67% of the inmates were black,<sup>61</sup> despite African-Americans representing only approximately 29% of Maryland's population.<sup>62</sup>

*d. Florida*

Florida may have a similar propensity toward executing minorities who kill white victims. In fact, as of 2001, the State of Florida had never executed a white capital offender who had killed an African-American.<sup>63</sup> As of 2005, Florida's population was 80.4% white and 15.7% black.<sup>64</sup> Yet, the Florida Department of Corrections reports that of the sixty-four death row inmates executed since 1976, forty (62.5%) were white and twenty-one (32.8%) were black.<sup>65</sup> Currently, 381 inmates sit on death row, 237 of whom are white males and 132 are black males.<sup>66</sup> In the four years between 1996 and 2000, seventy-seven of those on death row were convicted of an offense involving a white victim and twenty-four were on death row for an offense involving a black

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58. Michael Millemann & Gary W. Christopher, *Preferring White Lives: The Racial Administration of the Death Penalty in Maryland*, 5 U. MD. L. J. OF RACE, RELIGION, GENDER & CLASS 1, 4, 7–8 (2005); Moratorium Now!, State by State, <http://www.quixote.org/ej/> (last visited Aug. 23, 2007). Governor Parris N. Glendening, who commissioned the study, froze executions while the study was underway. Moratorium Now!, *supra*. The incoming governor, Robert L. Ehrlich, Jr., lifted the moratorium upon taking office. *Id.*

59. AMNESTY INT'L, *supra* note 31.

60. *Id.* According to Millemann and Christopher, as of October 2004, seven men populated Maryland's death row. Millemann & Christopher, *supra* note 58, at 3. All seven, five of whom were black, had been convicted of killing whites. *Id.*

61. *See id.*

62. *See* U.S. CENSUS BUREAU, STATE AND COUNTY QUICKFACTS, MARYLAND (2006), <http://quickfacts.census.gov/qfd/states/24000.html> (data from 2005).

63. Michael L. Radelet, *Recent Developments in the Death Penalty in Florida* (2002), <http://www.fadp.org/pad/apage4.html#race>. Radelet's document consists of information from his oral presentation at the "Life over Death" capital litigators training conference, which was held by the Florida Public Defender Association in Orlando, Florida, on September 7, 2001. *Id.* The data presented was up to date as of December 21, 2001. *Id.*

64. U.S. CENSUS BUREAU, STATE AND COUNTY QUICKFACTS, FLORIDA (2006), <http://quickfacts.census.gov/qfd/states/12000.html>. The size of Florida's death row population is in the top three with California and Texas. DEATH PENALTY INFO. CTR., *supra* note 28.

65. Florida Dep't of Corrections, Execution List: 1976–Present, <http://www.dc.state.fl.us/oth/deathrow/execlist.html> (last visited on Aug. 23, 2007).

66. Florida Dep't of Corrections, Death Row Roster, <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp> (last visited on Aug. 23, 2007).

victim.<sup>67</sup>

Both the national and state data demonstrate, at the very minimum, a substantial risk that race will impact a capital defendant's likelihood of receiving the death penalty, particularly if the defendant is a minority and the victim is white. The Supreme Court has stated that such discrimination, as in other legal contexts, violates both the Eighth and Fourteenth Amendments. However, the Court is unlikely to remedy this flaw so long as the public continues to support the punishment.

## II. "THE ELEPHANT IN THE ROOM": THE SUPREME COURT'S JURISPRUDENCE CONDONING RACISM IN THE DEATH PENALTY AND REJECTING THE EIGHTH AMENDMENT VALUE OF HUMAN DIGNITY

The Supreme Court's death penalty jurisprudence demonstrates that the Court is unwilling to tackle systemic racism in capital punishment other than racial bias in jury selection. By dodging the issue of systemic racism, the Court rejects its own mandate that human dignity should underlie punishment.

In Part II.A, I describe the Court's persistent failure to address racial discrimination in capital punishment, beginning in the early 1970s and culminating with *McCleskey*, the death knell for the Court's role in remedying systemic racial discrimination in capital punishment. In *McCleskey*, the Court confronted the issue but erected a virtually insurmountable barrier to such claims, holding that only proof of purposeful discrimination against a particular capital defendant would suffice to establish racial bias in capital sentencing.

The second section, Part II.B, illustrates why the Court's failure to handle racial discrimination in capital punishment is problematic under the United States Constitution. Because human dignity is a constitutional value under the Eighth and Fourteenth Amendments, a death sentence influenced by race violates a defendant's constitutional rights under either constitutional provision.

### A. *The Supreme Court's Failure to Tackle Racial Discrimination in Capital Punishment*

The Supreme Court's death penalty jurisprudence<sup>68</sup> demonstrates that the Court has repeatedly dodged the issue of systemic racial discrimination, despite capital defendants often raising discrimination claims under the Eighth and Fourteenth Amendments.<sup>69</sup> While acknowledging the risk that discrepancies in

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67. Radelet, *supra* note 63, at tbl.4.

68. For purposes of this Article, I describe the 'recent' history starting around the time of *Furman*.

69. Baldus and Woodworth described this as "tolerance" by the Court and, consequently, society. Baldus & Woodworth, *supra* note 10, at 1454 ("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."); *see also* Bright, *supra* note 16, at 217, 237 (using the word "tolerance" in the same context). In particular, Baldus

death sentencing may “correlate with race,”<sup>70</sup> the Court has acted to remedy discrimination in capital punishment only with regard to jury selection and composition.<sup>71</sup> The procedural mechanism the Court once emphasized as a means of reducing the risk of discrimination—proportionality review<sup>72</sup>—has largely failed.

1. *The Supreme Court’s Pre-McCleskey Blindness to Racial Discrimination in Capital Punishment*

In 1970, the Court punted on the issue of racial discrimination in *Maxwell v. Bishop*,<sup>73</sup> a case in which an Arkansas trial court sentenced an African-American defendant to death for raping a Caucasian woman.<sup>74</sup> Maxwell challenged his death sentence under the Equal Protection Clause based on the statistical disparity in the number of African-Americans sentenced to death for rape in Arkansas and elsewhere in the South.<sup>75</sup> The Eighth Circuit rejected the challenge.<sup>76</sup> The Supreme Court vacated the death sentence and remanded the case on a jury-qualification issue without addressing Maxwell’s equal protection claim.<sup>77</sup>

Two years later, in *Furman*, the Court found several capital punishment sentences unconstitutional,<sup>78</sup> effectively ending the death penalty in the United States. *Furman* involved three African-American defendants sentenced to death under either Georgia or Texas law, two for rape and one for murder.<sup>79</sup> The state statutes gave the jury discretion to choose either death or a lesser punishment.<sup>80</sup> The five concurring Justices, in separate opinions, reasoned that the state statutes—which allowed for unguided jury decision-making in capital sentencing—rendered the punishment arbitrary and capricious in violation of the Eighth Amendment.<sup>81</sup>

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and Woodworth argued that the Court’s *McCleskey* decision “significantly legitimated tolerance for race discrimination.” Baldus & Woodworth, *supra* note 10, at 1438.

70. *McCleskey v. Kemp*, 481 U.S. 279, 313 (1987).

71. *See* Batson v. Kentucky, 476 U.S. 79, 99 (1986). Leigh Bienen and others have described the Supreme Court’s withdrawal from the death penalty arena. *See, e.g.*, 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, 146-51 (1996).

72. *Gregg v. Georgia*, 428 U.S. 153, 204-06 (1976).

73. 398 U.S. 262 (1970).

74. *Maxwell v. Bishop*, 398 F.2d 138, 141 (8th Cir. 1968), *rev’d on other grounds*, 398 U.S. 262 (1970).

75. Baldus & Woodworth, *supra* note 10, at 1438.

76. *Maxwell*, 398 F.2d at 147.

77. *Maxwell*, 398 U.S. at 264-67.

78. 408 U.S. 238, 239-40 (1972) (per curiam). Justices Powell, Burger, Blackmun, and Rehnquist dissented. *Id.* at 240.

79. Two defendants were convicted of rape (one in Texas and one in Georgia), and one was convicted of murder (in Georgia). *Id.* at 252-53 (Douglas, J., concurring).

80. *Id.* at 240 (per curiam).

81. *Id.* at 309-10 (Stewart, J., concurring); *id.* at 313-14 (White, J., concurring); *id.* at 291-

Justice Stewart described the sentences as cruel and unusual “in the same way that being struck by lightning is cruel and unusual.”<sup>82</sup> He referred to the jury’s decisions to impose death on these petitioners as “capricious, wanton, and freakish,” thus violating the Eighth and Fourteenth Amendments.<sup>83</sup> Justice Stewart acknowledged the potential for racism: “My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.”<sup>84</sup> Nevertheless, because the defendants had not “proven” the race claim, Justice Stewart relied on the “wanton and freakish” nature of the punishment to strike down the statutes.<sup>85</sup>

Only the concurrences by Justices Douglas and Marshall went further to directly address the defendants’ race discrimination claims. Justice Douglas called it “incontestable” that the death penalty is cruel and unusual if it discriminates against a defendant “by reason of his race, religion, wealth, social position, or class . . . .”<sup>86</sup> Justice Marshall, citing statistics evidencing racial discrimination,<sup>87</sup> argued that:

capital punishment is imposed discriminatorily against certain identifiable classes of people . . . . “[I]t is usually the poor, the illiterate, the underprivileged, the member of the minority group—the man who, because he is without means, and is defended by a court-appointed attorney—who becomes society’s sacrificial lamb . . . .”<sup>88</sup>

Professor Charles J. Ogletree posits that the Court’s failure to directly address discrimination in *Furman* “started the Court down a path of analyzing the nature of punishment without regard to race.”<sup>89</sup> Ogletree refers to race as the “elephant in the room” in the Supreme Court’s capital punishment jurisprudence.<sup>90</sup>

Four years after *Furman*, the Court approved Georgia’s amended death penalty statute and revived the death penalty in *Gregg v. Georgia*.<sup>91</sup> In *Gregg*,

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95 (Brennan, J., concurring); *id.* at 248–50 (Douglas, J., concurring); *id.* at 362–69 (Marshall, J., concurring).

82. *Furman*, 408 U.S. at 309 (Stewart, J., concurring). Justice Stewart called selecting these petitioners out of all those convicted of rape and murder during the same time period “capricious.” *Id.*

83. *Id.* at 310.

84. *Id.*

85. *Id.*

86. *Id.* at 242 (Douglas, J., concurring).

87. *Id.* at 365–67 (Marshall, J., concurring).

88. *Id.* at 364 (quoting politician Michael DiSalle).

89. Ogletree, *supra* note 11, at 62.

90. *Id.* at 63.

91. 428 U.S. 153, 206–07 (1976) (plurality opinion). In her article, Hoefel argues that in *Furman*, the Court identified a substantive right against arbitrarily imposing death. Hoefel, *supra* note 10, at 773. Four years later, in *Gregg*, the Court “stepped back by declaring that *Furman* requires procedures that only reduce a substantial risk of arbitrariness.” *Id.* She proposes post-trial interviews of jurors as the most reliable method to determine arbitrariness. *Id.*

the Court decided the *mechanics* of Georgia's statute satisfied *Furman*:

[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. . . . [T]hese concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.<sup>92</sup>

The Court sanctioned the model of state statutes with a bifurcated sentencing structure in which the jury first decides guilt or innocence, and then, at a separate hearing, the judge or jury hears additional evidence "in extenuation, mitigation, and aggravation of punishment."<sup>93</sup> Under the amended Georgia law, the jury would have to find, beyond a reasonable doubt, one of ten statutory aggravating circumstances to impose the death penalty.<sup>94</sup> In *Gregg*, issues of prejudice and race discrimination in capital sentencing were mostly absent from the Court's analysis.<sup>95</sup>

Justice Stewart, writing for the Court, hinted at the possibility of prejudice in capital sentencing in the last paragraphs of his opinion when describing the state supreme court's appellate review procedure under the amended Georgia law.<sup>96</sup> The Georgia Supreme Court, under the new procedure, would review each capital sentence "to determine whether it was imposed under the influence of passion, prejudice, or any other arbitrary factor . . . ."<sup>97</sup> He referred to this appellate review as the safeguard that would ensure that capital punishment "will not be imposed on a capriciously selected group of convicted defendants."<sup>98</sup>

The *Gregg* opinion set the tone for the Supreme Court's future decisions in two important ways. First, the Court focused on mechanics,<sup>99</sup> neglecting in

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92. See *Gregg*, 428 U.S. at 195.

93. *Id.* at 163.

94. *Id.* at 164–66.

95. The petitioner in *Gregg* challenged the Georgia statute on the grounds that it did not eliminate the possibility of arbitrariness and caprice in sentencing. *Id.* at 162. Justice Stewart addressed this objection at the end of the Court's opinion when he described proportionality review as the "check" against arbitrariness and caprice in death sentencing. *Id.* at 204–06.

96. *Id.* at 204. As one author states, "the issue of proportionality always had race lurking in the background." Bienen, *supra* note 71, at 156. Bienen's article contains a comprehensive analysis of state efforts at conducting proportionality review, including the experiences of New Jersey, Connecticut, and Nebraska in implementing and conducting such review. See *id.* at 177–212.

97. *Gregg*, 428 U.S. at 204.

98. *Id.* In his concurring opinion, Justice White highlighted the importance of this appellate review, noting that the state supreme court would complete a questionnaire, which included a question regarding whether passion, prejudice, or any other arbitrary factor influenced the sentence. *Id.* at 211 (White, J., concurring).

99. The Court's shift in emphasis brings to mind the oft-quoted language of Justice

its analysis the constitutional value underlying the Eighth Amendment: preserving human dignity.<sup>100</sup> Second, the Court demonstrated its inclination to dodge the issue of discrimination in capital punishment, evoking “[c]onsiderations of federalism, as well as respect for the ability of the legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty.”<sup>101</sup> Ten years later, in *McCleskey*, the Court reiterated that a defendant’s claim of racial discrimination in capital punishment was best suited for the legislature: “It is not the responsibility—or the right—of this Court to determine the appropriate punishment for particular crimes.”<sup>102</sup>

## 2. *Proportionality Review: The Court’s Short-Lived Safeguard Against Racial Bias in Capital Punishment*

The *Gregg* Court’s safeguard against the risk of a death sentence imposed “under the influence of passion, prejudice, or any other arbitrary factor” was proportionality review.<sup>103</sup> Justice Stewart described this feature as a “check against the random or arbitrary imposition of the death penalty,”<sup>104</sup> noting the Georgia court’s success at using this process.<sup>105</sup> The Court later defined proportionality review as the reviewing court’s decision whether a penalty is unacceptable in a given case because it is disproportionate to the penalty imposed on others convicted of the same crime.<sup>106</sup>

Shortly after *Gregg*, however, the Court retracted the need for courts to provide this purported safeguard against racial discrimination in capital sentencing. In *Pulley v. Harris*,<sup>107</sup> the Court held that the Eighth Amendment did not require such review.<sup>108</sup> Justice White, writing for the Court, stated that

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Blackmun, who after wrestling with capital punishment cases during his tenure on the Court, described himself as tired of “finkering with the machinery of death.” *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

100. I describe this history and tradition in Part II.B of this Article.

101. *Gregg*, 428 U.S. at 187–88.

102. 481 U.S. 279, 319 (1987).

103. *Gregg*, 428 U.S. at 204. Bienen’s comprehensive analysis of proportionality review describes how states with capital statutes have implemented (or not) a mechanism for such review. Bienen, *supra* note 71, at 130–38; *see also* Barry Latzer, *The Failure of Comparative Proportionality Review of Capital Cases (with Lessons from New Jersey)*, 64 ALB. L. REV. 1161 (2001); Evan J. Mandery, *In Defense of Specific Proportionality Review*, 65 ALB. L. REV. 883 (2002). In *McCleskey*, the Court identified other safeguards designed to eradicate racial discrimination from sentencing, such as prohibiting a prosecutor from making racially biased arguments or from exercising peremptory challenges based on race. *McCleskey*, 481 U.S. at 309–11.

104. *Gregg*, 428 U.S. at 206.

105. Justice Stewart provided examples illustrating that “the Supreme Court of Georgia has taken its review responsibilities seriously.” *Id.* at 205.

106. *Pulley v. Harris*, 465 U.S. 37, 43 (1984).

107. 465 U.S. 37 (1984).

108. *Id.* at 50–51. In *Pulley*, the Court reviewed the California death penalty statute under

proportionality review was not necessary, noting that in *Jurek v. Texas*,<sup>109</sup> the Court approved a Texas statute that failed to contain a provision for proportionality review.<sup>110</sup> According to the Court, “We take statutes as we find them.”<sup>111</sup>

State legislatures responded to *Pulley* by reducing the scope and depth of their review.<sup>112</sup> Eighteen of the thirty-eight death penalty states<sup>113</sup> presently have no statutory mechanism for proportionality review.<sup>114</sup> State review practices vary enormously, with respect to both the methods employed and the universe of comparison cases.<sup>115</sup> Of the states with proportionality review,

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which Harris had been sentenced to death. The Court distinguished traditional proportionality review (evaluating, in the abstract, the appropriateness of a sentence for a crime) from comparative proportionality review (deciding whether a punishment is unacceptable because it is disproportionate to the punishment imposed on others convicted of the same offense). *Id.* at 43. The Court determined comparative proportionality review is not constitutionally required. *Id.* at 44. In *Turner v. California*, 498 U.S. 1053 (1991), Justice Marshall dissented from the Court’s denial of certiorari in a case in which the petitioner, who was convicted and sentenced to death, not only requested proportionality review but provided a survey of California appellate decisions purportedly showing that many offenders had received lesser punishments for similar crimes. *Id.* at 1053–55. Yet, the California Supreme Court refused to review the evidence, claiming it was not constitutionally required to do so. *Id.* at 1054. The United States Supreme Court denied certiorari. *Id.* at 1052–53. Justice Marshall described as “unacceptable” “[t]he singling out of particular defendants for the death penalty when their crimes are no more aggravated than those committed by numerous other defendants given lesser sentences . . . .” *Id.* at 1054.

109. 428 U.S. 262 (1976).

110. *Pulley*, 465 U.S. at 48–49. The Court held the Texas law complied with *Furman* requirements despite the absence of any provision for proportionality review. *Jurek*, 428 U.S. at 276–77.

111. *Id.* at 45. In *Pulley*, the Court conceded that capital sentencing schemes may at times produce aberrational results. *Id.* at 54. Yet, because states had addressed the systemic defects described in *Furman*, and a “perfect procedure” was unrealistic, the Court accepted California’s statute despite the absence of proportionality review. *Id.*

112. Bienen, *supra* note 71, at 133; Penny J. White, *Can Lightning Strike Twice? Obligations of State Courts After Pulley v. Harris*, 70 U. COLO. L. REV. 813, 847–48 (1999) (describing changes in states’ comparative review procedures following *Pulley*).

113. Currently, thirty-eight states, the federal government, and the United States military maintain death penalty laws. DEATH PENALTY INFO. CTR., *supra* note 28.

114. The eighteen states without such review are Arizona, Arkansas, California, Colorado, Connecticut, Idaho, Illinois, Indiana, Kansas, Maryland, Nevada, Oklahoma, Oregon, Pennsylvania, Texas, Utah, Virginia, and Wyoming. Anna-Liisa Joseloff, Note, *Connecticut’s Capital Punishment Scheme: Still Tinkering with the Machinery of Death*, 23 QUINNIPIAC L. REV. 889, 926 n.215 (2004) (citing Latzer, *supra* note 103, at 1161 n.2). Florida’s proportionality review is a matter of state constitutional law. *Id.* The death penalty statutes of nineteen states require such review: Alabama, Delaware, Georgia, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, South Carolina, South Dakota, Tennessee, and Washington. *Id.* In *State v. Loftin*, 724 A.2d 129 (N.J. 1999), the New Jersey Supreme Court provided a comprehensive overview of state practices concerning proportionality review. *Id.* at 136–39. At the time the court decided *Loftin*, twenty states conducted proportionality review. *Id.* at 137.

115. *Loftin*, 724 A.2d at 136–38 (describing various methods of proportionality review). At the time the court decided *Loftin*, eleven state supreme courts had vacated death sentences as disproportionate. *Id.* at 138.



many engage in only a broad-brush review of capital cases, which has led commentators to ask if state supreme courts are interested in only “the appearance of justice.”<sup>116</sup>

In California, for example, the highest court tests proportionality of a capital sentence by considering whether the death sentence “shocks the conscience and offends fundamental notions of human dignity.”<sup>117</sup> If so, the court “must invalidate the sentence as unconstitutional.”<sup>118</sup> The California high court compares a death sentence not to sentences in similar cases, but rather to the case itself, specifically “the circumstances of the offense, including its motive, the extent of the defendant’s involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant’s acts.”<sup>119</sup>

For example, in *People v. Wilson*,<sup>120</sup> the California Supreme Court responded to the defendant’s claim that his death sentence was capricious, arbitrary, discriminatory, and disproportionate by engaging in this “intracase” proportionality review.<sup>121</sup> Specifically, after reviewing the facts of the robbery and murder for which the jury sentenced Wilson to death, the court concluded that the punishment was not “disproportionate to his individual culpability and moral guilt.”<sup>122</sup> In other words, the court reviewed Wilson’s sentence to determine if the sentence was proportional to his “personal culpability.”<sup>123</sup> Because the review was “intracase,” the court stated that “the alleged greater culpability of another person is irrelevant.”<sup>124</sup>

Commentators have challenged both traditional proportionality review—in which the court examines the “intrinsic deathworthiness of a category of crimes”<sup>125</sup>—and comparative proportionality review—in which the court examines the death sentence against penalties in other factually similar

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116. See, e.g., Bienen, *supra* note 71, at 161. The nature of the review differs enormously. In Virginia, for example, the Supreme Court of Virginia does not compare death cases to cases in which a defendant is sentenced to life. See Latzer, *supra* note 103, at 1195–96. According to Latzer’s comprehensive study, only New Jersey, Tennessee, and Washington “continue to provide detailed factual comparisons of cases.” *Id.*

117. *People v. Steele*, 47 P.3d 225, 251 (Cal. 2002) (citing *People v. Hines*, 938 P.2d 388, 443–44 (Cal. 1997)).

118. *Steele*, 47 P.3d at 251.

119. *Id.* at 250.

120. 114 P.3d 758 (Cal. 2005).

121. *Id.* at 794. The court rejected the defendant’s argument that review should include other capital appeals. *Id.* The court agreed to review the facts of the defendant’s case against only the facts and circumstances surrounding that case. *Id.*

122. *Id.*

123. See *Steele*, 47 P.3d at 251. In reading these opinions, it is difficult to determine the gauge for the court’s comparison—one is left wondering with what the court is comparing petitioner’s case.

124. *Wilson*, 114 P.3d at 794.

125. Latzer, *supra* note 103, at 1166–67.

cases<sup>126</sup>—as inefficient, too expensive, and ineffective.<sup>127</sup> Yet, most agree that this review, if done properly, can provide a check against an aberrant death sentence in which an illegitimate factor, like race, impacts the decision.<sup>128</sup>

During the twelve years after *Furman*, the Court appeared to wrestle with whether to take steps to confront racial discrimination in capital punishment. In *Gregg*, the Court emphasized appellate review as a procedural mechanism for combating the likelihood of prejudice affecting an outcome.<sup>129</sup> Though not a substantial step, Justice Stewart at least acknowledged the risk of prejudice and states' need to statutorily address the risk.<sup>130</sup> Yet, a year later, in *Pulley*, the Court rejected the need for states to provide proportionality review.<sup>131</sup> The Court's wrestling ended with *McCleskey*, decided in 1987, in which the Court effectively barred a petitioner's ability to prove systemic racism in capital punishment.

### 3. *McCleskey: The Death Knell for the Supreme Court's Role in Remediating Systemic Racial Discrimination in Capital Punishment*

In *McCleskey*, the Court bluntly foreclosed the possibility of a remedy against systemic racial discrimination in capital sentencing.<sup>132</sup> The petitioner, an African-American man convicted of killing a white police officer during an armed robbery, argued that his death sentence violated the Eighth and Fourteenth Amendments.<sup>133</sup> Specifically, *McCleskey* proffered social science data—statistics prepared by Professors Baldus, Charles Pulaski, and Woodworth—as evidence of racial disparities in Georgia's imposition of the death penalty.<sup>134</sup> The statistics demonstrated two forms of racial

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126. *Id.*

127. *Id.* at 1164.

128. Radelet and Pierce studied 5300 cases in Illinois involving first-degree murder convictions as part of then-Governor George Ryan's Commission on Capital Punishment. Radelet & Pierce, *supra* note 11, at 117. In light of their findings, Radelet and Pierce recommended proportionality review, specifying that the Illinois Supreme Court would compare "cases in which death penalty was imposed and other death-eligible cases with equal levels of aggravation and mitigation in which the defendant was sentenced to a prison term." *Id.* at 144; *see also* Thomas P. Sullivan, *Preventing Wrongful Convictions—A Current Report from Illinois*, 52 *DRAKE L. REV.* 605, 615–16 (2004) (describing the type of proportionality review recommended by the Commission). Many commentators have written articles and notes on particular states' versions of proportionality review. *See, e.g.*, Joseloff, *supra* note 114; Cynthia M. Bruce, *Proportionality Review: Still Inadequate, but Still Necessary*, 14 *CAP. DEF. J.* 265 (2002); Matthew R. Wilmot, Note, *Sparing Gary Ridgway: The Demise of the Death Penalty in Washington State?*, 41 *WILLAMETTE L. REV.* 435 (2005); Clark Calhoun, Note, *Reviewing the Georgia Supreme Court's Efforts at Proportionality Review*, 39 *GA. L. REV.* 631 (2005).

129. 428 U.S. 153, 204 (1976).

130. *See id.* at 204.

131. 465 U.S. 37, 50–51 (1984).

132. *See* 481 U.S. 279, 312–13, 319 (1987).

133. *Id.* at 283.

134. *Id.* at 286.

discrimination: (1) Black defendants charged with killing white victims were 4.3 times more likely to receive death than black defendants charged with killing black victims, and (2) black defendants generally were 1.1 times more likely to receive the death penalty than other defendants.<sup>135</sup> The Court accepted the validity of the statistics but rejected the argument that such evidence rendered the petitioner's punishment unconstitutional.<sup>136</sup>

In considering McCleskey's equal protection claim, the Court summarily rejected the relevance of the Baldus evidence, instead requiring evidence of purposeful discrimination "specific to [McCleskey's] own case."<sup>137</sup> The Court conceded in addressing McCleskey's Eighth Amendment claim that the Baldus evidence may, indeed, demonstrate a risk of racism in capital punishment: "There is, of course, some risk of racial prejudice influencing a jury's decision in a criminal case."<sup>138</sup> Yet, the Court declined to confront this risk, failing to find it "constitutionally significant."<sup>139</sup>

Many have criticized the *McCleskey* Court for its unwillingness to remedy systemic racial discrimination in capital punishment, because the standard outlined—requiring proof of purposeful discrimination by a prosecutor, jury, or judge—is virtually unattainable for a capital defendant.<sup>140</sup>

The Court's tolerance for systemic racial bias in sentencing has allowed lower courts to follow suit and give inadequate attention to racial discrimination claims in capital proceedings.<sup>141</sup> Even in cases involving overt racial discrimination, the *McCleskey* standard has prevented relief.<sup>142</sup> In a 1993 Georgia death penalty case, defense counsel and the judge repeatedly referred to the defendant, Wilburn Dobbs, accused of killing a white man, as "colored" and "colored boy."<sup>143</sup> Dobbs was sentenced to death for murder in a three-day trial.<sup>144</sup> Two jurors admitted to using the racial slur "nigger," and defense counsel stated he used the term jokingly.<sup>145</sup> The federal court acknowledged

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135. *Id.* at 287.

136. *Id.* at 312 ("At most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system.").

137. *Id.* at 292–93. The Court then briefly explained why it accepted statistics as relevant evidence of discrimination in other areas of law. *Id.* at 293–94.

138. *Id.* at 308.

139. *See id.* at 313.

140. *See, e.g.,* Bright, *supra* note 16, at 236; Ogletree, *supra* note 11, at 63. Conceiving of scenarios in which a capital defendant could prove purposeful racial discrimination against him is difficult. The defendant would have to rely on a 'smoking gun' note or memo in which a prosecutor, judge, or juror explicitly described his or her racial bias against a particular capital defendant. The problem, of course, is that such 'smoking guns' are rare.

141. Bright, *supra* note 16, at 216–20.

142. *Id.*

143. *Id.* at 217 (describing *Dobbs v. Zant*, 720 F. Supp. 1566 (N.D. Ga. 1989), *rev'd on other grounds*, 506 U.S. 357 (1993)).

144. Bright, *supra* note 16, at 217.

145. *Dobbs*, 720 F. Supp. at 1577.

the prejudice of judge, defense lawyer, prosecutor, and jury, yet held that the prejudice did not require that the sentence be set aside.<sup>146</sup> The Court of Appeals agreed.<sup>147</sup> After the Supreme Court remanded the case, the district court held that Dobbs' rights were not violated despite the racial bias against him.<sup>148</sup>

Similarly, in *Green*, the Texas death penalty case mentioned in the introduction, the Texas Court of Criminal Appeals summarily rejected petitioner's claim that the trial court erred in admitting into evidence at the punishment phase a letter petitioner wrote in jail in which he stated, "I don't care if a nigga with me or not 'I forever be a trigga happy nigga.'"<sup>149</sup> The court also rejected petitioner's argument that his punishment was disproportionate in view of the evidence that one of his three accomplices, the only Caucasian, was not charged in connection with the murder.<sup>150</sup> The death sentence was affirmed because the court was unable to find "exceptionally clear proof" of intent to discriminate.<sup>151</sup>

My proposed model statute circumvents the *McCleskey* roadblock—a roadblock the Supreme Court created by failing to remedy the systemic racial discrimination demonstrated in that case, and the very same systemic racial discrimination that persists today. In view of *McCleskey*, the proposed statute does not rely on statistics of race in administering capital punishment to evidence racial discrimination. Rather, each case is examined independently, with other like cases (those cases having similar crime and defendant characteristics) serving as benchmarks. The statute would identify a "constitutionally significant"<sup>152</sup> risk of racial discrimination in sentencing by revealing that if not for the influence of racism, a disparate outcome in sentencing decisions would not exist.

#### 4. *Jury Selection: The Court's Limited Willingness to Address Racial Discrimination in Capital Punishment*

The Court has directly confronted racial discrimination in capital punishment only with regard to jury selection. In 1986, the Court decided *Batson v. Kentucky*,<sup>153</sup> which for many was a victory in the fight against racism.<sup>154</sup> In *Batson*, the Court held that the Equal Protection Clause prohibited prosecutors from peremptorily striking potential jurors because of race.<sup>155</sup> The

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146. *Id.* at 1578–79.

147. *Dobbs v. Zant*, 963 F.2d 1403, 1408 (11th Cir. 1991).

148. *Bright*, *supra* note 16, at 218.

149. 934 S.W.2d 92, 103 (Tex. Crim. App. 1996).

150. *Id.*

151. *Id.* at 102–03.

152. *See McCleskey v. Kemp*, 481 U.S. 279, 313 (1987).

153. 476 U.S. 79 (1986).

154. *Ogletree*, *supra* note 42, at 24.

155. *Batson*, 476 U.S. at 86.

Court further described the process by which a defendant shows such discrimination: The defendant has the evidentiary burden of establishing a prima facie case of purposeful race discrimination in jury selection;<sup>156</sup> then the burden shifts to the prosecution to rebut the prima facie case.<sup>157</sup>

In his concurring opinion in *Batson*, Justice Marshall added that he would eliminate peremptory challenges altogether.<sup>158</sup> According to Justice Marshall, “[m]erely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge.”<sup>159</sup> His opinion points to problems with the Court’s proposed remedy, identifying ways in which discrimination would still continue.<sup>160</sup>

For example, in *Turner v. Murray*,<sup>161</sup> the Court reversed and remanded a case in which an African-American defendant was accused of shooting the white owner of a jewelry store during a robbery.<sup>162</sup> The *Turner* Court held that such a defendant is entitled to have prospective jurors informed of the victim’s race and questioned about racial bias.<sup>163</sup> The Court noted that the applicable Virginia death penalty statute gave the jury wide discretion whether or not to impose capital punishment.<sup>164</sup> Accordingly, the statute allowed for “undetected” racial discrimination:

More subtle, less consciously held racial attitudes could also influence a juror’s decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner’s crime, might incline a juror to favor the death penalty.<sup>165</sup>

During the 2006 term, Justice Breyer recalled Justice Marshall’s warnings about the inability to cure the potential abuses of peremptory challenges. In *Rice v. Collins*,<sup>166</sup> petitioner Collins raised a *Batson* challenge concerning the prosecutor’s peremptory strike of an African-American potential juror.<sup>167</sup> Collins was convicted in the Superior Court of California for the County of Los Angeles of one count of possessing cocaine with intent to distribute.<sup>168</sup> The

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156. *Id.* at 97. The Court held that in determining whether a defendant had satisfied his burden, “the trial court should consider all relevant circumstances. For example, a ‘pattern’ of strikes against black jurors included in the particular venire might give rise to an inference of discrimination.” *Id.* at 96–97.

157. *Id.* at 97.

158. *Id.* at 107 (Marshall, J., concurring).

159. *Id.* at 105.

160. *Id.*

161. 476 U.S. 28 (1986).

162. *Id.* at 29–30, 38.

163. *Id.* at 36–37.

164. *Id.* at 34.

165. *Id.* at 35.

166. 546 U.S. 333 (2006).

167. *Id.* at 336.

168. *Id.*

prosecutor claimed she struck the potential juror for several reasons: She rolled her eyes in response to a question from the court, she was single, and she lacked ties to the community.<sup>169</sup>

The trial court rejected the *Batson* challenge, giving the prosecutor “the benefit of the doubt” regarding the juror.<sup>170</sup> Collins sought collateral relief in federal court, where a divided panel of the Ninth Circuit Court of Appeals reversed and remanded.<sup>171</sup> Under the governing Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which required that a federal habeas court affirm the trial court’s *Batson* determination unless finding it “an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,”<sup>172</sup> the Ninth Circuit held the prosecutor’s stated reasons for striking the potential juror were unreasonable.<sup>173</sup> The Supreme Court reversed the Ninth Circuit on the ground that the appellate court had overstepped its bounds because the trial court’s credibility determination was not unreasonable.<sup>174</sup>

In his dissenting opinion, Justice Breyer highlighted the insidious, subtle nature of racial stereotyping concerning jury selection:

[S]ometimes, no one, not even the lawyer herself, can be certain whether a decision to exercise a peremptory challenge rests upon an impermissible racial, religious, gender-based, or ethnic stereotype. . . . How can trial judges second-guess an instinctive judgment the underlying basis for which may be a form of stereotyping invisible even to the prosecutor?<sup>175</sup>

The Court also addressed race issues in jury selection in *Miller-El v. Dretke*,<sup>176</sup> in which the Court reviewed the petitioner’s claim that prosecutors in his capital murder trial made peremptory strikes of potential jurors based on race.<sup>177</sup> A Texas trial court determined that the prosecutors’ race-neutral explanations for striking black venire members were true.<sup>178</sup> The Court, in an opinion by Justice Souter, disagreed, starting its analysis by reviewing the

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169. *Id.*

170. *Id.*

171. *Id.* at 337–38.

172. *Id.* at 338 (quoting 28 U.S.C. § 2254(d)(2) (2006)).

173. *Rice*, 546 U.S. at 337.

174. *Id.* at 337–38.

175. *Id.* at 343 (Breyer, J., concurring).

176. 545 U.S. 231 (2005). The convoluted procedural background began with petitioner’s objection to prosecutors striking ten qualified black venire members. *Id.* at 236. The trial court heard evidence of the practice of excluding black members from criminal juries in Dallas County District Attorney’s office but found no systematic exclusion. *Id.* While petitioner’s appeal was pending, the Court decided *Batson*. The Texas Court of Criminal Appeals remanded petitioner’s case to trial court to review the argument in light of *Batson*. *Id.* The trial court found no evidence of prosecutors striking black jurors because of race. *Id.* at 236–37.

177. *Id.* at 235.

178. *Id.* at 236.

prosecutors' use of peremptories.<sup>179</sup> Of the 108-person venire panel for the petitioner's trial, twenty of whom were black, only one black person served on the jury.<sup>180</sup> The prosecution peremptorily struck ten of the black venire members.<sup>181</sup> The Court compared, in detail, the black panelists to the white panelists who served, describing their questionnaire answers and responses during questioning.<sup>182</sup>

The Court described the "broader patterns of [discriminatory] practice during the jury selection,"<sup>183</sup> including the "jury shuffle,"<sup>184</sup> and contrasting voir dire questions for black and white panel members.<sup>185</sup> The Court then reviewed the history of discrimination in the Dallas County District Attorney's office:

If anything more is needed for an undeniable explanation of what is going on, history supplies it. The prosecutors took their cues from a 20-year old manual of tips on jury selection, as shown by their notes of the race of each potential juror. By the time a jury was chosen, the State had peremptorily challenged 12% of qualified nonblack panel members, but eliminated 91% of the black ones.<sup>186</sup>

The Court therefore concluded, "[I]t blinks reality to deny that the State struck [potential jurors] Fields and Warren, included in that 91%, because they were black."<sup>187</sup> The Court consequently held that Miller-El was entitled to prevail on his federal habeas corpus claim.<sup>188</sup>

During the same term in which the Court decided *Miller-El*, the Court in *Johnson v. California*<sup>189</sup> struck down a California law that required a defendant making a *Batson* challenge to show that a prosecutor's motives were "more likely than not" discriminatory to establish a prima face case.<sup>190</sup> Justice Stevens, writing for the majority, rejected this high burden of persuasion, given the already difficult burden placed on petitioners making *Batson* challenges.<sup>191</sup>

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179. *Id.* at 240.

180. *Id.*

181. *Id.* at 240–41.

182. *Id.* at 243–52.

183. *Id.* at 253.

184. In a Texas criminal case, "either side may literally reshuffle the cards bearing panel members' names, thus rearranging the order in which members of a venire panel are seated and reached for questioning." *Id.* at 253.

185. *Id.* at 253–66.

186. *Id.* at 266.

187. *Id.*

188. *Id.* The Fifth Circuit Court of Appeals had granted the petitioner a certificate of appealability but rejected his claim on the merits. *Id.* at 237. Based on its findings, the Supreme Court reversed and remanded the Fifth Circuit's judgment. *Id.* at 266.

189. 545 U.S. 162 (2005).

190. *Id.* at 170 (stating they "did not intend the first step to be so onerous that a defendant would have to persuade the judge—on the basis of all the facts, some of what are impossible for the defendant to know with certainty—that the challenge was more likely than not the product of purposeful discrimination").

191. *Id.*

In sum, the Court has tolerated racial discrimination in capital sentencing, except in some cases concerning jury selection. This tolerance of systemic racial discrimination in capital punishment flies in the face of the notion that preserving human dignity underlies the prohibition against cruel and unusual punishment. Thus, the Court has rejected both race-based equal protection challenges to capital sentencing and its own mandate that a death sentence influenced by racial bias demeans and degrades a capital defendant in violation of his rights under the Eighth Amendment.

*B. A Death Sentence Influenced by Race Violates the Eighth Amendment Mandate to Preserve Human Dignity*

This Article's analysis of the Court's capital punishment jurisprudence is premised on two important notions articulated by the Supreme Court in the past but now neglected: First, under the Equal Protection Clause "even the vilest criminal remains a human being possessed of common human dignity,"<sup>192</sup> and second, human dignity is "the basic concept underlying the Eighth Amendment."<sup>193</sup> Human dignity means, at least, that all individuals are entitled to equal punishment for essentially equal crimes.<sup>194</sup> Accordingly, a death sentence influenced by racial discrimination should be unconstitutional under the Eighth Amendment as well as under the Equal Protection Clause.<sup>195</sup>

The Court's Eighth Amendment death penalty jurisprudence shows that the Court has neglected the concept of human dignity in its treatment of capital punishment.<sup>196</sup> The Court has recently relied primarily on evidence of a

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192. *Furman v. Georgia*, 408 U.S. 238, 273 (1972) (Brennan, J., concurring).

193. *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion).

194. Philosopher Adam Bedau described the Kantian view of human dignity as a series of attributes, the first of which is that "referring to a person's dignity is another way of referring to a person's worth." Hugo Adam Bedau, *The Eighth Amendment, Human Dignity, and the Death Penalty*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* 145, 153 (Michael J. Meyer & William A. Parent eds., 1992). According to Bedau, Kant went on to say that human beings share this worth equally. *Id.*

195. In his concurring opinion in *Furman*, Justice Stewart called race a "constitutionally impermissible" factor in capital sentencing. *Furman*, 408 U.S. at 310 (Stewart, J., concurring). In *McCleskey*, the Court acknowledged that sentencing decisions based on "purposeful" racial discrimination violate the Equal Protection Clause. 481 U.S. 279, 292 (1987). But as much as treating individuals alike or as possessing equal worth is paramount to protecting human dignity, the same value requires that the capital sentencing system treat each defendant as *unique*. In *Lockett v. Ohio*, 438 U.S. 586 (1978), the Court held, "The need for treating each defendant in a capital case with that degree of respect due to the uniqueness of the individual is far more important than in non-capital cases." *Id.* at 605. Thus, this Article acknowledges and seeks to alleviate the tension between treating individuals as distinct in terms of mitigating and aggravating circumstances, and as alike, in that racial or ethnic characteristics should not impact decision-making.

196. Ogletree, *supra* note 42, at 32. Ogletree describes "the burden" the Supreme Court's handling of race discrimination in capital sentencing places on African-Americans. *Id.* First, discrimination in sentencing "puts black defendants in the position of having their actions judged and punished more harshly than similarly situated white defendants." *Id.* Second, discriminatory



national consensus as the constitutional test, assessing human dignity and evolving standards of decency merely as part of the national consensus issue.<sup>197</sup>

The Court's language about human dignity, that it is "the basic concept underlying the Eighth Amendment," often repeated in Supreme Court opinions,<sup>198</sup> comes from the plurality opinion in *Trop v. Dulles*.<sup>199</sup> In *Trop*, the petitioner, born in America, had his citizenship forfeited after being convicted by a court-martial for wartime desertion.<sup>200</sup> In holding the forfeiture unconstitutional, the Court focused on the "demoralizing" nature of the punishment:

There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. . . . In short, the expatriate has lost the right to have rights.<sup>201</sup>

In non-capital criminal cases, the Court has adhered to the principle that human dignity underlies the Eighth Amendment. In *Hope v. Pelzer*,<sup>202</sup> the Court struck down an Alabama prison's practice of handcuffing prisoners to hitching posts for disruptive conduct.<sup>203</sup> In holding the practice unconstitutional, the Court quoted *Trop* for the idea that the "basic concept" underlying the Eighth Amendment (and thus the constitutionality of punishment) is "nothing less than the dignity of man."<sup>204</sup> Justice Stevens described *Hope*'s suffering on the hitching post as "antithetical to human dignity—he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous."<sup>205</sup> According to the *Hope* Court, therefore, punishment must comport with human dignity.<sup>206</sup>

In the death penalty context, when the Court struck down capital

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sentencing degrades: "White lives are considered to be more valuable than black lives, because the killing of a white is treated as a more serious crime—a crime worthy of a more severe punishment—than the killing of a black." *Id.* Third, Ogletree describes how discriminatory sentencing "shows a systemic disregard for black communities." *Id.*

197. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976); *see also* *Roper v. Simmons*, 543 U.S. 551, 564–67 (2005); *Atkins v. Virginia*, 536 U.S. 304, 316–17 (2002).

198. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

199. 356 U.S. 86, 100 (1958).

200. *Id.* at 87–88.

201. *Id.* at 101–02.

202. 536 U.S. 730 (2002).

203. *Id.* at 738.

204. *Id.* (citing *Trop*, 356 U.S. at 100).

205. *Hope*, 536 U.S. at 745.

206. *Id.* at 738. Some may call this a moral or ethical standard. Regardless of what one calls the standard, the Court has repeatedly stated that this principle underlies the constitutionality of punishment. *See* Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 753–89 (2006).

punishment as arbitrary in *Furman*, only Justice Brennan relied on the constitutional value of human dignity.<sup>207</sup> Justice Brennan, like the *Hope* Court, started with the conclusion in *Trop* that “nothing less than the dignity of man” underlies the Eighth Amendment.<sup>208</sup> Punishments may be too severe to comport with human dignity<sup>209</sup> but also may flout human dignity because they are arbitrary:

In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the [Cruel and Unusual Punishment] Clause—that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others.<sup>210</sup>

Justice Brennan further explained that a state, in punishing its citizens, must treat them “with respect for their intrinsic worth as human beings.”<sup>211</sup>

In *Gregg*, the Court again mentioned human dignity but gave the value no meaning.<sup>212</sup> Justice Stewart, writing for the Court, defined “accord with ‘the dignity of man’”<sup>213</sup> to mean, “at least,”<sup>214</sup> that “the punishment not be ‘excessive.’”<sup>215</sup> The Court outlined a two-prong test for determining whether a punishment would be excessive.<sup>216</sup> First, the penalty “must not involve the unnecessary and wanton infliction of pain,”<sup>217</sup> and, additionally, the punishment “must not be grossly out of proportion to the severity of the crime.”<sup>218</sup> Thus, the *Gregg* Court essentially gutted the notion of human dignity as an independent constitutional value by equating it with the general prohibition against excessive punishment. In doing so, the Court negated the constitutional mandate that punishment not unnecessarily degrade or demean. The Court’s shift eviscerated human dignity as the constitutional value under which racial discrimination in capital punishment violates the Eighth Amendment.

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207. 408 U.S. 238, 270 (1972) (Brennan, J., concurring).

208. *Id.* at 270 (quoting *Trop*, 536 U.S. at 100).

209. *Furman*, 408 U.S. at 271 (citing *Weems v. United States*, 217 U.S. 349, 366, 372, 377 (1910), and *Trop*, 536 U.S. at 101–02).

210. *Furman*, 408 U.S. at 274.

211. *Id.* at 270.

212. *See* 428 U.S. 153, 182 (1976). Commentators have opined that *Gregg* changed the course of capital punishment in this country. *See, e.g.,* Hoeffel, *supra* note 10, at 772, 774–80.

213. *Gregg*, 428 U.S. at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)).

214. Justice Stewart expressly defined the concept in its narrowest form. What if Justice Stewart had defined the concept in its most expansive form?

215. *Gregg*, 428 U.S. at 173.

216. *Id.*

217. *Id.* (citing *Furman*, 408 U.S. at 392–93 (Burger, J., dissenting)).

218. *Gregg*, 428 U.S. at 173 (citing *Trop*, 536 U.S. at 100, and *Weems v. United States*, 217 U.S. 349, 367 (1910)).

The Court returned to language concerning human dignity and punishment in *Atkins v. Virginia*,<sup>219</sup> involving capital punishment for mentally retarded offenders,<sup>220</sup> and *Roper v. Simmons*,<sup>221</sup> involving capital punishment for offenders under eighteen years of age.<sup>222</sup> Relying on “evolving standards of decency,” the Court in *Atkins* struck down as unconstitutional the execution of a mentally retarded convicted felon.<sup>223</sup> Quoting *Trop*, the Court expressly acknowledged the role of human dignity in Eighth Amendment decision-making.<sup>224</sup> Yet, the Court focused on the “national consensus” against executing mentally retarded defendants, describing the “changing attitudes” since the time of *Penry v. Lynaugh*.<sup>225</sup> Justice Stevens, writing for the Court in *Atkins*, hearkened back to the “Bloody Assizes” to illustrate that our standard for permissible punishment has changed.<sup>226</sup>

In *Roper*, the Court struck down as unconstitutional capital punishment for offenders who committed crimes when younger than eighteen.<sup>227</sup> Justice Kennedy, delivering the Court’s opinion, stated, “Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished . . . by reason of youth and immaturity.”<sup>228</sup> Regarding human dignity, Justice Kennedy wrote that “[b]y protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.”<sup>229</sup> Again, in *Roper*, the Court spoke of human dignity, yet gave the value no meaning, relying instead on a national consensus regarding executing those younger than eighteen to govern its decision.

The Court has not expressly addressed the notion of a national consensus regarding racial discrimination in capital punishment.<sup>230</sup> Baldus and Woodworth contend that the public perceives the problem of racial disparities in capital sentencing (at least concerning race-of-defendant discrimination) but does not consider it significant in terms of opposing or favoring the death penalty.<sup>231</sup> Justice Marshall, in his *Furman* concurrence, posited that no such

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219. 536 U.S. 304 (2002).

220. *Id.* at 321.

221. 543 U.S. 551 (2005).

222. *Id.* at 572–75.

223. *Atkins*, 536 U.S. at 321.

224. *Id.* at 311–12.

225. *Atkins*, 536 U.S. at 314 (citing *Penry v. Lynaugh*, 492 U.S. 302, 304 (1989)).

226. *Atkins*, 536 U.S. at 311.

227. *Roper*, 543 U.S. at 578.

228. *Id.* at 571.

229. *Id.* at 560. Later in the opinion, Justice Kennedy again mentioned human dignity, this time describing the Constitution’s “broad provisions to secure individual freedom and preserve human dignity.” *Id.* at 578.

230. A LEXIS database search containing the words “national consensus” in a query with “capital punishment” or “death penalty” produced only four Supreme Court cases, none of which involved racism or racial discrimination in capital punishment.

231. Baldus & Woodworth, *supra* note 10, at 1430. In terms of public opinion or a ‘national

consensus exists because “American citizens know almost nothing about capital punishment.”<sup>232</sup> He went on to say that if the public knew, for example, about the ineffectiveness of capital punishment as a deterrent, the dangers of executing the innocent, and the influence of racial discrimination on this punishment, “the great mass of citizens” would conclude the death penalty is unconstitutional.<sup>233</sup>

By neglecting the Eighth Amendment principle that human dignity underlies punishment, and instead relying primarily on the concept of a national consensus to inform the constitutionality of punishment under the Eighth Amendment, the Court has obviated a promising path toward prohibiting racial discrimination in capital punishment. Apart from the exceptions described above, preserving human dignity, which is irreconcilable with racial discrimination, is now meaningless in the Supreme Court’s capital punishment jurisprudence. The possibility of a Supreme Court remedy for racial discrimination in capital punishment via the Eighth Amendment is largely foreclosed. Thus, we now turn to congressional and state legislative and judicial efforts to remedy racial discrimination in capital sentencing.

### III. CONGRESSIONAL AND STATE LEGISLATIVE AND JUDICIAL EFFORTS TO REMEDY RACIAL DISCRIMINATION IN CAPITAL SENTENCING

The United States Congress and various state legislatures have proposed methods to remedy racial discrimination in capital sentencing. Some individual state courts have undertaken efforts to combat this problem, but it is unclear

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consensus’ about capital punishment, in 2006, a majority of Americans, approximately 67%, supported the death penalty. U.S. DEP’T OF JUST., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, tbl.2.52.2006 (2006), <http://www.albany.edu/sourcebook/pdf/t2522006.pdf> (data provided by The Gallup Organization, Inc.) (In response to the question, “Are you in favor of the death penalty for persons convicted of murder?” the 2006 data shows that 67% of those polled answered “yes.” Support for the death penalty decreased in response to the question, “Do you prefer capital punishment if life without parole is an option?”). This number reflects a decline in support since 1996, when 78% of Americans supported the punishment. DEATH PENALTY INFO. CTR., NEWS & DEVELOPMENT—PUBLIC OPINION, <http://www.deathpenaltyinfo.org/newsanddev.php?scid=23> (last visited on Aug. 23, 2007). Over half of those polled in 2003 believed the death penalty was administered fairly. U.S. DEP’T OF JUST., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, tbl.2.54 (2003), <http://www.albany.edu/sourcebook/pdf/t254.pdf> (data provided by The Gallup Organization, Inc.) (The polling did not contain questions about race discrimination. Rather, the question asked, “Generally speaking, do you believe the death penalty is applied fairly or unfairly in this country today?”). When those who opposed the death penalty were asked why, only 4% said it was because they believed the death penalty was unfairly applied. U.S. DEP’T OF JUST., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, tbl.2.56 (2003), <http://www.albany.edu/sourcebook/pdf/t256.pdf> (data provided by The Gallup Organization, Inc.) (Most of those who responded in 2003 answered that they opposed the death penalty because it was “[w]rong to take a life” (46%) or because “[p]unishment should be left to God/religious belief” (13%).).

232. 408 U.S. 238, 362 (1972) (Marshall, J., concurring).

233. *Id.* at 360–69. Marshall reiterated this position in his dissenting opinion in *Gregg*, 428 U.S. 153, 232 (1976) (Marshall, J., dissenting).

how successful they have been.<sup>234</sup> This Article's proposed model statute incorporates elements of the congressional and state proposals to remedy racial discrimination in capital sentencing.

#### A. Congressional Efforts to Address Racial Discrimination

After the Court decided *McCleskey*, some members of Congress sought a statutory remedy for racial discrimination in capital punishment.<sup>235</sup> In 1988, Representative John Conyers first introduced the Racial Justice Act ("RJA"),<sup>236</sup> an initiative that survived until 1994.<sup>237</sup> The proposed RJA prohibited putting a person to death "under color of State or Federal law in the execution"<sup>238</sup> of a sentence that was imposed based on race.<sup>239</sup>

The RJA allowed a defendant to establish an inference of racial discrimination in capital sentencing using statistical evidence of disparate impact.<sup>240</sup> To show disparate impact, defendants could introduce evidence that the particular jurisdiction either: (1) imposed the death penalty significantly more frequently on persons of the defendant's race than on persons of another race, or (2) imposed the death penalty significantly more frequently as punishment for crimes against persons of the race of the defendant's victim.<sup>241</sup>

The State could then rebut the inference by either showing pertinent non-racial reasons for the disparity or demonstrating that the defendant's statistics were inaccurate or misleading.<sup>242</sup> The State could not rely on "mere general assertions" that it did not intend to discriminate.<sup>243</sup> If the State could not rebut

234. Most commentators agree that state legislative efforts have increased awareness. Baldus & Woodworth, *supra* note 10, at 1473.

235. Don Edwards & John Conyers, Jr., *Violent Crime Control and Law Enforcement Act of 1994: The Racial Justice Act—A Simple Matter of Justice*, 20 U. DAYTON L. REV. 699, 700-01 (1995). The authors of the article, two of the congressmen leading the move for a statutory remedy, described the purpose of the Act as "ferret[ing] out race discrimination in the application of the death penalty by states and the federal government" because "decisionmakers in death sentencing . . . rarely admit that they are racially biased." *Id.* at 700.

236. H.R. 4442, 100th Cong. (1988); Charles J. Ogletree, Jr., *Making Race Matter in Death Matters*, in FROM LYNCH MOBS TO THE KILLING STATE 55, 65 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006); Justin Arnold, Note, *Race and the Death Penalty After McCleskey: A Case Study of Kentucky's Racial Justice Act*, 12 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 93, 95 (2005).

237. Edwards & Conyers, *supra* note 235, at 701.

238. Certainly the drafters could have selected a different word!

239. Edwards & Conyers, *supra* note 235, at 704 & n.29 ("summariz[ing] the Act as reported by the House Judiciary Committee in the 103rd Congress"); see also H.R. REP. NO. 458, 103d Cong., 2d Sess., at 7 (1994).

240. Edwards & Conyers, *supra* note 235, at 704. The drafters defended this method as consistent with the method of proving bias in the contexts of voting administration, employment, and jury selection "long accepted by the courts." *Id.* at 700.

241. *Id.* at 705.

242. *Id.* at 706.

243. *Id.*

the inference, the death sentence would not be administered.<sup>244</sup>

In October 1990, the RJA passed the House of Representatives as part of the Comprehensive Crime Control Act of 1990 but was dropped in conference.<sup>245</sup> In 1991, the House rejected the Act.<sup>246</sup> In 1994, the 103rd Congress reconsidered the Act.<sup>247</sup> Again, the House approved the RJA, which was incorporated into an omnibus crime bill.<sup>248</sup> Unfortunately, as the bill was in its final stages, the House-Senate conference committee “quietly” dropped the RJA provisions.<sup>249</sup>

The recently elected Congress may be more willing than its predecessor to approve such a bill.<sup>250</sup> Moreover, the events surrounding Hurricane Katrina presumably have increased public awareness of racism.<sup>251</sup> However, forces such as the September 11, 2001 attacks and the war in Iraq will likely increase public support for the death penalty and certainly will put Congress in a tough-on-crime posture: War and increases in violent crime are likely to bolster death penalty support.<sup>252</sup> Nevertheless, the existing Congress may seek to remedy this issue.

### B. State Efforts to Address Racial Discrimination

Because the Supreme Court has effectively removed itself from dealing with racial discrimination in capital punishment, and because congressional efforts have stalled, state politicians and judges now seem the most likely source of relief. An increasing number of states have researched and taken steps to remedy the problem. The solutions range from striking down the death penalty as unavoidably unconstitutional to imposing moratoria and enacting remedial statutes. The willingness of an increasing number of states to address

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244. *Id.*

245. *Id.* at 701.

246. *Id.*

247. *Id.*

248. *Id.*

249. THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 251 (Hugo Adam Bedau ed., 1997); see also Edwards & Conyers, *supra* note 235, at 701.

250. Similar legislation has not been introduced for some time. However, in the newly elected Democratic-controlled 110th Congress, we may see progress in this area. Speaker of the House Nancy Pelosi at one time sponsored a bill limiting capital punishment. On the Issues, Nancy Pelosi on Crime, [http://www.ontheissues.org/CA/Nancy\\_Pelosi\\_Crime.htm](http://www.ontheissues.org/CA/Nancy_Pelosi_Crime.htm) (last visited on Aug. 24, 2007). H.R. 1038, S. 233 proposed placing “a moratorium on executions by the Federal Government and urg[ing] the States to do the same” in order to allow a national commission to study “the fairness of the imposition of the death penalty.” *Id.*

251. See Marion Crain, *Afterword: The American Romance with Autonomy*, 10 EMP. RTS. & EMP. POL’Y J. 187, 187 (2006).

252. See Kirchmeier, *supra* note 20, at 102. According to Kirchmeier, a long-term war could negatively impact a death penalty moratorium movement. *Id.* at 102. Prior to September 11, 2001, the moratorium movement “benefited from a long period of peace, sympathetic defendants, decreasing crime rates, and a strong economy.” *Id.* at 113. Obviously, these conditions no longer exist.

racial discrimination is one of the reasons why my proposed solution is aimed at state legislatures.

*1. Kentucky's Racial Justice Act*

In 1998, Kentucky passed the Kentucky Racial Justice Act ("KRJA"),<sup>253</sup> modeled after the proposed federal Racial Justice Act.<sup>254</sup> Kentucky passed the law after commissioning two professors, Thomas Keil and Gennaro Vito, to study the impact of race on capital punishment.<sup>255</sup> In their report, Keil and Vito determined that Kentucky's system was "fraught with discrimination that defies elimination or control."<sup>256</sup>

Under the KRJA, a defendant may establish that a death sentence was based on race "if the court finds that race was a significant factor in decisions to seek the sentence of death in the Commonwealth at the time the death sentence was sought."<sup>257</sup> Relevant evidence to support such a finding could include "statistical evidence or other evidence, or both, that death sentences were sought significantly more frequently" on persons of one race or as punishment for offenses against persons of one race.<sup>258</sup>

Paragraph four of the KRJA sets forth the defendant's burden:

The defendant shall state with particularity how the evidence supports a claim that racial considerations played a significant part in the decision to seek a death sentence in his or her case.<sup>259</sup>

The defendant must prove discrimination by clear and convincing evidence, and the Commonwealth may rebut the claim.<sup>260</sup> The Kentucky Supreme Court has yet to address a KRJA claim.<sup>261</sup>

As discussed more fully below, the KRJA has received mixed reviews

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253. 1998 Ky. Acts ch. 252, § 1; see also Kentucky Racial Justice Act, KY. REV. STAT. ANN. §§ 532.300–09 (2006). Senator Gerald Neal introduced the KRJA in the 1998 session. Lesman, *supra*, at 376.

254. Baldus & Woodworth, *supra* note 10, at 1467.

255. In 1992, the State of Kentucky commissioned the two University of Louisville professors to study whether race discrimination impacted sentencing in the state. Alex Lesman, Note and Comment, *State Responses to the Specter of Racial Discrimination in Capital Proceedings: The Kentucky Racial Justice Act and the New Jersey Supreme Court's Proportionality Review Project*, 13 J. L. & POL'Y 359, 374 (2005); Arnold, *supra* note 236, at 98.

256. Arnold, *supra* note 236, at 100 (quoting Thomas Keil & Gennaro Vito, *Race and the Death Penalty in Kentucky Murder Trials, 1976–1991: A Study of Racial Bias as a Factor in Capital Sentencing*, 20 AM. J. CRIM. JUST. 17, 31–32 (1995)).

257. § 532.300(2). The statute thus focuses on the charging decision. A defendant making such a claim must do so at the pre-trial conference. § 532.300(4). The trial court then schedules a hearing on the claim. *Id.*

258. § 532.300(3)(a)–(b). Thus the statute encompasses both race-of-defendant and race-of-victim discrimination.

259. § 532.300(4).

260. § 532.300(5).

261. See Lesman, *supra* note 255, at 383. A LEXIS search of Kentucky Supreme Court cases revealed no cases in which the Court relied on the law to analyze a petitioner's claim.

both in terms of its procedural hurdles and its effectiveness in eliminating racial bias.<sup>262</sup> Commentators believe the KRJA has, at least, proven a valuable symbol of Kentucky's commitment to remedying racial discrimination in capital sentencing.<sup>263</sup>

## 2. *New Jersey's Proportionality Review and Recent Moratorium*

In the early 1990s, the New Jersey Supreme Court created a proportionality review procedure to eliminate arbitrariness, including racial discrimination, from its capital sentences. In 1992, in *State v. Marshall (Marshall II)*,<sup>264</sup> the court outlined a system for proportionality review that went far beyond the scope of the review provided under the relevant New Jersey statute.<sup>265</sup> In its per curiam opinion, the court described how, in 1988, Professor Baldus was appointed as the court's Special Master "to assist . . . in developing a system for proportionality review."<sup>266</sup> Baldus prepared an extensive database<sup>267</sup> and developed a method for conducting the court's review.<sup>268</sup> The role of the Special Master was to make recommended findings of fact and conclusions of law regarding proportionality of cases in general (not regarding a specific case) and to educate the court so that it could make an informed decision regarding sentencing proportionality.<sup>269</sup>

The court went on to detail its vision of proportionality review, including the methods of selecting comparison groups and criteria for comparison cases. The court described the two steps of proportionality review: "frequency analysis" and "precedent-seeking review."<sup>270</sup> First, in the frequency analysis, the court uses a "salient-factors" test to determine the universe of cases against which to compare the petitioner's case.<sup>271</sup> The court then determines the frequency of death sentences for this particular category of cases in order to decide whether the frequency was sufficiently high that imposing the death penalty in these cases "serves as an effective deterrent" or "constitute[s] a

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262. See, e.g., Baldus & Woodworth, *supra* note 10, at 1473; Lesman, *supra* note 255, 379–87.

263. See *id.* at 1473; see also Lesman, *supra* note 255, at 384–85.

264. 613 A.2d 1059 (N.J. 1992).

265. See *id.* at 1080–83; Latzer, *supra* note 103, at 1198; N.J. STAT. ANN. § 2C:11-3(e) (West 2006) (providing that, on a defendant's request, the state supreme court will determine whether the sentence is "disproportionate to the penalty imposed in similar cases"—limited to cases "in which a sentence of death has been imposed"—"considering both the crime and the defendant"); see also Bienen, *supra* note 71, at 187. Here, it was the court, despite strong, opposing political pressure, that undertook the task of proportionality review.

266. *Marshall II*, 613 A.2d at 1063.

267. Bienen, *supra* note 71, at 185. According to Bienen, this was the most comprehensive database compiled for such review. *Id.* at 192.

268. *Id.* at 185.

269. *Id.* at 191–92.

270. *Marshall II*, 613 A.2d at 1080.

271. See *id.*



justifiable form of retribution in light of contemporary community standards.”<sup>272</sup>

Precedent-seeking review is more fact intensive; the court compares the specific case to the facts of similar death-eligible cases.<sup>273</sup> In this review, the court focuses on three issues: the defendant’s moral blameworthiness, the degree of victimization, and the defendant’s character.<sup>274</sup> Regarding the race claim, the court stated:

[W]ere 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.<sup>275</sup>

Unfortunately, the issue of proportionality review has been controversial and divisive for the New Jersey Supreme Court.<sup>276</sup> In the late 1990s, the Court appointed Judge David Baime as the new Special Master for assisting in such reviews.<sup>277</sup> Baime altered the nature of the New Jersey Supreme Court’s review by eliminating the complex statistical analysis of past reviews and instead focusing on “systemic proportionality.”<sup>278</sup>

The New Jersey Supreme Court has persisted in conducting comprehensive proportionality reviews of capital sentences despite ongoing challenges. In *New Jersey v. Papasavvas*,<sup>279</sup> the court used the method outlined in *Marshall II* to determine that the petitioner’s death sentence was disproportionate.<sup>280</sup> In *Papasavvas*, the defendant was convicted of murdering a sixty-four-year-old woman during the course of a burglary.<sup>281</sup> The jury unanimously determined that the felony-murder aggravating factor outweighed the mitigating factors beyond a reasonable doubt.<sup>282</sup>

The court described the nature and purpose of its proportionality review:

Unlike direct review, proportionality review does not question whether

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272. *Id.* (quoting NAT’L CTR. FOR ST. CTS., PROPORTIONALITY REVIEW PROJECT 2–3 (1984) (quoting David C. Baldus, Charles A. Pulaski & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 668–69 (1983))).

273. *Marshall II*, 613 A.2d at 1083.

274. *Id.*

275. *Id.* at 1110.

276. *See* Bienen, *supra* note 71, at 194; *see also* Lesman, *supra* note 255, at 403. In *Loflin*, the Supreme Court of New Jersey questioned its own methodology for conducting proportionality review. 724 A.2d 129, 233 (1999).

277. Lesman, *supra* note 255, at 403.

278. *See id.* at 404–08. Lesman provides a comprehensive description of New Jersey’s proportionality review project from 1987 through the mid-1990s. *See id.* at 387–408.

279. 790 A.2d 798 (N.J. 2002) (per curiam).

280. *Id.* at 808–09, 817–18.

281. *Id.* at 801–03.

282. *Id.* at 804.

an individual death sentence is justified by the facts and circumstances of the case or whether, in the abstract, the sentence imposed on a defendant is deserved on a moral level. On the contrary, its role is to place the sentence imposed for one terrible murder on a continuum of sentences imposed for other terrible murders to ensure that the defendant “has not been singled out unfairly for capital punishment.”<sup>283</sup>

The court’s extensive review included comparing the petitioner’s case to others within the same general category of cases (either a murder committed during a residential robbery or a murder committed during a burglary).<sup>284</sup> Statistically, there was no public consensus for or against the death penalty in this category of cases.<sup>285</sup> The court then compared the defendant’s case to the aggravating and mitigating circumstances of specific cases recommended by the lawyers and selected by the court.<sup>286</sup> The court concluded the defendant’s sentence was disproportionate in light of these comparisons and vacated Papasavvas’s death sentence.<sup>287</sup>

In January 2006, the New Jersey legislature imposed a year-long moratorium on the death penalty.<sup>288</sup> The law mandated that the governor appoint a commission to undertake a comprehensive study of capital punishment in the state, including the economic costs of the punishment, its effectiveness, and factors such as racial discrimination that impact sentencing.<sup>289</sup> The Commission issued its report in January 2007.<sup>290</sup> Based on its review and findings, the Commission urged the state to abolish the death penalty, replacing it with life imprisonment in a maximum security facility without the possibility of parole.<sup>291</sup>

### 3. *Moratoria in Maryland and Illinois*

Moratoria have spread beyond New Jersey, although with differing effects. In Maryland, the moratorium was lifted; in Illinois, it continues to remain in place, and its future remains uncertain.

Beginning in the early 1990s, the State of Maryland undertook extensive research to determine whether race impacts capital sentencing.<sup>292</sup> In 2000,

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283. *Id.* at 800 (quoting *State v. Timmendequas*, 773 A.2d 18, 30 (N.J. 2001) (Long, J., dissenting)).

284. *Papasavvas*, 790 A.2d at 800.

285. *Id.* at 806.

286. *Id.* at 811–17.

287. *Id.* at 817–18.

288. Human Rights Watch, *Human Rights News*, U.S.: New Jersey Suspends Death Penalty, Jan. 16, 2006, <http://hrw.org/english/docs/2006/01/17/usdom12437.htm>.

289. *Id.*

290. See N.J. DEATH PENALTY STUDY COMM’N, NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT (Jan. 2007), [http://www.njleg.state.nj.us/committees/dpsc\\_final.pdf](http://www.njleg.state.nj.us/committees/dpsc_final.pdf).

291. *Id.* at 2.

292. In 1992, the Maryland capital punishment statute was amended so that proportionality

Governor Parris Glendening commissioned an empirical study to collect data necessary to determine whether race factored into the state's capital sentencing.<sup>293</sup> Governor Glendening imposed a moratorium on executions in May 2002 pending the results of the study, which was conducted by Dr. Raymond Paternoster from the University of Maryland's Department of Criminology and Criminal Justice.<sup>294</sup> Dr. Paternoster published his results in 2003, concluding that it was twice as likely that an offender with a white victim would be sentenced to death than an offender with an African-American victim.<sup>295</sup> However, despite this evidence, then-Governor Robert Ehrlich lifted the moratorium.<sup>296</sup> Maryland carried out its first execution in six years in June 2004.<sup>297</sup>

In January 2000, Governor George Ryan of Illinois issued a moratorium on capital punishment largely because he believed the system was "fraught with error."<sup>298</sup> Ryan also noted that, in Illinois at that time, more than two-thirds of the more than 160 death row inmates were African-American, thirty-five of whom were convicted by all-white juries.<sup>299</sup> In January 2003, he commuted the sentences of all death row inmates to life without parole.<sup>300</sup> The Illinois moratorium remains in place under the current governor, Rod Blagojevitch.<sup>301</sup>

#### 4. *New York and Kansas Declare the Death Penalty Unconstitutional*

State courts in New York and Kansas declared the death penalty unconstitutional in 2004, though the United States Supreme Court later

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review was no longer required. Article 27, section 414(e)(4) of the Maryland Code was deleted. Act of Oct. 1, 1992, ch. 331, 1992 Md. Laws 2674. The current statute provides for appellate review to determine whether a death sentence was "influenced by passion, prejudice, or any other arbitrary factor." MD. CODE ANN. CRIM. LAW § 2-401(d)(2)(i) (2006).

293. Millemann & Christopher, *supra* note 58, at 4.

294. *Id.*

295. *Id.*

296. Moratorium Now!, *supra* note 58.

297. *Id.* In the November 2006 elections for governor of Maryland, Martin O'Malley won, replacing Ehrlich. Matthew Mosk et al., *Cardin, O'Malley Win in Md.*, WASH. POST, Nov. 8, 2006, available at [http://www.washingtonpost.com/wp-dyn/content/article/2006/11/08/AR2006110800917\\_3.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/11/08/AR2006110800917_3.html). O'Malley promotes replacing capital punishment in Maryland with life without parole. Martin O'Malley, *Why I Oppose the Death Penalty*, WASH. POST, Feb. 2, 2007, at A15, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/20/AR2007022001292.html>. O'Malley posits that administering the death penalty unfairly and without deterrent value violates human dignity, which he describes as "the fundamental belief on which the laws of this state and this republic are founded." *Id.*

298. Governor George Ryan: An Address on the Death Penalty at University of Chicago Divinity School (June 3, 2002), <http://pewforum.org/events/?EventID=28>.

299. *Id.*

300. Austin Sarat, *The Rhetoric of Race in the "New Abolitionism"*, in FROM LYNCH MOBS TO THE KILLING STATE 273 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006).

301. Moratorium Now!, *supra* note 58.

reversed the Kansas Supreme Court.<sup>302</sup> Shortly after the New York Court of Appeals held the state death penalty statute unconstitutional in 2004, the Committee on Capital Punishment of the New York City Bar Association presented a report to the New York Assembly.<sup>303</sup> In the report, the Committee highlighted ways in which New York could change its death penalty system to improve its fairness.<sup>304</sup> The report concluded that the pre-2004 system had flaws that led not only to the conviction of innocent defendants but also to unfair and arbitrary sentences.<sup>305</sup>

#### IV. PROPOSED “RACIAL NEUTRALITY IN CAPITAL SENTENCING” MODEL STATUTE

The proposed model statute includes components of the Racial Justice Act initiated by Representative Conyers in Congress and reflects the general notion of reviewing factually similar death-eligible cases to ensure a death sentence is not aberrant. The statute’s framework follows a *Batson*-type burden-shifting structure wherein once a prima facie case of discrimination was shown, the burden would shift to the prosecution to come forward with a race-neutral explanation.<sup>306</sup>

Under the proposed law, states would designate points for specific capital offenses as well as for aggravating and mitigating circumstances. The offenses and circumstances would vary depending on the state statute. In Texas, capital punishment is prescribed for criminal homicide with one of nine aggravating factors.<sup>307</sup> Thus, the proposed law, if implemented in Texas, would include point values for homicide with the various aggravating factors. California’s

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302. In *People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004), the New York State Court of Appeals struck down the state’s existing death penalty statute as unconstitutional. *Id.* at 344. In *State v. Marsh*, 102 P.3d 445 (Kan. 2004), *rev’d*, 126 S. Ct. 2516 (2006), the Kansas Supreme Court struck down the Kansas death penalty statute after finding it unconstitutional because of its equipoise provision, which required the jury to impose the death penalty if aggravating and mitigating circumstances were weighed equally. *Id.* at 451–52. The court held the equipoise provision violated the Eighth Amendment. *Id.* The United States Supreme Court disagreed, reversing the Kansas decision. *Kansas v. Marsh*, 126 S. Ct. 2516, 2529 (2006). The Court held the statute constitutional, as the weighing provision “merely channels a jury’s discretion by providing it with criteria by which it may determine whether a sentence of life or death is appropriate.” *Id.* at 2526.

303. See Sara Darehshori, Jeffrey L. Kirchmeier, Colleen Quinn Brady & Evan Mandery, *Empire State Injustice: Based upon a Decade of New Information, a Preliminary Evaluation of How New York’s Death Penalty System Fails to Meet Standards for Accuracy and Fairness*, 4 CARDOZO PUB. L., POL’Y & ETHICS J. 85 (2006).

304. *Id.* at 90–118.

305. *Id.* at 87, 118–19. The article discusses the problem of states using the same jury for guilt and sentencing phases. *Id.* at 112–14. According to the authors, studies show that using the same jury for both phases leads to the exclusion of black and female jurors from the jury. *Id.* at 113.

306. See *Batson v. Kentucky*, 476 U.S. 79, 98 (1986).

307. TEX. PENAL CODE ANN. § 19.03 (Vernon 2006).

death penalty statute, however, includes a list of eleven factors for the jury to consider at the sentencing phase as either aggravating or mitigating the sentence.<sup>308</sup> The list includes aggravating circumstances such as the presence of criminal activity by the defendant which involved the use of force and mitigating factors like whether the defendant acted under extreme duress.<sup>309</sup> The point system, however constituted in a particular state, would serve not to assess culpability, but rather to provide a benchmark for the expected punishment.

Special attention would be required while drafting the statute to ensure it did not provide an additional avenue for racial discrimination to infect the sentence. Specifically, the state legislature would have to ensure that the method for attributing a defendant points did not allow for racial bias. The method of allocating points could invite bias if, for example, the legislature designated a special master to assign points, and the special master attributed a greater number of points to minority capital defendants to impact the comparison.<sup>310</sup>

Ideally, a jury would attribute points based on its fact-finding regarding aggravating and mitigating circumstances during sentencing.<sup>311</sup> The jury's verdict form would reflect the points attributable to a certain circumstance. The jury then, at the punishment phase, would be asked to consider aggravating and mitigating factors including the special circumstance found in the guilt phase and other statutory factors.<sup>312</sup>

In the alternative, courts could appoint a three-person panel from that state's sentencing commission (composed of lawyers and former judges familiar with sentencing) to determine a defendant's points under the statute based on the offense and mitigating and aggravating circumstances established at trial. The panel would provide a written report for the trial court explaining a defendant's point attribution.

The state would maintain a database of the points attributed to each death-eligible defendant, along with the race of the defendant and the victim. If

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308. CAL. PENAL CODE § 190.3 (Deering 2006). In the sentencing phase, California's death penalty statute does not separate the two. § 190.3.

309. § 190.3(b), (g). The text of the model statute, *infra* Part IV.A, borrows from this list. *See* § 190.3.

310. Reviewers of drafts of this Article often focused on this point. In response to the comments, I have tried to envision a process for removing bias at this stage of the statutory proceeding. At the same time, this comment illustrates one of the points of this Article: Racial discrimination is so embedded in the system, imagining a process free of such bias is almost impossible.

311. In California, for example, the capital punishment statute requires that the jury first (at the guilt phase) find a special circumstance as set forth in the statute for the defendant to be death-eligible. CAL. PENAL CODE § 190.4(a) (Deering 2006). These circumstances include factors such as if the murder was intentional and for financial gain or if the victim was a federal law enforcement officer. CAL. PENAL CODE § 190.2(a) (Deering 2006).

312. *See* § 190.3.

necessary, a defendant could then use this data as a benchmark to create an inference that his penalty is aberrant because of racial discrimination.<sup>313</sup>

A non-white defendant could create an inference of discrimination by showing that another death-eligible defendant—either white or of any race but with a non-white victim—with the same or higher points was not sentenced to death. By doing so, the defendant would not *prove* racial discrimination but rather the law would allow the defendant to create a rebuttable inference of an aberrant factor (race of defendant or victim) influencing punishment. Obviously, legitimate, race-neutral reasons may exist. In such a case, the State could rebut the inference of a race-based sentence by identifying and establishing for the trial court the circumstances that resulted in a lighter sentence in the precedent case.

Specifics of the proposed statute—like point values for offenses, circumstances, and burdens of proof—are deliberately left to the state's discretion. For purposes of this proposed law, the specific point values make no difference. The statute's purpose is to establish a consistent value for each particular crime and circumstance, so that a defendant can compare his point value to other defendants with a similar crime and circumstances. Whether a particular aggravating circumstance renders a +2 or a +3 is irrelevant so long as the state consistently applies the point values to defendants.

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313. The sentence could potentially be aberrant for other reasons; this statute aims at ferreting out only racial discrimination.

2007]

## A DEATH PENALTY WAKE-UP CALL

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A. *Proposed Model Statute: California's Racial Neutrality in Capital Sentencing Act*

- (a) *General prohibition against racial discrimination in capital sentencing.* No person shall be put to death under California law if racial discrimination influenced the decision to seek or impose the death penalty.
- (b) *Inference of racial or ethnic bias influencing capital sentencing.* A defendant may establish an inference that his or her death sentence was influenced by racial discrimination if the defendant, a member of a minority group, presents evidence that, at the time death was imposed, the defendant had fewer points, pursuant to subsection (c), than (1) a non-minority capital defendant who was not sentenced to death in the jurisdiction in question, or (2) a capital defendant whose victim was a minority, and who was not sentenced to death in the jurisdiction in question. The defendant must also provide evidence that the decision-makers in the case—prosecutor, judge, and jury—were aware that the defendant was a member of a minority group. If the defendant claims racial discrimination influenced the sentencing decision, the trial court shall hold an evidentiary hearing on the defendant's claim after sentencing.
- (c) *Point determinations.* The following points are assigned to capital offenses and to aggravating and mitigating circumstances:
- (1) Offenses:
    - (i) First-degree murder: 10.
  - (2) Aggravating or mitigating circumstances:
    - (i) The circumstances of the crime:
      - (A) The murder was intentional and carried out for financial gain: +3.
      - (B) The victim was a police officer who, while engaged in performing his duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in his duties: +4.
      - (C) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity: +4.
    - (ii) The presence or absence of criminal activity involving the use or threatened use of force or violence: +3 (aggravation) or -2 (mitigation).
    - (iii) The presence or absence of prior felony convictions: +1 (aggravation) or -1 (mitigation).

### B. Proposed Application

**Defendant A:** Defendant *A*, an African-American, shot a Caucasian police officer. The jury convicted him of first-degree murder (10) for the death of the officer (+4). Defense counsel provided evidence, and the jury agreed, that the defendant's lack of a prior felony conviction was a mitigating factor (-1). Thus, Defendant *A*'s points totaled 13. The jury sentenced Defendant *A* to death. Because the defendant's points exceeded a certain value, he was death-eligible under the state's death penalty statute. After sentencing, the special master prepared a report<sup>314</sup> reflecting a 13-point total for Defendant *A*.

**Defendant B:** Defendant *B*, an African-American, tortured and then shot his victim, who was Hispanic. The jury convicted the defendant of first-degree murder (10). At sentencing, the jury found the killing was heinous, involving serious physical abuse to the victim (+4). The jury found no mitigating circumstances. Defendant *B*'s points totaled 14. The prosecutor sought a life sentence without parole. The special master's report, attributing 14 points to Defendant *B*, was placed in the jurisdiction's capital-sentencing database, along with the race of Defendant *B* and the race of his victim.

Under the proposed statute, after sentencing, Defendant *A* could use these point values (and others in that jurisdiction's database) to create an inference that racial or ethnic bias stemming from an African-American perpetrating a crime on a white victim influenced his death sentence. The State could then seek to rebut the inference by showing a race-neutral reason for the different outcome (e.g., problems with witnesses concerning Defendant *B*'s case). The trial court would determine whether the evidence supported the inference that racism influenced the decision or whether the State established a race-neutral reason for the aberrant sentence. The defendant would have a right to appeal the decision. The statute would provide Defendant *A* with a vehicle for pursuing a claim that race influenced his death sentence.

### C. Potential Criticisms

I anticipate strong criticism of this proposal, ranging from the philosophical to the technical. I welcome these objections, as my goal in writing this Article and proposing a remedy is to revive the discourse about racial discrimination in capital punishment. I will address some of these objections and hope others will broaden this discussion.

#### 1. *The Statute Does Not End Racial Discrimination in Capital Punishment*

Some may argue that even with such a statute, the potential for racism continues, as the special master or juror may inject prejudice into their point

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314. This is assuming the state codified a version of the model statute that used a special master, as opposed to a jury or three-person panel, to attribute points.



determinations, the State may seek to prove a particular aggravating circumstance simply to increase a minority defendant's points, or racism may influence the trial judge who is reviewing the special master's report against comparison cases. Obviously, these possibilities exist. Yet, an imperfect solution that raises consciousness of the problem and creates varying degrees of care in avoiding racial discrimination strikes this author as far better than tolerating the status quo.

Some may also argue that such a remedy is unacceptable because the entire American criminal justice system shares the flaw of racial discrimination; a fix, therefore, should apply to the entire system. For those troubled by the notion that such a statute would remedy racial discrimination in only the capital punishment arena, perhaps this effort would lead to attempts to achieve racial neutrality in other areas of criminal law. My purpose, however, is to challenge state legislatures to fashion a remedy, rather than retreat because a proposed remedy is far from perfect.

## 2. *Such a Statute Would, De Facto, Abolish the Death Penalty*

Opponents of the proposed federal RJA argued the statute would abolish the death penalty.<sup>315</sup> The Act's sponsors countered this objection by pointing to the State's ability to rebut an inference of racial bias by highlighting the non-racial factors that caused the apparent pattern of racial bias.<sup>316</sup> Similarly, in my proposed model statute, the State has the right to rebut the inference. A defendant can raise an inference by pointing to another case with similar facts and circumstances that resulted in a lesser punishment. The State could certainly rebut the inference of racial bias by pointing to non-racial factors (e.g., problems with witnesses in the earlier case or an agreement to cooperate with the State in exchange for a lesser sentence in the prior case) to defeat the racial discrimination claim.

In practice, Kentucky's experience with the KRJA shows such a statute has little impact on the number of death sentences.<sup>317</sup> In reviewing Kentucky's experience with the KRJA, Professors Baldus and Woodworth described responses to a 2002 survey of Kentucky public defenders concerning their perceptions of the Kentucky law. At the time of the survey, no petitioner had obtained relief on a KRJA claim.<sup>318</sup> Of sixty-four lawyers surveyed, four had filed KRJA claims.<sup>319</sup> Baldus and Woodworth illustrated that the KRJA had

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315. Edwards & Conyers, *supra* note 235, at 707; Monica Wiley, McClesky [sic] v. Kemp: *Race-Conscious Decision Making in Reforming Capital Sentencing*, 3 HOWARD SCROLL: SOC. JUST. L. REV. 81, 97 (1995).

316. Edwards & Conyers, *supra* note 235, at 707.

317. Lesman, *supra* note 255, at 386; *see also* Baldus & Woodworth, *supra* note 10, at 1473–75.

318. Baldus & Woodworth, *supra* note 10, at 1468.

319. *Id.*

not ended the death penalty in Kentucky.<sup>320</sup> Rather, the number of death sentences had increased since the legislature enacted the law.<sup>321</sup>

The Kentucky experience illustrates that a racial justice act will not eliminate the death penalty and will probably not dramatically impact the numbers. Rather, the impact, as Baldus and Woodworth describe, is more subtle: a possible “think twice” attitude about charging decisions.<sup>322</sup>

### 3. *Each Case Is Unique (Individuation)*

Opponents argue that courts and prosecutors need discretion to treat each death-eligible case individually.<sup>323</sup> Critics contend the idea of invalidating a criminal sentence based on statistics is misguided, as criminal justice is characterized by human complexity and subtlety that statistics cannot capture.<sup>324</sup>

This argument falls flat because my proposed model statute fulfills this objective. This statute ferrets out an aberrant death sentence by scrutinizing the facts and sentencing decisions in a particular case. Rather than relying on statistical patterns in sentencing, this legislation relies on a detailed review of individual cases, looking for factors that might have led to inconsistent outcomes. Furthermore, states already engage in the practice of identifying aggravating and mitigating factors, categorizing certain behavior as enhancing or reducing culpability as a matter of law.<sup>325</sup>

### 4. *The Proposed Law Is Essentially Proportionality Review*

Commentators have challenged the notion of proportionality review as inefficient, costly, ineffective, and not constitutionally required.<sup>326</sup> Barry

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320. *See id.*

321. *Id.* at 1473. Baldus relayed other problems with the law described by the lawyers surveyed: (1) The statute restricted proof to the prosecutor’s judicial district (too small to obtain statistically significant results with regard to a given prosecutor), and (2) defense counsel feared being stigmatized by raising a claim against a prosecutor. *Id.* at 1469, 1486. In terms of positive outcomes, Baldus described “the symbolic” effect of the law—“legitimizing claims of race discrimination.” *Id.* at 1470. The other positive is the possible deterrent effect the Act may have on prosecutors who will more closely examine their charging decisions. *Id.*

322. Professor Baldus noted that with the advent of New Jersey’s proportionality review, the number of death sentences has declined since 1992. *Id.* at 1476. According to Baldus, the likely reason is “enhanced selectivity in prosecutorial charging decisions.” *Id.* at 1476.

323. Wiley, *supra* note 315, at 98.

324. *Id.* This argument certainly cuts both ways: just as statistics may show discrimination when it does not exist, they may certainly fail in demonstrating individual instances of discrimination in sentencing.

325. For example, under California law, murder with one of several aggravating factors is a capital offense. CAL. PENAL CODE § 190.3 (Deering 2006).

326. Latzer, *supra* note 103, at 1235–41. Latzer distinguishes what he calls comparative proportionality review from “inherent proportionality review,” which, according to Latzer, “seeks to determine the intrinsic deathworthiness of a category of crimes or class of defendants without regard to consistency or evenhandedness in the application of the death penalty.” *Id.* at 1190–94.

Latzer, in his comprehensive critique of New Jersey's system of comparative proportionality review, objects that such review compares cases "along a single dimension—the defendant's criminal culpability—while overlooking the many real-world considerations that lead prosecutors to seek or avoid a death penalty prosecution."<sup>327</sup>

Latzer illustrates his critique by the following hypothetical involving two offenders, of similar background and character, who both murdered police officers:

In Case *A*, the prosecutor is concerned that the state's witnesses are shaky. Their stories are somewhat inconsistent with one another, they are not especially articulate, and they have criminal pasts of their own. Moreover, the prosecutorial caseload is getting out of control in the district. In Case *B*, the witnesses are much stronger and with a prosecutorial election looming, a death sentence for a cop-killer might be politically attractive.<sup>328</sup>

Latzer objects that proportionality review would compel a court to treat both cases the same, operating as a type of quota system.<sup>329</sup>

Yet, the same hypothetical shows the merit of my proposed model statute. Under Latzer's hypothetical, if the defendant in Case *A* (Caucasian) received a life sentence and the defendant in Case *B* (African-American) was sentenced to death, the defendant in Case *B* could challenge his death sentence on race discrimination grounds under the proposed statute. The defendant in Case *B* could rely on Case *A* and other death-eligible cases from the jurisdiction to show that in cases involving cop killers of similar background and character (thus having the same or greater point value under the law) defendants typically received a life sentence. The prosecutor could rebut the inference by identifying for the court the witness problems in Case *A*. Thus, my proposed model statute would continue to permit prosecutorial discretion in decision-making. However, if the court perceived the prosecutor's reasons were illegitimate—that the prosecutor was seeking to secure a death sentence against an African-American defendant because of the defendant's race—the statute would aid in weeding out this aberration in sentencing.<sup>330</sup>

The proposed statute differs substantially from traditional conceptions of proportionality review in two critical ways. First, the proposed law does not rely on statistical patterns of sentencing as its gauge. The data necessary for a defendant to pursue a discrimination claim is simply a special master's report, similar to a probation report, from prior cases involving similar offenses and

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1167. Latzer does not oppose this type of review. *Id.* at 1194.

327. *Id.* at 1235.

328. *Id.*

329. *Id.*

330. Of course, the problem remains of a legitimate and improper reason mixed (e.g., shaky witnesses and an African-American victim).

circumstances, identifying the point value for these defendants. Thus, the law would not require states or counties to prepare and maintain extensive statistical databases; nor would it require defendants to hire a defense expert to compile and explain statistics.

Second, the proposed law operates without the court weighing culpability.<sup>331</sup> A defendant sentenced to death establishes an inference of racial discrimination by showing his point total is less than that of a capital offender who received a lighter sentence. The point values reflect the comparative culpability of the two offenders.<sup>332</sup> At no time does the court analyze the blameworthiness of the two offenders. Rather, once a defendant shows his sentence is aberrant because of the point disparity, the court hears evidence to determine whether the sentence is aberrant because of race. Although the proposed statute does compare cases, it does not share the most criticized aspects of proportionality review.

##### 5. *The Proposed Statute Is Costly and Ineffective*

When the House of Representatives passed the proposed RJA, those who opposed the act objected to the high cost of permitting defendants this additional appeal.<sup>333</sup> Opponents argued that the statute would require states to pay for each of their capital defendants to have lawyers, experts, statisticians, and investigators to assist with this appeal.<sup>334</sup> It would also require that the state maintain data concerning death-eligible cases and would increase a judge's workload to conduct an additional evidentiary hearing. The potential cost should be evaluated in light of the importance of the objective of the

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331. Many commentators and judges criticize the notion of comparing culpability to determine the appropriateness of sentencing. *See, e.g.*, Mandery, *supra* note 103, at 933–34. Mandery describes assessing the relative culpability of defendants as “an impossible task” for the courts. *Id.* at 883–84. In *Getsy*, the Sixth Circuit held a death sentence violated the Eighth Amendment “arbitrariness” standard because it was disproportionate when compared to another sentence in the same case. 456 F.3d 575, 577 (6th Cir. 2006). *Getsy* involved four defendants who were charged with murder for hire (of one of the defendant’s business rivals). *Id.* Defendant Santine—who initiated, contracted for, and paid for the murder—was sentenced to life imprisonment. *Id.* Defendant Getsy, nineteen years old at the time, was sentenced to death for murder for hire. *Id.* The court held that sentencing Getsy to death and sentencing Santine to life “for the very same crime” violated the Eighth Amendment. *Id.* at 587. In his dissenting opinion, Judge Gilman argued that “the Supreme Court’s proportionality jurisprudence, contrary to the majority’s view, focuses on whether the punishment of death is appropriate for specific types of criminal conduct, *not* on whether one defendant’s death sentence is morally justifiable with respect to that of another participant in the same crime.” *Id.* at 603 (Gilman, J., dissenting).

332. Defendant *A*’s 13 points reflect his culpability just as Defendant *B*’s 14 points reflect his culpability. If Defendant *A*, an African-American, is sentenced to death, and Defendant *B*, a Caucasian, is sentenced to life in prison, Defendant *A* can use the proposed statute to raise an inference of an aberrant sentence. The issue then becomes the State’s explanation for the lighter sentence.

333. Wiley, *supra* note 315, at 97.

334. *Id.*

statute: avoiding the risk of a capital sentence influenced by racism. On balance, states should begin (or continue their efforts) to attempt to alleviate this problem.

Finally, in assessing cost concerns, *existing* procedural safeguards to avoid racism in capital punishment should be compared with possible procedural safeguards. The New Jersey Supreme Court defended its use of proportionality review as “the only mechanism that permits system-wide evaluation of both prosecutorial and jury decision making so as to determine whether there has been racial or other impermissible discrimination.”<sup>335</sup> The proposed statute could arguably be less costly than proportionality review.

## V. CONCLUSION

State attempts to alleviate racial discrimination in capital punishment have succeeded in, at least, signifying commitment by those states to achieve racial neutrality in sentencing.<sup>336</sup> This “symbolic effect” has worked to deter discriminatory prosecutions in certain states.<sup>337</sup> Objections to existing state efforts to remedy racial discrimination in capital sentencing typically focus on the difficulty and monetary costs.<sup>338</sup> Most critics of these state efforts implicitly suggest that doing nothing is better than an imperfect attempt to repair this egregious flaw in our country’s criminal justice system.<sup>339</sup>

The model state statute proposed by this Article would do nothing more than provide a petitioner alleging racial discrimination in capital sentencing with a mechanism for presenting his race claim to the trial court at an evidentiary hearing. If a petitioner established an inference of race discrimination, the State would have the opportunity to rebut his claim by identifying and establishing race-neutral reasons for its sentencing decisions. Perhaps the outcome would remain the same. However, for courts to dismiss a challenge of racial bias in capital sentencing without an evidentiary hearing because of complaints that conducting such a hearing would be unmanageable and costly appalls those for whom racial discrimination in capital sentencing constitutes an unacceptable and unnecessary violation of a capital defendant’s constitutional rights.

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335. *State v. Loftin*, 724 A.2d 129, 142 (N.J. 1999).

336. Baldus & Woodworth, *supra* note 10, at 1473; *see also* Lesman, *supra* note 255. To Ogletree, the “greatest achievement” of the Kentucky RJA is that the statute “takes a major step toward acknowledging the presence and influence of subtle racism in capital sentencing.” Ogletree, *supra* note 11, at 68.

337. Baldus & Woodworth, *supra* note 10, at 1470, 1473.

338. Latzer, *supra* note 103, at 1238–39.

339. Here, Justice Brennan’s quote from his dissenting opinion in *McCleskey* comes to mind. Responding to the notion that acknowledging the sufficiency of *McCleskey*’s discrimination claim would “open the door to widespread challenges to all aspects of criminal sentencing,” Justice Brennan described the Court’s reaction as “a fear of too much justice.” 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

