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RACE AND THE JURY: RACIAL INFLUENCES ON JURY DECISION-MAKING IN DEATH PENALTY CASES

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Introduction

In 1984, a woman named Gayle Lewis Daniels was the only African American on a jury in Columbus, Georgia, that was deciding whether to impose the death penalty on an African-American man named William Henry Hance.[1] Some may argue that having an African American on the jury would be beneficial to Mr. Hance and decrease the chance that he would be placed on death row. When there are jurors who have the same racial or ethnic background as the defendant, it seems logical that they could help prevent racial discrimination in judging or sentencing the defendant. However, this is not necessarily the case, as illustrated by Ms. Daniels' experience.

Ms. Daniels said that she never voted to impose the death penalty on Mr. Hance during jury deliberations.[2] "According to Ms. Daniels, she voted for death when she was polled by the judge only because her fellow jurors had intimidated her into doing so."[3] The other jurors had tried to pressure Ms. Daniels into voting for death during deliberations, but she refused to do so.[4] As a result, although Ms. Daniels did not want to sentence Mr. Hance to death,

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1. Bob Herbert, *In America: Mr. Hance's 'Perfect Punishment,'* N.Y. TIMES, March 27, 1994.

2. William J. Bowers, Benjamin D. Steiner & Maria Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 174 (2001).

3. *Id.*

4. *Id.*

she ended up doing so because of pressure and intimidation from the other jurors. What is even more troubling is that a white juror in that case "confirmed Ms. Daniels's account and added that another Hance juror described the defendant as 'just one more sorry nigger that no one would miss.'"[5]

The question is whether Ms. Daniels' experience on the Georgia capital jury is an anomaly or is a regular occurrence in our criminal jury system. In fact, "the problem of arbitrariness and discrimination in the administration of the death penalty is a matter of continuing concern."[6] After discussing the jury selection process, I will examine studies and statistics regarding the impact of race on jury decision-making in capital cases. These studies and statistics show that the race of the jurors, the race of the defendant, and the race of the victim affect a jury's decision to impose the death penalty. I will then explore various possible ways of addressing this problem, including the approaches taken by the courts and proposals considered by Congress.

I. Jury Selection Process

The United States has an unfortunate history of systematic discrimination against African Americans, and that discrimination infected the U.S. criminal justice system. Under slavery, African Americans, but not whites, could be punished by death for certain crimes against white victims.[7] African Americans also were prohibited from testifying in their own defense or becoming jurors.[8] Even after the Civil War, "blacks have been executed for lesser crimes, at younger ages, . . . and over this period they have been disproportionately executed for crimes against whites."[9] However, almost all of the juries that sentenced African Americans to death during this period were comprised of white males only.[10]

The United States Supreme Court finally acknowledged this problem in 1879. In *Strauder v. West Virginia*, an African-American man was convicted of murder in the state of West Virginia, which had a statute that excluded African Americans from jury service.[11]

5. *Id.*

6. David Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1738 (1997-1998).

7. Bowers et al., *supra* note 2, at 175.

8. *Id.*

9. *Id.*

10. *Id.* at 175-76.

11. Strauder v. West Virginia, 100 U.S. 303, 304 (1879).

The Court struck down the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment.[12] The principle that a "State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause" was reaffirmed more recently by the Supreme Court in *Batson v. Kentucky*.[13] The Court in *Batson* also held that the state's privilege to strike individual jurors through the use of peremptory challenges is subject to the Equal Protection Clause.[14] A prosecutor can ordinarily use a peremptory challenge to excuse a juror for any reason related to his or her view concerning the outcome of the case, but "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable to impartially consider the State's case against a black defendant."[15]

Congress has also participated in addressing this problem by passing the Jury Selection and Service Act in 1968.[16] The policy behind the Jury Selection and Service Act is that anyone litigating in federal court has the right to a trial by jury "from a fair cross section of the community in the district or division wherein the court convenes."[17] In addition, every U.S. citizen has the right to be considered for jury service in federal court.[18] Thus, the Act declares that "no citizen shall be excluded from service as a grand or petit juror in the district courts of the United States . . . on account of race, color, religion, sex, national origin, or economic status."[19] The Act also sets forth a system for random jury selection to implement the policy and purpose behind the Act.[20]

However, the principle that a person may not be excluded from jury service based on his or her race has been limited in scope by the Supreme Court. According to the Court, although the Sixth Amendment guarantees that the jury will be selected from a pool of names representing a cross-section of the community,[21] it has never

12. *Id.* at 310.

13. Batson v. Kentucky, 476 U.S. 79, 84 (1985) (discussing the conviction of an African American after the prosecutor used his peremptory challenges to strike all four African Americans on the jury venire, and an all-white jury was selected).

14. *Id.* at 89.

15. *Id.*

16. Judiciary and Judicial Procedure, 28 U.S.C. § 1861-1867 (2000).

17. *Id.* § 1861.

18. *Id.*

19. *Id.* § 1862.

20. *Id.* § 1863.

21. Taylor v. Louisiana, 419 U.S. 522, 522 (1974) (discussing a male defendant's conviction of a crime by a petit jury selected from a venire "on which there were no women and which was selected pursuant to a system resulting from Louisiana constitutional and statutory requirements that a woman should not be selected for jury service unless she had previously filed a written declaration of her desire to be subject to

held that the Sixth Amendment requires that "petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population."[22] In other words, the way juries are chosen does not guarantee a defendant that the jury will be comprised of a "fair cross section of the community." More specifically, "a defendant has no right to a 'petit jury composed in whole or in part of persons of his own race.'"[23]

Prosecutors have also "preserved the all-white jury by using peremptory challenges to eliminate blacks at jury selection."[24] Although this is prohibited, "[t]he jurisprudence since *Strauder* has made it virtually impossible to successfully challenge the strikes of black jurors."[25] Under *Batson*, "the 'burden is, of course' on the defendant who alleges discriminatory selection of the venire 'to prove the existence of purposeful discrimination.'"[26] A defendant can establish a prima facie showing of purposeful discrimination solely by using evidence related to the prosecutor's exercise of peremptory challenges at the defendant's trial.[27] "Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors."[28] The prosecutor's explanation, however, does not need to "rise to the level justifying exercise of a challenge for cause."[29]

In other words, as long as the prosecutor's reason for excluding jurors is rational and the prosecutor does not mention race, courts typically uphold the exercise of peremptory challenges under the *Batson* test. After *Batson*, "it is agreed that all but the most egregious race-based strikes of black jurors are unlikely to be reversed."[30] Thus, if a prosecutor thinks his or her case will be more likely to succeed with a jury comprised of fewer African Americans and more whites, he or she can shrewdly exercise peremptory challenges to exclude African Americans from sitting on the jury.

For example, "[a]s recently as 2002, Dallas County prosecutors were excluding eligible black prospects from juries at more than twice the rate they turned down whites."[31] This issue surfaced

jury service").

22. *Id.* at 538.

23. Batson, 476 U.S. at 85.

24. Bowers et al., *supra* note 2, at 176.

25. *Id.* at 176-77.

26. Batson, 476 U.S. at 93.

27. *Id.* at 96.

28. *Id.* at 97.

29. *Id.*

30. Bowers et al., *supra* note 2, at 177.

31. Associated Press, *Report: Dallas Prosecutors Bar Black Jurors*, MSNBC, Aug. 21, 2005, *available at* http://msnbc.msn.com/id/9033376/.

earlier in 2005 "when the U.S. Supreme Court overturned the 1986 murder conviction of a black man accused of killing a white motel clerk, saying the Dallas County jury . . . was unfairly stacked with whites."[32] In its decision, the Court recognized that "'[t]he prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members . . . . Happenstance is unlikely to produce this disparity.'"[33] Further, the Court noted that "the appearance of discrimination is confirmed by widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries at the time Miller-El's jury was selected."[34]

Although the Court showed that it was willing to consider statistics and other evidence showing strong indications of racial discrimination in jury selection, the evidence in *Miller-El* was extremely clear and convincing. The Dallas policy was also in place for many years before the Court finally recognized a problem. In fact, "[t]he Supreme Court cited a manual, written in 1969 and used until at least 1980, that instructed prosecutors on how to exclude minorities from Texas juries,"[35] and *Miller-El* was not decided until 2005. Even after *Miller-El*, it is generally quite difficult for a defendant to successfully challenge a prosecutor's use of peremptory challenges.

II. Imposition of the Death Penalty: Studies and Statistics

The jury selection process can have a major impact on jury verdicts, specifically in the sentencing phase of a capital case, because it determines the racial makeup of the jury. Various studies and statistics, discussed below, show that the race of the jurors, in addition to the race of the defendant and the race of the victim, affect a jury's decision to impose the death penalty.

Before discussing these studies and statistics, it is important to become familiar with the Supreme Court's jurisprudence relating to racial discrimination in capital sentencing. In 1986, the Supreme Court explicitly recognized that racial attitudes could influence jurors' sentencing decisions in capital cases, particularly when the defendant is African American and the victim is white.[36] The Court ruled in *Turner v. Murray* that "a capital defendant accused of an

32. *Id.*
33. Miller-El v. Dretke, 545 U.S. 231, 241 (2005).
34. *Id.* at 253.
35. Associated Press, *supra* note 31.
36. *Id.*

interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias."[37] One should question whether this would resolve the problem because many jurors may be racially biased subconsciously. Even those jurors who know they are racially biased may not admit to that during voir dire. Thus, the Supreme Court recognized a problem, but its attempt to remedy the issue seems disingenuous.

The Supreme Court's wanton disregard of racial influences on juror decision-making became manifest only a year after *Turner* in *McCleskey v. Kemp*.[38] In that case, the defendant was an African-American man who was sentenced to death after being convicted of murdering a white police officer. One of the defendant's claims in his petition for a writ of habeas corpus was that "the Georgia capital sentencing process is administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments to the United States Constitution."[39] The defendant proffered a statistical study to support his claim, referred to as "the Baldus study."[40] This study professed "to show a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant."[41]

After analyzing the study in some detail, the Court admitted that "the Baldus study indicates that black defendants, such as McCleskey, who kill white victims have the greatest likelihood of receiving the death penalty."[42] Despite this admission, the Court rejected the defendant's equal protection claim based on the principle that "a defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination.'"[43] The Court held that "the Baldus study is clearly insufficient to support an inference that any of the decision makers in McCleskey's case acted with discriminatory purpose."[44] In rejecting the defendant's Eighth Amendment claim, the Court declared that "[a]t 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."[45] Thus, the Court held that "the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia

37. Turner v. Murray, 476 U.S. 28, 36-37 (1986) (holding this proposition in a case in which an African-American man was sentenced to death for killing a white jeweler).

38. 481 U.S. 279, 283 (1987).

39. *Id.* at 286.

40. *Id.*

41. *Id.*

42. *Id.* at 287.

43. *Id.* at 292.

44. *Id.* at 297.

45. *Id.* at 312.

capital sentencing process."[46]

In *McCleskey*, the Supreme Court was confronted with a statistical study showing strong evidence of racial bias in the imposition of the death penalty. In addition, the case involved an African-American defendant and a white victim, a combination that the Court previously acknowledged was especially dangerous in *Turner*. Yet, the Court decided to take no action, affirming the death sentence in the case and not requiring that any changes be made to Georgia's capital sentencing process. Instead, it fell back on the principle requiring a specific defendant to establish "purposeful discrimination," making it extremely difficult for McCleskey, as well as other defendants in his situation, to succeed in an equal protection challenge. "Short of an admission of racial bias by the prosecutor or jurors, this burden of proof is virtually impossible to meet."[47]

The Court in *McCleskey* "indicated its unwillingness to use statistics to establish discriminatory intent in death sentence decisions."[48] One could argue, as the Court did, that the Baldus study only showed correlation, not causation, but this study and many other studies seem to give strong indications that racism taints our criminal justice system. Unfortunately, the decision in *McCleskey* "has largely eliminated the federal courts as a forum for the consideration of statistically based claims of racial discrimination in capital sentencing."[49] According to Professor Baldus and his colleagues, there has been "only one case since *McCleskey* in which a federal district court has granted a hearing on a claim of racial discrimination in the application of the death penalty, and the court dismissed the claim for failure to meet the *McCleskey* burden of proof."[50]

Despite the Supreme Court's decision in *McCleskey*, one should be aware of the various studies and statistics that show the impact of race on jury decision-making in capital cases. One should first consider the fact that "opinion polls show that the public identifies blacks as more prone to criminality than other racial groups."[51] "This 'racialization' of criminality appears to promote generalized mistrust of blacks on the part of whites. . . Among whites, especially white males, racial stereotypes and mistrust are linked to

46. *Id.* at 313.

47. Amnesty International Canada, *Extreme Prejudice: Racism and the Death Penalty*, http://www.amnesty.ca/usa/racism.php (last visited Oct. 11, 2006).

48. Maxwell C. Smith, Case Note, Bell v. Ozmint, *332 F.3d 229 (4th Cir. 2003)*, 16 CAP. DEF. J. 121, 125-26 (2003).

49. Baldus et al., *supra* note 6, at 1734.

50. *Id.*

51. Bowers et al., *supra* note 2, at 179.

punitiveness, including support for the death penalty."[52] It would be difficult for anyone to ignore these stereotypes when he or she enters the jury box, no matter what instructions the judge gives.

In addition, African Americans and whites have different perspectives on the criminal justice system, which has implications on how they will serve as jurors.[53] "Blacks are more likely to believe that decisions to bring criminal charges, to convict on such charges, and to impose capital punishment are tainted with racial bias. Whites . . . are more likely to see the criminal justice system as excessively lenient and rigged in favor of defendants' rights."[54] Furthermore, "in capital cases, blacks may be more sympathetic than white jurors to mitigating evidence presented by a black defendant with whom they may be better able to identify and empathize, and whose background and experiences they may feel they understand better than do their white counterparts."[55] This is why many prosecutors would like to use peremptory challenges in capital cases involving African-American defendants to strike African-American jurors. More African Americans on the jury will only decrease the likelihood that the defendant will be sentenced to death.

These concerns are confirmed by studies and statistics. Mock jury studies, actual jury studies, and death penalty statistics tend to show similar patterns of "race-linked guilt and punishment decision making."[56] For instance, one mock jury study has shown that "white mock jurors were more likely to impose the death penalty on a black defendant than on a white defendant."[57] "[T]his tendency is fostered by white jurors' failing to give effect to mitigating circumstances when the defendant is black . . . jurors mentioned 'stereotype-consistent' reasons for their sentencing verdicts . . . and appeared less able or willing to empathize with black defendants."[58] Another mock jury study that focused on capital sentencing showed that the defendant's race was most influential in mid-range cases.[59] In these cases where the decision could go either way, African-American defendants were more likely to be sentenced to death than white defendants.[60] "Generally, the studies of mock jury capital sentencing have shown that white mock jurors have the

52. *Id.*
53. *Id.* at 180.
54. *Id.*
55. *Id.* at 181.
56. *Id.* at 181-82.
57. *Id.* at 183.
58. *Id.*
59. *Id.*
60. *Id.* at 183-84.

strongest tendency to impose death as punishment in cases where the defendant is black and the victim is white."[61]

Actual data from capital juries shows similar results. For example, Professor David Baldus and his colleagues conducted an elaborate empirical study of Philadelphia capital juries. This study analyzed hundreds of capital cases in Philadelphia over a 10-year period.[62] According to this study, "death sentences are less likely when black jurors are more numerous."[63] In particular, their preliminary findings suggested that "black defendants are treated less punitively vis-a-vis nonblack defendants as the proportion of blacks on the juries increases."[64] In addition, "the tendency for black defendants to be treated more harshly than white ones as the number of whites on the jury increases holds especially for black defendant/white victim cases."[65] On the other hand, the study shows that "the tendency for black defendants to be treated more harshly is curbed, especially when young black males and middle-aged black females are better represented on the jury."[66]

Another study known as the Capital Jury Project, which included data representing capital cases from fourteen states across the U.S., found that "the presence of five or more white males on the jury dramatically increased the likelihood of a death sentence in the [black defendant/white victim] cases."[67] This effect did not appear in cases involving white defendants and white victims, or black defendants and black victims.[68] On the other hand, the presence of African-American male jurors in cases involving a black defendant and white victim "substantially reduced the likelihood of a death sentence."[69] The presence of black male jurors reduced the likelihood of a death sentence to a lesser degree in black defendant/black victim cases, and not at all in white defendant/white victim cases.[70]

In regards to the decision-making of individual jurors, data from the Capital Jury Project showed that "black and white jurors' punishment stands diverged more in [black defendant/white victim] than in [white defendant/white victim] or [black defendant/black victim] cases. As the trial proceeded, this

61. *Id.* at 184.
62. *Id.* at 188.
63. *Id.*
64. Baldus et al., *supra* note 6, at 1721 n.159.
65. Bowers et al., *supra* note 2, at 188.
66. *Id.*
67. *Id.* at 193.
68. *Id.* at 195.
69. *Id.* at 193.
70. *Id.* at 195.

difference became considerably more pronounced."[71] At the guilt phase of the trial, white jurors were only three times more likely than black jurors to vote for death, but "[b]y the first vote on punishment, the differential between white and black jurors on death reached more than seven to one."[72] In white defendant/white victim and black defendant/black victim cases, the decision-making pattern was quite different.[73] In these cases, jurors of the same race as the defendant and victim were more likely to vote for death than jurors of other races.[74] Once again, this data shows the significant role that race plays in jury decision-making in capital cases.

In addition to these studies, statistics show a disparate treatment in the imposition of the death penalty, especially in cases where the defendant is African American and the victim is white. Statistics show that 34.2% of the defendants executed in the U.S. since the revival of the death penalty in 1976 have been black, while 56.9% have been white.[75] Some would argue that this contradicts the proposition that black defendants are more likely to be sentenced to death than white defendants. Though, upon closer examination, since African Americans only represent 12.3% of the population and whites represent 75.1% of the population, African Americans are clearly overrepresented in the death penalty population.[76]

A particularly disturbing statistic is that in executions since 1976, the victim was white in 79.3% of the cases, while the victim was black in only 14.1% of the cases.[77] In fact, the U.S. General Accounting Office declared that "[i]n 82% of the studies [reviewed], race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found more likely to be sentenced to death than those who murdered blacks."[78] Furthermore, in 213 cases involving interracial murders in which the defendant was executed since 1976, the defendant was African American and the victim was white.[79] On the other hand, only 14 cases involved a white defendant and an African-American victim.[80] This is such a substantial discrepancy that it would be illogical for one to deny

71. *Id.* at 200.
72. *Id.*
73. *Id.* at 201.
74. *Id.*
75. Death Penalty Information Center, *Race of Death Row Inmates Executed Since 1976*, http://www.deathpenaltyinfo.org/article.php?scid=5&did=184.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*

that race, especially the race of the victim, plays a role in how the death penalty is imposed.

III. Addressing the Problem of Racial Influences on the Jury in Capital Sentencing

Despite the limited efforts of Congress and the Supreme Court to address the problem, the studies and statistics discussed above clearly show that race continues to play a significant role in jury decision-making in capital cases. The defects in the jury selection process contribute to this problem because prosecutors might do whatever is necessary to increase the likelihood of a death sentence, including striking black jurors when the defendant is black. As discussed above, they are often able to exclude jurors based on race because *Batson* makes it difficult for a defendant to successfully challenge a prosecutor's use of peremptory challenges under equal protection jurisprudence.

One federal judge tried to create her own solution to the problem of racial bias in jury decision-making. U.S. District Judge Nancy Gertner of the District of Massachusetts had a plan that would have added steps to the jury selection process.[81] Judge Gertner wrote a 95-page opinion and noted that it would be "profoundly troubling" if the African-American defendants, Darryl Green and Branden Morris, were to face an all-white or mostly white jury in a trial to decide whether they should live or die.[82] Judge Gertner cited a study indicating that "wealthier towns with fewer minority residents keep more accurate residency lists than more diverse cities, including Boston." As a result, Gertner found "a higher percentage of jury summonses sent to minorities come back as undeliverable or go unanswered, often because the person has moved."[83]

Therefore, Judge Gertner "ordered the jury administrator to follow up when a notice is returned as undeliverable by randomly sending a new jury summons to another resident in the same ZIP code. If a summons goes unanswered, Gertner said, court officials should send a second notice. If there's still no response, a new summons should go to another resident in the same ZIP code, she

81. Shelly Murphy, "U.S. judges battle on makeup of juries: Plan to seat more blacks criticized," THE BOSTON GLOBE, September 16, 2005, http://www.boston.com/news/local/massachusetts/articles/2005/09/16/race_jury_selection_is_battle_in_courts/?page=full.

82. *Id.*

83. *Id.*

said."[84] In addition, the Chief Judge of the federal court in Boston "has asked a panel of judges to consider drafting a new jury plan for the whole court."[85]

One state court in particular has also addressed the problem of racial discrimination in death sentencing. "*McCleskey* does not bind state supreme courts and they are free to entertain claims of racial discrimination under their state constitutions . . ."[86] However, ". . . the idea is distinctly unappealing to nearly all such courts."[87] Only the state supreme courts in Connecticut and New Jersey, and the New York state legislature have showed some possible interest in the issue.[88] Furthermore, only the Supreme Court of New Jersey has actually heard a race claim.[89]

In *State v. Marshall*, the Supreme Court of New Jersey "rejected the *McCleskey* approach and ruled that, under the Equal Protection Clause of the New Jersey Constitution, claims of both race-of-victim and race-of-defendant discrimination are cognizable."[90] The test established by the court "asks whether the race of either the victim or the defendant 'played a significant part in capital-sentencing decisions' in New Jersey."[91] Instead of focusing "on the risk that race might adversely have influenced the decision of either the prosecutor or the jury in an individual case," the court in *Marshall* "focused on the constitutional legitimacy of the system as a whole."[92] The court found no evidence of unconstitutional discrimination in *Marshall*, but if it did in the future, "it would 'seek corrective measures' whose impact the court could observe through judicial oversight."[93] These may include "(1) a limitation on the class of death-eligible cases or (2) the promulgation of more objective and detailed standards to guide the exercise of prosecutorial discretion."[94] If the corrective measures did not rectify the discrimination, the court would presumably declare the system unconstitutional.[95] In spite of this decision, the Supreme Court of

84. *Id.*
85. *Id.*
86. Baldus et al., *supra* note 6, at 1736.
87. *Id.*
88. *Id.* at 1737.
89. *Id.*
90. *Id.* (noting that in *Marshall*, 613 A.2d 1059, 1062 (N.J. 1992), the defendant was convicted for the murder of his wife and then sentenced to death. The death penalty statute in New Jersey allowed the defendant to request that the Supreme Court of New Jersey review a death sentence imposed to determine if it was "disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.")
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 1737-38.
95. *Id.* at 1738.

New Jersey has "rejected all of the [similar race-based] claims it has heard thus far."[96]

Perhaps the courts are not the best venue for resolving the problem of racial bias in jury decision-making. Professor Baldus noted that the decision in *McCleskey* "suggested that one should present claims of discrimination for corrective action to legislatures."[97] In fact, two proposals, known as the Racial Justice Act and the Fairness in Death Sentencing Act, were made in the U.S. Congress after *McCleskey*.[98] The proposals did not address capital sentencing in any particular state or "specifically seek to impose structural remedies on the states that would limit the exercise of both prosecutorial and jury discretion to the most highly aggravated cases in which no race effect was apparent, which Justices Blackmun and Stevens suggested [in their dissent] in *McCleskey*."[99] Instead, the proposals were designed "to give offenders the right to challenge their individual death sentences as racially motivated, just as individuals who can claim discrimination under federal employment and housing laws."[100]

In particular, the two proposals enabled an African-American defendant or a defendant whose victim was white to "establish a prima facie case by showing a racially discriminatory pattern of death sentencing, presumably after adjustment for the leading aggravating circumstances."[101] This would have effectively overruled *McCleskey* and allowed a defendant to bring a claim of discrimination based on certain studies, such as the Baldus study, instead of having to prove purposeful discrimination by prosecutors in the defendant's particular case. Under the proposals, "[t]he State could rebut [the defendant's] showing by demonstrating, by a preponderance of the evidence, that identifiable and pertinent non-racial factors persuasively explain the observable racial disparities comprising the pattern."[102] If the State failed to rebut the defendant's showing, "defendants would be entitled to relief from their death sentences if their cases fell within a category of cases in which a racial disparity existed to their disadvantage."[103] Although the U.S. House of Representatives adopted one of the proposals, the Fairness in Death Sentencing Act, the Senate rejected it in a House-

96. *Id.*
97. *Id.* at 1735.
98. *Id.*
99. *Id.* at 1735-36.
100. *Id.* at 1736.
101. *Id.*
102. *Id.*
103. *Id.*

Senate Conference Committee.[104] Thus, neither proposal became law.

Because Congress and the courts have not effectively addressed the influence of race on jury decision-making in capital cases, one should think about other ways of tackling the issue. Perhaps the easiest way to resolve the issue would be to abolish the death penalty. Many people would be surprised to learn that several years after the *McCleskey* decision, Justice Powell, who wrote the majority opinion, "admitted he hadn't fully understood the statistical evidence of prejudice in the McClesky case and wished he had voted differently. He said, 'I have come to think that capital punishment should be abolished.'"[105]

If one considers the number of death row exonerations that have taken place, the death penalty system itself seems quite flawed. Since 1973, 122 people in 25 states have been released from death row through evidence of their innocence.[106] Even without attention to race, the large number of exonerations is disconcerting. Yet, if one were to look at exonerations by race, 61 of those exonerated were black, while 47 were white.[107] This could indicate that black defendants are more likely to be executed based on false or incomplete evidence than other people.

The Supreme Court effectively placed a moratorium on the death penalty in 1972 when it held in *Furman v. Georgia* that "the imposition of capital punishment under existing statutes was so arbitrary and wanton as to violate the Eighth Amendment's prohibition against 'cruel and unusual punishment.'"[108] Some of the concurring Justices, including Justice Marshall and Justice Douglas, referred to racial discrimination or bias in the application of the death penalty, but "it was not common to the opinions of the five-Justice plurality."[109] However, *Furman* was short-lived. States rewrote their capital statutes to decrease arbitrariness and discrimination in the imposition of the death penalty, and the Supreme Court affirmed the constitutionality of these rewritten

104. *Id.*

105. *See* Amnesty International Canada, *supra* note 47.

106. *Innocence and the Death Penalty,* http://www.deathpenaltyinfo.org/ article.php?did=412&scid=6 (last visited Oct. 11, 2006).

107. *Id.*

108. Bowers et al., *supra* note 2, at 177. (*Furman*, 408 U.S. 238 (1972), involved three cases in which the death penalty was imposed, and the Court looked at the death penalty statutes in Texas and Georgia, which were typical of those in most states at the time. In each the determination of whether the penalty should be death or a lighter punishment was left by the State to the discretion of the judge or of the jury. In the three cases here, the trial was to a jury).

109. *Id.*

statutes in *Gregg v. Georgia* in 1976.[110]

Conclusion

This note has addressed how race influences jury decision-making in the capital sentencing process. The statistics and studies are staggering. This is an extremely important issue because the criminal justice system gives juries a vast amount of decision-making power. Proposals to deal with the problem in Congress have failed, and state courts have generally ignored it. Judge Gertner's approach of trying to tackle the issue at the level of jury composition makes sense. Unfortunately, her attempt to resolve the problem was rejected by an appellate court. The U.S. criminal justice system needs more judges and other participants like Judge Gertner who have a desire to address the problem of racial bias. Rather than rejecting such basic attempts to resolve the problem, judges and the legal community at large should continue to discuss what viable options are available to continue to improve the system.

110. *Id.* (In *Gregg*, 428 U.S. 153 (1976), the defendant was convicted of armed robbery and murder and sentenced to death under the post-*Furman* statute in Georgia. The statute bifurcated the guilt and penalty phases of the trial, imposed certain procedures for the jury, and obligated the Georgia Supreme Court to review each death sentence to determine whether it was disproportionate to the punishment usually imposed in similar cases).

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