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Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of Its Prevention, Detection, and Correction

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Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of Its Prevention, Detection, and Correction

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Recent rhetoric in the Supreme Court and Congress has given currency and legitimacy to claims that racial discrimination in the administration of the death penalty is inevitable and impossible to prevent, detect, and correct. This Article considers the plausibility of these claims, which can be viewed more profitably as testable hypotheses. We argue that the inevitability hypothesis is probably overstated and that the impossibility hypothesis is almost certainly wrong. With proper procedures and firm enforcement of proscriptions against racial discrimination, we argue, capital sentencing systems can be largely purged of the discrimination that currently exists. We also consider recent developments in the New Jersey and Florida Supreme Courts that provide models for examining structural discrimination in capital sentencing and discrimination in individual cases. Over time, developments in these and in other state courts may shed important light on the plausibility of the inevitability and impossibility hypotheses.

*One source of resistance to the adaptation of legal initiatives to curb racial discrimination in capital sentencing has been uncertainty about how best to use statistical evidence as a basis for detecting purposeful discrimination. This Article focuses on various presumption-based models for evaluating statistical evidence of discrimination in individual cases. One is a "risk-based" model of proof patterned after Justice Blackmun's dissenting opinion in *McCleskey v. Kemp*; it would entitle a defendant to relief if he demonstrated systemic, purposeful discrimination in a death sentencing system that implicated his case. A more conservative "but-for" causation model of proof, used in employment cases and other contexts outside the criminal law, would permit the State to prevail despite statistical evidence of systemic, purposeful discrimination. The death sentence in an individual claimant's*

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case could be carried out if the State could prove by a preponderance of objective evidence that race was not a but-for factor in the defendant's case—that is, if it could demonstrate with evidence from other similar cases that because of the aggravated nature of the defendant's case, he would have received a death sentence irrespective of his race (or the race of his victim). A less conservative causation-based model of proof would allow the State to prevail if it could demonstrate that race was not a "substantial factor" in the individual's case. Under a third model, the State could prevail with proof that race was not a "motivating factor" in the individual's case.†

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I. Introduction

Discrimination on the basis of race and ethnicity has deep roots in American culture.¹ However, over the past forty years, changing perceptions of the legitimacy of such discrimination have produced a civil rights revolution. This revolution began with civil disobedience and political unrest, but ultimately manifested itself in a series of judicial decisions and legislative enactments directed toward the elimination of discrimination from most major governmental institutions—voting, employment, housing, public education, and the delivery of other public services. One institution that lags behind in this regard, however, is the criminal justice system, particularly as it applies to capital punishment.

The criminal justice system's failure to adapt may seem surprising because during this same period, concerns about racial discrimination in the use of the death penalty, especially in the South, prompted the United States Supreme Court to expand the procedural rights of all criminal defendants. Concerns about racial discrimination were also an unstated motivation for the Supreme Court's abolition of the death penalty in nonfatal rape cases in the 1970s.² However, neither the Supreme Court nor Congress has been willing to take direct action to prevent racial factors from influencing which defendants are sentenced to death for capital crimes.

Until recently, one obstacle to judicial action was the claim that the existence of racial discrimination had not been adequately proven. In *Furman v. Georgia*,³ this "not proven" objection appeared in both concurring and dissenting opinions⁴ in response to Justice Marshall's flat assertion that the system was racist to the core.⁵ This objection also served as an invitation to interested social scientists, statisticians, and lawyers to test empirically the claim that discrimination did not exist in the administration of the death penalty. The resulting research from the past fifteen years has produced a significant body of evidence that suggested that in many states,

1. See DERRICK A. BELL, *RACE, RACISM AND AMERICAN LAW* § 1.14 (3d ed. 1992).

2. See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding that death penalty for rape violates Eighth Amendment's prohibition of cruel and unusual punishments).

3. 408 U.S. 238 (1972).

4. See *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring); *id.* at 313 (White, J., concurring); *id.* at 389 n.12 (Burger, C.J., dissenting); *id.* at 449 (Powell, J., dissenting).

5. *Id.* at 364-65 (Marshall, J., concurring).

on average, the killer of a white victim was more likely to receive a death sentence than a similarly situated killer of a minority victim.⁶

Despite this evidence, neither the Court nor Congress has acted as they did on prior occasions—sometimes on the basis of less compelling evidence of discrimination in other areas of American life—by establishing rules and procedures to prevent discrimination and to remedy the effects of pre-existing discrimination. Instead, the Court and Congress have found new obstacles to effective action, which take the form of three assertions:

1. Racial discrimination in the administration of the death penalty is inevitable and impossible to prevent;
2. Racial discrimination in capital sentencing is impossible to detect; and
3. Racial discrimination is impossible to correct in individual cases without abolishing capital punishment altogether or requiring the overt use of quotas.

These assertions have been advanced to justify closure on the issue of race and the death penalty and to terminate discussion and exploration of the issue. Such a result would spare the Court from confronting the difficult constitutional dilemmas that it might face if it closely examined the American death penalty system.⁷ For the states, judicial recognition of the legitimacy of claims of racial discrimination in individual capital cases could mean additional costs, complexity, and delay.⁸ Moreover, the evidence that

6. U.S. GEN. ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990) [hereinafter GAO REPORT].

7. The alternatives available to remedy the problem of racial discrimination in capital punishment might include such politically difficult options as (a) narrowing the class of death-eligible cases, (b) requiring standards to limit the exercise of prosecutorial discretion, (c) recognizing claims of racial discrimination in individual cases and evaluating those claims under burdens of proof comparable to those applied in other areas of the law, or (d) abolishing the death penalty.

8. Ronald Tabak has noted that the eradication of racial discrimination from a state's death sentencing system could, by reducing the number of questionable death sentences, result in savings of money and time. Indeed, if a state were to follow the suggestion of Justices Blackmun and Stevens in *McCleskey v. Kemp*, 481 U.S. 279 (1987), and limit death sentencing only to the most aggravated categories of cases in which there was no evidence of racial discrimination, there would be substantially fewer capital prosecutions, which would result in great cost savings. *See id.* at 365 (Blackmun, J., dissenting); *id.* at 367 (Stevens, J., dissenting). Also, with a smaller volume, the remaining highly aggravated cases could be adjudicated more rapidly.

emerged in the adjudication of such claims might reduce the legitimacy of capital punishment. Thus, acceptance of claims of impossibility and inevitability avoids the necessity to confront a variety of unpalatable issues. Acceptance of these claims also avoids responsibility for the existing state of affairs and justifies the status quo.⁹

In contrast to some other legal propositions, the impossibility and inevitability assertions represent testable hypotheses.¹⁰ The first hypothesis—"inevitability"—is that racial discrimination in the United States is inherent in its death sentencing systems and that no combination of rules and standards can prevent it. The second hypothesis—"impossibility"—is that discrimination is impossible to detect and impossible to correct in individual cases without the de facto abolition of capital punishment or the use of race-based quotas to limit the exercise of the discretion of prosecutors and juries.

In this Article, we explore the role that claims of inevitability and impossibility have played in the recent capital punishment debate in the Supreme Court and Congress. We also evaluate their inherent plausibility and their plausibility in the face of the available data. In this latter regard, we report recent developments in the New Jersey and Florida Supreme Courts, which have developed models of proof to assess claims of structural discrimination and of discrimination in individual cases.¹¹ We also consider alternative models of proof that might be employed to evaluate claims of discrimination in individual cases. The first is a risk-based model, patterned after Justice Blackmun's dissenting opinion in *McCleskey v.*

9. For an insightful discussion of the rhetoric of judicial opinions in general, see Gerald B. Wetlauffer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1560-66 (1990). Ronald Tabak has pointed out that it may not be fair to say that the Supreme Court has done as much as Congress to advance the view that no one should deal with these issues. *McCleskey v. Kemp*, 481 U.S. 279 (1987), which rejected constitutional claims of racial discrimination in death sentencing, can be interpreted as saying that courts should not, by purporting to apply the Constitution, consider such issues on their own initiative. Rather, legislative bodies should address the problem and thereby eventually compel the courts to do so as well.

10. For example, the assertion in *Roe v. Wade*, 410 U.S. 113 (1973), that a fetus is not a "person" under the Fourteenth Amendment is not susceptible to empirical verification. *See id.* at 158.

11. *See Foster v. State*, 614 So. 2d 455, 465-68 (Fla. 1992) (Barkett, C.J., concurring in part, dissenting in part), *cert. denied*, 114 S. Ct. 398 (1993); *State v. Marshall*, 613 A.2d 1059, 1070-88 (N.J. 1992).

*Kemp*¹² and a recent dissenting opinion in the Florida Supreme Court.¹³ Such a model would entitle a capital defendant to relief upon proof of systemic, purposeful discrimination in the death sentencing system that implicates his case. We also consider three more conservative, causation-based models that are patterned after approaches used in employment discrimination law and in other contexts outside the criminal law. These models would entitle the State to prevail, despite evidence of systemic, purposeful discrimination that implicates a defendant's case, if the State could establish with objective evidence that in the defendant's case, race was not (a) a "but-for factor," (b) a "substantial factor," or (c) a "motivating factor."

II. *McCleskey v. Kemp*

McCleskey is important because it represents the Court's first serious consideration of empirical evidence of discrimination in the post-*Furman* era of death sentencing. The Scottish verdict of "not proven" tacitly used by the Court in *Furman* could not plausibly provide a ground for rejecting *McCleskey's* claims because the petitioner's evidence comprised one of the most exhaustive bodies of social scientific data and analysis ever assembled to examine a criminal law issue. Instead, the *McCleskey* opinion developed the theses of inevitability and impossibility, which figured significantly in the ensuing congressional debate over the desirability and feasibility of bypassing *McCleskey* through legislation that would allow condemned prisoners to raise claims of racial discrimination under the authority of federal law.¹⁴

Warren *McCleskey* was an African-American who killed a white police officer during an armed robbery in Fulton County, Georgia.¹⁵ The jury found two aggravating circumstances present in his case—the victim was a police officer and the homicide occurred in the course of an armed robbery—and returned a death sentence.¹⁶ In postconviction proceedings, *McCleskey* made two claims. First, he presented a structural challenge to

12. 481 U.S. 279, 351-53 (1987) (Blackmun, J., dissenting).

13. *Foster*, 614 So. 2d at 467-68 (Barkett, C.J., concurring in part, dissenting in part).

14. See *infra* notes 76-127 and accompanying text (discussing congressional reform efforts in wake of *McCleskey*).

15. *McCleskey v. Kemp*, 481 U.S. 279, 283 (1987).

16. *Id.* at 284-85.

the constitutionality of Georgia's capital sentencing system and alleged that it was administered in a racially discriminatory manner in violation of both the cruel and unusual punishments provision of the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment.¹⁷ Specifically, he alleged that black defendants and defendants whose victims were white were at a substantially greater risk of receiving a death sentence in Georgia than white defendants and defendants whose victims were black.¹⁸ McCleskey supported these claims with an analysis of over 2,000 defendants who had been indicted for murder and convicted of either murder or voluntary manslaughter in Georgia between 1973 and 1979.¹⁹ His evidence showed that among the cases involving black defendants, the death sentencing rate was 21% when the victim was white, but only 1% when the victim was black.²⁰ Among all cases with one or more white victims, the data showed a death sentencing rate of 11% versus a 1% rate in the black-victim cases.²¹ These frequently cited figures do not, however, take into account the possibility that systematic differences in the degree of aggravation or heinousness might distinguish the average white-victim and black-victim case and thereby explain the sharp differential in the death sentencing rates in the two groups of cases. To address this issue, McCleskey presented numerous statistical analyses that accounted for differences in the aggravation level of each case.²²

As expected, the "adjusted" race-of-victim disparities were less dramatic. After statistical adjustment for 39 nonracial statutory and nonstatutory aggravating and mitigating circumstances (such as whether the murder occurred during a rape or robbery, whether the murderer had a prior criminal record, or whether more than one victim was killed), on average a defendant's odds of receiving a death sentence were still 4.3 times higher if the murder victim were white.²³ The evidence also suggested that these

17. *Id.* at 286.

18. *Id.* at 286-87.

19. *Id.* at 286.

20. *Id.*

21. *Id.*

22. *Id.* at 287 & n.5.

23. *Id.* at 287; see DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 316-20 (1990). The analyses presented in *McCleskey* did not show consistent statistically significant statewide race-of-defendant effects. *Id.* at 328.

race-of-victim effects were principally the product of prosecutorial plea bargaining decisions and prosecutorial decisions to seek death sentences in death-eligible cases.²⁴ Moreover, McCleskey's evidence showed that among the moderately aggravated cases—the so-called "mid-range" of cases—in which the facts neither called out strongly for life (as in a drunken brawl among acquaintances), nor for death (as in a torture murder or multiple slaying case), the race-of-victim disparities were much greater.²⁵ Indeed, among black-defendant cases with a level of criminal culpability comparable to *McCleskey*, white-victim cases resulted in death sentences in approximately 34% of the cases, while similar black-victim cases resulted in death sentences in only 17% of the cases.²⁶

McCleskey's second claim was that his own death sentence was the product of racial discrimination and that as a consequence, it violated both the Eighth and Fourteenth Amendments to the Constitution.²⁷ To support this claim, he emphasized, as noted above, that statewide his case fell into the category of cases in which the statistical evidence of discrimination was strongest.²⁸ He also supplemented these data with statistical evidence specific to Fulton County, where his own case had been prosecuted.²⁹

24. Prosecutors regularly agreed to accept guilty pleas in black-victim cases that allowed the defendant to accept in return a life sentence or less, but insisted more commonly that defendants in white-victim cases go to trial for capital murder. See BALDUS ET AL., *supra* note 23, at 327-28.

25. *McCleskey*, 481 U.S. at 287 n.5; see BALDUS ET AL., *supra* note 23, at 320-21.

26. See BALDUS ET AL., *supra* note 23, at 320-21.

27. *McCleskey*, 481 U.S. at 291-92, 308.

28. *Id.* at 287 n.5.

29. McCleskey presented data on 581 Fulton County murder cases, which are summarized in Table 1. These data suggest that substantial race-of-victim effects also existed in Fulton County in plea bargaining and prosecutorial decisions to seek the death sentence. BALDUS ET AL., *supra* note 23, at 337-38. Although the data in Table 1 are not adjusted for the criminal culpability of the defendants involved, McCleskey presented the results of multivariate statistical analyses in which the race-of-victim disparities persisted after adjustment for legitimate case characteristics. See *id.* at 337-39.

Table 1

Fulton County Race-of-Victim Disparities in the Disposition of Cases at Six Points in the Charging-and-Sentencing Process and Overall, for All Cases (css)^a

A	B	C	D	E	F
	Average Rate	Race of Victim		Arithmetic Difference (C-D)	Ratio (C/D)
		White	Black		
1. Indictment for murder	.92 (581/629)	.95 (161/169)	.91 (420/460)	.04	1.04
2. Guilty plea to voluntary manslaughter after a murder indictment	.59 (340/581)	.45 (72/161)	.64 (268/420)	-.19	.70
3. Guilty plea to murder and no penalty trial	.21 (51/241)	.30 (27/89)	.16 (24/152)	.14	1.88
4. Murder conviction at guilt trial	.68 (129/189)	.81 (50/62)	.62 (79/127)	.19	1.31
5. Case advanced to a penalty trial after murder conviction at a guilt trial	.17 (19/110)	.24 (11/46)	.13 (8/64)	.11	1.85
6. Death sentence imposed at penalty trial	.53 (10/19)	.73 (8/11)	.25 (2/8)	.48	2.92
7. Combined effect of decisions after murder indictment resulting in a death sentence	.02 (10/581)	.05 (8/161)	.005 (2/420)	.045	10

^a BALDUS ET AL., *supra* note 23, at 338.

Table 2 shows the effects of race among the 32 most aggravated death-eligible Fulton County cases, which include *McCleskey*.

<i>Table 2</i>					
Fulton County Unadjusted and Adjusted Race-of-Victim Disparities Among Cases with the Highest Predicted Likelihood of Receiving a Death Sentence (css) ^a					
A	B	C	D	E	F
	Average Rate	Race of Victim		Arithmetic Difference (C-D)	Ratio (C/D)
		White	Black		
I. All cases (n = 32)	.31 (10/32)	.47 (8/17)	.13 (2/15)	.34	3.6
II. By aggravation level					
A. More aggravated cases (n = 14)	.57 (8/14)	.75 (6/8)	.33 (2/6)	.42	2.27
B. Typical cases (n = 8)	.25 (2/8)	.40 (2/5)	.00 (0/3)	.40	Infinite
C. Less aggravated cases (n = 10)	.00 (0/10)	.00 (0/4)	.00 (0/6)	.00	Infinite

^a BALDUS ET AL., *supra* note 23, at 335. This sample also includes five penalty-trial cases that were not among the cases with the highest predicted likelihood of receiving a death sentence.

The data in Table 2 indicate that the death sentencing rate in white-victim cases was 47%, compared to 13% in the black-victim cases—a 34-point disparity. BALDUS ET AL., *supra* note 23, at 335. After adjustment for the different levels of criminal culpability, the race-of-victim disparity in these Fulton County cases, which we estimated for this Article, was 28 percentage points. In the "typical" category, in which *McCleskey*'s case was located, the race-of-victim disparity was 40 points (40% compared to 0%), although the sample sizes were small. *See id.*

McCleskey's proof also focused on the 16 other Fulton County cases that involved a police officer victim, the most aggravating characteristic of his case. *McCleskey*, 481 U.S. at 356-57 (Blackmun, J., dissenting); *see* BALDUS ET AL., *supra* note 23, at 334. Six involved black victims, and 10 involved white victims. *Id.* Of these cases, only one other, with a black victim, advanced to a penalty trial, and it resulted in a life sentence. *McCleskey*, 481 U.S. at 357 (Blackmun, J., dissenting); *see* BALDUS ET AL., *supra* note 23, at 334. *McCleskey* further established that there were neither guidelines nor a system of supervisory oversight to regulate the exercise of prosecutorial discretion in Fulton County. *McCleskey*,

McCleskey argued that his evidence of race-of-victim discrimination, both statewide and in Fulton County, created a presumption that both the prosecutor and jury had discriminated against him in the decisions that led to his death sentence.³⁰ Because the State had failed to rebut this presumption, McCleskey argued that he had established a violation of the Equal Protection Clause of the Fourteenth Amendment, which entitled him to relief from his death sentence.³¹ He also argued that the data established a sufficiently large risk of racial discrimination in his case to constitute a violation of the cruel and unusual punishments provision of the Eighth Amendment,³² which had been interpreted in earlier Supreme Court cases to bar capital sentencing procedures that created an unacceptable risk of sentencing error.³³

The five-justice majority opinion in *McCleskey* did not explicitly address the structural claim that the entire Georgia death sentencing system was unconstitutional. Rather, it focused on McCleskey's narrower assertion that his proof entitled him to relief because of discrimination in his particular case.³⁴ Addressing McCleskey's equal protection claim, Justice Powell held that statistical evidence of systemic racial discrimination, either statewide or in a single judicial district, was an insufficient basis for relief in an individual case unless the defendant could establish by direct evidence that there had been discrimination by the prosecutor or jury in his case.³⁵ In so ruling, Justice Powell rejected McCleskey's argument that he could rely in his case on a presumption of discrimination³⁶ based on his statistical proof of race-of-victim discrimination statewide and in Fulton County. Addressing McCleskey's Eighth Amendment claim, Justice Powell further held that the

481 U.S. at 357-58 (Blackmun, J., dissenting); see *BALDUS ET AL.*, *supra* note 23, at 338, 346. Finally, McCleskey demonstrated that his 12-person jury included only one black juror. *See id.* at 340.

30. *McCleskey*, 481 U.S. at 292-93.

31. *Id.* at 291.

32. *Id.* at 308.

33. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

34. *McCleskey*, 481 U.S. at 292.

35. *Id.*

36. *Id.* at 292-93.

demonstrated risk of racial discrimination in *McCleskey*'s case was not sufficiently great to warrant relief.³⁷

Justice Powell presented four main justifications for the Court's decision. The first was methodological. Unlike the district court, which had rejected *McCleskey*'s statistical evidence as unreliable and had implied that proof of discrimination in a capital sentencing system was impossible, Justice Powell "assume[d] the study [was] valid statistically without reviewing the factual findings of the District Court."³⁸ He declined, however, to apply the usual presumptions arising from statistical evidence that the Court routinely relies upon to establish equal protection and Title VII claims in cases challenging jury selection procedures or discrimination in employment³⁹ and explained that the capital punishment system involved a larger number of independent decision makers who considered a larger number of variables.⁴⁰ The standard set by *McCleskey* for proving constitutional violations means that proof of racial discrimination in capital punishment cases is beyond the capacity of virtually all capital defendants.⁴¹

Second, Justice Powell emphasized the importance of prosecutorial discretion in the American criminal justice system and expressed concern about possible unfairness in asking prosecutors to explain their decisions.⁴² Third, he expressed a fear that relief for *McCleskey* under the Eighth Amendment could invite a variety of additional claims of arbitrariness that might call into question the fairness of the entire criminal justice system.⁴³

Justice Powell's fourth rationale rests on assertions of inevitability and impossibility. He first noted that jurors bring to their deliberations different "qualities of human nature and varieties of human experience."⁴⁴ He next

37. *Id.* at 313.

38. *Id.* at 291 n.7.

39. *Id.* at 293-94.

40. *Id.* at 294-95.

41. The only models of proof left open by *McCleskey* are direct evidence of discrimination (e.g., admissions by prosecutors and jurors that race was an important or but-for factor in their decisions) and statistical disparities of a magnitude unlikely to be seen in this country.

42. *McCleskey*, 481 U.S. at 296; *see id.* at 311-12 (discussing entrenchment of prosecutorial discretion in American law).

43. *Id.* at 315-18.

44. *Id.* at 311 (quoting *Peters v. Kiff*, 407 U.S. 493, 503 (1972) (opinion of Marshall, J.)).

observed that the judgments of juries "often [were] difficult to explain" and that "[a]pparent disparities in sentencing [were] an inevitable part of our criminal justice system."⁴⁵ Finally, he stated that "McCleskey's wide-ranging arguments . . . basically challenge[d] the validity of capital punishment in our multiracial society," a statement which could be taken to imply that short of total abolition of the death penalty, elimination of the inevitable disparities in death sentencing was impossible.⁴⁶ Another interpretation of his statement, however, is merely that elimination of discrimination is a difficult task. For if Justice Powell truly believed that discrimination was impossible to detect and correct, why would he have invited "legislative bodies" to address the issue?⁴⁷

Four justices dissented. Each believed that McCleskey's data were valid and clearly established a pattern of race-of-victim discrimination in both the State of Georgia and Fulton County.⁴⁸ Each also put to one side the structural challenge to the constitutionality of Georgia's death sentencing system as a whole and focused on whether discrimination had been

45. *Id.* at 311-12.

46. *Id.* Justice Powell's inevitability and impossibility rhetoric may have been influenced by Justice Scalia, who did not write an opinion in the case. However, three months before *McCleskey* was decided, Justice Scalia circulated to the Court a short memorandum on the subject. Memorandum from Antonin Scalia, Justice, United States Supreme Court, to the Conference of the Justices, United States Supreme Court (Jan. 6, 1987) (on file with the *Washington and Lee Law Review*). First, he took issue with Justice Powell's suggestion that McCleskey's sentence would have been different if his statistical evidence had been stronger: "Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof." *Id.* at 1. Justice Scalia also took issue with Justice Powell's methodological justification for discounting McCleskey's statistical evidence: "I disagree with the argument that the inferences that can be drawn from the Baldus study are weakened by the fact that each jury and each trial is unique, or by the large number of variables at issue." *Id.* Justice Scalia's memo surfaced in Justice Marshall's papers, recently opened to the public by the Library of Congress.

47. See *McCleskey*, 481 U.S. at 319.

48. See *id.* at 328 (Brennan, J., dissenting); *id.* at 356 (Blackmun, J., dissenting); *id.* at 366 (Stevens, J., dissenting). Even though Justice Stevens was persuaded that McCleskey's data were valid, he would have, in the interest of "orderly procedure," remanded the study to the court of appeals to decide whether in fact the data were valid and to determine whether McCleskey's case fell within the range of cases involving an unacceptable risk that "race played a decisive role" in the imposition of the death sentence. *Id.* at 367.

established in McCleskey's case.⁴⁹ Justice Brennan's Eighth Amendment analysis addressed the evidence that McCleskey's case fell within a category of cases (both statewide and in Fulton County) that involved a substantial risk that the race of the victim was a factor in the imposition of the death penalty. Accordingly, he concluded that McCleskey's death sentence violated the Eighth Amendment's prohibition of "cruel and unusual punishment."⁵⁰

Justice Blackmun addressed McCleskey's equal protection claim.⁵¹ What was required, he said, was not just proof of a "risk" of discrimination, but proof of "the existence of purposeful discrimination."⁵² To evaluate McCleskey's evidence, Justice Blackmun developed a three-part risk-based model of proof patterned on models used in challenges to the prosecutorial use of peremptory challenges under *Batson v. Kentucky*⁵³ and in claims of discrimination in the selection of jury venires.⁵⁴ Because he was black and his victim was white, McCleskey easily satisfied the first prong of the test: McCleskey was a member of a constitutionally protected class.⁵⁵ The third prong—that "the allegedly discriminatory procedure [was] susceptible to abuse or [was] not racially neutral"⁵⁶—was also easily met.⁵⁷

The showing necessary to satisfy the second prong was more difficult. It required McCleskey to demonstrate "a substantial likelihood that his death sentence [was] due to racial factors."⁵⁸ On the basis of his survey of McCleskey's statewide and Fulton County data, Justice Blackmun concluded that the "showing is of sufficient magnitude that, absent evidence to the contrary, one must conclude that racial factors entered into the decision-

49. See *id.* at 320 (Brennan, J., dissenting); *id.* at 349 (Blackmun, J., dissenting); *id.* at 366 (Stevens, J., dissenting).

50. *Id.* at 320 (Brennan, J., dissenting).

51. See *id.* at 346 (Blackmun, J., dissenting).

52. *Id.* at 351.

53. 476 U.S. 79 (1986).

54. See *McCleskey*, 481 U.S. at 352-53 (Blackmun, J., dissenting).

55. *Id.* at 353. Without much discussion, the majority recognized a defendant's standing to raise a claim of discrimination based on the race of his victim. *Id.* at 291 n.8.

56. *Id.* at 352-53 (Blackmun, J., dissenting).

57. *Id.* at 357-58.

58. *Id.* at 353.

making process that yielded McCleskey's death sentence."⁵⁹ In Justice Blackmun's view, McCleskey's statistical evidence shifted the burden to the State to "demonstrate that legitimate racially neutral criteria and procedures yielded this racially skewed result."⁶⁰ The State, he concluded, had failed to meet this burden, thereby entitling McCleskey to relief.⁶¹ Justice Blackmun's model of proof did not require a finding that race was a "but-for," or even a substantial, factor in the decisions of the prosecutor or jury that resulted in his death sentence. Rather, he focused on the decision-making process that produced McCleskey's sentence and the probability that racial factors influenced that process.⁶² The obvious implication of Justice Blackmun's opinion was that a defendant seeking relief had to establish that his case fell into a category of cases in which racial disparities were clearly established.⁶³

Justice Blackmun also implicitly rejected an "inevitability" hypothesis and suggested instead that racial discrimination in the system generally could be reduced: "[T]he establishment of guidelines for Assistant District Attorneys as to the appropriate basis for exercising their discretion at the various steps in the prosecution of a case would provide at least a measure of consistency."⁶⁴ Justice Blackmun also joined Justice Stevens in rejecting the view, implicit in Justice Powell's majority opinion, that granting relief in cases like *McCleskey* "would sound the death knell for capital punishment in Georgia."⁶⁵ In the words of Justice Stevens:

If Georgia were to narrow the class of death-eligible defendants to [the most highly aggravated categories of cases in which death sentences are consistently imposed without regard to race], the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated. . . . [S]uch a restructuring of the sentencing scheme is surely not too high a price to pay.⁶⁶

59. *Id.* at 359.

60. *Id.*

61. *Id.* at 360.

62. *See id.* at 350-51.

63. *See id.* at 351-52.

64. *Id.* at 365.

65. *Id.* at 367 (Stevens, J., dissenting).

66. *Id.* Justice Blackmun's recently developed view that America's present death penalty system is unconstitutional appears to rest in part on a belief in the inevitability of

III. The Impact of *McCleskey*

If the purpose of *McCleskey* was to provoke closure, it certainly was successful in the federal courts. The decision has eliminated the federal courts as a forum for the consideration of statistically based claims of racial discrimination in capital sentencing.⁶⁷ We know of 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 claim was dismissed for failure to meet the *McCleskey* burden of proof.⁶⁸

discrimination in the system as it is currently administered. *See Callins v. Collins*, 114 S. Ct. 1127, 1129 (1994) (Blackmun, J., dissenting). Whether Justice Blackmun believes that an evenhanded system is impossible to achieve under more tightly regulated procedures is less clear. There is no doubt, however, that he believes that an evenhanded system is impossible to achieve under the death penalty law as it is presently administered by the state and federal courts. *See id.* On the issue of discrimination, Justice Blackmun noted both the absence of a "serious effort to impeach" *McCleskey*'s data and the failure of "proponents of capital punishment [to] provide[] any reason to believe that the findings of that study are unique to Georgia." *Id.* at 1135-36.

67. *See, e.g., Carriger v. Lewis*, 971 F.2d 329, 334 (9th Cir. 1992) (rejecting statistical evidence for lack of proof of purposeful discrimination in application of death penalty), *cert. denied*, 113 S. Ct. 1600 (1993); *Richmond v. Lewis*, 948 F.2d 1473, 1490-91 (9th Cir. 1990) (same), *rev'd*, 113 S. Ct. 528 (1992); *Moore v. Zant*, 885 F.2d 1497, 1514 n.16 (11th Cir. 1989) (rejecting Baldus study), *cert. denied*, 497 U.S. 1010 (1990); *Smith v. Dugger*, 840 F.2d 787, 796 (11th Cir. 1988) (denying evidentiary hearing on several general statistical studies on ground that even if studies were valid, they would be insufficient to demonstrate unconstitutional discrimination under Fourteenth Amendment or to show irrationality, arbitrariness, or capriciousness under Eighth Amendment), *cert. denied*, 494 U.S. 1047 (1990); *Darden v. Dugger*, 825 F.2d 287, 295 (11th Cir. 1987) (rejecting study of racial discrimination in death sentencing), *cert. denied*, 485 U.S. 943 (1988); *Moore v. Kemp*, 824 F.2d 847, 857 (11th Cir. 1987) (rejecting Baldus study), *cert. denied*, 490 U.S. 1028 (1989); *Elledge v. Dugger*, 823 F.2d 1439, 1450 (11th Cir. 1987) (rejecting empirical studies of discrimination in application of death penalty in Florida for lack of proof of discriminatory purpose), *cert. denied*, 485 U.S. 1014 (1988); *Franklin v. Lynaugh*, 823 F.2d 98, 99 (5th Cir. 1987) (rejecting statistic-based claim of discrimination), *aff'd*, 487 U.S. 164 (1988); *Celestine v. Butler*, 823 F.2d 74, 80 (5th Cir.) (rejecting discrimination claim for lack of proof of intent to discriminate), *cert. denied*, 483 U.S. 1036 (1987); *Williams v. Chrans*, 742 F. Supp. 472, 494 (N.D. Ill. 1990) (rejecting statistical evidence of discrimination), *aff'd*, 945 F.2d 926 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 3002 (1992); *Smith v. Thigpen*, 689 F. Supp. 644, 663 (S.D. Miss. 1988) (same), *aff'd*, 904 F.2d 950 (5th Cir. 1990), *vacated sub nom. Smith v. Black*, 112 S. Ct. 1463 (1992).

68. *See Dobbs v. Zant*, 720 F. Supp. 1566, 1572, 1575-79 (N.D. Ga. 1989) (holding that qualitative evidence failed to establish that penalty-trial jurors "acted with discriminatory purpose when they decided to impose the death penalty"), *aff'd*, 963 F.2d 1403 (11th Cir.

State courts, by contrast, are not bound by *McCleskey* and are free to entertain claims of racial discrimination under their state constitutions. Even so, state courts routinely invoke *McCleskey* as a justification for dismissing such claims with or without a hearing.⁶⁹ Two state courts, however, have rejected *McCleskey*—New Jersey, in the death sentencing context,⁷⁰ and Minnesota, in the context of noncapital sentencing.⁷¹ Also, a three-person minority of the seven-member Florida Supreme Court has rejected it.⁷²

1991), *rev'd on other grounds*, 113 S. Ct. 835 (1993).

69. See, e.g., *Cochran v. State*, 547 So. 2d 928, 930 (Fla. 1989) (rejecting evidence that death penalty is imposed in racially discriminatory manner); *McCrae v. State*, 510 So. 2d 874, 879 (Fla. 1987) (rejecting appellant's evidence because statistical disparities do not establish that appellant's sentence was imposed with discriminatory purpose); *People v. Spreitzer*, 525 N.E.2d 30, 49 (Ill.) (rejecting Gross study), *cert. denied*, 488 U.S. 917 (1988); *People v. Orange*, 521 N.E.2d 69, 82 (Ill.) (same), *cert. denied*, 488 U.S. 900 (1988); *People v. Stewart*, 520 N.E.2d 348, 355 (Ill.) (same); *cert. denied*, 488 U.S. 987 (1988); *People v. Davis*, 518 N.E.2d 78, 80-81 (Ill. 1987) (same), *cert. denied*, 489 U.S. 1059 (1989); *State v. Mallett*, 732 S.W.2d 527, 538-39 (Mo.) (en banc) (rejecting defendant's statistics demonstrating that Missouri's death penalty violates Equal Protection Clause on ground that defendant failed to show intention to discriminate), *cert. denied*, 484 U.S. 933 (1987); *State v. Dickerson*, 543 N.E.2d 1250, 1260 (Ohio 1989) (rejecting appellant's statistics based on two Lucas County cases), *cert. denied*, 494 U.S. 1090 (1990); *State v. Sowell*, 530 N.E.2d 1294, 1309 (Ohio 1988) (rejecting appellant's equal protection claim on ground that appellant failed to offer any evidence that improper racial considerations prompted his sentence), *cert. denied*, 490 U.S. 1028 (1989); *State v. Byrd*, 512 N.E.2d 611, 619 (Ohio 1987) (rejecting defendant's evidence that those convicted of murder of whites in Hamilton County are more frequently sentenced to death on grounds that issue was not raised at trial and that claim was rejected in *McCleskey*), *cert. denied*, 484 U.S. 1037 (1988); *State v. Zuern*, 512 N.E.2d 585, 593-94 (Ohio 1987) (rejecting statistical evidence of discrimination), *cert. denied*, 484 U.S. 1047 (1988); *State v. Steffen*, 509 N.E.2d 383, 395-96 (Ohio 1987) (rejecting offer of statistical study), *cert. denied*, 485 U.S. 916 (1988); *State v. Irick*, 762 S.W.2d 121, 129 (Tenn. 1988) (rejecting evidence of statistical compilation of all homicide cases in Knox County from 1978-86), *cert. denied*, 489 U.S. 1072 (1989); *Turner v. Commonwealth*, 364 S.E.2d 483, 490 (Va.) (rejecting defendant's offer of statistical evidence), *cert. denied*, 486 U.S. 1017 (1988); *Barnes v. Commonwealth*, 360 S.E.2d 196, 201 (Va. 1987) (rejecting defendant's evidence of statistical study published in law review article), *cert. denied*, 484 U.S. 1036 (1988).

70. See *State v. Marshall*, 613 A.2d 1059, 1108-10 (N.J. 1992).

71. See *State v. Russell*, 477 N.W.2d 886, 888 n.2 (Minn. 1991).

72. See *Foster v. State*, 614 So. 2d 455, 465-68 (Fla. 1992) (Barkett, C.J., concurring in part, dissenting in part), *cert. denied*, 114 S. Ct. 398 (1993). In Parts V and VI of this Article, we describe the New Jersey and Florida approaches to discrimination in death sentencing and consider the light that they may shed on the plausibility of the impossibility

Overall, though, *McCleskey* has reduced to near zero the level of judicial oversight in prosecutorial and jury decision making in the administration of the death penalty.

Another effect of *McCleskey* has been to shift the focus of academic research on the death penalty. Instead of developing statistical evidence, the focus is now on extended interviews with jurors who have participated in the life-and-death decision making of penalty trials.⁷³ The early results indicate that this research will shed substantial light on the plausibility of the inevitability and impossibility hypotheses.

The *McCleskey* decision has drawn considerable criticism. Numerous commentators have expressed serious concern with the Court's placement of an implicit imprimatur on racial discrimination in such an important area of the criminal law.⁷⁴ Particularly offensive to African-Americans is the perception, based upon *McCleskey*, that the Constitution authorizes prosecutors and jurors to provide minority communities with less protection than it provides white communities.⁷⁵

IV. Congressional Reform Efforts

Although *McCleskey* has closed down judicial discussion of race in capital cases, it did not block further consideration by Congress. Indeed, *McCleskey* itself suggested that claims of discrimination might best be presented to legislatures for corrective action.⁷⁶

and inevitability hypotheses. See *infra* notes 174-216 and accompanying text.

73. See generally Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993) (evaluating anecdotal evidence of jury decision making in capital cases).

74. See BALDUS ET AL., *supra* note 23, at 370-93; SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION 159-211 (1989); Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1389 (1988); Anderson E. Bynam, Casenote, *Eighth and Fourteenth Amendments—The Death Penalty Survives*, 78 J. CRIM. L. & CRIMINOLOGY 1080, 1117-18 (1988); Jacqueline Cook, Casenote, *Coming Full Circle: A Return to Arbitrary Sentencing Patterns in Capital Punishment Cases*, 56 UMKC L. REV. 387, 397 (1988); Mary E. Holland, Note, *McCleskey v. Kemp: Racism and the Death Penalty*, 20 CONN. L. REV. 1029, 1061 (1988); Kendra Meinert, Note, *Criminal Injustice: Continuing Racial Inequities in Death Penalty Sentencing*, 22 SW. U. L. REV. 1177, 1201-02 (1993).

75. See Kennedy, *supra* note 74, at 1394-95.

76. *McCleskey*, 481 U.S. at 319.

In *McCleskey*'s wake, congressional concerns first stimulated a formal assessment of the scope of the problem in American capital charging and sentencing systems. In 1988, Congress directed the General Accounting Office (the GAO) to study the issue and to determine if race-of-victim or race-of-defendant discrimination influences the likelihood that defendants will be sentenced to death. The GAO initially considered conducting one or more empirical studies itself, but finally opted for "an evaluative synthesis—a review and critique of existing research."⁷⁷ Toward that end, the agency evaluated 28 empirical studies and discovered that in 82% of them, the "race of [the] victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty."⁷⁸ The results of the GAO report clearly suggest that there is a problem, especially with respect to race-of-victim discrimination.

Congressional concerns, substantiated by the GAO findings, led to a series of congressional efforts to bypass *McCleskey* by relying on the legislative power granted Congress under the Enabling Clause of the Fourteenth Amendment.⁷⁹ Neither of the two proposed legislative measures addresses the specific situation in Georgia or any other state. Nor would they impose structural remedies of the type suggested by Justices Blackmun and Stevens—requiring standards that limit the exercise of prosecutorial discretion in seeking death sentences and that narrow the class of death-eligible cases.⁸⁰ Instead, the measures are designed to give offenders condemned to death the same right to challenge their individual death sentences as racially motivated as is currently enjoyed by individuals claiming discrimination under federal employment and housing laws.⁸¹

77. GAO REPORT, *supra* note 6, at 1.

78. *Id.* at 5. The results on race-of-defendant discrimination were described as "equivocal." *Id.* at 6.

79. The Enabling Clause, U.S. CONST. amend. XIV, § 5, empowers Congress to enforce the Fourteenth Amendment, which includes the Equal Protection Clause. *See generally* *Katzenbach v. Morgan*, 384 U.S. 641 (1966). There was, nevertheless, some argument that Congress lacked power to "overrule" *McCleskey* and that as a consequence, any effort to do so would violate Article I and the Tenth Amendment. *See* 136 CONG. REC. S6900-01 (daily ed. May 24, 1990) (statement of Sen. Hatch).

80. *See McCleskey*, 481 U.S. at 365 (Blackmun, J., dissenting); *id.* at 367 (Stevens, J., dissenting).

81. *See* 42 U.S.C. §§ 2000e to e-17 (1988); 42 U.S.C. §§ 3601-3619 (1988).

The first of these proposed measures, known as the Racial Justice Act,⁸² is presented in Appendix A of this Article. It would allow a condemned prisoner to attack his death sentence if its imposition "furthers a racially discriminatory pattern" of death sentencing in the offender's jurisdiction.⁸³ The bill embraces a risk-based model of proof patterned on Justice Blackmun's *McCleskey* dissent and authorizes the use of statistical methods of proof comparable to those used in jury venire discrimination cases.⁸⁴ The law would also require states to maintain sufficient data on all potential capital cases in order to allow capital defendants and the State to present and defend claims under the Act.⁸⁵

Under the Racial Justice Act, a defendant could establish a prima facie case by using the State's data to show a racially discriminatory pattern of death sentencing, presumably after adjustment for the leading aggravating circumstances.⁸⁶ The State could rebut this showing by presenting "clear and convincing evidence that identifiable and pertinent nonracial factors persuasively explain the observable racial disparities comprising the pattern."⁸⁷ Absent such a rebuttal by the State, a defendant would be entitled to relief from his death sentence if his case fell within a category of cases in which a racial disparity existed to his disadvantage.⁸⁸

The second proposal, known as the Fairness in Death Sentencing Act,⁸⁹ is presented in Appendix B of this Article in the form that was

82. S. 1696, 101st Cong., 1st Sess., 135 CONG. REC. S12,161 (daily ed. Sept. 28, 1989) [hereinafter Racial Justice Act]; see H.R. 4422, 100th Cong., 2d Sess., 134 CONG. REC. E1175 (daily ed. Apr. 21, 1988).

83. Racial Justice Act, *supra* note 82, § 2922(a), 135 CONG. REC. S12,161. For discussion of the Racial Justice Act, see M. Shanara Gilbert, *Racism and Retrenchment in Capital Sentencing: Judicial and Congressional Haste Toward the Ultimate Injustice*, 18 N.Y.U. REV. L. & SOC. CHANGE 51, 61-66 (1990-91); Angela Dorn et al., Comment, *Too Much Justice: A Legislative Response to McCleskey v. Kemp*, 24 HARV. C.R.-C.L. L. REV. 437, 461-528 (1989).

84. See Racial Justice Act, *supra* note 82, § 2922(b), 135 CONG. REC. S12,161.

85. *Id.* § 2923, 135 CONG. REC. S12,162.

86. *Id.* § 2922(c)(1), 135 CONG. REC. S12,161-62.

87. *Id.* § 2922(c)(2), 135 CONG. REC. S12,162.

88. *Id.* § 2922(a), 135 CONG. REC. S12,161.

89. H.R. 2851, 102d Cong., 1st Sess. (1991) [hereinafter Fairness in Death Sentencing Act].

adopted by the U.S. House of Representatives on April 20, 1994.⁹⁰ Like the Racial Justice Act, it would provide a condemned prisoner the opportunity to challenge his death sentence with statistical proof of racial discrimination⁹¹ and would also employ a risk-based model of proof.⁹² The principal differences between the two proposals are that the Fairness in Death Sentencing Act provides more detailed specifications for proving a prima facie case (e.g., a large and statistically significant race disparity)⁹³ and merely guarantees a claimant access to whatever relevant data have already been collected by state officials, without imposing any additional data collection requirements on the State.⁹⁴

Congressional opposition to the two measures has taken several paths. One series of arguments turns primarily on methodological concerns. First, in contrast to the talk of inevitability in *McCleskey*, congressional critics have argued that there is no trustworthy evidence that racial discrimination is a problem in the American death sentencing system.⁹⁵ They have argued that if anything, the evidence suggests that white defendants in fact are at greater risk of receiving death sentences than are black defendants.⁹⁶

90. For a thorough discussion of the proposed Fairness in Death Sentencing Act, see Ronald J. Tabak, *Is Racism Irrelevant? Or Should the Fairness in Death Sentencing Act Be Enacted to Substantially Diminish Racial Discrimination in Capital Sentencing?*, 18 N.Y.U. REV. L. & SOC. CHANGE 777 (1990-91).

91. Fairness in Death Sentencing Act, *supra* note 89, § 2921.

92. *Id.* § 2921(c).

93. See *id.* § 2921(b) (requiring statistical significance of racial disparities); *id.* § 2921(c) (allowing evidence that death sentences were "imposed significantly more frequently" in white-victim or black-defendant cases).

94. *Id.* § 2922. The application of either of these statutes in Georgia clearly would have entitled McCleskey to relief because his case fell within a subcategory of cases in which there was a strong, statistically significant race-of-victim effect, both statewide and in Fulton County. For background on the two proposals, see generally *Death Penalty Legislation and the Racial Justice Act: Hearings on H.R. 4618 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990).

95. Senator Orrin Hatch from Utah stated in his argument against the Racial Justice Act that "[a]uthoritative studies simply do not support the conclusion drawn by some of the sponsors of this bill; namely, that racial animus is distorting the capital sentencing system. If such animus exists, however, adequate safeguards exist to prevent and eliminate it." 136 CONG. REC. S6901 (daily ed. May 24, 1990) (statement of Sen. Hatch).

96. Senator Hatch cited a 1985 Department of Justice study that "established that, rather than discriminating against blacks, capital punishment has been disproportionately

Second, the congressional critics have insisted that the higher risk of capital punishment in white-victim cases is explained by nonracial factors. For example, they have suggested that white-victim cases are more likely to involve premeditated, predatory murders than are black-victim cases.⁹⁷

The opposition has also invoked the "impossibility" rhetoric from the language of the *McCleskey* opinion, as well as quota arguments drawn from a recent congressional debate to repeal by legislation a Supreme Court decision limiting the use of statistical evidence in Title VII employment discrimination cases.⁹⁸ Opponents of the Racial Justice Act first argued that its adoption would constitute a de facto abolition of the death penalty. In the words of Senator Charles Grassley of Iowa, "You cannot support the availability of capital punishment, while supporting the Racial Justice Act."⁹⁹ This argument presupposes that under the proposed standards for

inflicted upon white defendants According to the DOJ statistics, whites are more likely to be sentenced to death, more likely to be actually executed, and less likely to be released from death row." *Id.* at S6902. For comments to the same effect in the House of Representatives, see 137 CONG. REC. H8141 (daily ed. Oct. 22, 1991) (statement of Rep. Hyde) (arguing generally against Fairness in Death Sentencing Act).

97. Senator Hatch noted:

The reason that crimes involving white victims result in more death sentences than crimes involving black victims is not the result of racial animus in the criminal justice system. Murders involving white victims, according to studies conducted by the Stanford Law Review and the State of Florida, are more often premeditated crimes linked to rape and robbery. Murders involving black victims are more often "crimes of passion" committed in domestic setting[s] without aggravating factors such as rape or robbery. Because whites are simply more often the victims of murders involving aggravated circumstances and premeditation, these crimes more often result in death sentences.

1984 DOJ studies show that whites are 77 percent of the victims in rape cases and 89 percent of the victims of robbery cases. Therefore, it is only to be expected that a higher number of whites would be the victims in aggravated murders associated with other felonies—the particular form of murder that leads to the death penalty.

134 CONG. REC. S7561 (daily ed. June 10, 1988) (statement of Sen. Hatch).

98. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989) ("Racial imbalance in one segment of an employer's work force does not, without more, establish a prima facie case of disparate impact A contrary ruling on this point would almost inexorably lead to the use of numerical quotas in the workplace, a result that Congress and this Court have rejected repeatedly in the past.").

99. 137 CONG. REC. S8293 (daily ed. June 20, 1991) (statement of Sen. Grassley).

evaluating statistical evidence, black defendants and defendants with white victims would always prevail and their death sentences would be vacated.¹⁰⁰ Since such cases constitute the overwhelming majority of cases, the critics contended that death sentencing would come to a grinding halt.

The proponents of the de facto abolition argument give three reasons for their views. The first is that statistical proof of discrimination is inherently untrustworthy and cannot accurately detect whether discrimination has occurred.¹⁰¹ The second claim is that the models of proof contempla-

100. "I submit that every jurisdiction to whom this law would apply would be subject to a finding of a statistical imperfection . . ." 136 CONG. REC. S6892 (daily ed. May 24, 1990) (statement of Sen. Graham). Opponents of the Fairness in Death Sentencing Act argued that it would abolish the death penalty "because it imposes a burden on the prosecution that is too onerous and places an expense on the taxpayers of this Nation that is too great." 137 CONG. REC. H7899 (daily ed. Oct. 16, 1991) (statement of Rep. Riggs). According to this argument, the Act more truthfully could be called the "Death Penalty Repeal Act." *Id.* at H7905 (statement of Rep. McCollum).

101. Senator Hatch noted:

[T]he statistics do not measure the culpability of the defendant. Statistics do not measure the suffering of the victims. Statistics do not even measure racial bias, as shown by the evidence that whites more often than blacks suffer the death penalty. Statistics have no place in the sentencing courtroom.

. . . .

Statistics measure quantities, but the real differences in this area [the disparity between those who are sentenced to death for killing a white victim versus a black victim] are qualitative. It is the type of murder that is different and causes the harsher penalty. Once again, juries can take these qualitative factors into account. Statistics cannot.

134 CONG. REC. S7562 (daily ed. June 10, 1988) (statement of Sen. Hatch).

"Murderers wreak their havoc without regard to racial statistics and ought to be brought to justice without regard to racial statistics." 136 CONG. REC. S6899 (daily ed. May 24, 1990) (statement of Sen. Hatch). "[A]lleged statistical discrepancies, even if assumed valid, do not prove that a single judge, juror, or prosecutor was influenced by racial animus. Statistics are simply not evidence of any relevance to the specific case before the judge and jury." *Id.* at S6900.

[S]tatistics have no place in the criminal justice equation. Murderers must be judged and sentenced without regard to statistics. Murderers must be sentenced according to the facts of their own particular case. Aggravating and mitigating factors must be fully weighted by an impartial jury. This is what juries now do. Statistical justice, however, would take the determination out of the hands of juries and leave it in the hands of a battery of experts.

Id. at S6902.

ted by the proposed statutes are so broad that statistical evidence of any racial disparity, however small, would entitle all defendants who were black or whose victims were white to obtain relief without requiring them to prove racism in their own cases.¹⁰² This problem is alleged to be particularly acute in small jurisdictions with few death-eligible cases and very few death sentences imposed.¹⁰³ Finally, because the measures would be retroactive,

Proponents of this legislation point to the use of statistical evidence in the area of employment discrimination as the basis for this legislation.

....

However, the criminal justice system is inherently different from the employment process. As the Supreme Court has said, the very nature of the capital sentencing decision, and the relationship of statistics to that decision, are fundamentally different from the corresponding elements for a [T]itle VII employment discrimination case.

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

102. Senator Strom Thurmond from South Carolina argued that death row inmates will use statistics to overturn all death sentences without having to show any racism in their own cases:

For example, a Federal court would be required to overturn every death sentence in a particular State if a study is presented to the court which shows the death penalty is applied in a disproportionate manner. Every death sentence—including the death sentence of a white defendant, who murdered a white victim, found guilty by an all white jury, and sentenced by a white judge—would be overturned. The same would hold true if every person involved in the case was black. This makes no sense whatsoever.

136 CONG. REC. S6888 (daily ed. May 24, 1990) (statement of Sen. Thurmond). Senator Bob Graham from Florida argued that death penalty cases

have been reviewed by all of those judicial forums and have been found, as an individual matter, to not be subject to the charge of racial discrimination. If there were any evidence in the individual case that that had occurred, the case would be dismissed or the individual would be afforded some new opportunity for justice.

In all of these cases, almost by definition, there has been no evidence of racial discrimination on the facts of the individual case that would warrant such relief, and so the look turns not to the individual, but rather to the system, to try to find that the system contains some invidious racial[ly] discriminatory pattern.

Id. at S6893 (statement of Sen. Graham).

103. Representative James Sensenbrenner from Wisconsin argued the following:

[S]tatistics . . . really do not take into account what happens in small jurisdictions, rural jurisdictions, where a capital crime is committed very infrequently, say once every 5 or 6 or 7 years.

the critics argue that the statutes would overturn otherwise settled cases decided years ago and would thereby put virtually all death sentences at risk.¹⁰⁴ The only way to avoid these consequences, the argument continues, would be to adopt quotas, which would make race an outcome-determinative factor and would produce an even more arbitrary and discriminatory system than we now have.¹⁰⁵

Other arguments against the proposed legislation range from the conceptual to the technical. One conceptual objection is that the legislative proposals run against strong American traditions that preserve maximum discretion for jurors and prosecutors.¹⁰⁶ Another is that the solution to

. . . Once someone is sentenced to death in one of these small low-crime jurisdictions, the race of that person and the race of the victim would so skew the statistical formulation that it would be very hard to put anybody to death of another race who committed the same or similar kind of crime.

137 CONG. REC. H8141 (daily ed. Oct. 22, 1991) (statement of Rep. Sensenbrenner).

104. Representative Bill McCollum from Florida argued that because the Fairness in Death Sentencing Act was retroactive, "[t]he more than 2,450 existing capital sentences would all be open to challenge under this unequal and unjust approach, regardless of the facts of the case or the guilt of the convicted killer." *Id.* at H7905 (daily ed. Oct. 16, 1991) (statement of Rep. McCollum). Representative Jim Kolbe from Arizona stated that the retroactivity of the Act would "wip[e] out hundreds of convictions." *Id.* at H7911 (statement of Rep. Kolbe). And Senator Gordon J. Humphrey from New Hampshire declared that "[a] defendant can conclusively avoid the death penalty by selecting any past period of years which produces sentencing statistics that do not conform with the standard of strict racial parity." 136 CONG. REC. S6896 (daily ed. May 24, 1990) (statement of Sen. Humphrey).

105. Senator Humphrey stated:

Clearly, it is legally impossible for the States to control the racial breakdown of sentencing outcomes. The only way they could possibly do so would be to deliberately use race as the decisive factor in choosing to seek the death penalty or not in each case. In other words, a bill which calls itself the "Racial Justice Act" would actually require the death sentence to be allocated precisely on the basis of race. This is both unconstitutional and immoral.

136 CONG. REC. S6896 (daily ed. May 24, 1990) (statement of Sen. Humphrey). Senator Graham concluded that the Racial Justice Act would "make the system much more arbitrary and capricious than even the proponents of this bill would argue it is today." *Id.* at S6884 (statement of Sen. Graham).

106. Senator Graham argued that the Racial Justice Act would "unravel some basic tenets of our American criminal justice system: One, the State's interest in protecting its citizens from murderers; two, prosecutorial discretion recognized in every State; and, three, the jury system in general." *Id.* He explained:

such problems should develop in the states.¹⁰⁷ Opponents also argue that the proposed measures are bad policy—for example, they do not seek to prevent discrimination in the future and only focus on remedying past discrimination.¹⁰⁸ In addition, it has been suggested that eliminating race-of-victim discrimination would have the perverse effect of bringing more black defendants to death row because most black-victim cases involve black defendants.¹⁰⁹ A final, pragmatic argument is that either proposal would

[H]istorically, prosecutors have been entrusted with wide discretionary powers. These powers include the decision to seek the death penalty where the law permits. . . .

This power is inherent in our criminal justice system. To adopt this bill would call for a complete overhaul of that system, an overhaul which I do not believe this Senate should be prepared to impose on every State in this Nation.

Id. Senator Grassley argued that "Congress cannot exercise discretion for prosecutors, judges and juries. And, prosecutors and judges cannot decide for juries—based on some arbitrary racial quota—who is to receive the death penalty and who is not." *Id.* at S6907 (statement of Sen. Grassley).

107. "[A]n analysis of these issues can best be conducted in the individual states. . . . [T]he proper role of Congress is to encourage our States to look at their entire justice systems and for the States to formulate their own responses to any racial or ethnic bias." *Id.* at S6885 (statement of Sen. Graham).

108. *See id.* at S6897 (statement of Sen. Hatch).

109. Senator Hatch read the following statement by Professor Richard Lempert of the University of Michigan:

If prosecutors seek to resolve those racial disparities that turn on the victim's race by consciously suppressing this factor in deciding whether to seek death, the overwhelming number of those who suffer for it will be blacks. The reason is that most killers with black victims are themselves blacks, so any increase in the death penalty rate for those who kill[] blacks will fall disproportionately on black defendants. This is likely to be true even if discrimination on the basis of the defendant's race is at the same time eliminated.

Id. at S6900.

The measures also would apply to treason and hijacking where race usually is no problem:

[W]ho are the victims of treason? Are we not all? Who are the victims of airline hijacking or of drug-kingpin activity? This bill, if enacted, would force the criminal justice system to consider these things. It would inject the factor of race into the operation of the criminal justice system in cases, such as prosecutions for treason, where no one has ever even alleged that race is a problem.

add complexity, expense, and delay to an already burdensome process of judicial review. The result would simply be too much for the states to bear.

The plausibility of these different arguments varies substantially. The concerns about additional cost and delay are legitimate, although we consider the magnitude of the cost estimates to be exaggerated. The cost involved will depend on the complexity of the model of proof used to assess the evidence in individual cases.¹¹⁰ It is also implausible that such additional cost and delay would be sufficient to trigger the legislative repeal of capital punishment in the leading death penalty states. In addition, as noted above,¹¹¹ the long-term effects of eliminating discrimination from death sentencing may be to reduce the number of death sentences imposed, with great savings, and to speed up the disposition of those that are imposed. The ultimate question, of course, is whether the costs of removing the cloud of discrimination that currently hangs over the system are too much to pay. A similar calculus is appropriate in assessing the importance that should be placed on the preservation of the traditional discretion given to prosecutors and jurors.¹¹²

Id. at S6897.

The proposals also could carry over to burglary and drug crimes:

As the Supreme Court noted, this notion of statistical justice could be applied elsewhere as well. Can you imagine statistics about racial factors in drug busts overturning our war on drugs? Can you imagine statistics about racial factors in burglary convictions invalidating those prosecutions? And, if racial factors are accepted despite their lack of relevancy, what happens when statistics tend to show that physical attractiveness influences some prosecutions? The proposed bill does not extend that far, but the Supreme Court is on target when it states that there is simply no limiting principle with regard to the type of challenge created by this provision.

Id. at S6900.

110. In Part VI, we consider a parsimonious model that involves much less data and is less complex than McCleskey's approach. *See infra* notes 197-216 and accompanying text.

111. *See supra* note 8.

112. Senator Hatch's argument about the absence of a limiting principle is unpersuasive. *See supra* note 109. The principle underlying the two proposals is the same principle that forms the basis of other federal antidiscrimination laws. However, the Senator's point concerning the effect that an evenhanded death sentencing system would have on black defendants invites a response. The argument assumes that equal treatment would result in a higher death sentencing rate in black-victim cases (with primarily black defendants), rather than a lower rate for the white-victim cases. *See supra* note 109. The outcome on this issue is not obvious.

An assessment of these tradeoffs calls for moral judgments for which we have no special qualifications. By contrast, we believe that our expertise and experience can shed light on the methodological arguments against the two legislative proposals.

First, consider the claim that there is no reliable evidence of racial discrimination in the American death penalty system.¹¹³ This argument simply ignores the substantial and statistically reliable evidence that race-of-victim discrimination exists in many states.¹¹⁴ Additionally, even though the evidence of race-of-defendant discrimination is less widespread, there is clear empirical evidence that it also exists in certain localities.¹¹⁵ Congressional critics of the proposals have attempted to refute this evidence by citing

In our analysis of the Georgia data from *McCleskey*, we estimated the changes that would likely occur in an evenhanded system. See BALDUS ET AL., *supra* note 23, at 155-56. We developed the estimates based on the assumption that white-victim standards would be applied to black-victim cases. *Id.* at 156. The results predicted a 23% increase in the number of death sentences in the black-victim cases and a 6% increase in the death sentencing rate for all cases. *Id.* If the white-victim standard had been applied to all cases, the percentage of black defendants on death row would have increased by 5 percentage points (from 53% to 58%); if the black-victim standard had been applied to all cases, the proportion of blacks on death row also would have increased by 5 percentage points. *Id.* The moral calculus by which these data would lead one to prefer a racially discriminatory system to an evenhanded one is not clear to us.

113. See *supra* notes 95-97 and accompanying text.

114. See GAO REPORT, *supra* note 6, at 5 (noting pattern of racial disparities in charging and sentencing in death-eligible cases).

115. See BALDUS ET AL., *supra* note 23, at 179 (finding statistically significant race-of-defendant effects in prosecutorial decisions in rural Georgia); *id.* at 181 (finding statistically significant race-of-defendant effects in Ocmulgee, Georgia Judicial Circuit); *id.* at 258 (noting that Sam Gross and Robert Mauro found statistically significant race-of-defendant effects in Arkansas from 1976-80); *id.* at 261 (noting that Barry Nakell and Kenneth Hardy found statistically significant race-of-defendant effects at various stages of North Carolina's system in 1977 and 1978); *id.* at 328 (finding statewide race-of-defendant effects in Georgia's white-victim cases that involve highly aggravated crime or contemporaneous felony, but not significant beyond .10 level); *id.* at 362 n.54 (finding statistically significant race-of-defendant effect in highly aggravated white-victim cases prosecuted in rural Georgia judicial circuits). A recent report by the staff of the House Subcommittee on Civil and Constitutional Rights indicates that while 24% of the persons convicted of participating in drug enterprises were black, 78% of those chosen for death penalty prosecutions were black. STAFF OF HOUSE SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS, HOUSE COMM. ON THE JUDICIARY, 103D CONG., 2D SESS., RACIAL DISPARITIES IN FEDERAL DEATH PENALTY PROSECUTIONS 1988-1994, at 2 (Comm. Print 1994).

a single Justice Department study that, according to Senator Orrin Hatch and other lawmakers, proves that "whites are more likely to be sentenced to death, more likely to be actually executed, and less likely to be released from death row" than black defendants.¹¹⁶ In fact, the Justice Department's study contains absolutely no data to support such a claim.¹¹⁷ The study reports merely that of the prisoners on death row in 1985, 57% were white and 42% were black and that of 50 prisoners executed between 1977 and 1985, 33 were white and 17 were black.¹¹⁸ Obviously, these figures say nothing about the "likelihood" of either outcome because the report gives no data whatsoever about the racial composition of the pools of defendants from which the convicted and executed defendants were selected.¹¹⁹

Another very misleading claim is that the race-of-victim disparities reported in the literature are statistical artifacts that reflect a higher level of "death-worthiness" in the typical white-victim case than is found in the typical black-victim case. This claim is misleading because it falsely suggests that the race-of-victim disparities reported in the literature are unadjusted, i.e., calculated without adjustment for the many legitimate case characteristics that affect the typical level of criminal culpability in black-and white-victim cases. In fact, the more rigorously conducted studies that

116. 136 CONG. REC. S6902 (daily ed. May 24, 1990) (statement of Sen. Hatch).

117. See *Capital Punishment, 1985*, BUREAU JUST. STAT. BULL. (U.S. Dep't of Justice/Bureau of Justice Statistics, Washington, D.C.), Nov. 1986, at 1, 5-8.

118. *Id.* at 6-7.

119. A slightly more relevant comparison would be between the proportion of blacks among those individuals arrested for murder and nonnegligent manslaughter (for example, 55% in 1991) and the proportion of blacks on death row (42%). FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 1991, at 231 (1992). However, little can be concluded from these data for three reasons. First, the death sentencing rates being compared are among people arrested for murder and nonnegligent manslaughter. In this population, a much lower proportion of black defendants than white defendants are death-eligible. We estimate that only about 10% of the cases covered by these statistics are death-eligible. Second, and more important, the death sentencing rate in black-defendant cases is suppressed by race-of-victim discrimination. Because the victim in the vast majority of black-defendant cases is black, the disproportionately low death sentencing rate in black-victim cases suppresses the overall sentencing rate in the black-defendant cases. Third, the scope of race-of-defendant discrimination can be reliably assessed only after statistical adjustment is made for legitimate background factors affecting the level of aggravation in the cases and the race of the victim. This point applies to any analysis of racial discrimination in capital punishment, whether the focus is on the race of the victim or the race of the defendant.

reveal race-of-victim effects thoroughly control for the differences in the aggravation levels (for example, rape, premeditation, murders accompanied by robberies) of the cases included in the analyses.¹²⁰ All of the race-of-victim effects discussed in this Article and in the literature generally are estimated *after* accounting for the very factors that critics say would, if examined, explain the disparities.¹²¹ In our Georgia study, we observed strong race-of-victim effects in a wide variety of analyses using many different combinations of background controls—one of which involved 230 such variables.¹²² In fact, we were unable to generate a single analysis that did not demonstrate statistically significant statewide race-of-victim effects. Nor could the State of Georgia point to such an analysis, for the simple reason that the State's expert testified that he never attempted to construct a model that would show whether there were race effects in the system.¹²³

Other methodological arguments by opponents of the two legislative proposals are somewhat less implausible.¹²⁴ However, they are based in varying degrees on a misunderstanding of (a) the requirements of the legislative proposals, (b) the function of statistical proof of discrimination in general, and (c) the kinds of factual inferences that statistical evidence can support in individual cases. At most, those arguments might justify the substitution of a more conservative model of proof than is contemplated by the current legislative proposals.

As background to this discussion, it is useful to consider the distinctions between the different methods or models of proof that currently are used in other areas of the law to establish purposeful discrimination in individual cases. The first distinction is between models based on direct and circumstantial evidence. Direct evidence models require eyewitness testimony or admissions by the defendant that directly support a finding of

120. Some studies also control for the socioeconomic status of both the defendant and the victim. See BALDUS ET AL., *supra* note 23, at 587-601.

121. The GAO report on capital punishment describes in detail the methods of statistical control used in all the studies that it surveyed and notes that race-of-victim effects are observed in studies with both strong and weak controls for factors affecting the aggravation level of the cases. GAO REPORT, *supra* note 6, at 3, 5.

122. See BALDUS ET AL., *supra* note 23, at 317.

123. As far as we are aware, no analysis has been published using our Georgia data (which are publicly available at the University of Michigan) that does not demonstrate a statewide race-of-victim effect.

124. See *supra* notes 99-102 and accompanying text.

discrimination—for example, an employer's remark that "Hispanics are lazy." Today, such evidence is rare, and courts routinely rely on circumstantial evidence models, of which there are several. Most start with a prima facie case, which under some models can be established by qualitative evidence, whereas other models focus initially on statistical evidence.¹²⁵ Virtually all circumstantial evidence models employ a series of presumptions and burden shifts that progressively narrow and sharpen the factual inquiry. They also vary in terms of the ultimate factual inference required. Under some, proof establishing a significant risk of discrimination will suffice (we call models of this type "risk-based"), whereas others require an actual finding that race was: (a) a motivating factor, (b) a substantial or significant factor, or (c) a but-for factor in the decision that adversely affected the claimant (we call models principally of this type "causation-based").¹²⁶

Both the Racial Justice Act and the Fairness in Death Sentencing Act employ risk-based models. These models rely on statistical evidence to establish a prima facie case of purposeful racial discrimination among a subgroup of cases that implicates the defendant's case. Such a prima facie showing shifts to the State the burden of proving that the racial disparities

125. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), prescribed the most widely used Title VII model for proving purposeful discrimination in individual cases. *See id.* at 802. Its prima facie case is based solely on qualitative circumstantial evidence. *Id.* No models of which we are aware limit proof to direct evidence.

126. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), usefully illustrates the distinctions among a "motivating" factor, *id.* at 244 (opinion of Brennan, J.), a "substantial" factor, *id.* at 259 (White, J., concurring in judgment); *id.* at 276 (O'Connor, J., concurring in judgment), and a "but-for" factor. *Id.* at 240 (opinion of Brennan, J.). The standards of causation applied by the courts vary. For a survey of various standards under the Fair Housing Act, 42 U.S.C. §§ 3601-3631 (1988), see, e.g., *Jordan v. Dellway Villa, Ltd.*, 661 F.2d 588, 594 (6th Cir. 1981) (holding defendant liable if race "played a part" in his decision to reject plaintiff), *cert. denied*, 455 U.S. 1008 (1982); *Marable v. H. Walker & Assocs.*, 644 F.2d 390, 395 (5th Cir. Unit B May 1981) (holding defendant liable if race was "one significant factor considered by the defendant in dealing with the plaintiff"); *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1042 (2d Cir. 1979) (holding defendant liable if race was "even one of the motivating factors"); *United States v. Mitchell*, 580 F.2d 789, 791 (5th Cir. 1978) (holding defendant liable if race "was a consideration and played some role in the real estate transaction"). In discrimination cases challenging the selection of a venire or grand jury on the basis of statistical evidence, the courts use a risk-based model that requires no evidence of causation in the individual defendant's case. *See Castaneda v. Partida*, 430 U.S. 482, 494-95 (1977) (explaining statistical test for Fourteenth Amendment grand jury selection claims).

supporting the claimant's case can be explained by nonracial factors.¹²⁷ The ultimate factual issue is whether the evidence supports an inference of purposeful racial discrimination within that group of cases. If the answer is yes, the defendant is entitled to relief from his death sentence. Although a showing of purposeful discrimination by a prosecutor or jury in a claimant's case would clearly justify relief, neither legislative proposal *requires* an inference that race was actually a motivating factor in the defendant's particular case.

The methodological objections to the models of proof in the two proposals raise three issues: First, what proof should be required to support a *prima facie* case? Second, what defenses should be available to the states, and how likely are they to prevail? Third, are risk-based models of proof of the type contemplated by the two proposals desirable, or would a causation-based model of proof be a more appropriate basis for remedying discrimination in individual cases?

A. Requirements for a *Prima Facie* Case

It is important to recognize that the statistical methodology employed by the two legislative proposals is not foreign to the federal courts. Federal judges regularly encounter similar methods of proof in other types of discrimination cases,¹²⁸ and when faced with issues of proof that arise under the two proposals, those judges would likely apply the standards used to resolve similar questions outside the criminal law.

A judicial finding that a death sentence "was imposed based on race" within the meaning of section 2921(a) of the Fairness in Death Sentencing Act requires proof by a preponderance of the evidence either (a) that race was a motivating factor in an individual claimant's case or (b) that capital punishment was being administered in a racially discriminatory manner in the "jurisdiction in question."¹²⁹ When read as a whole, section 2921

127. See Fairness in Death Sentencing Act, *supra* note 89, § 2921; Racial Justice Act, *supra* note 82, § 2922, 135 CONG. REC. S12,161-62. For a discussion of the role of direct and qualitative evidence under the Fairness in Death Sentencing Act, see *infra* note 129 and accompanying text.

128. DAVID C. BALDUS & JAMES W. L. COLE, STATISTICAL PROOF OF DISCRIMINATION (1980) summarizes this jurisprudence, particularly as it relates to employment law.

129. Fairness in Death Sentencing Act, *supra* note 89, § 2921(c). Although the following discussion tracks the Fairness in Death Sentencing Act, it applies with equal force to the earlier Racial Justice Act. It is also worth noting that in congressional floor debates

leaves open the possibility that a prima facie case could be based on direct evidence, such as an admission of purposeful discrimination by a prosecutor. The more commonly contemplated approach, however, would be a prima facie case established with statistical evidence under sections 2921(b) and (c), which contemplate evidence that death sentences were being imposed "significantly more frequently" in cases involving victims or defendants of one race than another¹³⁰ and that the disparity supporting the inference is "statistically significant."¹³¹ Moreover, the disparity must be estimated *after* adjustment is made for the presence of the statutory aggravating factors present in all of the relevant cases.¹³² In short, the statistical disparity supporting an inference of discrimination must be both practically *and* statistically significant.

Small statistical disparities that fail to satisfy these tests are not enough to support such an inference. Critics nevertheless contend that minor differences in the number or percentage of death sentences that a state has imposed in factually similar categories of cases involving defendants (or victims) of different races will require the state to shoulder a difficult burden of disproving discrimination.¹³³ More specifically, those critics argue that such minor disparities would be sufficient to demonstrate that the death

and in the media, the proposed Fairness in Death Sentencing Act is uniformly referred to as the Racial Justice Act.

130. *Id.* § 2921(c).

131. *Id.* § 2921(b).

132. *Id.* § 2921(d). Under Title VII there is a small-firm exception to the requirement of statistical significance that might apply under the two proposals. It has been applied when (a) an employer's workplace is so small that substantial disparities suggestive of discrimination exist, but fail to achieve statistical significance because of small sample size, and (b) there exists in the record other qualitative or quantitative evidence to support an inference of discrimination. The rationale of the exception is that many forms of evidence are relevant to an inference of discrimination and that rigid application of a statistical significance requirement could immunize very small firms from claims based on statistical evidence even when, in fact, they purposefully discriminated. *See* BALDUS & COLE, *supra* note 128, § 9.12 (Cum. Supp. 1987). In the death sentencing context, by similar reasoning, the statistical significance requirement may be appropriately relaxed when because of small sample size, a demonstrated substantial racial disparity fails to achieve statistical significance and there is other convincing evidence to support the inference of discrimination. For a description of a similar approach suggested by former Chief Justice Barkett of the Florida Supreme Court, see *infra* note 207 and accompanying text.

133. *See supra* note 100 and accompanying text.

penalty is being imposed "significantly more frequently" in cases of one race than another under section 2921(c) of the Act.¹³⁴

This argument is simply wrong. When an observed racial disparity in a state's death sentencing rate is small or is based on a small number of cases, it is *not*, by itself, sufficient to obligate the State to disprove discrimination. Such minor numerical disparities cannot serve to establish, as section 2921(b) requires, that "race was a statistically significant factor in decisions to seek or to impose the sentence of death."¹³⁵ Consider, for example, a state in which the death-row population consists of 6 inmates, 4 of whose cases involve a white victim, while only 40% of the death-eligible cases in the state involve a white victim. Or consider a state in which death row consists of 100 prisoners, 43 of whose cases involve a white victim, while 40% of the death-eligible cases from which they were selected have a white victim. Common sense suggests that neither of these patterns represents a situation in which the death penalty is being imposed "significantly more frequently" upon killers of white victims.¹³⁶ Any sort of responsible statistical analysis will lead to exactly the same conclusion: Numerical differences as small as the ones described above are not statistically significant, as required by section 2921(b), and would not by themselves support a *prima facie* case of racial discrimination.¹³⁷

134. Fairness in Death Sentencing Act, *supra* note 89, § 2921(c).

135. *Id.* § 2921(b).

136. *Id.* § 2921(c).

137. Does this analysis mean that racial discrimination can never be proven in cases with small death row populations, thereby removing such states from the scrutiny of the proposed legislation? The answer is no. It is true that in such a jurisdiction, statistical evidence, with no other supporting evidence, would fail to establish a *prima facie* case. The legislation appears to contemplate, however, the use of other forms of evidence, both qualitative and quantitative, such as racist remarks by a prosecutor. See *supra* note 129 and accompanying text. Under such circumstances, a court could find a *prima facie* case even if the statistical disparity is not statistically significant—if it is substantial and there is other relevant evidence that supports the inference of discrimination.

In considering the role of "statistical significance," it is also important to recognize that it is a flexible concept. To be sure, there are certain conventions among social scientists and applied statisticians regarding the level of assurance or degree of statistical significance that must be present (usually the risk that the result could occur by chance must be 5% or less) in order to establish that a correlation between variables is more than the product of chance. However, legislators contemplating the use of a risk-based model as a device to prevent racially infected sentences are not bound by such conventions. Depending upon how vigilant they want to be in light of other competing considerations, legislators can specify a

Small numerical differences like these could readily occur by chance in a criminal justice system that was not discriminating on the grounds of race. Ordinary statistical procedures do not permit conclusions of racial discrimination to be drawn solely on the basis of small samples (for example, 4 out of 6 cases) or on the basis of small differences in death sentencing rates between racial groups even when the sample size is not small (for example, 43 out of 100 cases as compared to 40 out of 100). To the contrary, the major function of tests of statistical significance, the type that would be applied under the Act,¹³⁸ is to distinguish disparities that are real from those that may simply be attributable to chance.

This discussion leads us to ask: "What type of disparities are we likely to observe in the various states?" On the basis of the studies that the GAO report summarizes, we are likely to see strong statewide race-of-victim disparities in some states, as we did in Georgia, but quite unlikely to see comparable race-of-defendant effects.¹³⁹ We are also likely to see quite different results in the different localities of individual states. For example, our research from Georgia showed no consistent statewide evidence of race-of-defendant discrimination.¹⁴⁰ Those overall results, however, masked data from one judicial district that did show strong race-of-defendant effects.¹⁴¹ Those data also included evidence of race-of-defendant discrimination among a number of rural prosecutors.¹⁴² It is in areas like these that the evidence is likely to support an inference that a sentence "was imposed based on race" within the meaning of section 2921(a).

B. Defenses Available to the State

There are four possible defenses available to the States under the Fairness in Death Sentencing Act. These defenses would ensure that if a state's capital sentencing system is applied evenhandedly, it will be able to overcome the effort of a claimant to establish a prima facie case of racial discrimination. Indeed, the first of the four defenses is a demonstration that

greater or lesser degree of statistical significance as a prerequisite to establishing a prima facie case.

138. Fairness in Death Sentencing Act, *supra* note 89, § 2921(b).

139. See GAO REPORT, *supra* note 6, at 6.

140. BALDUS ET AL., *supra* note 23, at 328.

141. *Id.* at 181.

142. *Id.* at 179.

the magnitude or statistical significance of any disparities established by the defendant's evidence are not sufficient to support a *prima facie* case.

However, in cases in which the defendant does establish a *prima facie* case, section 2921(e) contemplates a second possible defense by allowing the State to establish "by a preponderance of the evidence" that identifiable and pertinent nonracial factors persuasively explain the racial disparities that might otherwise support the inference that race was the basis for the death sentence.¹⁴³ There are a variety of accepted statistical techniques that the State may use for this purpose.¹⁴⁴ If the observed racial disparity supporting the defendant's *prima facie* case is merely a statistical artifact reflecting, for example, differences in the aggravation levels of typical white- and black-victim cases, then the observed disparity will lose its practical and statistical significance. Generally accepted statistical procedures provide a solid basis for estimating the likelihood that the racial disparities that finally emerge from the analysis are indeed the product of racial discrimination and are not explained by different levels of aggravation among the various subgroups of cases that are being compared.

Certainly, because section 2921(d) of the Act requires a defendant to "take into account . . . evidence of the statutory aggravating factors" when attempting to establish a *prima facie* case, it effectively requires the death-sentenced offender to use statistical techniques unless direct evidence of a discriminatory purpose is available.¹⁴⁵ However, section 2921(e) also permits the State to conduct similar analyses with respect to mitigating and other nonstatutory aggravating factors, a process that might succeed in explaining the disparities initially estimated by the defendant.

Generally accepted statistical procedures of the type contemplated by the Fairness in Death Sentencing Act are employed in a wide variety of other legal and nonlegal contexts in which it is important to distinguish between what is apparent and what is real. For example, such procedures provide the principal medical evidence establishing a connection between cigarette smoking and cancer and between cholesterol and heart attacks.¹⁴⁶

143. See Fairness in Death Sentencing Act, *supra* note 89, § 2921(e).

144. For a sampling, see BALDUS ET AL., *supra* note 23, at 46-66.

145. Fairness in Death Sentencing Act, *supra* note 89, § 2921(d).

146. See THOMAS R. DAWBER, THE FRAMINGHAM STUDY: THE EPIDEMIOLOGY OF ATHEROSCLEROTIC DISEASE 121-41 (1980) (noting overwhelming evidence that blood cholesterol level is powerful factor in development of coronary heart disease, myocardial infarction, and angina pectoris); U.S. DEP'T OF HEALTH, EDUC., & WELFARE, SMOKING

Moreover, similar procedures are widely used in lawsuits, particularly in employment discrimination cases involving claims of purposeful discrimination in employee hiring, promotion, and discharge. In those settings, the use of generally accepted statistical methods of proof has been explicitly and unanimously endorsed by the United States Supreme Court.¹⁴⁷ These procedures provide an indispensable basis for the valid and just assessment of claims of race- and gender-based discrimination.¹⁴⁸ Moreover, defendants in discrimination cases are often successful in rebutting plaintiffs' prima facie cases with objective and relevant nonracial or gender-neutral factors.¹⁴⁹ We fully expect such defenses to be similarly deployed in the context of the Fairness in Death Sentencing Act—often with considerable success.

In comparing potential claims under the Fairness in Death Sentencing Act with comparable Title VII cases—those involving special qualifications for hiring or promotion—it is worth noting that the employment discrimination plaintiff carries as part of her prima facie case the burden of accounting for the most important nonracial factors (for example, training and experience) that are relevant to the personnel decisions at issue in the case.¹⁵⁰ As long as the relevant data are available to the parties, this Title

AND HEALTH: A REPORT OF THE SURGEON GENERAL 5-31 to 5-32 (1979) (presenting evidence of linkage between smoking and lung cancer).

147. See *Bazemore v. Friday*, 478 U.S. 385, 397-404 (1986) (opinion of Brennan, J.) (applying but-for causation-based model of proof); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-09 (1977) (same); *Castaneda v. Partida*, 430 U.S. 482, 494-95 (1977) (applying risk-based model of proof). The argument that statistical methods of proof may be capable of proving purposeful discrimination in employment and housing but not in death sentencing is completely unpersuasive. See BALDUS ET AL., *supra* note 23, at 375-80 (critiquing methodologically based reasoning of *McCleskey*). Even Justice Scalia, who voted with the majority in *McCleskey*, considers this claim unpersuasive. See *supra* note 46.

Also, a recently published biography of Justice Powell, who wrote the majority opinion in *McCleskey*, indicates that he now believes that *McCleskey* was wrongly decided and that he would "vote the other way in any capital case." JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451-52 (1994).

148. See BALDUS & COLE, *supra* note 128, § 8.021 (1980 & Cum. Supp. 1987) (discussing use of multiple regression models in disparate treatment and disparate impact cases).

149. See *id.* at 103-04 (Cum. Supp. 1987); 2 ARTHUR LARSON & LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 50.83 (1993).

150. See *Bazemore*, 478 U.S. at 398-400; *Hazelwood Sch. Dist.*, 433 U.S. at 308 n.13; *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 n.20, 342 n.23 (1977).

VII requirement is appropriate and imposes no undue hardship on plaintiffs. As noted above, section 2921(d) would impose a similar burden on offenders presenting claims under the Fairness in Death Sentencing Act by requiring that any showing of racial disparities take into account the presence of statutory aggravating factors to the extent that such data are "compiled and made publicly available."¹⁵¹

The argument that claimants will always prevail in claims brought under the Fairness in Death Sentencing Act overlooks a simple fact.¹⁵² After taking into account pertinent nonracial factors, it would be very unlikely to see evidence of racial discrimination unless racial factors were in fact exerting a significant influence on capital sentencing in the jurisdiction. As a result, states usually will not lose cases under the Act if their systems are applied in an evenhanded fashion. Also, for reasons that we discuss below, some claimants will be unsuccessful in their claims even if they can present unrebutted evidence that in general, the racial characteristics of the cases are a significant influence in the application of the death penalty in the jurisdiction.¹⁵³

The existing literature suggests that it is quite unlikely that statewide claims of race-of-defendant discrimination will be successful although the picture may be quite different in particular subdivisions of the individual states (where a particular prosecutor may, in fact, be engaged in an indefensible pattern of racial discrimination).¹⁵⁴ Moreover, we expect that as prosecutors become more aware of their obligations to treat capital cases evenhandedly, fewer and fewer discrimination claims of any type will be successful. On this point, we note that our data from Georgia showed quite strong evidence of statewide discrimination against black offenders before *Furman v. Georgia* was decided in 1972.¹⁵⁵ For the period from 1973 to 1980, however, we observed no statewide evidence of race-of-defendant discrimination.¹⁵⁶ One

151. Fairness in Death Sentencing Act, *supra* note 89, § 2921(d). This defense would create strong incentives for states to gather sufficient information on death-eligible cases in order to rebut potential prima facie cases.

152. See *supra* notes 102-03 and accompanying text (discussing argument that claimants always will prevail under Fairness in Death Sentencing Act).

153. See *infra* note 158 and accompanying text.

154. See *supra* notes 139-42 and accompanying text.

155. BALDUS ET AL., *supra* note 23, at 148.

156. *Id.* at 150. Compare *id.* at 142 (charting pre-*Furman* results) with *id.* at 151 (charting post-*Furman* results).

probable partial explanation for this change is that during the latter period, more black jurors served on Georgia's juries and black defendants received more competent legal representation because of the increased constitutional protections required by the federal courts. It is also likely that with the general decline of overt racism in the South, Georgia's prosecutors and juries became more sensitive to the problem of racial discrimination and sought to treat offenders more evenhandedly. If the Fairness in Death Sentencing Act were to become law, we would expect to see a similar development over time with respect to the race of the victim.

It is also important to note that the statistical analysis needed to defend a claim of discrimination requires—beyond data on the presence or absence of the statutory aggravating and mitigating factors—information on relatively few factual circumstances relating to each case.¹⁵⁷ Thus, there is little basis for the claim that the Fairness in Death Sentencing Act would require states to collect and maintain massive statistical data files. Once the required data base for evaluating the system is in place, it will be available for use with no further expense beyond routine updating. The suggestion that each claim brought under the Fairness in Death Sentencing Act will require the development from scratch of a vast new data base ignores this fact.

Even if the State could not overcome a statistical showing that in a given category of capital cases, racial factors were influencing the sentences imposed, a third defense remains potentially available through a demonstration either (a) that because of factual differences, the defendant's case should not be included in the category of cases affected by the observed pattern of discrimination or (b) that the defendant's race or the race of the victim is not implicated by the observed pattern of discrimination. In either of these circumstances, there would be no basis for inferring that the demonstrated pattern of racial discrimination affected the defendant's sentence, and he would be entitled to no relief. This type of defense can be quite potent. Based upon the studies conducted to date, it seems quite likely that claimants might be able to demonstrate the existence of race-based discrimination within certain subsets of death-eligible cases. But this by no means leads to an automatic conclusion that the defendant's own case was affected. For example, our studies of Georgia indicated that although racial factors affected the sentences imposed in moderately aggravated ("mid-range")

157. Our experience in conducting empirical studies of death sentencing systems in Georgia, New Jersey, and Colorado suggests that about 15 to 20 factors would be required beyond the statutory aggravating and mitigating circumstances.

cases, there were no observable race effects related to either the race of the defendant or the victim in highly aggravated cases that involved torture or multiple victims. In the terminology of section 2921(a), such evidence clearly would not support an inference that the sentences in those highly aggravated cases were "imposed based on race,"¹⁵⁸ and therefore, such sentences would be sustained under the proposed legislation.

Finally, it is important to note that even if there is evidence of a statewide pattern of discrimination, the State would have a fourth, potentially solid, defense if the evidence from the claimant's own judicial circuit or district did not reflect a similar pattern of discrimination. What gave force to McCleskey's claim of race-of-victim discrimination in his own case was the combination of strong statewide evidence of discrimination among the cases that were comparable to his and strong evidence of race-of-victim discrimination in Fulton County.¹⁵⁹

C. The Pros and Cons of Causation-Based Models of Proof in Individual Cases

A risk-based model of proof of the type applied by Justice Blackmun in *McCleskey* and proposed in the Fairness in Death Sentencing Act and the Racial Justice Act can clearly support a causal inference.¹⁶⁰ Specifically, when the claimant establishes an unrebutted prima facie case, the evidence supports an inference that race substantially influenced decisions in some cases implicated by the analysis. Indeed, it is this causal inference that arguably justifies relief for all cases so implicated because any one of the sentences imposed in them may have been adversely affected by racial discrimination. Stated differently, the unrebutted statistical proof of discrimination creates a presumption that race adversely affected each implicated case. Under a risk-based analysis, this presumption is irrebuttable, and relief follows for all of the implicated cases. It is a legitimate

158. Fairness in Death Sentencing Act, *supra* note 89, § 2921(a).

159. Our research from Georgia also indicated that the magnitude of racial disparities in capital sentencing varies significantly from one judicial district or county to the next. *See supra* note 115. Thus, a finding of discrimination in one district would provide no basis for relief in a jurisdiction in which there is no evidence that race is influencing the system.

160. *See McCleskey v. Kemp*, 481 U.S. 279, 351-53 (1987) (Blackmun, J., dissenting); Fairness in Death Sentencing Act, *supra* note 89, § 2921(b)-(d); Racial Justice Act, *supra* note 82, § 2922(b)-(c), 135 CONG. REC. S12,161-62.

question, however, whether this presumption should be rebuttable by the State. The following argument suggests that it should be.

By its very nature, statistical evidence is most meaningful with respect to groups of cases. A presumption of discrimination established by unrebutted statistical evidence concerning a group of cases applies equally to each implicated case. However, as compelling as statistical evidence can be with respect to a group of cases, it cannot definitively prove a causal connection between race and the adverse decision in any specific case within the group. Indeed, it normally will be almost certain that race adversely affected only some of the implicated cases. Causation-based models seek to identify the cases whose decisions were adversely affected by race. They are distinguishable from risk-based models, therefore, because they contemplate an additional inquiry into the specifics of the claimant's case. Such a model would give the State an additional fifth defense by permitting it to show, on the basis of evidence concerning how other similarly situated defendants were treated, that regardless of the magnitude of the unrebutted disparity suggesting a general pattern and practice of discrimination in the jurisdiction, race played no role in the claimant's case.

Assume, for example, that the statistical evidence authoritatively establishes a policy of race-of-defendant discrimination in a group of cases that includes *A*, a black defendant. It is quite possible that the circumstances of some of the implicated cases in this group (possibly including *A*'s case) would support an inference that the prosecutor would have sought, and the jury would have imposed, a death sentence in *A*'s case even if he had been white. For this reason, a legislature might rationally conclude that under such circumstances, the State should be able to overcome the presumption of discrimination as it applies to the case of *A* if the State can establish by objective evidence concerning similar cases that race was not a but-for factor in *A*'s case. Other, more demanding alternative defenses would allow the State to prevail if it could show (a) that race did not play a substantial or significant role or (b) that race played no role at all in *A*'s sentence—in other words, it was not a motivating factor.¹⁶¹

In cases outside the criminal law, causation-based models provide the final line of defense against unrebutted statistically based claims. Usually, the proponent of the causation-based defense must shoulder a heavy burden

161. The but-for model of proof is the most conservative model. It would be considerably more difficult for the State to prove that race was not a substantial factor or was not a factor at all.

of proof, such as a requirement of proof by clear and convincing evidence. For example, in a class action claiming discrimination in employment practices, current law allows plaintiffs to establish liability with statistical evidence that shows a substantial, un rebutted race or gender effect among a group of applicants. This proof moves the case to a remedial stage during which the employer is given the opportunity to escape liability with respect to the individual members of the protected class. This can be done by persuading the court, on the basis of objective evidence concerning the treatment of other applicants, that specific individuals simply were unqualified and that race or gender was not a but-for cause of the employer's decisions adversely affecting them.¹⁶²

A defense of this type may be established with statistical or qualitative evidence. It may be proven statistically by estimating the probability of an outcome adverse to a person not in the protected class who is otherwise comparable to the individual being scrutinized. For example, in a recent mortgage lending discrimination case, a statistical analysis of lending decisions showed substantial un rebutted evidence of discrimination against black applicants, 72 of whom had been denied loans.¹⁶³ On the basis of the statistical model that had established liability, it was possible to establish that if the lender had evaluated those 72 black applicants using the same standards used to evaluate white applicants, 25 (or 35%) of the applications filed by those black applicants would have been accepted.¹⁶⁴ On the basis of these results, the awards that ultimately resulted in this case were limited

162. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 359 (1977) (citing *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772 (1976)) (applying test in Title VII employment discrimination case); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977) (noting burden shift in Fourteenth Amendment zoning discrimination claim); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-86 (1977) (applying test to employment discrimination claim arising in context of First Amendment).

163. See *Mortgage Lending Discrimination: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong., 1st Sess. 10 (1993) (statement of James P. Turner, Acting Assistant Attorney General, Civil Rights Division) (describing evidence and settlement in pattern and practice action, *United States v. Decatur Sav. and Loan Ass'n* (unreported case), brought under Fair Housing Act, 42 U.S.C. §§ 3601-3619 (1988), and Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f (1988)).

164. *Id.* Estimates such as those used in *Decatur* can be made with a model produced through an analysis of all of the cases. It is also possible to use models estimated separately for black and white applicants.

to the 25 rejected black applicants with respect to whom the defendant lender failed to carry its but-for burden of proof.¹⁶⁵ However, the other 47 applicants received no relief because the statistical model indicated that their loan applications would have been denied even if they had been white. Similarly, in the death sentencing context, if a statistical model of prosecutorial decision making were used, one could estimate, for example, the probability that the prosecution would have sought a death sentence in a black-defendant case if the defendant had been white.¹⁶⁶ A similar analysis of decisions by sentencing judges and juries could be conducted, as well as an analysis of the combined effects of all decisions subsequent to indictment.¹⁶⁷

Policymakers might consider several points in their assessment of the pros and cons of risk-based, as contrasted with causation-based, models of proof in the capital sentencing context. Depending upon the specific showing required to overcome an un rebutted prima facie case, a causation-based model will reduce, to varying degrees, the risk that a defendant will be executed even though racial factors were present in his case. The but-for test, which of the three tests previously discussed is the most forgiving to the State, would uphold a defendant's death sentence even if race were a substantial, but not a but-for, factor in the defendant's case. The substantial factor test would allow a defendant to be executed as long as race was only a minor factor in the case. The most stringent of the three tests would allow a death sentence to stand only if the State showed that race played no part whatsoever in the defendant's case.

It is apparent, therefore, that under the first two tests, defendants whose death sentences were partly motivated by race could nevertheless be executed. Indeed, given the complexity of the causal issue to be addressed,

165. *Id.*

166. In making this causal assessment, a court may usefully consider (a) other forms of statistical evidence involving cases that are closely comparable to the case under review and (b) qualitative comparative evidence consisting of narrative summaries of the cases most comparable to that of the defendant. The court obviously would have the greatest confidence when both the quantitative and qualitative results point in the same direction. Unless both types of evidence support the State's case, the State would likely fail to carry its burden of proof.

167. It is worth noting that in an analysis of Georgia's death sentencing system that was similar though not identical to the analysis in *Decatur*, we estimated that among white-victim cases that resulted in the death penalty between 1973 and 1979, the victim's race was a but-for causal factor of the death sentence in 29% of the cases. BALDUS ET AL., *supra* note 23, at 155.

there is a risk that death sentences motivated in part by racial discrimination will not be identified and that an execution will follow, even under the most stringent "no motivating factor" test. By contrast, the risk-based models of proof avoid such potential pitfalls. That is their virtue. Their vice, however, is that they may allow some offenders to avoid execution even though race played no, or only a minor, role in their sentences.¹⁶⁸ Thus, selection of the appropriate model of proof for capital sentencing cases is guided on the one hand by one's concern about the execution of a death sentence motivated by, but not necessarily caused by, race. That consideration is balanced on the other hand against one's concern that a death sentence will be vacated even though race was not a but-for factor in the decision.

D. Quota Arguments Are Misleading

The argument that application of the Fairness in Death Sentencing Act would require the use of quotas is extremely misleading.¹⁶⁹ Experience outside the criminal law provides no support for this claim. Consider, for example, racial discrimination in employment. Assume that the proportion of minorities who applied to a given employer (for example, 50%) were much higher than proportions of minorities who were hired (for example, 20%). The employer could vindicate its choices as the product of an evenhanded selection process by showing that the lower hiring rate for the minorities reflected lower average qualification levels for the minority applicants. Thus, if the system were evenhanded, the apparent initial disparities would vanish after controlling for the different qualification levels of all of the applicants. The employer would have no need for quotas—nor, in the criminal context, would prosecutors, judges, or juries who processed all capital cases in an evenhanded manner.

In the employment discrimination context, the United States Supreme Court has for years authorized methods of proving purposeful discrimination that are comparable to those contemplated by the Fairness in Death Sentencing Act.¹⁷⁰ Plaintiffs in such cases sometimes win and sometimes lose, but no one has ever seriously claimed that either the right to challenge classwide purposeful discrimination in an employment context or the

168. See *supra* text accompanying note 160.

169. See *supra* note 105 and accompanying text.

170. See *supra* note 150.

methods of proof employed for the task have led to racial or gender quotas in employment. The current dispute over quotas under the 1991 Civil Rights Act relates strictly to so-called "disparate impact" claims (which require no proof of purposeful discrimination) and not to claims of classwide "disparate treatment" discrimination (which do require proof of intentional discrimination).¹⁷¹

In spite of the inherent flaws in the arguments against the proposed Racial Justice Act and the Fairness in Death Sentencing Act, intensive

171. The Supreme Court has distinguished between disparate treatment and disparate impact discrimination as follows:

"Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive, we have held, is not required under a disparate impact theory.

International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (citations omitted).

In addition to de facto abolition and quota arguments, opponents of the Fairness in Death Sentencing Act and the Racial Justice Act introduced a proposed "Equal Justice Act," which prohibits the use of "statistical tests" as a means "to achieve a specified racial proportion" of offenders. S. 1241, 102d Cong., 1st Sess. § 1002, 137 CONG. REC. S8369 (daily ed. June 20, 1991) (Thurmond Amendment No. 367) [hereinafter *Equal Justice Act*]; see H.R. 2217, 103d Cong., 1st Sess. §§ 701-705 (1993). This provision reflects a complete misconception of the function of statistical tests. Such tests are used to compare differences in the rates at which characteristics of all types occur in different populations—for example, the rates at which cancer develops in people who smoke as compared to those who do not—and to provide a basis for making causal inferences. In the context of death sentencing research, statistical tests, as contemplated by the Fairness in Death Sentencing Act, are merely an aid in determining whether different racial groups are being treated differently and whether those differences are a product of chance, the uneven distribution of nonracial factors among different racial groups, or racial discrimination. Those tests have nothing whatsoever to do with achieving "a specified racial proportion relating to offenders." *Equal Justice Act, supra*, § 1002(b)(3), 137 CONG. REC. S8369. While Congress may wish to outlaw quotas in death sentencing, to equate quotas with statistical tests is absurd. Moreover, the enactment of such a provision could unintentionally limit the capacity of state courts to monitor their own capital sentencing systems to ensure that they suffer from no racial discrimination.

lobbying by many prosecutors and attorneys general from states espousing the death penalty has successfully persuaded the United States Senate to reject the original Racial Justice Act on four separate occasions.¹⁷² The Fairness in Death Sentencing Act has been approved twice by the House of Representatives, but each time it ultimately foundered in a Senate-House conference committee.¹⁷³ Nevertheless, the fundamental capacity of such

172. On October 13, 1988, the Senate defeated the Racial Justice Act by a vote of 52 to 35 when it was introduced as an amendment to the Omnibus Drug Initiative Act of 1988. 136 CONG. REC. S6884 (daily ed. May 24, 1990) (statement of Sen. Graham). In 1990, during the Senate's consideration of the Omnibus Crime Bill, Senator Graham successfully offered an amendment to strike the Racial Justice Act of 1989 from the Bill approved by the Judiciary Committee. *Id.* The vote was 58 to 38 in favor of the amendment. *Id.* at S6910. In 1991, during the Senate's consideration of the Violent Crime Control Act of 1991, Senator Graham offered another amendment to strike the Racial Justice Act of 1991, which again had been approved by the Judiciary Committee. 137 CONG. REC. S8282 (daily ed. June 20, 1991) (statement of Sen. Graham). The Senate adopted this amendment by a vote of 55 to 41. *Id.* at S8300. Finally, on May 11, 1994, the Senate adopted, by a vote of 58 to 41, a nonbinding resolution instructing its conferees to insist on dropping the Fairness in Death Sentencing Act (referred to in the debate as the Racial Justice Act) from the pending Omnibus Crime Control and Safe Streets Act. 140 CONG. REC. S5526 (daily ed. May 11, 1994). See Appendix C for details of this legislative activity.

173. In 1990, during House consideration of the Comprehensive Crime Control Act of 1990, Representative William Hughes from New Jersey introduced an amendment that substituted the provision that came to be known as the Fairness in Death Sentencing Act for the Racial Justice Act, which had been adopted by the Judiciary Committee as part of the Crime Bill. 136 CONG. REC. H9001 (daily ed. Oct. 5, 1990) (statement of Rep. Hughes). The House adopted the amendment by a vote of 218 to 186. *Id.* at H9005. Representative Sensenbrenner then introduced an amendment that would have struck the Racial Justice Act from the Crime Bill. *Id.* The House rejected this amendment by a vote of 216 to 204. *Id.* at H9011. Thereafter, Senate and House conferees agreed to set aside the Fairness in Death Sentencing Act and many other highly contested provisions of the Omnibus Crime Bill. *Id.* at H13,296 (daily ed. Oct. 27, 1990).

On April 20, 1994, the House, by a vote of 217 to 212, rejected an attempt to strike from the Violent Crime Control and Law Enforcement Act of 1994 a measure entitled Racially Discriminatory Capital Sentencing (Title IX), which with one minor addition is identical to the Fairness in Death Sentencing Act passed in 1990. 140 CONG. REC. H2533 (daily ed. Apr. 20, 1994). On April 21, 1994, the House rejected an attempt to replace Title IX with a competing measure, Representative Bill McCollum's Equal Justice Act. *Id.* at H2608 (daily ed. Apr. 21, 1994). The Equal Justice Act is described *supra* at note 171. In 1994, a Senate-House conference committee deliberated for more than two months before rejecting the Fairness in Death Sentencing Act from the crime bill. See Appendix C for details of this legislative activity.

legislative proposals to diminish, if not eliminate, the impact of racial factors in capital cases remains essentially unimpeached.

V. *The New Jersey Experiment*

Post-*McCleskey* capital sentencing developments in the New Jersey Supreme Court are significant for two reasons. First, they provide the opportunity to test the feasibility of the models for proving discrimination that we have discussed—both structurally and in individual cases. Second, the New Jersey experience promises to shed new light on the plausibility of both the inevitability and impossibility hypotheses.¹⁷⁴ Specifically, the results of the New Jersey experiment may provide reliable evidence bearing on the following questions:

- Is racial discrimination in death sentencing inevitable, or can legal procedures be adopted (by legislators, prosecutors, or courts) to prevent it?
- Can such racial discrimination be validly detected (a) in subgroups of cases within the system and (b) in individual cases?
- Can racial discrimination be corrected in subgroups of cases and in individual cases without the de facto abolition of capital punishment or the use of quotas?

In 1988, the New Jersey Supreme Court commenced the development of a dual-purpose data base, which embraces all death-eligible cases processed through its death sentencing system since 1982. We helped the court develop this resource over a three-year period.¹⁷⁵ Its primary function is to provide detailed information on death-eligible cases for use in the comparative proportionality review of death sentences. These same data also enable the court to monitor its death sentencing system for evidence of racial discrimination and to provide defendants and the State with a basis for asserting and defending claims of discrimination.

174. Recent developments in New Jersey are consistent with the American tradition of using states as laboratories for testing and experimenting with new legal approaches.

175. See *State v. Marshall*, 613 A.2d 1059, 1063 (N.J. 1992). Professor Baldus was appointed Special Master for Proportionality Review to assist the court. *Id.* Professor Woodworth and Mr. Pulaski served as consultants for the project.

*State v. Marshall*¹⁷⁶ was the first case in which the New Jersey Supreme Court considered detailed evidence of racial discrimination in its capital punishment system. In *Marshall*, the New Jersey court rejected the *McCleskey* approach and ruled that under the equal protection clause of the New Jersey Constitution,¹⁷⁷ claims of race-of-victim and race-of-defendant discrimination are cognizable.¹⁷⁸ It also recognized the standing of a white defendant to present a "structural challenge to the constitutional fairness" of New Jersey's death sentencing system as that system is actually applied by the state's prosecutors and juries.¹⁷⁹ The operative test asks whether the race of the victim or the race of the defendant "played a significant part in capital-sentencing decisions in New Jersey."¹⁸⁰ The focus in the *Marshall* case was on the constitutional legitimacy of the system as a whole, rather than on the risk that race might have adversely influenced the decision of the prosecutor or jury in an individual case.

The *Marshall* opinion is less developed regarding potential remedies because the New Jersey court did not find evidence of unconstitutional discrimination. The court did state that if it found such discrimination to exist, it would "seek corrective measures," whose impact the court could observe through its system of judicial oversight.¹⁸¹ The most likely possibilities would be a limitation on the class of death-eligible cases or the promulgation of more objective and detailed standards to guide the exercise of prosecutorial discretion. The court further stated that if the corrective measures failed to correct the discrimination, it "could not . . . tolerate" such a system and would presumably declare it unconstitutional.¹⁸²

176. 613 A.2d 1059 (N.J. 1992).

177. N.J. CONST. art. I, ¶ 1.

178. *State v. Marshall*, 613 A.2d 1059, 1109 (N.J. 1992). "New Jersey's history and traditions would never countenance racial disparity in capital sentencing. As a people, we are uniquely committed to the elimination of racial discrimination." *Id.* at 1108. The court specifically rejected the *McCleskey* "parade of horrors," which suggested that a ruling in favor of *McCleskey* would open the courts to an unmanageable series of Eighth Amendment claims throughout the criminal justice system. *Id.* at 1110; *see* *McCleskey v. Kemp*, 481 U.S. 279, 317-18 (1987).

179. *Marshall*, 613 A.2d at 1109.

180. *Id.* at 1110.

181. *Id.*

182. *Id.* As noted, the focus of *Marshall* was a "structural challenge" to the system as a whole. The opinion did not, however, foreclose the possibility of recognizing a claim that

The *Marshall* court considered certain evidence of discrimination that we had developed during our study of New Jersey death sentences.¹⁸³ The data base for the project included 237 death-eligible cases processed in New Jersey between 1982 and 1991, 39 of which resulted in death sentences.¹⁸⁴

The analysis that we presented to the court allows us to compare evidence of racial discrimination in New Jersey from 1982 to 1991 with the 1973-79 results from Georgia that we presented in *McCleskey*.¹⁸⁵ Table 3 presents the race-of-victim and race-of-defendant results in three parts, each of which focuses on a different outcome. Part I of Table 3 presents disparities in death sentencing rates imposed among all death-eligible cases. These race effects reflect the combined effects of all decisions, from the point of indictment to the final sentencing decision. Part II of Table 3 presents disparities in the rates at which death-eligible cases advance to a penalty trial, an outcome primarily determined by the exercise of prosecutorial discretion. Part III of Table 3 presents disparities in jury penalty-trial sentencing decisions.

an individual death sentence should be vacated on the ground that it was racially motivated. In Part IV of this Article, we discuss alternative models for proving and defending claims of discrimination in individual cases. *See supra* notes 128-73 and accompanying text. In Part VI, we describe a risk-based model developed by former Chief Justice Barkett of the Florida Supreme Court that parallels the approach of Justice Blackmun's dissent in *McCleskey*. *See infra* notes 197-216 and accompanying text.

183. *See Marshall*, 613 A.2d at 1073.

184. *Id.* at 1073, 1089.

185. *See McCleskey v. Kemp*, 481 U.S. 279, 286-87 (1987).

<i>Table 3</i>		
Evidence of Racial Discrimination in Capital Sentencing: Georgia 1973-79 and New Jersey 1982-91 ^a		
<i>A</i>	<i>B</i> Race-of-Victim Disparity	<i>C</i> Race-of-Defendant Disparity
I. Death Sentence Imposed Among Death-Eligible Cases A. Georgia (<i>n</i> = 2342) ^b B. New Jersey (<i>n</i> = 237) ^c	4.3 (.003) 2.4 (.50)	.94 (.88) 3.6 (.36)
II. Advancement of Cases to a Penalty Trial A. Georgia (<i>n</i> = 708) ^d B. New Jersey (<i>n</i> = 237) ^e	3.3 (.02) 3.3 (.008)	2.4 (.10) 0.73 (.40)
III. Jury Death Sentencing Decision A. Georgia (<i>n</i> = 253) ^f B. New Jersey (<i>n</i> = 123) ^g	3.4 (.02) 2.9 (.27)	1.3 (.50) 18.6 (.01)

^a The reported statistics are odds multipliers with the level of statistical significance in parentheses.

^b BALDUS ET AL., *supra* note 23, at 319-320.

^c DAVID C. BALDUS, DEATH PENALTY PROPORTIONALITY REVIEW PROJECT: FINAL REPORT TO THE NEW JERSEY SUPREME COURT, technical app. 10, sched. 11 (Sept. 24, 1991) (on file with *Washington and Lee Law Review*).

^d BALDUS ET AL., *supra* note 23, app. L, sched. 8.

^e BALDUS, *supra* note c, technical app. 10, sched. 14.

^f BALDUS ET AL., *supra* note 23, app. L, sched. 9.

^g BALDUS, *supra* note c, technical app. 10, sched. 5.

The statistics reported in Table 3 are "odds multipliers." They indicate, on average, the extent to which the odds of receiving a death sentence or advancing to a penalty trial are enhanced if the victim is white or the defendant is black. Each of these disparities is calculated after adjusting for the most important and statistically significant legitimate case characteristics, such as the commission of a contemporaneous armed robbery or the killing of a police officer.¹⁸⁶ The key statistic from *McCleskey* was the odds multiplier of 4.3 (with strong statistical significance) reported in Row IA, Column B. It shows that after adjusting for 39 background variables affecting the aggravation levels of the cases, the odds of receiving a death sentence are, on average, 4.3 times higher if the case involves a white victim.¹⁸⁷ In New Jersey, by contrast, the equivalent coefficient is 2.4 (Row IB, Column D), which is considerably smaller and lacks statistical significance. The race-of-defendant disparities in Column C show a curious result—black defendants in New Jersey are, on average, at greater risk of receiving a death sentence (3.6) than they are in Georgia (.94). However, neither of these disparities is statistically significant, which, for New Jersey, may possibly be explained by the comparatively smaller sample of cases.¹⁸⁸

A comparison of the results in Parts II and III of Table 3 provides further insight into the disparities reported in Part I. With respect to the race-of-victim disparities set forth in Column B, the Georgia results show statistically significant disparities both for prosecutors (3.3—Row IIA) and for juries (3.4—Row IIIA), which help to explain the strong and highly significant overall disparity in Row IA (4.3). In New Jersey, there is a substantial race-of-victim disparity both for prosecutors (3.3—Row IIB) and juries (2.9—Row IIIB). However, the jury disparity is not a statistically significant factor, which may explain the overall lack of statistical significance noted in Row IB.

Column C, which focuses on race-of-defendant disparities, shows quite different results for Georgia and New Jersey. In Georgia, the race-of-defendant effect is weak for prosecutors (2.4—Row IIA) and very weak for

186. In the Georgia analyses, the number of such variables ranges from 10 to 39, while in the New Jersey analyses, the number ranges from 23 to 30.

187. See *McCleskey*, 481 U.S. at 287.

188. The level of statistical significance of a disparity in the death sentencing context depends primarily on the size of the disparity and the number of cases (sample size) involved in the analysis.

juries (1.3—Row IIIA). In New Jersey (Row IIB), we also see no race-of-defendant effect in the prosecutorial decisions (in fact, white defendants are at a slightly greater risk of advancing to a penalty trial). However, Row IIIB reveals a strong, statistically significant race-of-defendant effect in jury sentencing decisions (18.6). However, when this disparity is combined with the absence of prosecutorial race-of-defendant effects, the overall statewide disparity shown in Row IB (3.6) is much lower and is not statistically significant.

As was the case in our Georgia study, the New Jersey data also show a concentration of race effects in the mid-range of cases in which the ability to exercise discretion is the greatest.¹⁸⁹ For example, Table 4 sorts New Jersey penalty-trial decisions into five levels of culpability from lowest (1) to highest (5). Columns *B* and *C* report the death sentencing rates for black and "other" (white and Hispanic) defendants, and Column *D* reports the disparity in percentage points. There is no race effect in levels 1, 2, and 5. But among the 50 cases in levels 3 and 4, there is a very large race-of-defendant disparity, which is the source of the large race-of-defendant disparity reported in Table 3, Row IIIB, Column *C*. When the disparity in levels 3 and 4 is averaged with the zero effects in levels 1, 3, and 5, the overall average race-of-defendant disparity is 19 percentage points. If a court were convinced of the validity of such data, it might consider relief of the type suggested by Justices Stevens and Blackmun in *McCleskey*: limiting death sentencing strictly to the "most aggravated" category, in which there are no race effects.¹⁹⁰

189. See *McCleskey*, 481 U.S. at 287 n.5 (noting concentration of race effects in mid-range Georgia cases).

190. See *id.* at 365 (Blackmun, J., dissenting); *id.* at 367 (Stevens, J., dissenting).

Table 4

Race-of-Defendant Disparities in New Jersey Penalty-Trial
Death Sentencing Decisions After Adjustment for Case
Culpability Levels: 1983-91^a

A Culpability Level (1) Low to (5) High	Penalty-Trial Death Sentencing Rates		D Disparity in Percentage Points ^b (B-C)
	B Black Defendants	C Other Defendants	
1	.0 (0/13)	.0 (0/10)	0
2	.0 (0/13)	.0 (0/12)	0
3	.30 (3/10)	.0 (0/15)	30
4	.87 (7/8)	.23 (4/17)	64
5	1.0 (11/11)	1.0 (14/14)	0
Average	.38 (21/55)	.26 (18/68)	

^a DAVID C. BALDUS, DEATH PENALTY PROPORTIONALITY REVIEW PROJECT: FINAL REPORT TO THE NEW JERSEY SUPREME COURT, tbl. 18 (Sept. 24, 1991) (on file with *Washington and Lee Law Review*).

^b The overall average race-of-defendant disparity is 19 percentage points, statistically significant at the .0001 level. The overall disparity equals the sum, for each culpability level, of the disparity in Column D times the number of cases at each of the five levels on the culpability scale divided by the total sample size—i.e., $23.5/123 = .19$. The levels of statistical significance were calculated in a Mantel-Haenszel procedure.

Table 5 reports the race-of-victim disparity for the New Jersey cases that advance to a penalty trial. It shows less dramatic mid-range effects than Table 4. Nevertheless, the disparity at level 3 (47 percentage points) is at least 2 times larger than any of the other statistical disparities. Depending on how the cases are classified, the overall estimated average race-of-victim disparity is from 14 to 17 percentage points.

<i>Table 5</i>			
Race-of-Victim Disparities in Rates at Which New Jersey Cases Advance to a Penalty Trial After Adjustment for Case Culpability Levels: 1983-91 ^a			
<i>A</i> Culpability Level (1) Low to (5) High	Rates at Which Cases Advance to a Penalty Trial		<i>D</i> Disparity in Percentage Points ^b (<i>B-C</i>)
	<i>B</i> White-Victim Cases	<i>C</i> Other Cases	
1	.17 (4/24)	.04 (2/45)	13
2	.50 (8/16)	.33 (5/15)	17
3	.67 (10/15)	.20 (3/15)	47
4	.78 (14/18)	.56 (10/18)	22
5	.97 (34/35)	.92 (33/36)	5
Average	.65 (70/108)	.41 (53/129)	

^a DAVID C. BALDUS, DEATH PENALTY PROPORTIONALITY REVIEW PROJECT: FINAL REPORT TO THE NEW JERSEY SUPREME COURT, tbl. 18A (Sept. 24, 1991) (on file with *Washington and Lee Law Review*).

^b The overall average race-of-victim disparity is at least 14 percentage points. The overall disparity is the sum, for each culpability level, of the disparity in Column *D* times the number of cases at each of the five levels on the culpability scale divided by the total sample size. The overall disparity on the 5-level scale in this table was 17 percentage points (39.73/237), $p = .001$. On a 10-level scale, the overall disparity was 14 percentage points (33.11/237), $p = .004$. The levels of statistical significance were calculated in a Mantel-Haenszel procedure.

The New Jersey court in *Marshall* expressed concern about the evidence of discrimination in its capital sentencing system, especially in jury

sentencing decisions.¹⁹¹ It concluded, however, that the data were less strong than the evidence presented in *McCleskey* and did not establish a constitutional violation.¹⁹² In terms of the overall race-of-victim effects shown in Table 3, Row IB, Column D, this conclusion seems correct because the disparity is smaller than the *McCleskey* disparity and is not statistically significant. As for the race-of-defendant effects in the jury penalty-trial data, the court was cautious because changes in the law that would be likely to reduce discrimination had occurred in 1987 and 1988 and because there were an inadequate number of post-1988 cases with which to estimate race-of-defendant effects.¹⁹³

There was stronger evidence of race effects in prosecutorial decision making.¹⁹⁴ Nevertheless, the practical effect of these prosecutorial decisions has been ameliorated by the fact that according to the records of the Administrative Office of the New Jersey Courts, over 80% of all of New Jersey's death sentences imposed since 1982 have been vacated because of legal errors unrelated to racial issues. The data are disturbing nonetheless. To meet those concerns, the New Jersey court in *Marshall* urged the state's Attorney General and prosecutors to cooperate with the court and its staff in maintaining and improving the court's data base in order to enhance its capacity to detect signs of discrimination in the system.¹⁹⁵ The court also suggested that its "unease" about racial issues would be ameliorated "if there were some type of inter-agency review to provide the most rudimentary monitoring of the [prosecutorial] capital-charging decisions."¹⁹⁶

VI. *The Barkett Prosecutorial Discretion Model*

Another response to *McCleskey* has recently emerged from the Florida Supreme Court.¹⁹⁷ Because only three of the court's seven members support this approach, it is still only a proposal. If adopted and applied by

191. *Marshall*, 613 A.2d at 1112.

192. *Id.* at 1110.

193. *Id.* at 1112.

194. *See id.* at 1110-11.

195. *Id.* at 1114.

196. *Id.*

197. *See Foster v. State*, 614 So. 2d 455, 465-68 (Fla. 1992) (Barkett, C.J., concurring in part, dissenting in part), *cert. denied*, 114 S. Ct. 398 (1993).

the court, it could shed important light on both the inevitability and impossibility hypotheses.

Former Chief Justice Barkett presented the proposal in a dissenting opinion in *Foster v. State*.¹⁹⁸ She began by rejecting *McCleskey* as inconsistent with the Florida Constitution: "Discrimination, whether conscious or unconscious, cannot be permitted in Florida courts. As important as it is to ensure a jury selection process free from racial discrimination, it is infinitely more important to ensure that the State is not imposing the ultimate penalty of death in a racially discriminatory manner."¹⁹⁹ This echoes the position of the New Jersey court.²⁰⁰ The Barkett alternative for detecting and curing the effects of discrimination, however, is narrower than the New Jersey approach. Although obviously inspired by Justice Blackmun's concern with decisions affecting an individual case, the Barkett model of proof does not focus on the death sentencing decisions themselves. Rather, it examines the charging and plea bargaining decisions of a given prosecutor's office, especially that office's decisions to seek the death sentence.²⁰¹

The Barkett approach builds primarily on models of proof developed in the Florida courts to scrutinize the prosecutorial use of peremptory challenges in jury selection.²⁰² This model of proof, like the one applied by Justice Blackmun in his *McCleskey* dissent, is risk-based and does not require proof that the specific decision under challenge was racially motivated. Instead, it depends upon proof that relevant decision-making "practices" in the prosecutor's office were influenced by racial considerations.²⁰³ A prima facie case is established if an evaluation of the "capital sentencing process . . . as a whole" indicates that "discrimination exists and that there is a strong likelihood it has influenced the State to seek the death

198. 614 So. 2d 455 (Fla. 1992). In April 1994, Chief Justice Barkett was appointed to serve on the United States Court of Appeals for the Eleventh Circuit.

199. *Foster v. State*, 614 So. 2d 455, 466 (Fla. 1992) (Barkett, C.J., concurring in part, dissenting in part), *cert. denied*, 114 S. Ct. 398 (1993).

200. *See State v. Marshall*, 613 A.2d 1059, 1108-09 (N.J. 1992).

201. *See Foster*, 614 So. 2d at 467 (Barkett, C.J., concurring in part, dissenting in part).

202. *See State v. Slappy*, 522 So. 2d 18, 21-22 (Fla.), *cert. denied*, 487 U.S. 1219 (1988).

203. *Foster*, 614 So. 2d at 467-68 (Barkett, C.J., concurring in part, dissenting in part). The suspect categories under the Barkett approach are both the race of the victim and the race of the defendant. *Id.* at 468.

penalty."²⁰⁴ This showing would shift to the State the burden of demonstrating that the "practices in question are not racially motivated."²⁰⁵ If the State fails to meet this burden, it would be "prohibited from seeking the death penalty in that case."²⁰⁶

When proceeding under the Barkett approach, a claimant would be able to establish a violation with either statistical or qualitative evidence. This evidence might include not only a quantitative analysis of "the disposition of first-degree murder cases in a particular jurisdiction, but also other information that could suggest discrimination."²⁰⁷ This "other information" category apparently could include evidence of the prosecutorial "resources devoted to the prosecution" of white-victim cases as compared to black-victim cases and evidence of the "general conduct" of the state attorney's office, which could include "hiring practices and the use of racial epithets and jokes."²⁰⁸ "[A]ll aspects" of the prosecutor's policies "should be available for evaluation by a court in reviewing evidence of discrimination."²⁰⁹

In *Foster*, the "raw numbers" for the period 1975 to 1987 showed that in the state attorney's office under scrutiny:

- defendants in white-victim cases were four times as likely to be charged with first-degree murder as defendants in black-victim cases,
- defendants with white victims charged with first-degree murder were six times more likely to go to trial than defendants with black victims, and
- of those tried for first-degree murder, defendants with white victims were 26 times more likely to be convicted than defendants with black victims.²¹⁰

Although the issue in *Foster* was limited to whether there should have been a hearing on the discrimination issue, the implication of former Chief Justice Barkett's dissenting opinion is that such data might be sufficient to establish

204. *Id.* at 467-68.

205. *Id.* at 468.

206. *Id.*

207. *Id.* at 467.

208. *Id.*

209. *Id.*

210. *Id.* at 463 (per curiam).

a prima facie case of discrimination in a prosecutorial decision to seek a death sentence.²¹¹

The Barkett model of proof has a number of strengths. First, it does not place on defendants an unreasonable burden of proof in proving discrimination. Instead, it proposes a burden-shifting approach used by antidiscrimination laws in many other contexts.²¹² Second, it grants broad discretion to the trial court to consider all forms of relevant evidence, both quantitative and qualitative.²¹³ Over time, the application of this standard also would lead to the development of general rules of thumb like those used in the evaluation of evidence of discrimination in other contexts.²¹⁴ Third,

211. We speculate on the application of the Barkett model to the facts in *Foster* because the sample sizes on which the disparities are based were not reported in the court's opinion. It is also likely that the application of the Barkett model would have supported a prima facie case in *McCleskey v. Kemp*, 481 U.S. 279 (1987). There, the weighted sample of cases from Fulton County consisted of 581 defendants indicted for murder, 10 of whom received in a death sentence. See *BALDUS ET AL.*, *supra* note 23, at 337. Table 1 shows the outcomes for the white- and black-victim cases at each stage of the Fulton County death penalty process. See *supra* note 29. At each step, the white-victim defendants were treated more punitively. Table 2 also shows the actual death sentencing disparities among the 32 most aggravated Fulton County cases (which include all 10 of the county's death sentences), stratified by their level of aggravation. See *supra* note 29. The average overall race-of-victim disparity is 28 percentage points and in the category of "Typical" cases (Row IIB in Table 2) in which *McCleskey's* case falls, the disparity is 40 percentage points. In fact, no death sentences were imposed in the three black-victim cases at this level of culpability.

McCleskey also offered qualitative evidence that would be relevant under the *Foster* standard. The first was the deposition of the Fulton County district attorney, who had served in that office for eighteen years. *McCleskey*, 481 U.S. at 357 (Blackmun, J., dissenting). He testified that there were no standards for assistant district attorneys regarding plea bargaining in death-eligible cases or guiding them as to when to seek the death penalty. *Id.* He also testified that neither he nor his deputies provided systematic oversight of his office's daily decisions in death-eligible cases. *Id.* at 357-58. *McCleskey's* second item of qualitative evidence was testimony that his jury had included only one black juror. See *BALDUS ET AL.*, *supra* note 23, at 340. Under the Barkett test, it seems quite likely that *McCleskey* would have established a prima facie case, and in the absence of rebuttal by the State, his death sentence would have been vacated.

212. See *Foster*, 614 So. 2d at 468 (Barkett, C.J., concurring in part, dissenting in part).

213. *Id.* at 467; see *Bazemore v. Friday*, 478 U.S. 385, 387 (1986) (per curiam) (holding "that, on remand, the Court of Appeals should examine all of the evidence in the record relating to salary disparities under the clearly-erroneous standard").

214. Chief Justice Barkett specifically rejects the search for a single "bright line test." *Foster*, 614 So. 2d at 467 (Barkett, C.J., concurring in part, dissenting in part).

the Barkett approach would create incentives for prosecutors to maintain data on all death-eligible cases in accessible form for use in rebutting a prima facie case of discrimination. To be effective, these records would also include the reasons for seeking or not seeking a death sentence in each death-eligible case. Additionally, with richer data available on the operation of their offices, prosecutors would be in a better position to monitor the racial consequences of their own decisions and to eliminate the conscious or unconscious influence of any racial considerations in their decision making.

Fourth, the Barkett approach contemplates pretrial challenges to decisions to seek a death sentence.²¹⁵ If successful, this approach would avoid the expense of a capital trial and the multiple postconviction proceedings that often result when a death sentence is imposed. Fifth, because the Barkett approach appears to scrutinize only prosecutorial decisions, the target of the claims will be in a position, unlike a jury, to explain their decisions, as they currently do in defending challenges to their use of peremptories.²¹⁶ A final advantage of the Barkett model of proof is that it can be applied without the need for a large and expensive data base of the type developed for the *McCleskey* case and, more recently, by the New Jersey court.

VII. Conclusion

Claims that racial discrimination in the administration of the death penalty is inevitable and that such discrimination is impossible to prevent, detect, and correct enable judges and legislators to avoid difficult choices. Whether such claims are honestly asserted or whether they are only subterfuges for other, unspoken goals, they do not comport with the available quantitative and anecdotal data. Although there is considerable evidence that racial discrimination does infect the death sentencing process, there is very little evidence suggesting that such discrimination cannot be prevented. In the early 1970s, in the wake of *Furman v. Georgia*, many states adopted sentencing reforms intended to achieve this result. It is now apparent that those early reforms were less than successful. However, with hindsight, it is also possible to identify with considerable success the reasons

215. See *id.* at 468.

216. In states like Florida, where trial judges are the final sentencing authority, the Barkett model also could be used in postconviction proceedings to challenge judicial death sentencing decisions.

why those reforms failed and how improved procedures might very likely succeed.

Nevertheless, since the 1970s, there have been no serious judicial or legislative efforts to achieve the results to which the post-*Furman* legislation aspired. Nor have the state or federal courts made any sustained effort to confront the issue of racial discrimination in individual capital cases. Indeed, in *McCleskey v. Kemp*, the United States Supreme Court put the entire subject off-limits for federal courts. Almost all of the state courts have also followed *McCleskey*, although that decision in no way limited their ability to address discriminatory capital sentencing as a matter of state law. More troubling, however, is the failure of Congress to address this issue, especially because the *McCleskey* opinion specifically invited legislative intervention.²¹⁷

Apologists for this pattern of judicial and legislative inaction frequently assert that permitting capital defendants to challenge the racially infected character of their death sentences would result in either the de facto abolition of the death penalty or the use of quotas. The evidence relating to both of these claims is unpersuasive. Recent judicial pronouncements by the New Jersey Supreme Court and by three Florida Supreme Court Justices, as well as the extensive experience of state and federal courts in adjudicating discrimination claims in employment and other contexts outside the criminal law, strongly suggest that procedures are available for identifying racially affected death sentences without unduly interfering with the entire capital sentencing process. Furthermore, whether such procedures employ a risk-based model of proof, which focuses upon quantitative indicia of purposeful discrimination by examining groups of similar cases, or employ a causation-based model, similar to those that courts sometimes employ in contexts outside the criminal law, legislators and judges can modulate the frequency with which such procedures are likely to overprotect or underprotect death-

217. Justice Powell's majority opinion in *McCleskey* suggested that "McCleskey's arguments are best presented to the legislative bodies." *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987). In his view, state legislatures are better able to respond to the will and the moral values of the people. *Id.* (citing *Furman v. Georgia*, 408 U.S. 238, 283 (1972) (Burger, C.J., dissenting)). They are also, he said, better able to evaluate statistical studies in terms of their own local conditions. *Id.* (citing *Gregg v. Georgia*, 428 U.S. 153, 186 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

The only move in this direction at the state level of which we are aware is the recent introduction in the Maryland legislature of a bill modeled after the proposed Fairness in Death Sentencing Act. See S. 440, 408th Sess. (Md. 1994).

sentenced defendants in cases in which the impact of racial factors may be problematic.

Obviously, the precise level of protection that such defendants should receive is a matter to be determined by each jurisdiction that addresses the issue and may well depend upon the perceived risk of surreptitious discrimination based upon historical factors. What we wish to emphasize, however, is that the tools are available to prevent racially motivated death sentences. What some may describe as the inevitability of such sentences or the impossibility of preventing, detecting, and correcting them reflects, in our judgment, only an unwillingness to make the effort.

*Appendix A**RACIAL JUSTICE ACT*

103^D CONGRESS
1ST SESSION

H.R. 3315

**"CHAPTER 177—RACIALLY DISCRIMINATORY
CAPITAL SENTENCING**

"2921. Definitions

"For purposes of this chapter—

"(1) the term 'a racially discriminatory pattern' means a situation in which sentences of death are imposed more frequently—

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

"(B) as punishment for crimes against persons of one race than as punishment for crimes against persons of another race,

and the greater frequency is not explained by pertinent nonracial circumstances;

"(2) the term 'death-eligible crime' means a crime for which death is a punishment that is authorized by law to be imposed under any circumstances upon a conviction of that crime;

"(3) the term 'case of death-eligible crime' means a case in which the complaint, indictment, information, or any other initial or subsequent charging paper charges any person with a death-eligible crime; and

"(4) the term 'Federal or State entity' means any State, the District of Columbia, the United States, any territory thereof, and any subdivision or authority of any of these entities that is empowered to provide by law that death be imposed as punishment for crime.

"2922. Prohibition on the imposition or execution of the death penalty in a racially discriminatory pattern

"(a) PROHIBITION.—It is unlawful to impose or execute sentences of death under color of State or Federal law in a racially discriminatory pattern.

No person shall be put to death in the execution of a sentence imposed pursuant to any law if that person's death sentence furthers a racially discriminatory pattern.

"(b) ESTABLISHMENT OF A PATTERN.—To establish that a racially discriminatory pattern exists for purposes of this chapter—

"(1) ordinary methods of statistical proof shall suffice; and

"(2) it shall not be necessary to show discriminatory motive, intent, or purpose on the part of any individual or institution.

"(c) PRIMA FACIE SHOWING.—(1) To establish a prima facie showing of a racially discriminatory pattern for purposes of this chapter, it shall suffice that death sentences are being imposed or executed—

"(A) upon persons of one race with a frequency that is disproportionate to their representation among the numbers of persons arrested for, charged with, or convicted of, death-eligible crimes; or

"(B) as punishment for crimes against persons of one race with a frequency that is disproportionate to their representation among persons against whom death-eligible crimes have been committed.

"(2) To rebut a prima facie showing of a racially discriminatory pattern, a State or Federal entity must establish by clear and convincing evidence that identifiable and pertinent nonracial factors persuasively explain the observable racial disparities comprising the pattern.

"2923. Data on death penalty cases

"(a) DESIGNATION OF AGENCY.—Any State or Federal entity that provides by law for death to be imposed as a punishment for any crime shall designate a central agency to collect and maintain pertinent data on the charging, disposition, and sentencing patterns for all cases of death-eligible crimes.

"(b) RESPONSIBILITIES OF CENTRAL AGENCY.—Each central agency designated pursuant to subsection (a) shall—

"(1) affirmatively monitor compliance with this chapter by local officials and agencies;

"(2) devise and distribute to every local official or agency responsible for the investigation or prosecution of death-eligible crimes a standard form to collect pertinent data;

"(3) maintain all standard forms, compile and index all information contained in the forms, and make both the forms and the compiled information publicly available;

"(4) maintain a centralized, alphabetically indexed file of all police and investigative reports transmitted to it by local officials or agencies in every case of death-eligible crime; and

"(5) allow access to its file of police and investigative reports to the counsel of record for any person charged with any death-eligible crime or sentenced to death who has made or intends to make a claim under section 2922 and it may also allow access to this file to other persons.

"(c) RESPONSIBILITY OF LOCAL OFFICIAL.—(1) Each local official responsible for the investigation or prosecution of death-eligible crimes shall—

"(A) complete the standard form developed pursuant to subsection (b)(2) on every case of death-eligible crime; and

"(B) transmit the standard form to the central agency no later than 3 months after the disposition of each such case whether that disposition is by dismissal of charges, reduction of charges, acceptance of a plea of guilty to the death-eligible crime or to another crime, acquittal, conviction, or any decision not to proceed with prosecution.

"(2) In addition to the standard form, the local official or agency shall transmit to the central agency one copy of all police and investigative reports made in connection with each case of death-eligible crime.

"(d) PERTINENT DATA.—The pertinent data required in the standard form shall be designated by the central agency but shall include, at a minimum, the following information:

"(1) Pertinent demographic information on all persons charged with the crime and all victims (including race, sex, age, and national origin).

"(2) Information on the principal features of the crime.

"(3) Information on the aggravating and mitigating factors of the crime, including the background and character of every person charged with the crime.

"(4) A narrative summary of the crime.

"2924. Enforcement of the chapter

"(a) ACTION UNDER SECTIONS 2241, 2254, OR 2255 OF THIS TITLE.—
In any action brought in a court of the United States within the jurisdiction conferred by sections 2241, 2254, or 2255, in which any person raises a claim under section 2922—

"(1) the court shall appoint counsel for any such person who is financially unable to retain counsel; and

"(2) the court shall furnish investigative, expert or other services necessary for the adequate development of the claim to any such person who is financially unable to obtain such services.

"(b) DETERMINATION BY A STATE COURT.—Notwithstanding section 2254, no determination on the merits of a factual issue made by a State court pertinent to any claim under section 2922 shall be presumed to be correct unless—

"(1) the State is in compliance with section 2923;

"(2) the determination was made in a proceeding in a State court in which the person asserting the claim was afforded rights to the appointment of counsel and to the furnishing of investigative, expert and other services necessary for the adequate development of the claim which were substantially equivalent to those provided by subsection (a); and

"(3) the determination is one which is otherwise entitled to be presumed to be correct under the criteria specified in section 2254."

*Appendix B**FAIRNESS IN DEATH SENTENCING ACT*

103D CONGRESS
2D SESSION

H.R. 4092**"CHAPTER 177—RACIALLY DISCRIMINATORY
CAPITAL SENTENCING****"§ 2921. Prohibition against the execution of a sentence of death
imposed on the basis of race**

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

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

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

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

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

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

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

§ 2922. Access to data on death eligible cases

"Data collected by public officials concerning factors relevant to the imposition of the death sentence shall be made publicly available.

§ 2923. Enforcement of the chapter

"In any proceeding brought under section 2254, the evidence supporting a claim under this chapter may be presented in an evidentiary hearing and need not be set forth in the petition. Notwithstanding section 2254, no determination on the merits of a factual issue made by a State court pertinent to any claim under section 2921 shall be presumed to be correct unless—

"(1) the State is in compliance with section 2922;

"(2) the determination was made in a proceeding in a State court in which the person asserting the claim was afforded rights to the appointment of counsel and to the furnishing of investigative, expert and other services necessary for the adequate development of the claim; and

"(3) the determination is one which is otherwise entitled to be presumed to be correct under the criteria specified in section 2254."

Appendix C

**HISTORY OF FEDERAL LEGISLATION CONCERNING
RACIAL DISCRIMINATION IN THE ADMINISTRATION OF
THE DEATH PENALTY**

Since 1988, the House and Senate have considered two measures, the Racial Justice Act and the Fairness in Death Sentencing Act. The following is a listing of the various bills incorporating these measures and a brief legislative chronology of each. All citations to the *Congressional Record* are to the daily edition. Except for a modification in how the government may rebut a plaintiff's prima facie case of race discrimination, the measure before the 103d Congress, Title IX, Racially Discriminatory Capital Sentencing, is substantially the same measure as the Fairness in Death Sentencing Act.

103D CONGRESS (Jan. 1993 - Dec. 1994)

First Session

H.R. 3315: Crime Prevention & Criminal Justice Reform Act.

Title VI, Subtitle A: Racial Justice Act.

Status: Pending.

Chronology: 10/19/93 Introduced, 139 CONG. REC. H8202.

H.R. 3329: Racial Justice Act of 1993.

Status: Pending.

Chronology: 10/21/93 Introduced, 139 CONG. REC. H8362.

Second Session

H.R. 4017: Racial Justice Act.

Status: Pending.

Chronology: 3/11/94 Introduced, 140 CONG. REC. H1322.

H.R. 4092: Violent Crime Control and Law Enforcement Act of 1994.

Title IX: Racially Discriminatory Capital Sentencing.

Status: Became part of H.R. 3355, Amendments to the Omnibus Crime Control and Safe Streets Act of 1968, which is pending.

- Chronology: 3/18/94 Introduced in the House following approval by the Judiciary Committee, 140 CONG. REC. H1556.
- 4/20/94 The House rejected, 216-212 (Roll No. 131), an attempt to strike portions of Title IX from the bill. *Id.* at H2533.
- 4/21/94 The House rejected, 235-192 (Roll No. 143), an attempt to replace Title IX with a competing measure, the Equal Justice Act. *Id.* at H2607-08.
- 4/21/94 H.R. 4092 passed by the House, 285-141 (Roll No. 144). *Id.* at H2608.
- 4/21/94 The House, by voice vote, inserted H.R. 4092 into H.R. 3355. *Id.* at H2609.
- 5/11/94 The Senate adopted 58-41 (Vote No. 106), a nonbinding resolution instructing its conferees to insist on dropping Title IX from the bill. *Id.* at S5526.
- 7/27/94 Title IX deleted from the bill by a Senate-House conference committee.

102D CONGRESS (Jan. 1991 - Dec. 1992)

First Session

S. 1249: Racial Justice Act of 1991.

Status: Not Enacted.

Chronology: 6/6/91 Introduced, 137 CONG. REC. S7291.

H.R. 2851: Fairness in Death Sentencing Act of 1991.

Status: Not Enacted.

Chronology: 7/10/91 Introduced, 137 CONG. REC. H5340.

7/31/91 Approved by the House Subcommittee on Civil and Constitutional Rights for full committee action. *Id.* at D1026.

S. 618: Violent Crime Control Act of 1991.

Title II, sec. 207: Racial Justice Act of 1991.

Status: Not Enacted.

Chronology: 3/12/91 Introduced, 137 CONG. REC. S3020.

S. 1241: Violent Crime Control Act. Included Racial Justice Act.

Status: The Senate passed the bill after striking the Racial Justice Act. Not enacted.

Chronology: 6/06/91 Introduced, 137 CONG. REC. S7321.
 6/20/91 The Senate voted 55-41 (Vote No. 102) to strike the Racial Justice Act from the bill. *Id.* at S8300.
 7/11/91 The Senate passed the bill, 71-26 (Vote No. 125), by voice vote. *Id.* at S9832.

H.R. 3371: Omnibus Crime Control Act of 1991.

Title XVI: Fairness in Death Sentencing Act of 1991.

Status: Passed by the House without the Fairness in Death Sentencing Act. Not enacted.

Chronology: 9/23/91 Introduced, 137 CONG. REC. H6720.
 9/24/91 The House Judiciary Committee rejected, 21-12 (Committee Vote No. 222), a substitute amendment for the Fairness in Death Sentencing Act. *Bill Tracking Report, available in LEXIS, Legis Library, BLT102 file.*
 10/22/91 The House voted 223-191 (Roll No. 322) to strike the Fairness in Death Sentencing Act. 137 CONG. REC. at H8145-46.
 10/22/91 The House passed the bill, 305-118 (Roll No. 327). *Id.* at H8173.

101ST CONGRESS (Jan. 1989 - Dec. 1990)

First Session

S. 32: Federal Death Penalty Reestablishment Act.

Status: Not Enacted.

Chronology: 1/25/89 Introduced, 135 CONG. REC. S299.
 10/17/89 The Senate Judiciary Committee voted 7-6 (Committee Vote No. 325) to add the Racial Justice Act to the bill. *Bill Tracking Report, available in LEXIS, Legis Library, BLT101 file.*

10/20/89 The Senate Judiciary Committee reported the bill without recommendation, the vote for recommendation having been 7-7 (Committee Vote No. 326). *Id.*

S. 1696: Racial Justice Act.

Status: Not Enacted.

Chronology: 9/29/89 Introduced, 135 CONG. REC. S12,151.

Second Session

H.R. 4618: Racial Justice Act of 1990.

Status: Not Enacted.

Chronology: 4/25/90 Introduced, 136 CONG. REC. H1761.

S. 1970: Omnibus Crime Bill. Included Racial Justice Act.

Status: Not Enacted.

Chronology: 11/21/89 Introduced, 135 CONG. REC. S16,680.

5/24/90 The Senate voted 58-38 (Vote No. 108) to strike the Racial Justice Act from the bill. 136 CONG. REC. S6910.

H.R. 5269: Comprehensive Crime Control Act of 1990.

Title XVIII (as introduced): Racial Justice Act.

Title XVIII (as passed): Fairness in Death Sentencing Act.

Status: Fairness in Death Sentencing Act was passed by the House, but was then dropped in conference. Not enacted.

Chronology: 7/13/90 Introduced, 136 CONG. REC. H4709.

10/5/90 The House voted 218-186 (Roll No. 422) to substitute what would become known as the Fairness in Death Sentencing Act for the Racial Justice Act in Title XVIII. *Id.* at H9005.

10/5/90 The House rejected, 216-204 (Roll No. 423), a motion to strike Title XVIII from the bill. *Id.* at H9011.

10/5/90 The House passed the bill, 368-55 (Roll No. 427). *Id.* at H9042.

10/22/90 The Senate insisted on its version of the bill by voice vote. *Id.* at S16,479.

10/27/90 Announcement that the conference committee dropped Title XVIII from the bill. *Id.* at H13,296.

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Second Session

H.R. 4442: Racial Justice Act of 1988.

Status: Not enacted.

Chronology: 4/21/88 Introduced, 134 CONG. REC. H2472.

H.R. 5210: Omnibus Anti-Substance Abuse Act.

Status: Enacted as Public Law 100-690.

Chronology: 8/11/88 Introduced, 134 CONG. REC. H7060.

10/13/88 The Senate rejected, 52-35 (Vote No. 369), a motion to add the Racial Justice Act to the bill. *Id.* at S15,755-56.