

DISCRIMINATION, DEATH AND DENIAL: THE TOLERANCE OF RACIAL DISCRIMINATION IN INFLICTION OF THE DEATH PENALTY

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I. INTRODUCTION

Capital punishment, one of America's most prominent vestiges of slavery and racial violence, is flourishing once again in the United States. After a moratorium on executions in the 1960s and '70s, the execution of human beings by the state has become "routine." Over 3,000 men, women and children are on death rows throughout the nation waiting to be electrocuted, injected, shot, hung or gassed.¹

Those being executed and awaiting their deaths are no different from those selected for execution in the past: virtually all are poor; about half are members of racial minorities; and the overwhelming majority were sentenced to death for crimes against white victims.² Many suffer from severe mental impairments or limitations and many others were the victims of the most brutal physical, sexual and psychological abuse during their childhoods.³

The death penalty was declared unconstitutional in 1972 due to arbitrariness and discrimination against racial minor-

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1. *Death Row U.S.A.*, NAACP LEGAL DEF. & EDUC. FUND, INC., at 1 (Summer 1995) (reporting that there were 3,028 persons under sentence of death as of Aug. 31, 1995).

2. *Id.* at 1, 3 (reporting that over half of those under death sentence are African-American, Latino, Native American or Asian, and that in 82 percent of the cases in which executions have been carried out, the victims were white).

3. See, e.g., Dorothy Otnow Lewis et al., *Psychiatric, Neurological and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 145 AM. JUR. PSY. 838 (1986). The author has observed the presence of these factors, virtually without exception, in capital cases he has handled and supervised, as well as in cases in which he has consulted other lawyers.

ities and the poor.⁴ New capital punishment laws, supposedly designed to prevent arbitrariness and discrimination, were upheld by the Supreme Court in 1976.⁵ But race and poverty continue to determine who dies. The poor are frequently represented by inept court-appointed lawyers, who often fail to protect the rights of their clients and fail to provide juries with critical information needed for the sentencing decision, leaving the accused virtually defenseless.⁶ Prosecutors are given wide discretion in deciding whether to seek the death penalty and juries are given great discretion in deciding whether to impose it. This discretion provides ample room for racial prejudice to influence whether the accused lives or dies.

Although African-Americans are the victims in half of the murders that occur each year in the United States,⁷ eighty-five percent of the condemned were sentenced to death for murders of white persons.⁸ An analysis of twenty-eight studies by the U.S. General Accounting Office found a "remarkably consistent" pattern of racial disparities in capital sentencing throughout the country.⁹ A study in 1994 of death sentences in Harris County, Texas, which has carried out more executions and sentenced more people to death than most states,¹⁰ found that "Harris County has sent blacks to death row nearly twice as often as whites during the last ten years, a growing imbalance that eclipses the pre-civil rights

4. *Furman v. Georgia*, 408 U.S. 238 (1972).

5. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

6. For a discussion of the impact of poverty on the imposition of the death penalty due to the quality of representation provided by court-appointed counsel, see Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

7. BUREAU OF JUSTICE STATISTICS, U.S. DEPT' OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1993, at 384, table 3.128 (Kathleen Maguire & Ann L. Pastore eds., 1993).

8. See *supra* note 2.

9. GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (Feb. 1990).

10. At the end of February 1995, 37 persons sentenced to death in Harris County had been executed, more than in any state except Texas. Harris County accounts for 113 persons on Texas' death row awaiting lethal injection. Tamar Lewin, *Who Decides Who Will Die? Even Within States It Varies*, N.Y. TIMES, Feb. 23, 1995, at A1, A13. Only eleven states besides Texas have over 100 persons under death sentence. *Death Row U.S.A.*, *supra* note 1.

days of 'Old Sparky' the notorious Texas electric chair."¹¹ In Florida, which has the nation's third largest death row,¹² the Racial and Ethnic Bias Commission of the Florida Supreme Court found that "the application of the death penalty in Florida is not colorblind."¹³ A Congressional study found stark disparities in the use of the federal death penalty.¹⁴ Racial disparities have been documented by other observers.¹⁵

11. Bryan Denson, *Death Penalty: Equal Justice?* THE HOUSTON POST, Oct. 16, 1994, at A1.

12. *Death Row U.S.A.*, *supra* note 1, at 18 (stating there are 341 people on Florida's death row).

13. REPORT AND RECOMMENDATION OF THE FLORIDA SUPREME COURT RACIAL AND ETHNIC BIAS STUDY COMMISSION, at xvi (Dec. 11, 1991). *See also* Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 U. FLA. L. REV. 1 (1991); *Foster v. State*, 614 So. 2d 455 (Fla. 1992) (affirming refusal to hold hearing on claim of racial discrimination where evidence proffered showed prosecutors in Bay County State Attorney's office were four times more likely to charge first degree murder in cases involving white victims than cases involving black victims; that of such cases that went to trial, first degree murder convictions were 26 times more likely in cases with white victims; and that even though blacks constituted 40% of the murder victims in Bay County between 1975 and 1987, all 17 death sentences that were imposed were for homicides involving white victims).

14. STAFF REPORT BY THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE COMMITTEE OF THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES, RACIAL DISPARITIES IN FEDERAL DEATH PENALTY PROSECUTIONS 1988-1994, H.R. 458, 103d Cong. 2d Sess. at 2 (Mar. 1994) [hereinafter *House Subcommittee, Racial Disparities in Federal Death Penalty Prosecutions*].

15. In addition to the studies cited by the General Accounting Office in its report, *supra* note 9, *see* DAVID C. BALDUS, ET AL., EQUAL JUSTICE AND THE DEATH PENALTY (1990); SAMUEL R. GROSS & ROBERT MAURO, DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING (1989); Bob Levenson & Debbie Salamore, *Prosecutors See Death Penalty in Black and White*, THE ORLANDO SENTINEL, May 24, 1992, at A1 (reporting that "[j]ustice . . . is not colorblind in Central Florida when it comes to the prosecution of first degree murder cases"); Jim Henderson and Jack Taylor, *Killers of Dallas Blacks Escape the Death Penalty*, DALLAS TIMES HERALD, Nov. 17, 1985, at 1 (accompanied by other stories and charts demonstrating the relationship between race and imposition of the death sentence); David Margolick, *In the Land of Death Penalty, Accusations of Racial Bias*, N.Y. TIMES, July 10, 1991, at A1 (describing racial disparities in the infliction of the death penalty in Georgia's Chattahoochee Judicial Circuit, which includes the city of Columbus); Paul Pinkham & Robin Lowenthal, *The Color of Justice in Jacksonville: Killers of Blacks get off Easier than Killers of Whites*, THE FLORIDA TIMES-UNION, Dec. 8, 1991, at D1. Thomas J. Keil & Gennaro F. Vito, *Race and the Death Penalty in Kentucky Murder Trials: 1976-1991*, paper presented to Academy of Criminal Justice Sciences, Chicago (1994) (finding that Blacks accused of killing whites had a higher than average probability of being charged with a capital crime by the prosecutor and being sentenced to death by the jury).

Few people familiar with the state of race relations in the United States today would deny that there is a risk of racial prejudice influencing the sentencing decision in the typical capital case: an African-American facing the death penalty for the murder of a prominent white person who is prosecuted by a white prosecutor before a white judge and an all-white or predominantly white jury. The likelihood of racial prejudice influencing whether the death penalty is sought by the prosecutor or imposed by the jury is even greater if other factors are present, such as the rape of a white woman.¹⁶

The United States Supreme Court has observed, "a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether [the] crime involved aggravating factors"¹⁷ In addition, a juror's racial biases might prevent him or her from considering evidence about the life and background of the accused in mitigation. The Court pointed out, for example, that "[s]uch a juror might also be less favorably inclined toward [the defendant's] evidence of mental disturbance as a mitigating circumstance."¹⁸

The Supreme Court also observed that "[m]ore subtle, less consciously held racial attitudes"—unconscious racism—"could also influence a juror's decision in [the] case."¹⁹ For example, "[f]ear of blacks, which could easily be stirred up by the violent facts of [the] crime, might incline a juror to favor the death penalty."²⁰

16. There has been a particularly pronounced racial disparity in the infliction of the death penalty for rape of white victims by African-Americans. See *Furman v. Georgia*, 408 U.S. 238, 364 n.149 (1972) (Marshall, J., concurring); *Maxwell v. Bishop*, 398 F.2d 138, 145 (8th Cir. 1968), *vacated*, 398 U.S. 262 (1970).

17. *Turner v. Murray*, 476 U.S. 28, 35 (1976).

18. *Id.*

19. *Id.* See also *United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1986) (observing that an individual may harbor "certain negative stereotypes which, despite his protestations to the contrary, may well prevent him or her from making decisions solely on the facts and the law that our jury system requires.").

20. *Turner*, 476 U.S. at 35. The way in which such racial prejudice may come into play in decision-making has been described in detail by many scholars. See, e.g., Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1571 (1989) (describing the tendency of people to make decisions based on "racial stereotypes and assumptions"); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985) (documenting tendency among whites to convict black defendants in instances where white defendants would be acquitted); Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of*

Although the Supreme Court spoke of jurors, racial prejudice is not limited to jurors. Law enforcement officials, prosecutors, judges, defense lawyers, and court officials may have racial biases which influence their attitudes toward crimes and those accused, as well as their exercise of discretion in the process leading to imposition of a death sentence.

A prosecutor who believes that "blacks are violence prone or morally inferior"²¹ may be less likely to seek the death penalty in cases involving African-American victims and more likely to seek the death penalty in cases involving African-American defendants. A prosecutor's unconscious racism, his or her fear or misunderstanding of people of a different race or culture, may well be "stirred up" in a case involving an interracial crime and influence the prosecutor to seek the death penalty in that case, but not in similar cases that are not interracial.

A judge with similar attitudes may fail to recognize or correct racial discrimination by prosecutors in selecting juries, in seeking the death penalty, or in presenting evidence or argument. A defense lawyer who has racial biases may not spend enough time with the client or the client's family to discover mitigating evidence. An African-American client may be seen as "arrogant" or "uncooperative" due to the lawyer's racial stereotypes.²² A lawyer may not diligently try to save the life of one believed to be inferior.

Racial discrimination often influences the capital sentencing decision in other ways as well. Members of racial minorities continue to be excluded as judges, jurors, prosecutors, lawyers, and law enforcement officials in the criminal

Criminal Punishment, 74 CORNELL L. REV. 655, 708 (1989) (describing the psychological tendency of predominantly white decision makers to sympathize more with whites than blacks); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758 (1990); Charles R. Lawrence, *The ID, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Francis C. Dane & Lawrence S. Wrightsman, *Effects of Defendants' and Victims' Characteristics on Jurors' Verdicts*, in THE PSYCHOLOGY OF THE COURTROOM 104-06 (1982) (reporting that identification with a victim is particularly pronounced and results in the most severe sentences where the victim is of the same race, and the defendant is of a different race from that of the jurors).

21. *Turner v. Murray*, 476 U.S. 28, 35 (1976).

22. See e.g., *Dobbs v. Zant*, 720 F. Supp. 1566, 1577 (N.D. Ga. 1989) (describing that a court-appointed defense lawyer, after admitting his belief that blacks are less intelligent than whites and have inferior morals, characterized his client as "arrogant" and "uncooperative"), *aff'd*, 963 F.2d 1519 (11th Cir. 1991), *remanded on other grounds*, 113 S. Ct. 835 (1993).

justice system. A member of a racial minority who is also poor faces the disadvantage in a capital prosecution of being represented by a court-appointed lawyer. In many states, defense lawyers are appointed by elected trial judges, many of whom are former prosecutors who won positions on the bench after prosecuting high publicity capital cases. Often, court-appointed lawyers lack the knowledge, skill, resources, sensitivity and inclination to handle the case.²³ These lawyers may fail to recognize and challenge the role that race plays in determining who dies.²⁴

While it is difficult to measure precisely the extent to which race influences decision-making in any particular capital case, only those oblivious to the brutal history of racial discrimination in American law²⁵ would deny the danger of racial prejudice entering the decisions which lead to the imposition of a death sentence. However, instead of undertaking the challenge of minimizing or eliminating the potential for racial prejudice in these highly subjective and emotional decisions, courts and legislatures have been largely indifferent to the influence of race in the infliction of the death penalty. Despite pronounced racial disparities in the infliction of the death penalty in both state and federal capital cases, Congress and state legislatures have failed to limit application of the death penalty or provide remedies for racial discrimination, such as the Racial Justice Act.²⁶

Instead of acknowledging the risk of racial discrimination and attempting to identify and eliminate it, both federal and state courts frequently dodge the inquiry. They deny the existence of racial discrimination that is apparent to everyone, employ legal fictions that have no relation to the reality of race relations in America today, set legal standards or bur-

23. See generally Bright, *supra* note 6.

24. See *infra* notes 200, 261-64 and accompanying text (describing the failure of court-appointed lawyers to challenge discrimination against African-Americans in composition of jury pools).

25. See DERRICK A. BELL, *RACE, RACISM AND AMERICAN LAW* (3d ed. 1992); A. LEON HIGGINBOTHAM, *IN THE MATTER OF COLOR: RACE IN THE AMERICAN LEGAL PROCESS* (1978).

26. See *infra* text accompanying notes 186-191. The Racial Justice Act was passed by the House of Representatives as part of the 1994 Crime Bill, but was rejected in the Senate version of the bill. It was not included in the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994), which was signed into law on September 14, 1994. 55 CRIM. L. REP. (BNA) 2305 (Aug. 31, 1994)

dens of proof that are impossible to meet, or provide wholly inadequate remedies for discrimination that is undeniable. All this may be done while the courts are issuing sweeping pronouncements decrying the evil of racial discrimination and proclaiming their "unceasing efforts" to cure it.²⁷ One prominent federal appellate judge observed that the failure of the courts to remedy instances of racial discrimination has sent the message that federal courts, which once offered the greatest hope to the nation's minorities, are "no longer interested in protecting the rights of minorities."²⁸

This article examines the historic relationship between racial violence and the death penalty, describes some of the ways in which racial prejudice continues to influence capital sentencing decisions, and discusses the failure of the courts to confront the racial bias that infects the criminal justice system.

II. "LEGAL LYNCHINGS"

The death penalty is a direct descendant of lynching and other forms of racial violence and racial oppression in America. From colonial times until the Civil War, the criminal law in many states expressly differentiated between crimes committed by and against blacks and whites.²⁹ For example, Georgia law provided that the rape of a white female by a black man "shall be" punishable by death, while the rape of a white female by anyone else was punishable by a prison term not less than two nor more than twenty years.³⁰ The rape of a black woman was punishable "by fine and imprisonment, at the discretion of the court."³¹

Disparate punishments—exacted by the courts and by the mob—based upon both the race of the victim and the race

27. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 309, 333 (1987) (describing "unceasing efforts" while finding that racial disparities in capital sentencing do not violate the Eighth or Fourteenth Amendments); *Holland v. Illinois*, 493 U.S. 474, 504 n.2, 511 (1990) (reiterating the "earnestness" of the Court's "commitment to racial justice" while holding that the prosecutorial use of peremptory strikes against African-Americans did not violate the Sixth Amendment's right to an impartial jury).

28. Stephen Reinhardt, *Riots, Racism, and the Courts*, quoted in *HARPER'S MAGAZINE*, Aug. 1992, at 15, 16.

29. A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE IN THE AMERICAN LEGAL PROCESS* 256 (1978).

30. *Id.*

31. *Id.* See also *McCleskey*, 481 U.S. at 329-32 (Brennan, J., dissenting).

of the defendant continued in practice after the abolition of slavery. At least 4,743 people were killed by lynch mobs.³² More than ninety percent of the lynchings took place in the South, and three-fourths of the victims were African-Americans.³³ The threat that Congress might pass an anti-lynching statute in the early 1920s led Southern states to "replace lynchings with a more '[humane] . . . method of racial control'—the judgment and imposition of capital sentences by all-white juries."³⁴ As one historian observed:

Southerners . . . discovered that lynchings were untidy and created a bad press. . . . [L]ynchings were increasingly replaced by situations in which the Southern legal system prostituted itself to the mob's demand. Responsible officials begged would-be lynchers to 'let the law take its course,' thus tacitly promising that there would be a quick trial and the death penalty [S]uch proceedings 'retained the essence of mob murder, shedding only its outward forms'.³⁵

The process of "legal lynchings" was so successful that in the 1930s, two-thirds of those executed were black.³⁶

Powell v. Alabama,³⁷ decided by the Supreme Court in 1932, involved nine young African-Americans who were charged in Scottsboro, Alabama, with the rape of two white women, the classic case for a lynching or the death penalty.³⁸ The youths were tried in groups in three trials while mobs outside the courtroom demanded the death penalty.³⁹ The accused were represented by two lawyers; one was a drunk and the other was senile.⁴⁰ All-white, all-male juries sen-

32. These numbers come from the archives at Tuskegee University, where lynchings have been documented since 1882. Mark Curriden, *The Legacy of Lynching*, ATLANTA J. & CONST., Jan. 15, 1995, at M1.

33. *Id.*

34. Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 80 (1990) (quoting MICHAEL BELKNAP, FEDERAL LAW AND SOUTHERN ORDER 22-26 (1987)).

35. DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 115 (rev. ed. 1992).

36. Colbert, *supra* note 34, at 80.

37. 287 U.S. 45 (1932).

38. For excellent accounts of the case of the "Scottsboro boys," see JAMES GOODMAN, STORIES OF SCOTTSBORO (1994); and CARTER, *supra* note 35.

39. CARTER, *supra* note 35, at 20-48.

40. *Id.* at 18-19, 22.

tenced the accused to death.⁴¹ When there was a national outcry about the injustice of such summary trials with only perfunctory legal representation, the people of Scottsboro did not understand the reaction. After all, they did not lynch the accused; they gave them a trial.⁴²

In one of many examples of legal lynchings, a man was hung immediately after a trial in Kentucky that lasted less than an hour.⁴³ The *Louisville Courier-Journal* "tried to put the best light on the execution," saying that although it was a little hasty, at least there was not a lynching.⁴⁴ The paper also observed that since a Negro had raped a white woman, "no other result could have been reached, however prolonged the trial."⁴⁵

As racial violence was achieved increasingly through the criminal courts, Georgia became the nation's primary executioner, carrying out the most executions in the twentieth century before the death penalty was declared unconstitutional in 1972.⁴⁶ Between 1924 and 1972, Georgia executed 337 black people and 75 white people.⁴⁷

The death penalty was held unconstitutional in *Furman v. Georgia*⁴⁸ because of discrimination and arbitrariness in its infliction.⁴⁹ New death penalty statutes were enacted almost

41. *Id.* at 20-48; *Powell*, 287 U.S. at 50.

42. CARTER, *supra* note 35 at 104-16; GOODMAN, *supra* note 38 at 47-50, 297-98.

43. GEORGE C. WRIGHT, RACIAL VIOLENCE IN KENTUCKY 1865-1940; LYNCHINGS, MOB RULE, AND "LEGAL LYNCHINGS" 252 (1990).

44. *Id.* at 253. The editorial read as follows: "The fact, however, that Kentucky was saved the mortification of a lynching by an indignant multitude, bent upon avenging the innocent victim of the crime, is a matter for special congratulation." *Id.*

45. *Id.* Wright describes other legal lynchings in Kentucky. *Id.* at 251-305.

46. *The Pace of Executions: Since 1976 . . . and Through History*, N.Y. TIMES, Dec. 4, 1994, § 4, at 3. Georgia carried out 673 executions between 1900 and the end of 1994, the most of any state during this period. *Id.*

47. Prentice Palmer & Jim Galloway, *Georgia Electric Chair Spans 5 Decades*, THE ATLANTA J., Dec. 15, 1983, at 15A. After adopting electrocution as a means of execution in 1924, Georgia put more people to death than any state and "set national records for executions over a 20-year period in the 1940s and 1950s." *Id.*

48. 408 U.S. 238 (1972).

49. The five justices that made up the majority in *Furman* concluded that the death penalty was being imposed so discriminatorily, *id.* at 249-52 (Douglas, J., concurring), *id.* at 310 (Stewart, J., concurring), *id.* at 364-66 (Marshall, J., concurring), so arbitrarily, *id.* at 291-95 (Brennan, J., concurring), *id.* at 306 (Stewart, J., concurring), and so infrequently, *id.* at 311 (White, J., concurring), that any given death sentence was cruel and unusual. Justice Brennan also

immediately by a number of states.⁵⁰ Some of those statutes were upheld by the Supreme Court in 1976.⁵¹ However, the new statutes have failed to end the influence of racial prejudice in the use of the death penalty.

III. RACIAL DISCRIMINATION AFTER *FURMAN*

Most death penalty schemes adopted by the states after *Furman v. Georgia* provide for the death penalty in most first degree and felony murders. Any murder involving a robbery, arson, burglary, rape, or kidnapping may be prosecuted as a capital case.⁵² In addition, death may be imposed for any other "heinous, atrocious or cruel"⁵³ or "horrible" murders,⁵⁴ which of course describe almost all murders. But no crime—no matter how heinous—must be punished by death. In most states, the sentence is determined by the imprecise and wholly subjective consideration of aggravating and mitigating factors. The breadth of the death penalty statutes and the unfettered discretion given to prosecutors and juries provide ample room for racial prejudice to influence whether

concluded that because "the deliberate extinguishment of human life by the State is uniquely degrading to human dignity," it is inconsistent with "the evolving standards of decency that mark the progress of a maturing society." *Id.* at 291, 270.

50. *Gregg v. Georgia*, 428 U.S. 153, 179-80 & n.23 (1976) (noting that at least 35 states passed death penalty statutes).

51. The Supreme Court upheld the statutes enacted by Florida, Georgia and Texas. *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976). The Court struck down the statutes adopted by North Carolina and Louisiana. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976). The first execution after the Supreme Court allowed the resumption of capital punishment was in 1977, when Gary Gilmore was killed by a firing squad in Utah. Jon Nordheimer, *Gilmore is Executed After Stay is Upset; 'Let's Do It?' he said*, N.Y. TIMES, Jan. 18, 1977, at A1.

52. See, e.g., GA. CODE ANN. §§ 16-5-1, 17-10-30 (Michie 1994); FLA. STAT. ANN. § 921.141 (West 1985 & Supp. 1994); ALA. CODE § 13A-5-40 (1994). For a summary of capital offenses by state, see BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 1993 Table 1, at 5 (Dec. 1994). Under many capital statutes, the death penalty may also be imposed for the murder of a police or correctional officer, contract murders, murders related to drug offenses, and murders committed by persons with a previous conviction for a violent crime. *Id.*

53. FLA. STAT. ANN. § 921.141(5)(h) (West 1985 & Supp. 1994).

54. GA. CODE ANN. § 17-10-30(b)(7) (Michie 1994).

death is sought or imposed.⁵⁵ As a result, “[r]ace plays an especially influential role in capital sentencing decisions.”⁵⁶

The criminal courts are the institutions least affected by the Civil Rights Movement that brought changes to many American institutions in the last forty years. Judges and prosecutors are still elected in judicial circuits that are drawn to dilute the voting strength of racial minorities.⁵⁷ Thus, even in many areas with substantial minority populations, all of the judges and prosecutors are white.⁵⁸ In Georgia, for example, all of the elected district attorneys are white.⁵⁹ Many other states also have no or very few African-Americans as prosecutors.⁶⁰ Members of racial minorities are often underrepresented in jury pools and excluded in the jury selection process.⁶¹ Often, the only member of a racial minority who participates in the process is the accused. Racial disparities are still apparent in all types of sentencing.⁶² The per-

55. The Supreme Court has observed that “[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate” *Turner v. Murray*, 476 U.S. 28, 35 (1985). However, as will be discussed in part IV, *infra*, the Court has refused to require procedures and remedies adequate to identify and cure the influence of race.

56. *Blair v. Armontrout*, 916 F.2d 1310, 1351 (8th Cir. 1990) (Heaney, J., concurring and dissenting).

57. *Nipper v. Smith*, 39 F.3d 1484, 1537-41 (11th Cir. 1994) (en banc); *League of United Latin American Citizens, Counsel No. 434 v. Clements*, 999 F.2d 831, 904-18 (5th Cir. 1993) (en banc) (King, J., dissenting), *cert. denied*, 114 S. Ct. 878 (1994). Ruth Marcus, *Does Voting Rights Law Cover Judicial Elections?*, WASH. POST, Apr. 21, 1991, at A4.

58. Mark Curriden, *Racism Mars Justice in U.S. Panel Reports*, ATLANTA J. & CONST., Aug. 11, 1991, at D1, D3 (observing that only 6 of Georgia’s 134 Superior Court judges were African-American, and those 6 were in 3 judicial circuits); ASSOCIATED PRESS, *Second Black Alabama Supreme Court Justice Sworn In*, COLUMBUS (GA.) LEDGER-ENQUIRER, Nov. 2, 1993, at B2 (noting that there was only 1 African-American among Alabama’s 17 appellate court judges, and only 12 blacks among the state’s 255 circuit and district court judges); Rorie Sherman, *Is Mississippi Turning?*, NAT’L. L. J., Feb. 20, 1989, at 1, 24 (only 2.6 % of all state court judges in the United States are black).

59. Mark Curriden, *Racism Mars Justice in U.S. Panel Reports*, *supra* note 58, at D3.

60. JESSE SMITH & ROBERT JOHNS, EDS., *STATISTICAL RECORD OF BLACK AMERICA 774-75* (3d ed. 1995) (after listing the number of African-Americans as judges, magistrates and justices of the peace, showing no African-American for “other judicial officials” for Arkansas, Connecticut, Florida, Illinois, Indiana, Michigan, Oklahoma, South Carolina, and Texas).

61. American Bar Association Task Force on Minorities and the Justice System, *Achieving Justice in a Diverse America* at 15 (1992).

62. *See, e.g., State v. Russell*, 477 N.W.2d 886 (Minn. 1991) (finding equal protection violation due to more severe sentences imposed for possession of

functory capital trial—the legal lynching—is not a thing of the past. Those facing the death penalty still receive token representation by court-appointed lawyers in cases infected by racism.

A. *Tolerance of Racial Discrimination in the Criminal Courts*

Wilburn Dobbs, an African-American who faces execution in Georgia for the murder of a white man, was referred to at his trial as “colored” and “colored boy” by the judge and defense lawyer and called by his first name by the prosecutor.⁶³ Two of the jurors who sentenced Dobbs to death for the murder admitted after trial to using the racial slur “nigger.”⁶⁴ Dobbs was tried only two weeks after being indicted for murder and four other offenses. Dobbs was assigned a court-appointed lawyer who did not know for certain until the day of trial that he was going to represent Dobbs.⁶⁵ The lawyer filed

crack cocaine than for powdered cocaine where 96.6% of those charged with possession of crack cocaine are black and 79.6% of those charged with possession of powdered cocaine are white); *Stephens v. State*, No S94A1854, 1995 WL 116292 (Ga. S. Ct. Mar. 17, 1995), *withdrawn and superseded*, *Stephens v. State*, 456 S.E.2d 560 (Ga. 1995) (stating that of 375 persons serving life sentences for a second conviction for sale or possession with intent to distribute certain narcotics, 98.4% are African-Americans). *See, e.g.*, Samuel Myers, Jr., *Racial Disparity in Sentencing: Can Sentencing Reforms Reduce Discrimination in Punishment?*, 64 U. COLO. L. REV. 781 (1993); Gary Kleck, *Racial Discrimination in Criminal Sentencing*, 46 AM. SOCIOLOGICAL REV. 783 (1981); Dennis Cauchon, *Sentences for Crack Called Racist*, USA TODAY, May 26, 1993, at 1A; Curriden, *supra* note 58 at D1; Ruth Marcus, *Racial Bias Widely Seen in Criminal Justice System*, WASH. POST, May 12, 1992, at A4; Richard A. Berk & Alec Campbell, *Preliminary Data on Race and Crack Charging Practices in Los Angeles*, 6 Fed. Sent. R. 36 (1993); Douglas C. McDonald & Kenneth E. Carlson, *Why Did Racial/Ethnic Sentencing Differences in Federal District Courts Grow Larger Under the Guidelines?*, 6 Fed. Sent. R. 223 (1994); Charles J. Ogletree, *The Significance of Race in Federal Sentencing*, 6 Fed. Sent. R. 229 (1994); Rhonda Cook, *Sentence Disparities are the Rule in Ga.*, ATLANTA J. & CONST., Dec. 3, 1990, at A1; Tracy Thompson, *Blacks Sent to Jail More Than Whites for Same Crimes*, ATLANTA J. & CONST., Apr. 30, 1989, at 1A (with related stories and charts); Tracy Thompson, *Justice in Toombs Circuit not Colorblind, Some Say*, ATLANTA J. & CONST., Dec. 13, 1987, at 1A (three other articles appeared on the following days).

63. *Dobbs v. Zant*, 720 F. Supp. 1566, 1578 (N.D. Ga. 1989), *aff'd*, 963 F.2d 1403 (11th Cir. 1991), *rev'd*, 113 S. Ct. 835 (1993).

64. *Id.* at 1576.

65. Trial counsel testified “[t]here was uncertainty all the way up until the trial began as to whether or not I would represent him.” Transcript of State Habeas Corpus Hearing of Sept. 28, 1977, at 55, included in Record on Appeal, *Dobbs v. Zant*, 963 F.2d 1403 (11th Cir. 1991), *rev'd and remanded*, 113 S. Ct.

only one motion, a demand for a copy of the accusation and a list of witnesses.⁶⁶ Counsel sought a continuance on the morning of trial,⁶⁷ stating to the trial court that he was “not prepared to go to trial”⁶⁸ and he was “in a better position to prosecute the case than defend it.”⁶⁹ Nevertheless, the trial court denied the motion and the case proceeded to trial.⁷⁰ The federal district court described the defense lawyer’s attitude towards African-Americans as follows:

Dobbs’ trial attorney was outspoken about his views. He said that many blacks are uneducated and would not make good teachers, but do make good basketball players. He opined that blacks are less educated and less intelligent than whites either because of their nature or because “my granddaddy had slaves.” He said that integration has led to deteriorating neighborhoods and schools and referred to the black community in Chattanooga as “black boy jungle.” He strongly implied that blacks have inferior morals by relating a story about sex in a classroom. He also said that when he was young, a maid was hired with the understanding that she would steal some items. He said that blacks in Chattanooga are more troublesome than blacks in Walker County [Georgia]. . . .

The attorney stated that he uses the word “nigger” jokingly.⁷¹

Dobbs was convicted and sentenced to death in a trial that lasted only three days. During the penalty phase of Dobbs’ trial, when the jury could have heard anything about his life, background and any reasons Dobbs should not have been sentenced to death,⁷² the lawyer presented no evi-

835 (1993). Defense counsel testified before the federal court: “As a matter of fact, I didn’t know for sure what he was going to be tried for.” Transcript of trial at 85, included as part of the Record on Appeal in *Dobbs*, 963 F.2d 1403.

66. Record on Appeal to Georgia Supreme Court at 24, included in the Record on Appeal in *Dobbs*, 963 F.2d 1403.

67. Transcript of trial at 2, included in the Record on Appeal in *Dobbs*, 963 F.2d 1403.

68. *Id.* at 7.

69. *Id.* at 5.

70. *Id.* at 10.

71. *Id.* at 1577.

72. Any aspect of the life and background of the accused may be considered by the sentencer as a reason to impose a sentence less than death. *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

dence.⁷³ For a closing argument he read part of Justice Brennan's concurring opinion in *Furman v. Georgia*,⁷⁴ which expressed the view that the death penalty was unconstitutional and could not be carried out.⁷⁵ Thus, rather than emphasizing to the jury the enormous decision it had to make about whether Dobbs was going to live or die, the lawyer suggested that because the death penalty would never be carried out, the jury's decision was not important.⁷⁶

The federal courts determined that the racial prejudice of the judge, prosecutor, defense lawyer and jurors in the *Dobbs* case did not require his death sentence to be set aside. The Court of Appeals found that "[a]lthough certain of jurors' statements revealed racial prejudice, no juror stated that [he or she] viewed blacks as more prone to violence than whites," or as morally inferior to whites.⁷⁷ Since neither the trial judge nor defense lawyer decided the penalty, the Court held that "apart from the trial judge's and defense lawyer's references to Dobbs as 'colored' and 'colored boy,' it cannot be said that the trial judge's or the defense lawyer's racial attitudes affected the jurors' sentencing determination."⁷⁸ After a remand from the United States Supreme Court,⁷⁹ the district court again held that Wilburn Dobbs did not receive incompetent representation despite the lawyer's racism.⁸⁰

Dobbs is only one of many cases that starkly illustrates that racial discrimination not acceptable in any other area of American life today is tolerated in criminal courts. The use of a racial slur may cost a sports announcer his job,⁸¹ but there have been capital cases in which judges, jurors and defense counsel have called an African-American defendant a "nig-

73. Transcript of trial at 503-05, included as part of the Record on Appeal in *Dobbs*, 963 F.2d 1403.

74. 408 U.S. 238, 257-306 (1972).

75. Transcript of Closing Argument, included as part of the Record on Appeal in *Dobbs v. Zant*, 963 F.2d 1403 (11th Cir. 1991).

76. A prosecutor is not allowed to make an argument which would diminish the jury's sense of responsibility for its life and death decision. See *Caldwell v. Mississippi*, 472 U.S. 320, 328-30 (1985).

77. *Dobbs v. Zant*, 963 F.2d 1403, 1407 (11th Cir. 1991), *rev'd and remanded*, 113 S. Ct. 835 (1993).

78. *Id.* at 1407-08.

79. *Dobbs v. Zant*, 113 S. Ct. 835 (1993) (per curiam).

80. *Dobbs v. Zant*, N.D. Ga. No. 4:80-cv-247-HLM (Order of July 29, 1994).

81. See *CBS Drops Commentator*, N.Y. TIMES, Jan. 17, 1988, at A1. See also Richard Harwood, *Pressure from the 'Isms,'* WASH. POST, Feb. 11, 1990, at C6; *Racial Remarks Cost Dodger Official His Job*, N.Y. TIMES, Apr. 9, 1987 at A1.

ger" with no repercussions for anyone except the accused. For example, parents of an African-American defendant were referred to as the "nigger mom and dad" by the judge in a Florida case.⁸² The judge did not lose his job; the Florida Supreme Court merely suggested that judges should avoid the "appearance" of impropriety in the future.⁸³

Similarly, a death sentence was upheld in a Georgia case where jurors used racial slurs during their deliberations.⁸⁴ The court reasoned that the evidence "shows only that two of the twelve jurors possessed some racial prejudice and does not establish that racial prejudice caused those two jurors to vote to convict [the defendant] and sentence him to die."⁸⁵ No state or federal court so much as held a hearing on the racial prejudice which infected the sentencing of Henry Hance before he was executed by Georgia in 1994, even though jurors signed affidavits swearing racial slurs had been used during deliberations.⁸⁶ In at least five capital cases in Georgia, the accused were referred to with racial slurs *by their own lawyers* at some time during the court proceedings.⁸⁷

It is the publicly announced policy of Ed Peters, the District Attorney of Jackson, Mississippi, to "get rid of as many" black citizens as possible when exercising his peremptory strikes to select a jury.⁸⁸ As a result of this "policy" by a government official, Leo Edwards, an African-American, was sentenced to death by an all-white jury, even though he was

82. Peek v. Florida, 488 So. 2d 52, 56 (Fla. 1986).

83. *Id.*

84. Spencer v. State, 398 S.E.2d 179 (Ga. 1990), *cert. denied*, 500 U.S. 960 (1991).

85. *Id.* at 185.

86. Hance v. Zant, Super. Ct. of Butts Co., Ga., No. 93-V-172 (affidavits of juror Patricia LeMay & Gayle Lewis Daniels). See also Hance v. Zant, 696 F.2d 940 (11th Cir. 1983), *cert. denied*, 463 U.S. 1210 (1994) (Blackmun, J., dissenting from denial of certiorari); Bob Herbert, *Mr. Hance's 'Perfect Punishment'*, N.Y. TIMES, Mar. 27, 1994, at D17; Bob Herbert, *Jury Room Injustice*, N.Y. TIMES, Mar. 30, 1994, at A15.

87. Charlie Young, Curfew Davis, George Dungee, Terry Lee Goodwin and Eddie Lee Ross were all referred to as "niggers" by their defense lawyers at some point in the trials during which they were sentenced to death. Transcript of Opening and Closing Arguments, Dungee v. Kemp, 778 F.2d 1482 (11th Cir. 1985), *decided sub nom.* Isaacs v. Kemp, 778 F.2d 1482 (11th Cir. 1985), *cert. denied*, 476 U.S. 1164 (1986); Goodwin v. Balkcom, 684 F.2d 794, 805 n.13 (11th Cir. 1982). See also *Ex parte Guzman*, 730 S.W.2d 724, 736 (Tex. Crim. App. 1987) (defense counsel referred to his own client, a Salvadoran man, as a "wet back" in front of all-white jury).

88. Edwards v. Scroggy, 849 F.2d 204, 207 (5th Cir. 1988).

tried in a community which was thirty-four percent African-American.⁸⁹ The federal courts rejected Edwards' challenge to Peters' discrimination⁹⁰ and Edwards was executed in 1989.⁹¹ In what other area of American life may a public official openly espouse and carry out a policy of "getting rid of" people based upon their race and have it approved by the courts?

The practice of total exclusion from jury service on the basis of race is not limited to the district attorney in Jackson. A prosecutor in Chambers County, Alabama, used twenty-six jury strikes against twenty-six African-Americans who were qualified for jury duty in order to get three all-white juries in a case involving Albert Jefferson, a mentally retarded African-American, accused of a crime against a white victim.⁹² At the time of Jefferson's trial, marriage records at the courthouse in Chambers County were kept in books engraved "white" and "colored."⁹³ During state post-conviction proceedings, lawyers representing Jefferson discovered lists which had been made by the prosecutor prior to jury selection in which the prosecutor divided prospective jurors into four lists—"strong," "medium," "weak," and "black."⁹⁴ A state circuit judge in Chambers County ruled that no racial discrimination had occurred in the selection of the juries.⁹⁵

Some courts are indifferent to even the most blatant appearances of racial bias. African-Americans facing the death penalty in Georgia usually appear before a white judge sitting in front of the Confederate battle flag. Georgia adopted its state flag in 1956⁹⁶ to symbolize its defiance of the Supreme Court's decision in *Brown v. Board of Education*.⁹⁷ As observed one federal district court in Georgia

89. *Id.*

90. *Id.* at 208.

91. *Death Row USA*, *supra* note 1 at 6.

92. *Alabama v. Jefferson*, Cir. Ct. Chambers County No. CC-81-77 (Order of Oct. 2, 1992). One jury was for a hearing on Jefferson's mental competence to stand trial, another was for guilt and the third was for sentencing. *Id.*

93. *Alabama County Still Records Marriages by Race*, ATLANTA J. & CONST., July 21, 1991, at A2.

94. *Alabama v. Jefferson*, Order of Oct. 2, 1992, *supra* note 92.

95. *Id.* The court held there were race neutral reasons for each of the strikes of African-Americans.

96. GA. CODE ANN. § 50-3-1 (Michie 1994)

97. 347 U.S. 483 (1954) (holding that racial segregation in the public schools violates the Equal Protection Clause); *Brown v. Board of Education*, 349

The predominant part of the 1956 flag is the Confederate battle flag, which is historically associated with the Ku Klux Klan. The legislators who voted for the 1956 bill knew that the new flag would be interpreted as a statement of defiance against federal desegregation mandates and an expression of anti-black feelings.⁹⁸

The new flag was designed to carry the message that Georgia “intend[s] to uphold what [it] stood for, will stand for, and will fight for”—namely, state-sponsored commitment to black subordination and the denial of equal protection of the laws to Georgia’s African-American school children.⁹⁹ Although it is well recognized that the flag serves as “a visual focal point for racial tensions”¹⁰⁰ and symbolizes defiance of the principle of equal protection under law, it is displayed in most Georgia courtrooms.

B. *Discrimination in the Exercise of Discretion*

Members of racial minorities have long been excluded from being prosecutors, judges, jurors, lawyers, and from holding prominent positions in law enforcement. A typical scene in a Georgia courtroom was described as follows:

Four black men stood before a Cobb County judge recently asking for bond to be set in their cases, all involving drug

U.S. 294, 300 (1955) (requiring that desegregation of the public schools proceed “with all deliberate speed”).

98. *Coleman v. Miller*, 885 F. Supp. 1561, 1569 (N.D. Ga. 1995). See also Julius Chambers, *Protection of Civil Rights: A Constitutional Mandate for the Federal Government*, 87 MICH. L. REV. 1599, 1601 n.9 (1989).

99. Jim Auchmutey, *Unraveling the Flag: A Guide to Rebel Colors*, ATLANTA J. & CONST., Sept. 29, 1991, at M1, M8 (quoting state representative Denmark Groover). See also *Miller Throws in Towel on Flag*, COLUMBUS LEDGER-ENQUIRER, Mar. 10, 1993, at A1. Governor Marvin Griffin delivered the same message of defiance during his State of the State address in 1956 stating: “All attempts to mix the races whether they be in the classrooms, on the playgrounds, in public conveyances, [or] in any other area of close contact imperil the mores of the South.” Mark Sherman, *Pledging Allegiances at Flag Forum*, ATLANTA J. & CONST., Jan. 29, 1993, at G1, G6.

100. *Augustus v. School Board of Escambia County*, 507 F.2d 152, 155 (5th Cir. 1975). As one court observed:

To some, [the flag] represents the undeniable fact that Georgia was a member of the Confederacy and did secede from the Union. The flag may also represent southern heritage, the old South, or values of independence. Undeniably, to others it represents white supremacy, rebellion, segregation, and discrimination. The court is not prepared to say that any of these perspectives are incorrect. The only thing that is clear is what the flag is not: a symbol of unity for Georgians.

Coleman, *supra* note 98, at 1569.

charges. After reviewing each case, the judge ordered them all held without bond until trial. Virtually everyone else in the courtroom—the judge, two prosecutors, five defense lawyers, law clerks and bailiff—were white people. “If [my son] had been white, he’d be coming home,” said the mother of one defendant. “You saw what happened in there. It resembled some kind of Klan meeting.” While the Cobb judge’s handling of the case was not unusual, neither was the mother’s reaction.¹⁰¹

Things are no different in many other courtrooms throughout the nation. The criminal justice system in Jacksonville, Florida was described as follows:

Often the only black faces involved in Jacksonville murder cases belong to the victim and the killer.

In a city where most murders are committed by blacks against other blacks, the faces of law and order are overwhelmingly white.

There are:

No black felony judges, the only circuit judges to handle homicides.

No black members of the Public Defender Office homicide team.

Two black prosecutors out of 14 homicide-team members and supervisors at the State Attorney’s Office.

Four black homicide detectives and supervisors out of 26 at the Jacksonville’s Sheriff’s Office.¹⁰²

Thus, members of racial minorities often do not participate in the highly subjective decisions that lead to the imposition of the death penalty. Such decisions are frequently made by persons who are hostile to, or at the very least indifferent or insensitive to, the minority community.

1. *Discretion Exercised by Law Enforcement Officials and Prosecutors*

The most important decisions that may determine whether the accused is sentenced to die are those made by the prosecutor. It is the prosecutor who decides whether to seek the death penalty, and whether to resolve the case with a plea bargain for a sentence less than death. In many juris-

101. Curriden, *supra* note 58, at D1, D3.

102. See generally Paul Pinkham & Robin Lowenthal, *Getting more Minorities Involved . . . Fosters Respect for the System*, THE FLORIDA TIMES UNION, Dec. 10, 1991, at A1.

dictions, these critical decisions are made by one white man, the elected district attorney, with no input from the community. Even where more than one person decides, there may be no representation for the minority community. For example, in Orange County, the jurisdiction which ranks third in sending people to California's death row, a panel of prosecutors composed exclusively of white males decides whether the death sentence will be sought in a case.¹⁰³ Some prosecutors seek the death penalty frequently. Some hardly ever seek it. There are no state-wide standards to govern when the death penalty is sought. Each local district attorney sets his or her own policy in deciding which cases will be prosecuted as death cases.

In most jurisdictions with the death penalty, all murders accompanied by another felony, as well as all murders considered "heinous, atrocious or cruel" or "outrageously and wantonly vile, horrible and inhuman," may be prosecuted as capital cases.¹⁰⁴ From among the many cases where death could be sought, the local district attorney decides which few will actually be prosecuted as capital cases. For the white men who usually make these decisions in judicial districts all over the country, the crime may seem more heinous or horrible if the victim is a prominent white citizen. As one scholar has observed: "The life-and-death decision is made on trivial grounds, and tends to reflect the community's prejudices."¹⁰⁵

Race may also influence the decision to seek the death sentence in more subtle ways. Prosecutors make the decision whether to seek the death penalty based in part on the strength of the evidence brought to them by law enforcement in each case. Often, the amount of available evidence differs because the local sheriffs and police departments investigate crime in the white community much more aggressively than crime in the black community.¹⁰⁶ While massive searches in-

103. Rene Lynch, *Deciding Life or Death for O.C.'s Worst Murderers*, L.A. TIMES, Feb. 23, 1994, at A1.

104. See *supra* notes 52-54 and accompanying text.

105. Rick Bragg, *Two Crimes, Two Punishments*, N.Y. TIMES, Jan. 22, 1995, at 1 (quoting Franklin Zimring, Director of the Earl Warren Legal Institute at the University of California at Berkeley).

106. Studies and cases documenting discriminatory practices by police against racial minorities are collected and discussed by Charles J. Ogletree, *Does Race Matter in Criminal Prosecutions*, CHAMPION, July 1991, at 7, 10-12. Even before the notorious Rodney King case and the Mark Fuhrman tapes, there was concern about the racial attitudes of the police department in Los

volve the police, army units, and even the Boy Scouts may occur when there is a crime against a white person,¹⁰⁷ nothing more than a missing person report may be completed when a black citizen disappears.¹⁰⁸ This disparity in the investigative treatment of cases results in a disparity of evidence available to prosecute the cases. Thus, racial discrimination against crime victims by police departments results in the prosecutor having stronger evidence with which to justify seeking the death penalty in white victim cases and not seeking it in cases where the victim is a minority.

As a result of these influences, many cases in which prosecutors decide to seek the death penalty are indistinguishable from hundreds of other murder cases in which the death penalty is not sought. For example, most tragically, there are many convenience store robberies that result in a loss of life. Only a handful are prosecuted as death cases. A case involving a battered woman with no criminal record who kills her abusive spouse is typically not a death penalty case in most parts of the country. However, the prosecutor in Talladega, Alabama, has obtained death sentences for at least two battered women for their roles in killing their abusers.¹⁰⁹ Of course, there are many other examples of cases which are eligible for the death penalty, but are seldom prosecuted as capital cases.

An investigation into why some cases are treated as capital cases when other similar cases are not will almost always

Angeles. See *Los Angeles v. Lyons*, 461 U.S. 95, 116 n.3 (1983) (Marshall, J., dissenting) (noting that although only 9 % of the residents of Los Angeles are black males, they have accounted for 75 % of the deaths resulting from chokeholds by police).

107. See, e.g., Carl Cannon, *Abducted Girl Found Slain Near her Columbus Home*, COLUMBUS GA. LEDGER-ENQUIRER, July 17, 1977, at 1 (describing search for missing white victim by police officers, "truckloads of Military Policemen, trained dogs, an Army helicopter, and troops of Boy Scouts").

108. For example, after an African-American youth disappeared in Columbus, Georgia, he was first reported missing. Later his father was told a body had been found but it could not be identified because it was so badly decomposed. Two weeks later, the police told the father the body was definitely that of his son, who had been stabbed to death. Transcript of hearing held on Sept. 1-14, 1991, Sept. 12, 1991, at 176-177, *State v. Brooks*, Indictment Nos. 3888, 54606, *on appeal*, 415 S.E.2d 903 (Super. Ct. of Muscogee Co., Ga. 1992) [hereinafter *Hearing on Racial Discrimination*].

109. *Ex parte Haney*, 603 So. 2d 412 (Ala. 1992); *Walker v. State*, 586 So. 2d 49 (Ala. Crim. App. 1991), *after remand*, 611 So. 2d 1133 (Ala. Crim. App. 1992).

reveal the influence of race, class, and politics. Often, there is more publicity and greater outrage in the community over an interracial crime than other crimes. Community outrage, the need to avenge the murder because of the prominence of the victim in the community, the insistence of the victim's family on the death penalty, the social and political clout of the family in the community, and the amount of publicity regarding the crime are often far more important in determining whether death is sought than the facts of the crime or the defendant's record and background.

For example, an investigation of all murder cases prosecuted in Georgia's Chattahoochee Judicial Circuit from 1973 to 1990 revealed that in cases involving the murder of a white person, prosecutors often met with the victim's family and discussed whether to seek the death penalty.¹¹⁰ In a case involving the murder of the daughter of a prominent white contractor, the prosecutor contacted the contractor and asked him if he wanted to seek the death penalty.¹¹¹ When the contractor replied in the affirmative, the prosecutor said that was all he needed to know.¹¹² He obtained the death penalty at trial.¹¹³ He was rewarded with a contribution of \$5,000 from the contractor when he successfully ran for judge in the next election.¹¹⁴ The contribution was the largest received by the District Attorney.¹¹⁵ There were other cases in which the District Attorney issued press releases announcing that he was seeking the death penalty after meeting with the family of a white victim.¹¹⁶ But prosecutors failed to meet with African-Americans whose family members had been murdered to determine what sentence they wanted. Most were not even

110. *Hearing on Racial Discrimination*, *supra* note 108, Transcript of Sept. 12, 1991, at 67-69. The evidence is described in David Margolick, *In Land of Death Penalty, Accusations of Racial Bias*, N.Y. TIMES, July 10, 1991, at A1; and DEATH PENALTY INFO. CTR., CHATTAHOOCHEE JUDICIAL DISTRICT: THE BUCKLE OF THE DEATH BELT 10 (1991).

111. Transcript of Hearing at 38, *Davis v. Kemp*, Super. Ct. of Butts Co., Ga., (1988) (No. 86-V-865) (testimony of James Isham, father of the victim).

112. *Id.*

113. *Davis v. State*, 340 S.E.2d 869, *cert. denied*, 479 U.S. 871 (1986).

114. Clint Claybrook, *Slain Girl's Father Top Campaign Contributor*, COLUMBUS LEDGER-ENQUIRER, Aug. 7, 1988, at B1.

115. *Id.*

116. *See, e.g.*, Phil Gast, *District Attorney Criticizes Court for Rejecting Sentence*, COLUMBUS ENQUIRER, Sept. 17, 1983 at A1, A2.

notified that the case had been resolved.¹¹⁷ As a result of these practices, although African-Americans were the victims of sixty-five percent of the homicides in the Chattahoochee Judicial Circuit, eighty-five percent of the capital cases in that circuit were white victim cases.¹¹⁸

2. *Exclusion of Minority Persons from Juries*

The prosecutor's decision to seek the death penalty may never be reviewed by a minority juror. Many capital cases are tried in white flight suburban communities where there are so few minority persons in the community that there is little likelihood the minority community will be represented on the jury. Counties like Baltimore County, Maryland, and Cobb County, Georgia, account for a disproportionately high number of persons sentenced to death in those states.¹¹⁹ But even in communities where there is a substantial minority population, prosecutors are often successful in preventing or minimizing participation by minorities.

During jury selection for a capital trial, the judge or prosecutor asks potential jurors if they are conscientiously opposed to the death penalty. If they are opposed to the death penalty and cannot put their views aside, the state is entitled to have those people removed for cause.¹²⁰ Although this process results in a more conviction-prone jury, it has been upheld by the Supreme Court.¹²¹ This "death qualification" process often results in the removal of more prospective jurors

117. *Hearing on Racial Discrimination*, *supra* note 108, Transcript of Sept. 12, 1991 at 178, 184-85, 192-93, 197, 199-200.

118. See Defense Exhibit 1A, admitted at *Hearing on Racial Discrimination*, *supra* note 108.

119. See REPORT OF THE GOVERNOR'S COMMISSION ON THE DEATH PENALTY: AN ANALYSIS OF CAPITAL PUNISHMENT IN MARYLAND: 1978 TO 1993 (Nov. 1993) at 91, 92, 119 (although Baltimore City has well over ten times as many murders as Baltimore County each year, of forty-one death sentences imposed in Maryland under its current death penalty statute, twenty-two were imposed in Baltimore County; of the fifteen death sentences in effect on June 30, 1993, all but four were from Baltimore County; only five death sentences were imposed in Baltimore City and only two of the sentences in effect on June 30, 1993, were from Baltimore City). The author is aware of seventeen death sentences imposed in Cobb County, Georgia, under the death penalty statute adopted by Georgia in 1973. This is among the highest number of death sentences for a Georgia county.

120. See *Wainwright v. Witt*, 469 U.S. 412 (1985); *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

121. *Lockhart v. McCree*, 476 U.S. 162, 173 (1986).

who are members of minority groups than those who are white. The minority jurors may have reservations about the death penalty because it has been used in a racially discriminatory manner. This is one of many ways in which past discrimination in the application of the death penalty perpetuates continued discrimination.

Often the "death qualification" process reduces the number of minority jurors to few enough that those remaining can be eliminated by the prosecutor with peremptory strikes. Even when jurors who express reservations about the death penalty indicate they can put aside their personal views and consider it, the prosecutor may justify his or her strikes with the hesitancy of those jurors to impose the death penalty. For example, in *Lingo v. State*,¹²² a Georgia prosecutor used all eleven of his jury strikes against African-Americans to obtain an all white jury in a capital case.¹²³ In a challenge to those strikes under *Batson v. Kentucky*,¹²⁴ the Georgia Supreme Court—over the dissent of its two African-American justices—upheld the strikes based on the "race neutral" reasons articulated by the prosecutor, many of which had to do with the jurors' answers to the death qualification questions.¹²⁵

A federal court in Alabama found the "standard operating procedure of the Tuscaloosa County District Attorney's Office" was "to use the peremptory challenges to strike as many blacks as possible from the venires in cases involving serious crimes."¹²⁶ The District Court also found that prosecutors,

manipulated the trial docket in their effort to preserve the racial purity of criminal juries. Inasmuch as they actually set the criminal trial dockets until 1982, they implemented a scheme in which juries with fewer black venirepersons would be called for the serious cases.¹²⁷

In Georgia's Chattahoochee Judicial Circuit, which has sent more people to death row than any other circuit in the

122. 437 S.E.2d 463 (Ga. 1993).

123. *Id.* at 465.

124. 476 U.S. 79 (1986).

125. *Lingo*, 437 S.E.2d at 466-67.

126. *Jackson v. Thigpen*, 752 F. Supp. 1551, 1554 (N.D. Ala. 1990), *rev'd in part and aff'd in part, sub nom. Jackson v. Herring*, 42 F.3d 1350 (11th Cir. 1995).

127. *Id.* at 1555.

state,¹²⁸ prosecutors have used eighty-three percent of their opportunities to use peremptory jury strikes against African-Americans, even though black people constitute thirty-four percent of the population in the circuit.¹²⁹ As a result, six African-American defendants were tried by all-white juries.¹³⁰ Two of them have been executed.¹³¹

William Henry Hance was the first black defendant tried in a Chattahoochee Circuit capital case after *Furman* to have a member of his race on his jury.¹³² During jury selection at Hance's first trial, the prosecutor used nine of his ten peremptory strikes against African-Americans, leaving one black on the jury.¹³³ The death penalty was imposed. However, it was later set aside because the prosecutor made a lynch-mob type appeal to the jury for the death penalty in closing argument, which the United States Court of Appeals characterized as a "dramatic appeal to gut emotion" that "has no place in a courtroom."¹³⁴ These words from a federal court had no impact on the prosecutor. After the reversal, he called a press conference, insisted that he had done nothing wrong, and announced he would once again seek the death penalty against Hance.¹³⁵ At the second trial, he used seven of eight strikes against blacks, again eliminating all but one member of Hance's race from jury service.¹³⁶ Hance was again sentenced to death and this death sentence was carried out.¹³⁷

The judicial circuit second only to Chattahoochee in sending people to Georgia's death row is the Ocmulgee Judi-

128. By the author's count, the death sentence has been imposed 22 times in the Chattahoochee Judicial Circuit, more than any other judicial circuit in Georgia. Four of those death sentences have been carried out. Three of the four persons executed were African-Americans.

129. Defense Exhibit 2A, admitted at *Hearing on Racial Discrimination*, *supra* note 108.

130. *Id.*

131. Joseph Mulligan and Jerome Bowden, both sentenced to death by all-white juries, have been executed. *Death Row USA*, *supra* note 1, at 5.

132. See Defense Exhibit 1A, admitted in *Hearing on Racial Discrimination*, *supra* note 108.

133. *Id.*

134. *Hance v. Zant*, 696 F.2d 940, 952 (11th Cir. 1983), *cert. denied*, 463 U.S. 1210 (1994).

135. *Hearing on Racial Discrimination*, *supra* note 108, Transcript of Sept. 12, 1991, at 144-46 (testimony of William J. Smith, the prosecutor in *Hance*).

136. Defense Exhibit 2A, admitted in *Hearing on Racial Discrimination*, *supra* note 108.

137. Hance was executed on March 31, 1994. *Death Row USA*, *supra* note 1, at 8.

cial Circuit in middle Georgia.¹³⁸ Joseph Briley tried thirty-three death penalty cases in his tenure as District Attorney in the circuit between 1974 and 1994.¹³⁹ Of those thirty-three cases, twenty-four were against African-American defendants.¹⁴⁰ It was discovered that Briley had instructed jury commissioners in one county in the circuit to under-represent black citizens on the master jury lists from which grand and trial juries were selected.¹⁴¹ Additionally, the African-Americans who were summoned for jury duty in the circuit were often sent back home after Briley used his peremptory jury strikes against them. In the cases in which the defendants were black and the victims were white, Briley used ninety-four percent of his jury challenges—96 out of 103—against black citizens.¹⁴²

When a prosecutor uses the overwhelming majority of his jury strikes against a racial minority, that minority is prohibited from participating in the process. A jury does not represent “the conscience of the community on the ultimate question of life or death”¹⁴³ when one-fourth or more of the community is not represented on it.¹⁴⁴

African-Americans and other minorities continue to be excluded from jury service, even after the Supreme Court’s decision in *Batson v. Kentucky*,¹⁴⁵ which changed the standard of proof for establishing a prima facie case of discrimination.¹⁴⁶ *Batson* requires trial judges—most of whom are

138. By the author’s count, 18 persons have been sentenced to death in the Ocmulgee Judicial Circuit since 1973.

139. Charts showing most of the prosecutor’s capital trials are included in *Horton v. Zant*, 941 F.2d 1449, 1468-70 (11th Cir. 1991), cert. denied, 117 L.Ed.2d 652 (1992). Two other capital cases were tried against white defendants before the prosecutor left office. *Tharpe v. State*, 416 S.E.2d 78 (Ga. 1992); *Fugate v. State*, 431 S.E.2d 104 (Ga. 1993).

140. *Horton*, 941 F.2d at 1468-70.

141. *Amadeo v. Zant*, 486 U.S. 214 (1988).

142. *Horton*, 941 F.2d at 1458.

143. *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

144. *Id.*

145. 476 U.S. 79 (1986).

146. *Id.* After years of criticism about the crippling and virtually impossible burden of proof established in *Swain v. Alabama*, 380 U.S. 202 (1965), the Supreme Court held that a prima facie case of racial discrimination could be established by disparate strikes against minority jurors in a particular case. *Batson v. Kentucky*, 476 U.S. 79 (1986). *Swain* had required the defendant to prove that the prosecutor struck black citizens “in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be . . . with the result that no Negroes ever serve on petit juries.” *Swain*,

popularly elected—to assess the district attorney's reasons in order to determine whether the prosecutor intended to discriminate.¹⁴⁷ Many judges are former prosecutors who may have hired the district attorneys appearing before them. Even if the judge is not personally close to the prosecutor, he or she may be dependent upon the prosecutor's support in the election to remain in office.¹⁴⁸ Thus, in the many jurisdictions where judges are elected, it may be politically impossible and personally difficult for the judge to reject a reason proffered by the prosecutor for striking a minority juror. Courts routinely uphold convictions and death sentences even where a grossly disproportionate number of African-Americans have been excluded from jury service by the prosecutor's peremptory jury strikes.¹⁴⁹

Racial diversity on juries makes a difference in capital trials. Juries selected through discriminatory practices often bring to the jury box, either consciously or subconsciously, "racial stereotypes and assumptions" which influence them "in the direction of findings of black culpability and white victimization, . . . black immorality and white virtue, . . . blacks as social problems and whites as valued citizens."¹⁵⁰ Experience has taught that the death penalty is much more likely to be imposed in cases tried to all-white juries than in cases tried to more racially diverse juries.¹⁵¹ Decisions made by all-white juries do not receive the respect of other racial

380 U.S. at 223. *Swain* is discussed further in notes 225-228 and accompanying text.

147. See *Batson*, 476 U.S. at 98.

148. See, e.g., Mark Ballard, *Gunning For A Judge; Houston's Lanford Blames DA's Office For His Downfall*, TEX. LAW., Apr. 13, 1992, at 1 (describing how Houston District Attorney John B. Holmes, unhappy with rulings by a Republican judge in two murder cases, helped cause the judge's defeat by running one of his assistants against the judge and causing congestion in his docket).

149. See Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63 (1993); Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky*, 27 U. MICH. J.L. REF. 229 (1993).

150. Peggy C. Davis, *Popular Legal Culture: Law as Microaggression*, 98 YALE L.J. 1559, 1571 (1989).

151. The psychological tendency of predominantly white decision-makers to sympathize more with whites than blacks is described in Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 708 (1989); Francis C. Dane & Laurence S. Wrightsman, *Effects of Defendants' and Victims' Characteristics on Jurors' Verdicts*, in THE PSYCHOLOGY OF THE COURTROOM 104-06 (1982). The effect is particularly pronounced and results in the most severe sentences where the victim is of the

groups which were denied participation. On the other hand, more diverse juries bring to their decision-making a broader perspective gained through varied life experiences. An African-American member of the Georgia Supreme Court has observed that, “[w]hen it comes to grappling with racial issues in the criminal justice system today, often white Americans find one reality while African-Americans see another.”¹⁵² The decisions of representative juries are seen as more legitimate and are accorded greater respect by all segments of the community.

3. *The Impact of Racial Prejudice of Defense Counsel*

In rejecting a challenge to the effectiveness of a defense lawyer who expressed racist sentiments in *Dobbs v. Zant*,¹⁵³ both the District Court and the Court of Appeals reasoned that since the defense lawyer did not decide the sentence, the claim should be rejected.¹⁵⁴ But there are numerous other ways in which the racial prejudice of defense counsel may affect the sentencing decision.

A lawyer defending the accused in a capital case has the obligation to investigate the life and background of the client in order to introduce mitigating evidence.¹⁵⁵ To fulfill this constitutional and ethical obligation, a lawyer must be comfortable working with the client, the client’s family, and the client’s friends. If the appointed lawyer regards the client, his family, or his friends in a demeaning way, the lawyer cannot possibly obtain and present the needed information and fulfill the role as an advocate for the client’s life. In addition, the defendant who is assigned a lawyer who shares the racial

same race and the defendant is of a different race from that of the jurors. *Id.* at 106.

152. *Lingo v. State*, 437 S.E.2d 463, 468 (Ga. 1993) (Sears-Collins, J., dissenting).

153. *See supra* notes 63-80 and accompanying text.

154. *Dobbs v. Zant*, 720 F. Supp. 1566, 1578 (N.D. Ga. 1989), *aff’d*, 963 F.2d 1403, 1407 (11th Cir. 1991), *rev’d and remanded*, 113 S. Ct. 835 (1993).

155. Any aspect of the life and background of the accused may be considered by the sentencer as a reason to impose a sentence less than death. *See supra* note 72. For a discussion of the special demands upon defense counsel in properly preparing for the defense of a capital trial see Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323 (1993). *See also* Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 303-04 (1983).

prejudices of the jurors, judge, and prosecutor is left without an advocate to expose and challenge such biases.

For example, a federal district court in Alabama described the representation provided to an African-American woman whose court-appointed lawyers had assumed she would not be sentenced to death for the "shothouse killing" of another black woman:

Petitioner's counsel did not prepare for the sentencing hearing. . . .

Roughly one hour after her conviction, petitioner and her counsel appeared before the jury again for the sentencing hearing. [Counsel] testified at the *habeas* hearing that he told the judge the [capital murder] verdict was so shocking to him that he was not prepared to go forward with sentencing.

Between the time of petitioner's indictment and sentencing, her lawyers did no work on the sentencing aspects of her case. . . .

No social history of petitioner was undertaken prior to either of the sentencing hearings [one before the jury and the second before a judge]. No family members or friends were contacted and informed of either the sentencing hearing before the jury or the trial judge. Therefore, no evidence of mitigation was adduced. . . .

. . . At the onset of petitioner's trial, when they clearly should have challenged the prosecutor's intentional and racially-motivated utilization of peremptory challenge to exclude *all* blacks from the jury chosen to try their black client, petitioner's counsel inexplicably failed to do so.¹⁵⁶

One reason for the inadequate representation that Melvin Wade received before being sentenced to death by a California jury may have been the racial attitudes of his attorney. The attorney, who used racial slurs to refer to African-Americans, including Wade, failed to adequately present evidence of Wade's abuse as a child. The attorney also gave harmful closing arguments, including a penalty phase argument which asked the jury to impose the death sentence on his client. Kim Taylor, an associate professor at Stanford University Law School and former director of the Public Defender for the District of Columbia, described the relationship be-

156. *Jackson v. Thigpen*, 752 F. Supp. 1551, 1555, 1556, 1562 (N.D. Ala. 1990), *rev'd in part and aff'd in part, sub nom, Jackson v. Herring*, 42 F.2d 1350 (11th Cir. 1995).

tween counsel's racial attitudes and his performance as follows:

From the evidence before me, it seems clear that race played a significant and insidious role in Mr. Wade's trial. . . . Mr. Wade was represented by a man who viewed blacks with contempt, and this evidence is supported by the manner in which that attorney conducted himself at trial. Trial counsel failed to take any steps to impeach the state's injection of racial stereotyping and race-based misinformation into the case . . . and counsel comported himself in his argument to the jury in a manner as to convey his raced-based contempt.¹⁵⁷

Such performances by defense counsel make it impossible for jurors to perform their constitutional obligation to impose a sentence based on "a reasoned *moral* response to the defendant's background, character, and crime."¹⁵⁸ Nor can courts discharge their responsibility to protect the constitutional rights of the accused, including the right to a trial not infected by racial discrimination, when court-appointed lawyers fail to raise issues of discrimination out of ignorance or indifference.

C. *Disparities in Imposition of Death Sentences in the State Courts*

Sentencing patterns confirm that racial prejudice plays a role in imposition of the death penalty. Although African-Americans make up only twelve percent of the total population of the United States, they have been the victims in about half of the total homicides in this country in the last twenty-five years.¹⁵⁹ In some states in the South, where capital punishment is often imposed, African-Americans are the victims of over sixty percent of the murders. Yet eighty-five percent of the cases in which the death penalty has been carried out have involved white victims.¹⁶⁰

157. Declaration of Kim Antoinette Taylor, Sept. 30, 1991, filed in *Wade v. Calderon*, 29 F.3d 1312 (9th Cir. 1994), *cert. denied*, 130 L. Ed. 2d 802 (1995).

158. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

159. Erik Eckholm, *Studies Find Death Penalty Often Tied to Victim's Race*, N.Y. TIMES, Feb. 24, 1995, at A1; see also BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1993, at 384, table 3.128 (Kathleen Maguire & Ann L. Pastore eds., 1993).

160. *Death Row USA*, *supra* note 1, at 3.

In Georgia, for example, although African-Americans were the victims of 63.5 percent of the murders between 1976 and 1980, 82 percent of the cases in which death was imposed during that period involved murders of whites.¹⁶¹ Professor David Baldus and his associates conducted two studies of the influence of race in the application of the death penalty, examining over 2,000 murder cases which occurred in Georgia during the 1970s.¹⁶² They found that prosecutors are more likely to seek the death penalty where the victim is white and juries are more likely to impose the death penalty in such cases.¹⁶³ Defendants charged with murders of white persons received the death penalty in eleven percent of the cases, while defendants charged with murders of blacks received the death penalty in only one percent of the cases.¹⁶⁴ Defendants charged with killing white victims were 4.3 times more likely to receive a death sentence than defendants charged with killing blacks.¹⁶⁵

Georgia carried out twenty executions, under the death penalty statute upheld by the Supreme Court in 1976, by August 31, 1995.¹⁶⁶ Twelve of those executed were African-Americans.¹⁶⁷ In eighteen of the cases, the victims were white.¹⁶⁸ Six of the African-Americans executed were sentenced to death by all-white juries.¹⁶⁹ These patterns are not limited to Georgia. Nine of the first twelve persons executed in Alabama were African-American.¹⁷⁰ The General Accounting Office summarized its analysis of twenty-eight studies of the death penalty as follows:

In 82 percent of the studies, race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those

161. GROSS & MAURO, *supra* note 15, at 43-44.

162. The studies are discussed extensively in BALDUS ET AL., *supra* note 15; and in the Supreme Court's decision in *McCleskey v. Kemp*, 481 U.S. 279, 286-87 (1987); *id.* at 325-28 (Brennan, J., dissenting).

163. BALDUS ET AL., *supra* note 15, at 149-57, 160-78, 311-40; *McCleskey*, 481 U.S. at 287.

164. BALDUS ET AL., *supra* note 15, at 314-15; *McCleskey*, 481 U.S. at 286.

165. BALDUS ET AL., *supra* note 15, at 316; *McCleskey*, 481 U.S. at 287.

166. *Death Row USA*, *supra* note 1, at 9.

167. *Id.* at 4-9.

168. *Id.*

169. The author has made this determination from the trial judge's reports to the Georgia Supreme Court in the six cases which indicate that no member of the defendant's race was on the jury which sentenced him to death.

170. *Id.*

who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks. This finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques.¹⁷¹

The United States Supreme Court permitted such racial disparities in the imposition of the death penalty in *McCleskey v. Kemp*.¹⁷² By a 5-4 vote, the Court allowed Georgia to carry out its death penalty law despite racial disparities that would not be officially tolerated in any other area of the law. The Court rejected challenges based on equal protection and the Eighth Amendment's cruel and unusual clause.¹⁷³ The Court found that the studies established "at most . . . a discrepancy that appears to correlate with race"¹⁷⁴ and declined "to assume that that which is unexplained is invidious,"¹⁷⁵ thus holding the disparities insufficient even to raise a *prima facie* case of racial discrimination. The Court also expressed its concern that "McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system."¹⁷⁶ Justice Brennan, in dissent, characterized this concern as "a fear of too much justice."¹⁷⁷

The Court's fear of too much justice may result in no justice at all. The decision in *McCleskey* has been employed by lower federal and state courts to avoid dealing with issues of racial discrimination. Its crippling standard of proof, discussed more fully in section IV.C., is so formidable that many courts have denied even a hearing on gross racial disparities.¹⁷⁸ As will be discussed there, such an unwillingness to confront racial issues allows discrimination to go unchecked.

171. U.S. GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (Feb. 1990).

172. 481 U.S. 279 (1987).

173. *Id.* at 306.

174. *Id.* at 312.

175. *Id.* at 313.

176. *Id.* at 314-15.

177. *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

178. See *infra* notes 242-51 and accompanying text.

D. *Disparities in Federal Death Prosecutions*

The federal government in pursuing death sentences authorized by the Anti-Drug Abuse Act of 1988¹⁷⁹ has an even worse record of discrimination than the states. The Act authorizes the death penalty for murders committed by "kingpins" involved in drug trafficking "enterprises."¹⁸⁰ Federal prosecutors are given wide discretion in deciding whether to seek the death penalty. One Congressional committee observed: "The drug trafficking 'enterprise' can consist of as few as five individuals, and even a low-ranking 'foot soldier' in the organization can be charged with the death penalty if involved in a killing."¹⁸¹

Although three-fourths of those convicted of participating in a drug enterprise under the general provisions of 21 U.S.C. section 848 are white,¹⁸² the death penalty provisions of the Act have been used almost exclusively against minorities. Of the first thirty-seven federal death penalty prosecutions, all but four were against members of minority groups.¹⁸³ Nevertheless, in 1994, Congress provided the death penalty for over fifty additional crimes and refused to enact the Racial Justice Act.¹⁸⁴

Those accused of federal capital crimes are supposedly protected from racial discrimination by the requirements that juries be instructed not to discriminate and all jurors sign certificates guaranteeing they did not discriminate.¹⁸⁵ But this almost laughable provision is hardly a protection against racial discrimination. By the time the jury is selected, racial prejudice may have already influenced the prosecutor's decisions to seek the death penalty, to refuse a plea bargain for a non-capital sentence, and to strike minority jurors. Moreover, the most pernicious racial discrimination that occurs today is that perpetrated by those who have the sophistication

179. 21 U.S.C. § 848 (1988).

180. *House Subcommittee, Racial Disparities in Federal Death Penalty Prosecutions*, *supra* note 14, at 2.

181. *Id.*

182. *Id.*

183. *Id.* at 3.

184. *See* The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994). There is no reason to expect that the federal government will be more successful in preventing discrimination under the Violent Crime Control Act than it has been with the Anti-Drug Abuse Act.

185. 18 U.S.C. § 848(o)(1) (1988).

not to admit their biases. Those who live in racially exclusive neighborhoods, are members of racially exclusive social organizations, send their children to segregation academies, and refuse to rent to black citizens may be more than happy to listen to jury instructions and sign the certificate of nondiscrimination before sending some black person off to his death. Of course, many may not even be aware of their unconscious racism.

E. *Failure to Pass the Racial Justice Act*

Despite the pronounced racial disparities in the infliction of the death penalty in both state and federal capital cases, Congress refused to include the Racial Justice Act as part of the crime bill in 1994, just as it refused to enact the Racial Justice Act in previous years.¹⁸⁶ The Racial Justice Act was a modest proposal that would have required courts to hold hearings on racial disparities in the imposition of the death penalty and look behind the disparities to determine whether they were related to race or some other factor.¹⁸⁷

It is not unreasonable to require publicly elected prosecutors to justify racial disparities in capital prosecutions. If there is an underrepresentation of black citizens in a jury pool, jury commissioners are required to explain the disparity.¹⁸⁸ A prosecutor who strikes a disproportionate number of black citizens in selecting a jury is required to rebut the inference of discrimination by showing race neutral reasons for his or her strikes.¹⁸⁹ If there are valid, race neutral explanations for the disparities in capital prosecutions, they should be presented to the courts and the public. Prosecutors, like other public officials, should be accountable for their actions. The bases for critical decisions about whether to seek the death penalty and whether to agree to a sentence less than

186. The Racial Justice Act was adopted in a version of the crime bill that passed the House of Representatives in April, 1994. See David Cole, *Fear of Too Much Justice*, LEGAL TIMES, May 9, 1994, at 26. However, due to opposition in the Senate, it was not included in the final bill reported by the conference committee and adopted by both the Senate and the House later in the summer.

187. See David Cole, *Fear of Too Much Justice*, *supra* note 186.

188. See, e.g., *Castaneda v. Partida*, 430 U.S. 482 (1977); *Gibson v. Zant*, 705 F.2d 1543 (11th Cir. 1983). Once it is shown that there is substantial underrepresentation, jury officials must demonstrate that it was not the result of discrimination.

189. *Batson v. Kentucky*, 476 U.S. 79 (1986).

death in exchange for a guilty plea should not be shrouded in secrecy, but should be openly set out, defended, and evaluated.

The likelihood is not that it would be too difficult for prosecutors to rebut the inference of discrimination, but that it would be too easy. The task of rebutting an inference of racial discrimination under *Batson* has proven to be remarkably easy for prosecutors, even when they have used all of their jury strikes against minorities.¹⁹⁰ Nevertheless, the Racial Justice Act presented the threat of too much justice to the United States Senate and was defeated.

It is not surprising that Congress failed to pass the Racial Justice Act. Congress steadfastly refused to pass an anti-lynching law when African-Americans and other minorities were being lynched.¹⁹¹ Instead, the federal government put much of its law enforcement efforts into pursuing moonshiners. Today, the federal government commits ample resources for questionable and expensive efforts to demonstrate it is "tough on crime"—the war on drugs, the pursuit of federal death sentences for many crimes that could be prosecuted in the state courts, and the housing of ever increasing numbers of people in federal prisons for longer periods of time. But few resources are devoted to the constitutional commitment of equality for racial minorities and the poor.

The United States Department of Justice, which might be expected to be concerned about racial discrimination in the courts and its impact on public confidence in the courts, is now one of the worst offenders in the discriminatory use of the death penalty. There is no large or powerful constituency concerned about racial discrimination in capital cases. The Republican Contract With America for the 1994 elections promised greater use of the death penalty and even greater utilization of prisons, not passage of the Racial Justice Act. Thus, there is no reason to expect solutions or even leadership from the executive or legislative branches of the federal government with regard to the racial discrimination in capital cases.

190. See *supra* note 149.

191. See W. FITZHUGH BRUNDAGE, *LYNCHINGS IN THE NEW SOUTH; GEORGIA AND VIRGINIA, 1880-1930* (1993); see generally GEORGE C. WRIGHT, *RACIAL VIOLENCE IN KENTUCKY* (1990).

IV. THE AVOIDANCE, DENIAL, AND TOLERANCE OF RACIAL DISCRIMINATION BY THE COURTS

Despite extraordinary competition among politicians to be tough on crime, prosecutors and the judicial system remain remarkably soft on the crime of racial discrimination. Those who discriminate are seldom disciplined or punished. Appellate courts which normally publish long opinions on minor issues often do not even mention the extraordinary racial discrimination that comes before them, finding ways to dispose of cases on other grounds. And when racial discrimination is recognized, the remedies are often woefully inadequate.

A. *The Crime that Goes Unpunished*

Jury officials in Alabama, in an attempt to defeat a challenge to the exclusion of black citizens from jury service in 1933, forged the names of six black citizens on the jury rolls.¹⁹² The local trial judge rejected the assertion of fraud, saying he “would not be authorized to presume that somebody had committed a crime” or had been “unfaithful to their duties and allowed the books to be tampered with.”¹⁹³ The United States Supreme Court generously observed that “the evidence did not justify that conclusion.”¹⁹⁴ Although the case was reversed, no action was taken against those responsible for the forgery.¹⁹⁵

In 1988, the Supreme Court found that a Georgia prosecutor instructed jury commissioners to underrepresent African-Americans in jury pools in such a way as to avoid detection and defeat a *prima facie* case of discrimination.¹⁹⁶ No action was taken against the prosecutor, and he remained in office until 1994, when he resigned while under investigation for sexual harassment.¹⁹⁷

192. *Norris v. Alabama*, 294 U.S. 587, 592 (1935). Expert testimony established that the names of the six black citizens were added by the clerk at the direction of a jury commissioner. *Id.*

193. *Id.* at 593.

194. *Id.*

195. *Norris* was again sentenced to death. Dan T. Carter, *supra* note 35, at 370.

196. *Amadeo v. Zant*, 486 U.S. 214 (1988).

197. *The Briley File*, FULTON COUNTY DAILY REP., Nov. 7, 1994, at 1. The district attorney was not prosecuted for either racial discrimination or sexual

In Columbus, Muscogee County, Georgia, black citizens were excluded for years and then underrepresented in the jury pools. In 1966, the Fifth Circuit Court of Appeals held that this discrimination violated the Constitution.¹⁹⁸ In 1972, the Supreme Court reached the same conclusion in another case from the county, and three justices even went so far as to point out that the way in which juries were being selected in the county violated 18 U.S.C. section 243, which makes it a criminal offense to exclude persons from jury service on the basis of race.¹⁹⁹

Despite these court decisions, the unconstitutional, systematic underrepresentation continued throughout the 1970s. This underrepresentation was made possible in part because one public defender, appointed by white judges in Columbus, would not, as a matter of "policy," file challenges to the underrepresentation of blacks in the jury pool for fear of incurring hostility from the community.²⁰⁰

As a result, at the capital trial of a black man in Columbus, Georgia in 1977—eleven years after the Fifth Circuit decision and five years after the Supreme Court warned that the exclusion of black citizens violated federal criminal statutes—there were only eight black citizens in a venire of 160 persons.²⁰¹ A venire that fairly represented the community would have included fifty black citizens. That case was tried by an all-white jury.²⁰² The death penalty was imposed.²⁰³

There are people awaiting execution on Georgia's death row who were sentenced to death in Columbus by juries chosen in defiance of the Supreme Court's decision requiring an

harassment and was allowed to retire with a pension after 20 years in office. *Id.*

198. *Vanleeward v. Rutledge*, 369 F.2d 584 (5th Cir. 1966).

199. *Peters v. Kiff*, 407 U.S. 493, 505-07 (1972) (White, J., concurring).

200. *Gates v. Zant*, 863 F.2d 1492, 1498 (11th Cir.), *rehearing denied*, 880 F.2d 293, 293-97 (Clark, J., dissenting from denial of rehearing), *cert. denied*, 493 U.S. 945 (1989).

201. *Challenge to the Petit Jury Array* filed in *State v. Brooks*, Indictment No. 3888 (Nov. 1977), *on appeal*, 261 S.E.2d 379 (1979), *vacated and remanded*, 446 U.S. 961 (1980), *on remand*, 271 S.E.2d 172 (Ga. 1980), *cert. denied*, 451 U.S. 921 (1981), *conviction and death sentence vacated sub nom. Brooks v. Kemp*, 762 F.2d 1383 (11th Cir. 1985) (en banc), *vacated and remanded*, 478 U.S. 1016 (1986), *decision adhered to on remand*, 809 F.2d 700 (11th Cir. 1987) (en banc), *cert. denied*, 483 U.S. 1010 (1987).

202. Trial Judge's Report to the Georgia Supreme Court in *State v. Brooks*, *supra* note 201, at 6, § E(4).

203. *Id.*

end to discrimination. Yet those who defied the federal courts and the Constitution were never prosecuted or disciplined. Some are still presiding as judges in the local courts there.

It simply cannot be said that courts are engaging in “un-ceasing efforts” to eliminate racial discrimination from the criminal justice system²⁰⁴ when prosecutors can rig juries on the basis of race with impunity, when decisions from the Supreme Court and the United States Courts of Appeals regarding discrimination in jury selection can be ignored for years with impunity, and a prosecutor may remain in office and death sentences are carried out even though juries are selected pursuant to the prosecutor’s practice of striking as many African-Americans as possible. Judicial tolerance of such discrimination sends the unmistakable message that the “war on crime” need not be fought according to the Constitution, and racial discrimination will be tolerated when it is perceived as necessary to obtain convictions and death sentences.

B. *Avoiding Issues Involving Race*

Despite the racial discrimination which has been a major aspect of the death penalty throughout American history, the Supreme Court and lower federal and state courts have been reluctant to face racial issues presented by capital cases. The courts have simply been in a state of denial instead of confronting and dealing with the difficult and sensitive issue of race.

After declaring racially discriminatory jury selection practices in one Georgia county unconstitutional,²⁰⁵ the United States Supreme Court remanded to the Georgia Supreme Court a capital case in which the jury had been selected by the same illegal means in the same county.²⁰⁶ However, when the Georgia Supreme Court refused to reconsider its previous holding that the issue had been waived,²⁰⁷ the United States Supreme Court backed down, denied certiorari

204. *See supra* note 27.

205. *Avery v. Georgia*, 345 U.S. 559, 562 (1953).

206. *Williams v. Georgia*, 349 U.S. 375, 391 (1955).

207. *Williams v. State*, 88 S.E.2d 376, 377 (Ga. 1955), *cert. denied*, 350 U.S. 950 (1956).

and allowed the execution to be carried out.²⁰⁸ It appears that the Court, already encountering resistance to its decision in *Brown v. Board of Education*,²⁰⁹ was anxious to avoid a confrontation with southern state courts over racial discrimination in the criminal courts.²¹⁰

Over ten years later, the United States Supreme Court appeared willing to review the role of racial prejudice in capital cases when it granted certiorari in *Maxwell v. Bishop*,²¹¹ a case in which the Eighth Circuit rejected a challenge based upon the pronounced disparity in the number of African-Americans sentenced to death for rape in Arkansas and other parts of the South.²¹² However, after twice hearing oral argument devoted mostly to the issue of racial discrimination, the Court vacated the death sentence and remanded the case based upon a jury qualification issue which had not even been raised in the Court of Appeals.²¹³

Although the specter of race discrimination was acknowledged by justices in both the majority and the dissent in *Furman v. Georgia*,²¹⁴ only Justice Marshall discussed racial discrimination at length.²¹⁵ Justice Stewart found it unnecessary to decide the issue, while acknowledging that "if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissibly basis of race."²¹⁶

Despite the extraordinary history of discrimination with regard to the infliction of the death penalty upon African-

208. *Williams v. Georgia*, 350 U.S. 950 (1956).

209. 347 U.S. 483 (1954); *Brown v. Board of Education*, 349 U.S. 294 (1955). See *supra* note 97.

210. Del Dickson, *State Court Defiance and the Limits of Supreme Court Authority: Williams v. Georgia Revisited*, 103 YALE L.J. 1423, 1425-26 (1994).

211. 398 F.2d 138 (8th Cir. 1968), *vacated and remanded on other grounds*, 398 U.S. 262 (1970).

212. *Id.* at 147.

213. 398 U.S. 262, 262 (1970). MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 163-67, 199-211 (1973).

214. 408 U.S. 238 (1972). See 408 U.S. at 257 (Douglas, J., concurring) (describing the statutes before the Court as "pregnant with discrimination"); *id.* at 310 (Stewart, J., concurring); *id.* at 364-65 (Marshall, J., concurring); *id.* at 389 n.12 (Burger, C.J., dissenting); *id.* at 449-50 (Powell, J., dissenting).

215. *Id.* at 364-65 (Stewart, J., concurring.).

216. *Id.* at 310. Justice Douglas concluded there was an unacceptable *risk* of discrimination. *Id.* at 257.

Americans for the rape of white women,²¹⁷ the Court did not even mention race in striking down the death penalty for the crime of rape in *Coker v. Georgia*.²¹⁸

It is impossible to know how many state courts have found ways to avoid the issue of race in deciding capital cases. The Georgia Supreme Court frequently discusses every issue presented to it, even those which need not be addressed for a decision.²¹⁹ But in holding that a trial judge should be recused from a case because of his involvement in opposing a motion to disqualify him, the court never mentioned the motion was based on the judge's long history of racial discrimination.²²⁰ Evidence presented in the trial court established that the judge regularly appointed jury commissions which underrepresented African-Americans, tolerated gross underrepresentation of blacks in the grand and trial juries, mistreated black attorneys in court, used racial slurs, and practiced discrimination in his personal life.²²¹ The Missouri Supreme Court summarily reversed two capital cases without mentioning evidence that prosecutors in Kansas City used racial slurs to refer to black citizens, systematically excluded black citizens from juries, and refused to plea bargain with African-Americans charged with murders of whites while offering plea bargains in all other potential capital cases, including a case of murderers who killed four generations of African-Americans.²²²

The Alabama Court of Criminal Appeals similarly failed to acknowledge or discuss disturbing evidence of racial discrimination in setting aside a capital conviction and sentence.²²³ The court did not mention that the prosecutor had used twenty-six peremptory jury strikes against African-

217. As Justice Marshall pointed out in *Furman*, of the 455 persons executed for the crime of rape after the Justice Department began compiling statistics, 405 were African-Americans. *Id.* at 364.

218. 433 U.S. 584 (1977).

219. *See, e.g.*, Thornton v. State, 449 S.E.2d 98 (Ga. 1994).

220. Isaacs v. State, 355 S.E.2d 644 (Ga. 1987), *cert denied*, 497 U.S. 1032 (1990).

221. *See id.* (transcript of hearing on motion to recuse held Oct. 6-8, 1986).

222. *See State v. Taylor*, Mo. S. Ct. No. 74220 (Order of June 19, 1993); *State v. Nunley*, Mo. S. Ct. No. 76104 (Order of June 29, 1993) (both orders vacate the judgments in the two cases and remand for a new penalty hearing without opinion or further elaboration). The evidence of racial discrimination was presented in an evidentiary hearing before the Circuit Court of Jackson County, Missouri, in 1992.

223. *Jefferson v. State*, 645 So. 2d 313 (Ala. Crim. App. 1994).

Americans after dividing potential jurors into four lists under the headings, "strong," "medium," "weak" and "black" or that the trial court had held there was no discrimination.²²⁴

Apparently, many courts believe it is best to avoid the sensitive issue of race. Why else did the courts not denounce these outrageous examples of racial discrimination in the strongest terms? While the failure of the appellate courts to mention the race issues in these cases may have been coincidence, it is more likely that courts are defensive about the racial discrimination that takes place in what is supposed to be a system of equal justice. Their opinions leave those who read them without any hint that the cases involved racial discrimination and thus provide trial courts with no guidance in considering those issues. In addition, lawyers reading appellate opinions are less likely to realize the importance of race and search out and challenge discrimination. The failure of the courts to discuss and condemn racial discrimination only fosters more discrimination.

C. *Unreasonable Burdens of Proof, Impossible Standards, and Inadequate Remedies*

In 1965, in the midst of the Warren Court decisions applying the Bill of Rights to state criminal procedure, the Court upheld a capital conviction in *Swain v. Alabama*,²²⁵ despite evidence that due to peremptory challenges, no black person had ever served on a jury in either a criminal or civil case in Talladega County, Alabama, where African-Americans constituted twenty-six percent of the population. While reiterating its prior pronouncements that "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause,"²²⁶ the Court set an almost impossible burden of proof, holding that to establish discrimination by a prosecutor in the use of peremptory strikes, a defendant must prove the prosecutor engaged in a practice of striking black citizens "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be . . . with the result that no Negroes ever

224. *Id.*

225. 380 U.S. 202 (1965).

226. *Id.* at 203-04.

serve on petit juries."²²⁷ The decision, disapproving of racial discrimination but allowing it to continue by setting a virtually impossible standard of proof, was subject to "almost universal and often scathing criticism,"²²⁸ but remained the law for twenty years before the standard was changed in *Batson v. Kentucky*.²²⁹

The Supreme Court has created an equally difficult barrier to sustaining claims of racial discrimination in the infliction of the death penalty. In *McCleskey v. Kemp*,²³⁰ the Court accepted the racial disparities in the imposition of the death penalty as "an inevitable part of our criminal justice system."²³¹ The Court held that to prevail under the Equal Protection Clause the defendant must present "exceptionally clear proof"²³² that "the decision makers in *his* case acted with discriminatory purpose."²³³ As in *Swain*, the Court found the evidence insufficient to overcome a presumption of propriety with regard to the exercise of discretion by prosecutors.²³⁴ But while requiring exceptionally clear proof of discrimination, the Court made it almost impossible to obtain it, concluding that "the policy considerations behind a prosecutor's traditionally 'wide discretion' suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties, 'often years after they are made.'"²³⁵

In rejecting McCleskey's claim under the Eighth Amendment, the Court, while acknowledging the risk of racial prejudice influencing the capital sentencing decision,²³⁶ held that evidence that blacks who kill whites are sentenced to death at nearly twenty-two times the rate of blacks who kill blacks²³⁷ did not "demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process."²³⁸ Thus, the Court held the risk of racial discrimi-

227. *Id.* at 223.

228. *McCray v. New York*, 461 U.S. 961, 964 (1983) (Marshall, J., dissenting from denial of certiorari).

229. 476 U.S. 79 (1986).

230. 481 U.S. 279 (1987).

231. *Id.* at 312.

232. *Id.* See *supra* notes 172-177 and accompanying text.

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

234. *Id.* at 296.

235. *Id.*

236. *McCleskey v. Kemp*, 481 U.S. 279, 308 (1987).

237. *Id.* at 327 (Brennan, J., dissenting).

238. *Id.* at 313.

nation was not "constitutionally unacceptable" under the Eighth Amendment.²³⁹

This disgraceful decision is more consistent with the Court's decisions in *Swain*, *Dred Scott v. Sandford*,²⁴⁰ and *Plessy v. Ferguson*²⁴¹ than its more recent decisions recognizing racial discrimination in other areas of life. The Court could have concluded that racial disparities were "inevitable" or not "constitutionally unacceptable" in education, housing, employment, or so many other areas of life where minorities have experienced racial discrimination. Justice Powell, who cast the deciding vote and authored the majority's opinion in the 5-4 decision in *McCleskey*, expressed his regret, after leaving the Court, at his vote in the case.²⁴²

Other courts have followed the Supreme Court's head-in-the-sand approach. The Florida Supreme Court, by a 4-3 vote, refused to require a hearing on racial disparities in the infliction of the death penalty.²⁴³ The Georgia Supreme Court upheld the denial of a hearing on racial discrimination in a capital prosecution against an African-American accused of the murder of a white person in Cobb County, a county which has a long history of racial discrimination.²⁴⁴ Some criminal defense lawyers in Cobb County have stated that they have never had the opportunity to accept or strike an African-American juror due to the regular practice of the district attorney's office of striking all the African-Americans.²⁴⁵ To deny even a hearing on racial discrimination in Cobb

239. *Id.* at 309.

240. 60 U.S. 393, 407 (1857) (holding that African-Americans were "altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect").

241. 163 U.S. 537, 552 (1896) (holding that "[i]f one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane").

242. John C. Jeffries, Jr., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 451 (1994).

243. *Foster v. State*, 614 So. 2d 455 (Fla. 1992), *cert. denied*, 114 S. Ct. 398 (1993).

244. *Jones v. State*, 440 S.E.2d 161 (Ga. 1994).

245. Affidavit of Darrell Green, *introduced at hearing*, *Hill v. Zant*, Super. Ct. of Butts Co., Ga., No. CV 85-105(RC), Tr. of Hearing of Dec. 9, 1990 at 39-42, 51-52, of Dec. 9, *on appeal*, 425 S.E.2d 858 (Ga. 1993), *cert. denied*, 114 S. Ct. 342 (1993). The extraordinary efforts of officials of Cobb County to keep African-Americans out of their community by refusing to join the Metropolitan Atlanta Rapid Transit Authority and other means is described in the affidavit of Brian Sherman, Ph.D., filed in *Hill v. Zant*.

County is simply to run from the truth instead of confronting it.²⁴⁶

The willingness of courts to tolerate racial discrimination in order to carry out the death penalty has a corrupting effect not just on capital cases, but throughout the criminal justice system. For example, the Georgia Supreme Court, under immense political pressure from Georgia's Attorney General and district attorneys and dire warnings that the death penalty was in danger, did a complete about face in only thirteen days in a case regarding gross racial disparities in sentencing for drug offenses.²⁴⁷ The Court first held by a 4-3 vote that a *prima facie* case of racial discrimination was established by evidence that 98.4% of those serving life sentences for certain narcotics offenses were black.²⁴⁸ All of the discretion in pursuing life sentences for the offenses was entrusted to district attorneys.²⁴⁹ Statistics from the Georgia Department of Corrections established that less than one percent of the whites eligible for life sentence for narcotics offenses—just one in 168—received it, while 16.6 percent of African-Americans—202 of 1,219—received it.²⁵⁰

The Attorney General of Georgia joined by all of the forty-six district attorneys in the state—all of whom are white—filed a petition for rehearing with the court arguing that the court's decision took a "substantial step toward invalidating" the state's death penalty law and would "paralyze the criminal justice system."²⁵¹ In response, one member of the court switched his vote and the court adopted the position of what had previously been the dissent, that the proper governing standard was *McCleskey v. Kemp* and, therefore, no *prima facie* case had been established.²⁵² The only way a more compelling showing could have been made would have

246. See also *Griffin v. Dugger*, 874 F.2d 1397 (11th Cir. 1989), *cert. denied*, 493 U.S. 1051 (1990) (upholding denial of a hearing on racial discrimination).

247. *Stephens v. State*, No S94A1854, 1995 WL 116292 (Ga. S. Ct. Mar. 17, 1995), *withdrawn and superseded*, *Stephens v. State*, 456 S.E.2d 560 (Ga. 1995).

248. *Id.*

249. *Id.*

250. *Id.*

251. *Stephens v. State*, 456 S.E.2d 560 (Ga. 1995); Emily Heller, *Second Thoughts on Second-Offense Law*, FULTON COUNTY DAILY REPORT, Apr. 3, 1995, at 1, 10.

252. Emily Heller, *Racial Test Put to the Test*, FULTON COUNTY DAILY REPORT, Mar. 30, 1995, at 1, 5.

been if all 100% of those serving life sentences for a second narcotics offense were black, instead of just 98.4%. Yet the Georgia Supreme Court chose to erect an impossible standard of proof based on its interpretation of *McCleskey* in order to avoid even a hearing on the reasons for the remarkable racial disparities in sentencing for narcotics offenses.

The United States Supreme Court based its decision in *McCleskey* in part on the "safeguards designed to minimize racial bias in the process."²⁵³ Those safeguards include the right to a representative jury, the prohibition of use of peremptory challenges by prosecutors on the basis of race, and the right in cases involving interracial crimes to question potential jurors about racial bias.²⁵⁴ But in many cases, such safeguards are either nonexistent or inadequate.

The stages of the process that allow the greatest room for racial prejudice are the prosecutorial decision to seek the death penalty and the plea bargaining process. There are no effective safeguards to prevent discrimination at either of those stages. As previously noted, many courts which rely on *McCleskey* do not even allow hearings on the influence of race at those critical stages. Minorities remain woefully underrepresented in decision making positions in the criminal justice system. Courts have been increasingly hostile to challenges to the exclusion of minorities from state judicial systems, even when it is apparent that the minority vote has been diluted in order to preserve a primarily white judiciary.²⁵⁵

The "safeguards" relied upon by the Court in *McCleskey* are also inadequate because issues of discrimination usually focus on the intent of the decision maker, which is exceptionally difficult to prove, instead of the results of their actions. Nor do courts consider unconscious or subtle racial biases of decision makers. As previously discussed, courts allow prosecutors to use even 100 percent of their peremptory jury strikes based on assertions of "race neutral" reasons.²⁵⁶ The Supreme Court in *McCleskey* found that racial disparities did

253. *McCleskey v. Kemp*, 481 U.S. 279, 309, 313 (1987).

254. *Id.* at 309 n.30.

255. See, e.g., *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994), petition for cert. filed (Mar. 2, 1995); *League of United Latin American Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc), cert. denied, 114 S. Ct. 878 (1994).

256. See *supra* notes 92-95, 122-129, and 149 and accompanying text.

not sufficiently prove racial discrimination, but it failed to examine the role that racial stereotypes and other attitudes may have played in the results.²⁵⁷

Although the Supreme Court in *Turner v. Murray*²⁵⁸ acknowledged the potential impact that the unconscious racism of jurors might have on the capital sentencing decision,²⁵⁹ *Turner* is limited to interracial crimes.²⁶⁰ Thus, an accused who is charged with the murder of a member of his own race is not entitled to ask prospective jurors about their racial attitudes. Even in interracial crimes, trial courts may limit voir dire so that it does not disclose subtle racial attitudes which may come into play.²⁶¹

The failure of courts to provide poor defendants with adequate legal representation may leave the accused without any ability to utilize what limited protections are available. Those accused of crimes in Jefferson County, Georgia, were tried for years before patently unconstitutional juries because local lawyers appointed by local judges failed to challenge the severe underrepresentation of African-Americans in the jury pools. It was shown in one capital case in which the accused was represented by *pro bono* lawyers from outside the judicial circuit that although African-Americans made up 54.5% of the population of the county, they made up only 21.6% of the jury pool, an underrepresentation of over 50%.²⁶² However, when this evidence was presented in a post-conviction challenge to the conviction and sentence, the federal courts held that the defendant was barred from raising the issue because no challenge had been made by the local court appointed lawyer prior to trial.²⁶³ The defendant had the misfortune of being represented—over his protests—by a court-appointed lawyer who, when later asked to name the criminal law deci-

257. For a discussion of the relationship of unconscious racism to the decisions in *McCleskey v. Kemp*, *Turner v. Murray* and *Batson v. Kentucky*, see Sheri Lynn Johnson, Comment, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988).

258. 476 U.S. 28 (1986).

259. *Id.* at 35.

260. *Id.* at 36.

261. The Supreme Court's decision in *Turner* gives trial judges discretion to limit the form and number of questions and even allows collective questioning of the jurors. *Turner*, 476 U.S. at 37.

262. *Birt v. Montgomery*, 725 F.2d 587, 598 n.25 (11th Cir. 1984), *cert. denied*, 469 U.S. 874 (1984).

263. *Id.* at 600-01.

sions from any court with which he was familiar, could name only two: *Miranda* and *Dred Scott*.²⁶⁴

In Columbus, Georgia, even after the United States Supreme Court declared that jury officials were unconstitutionally and illegally excluding African-Americans from jury service, the practice continued because of the "policy" of the local court-appointed indigent defender of not challenging racial discrimination for fear of incurring hostility from the community.²⁶⁵ These are not isolated examples regarding a single case. The failure of lawyers to challenge clearly unconstitutional racial discrimination in the composition of jury pools affected every criminal case in these judicial circuits over decades.

In the case of an African-American tried before an all-white jury after the prosecutor struck four black jurors, the United States Court of Appeals for the Eighth Circuit refused to review a prosecutor's emphasis on the difference in race between the "attractive" white victim and "this black man"²⁶⁶ because no objection had been made at the time of the argument.²⁶⁷

The right to question jurors about race in an interracial crime was utilized as follows by defense counsel in an Alabama case tried in 1993:

Mr. NELSON [Defense counsel]: I have just a couple of more questions and I promise I will quit. We are talking about this case and not some fictional case. In this case this is a black man and Mrs. Hargrove's son was a young white man. I will ask you this and it's not—it's like Bob said. I'm not asking you this to embarrass you, but do any of you belong to any organizations such as the Klan or have close family members that belong to the

264. Transcript of Hearing of Apr. 25-27, 1988, at 231, *State v. Birt* (Super. Ct. Jefferson Co., Ga. No. 2360, 1988). The lawyer was referring to *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Dred Scott v. Sandford*, 60 U.S. 393 (1857). *Dred Scott* was not a criminal case.

265. See notes 198-203 and accompanying text. See also *Barrow v. State*, 236 S.E.2d 257, 259 (Ga. 1977) (defense attorney did not challenge underrepresentation of blacks on the jury because "he felt adverse community pressure would insure to him personally" if he did so); *Goodwin v. Balkom*, 684 F.2d 794, 806 (11th Cir. 1982) (discussing how lawyer's concerns over "community ostracism" not only inhibited his performance at trial, but "every facet of counsel's functions").

266. *Blair v. Armontrout*, 916 F.2d 1310, 1333, 1351-1352 (8th Cir. 1990) (Heaney, J., concurring in part and dissenting in part).

267. *Id.* at 1325 n.15.

Klan or an organization known as the Skinheads, Na[]zi groups or anything like that who believe that a race is inferior or a religion is inferior? Do any of you belong to any of those things?(No response)

MR. NELSON: Do any of you believe any of that stuff? Is there anybody that believes in that stuff on this jury?

JUROR BARTLETT: The Klan has a lot of stuff that they stand for that is good.

MR. NELSON: I'm sorry, Mr. Bartlett?

JUROR BARTLETT: The Klan has lot of things they stand for that is good. I have read some of their literature.

MR. NELSON: You believe in some of the doctrine that the Klan has in their literature?

JUROR BARTLETT: I guess it would be called doctrine. I don't know.

MR. NELSON: Would you tell me what it is that you believe in that you have read?

JUROR BARTLETT: Well, there are just certain things about the way things are going, the way the law is going about a lot of this stuff.

MR. NELSON: Let me ask you this. The fact that this is a black man over here, do you think you could be fair to him even if—

JUROR BARTLETT: Yeah.

MR. NELSON: Even if the man that was killed was a young white man?

JUROR BARTLETT: I would be as fair to him as anybody else.²⁶⁸

No further questions were asked of juror Bartlett or any other member of the panel regarding the issue of race.²⁶⁹ Such a voir dire is hardly adequate to reveal the “[m]ore subtle, less consciously held racial attitudes” that the Supreme Court described in *Turner v. Murray*.²⁷⁰

Despite the limitations of *Batson v. Kentucky* and *Turner v. Murray* in preventing racial discrimination, the Court in *McCleskey* indulged in the remarkable presumption that the mere existence of these limited procedural safeguards in jury selection were sufficient to prevent racial discrimination in

268. Record at 593-94, *State v. Pace*, Cir. Court of Morgan County, Decatur, Alabama, No. CC-92-609 (Nov. 9, 1993).

269. *Id.*

270. 476 U.S. 28, 35 (1976).

every capital case. At the same time, the Court discounted evidence which established that in reality the race of the victim and the race of the defendant actually influenced the sentence in *McCleskey's* case and other cases despite the safeguards.

The Supreme Court decision in *McCleskey v. Kemp* is a badge of shame upon American's system of justice. It is a manifestation of indifference on the part of the Court to secure justice for racial minorities in cases in which there is a long history of discrimination and there is every indication that racial prejudice influences the vast discretion exercised in making the highly charged, emotional decisions about who is to die. The *McCleskey* decision is worthy of the universal and scathing criticism visited upon *Swain v. Alabama*.

V. CONCLUSION

There is enormous public support for the death penalty in the United States, but little honest discussion of the inequities involved in its imposition. Many public officials continue to peddle the preposterous notion that we may ignore over two centuries of history in race relations as easily as we may ignore yesterday's weather. They readily admit racial discrimination up until 1964, or 1972, or even until yesterday, but argue that it suddenly, magically just ended. Unfortunately, this does not square with the reality of race relations in the United States today. As Justice William Brennan observed in his dissent in *McCleskey v. Kemp*:

[I]t has been scarcely a generation since this Court's first decision striking down racial segregation, and barely two decades since the legislative prohibition of racial discrimination in major domains of national life. These have been honorable steps, but we cannot pretend that in three decades we have completely escaped the grip of a historical legacy spanning centuries. . . . [W]e remain imprisoned by the past as long as we deny its influence on the present.²⁷¹

The courts and legislatures have made a tragic mistake by substituting a notion of what the criminal justice should be for what it is. Citizens, judges, the bar, and the press would like to believe we have a system which equally and

271. *McCleskey v. Kemp*, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting.).

fairly dispenses justice. But neither legal presumptions nor legal fictions will make it so. As Justice Thurgood Marshall said in another context, “constitutionalizing [the] wishful thinking” that “racial discrimination is largely a phenomenon of the past” does a “grave disservice . . . to those victims of past and present racial discrimination.”²⁷²

The criminal justice systems in many parts of the country have suffered from years of neglect, inadequate funding and other problems. Often they have been entrusted to persons with neither the ability nor the inclination to carry out their high functions. Members of racial minorities continue to be underrepresented in all positions in the criminal justice system. It should not surprise anyone that the problems of racial exclusion and racial discrimination are greater there than in other parts of our society.

The price paid for the denial of racial discrimination by courts, legislatures, and the bar is considerable. Courts cannot deliver justice when they tolerate racial prejudice and racial exclusion. Courts lose respect and credibility when they refuse to acknowledge and remedy racial discrimination which is apparent to everyone else. Responding to the public clamor for executions is not justification for ignoring racial discrimination in the court system. Courts of vengeance are not courts of justice.

There is debate over whether racial discrimination in the infliction of the death penalty can be detected and remedied. Some think racial discrimination is inevitable and impossible to prevent; others think the influence of race can be eliminated.²⁷³ This question must be answered, not avoided. If racial discrimination cannot be prevented, the death penalty should not be carried out.²⁷⁴ If discrimination can be elimi-

272. *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 552-53 (1989) (Marshall, J., dissenting).

273. See David C. Baldus et al., *Reflections on the “Inevitability” of Racial Discrimination in Capital Sentencing and the “Impossibility” of Its Prevention, Detection and Correction*, 51 WASH. & LEE L. REV. 359 (1994); *McCleskey*, 481 U.S. at 367 (Stevens, J., dissenting) (expressing the view that the death penalty could be constitutionally imposed if limited to the upper range of cases where prosecutors consistently seek death and juries consistently impose it).

274. *Callins v. Collins*, 114 S. Ct. 1127 (1994) (Blackmun, J., dissenting from the denial of *certiorari*) (expressing the view that the death penalty is unconstitutional because of the racial disparities in its infliction); *McCleskey v. Kemp*, 481 U.S. 279, 367 (1987) (Stevens, J., dissenting) (“If society were indeed forced to choose between a racially discriminatory death penalty . . . and no death

nated, then it should be the highest priority of the courts. But to pretend it does not exist, to deny a remedy, to deny even a hearing, is to give up on achieving the goal of equal justice under law. Tragically, that is what the state and federal courts have done.

In *McCleskey v. Kemp*, the Supreme Court asserted that evidence of racial discrimination should be taken to the legislatures.²⁷⁵ But legislators respond to powerful interests. The poor person accused of a crime has no political action committee, no lobby, and often no effective advocate even in the court where his life is at stake. The crime debate in the United States has become increasingly demagogic and irresponsible. There is little reason for hope in the legislatures.

The constitutional buck of equal protection under law stops with the Supreme Court and with judges on lower courts throughout the land who have taken oaths to uphold the Constitution and the Bill of Rights even against the passions of the moment and the prejudices that have endured for centuries. So long as racial discrimination remains a prominent feature of the imposition of the death penalty in the state and federal courts, the challenge of meeting the immense burden established in *McCleskey* for proving racial discrimination must be accepted. Other instances of discrimination must be identified and challenged. State constitutional guarantees must be asserted as a basis for challenging discrimination in the infliction of the death penalty.²⁷⁶

Silence about racial discrimination in capital cases will only allow it to continue to fester. Wishful thinking cannot take the place of dealing with reality. Decisions tolerating racial discrimination must be assailed until, like *Swain v. Al-*

penalty at all, the choice mandated by the Constitution would be plain" since racial disparities influenced by race would flagrantly violate[] the Court's prior "insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all." (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982)); *Godfrey v. Georgia*, 446 U.S. 420, 442 (1980) (Marshall, J., concurring in judgment) ("the effort to eliminate arbitrariness in the infliction of that ultimate sanction is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether").

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

276. See, e.g., *Foster v. State*, 614 So. 2d 455, 465-68 (Fla. 1992) (Barkett, J., dissenting) (suggesting a standard for analyzing claims of racial discrimination in the infliction of the death penalty under the equal protection clause of the Florida Constitution); *Livingston v. State*, 444 S.E.2d 748, 757-61 (Ga. 1994) (Benham, J., dissenting) (asserting that admission of victim impact evidence violates various provisions of the Georgia Constitution).

abama, they are rejected and replaced with standards that acknowledge and respond to the influence of racial prejudice in the criminal courts in general and in capital cases in particular.

