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Race, Law, and Punishment: *The Death Penalty*

"[T]he unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable."
—Antonin Scalia

NO ISSUES CONCERNING race and criminal law are more sobering than those raised by allegations that racial selectivity affects the administration of capital punishment. First, sentencing a person to death as punishment for crime is a unique flexing of state power that inevitably reflects the society's deepest values, emotions, and neuroses. Second, the legal system has shown itself to be largely incapable of acknowledging the influence of racial sentiment in the meting out of punishment even in circumstances in which the presence of such bias is obvious. In no other area of criminal law have judges engaged in more obfuscation, delusion, evasion, and deception. Third, addressing racial discrimination in capital sentencing poses a daunting task for those seeking to craft appropriate remedies.

If a jurisdiction tends to punish more harshly murderers of whites than murderers of blacks, is the appropriate response to abolish capital punishment, to more narrowly limit the circumstances in which capital punishment is imposed, or to execute more people who murder blacks? Even if such a tendency exists, should it be the basis for grant-

ing relief to a convicted murderer who fails to show that racial discrimination affected the punishment meted out in his particular case? Is such a tendency a remediable wrong or, instead, an inevitable social trait whereby people unavoidably identify more with the victimization of "their own" as opposed to the victimization of "others"? If this tendency is a wrong, is remedying it within the capacity of courts or is remedying this wrong best left to the legislative and executive branches of government?

These and related questions are the subject of this chapter.

Rape, Capital Punishment, and the Politics of Denial

The clearest example of both the presence of racial discrimination in sentencing and the determination of judges to avoid acknowledging that presence is the case law that arose from efforts to save from execution black men convicted of raping white women.

The case of the Martinsville Seven, a group of black men condemned to death for raping a white woman in Martinsville, Virginia, in 1949, marked the first instance that death sentences for rape were seriously challenged on racial discrimination grounds.[1] The seven were tried and sentenced by all-white juries in proceedings that clearly established their guilt. On appeal, the defendants' attorneys showed that between 1908 and 1949, no white man had been executed for rape, although forty-five black men had been put to death.* During those same years, almost twice as many blacks as whites convicted for rape were sentenced to life imprisonment. Lawyers for the Martinsville Seven challenged their clients' death sentences on the grounds that this racial pattern represented a continuation of antebellum practices that the federal constitution had rendered illegal. They asserted that it was "the policy, practice, and custom of the Commonwealth of Virginia to inflict the death penalty upon negroes, because of their race and color, convicted of rape upon white women, while failing and refusing to in-

*One white man who had been sentenced to death for rape, received a commutation and pardon from the governor (for reasons I do not know). See Eric W. Rise, *The Martinsville Seven*, 120 (1995).

flict the death penalty upon white [men] convicted of rape of negro women."[2]

Virginia courts rebuffed the defendants' claim with arguments that have been repeated subsequently on numerous occasions. On direct review, the Supreme Court of Virginia took umbrage at the defendants' allegation, stating vehemently that there was "not a scintilla of evidence" in support of it and, indeed, that it was "contrary to fact."[3] The court noted two cases in which it set aside convictions and death sentences imposed on black men accused of raping white women. That response, however, failed to address the defendants' claim that, customarily, the criminal justice apparatus treated black men differently from white men convicted of rape. The defendants did not aver that the justices of the Supreme Court of Virginia treated blacks and whites differently on a racial basis. Rather, they argued that other, lower officials in the criminal justice hierarchy meted out racially discriminatory treatment in punishment. However, even if the defendants had charged the Virginia Supreme Court with complicity in the racial discrimination complained of, the two counterexamples that the court cited provide weak rebuttal evidence. Simply because the court ruled in favor of two black defendants did not mean that, as a class, black defendants accused of raping white women were not the targets of invidious racial discrimination. Even the two black defendants freed may have been discriminated against in the sense that similarly situated white men would not have been prosecuted or would have been freed more willingly by the courts pursuant to a different evidentiary standard. The charge of the Martinsville Seven was not that blacks were *invariably* discriminated against; their claim was that, for racial reasons, black men were typically sentenced to death for offenses which elicited less severe punishment when committed by white men. Furthermore, the cases cited by the Virginia Supreme Court were ones in which defendants' convictions were annulled for lack of evidence of guilt. Defendants' complaints, however, went to the question of punishment, not guilt. They maintained that even guilty defendants were entitled to be free of racial discrimination in the infliction of punishment.

The statistics offered by the defendants should have been deemed sufficiently arresting to require explanation in the same way that the prolonged absence of blacks from juries was deemed to require expla-

nation in *Neal* and *Norris* (see pp. 169–177). Put more formally, the statistics should have been seen as constituting a prima facie case of racial discrimination. The Supreme Court of Virginia, however, gave the statistical evidence no credit and offered no reason for minimizing its significance so strongly. Nor did the court offer a counter-explanation that might plausibly explain why, over a forty-two–year period, forty-five of the forty-six men sentenced to death for rape were black.[4]

Rather than attempting to explain this pattern, the Virginia Supreme Court attacked the defendants' attorneys for even raising the issue, asserting that doing so was "an abortive attempt to inject into the proceedings racial prejudice."[5] To use a much noted current phrase, the Supreme Court of Virginia accused the lawyers of the Martinsville Seven of "playing the race card" in their efforts to save their clients from execution. As we have seen, defense attorneys do sometimes exploit racial sentiment. It is far-fetched to believe, however, that the attorneys for the Martinsville Seven were doing so. They raised the race question because the demographics of punishment for rape (and a social order openly devoted to a white supremacist pigmentocracy) gave good reason to believe that, for racial reasons, sentencing authorities characteristically treated blacks eligible for capital punishment more harshly than similarly situated whites.*

Further attempting to rebut the defendants' allegation, the Virginia Supreme Court admiringly highlighted the trial judge's admonition to the defense and prosecuting attorneys:

> Gentlemen of counsel, as you know, we are here called upon to try seven men charged with the most serious crime. . . . We here in the City and County have been entirely free from any trouble between

*At the time of the trial of the Martinsville Seven, Virginia required private firms to separate the races in places of public accommodation; required public authorities to separate the races in schools, hospitals, prisons, and other facilities; prohibited trans- racial marriage; excluded blacks from certain educational opportunities (e.g., med- ical and dental education) within the state (though the state did make available some limited funds for such education outside the state); and denied licenses to do busines within Virginia to any fraternal beneficiary association, company, or society that ac- cepted white and colored members. See Pauli Murry, *State's Laws on Race and Col* 46–490 (1950).

> the races. We have in our community a negro population of splendid citizens and these good negro citizens deplore this unfortunate alleged happening as much, or more, than do the citizens of the white race. I here and now admonish you that this case must and will be tried in such a way as not to disturb the kindly feeling now locally existing between the races. It must be tried as though both parties were members of the same race.[6]

Putting aside the dubious notion that a jurisdiction governed by de jure segregation could be "entirely free from any trouble between the races," the trial judge's remarks, even if curative, were directed to the attorneys, not to the people who actually did the sentencing. Under Virginia law, it was left to the discretion of the jury to sentence persons convicted of rape to be "punished with death, or confinement in the penitentiary for life, or for any term not less than five years."[7] This law, the court declared, "applies to all alike, regardless of race or creed."[8] Of course, the defendants did not challenge the facial validity of the law; they challenged the way it was administered. The court claimed that variation in punishments handed down by juries "does not depend upon the race of the accused, but upon the circumstances, aggravation, and enormity of the crime proven in each case."[9] That observation, however, was more a declaration of faith than a description of reality. The court offered no factual support to substantiate its assertion.

Only briefly did the Supreme Court of Virginia respond with particularity to the defendants' charge:

> There are no ameliorating circumstances shown in the records in these cases. On the contrary, the evidence shows that four men deliberately planned to waylay [the victim] and to ravish her. . . . [One defendant], a man 37 years of age, saw the four men attacking [the victim]. Instead of helping her, he left the scene, informed two others of what was taking place, the three went to the scene, and each, in turn, ravished [the victim]. One can hardly conceive of a more atrocious, a more beastly crime.[10]

The court seems to have been saying that, regardless of what had happened in other prosecutions, in this one there were sound, nonracial reasons for this jury or any jury to sentence these defendants to death. The

court rejected defense attorneys' efforts to link this case to other rape cases. The court insisted that sentencing in other cases shed little or no light on the appropriateness of the punishment meted out in the case at hand.

After the Supreme Court of Virginia rejected their appeal, the Martinsville Seven pressed their claims anew in state habeas corpus proceedings. In addition to voicing arguments previously noted, the judges who rebuffed the defendants raised another concern worthy of notice: a belief that retaining the death penalty and eliminating racial disparities in sentencing would necessarily entail race consciousness in regulating punishment. That this concern was in the mind of at least one of the Virginia justices is shown by the worried musings of Justice John W. Eggleston, who suggested at oral argument that if the defendants' argument prevailed, "no Negroes could be executed unless a certain number of white people" were also sentenced to death.[11]

Soon after the Supreme Court of the United States declined to review the Virginia Supreme Court's denial of habeas corpus relief, the Martinsville Seven were executed by electrocution.* The arguments that their attorneys pioneeringly advanced, however, did not die. Other attorneys picked up and used these arguments in other jurisdictions where research unearthed clear, sharp, unexplained differences in the extent to which blacks as opposed to whites were sentenced to death for rape. In several cases in Florida, for example, defense attorneys challenged death sentences with racial discrimination claims based on evidence that, for a twenty-year period between 1935 and 1955, twenty-three blacks were executed for rape but only one white person.[12]

These challenges, too, however, proved unavailing. Characteristic is the following response by the Florida Supreme Court. The defendant's statistical evidence, the court declared,

*In addition to challenging the death sentences in court, those seeking to save the Martinsville Seven appealed for clemency to the governor of Virginia. Several letters pleading for mercy referred to an incident in which two white Richmond police officers convicted of raping a black woman received only seven-year prison terms. Nevertheless, Governor John S. Battle declined to commute the sentences of the Martinsville Seven. See Rise, *The Martinsville Seven*, 108.

> is not shown to have any bearing on or relation to the case at bar. The historical fact that over a period of 20 years or more one white man and 23 Negroes have been tried and convicted for rape in Florida offers no lead to the correct determination of this case. The facts in none of these cases are shown to be remotely relevant to the case at bar and the points of law raised are not shown to be parallel in the slightest. To a sociologist or psychologist in some fields of research they would no doubt have value, but in a court of law as presented they are devoid of force or effect.[13]

The courts which rejected these and similar racial discrimination claims would have probably rejected *any* challenge to a punishment based primarily on a statistical study, regardless of its sophistication.* Notwithstanding judicial hostility, however, defense attorneys continued to press these claims. In the face of judicial rebukes, they persistently refined their evidence. There was considerable room for improvement, because the early statistical studies, although sufficiently disturbing to require an explanation from the state, did not precisely and systematically negate the possibility that disparities might, in fact, be explainable on other grounds. To remedy this deficiency, the NAACP Legal Defense and Educational Fund (LDF) organized a project to collect and assemble data about the administration of punishment for rape.[14] In one proceeding in which defense attorneys sought to make use of this information, a federal district judge reacted in a unique but noteworthy fashion.

In 1966, lawyers for Louis Moorer, a black man who raped a white woman in South Carolina, requested a sixty-day extension of a deadline

*Indeed, some judges came close to saying as much. In affirming the rejection of a racial discrimination challenge, a U.S. court of appeals remarked that "in light of the inviolability of the jury room, and in view of the uncontrolled character of the determinations that are confided to the jury, the trial court could not find that the statute here is unconstitutional in its application either to Negroes generally or to this appellant." *State* v. *Culver*, 253 F.2d 507, 508 (CA 5 1958), *cert. denied*, 358 U.S. 822 (1958). The notion that juries should possess a discretion in sentencing that is of an "uncontrolled character," along with a belief that the "inviolability of the jury room" entails refusing to review jury sentencing determinations, would appear to doom any and all equal protection attacks on sentences.

for submitting legal briefs on his behalf. He claimed that the state's administration of capital punishment for rape was racially discriminatory and that the extension was necessary in order to permit his attorneys the opportunity to buttress his case with information gathered by the LDF. U.S. District Judge Robert W. Hemphill denied the extension. Attorneys for Moorer then offered to introduce into evidence the raw data that had been gathered. Judge Hemphill refused to admit the documentation and instead took it into custody and ordered it sealed and subject to copying only with his permission. Moorer's attorney eventually succeeded in convincing a court of appeals to return the documentation to them (and indeed succeeded in winning a new trial for Moorer on grounds other than his racial discrimination claim).[15] But Judge Hemphill's order, albeit idiosyncratic, does illuminate the deep sense of affront felt by many judges when confronting the racial discrimination claims that desperate defense attorneys continued to assert.

The fullest airing of this issue occurred in a case from Garland County, Arkansas, which gave rise to several significant judicial opinions that rejected the defendant's claim.[16] In 1962, an all-white jury convicted a twenty-two-year-old black man, William L. Maxwell, of raping a thirty-five-year-old white woman, Stella Spoon, after breaking into her home, where she lived with her ninety-year-old father. Under Arkansas law, the jury could have either acquitted Maxwell, found him guilty with an affixed punishment of life imprisonment, or simply found him guilty, in which case the death penalty was mandatory. Because the jury selected the third alternative, it effectively condemned him to death.

Defense attorneys asserted that, by racial custom, Arkansas juries tended to deal more harshly with black men convicted of raping white women than any other class of convicted rapists. They charged that by more readily sentencing to death black male rapists of white women, the Arkansas authorities deprived that class of criminals of equality before the law. To advance this thesis, defense attorneys relied upon statistical studies directed by Professor Mervin Wolfgang.[17]

Using standard techniques, Wolfgang selected a random sample of counties to represent urban–rural and black–white demographic distributions. He examined information about every rape conviction in the counties between 1945 and 1965, not only the race of perpetrators and victims but a long list of other variables that would likely have had

bearing on the sentence rendered: offender characteristics (age, marital status, previous criminal record, etc.); victim characteristics (age, marital status, criminal record, reputation for chastity, children, etc.); nature of the relationship between the victim and the offender (were they strangers or had they had prior sexual relations); circumstances of the offense (was it related to a contemporaneous offense, was it carried out with a weapon, was the victim seriously physically injured, was the victim made pregnant by the attack, etc.); the circumstances of the trial (did the defendant plead guilty, was he represented by paid or appointed counsel, and so on).

Wolfgang's study found that of thirty-four blacks convicted of rape, ten (or 29 percent) were sentenced to death. By contrast, of twenty-one whites convicted of rape, only four (or 19 percent) were sentenced to death. When Wolfgang took the race of the victim into account, racial disparities widened and sharpened. Of the nineteen blacks convicted of raping white women, nine (or nearly 50 percent) were sentenced to death. By contrast, the incidence of the death penalty declined considerably in the remainder of the cases, all of which were intraracial (a black man charged with raping a black woman or a white man charged with raping a white woman). Juries imposed death sentences in only five (or 14 percent) of such cases.[18]

In the federal habeas corpus phase of the Maxwell litigation, U.S. District Court Judge J. Smith Henley gave the most detailed response to a racial discrimination challenge to a death sentence in a rape case that had ever been offered up to that point. Henley conceded that the sentencing pattern revealed by the Wolfgang study "could not be due to the operation of the laws of chance." Nonetheless, he concluded:

> the Court is not convinced that [the statistical evidence] is sufficiently broad, accurate, or precise as to establish satisfactorily that Arkansas juries in general practice unconstitutional racial discrimination in rape cases involving Negro men and white women or to require or justify the inference that the Garland County jury which tried petitioner was motivated by racial discrimination when it failed to assess a punishment of life imprisonment.[19]

Henley gave several reasons for his conclusion. First, in his view, the study covered too few counties and too few cases to make it convincing.

He noted that the counties examined contained only 47 percent of the state's population, questioned whether the counties studied were representative, and observed that the county in which the defendant was tried was not among those counties included in the Wolfgang study.

Henley also maintained that the Wolfgang study, although more extensive and sophisticated than its predecessors, failed to produce sufficient information about the rape cases examined to show convincingly that racial considerations as opposed to something else prompted the sentencing decisions of the juries studied. "Dr. Wolfgang's statistics," Henley remarked, "really reveal very little about the details of the cases of the . . . Negroes who received the death sentence for raping white women as compared to the details of the cases in which other racial situations were involved."[20]

Henley suggested, for instance, that the defense of consent in a rape case might play a role in the punishment handed down. Facing a consent defense, a jury might feel sufficiently sure of guilt to convict a defendant but insufficiently sure to condemn him to death. Defense counsel for a black defendant charged with raping a white woman might feel disabled, however, from using a consent defense for fear that it would alienate white jurors and judges.* Perceiving that a consent defense is infeasible (even if true), defense counsel for black defendants might have set forth other defenses that resulted in stiffer penalties than those given to defendants who did offer consent defenses. One response, of course, is to say that defense counsels' very fear of alienating white jurors is itself a testament to popular prejudices that infect the administration of the criminal law.† On the other hand, it might be said that defense attorneys misread judges and jurors and therefore mistakenly deprive their clients of a defense strategy that would have been helpful

*In Maxwell's case, however, the defense was consent. See *Maxwell* v. *Bishop*, 398 F.2d at 146–147 (CA 8 1968).

†On appeal, Maxwell's attorneys made just this point, writing that

> any experienced criminal lawyer in the South . . . well knows that the failure to present the defense of consent in interracial rape cases is itself a product of the discriminatory pattern of Southern justice. . . . Southern jury attitudes . . . have long impressed upon defense counsel the extreme unwisdom of advancing the consent defense on behalf of a Negro defendant where the complainant is white.

398 F.2d at 146. Did Maxwell's trial attorney behave foolishly?

to them. If this second hypothesis is true, it could be that, to a certain extent, racial disparities in sentencing reflect not racial discrimination by jurors but rather jurors' responses to black defendants whose attorneys have weakened their cases by offering fallacious defenses on the basis of misreadings of community sentiment.[21]

To buttress his ruling, Judge Henley quoted from the defendant's own expert witness. His analysis, Wolfgang had stated, "strongly suggests that racial discrimination is operative in the imposition of the death penalty for rape in Arkansas." Simultaneously, however, Wolfgang had heavily qualified his conclusion, writing that his "preliminary" analysis was neither "exhaustive nor conclusive," that his findings were merely "tentative" and "based upon an exploratory investigation of the available data," and that "interpreting the results must be done with caution." This rather remarkable equivocation of the defense's star witness, along with the momentum of precedent, eased the way for Judge Henley to hold that he was "simply not prepared to convict Arkansas juries of unconstitutional racial discrimination in rape cases."[22]

Henley intimated that he would probably *never* be persuaded to find a sentence unconstitutional on the basis of a statistical challenge of the sort relied upon by Maxwell. He doubted, he wrote, "that [racial] discrimination, which is a highly subjective matter, can be detected accurately by a statistical analysis. . . . Statistics are an elusive thing at best, and it is a truism that almost anything can be proved by them."[23]

Henley mentioned another consideration rather offhandedly that also figured into his decisionmaking. "There is no question," he remarked, "that the facts and circumstances surrounding [Maxwell's] offense were such as to justify the imposition of [capital punishment] entirely apart from any consideration of race."[24] Henley appears to have been saying (as did the Virginia Supreme Court in the Martinsville Seven case) that even if racial discrimination factored in other sentencing decisions, in the one before him the egregious character of the offense was more than sufficient to explain why a jury would impose the most severe punishment available.* This conclusion highlights one of

*The Supreme Court of Arkansas described the crime as follows based on evidence presented at trial:

> Once inside the home, the intruder subjected [the victim] to a literal nightmare of brutality and abuse. She fought and struggled, but to no avail. She

the great problems facing any advocate challenging a conviction or sentence for a serious violation on any grounds other than wrongful conviction—the impatience, annoyance, contempt, even hatred that many people, including appellate judges, feel for those who have perpetrated horrible crimes against society and then, after having done so, appeal to society's norms in order to avoid or lessen their punishment. Many people feel intuitively that defendants should receive no benefit even if they succeed in revealing abuses in the administration of the law. Compounding that ever-present difficulty is that, in *Maxwell* v. *Bishop*, defense attorneys were stuck with a client who had perpetrated an especially ugly version of an especially ugly crime.

The U.S. Court of Appeals upheld Judge Henley's ruling in an opinion written by Harry A. Blackmun, who would later play a pivotal role in struggles over the death penalty as a member of the U.S. Supreme Court.[25] The central theme of Blackmun's opinion was that the Wolfgang statistics were virtually irrelevant because they revealed nothing specific to Maxwell's sentencing. "What we are concerned with here," Blackmun declared, "is Maxwell's case and only Maxwell's case."[26]*

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struck the intruder with a purse. When he forced his hand over her mouth to silence her screams she bit his finger, causing it to bleed. Her helpless father tried to aid her, but was struck and left bleeding. She tried to escape through the front door, but was caught. Her attacker kept threatening to kill her and her father as well. She was dragged and forced outside the house without shoes, and while clad only in her pajamas was forced to a remote spot some two blocks from her home, where battered, bruised, bleeding and exhausted she was overpowered and compelled against her will to suffer a deliberate and calculated rape of her person. After the ravage of her person had been accomplished, and before fleeing, her attacker threatened to kill her and her father if she told.

Maxwell v. *State*, 370 S.W.2d 113, 115 (1963).

*This theme emerges repeatedly:

> We are not yet ready to condemn and upset the result reached in every case of a negro rape defendant in the State of Arkansas on the basis of broad theories of social and statistical justice. . . . Whatever value [the defendant's] argument may have as an instrument of social concern, whatever suspicion it may arouse with respect to southern interracial rape trials as a group over a long period of time, and whatever it may disclose with respect to other lo-

Blackmun also objected to the logic behind the defendant's proposed remedy. Blackmun noted that at oral argument Maxwell's lead attorney, Anthony Amsterdam, was asked whether agreement with his position would mean that it would be unconstitutional under the Equal Protection Clause for a black defendant in Arkansas ever to be properly sentenced to death if his victim was a white woman. Amsterdam had answered in the affirmative. He had also maintained that under his argument white men would still be able to be sentenced to death for rape. When Amsterdam was then asked whether this arrangement would create a new racial discrimination problem, he had replied that, once the situation immediately facing blacks was remedied, the situation facing whites "would take care of itself."[27]

This response touched a nerve. "The legal logic and the rightness of this totally escape us," Blackmun wrote. "The argument . . . turns back upon and defeats the very side which here proposes it."[28] The court of appeals, echoing the musing of Judge Eggleston in the Martinsville Seven case, was clearly bothered by the prospect of creating a formal racial distinction in the law as a remedy for what defense attorneys portrayed as an illicit, informal racial distinction in sentencing.

Nine years later, in 1976, the campaign to reform racially discriminatory sentencing for rape came to an ambiguous end when the Supreme Court, in *Coker* v. *Georgia*,[29] prohibited states from punishing rape with death. It did so, however, not on equality grounds but on the

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calities, we feel that the statistical argument does nothing to destroy the integrity of Maxwell's trial.

Maxwell, 398 F. 2d at 147. According to Blackmun, moreover, the Wolfgang statistics failed to cast doubt on the Maxwell sentencing, in part because Garland County was not included among those that Wolfgang studied. Conceding that it was the state of Arkansas, not the county of Garland, that sought to execute Maxwell, Blackmun insisted that "nevertheless the county has a character and posture, too. . . . We are not yet ready to nullify this petitioner's Garland County trial on the basis of results generally, but elsewhere, throughout the South" Ibid. Blackmun also insisted that sentencing statistics in Garland County afforded "no local support for the petitioner's statistical argument" because, between 1954 and 1963, other than Maxwell's case, there were no death sentences handed down in that county. Ibid. "We are not certain," Blackmun concluded, "that statistics will ever be [Maxwell's] redemption." Ibid., 148.

grounds that the death penalty is so "excessive" in relation to rape that it violates the federal constitution's Eighth Amendment, which bans "cruel and unusual punishments."* Moreover, the Court did so without even mentioning the race question.†

There is some excuse for the Court's silence about race in *Coker*. The defendant and the victim were both white. That fact did not prevent Coker's attorney from mentioning at oral argument the Georgia authorities' "notorious and unsavory reputation for racial discrimination."[30] Nor did it prevent the American Civil Liberties Union, the Center for Constitutional Rights, the National Organization for Women, Legal Defense Fund, and other groups from contending, in a brief authored largely by Ruth Bader Ginsburg (now Justice Ginsburg), that "the death penalty for rape is an outgrowth of both male patriarchal views of women no longer seriously maintained by society and gross racial injustice created in part out of that patriarchal foundation."[31] Those references to race, however, were tangential to the main issue, at least as framed by the Supreme Court: whether a death sentence for rape is impermissibly harsh.

*That the Court would abolish capital punishment for rape but do so without grappling with the long-standing allegation of racial discrimination was foreshadowed by the first occasion on which several justices suggested that the death penalty for rape might be vulnerable to constitutional attack. In a 1963 case, *Rudolph* v. *Alabama*, 375 U.S. 889 (1963), Justice Arthur J. Goldberg (joined by Justices William O. Douglas and William J. Brennan) wrote a dissent from the Court's denial of review to a case in which a black man convicted of raping a white woman had been sentenced to death. Goldberg asserted that the Court should consider whether executing a person solely for rape is compatible with federal constitutional norms. In his published dissent, Goldberg made no mention of racial discrimination. It later surfaced, however, that in an earlier draft of the dissent he had briefly mentioned the race issue. Prohibiting capital punishment for sexual crimes not endangering human life, he had written, "would also eliminate the well-recognized disparity in the imposition of the death penalty for sexual crimes committed by whites and nonwhites." See Dennis D. Dorin, "Two Different Worlds: Criminologists, Justice and Racial Discrimination in the Imposition of Criminal Punishment in Rape Cases," 72 *Journal of Criminal Law and Criminology* 1667, 1694 (1981).

†"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Constitution of the United States, Amendment VIII (1791).

Contrary to what some have suggested, therefore, the Court in *Coker* did not have to stretch greatly to avoid confronting the race question. Given the facts of the case and the Court's disposition of it, a comprehensive discussion of racial bias would have been somewhat gratuitous. On the other hand, it should be recognized that the justices are not passive figures who merely react to what comes before them. They select the cases they will adjudicate and in so doing either promote or subordinate issues competing for attention. It was probably no accident that, of the variety of cases involving convicted rapists on death row, the Supreme Court chose to review one involving a white defendant charged with an *intraracial* rape. The year before Ehrlich Anthony Coker was sentenced to death in Georgia, three black men were sentenced to death there.[32] These defendants were convicted of *interracial* rapes that would have posed squarely the racial discrimination issue.* The Court put them to the side while it dealt with Coker. Although a dodge of the race issue, the Court's action probably redounded to the black defendants' benefit. The Court would likely have ruled against them if it had adjudicated the racial issue. As it turned out, because of the *Coker* decision, the death sentences of *all* defendants condemned to die solely for rape were vacated and reduced.

Coker brought the campaign against racial discrimination in sentencing for rape to a standstill. It is by no means clear, however, that, in terms of racial equality, the underlying problem has been remedied. True, black rapists no longer are sent to death row at far greater rates than white rapists. It would not be at all surprising to learn, though, that a racial hierarchy still exists under which, in many locales, the black offender–white victim case elicits harsher punishment than any other racial dyad: black offender–black victim, white offender–white victim, or white offender–black victim. After all, that hierarchy continues to assert itself in capital sentencing for murder and other contexts suggestive of racially selective concern for the victims of crime.

*One of the cases would have posed the racial discrimination issue in an especially gripping context. The defendants badly beat a young woman, whom they accosted on a highway as she waited for assistance in repairing flat tires on her automobile. She testified that at least one of the men referred to her as a "honky bitch" and a "white bitch" as they beat and kidnapped her. See *Eberheart* v. *Georgia*, 206 S.E. 2d 12, 14 (1974).

In the absence of the death penalty, rights attorneys were less motivated to pursue the race issue in sentencing for rape. This is probably explainable in part by a justified disbelief that courts were likely to respond affirmatively to racial discrimination claims in noncapital sentencing. It is also attributable in part to a sense that other concerns were more worthy of investment. Jack Greenberg notes, for example, that soon after LDF attorneys prevailed in *Coker*, the LDF Board of Directors "began asking questions about [the] capital punishment docket. It wanted to know what proportion of our energies went into capital cases, something board members asked about no other program." The questions, he notes, clearly "revealed discomfort" with the resources allocated to attacking capital punishment as opposed to other matters.[33] Over time, a campaign that had begun as an attack against racial oppression in punishment evolved into more of a campaign against capital punishment per se.* Hence, after *Coker*, when the specter of capital punishment left the scene, death penalty abolitionists left the scene, too. The scene that was left, however, the juncture at which sex, race, and violence meet, remains a place where the rape of a white woman by a black man is often still considered to be a more serious affront to decency than any other species of rape.[34]

Homicide, Race and Capital Punishment

The Supreme Court decided *Coker* at a critical moment in the history of capital punishment. In 1972, in *Furman* v. *Georgia*,[35] a closely divided (5 to 4) Court invalidated most existing state laws authorizing the death sentence on the grounds that they violated the Eighth Amendment's

*The enlistment of the LDF in the campaign to abolish capital punishment distorted [its] traditional focus on the treatment of the black American. Although the Fund's involvement at first stressed traditional issues of racial discrimination, nonracial formulations soon crept into the campaign's arsenal. . . . [It became difficult] to determine whether, at very bottom, it was the mere presence of racism in the capital process, or the ominous possibility of death at the end of the process, which was truly propelling the campaign.

Eric L. Muller, "The Legal Defense Fund's Capital Punishment Campaign: The Distorting Influence of Death," 4 *Yale Law and Policy Review* 158, 181 (1985).

prohibition against cruel and unusual punishments. All nine justices wrote opinions in *Furman*, prompting Professor Robert Weisberg to observe that it is not so much a ruling "as a badly orchestrated opera, with nine characters taking turns to offer their own arias."[36] Amid the cacophony, however, a main chord is discernible—that the principal failing of then-existing capital sentencing regimes was the absence of a meaningful basis "for distinguishing the few cases in which [capital punishment] is imposed from the many cases in which it is not."[37] "These death sentences," Justice Potter Stewart complained, were "cruel and unusual in the same way that being struck by lightning is cruel and unusual."[38]

Furman suggested to some observers that the United States might join the trend of other advanced, Western, industrial democracies toward disavowal of capital punishment.* Many state legislatures responded to *Furman*, however, by enacting new death penalty statutes which they believed might overcome the Court's objections. In 1976, in yet another case from Georgia, *Gregg* v. *Georgia*,[39] the Supreme Court affirmed the constitutionality of at least some of these new "improved" capital punishment laws. The Court validated capital punishment as long as it was implemented by procedures that, in its view, "suitably directed and limited" the discretion of sentencers to preclude arbitrary or capricious punishment.[40] The most salient and significant feature of the approved death penalty statutes is the bifurcation of trials into a phase directed solely to determining whether the defendant is guilty and then a phase directed solely to determining whether he should be sentenced to death. At the sentencing phase, the defendant is given wide latitude to argue to a judge or jury that his life should be spared. The state, on the other hand, must persuade the judge or jury that the crime meets certain statutorily defined criteria that distinguish it from other crimes, and therefore justifies a death sentence.

In the aftermath of *Gregg*, and particularly as states began aggressively to seek the execution of condemned prisoners, civil rights activists

*France, Denmark, Germany, Spain, Italy, Switzerland, Sweden, and Australia, for example, do not permit capital punishment under any circumstances. Israel, Great Britain, South Africa, Canada, and Mexico permit capital punishment only for crimes under military law or crimes committed during wartime. See *The Death Penalty in America: Current Controversies* 78–83, ed. Hugo Adam Bedan (1997).

redoubled their efforts. A central feature of their attack, in courts of public opinion as well as courts of law, was and remains their allegation that death sentences tend to be applied in a racially discriminatory fashion. The Court declined to adjudicate the issue on several occasions[41] but finally agreed to consider it in 1987 in yet a third landmark case from Georgia, *McCleskey* v. *Kemp*.[42]

On May 13, 1978, Warren McCleskey, a black man, helped to rob the Dixie Furniture Store in Atlanta, Georgia. A white police officer, Frank Schlatt, attempted to foil the robbery but was killed by a shot to the head. Sometime later, McCleskey was arrested in connection with another armed robbery. Under questioning, he admitted to participating in the furniture store heist but denied shooting Officer Schlatt. After further investigation, it emerged that McCleskey had stolen a revolver capable of shooting the type of bullet that killed Officer Schlatt. McCleskey also reportedly admitted shooting Schlatt to both a codefendant and a neighboring inmate in jail, both of whom later testified against him.

A jury of eleven whites and one black sentenced McCleskey to life imprisonment for the robbery and death for the murder. His subsequent appeals followed the normal, dreary route of postconviction proceedings in capital cases. An aspect of his appeal, however, contained a challenge to the entire system of capital punishment in Georgia and beyond. Supported by the most comprehensive statistical analysis ever done on the racial demographics of sentencing in a single state, McCleskey's attorneys argued that their client's sentence should be invalidated because there was a constitutionally impermissible risk that both his race and that of his victim had played a significant role in the decision to sentence him to death.

McCleskey's claim was largely predicated on a study organized and overseen by David C. Baldus, an expert in the application of statistics to legal problems.[43] The Baldus study was derived from records involving the disposition of more than two thousand murder cases between 1973 and 1979. The Georgia Department of Pardons and Paroles and other state agencies provided Baldus with police reports, parole board records, prison files, and other items that evidenced the process by which state authorities handled criminal homicides.

Three findings of the Baldus study are especially pertinent. First,

viewing the evidence on a statewide basis, Baldus found "neither strong nor consistent" evidence of discrimination directed against black defendants because of their race.[44] That did not prevent McCleskey's attorneys from asserting that "the race of the defendant—especially when the defendant is black and victim white—influences Georgia's capital sentencing process."[45] In their argument to the Supreme Court, however, McCleskey's attorneys clearly subordinated the claim of race-of-the-defendant discrimination to the claim of race-of-the-victim discrimination.

Second, Baldus found that among the variables that might plausibly influence capital sentencing—age, level of education, criminal record, military record, method of killing, motive for killing, relationship of defendant to victim, strength of evidence, and so forth—the race of the victim emerged as the most consistent and powerful factor. Initially, simple correlations suggested the importance of this variable. Without attempting to control for the possible effects of competing variables, Baldus found that perpetrators in white-victim cases were eleven times more likely to be condemned to death than perpetrators in black-victim cases.

Professor Baldus and his associates subjected this striking correlation to extensive statistical analysis to test whether the seemingly racial nature of this disparity was explainable in terms of hidden factors confounded with race. He eventually took into account some 230 nonracial variables that might have influenced the pattern of sentencing. He concluded that even after accounting for every nonracial variable that might have mattered substantially, the race of the victim continued to have a statistically significant correlation with the imposition of capital sentences. Applying a statistical model that included the thirty-nine nonracial variables believed most likely to play a role in capital punishment in Georgia, the Baldus study concluded that the odds of being condemned to death were 4.3 times greater for defendants who killed whites than for defendants who killed blacks, a variable nearly as influential as a prior conviction for armed robbery, rape, or even murder.[46]

Third, Baldus concluded that racial disparities in capital sentencing are most dramatic in that category containing neither the most aggravated nor the least aggravated homicides. Racial disparities are greatest, he argued, in the middle range of aggravated homicides. In the most ag-

gravated cases, decisionmakers typically impose the death sentence regardless of racial variables, and in the least aggravated cases decisionmakers typically spare the defendant regardless of racial variables. In the middle range of aggravation, however, where a decision could go either way, the influence of racial variables emerges more powerfully. This hypothesis is particularly relevant to *McCleskey* because, in Baldus's view, McCleskey's crime was situated in the middle range of aggravated homicide.

After an evidentiary hearing, U.S. District Judge J. Owen Forrester rejected McCleskey's race discrimination claim primarily on the ground that the Baldus study did not represent "good statistical methodology."[47] He objected to what he viewed as significant omissions, errors, and inconsistencies in Baldus's data base and inadequacies in the design of Baldus's statistical models. Judge Forrester's findings were subsequently eclipsed because the court of appeals and the Supreme Court resolved the case without reviewing them; the appellate courts assumed arguendo that the Baldus study was valid. Judge Forrester's findings, however, continue to be relevant insofar as much of the criticism of *McCleskey* and support for legislative responses to it is premised on a belief in the validity of the Baldus study.

Although a comprehensive examination of the Baldus study would itself require a volume, several considerations pertinent to making an independent evaluation should be mentioned. First, the Baldus study is a product of the death penalty abolitionist wing of the academic community. Although Professor Baldus maintains that he would have published the results of his study no matter what its conclusions,[48] his study was partially financed by funds distributed by LDF—the employer of McCleskey's lawyers and an organization committed to erasing the death penalty. Baldus and his colleagues stated, moreover, that after a certain point, they began to conduct their research with litigation in mind. The Baldus study, in other words, is not the product of disinterested academic research subsequently used by a litigant's attorneys. Rather, the Baldus study is a species of sponsored research animated in part by sympathies with one side of a controversy. It should therefore be viewed with the skepticism that such research should always engender.

The methodology of the Baldus study has received high praise from many of the most distinguished researchers who have investigated the application of statistics to legal problems. Professor Richard Berk,

member of the National Academy of Sciences' Committee on Sentencing Research, testified that the Baldus study has "very high credibility" and "is far and away the most complete and thorough analysis of sentencing that [has] ever been done."[49] Similarly, several leading scholars in the field have collectively affirmed that the Baldus investigations "are among the best empirical studies on criminal sentencing ever conducted."[50] Such endorsements, however, must themselves be viewed skeptically against the backdrop of the propaganda war over capital punishment, because many, if not most, elite academics oppose capital punishment.

The factual core of the Baldus study withstands even a skeptical analysis, however. To some extent I am moved to this conclusion by the study's evident carefulness and its authors' insistence on making their data, premises, and calculations available and transparent to the public. I am also influenced by the sworn testimony of respected experts in Baldus's field, notwithstanding the risk of ideological taint identified above. The Baldus study, moreover, is consistent with findings published by a large body of prior research.[51] Even commentators who generally deride allegations of racial discrimination in the administration of criminal law concede that in the context of capital punishment the race of the victim consistently influences sentencing decisions.[52]

Although District Judge Forrester refused to credit the Baldus study, several distinguished specialists in applied statistics have brought the competence underlying his judgment into serious question.[53] Moreover, beyond the technical deficiencies noted by experts, Judge Forrester displayed a glaring, self-discrediting hostility to the Baldus study. Nothing better illustrates this than Judge Forrester's conclusion that Baldus's data base was irredeemably flawed because the questionnaires used to collect information "could not capture every nuance of every case."[54]* In the first place, Judge Forrester neglected to specify the significance of the omissions he deemed so important.[55] Second, and more fundamen-

*Subsequently Judge Forrester revealed contempt for the Baldus study by writing that the racial disparities it found were produced by "arbitrarily structured little rinky-dink regressions that accounted for only a few variables. . . . They prove nothing other than the truth of the adage that anything may be proved by statistics." *McCleskey* v. *Kemp,* No. C87-1517A 12 (N.D. Ga. Dec. 23, 1987) (order granting relief to McCleskey on other grounds).

tally, Judge Forrester's objection is premised upon a wildly perfectionist standard that is impossible to satisfy. "By insisting on a standard of 'absolute knowledge' about every single case, [Judge Forrester] implicitly rejected the value of all applied statistical analysis."[56]

The Court of Appeals for the Eleventh Circuit assumed the validity of the Baldus study but nevertheless affirmed the district court's race discrimination holding on the grounds that the statistical disparities and supplemental evidence failed to prove a constitutional violation.[57] The court declared that, in order to succeed, McCleskey would have to have produced evidence indicating that *his* sentence was the product of race-dependent decisionmaking. The Baldus study, however, "only" showed "that in a group involving blacks and whites, all of whose cases were virtually the same, there would be . . . more murderers of whites receiving the death penalty than murderers of blacks."[58] The court conceded that the statistics demonstrate that "there is a race-of-the-victim relationship with the imposition of the death sentence discernible in enough cases to be statistically significant in the system as a whole."[59] It concluded, however, that "no single petitioner could, on the basis of these statistics alone, establish that he received the death sentence because, and only because, his victim was white."[60]*

Justice Lewis Powell's opinion for a bare majority (5 to 4) of the Supreme Court largely followed the Eleventh Circuit's analysis.[61] The Supreme Court, too, assumed, arguendo, the validity of the Baldus study. Similarly, the Court insisted that the constitutionality of McCleskey's sentence must be determined by asking whether officials in *his* case purposefully discriminated on the basis of race. The Court concluded that no such inference could be drawn from the Baldus statistics. Justice Powell noted that in some contexts a "stark" pattern of statistical disparities may create a prima facie case which shifts onto the state the

*Three of the twelve judges who participated in the case dissented, including Judge Joseph W. Hatchett, the only black then on the Eleventh Circuit Court of Appeals, who dissented on the equal protection issue. See 753 F. 2d. at 907–927).

The other black jurist who participated in deciding *McCleskey*, Justice Thurgood Marshall, also dissented. I mention the racial backgrounds of Hatchett and Marshall not because their race presumptively endows them with greater insight but as a sociological datum that warrants further exploration and interpretation. Cf. Randall Kennedy, "Racial Critiques of Legal Academia," 102 *Harvard Law Review* 1745 (1989).

burden of rebutting an allegation of racial discrimination. He observed, however, that in the context of capital sentencing, "decisions at the heart of the State's criminal justice system," the Court would demand "exceptionally clear proof" before inferring that a sentencing authority had abused its discretion.[62] In the Court's view, the racial correlations revealed by the Baldus study did not meet that standard. Powell declared that "because of the risk that the factor of race may enter the criminal justice process, [the Court has] engaged in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system."[63] In this instance, though, no clear showing had been made that racial prejudice animated the death sentence imposed upon McCleskey. Nor, according to Powell, did the Baldus statistics even show that racial prejudices played a significant role in other cases in Georgia. "At most," Powell averred, "the Baldus study indicates a discrepancy that appears to correlate with race."[64]

Justice Powell noted several reasons of policy that pushed the Court to rule as it did. One was the need to give ample latitude for sentencers to use their discretion in making the unique decision as to whether to end the life of a human being as punishment for a crime. Another concern was that accepting McCleskey's challenge would open a Pandora's box of litigation. "McCleskey's claim, taken to its logical conclusion," Powell remarked with alarm, "throws into serious question the principles that underlie our entire criminal justice system," because, if accepted, the Court "could soon be faced with similar claims as to other types of penalty" from members of other groups alleging bias.[65] Finally, Powell invoked considerations of judicial competence and judicial restraint as reasons for avoiding intervention. "McCleskey's arguments," he declared, "are best presented to legislative bodies. . . . It is the legislatures, the elected representatives of the people, that are constituted to respond to the will and consequently the moral values of the people."[66]

With the exception of Thurgood Marshall,* each of the dissenting justices (William J. Brennan, Harry A. Blackmun, and John Paul Stevens) wrote opinions explaining their disagreement with the Court.

*Although he joined Justice Brennan's dissent, it is striking that Justice Marshall declined to write an opinion of his own in *McCleskey* insofar as it constituted a major blow to his abolitionist hopes.

Maintaining that "we cannot pretend that in three decades we have completely escaped the trap of a historical legacy spanning centuries," Justice Brennan declared that "Warren McCleskey's evidence confronts us with the subtle and persistent influence of the past."[67]* Crediting the Baldus study "in light of both statistical principles and human experience," Brennan concluded that "the risk that race influenced McCleskey's sentence is intolerable by any imaginable standard."[68] Responding to the Court's concern that accepting McCleskey's claim would open the door to challenges attacking all aspects of criminal sentencing, Brennan remarked that it displayed "a fear of too much justice. . . . The prospect that there may be more widespread abuse than McCleskey documents may be dismaying, but it does not justify complete abdication of [the] judicial role."[69]

In his dissent, Justice Blackmun wrote that he was "disappointed with the Court's action not only because of its denial of constitutional guarantees to petitioner McCleskey individually, but also because of its departure from . . . well-developed constitutional jurisprudence."[70] Blackmun concluded that "the Court . . . sanctions the execution of a man despite his presentation of evidence that establishes a constitutionally intolerable level of racially based discrimination leading to the imposition of his death sentence."[71]†

Like Blackmun, John Paul Stevens did not consider the death

*According to Justice Blackmun:

> Unlike the evidence presented by Maxwell, which did not contain data from the jurisdiction in which he was tried and sentenced, McCleskey's evidence includes data from the relevant jurisdiction. Whereas the analyses presented by Maxwell did not take into account a significant number of variables and were based on a universe of 55 cases, the analyses presented by McCleskey's evidence take into account more than 400 variables and are based on data concerning all offenders arrested for homicide in Georgia from 1973 through 1978, a total of 2,484 cases. Moreover, the sophistication of McCleskey's evidence permits consideration of the existence of racial discrimination at various decision points in the process, not merely at the jury decision.

McCleskey, 481 U.S. at 354 n. 7 (Blackmun, J. dissenting).

†Ironically, the Eleventh Circuit Court of Appeals and, to a lesser extent, the Supreme Court argued that Baldus's ability to construct three tiers of sentencing for homicide in Georgia ws a *validation* of the state's new, post-*Furman*, death penalty regime. As Judge Paul H. Roney put it, "the Baldus study revealed an essentially

penalty to be unconstitutional per se but did consider it to be unconstitutionally applied in Georgia in light of the Baldus study. In addition to criticizing the Court's judgment, Stevens proposed a reform aimed at lessening racial disparities in capital sentencing while simultaneously retaining the death penalty. Stevens (joined by Blackmun) proposed to limit the class of persons eligible for capital punishment to those who commit only the worst type of homicides. This proposal stemmed from his belief that "one of the lessons of the Baldus study is that there exist certain categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender."[72] He argued that "if Georgia were to narrow the class of death eligible defendants to those categories, the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated."*

A sign of the difficulties posed by *McCleskey* is that none of the justices' opinions is altogether satisfactory. The worst of the lot is also the one backed by the most power: Justice Powell's opinion for the Court. Powell strives to convey the impression that the conclusion he and his four associates reached is the only sensible alternative. He therefore gives the false impression that the case is easy. He responds to the parties' briefs, which one expects to be one-sided, with yet another tenden-

tional system, in which high aggravation cases were more likely to result in the death sentence than low aggravation cases. 753 F. 2d. at 879. See also 481 U.S. 313 n.36 ("The Baldus Study in fact confirms that the Georgia system results in a reasonable level of proportionality among the class of murderers eligible for the death penalty").

The Stevens-Blackmun proposal to execute only "worst case" perpetrators was vaguely anticipated by the judges who approved the death sentences in the Martinsville Seven case and *Maxwell* v. *Bishop* on the grounds that the crimes committed in those cases were so horrible that juries would likely have sentenced the defendants to death regardless of the racial sentiments of the juries.

*After the Supreme Court ruled against McCleskey's racial discrimination claim, his attorneys attacked his conviction on other grounds. This litigation also went to the Supreme Court, which again ruled against McCleskey. See *McCleskey* v. *Zant*, 499 U.S. 461 (1991). Georgia executed McCleskey on September 25, 1991. See Lyle V. Harris and Mark Curriden, "McCleskey Is Executed for '78 Killing; Marietta Native Paces His Cell, Consoles Family in Final Hours," *Atlanta Constitution*, September 25, 1991.

tious brief, although his is styled an "opinion" and thus part of the constitutional law of the United States.

Two features of Powell's opinion are especially troubling. One is his minimization of the facts behind McCleskey's claim. Confronted by statistics indicating that people who kill whites in Georgia are four times more likely to be sentenced to death than people who kill blacks, Powell blandly remarked that "at most [this] indicates a discrepancy that appears to correlate with race"[73]—a statement as vacuous as one declaring, say, that "at most" studies on lung cancer indicate a discrepancy that appears to correlate with smoking. Another example of the resolute evasiveness that emerges time and again in Powell's opinion is his statement that the Court should "decline to assume that what is unexplained is invidious."[74] The petitioner, of course, was not asking the Court to make any such assumption. Rather, McCleskey's attorneys offered into evidence a comprehensive study showing that certain patterns in capital sentencing cannot plausibly be explained by any variable other than race.

A willful refusal to grant any credence whatsoever to the petitioner's arguments also characterizes Powell's handling of historical evidence. Prior to the Civil War, Georgia, like most slave states, enacted laws that expressly imposed racially discriminatory capital punishments. In the aftermath of slavery, Southern officials continued to administer the death penalty and indeed the entire apparatus of the criminal law in a patently racist fashion. In 1972, when the Court struck down the Georgia capital sentencing statute in *Furman* v. *Georgia*, a number of justices acknowledged the existence of credible evidence indicating that race had continued to serve as a basis for inflicting death sentences.[75] Moreover, if one views capital punishment in Georgia in light of experience derived from other contemporaneous aspects of the state's criminal justice system, the historical argument in favor of McCleskey's contention gains even more force.[76] The Court, however, curtly dismissed McCleskey's reference to historical context:

> [McCleskey's "historical evidence"] focuses on Georgia laws in force during and just after the Civil War. Of course, the historical background of the decision is one evidentiary source for proof of intentional discrimination. But unless historical evidence is reasonably

> contemporaneous with the challenged decision, it has little probative value. Although the history of racial discrimination in this country is undeniable, we cannot accept official actions taken long ago as evidence of current intent.[77]

This comment misrepresents McCleskey's evidence and argument. McCleskey did not call attention solely to laws in force "during and just after the Civil War." Rather, he focused attention on certain historical continuities that illuminate the statistical data that constituted the core of his case. As Justice Brennan rightly observed, it is "unrealistic to ignore the influence of history in assessing the plausible implications of [the statistical] evidence."[78] The Court's suggestion that the legacy of Georgia's history shines *no* light on the Baldus statistics is both laughable and tragic.

The second outstanding feature of Powell's opinion is his resolute unwillingness to recognize the uniqueness of two distinctions that the Court had previously periodically acknowledged. One was that *McCleskey* involved a peculiarly irrevocable punishment; as various justices have noted, "death is different."[79] The other is that the case involved an allegation that capital punishment in Georgia was systematically meted out according to an especially toxic social demarcation, the race line. Powell refused to recognize these two distinctions as limiting boundaries, probably because doing so would undercut his demagogic assertion that accepting McCleskey's claim would necessarily open a Pandora's box from which limitless disruption would ensue. Fretting that an acceptance of McCleskey's racial claim would invite members of other groups—"even" women[80]—to launch equal protection challenges, Powell and the Court majority resolutely shut the door to any statistics-driven, class-based challenge to the administration of punishment. To justify this action in the context of a case involving blacks, the paradigmatic "out-group" in American political culture, Powell argued that no "logical" reason exists for distinguishing racial or gender bias from any other sort of bias—a bias, for instance, against facial unattractiveness.[81] The life of the law, however, includes not only logic but also experience, and experience teaches that in the United States, racial sentiment displays an intensity and persistence that is distinguishable from all other biases. There exists, moreover, a textual war-

rant in the Constitution for distinguishing racial and, to a lesser extent, gender bias from other sorts of preference and prejudice.

A similar slamming of the door greeted the oft-voiced claim that allegations of unfairness with respect to death penalties are entitled to special judicial solicitude.[82] As Blackmun complained in dissent, Powell's opinion for the Court gave "new meaning" to the notion that death is different by applying *lesser* scrutiny to the decisionmaking process that leads to death sentences than to decisions affecting employment or the selection of juries.[83]

Powell's *McCleskey* opinion was haunted by anxiety over the consequences of acknowledging candidly the large influence of racial sentiment in the administration of capital punishment in Georgia. Powell did not want to concede facts that might prompt the Court to question the racial fairness of capital sentencing, trigger additional *McCleskey*-like challenges, and perhaps even lead to judicially directed reforms of sentencing in general. Nor did he want to concede facts that indicate that the Court was knowingly willing to countenance a regime of capital punishment in which race significantly influenced decisions as to who would be spared and who would be killed. So Powell and his associates acted as if the Baldus study uncovered a minor discrepancy as opposed to an alarming anomaly. It would have been better if the Court openly declared that, for reasons of policy, it declined to grant relief to McCleskey notwithstanding the disturbing facts revealed by the Baldus study.* Doing so would have performed the tremendous benefit of edu-

*Several years after *McCleskey*, Justice Powell revealed that his "understanding of statistical analysis . . . ranges from limited to zero." See John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.*, 439 (1994). One might wonder whether a person with such limited knowledge should have played a pivotal role in a case so dependent on a statistical analysis. Judicial ignorance of various sorts, however, is a fact of life. See Dennis D. Dorin, "Two Different Worlds: Criminologists, Justices, and Racial Discrimination in the Imposition of Capital Punishment in Rape Cases," 72 *Journal of Criminal Law and Criminology* 1667 (1981).

After retiring from the Court, Powell indicated that he no longer believed that states should be allowed to inflict capital punishment. See Jeffries, *Powell* at 435. Some have lauded Powell for publicly disclosing his change of mind. I am more impressed by the poignant fact that the learning and experience which prompted this conversion came too late to be put to direct use by Powell in his capacity as a Justice.

cating the public about the real world of capital sentencing and the real world of Supreme Court decisionmaking.*

Dissent in McCleskey: *The Perils of Sentimentality*

The dissenters rebuked the *McCleskey* Court for what they saw as its betrayal of established traditions. Justice Blackmun maintained, for instance, that he was "disappointed with the Court's action . . . because of its departure from . . . well-developed constitutional jurisprudence."[84] There is much in the claim of disappointment, however, that smells of rank sentimentality. True, the Court could have decided differently; had there been the will, available precedent could have lit the way. In the context of equal protection challenges to jury commissioners authorized to select jury pools on the basis of vague standards, for example, the Supreme Court has shown a marked skepticism toward unexplained racial disparities. It has shifted the burden of explanation to the state when presented with evidence indicating significant discrepancies between the percentage of the population of eligible racial minorities in a given jurisdiction and the percentage of racial minorities selected for

*Soon after reading an early draft of Justice Powell's opinion, Justice Scalia wrote a memorandum to his colleagues in which he stated that he believed that racial discrimination did affect capital sentencing and that he would nonetheless vote to uphold it. He wrote that he did not "share the view, implicit in [Powell's draft opinion] that an effect of racial factors upon sentencing, if it could be shown by sufficiently strong statistical evidence, would require reversal. Since it is my view," he continued, "that the unconscious operation of irrational sympathies, including racial, upon jury decision and (hence) prosecutorial [ones], is real, acknowledged by the [cases] of this court, and ineradicable, I cannot honestly say that all I need is more proof."

One cannot know for certain whether Justice Scalia remained committed to this view. If he did, it is unfortunate that he decided not to publish his perspective on *McCleskey*. Because his comments surely represent the viewpoint of at least some policymakers, making them widely accessible would have sharpened and deepened public debate. Justice Scalia's memo became public when it was found among the papers Justice Thurgood Marshall gave to the Library of Congress. See Dennis D. Dorin, "Far Right of the Mainstream: Racism, Rights, and Remedies from the Perspective of Justice Antonin Scalia's *McCleskey* Memorandum," 45 *Mercer Law Review* 1035 (1994).

possible jury service. The Court could have deployed this same methodology in *McCleskey*—if it had possessed the will to do so. On the other hand, Powell's opinion for the Court was well within the ambit of expectations reasonably derived from prior rulings. *McCleskey* did not begin the Supreme Court's deregulation of the death penalty; it reflected and accelerated a process that had already begun and developed momentum.[85] Although some justices had intimated that the Court should subject to special rigor death sentences challenged on grounds of racial fairness, a stronger tradition, exemplified by the Martinsville Seven case, favored the ethos that prevailed.

If *McCleskey* disappoints, it should do so on some basis other than tradition, for the majority cannot rightly be accused of promulgating a startling ruling. To the contrary, *McCleskey* was all too predictable. Its critics must face the fact that, as far as reported cases disclose, defendants rarely, verging on never, succeed in challenging punishments using arguments of the sort voiced by Warren McCleskey's attorneys.[86]

The Problem of Remedy

The central concern that dictated the Court's resolution of *McCleskey* was anxiety about what judges might have to face if it acknowledged that the influence of racial sentiment in sentencing represents a distortion and unfairness of constitutional dimension. Pretend for a moment, however, that the Supreme Court reversed the district court's rejection of the Baldus study and, based on the study's conclusions, declared a violation of the Equal Protection Clause. Assuming that the Court could have reached this point, what should it have done next?

One alternative would have been to abolish capital punishment entirely on the grounds that racial selectivity is an inextricable part of the administration of capital punishment in the United States and that it would be better to have no death penalty than one unavoidably influenced consistently by racial sentiment.

A more reserved variant would have involved vacating all death sentences in Georgia. Such a response would have fallen short of the ultimate aim of abolitionists since it would apply only to a single state. However, this response would surely have given a tremendous boost to the abolitionist movement by placing a large question mark over the le-

gitimacy of any death penalty system generating unexplained racial disparities of the sort at issue in *McCleskey*. Since studies suggest that *McCleskey*-like statistics exist in several death penalty states, especially those with the largest death rows, the implementation of even a limited abolitionist remedy would have been significant indeed.

For those opposed to capital punishment anyway, abolishing it to vindicate the norms of equal protection is a costless enterprise. Abolition, however, is a costly prospect to the extent that one views the death penalty—as most Americans do—as a useful and highly valued public good. Polls indicate that, at least since the 1980s, upwards of 70 percent of Americans indicate that they favor capital punishment.[87] Moreover, since 1988, the number of crimes punishable by death has increased dramatically, mainly as a result of federal legislation.[88] From the perspective of a proponent of capital punishment, abolition as a remedy for race-of-the victim discrimination is equivalent to reducing to darkness a town in which streetlights have been provided on a racially unequal basis.[89] From this perspective, it would make more sense to remedy the inequality by installing lights in the parts of town which have been wrongly deprived of illumination. Carrying on the analogy, it would be better to remedy the problem outlined by the Baldus statistics by leveling up—increasing the number of people executed for murdering blacks—rather than leveling down—abolishing capital punishment altogether.

Before turning to the level-up solution, however, notice should be paid to still other possibilities. One is the idea, embraced by Justices Stevens and Blackmun, of limiting the class of persons eligible for execution to those who commit only the most aggravated homicides. The problem with this proposal is that it seems merely to replicate what the Court sought to accomplish by permitting the revival of capital punishment pursuant to procedures that, theoretically, limited and informed sentencers so that similarly situated criminals would be punished according to some tolerably coherent pattern. One point upon which both death penalty deregulators and death penalty abolitionists agree is that "the task of selecting in some objective way those persons who should be condemned to die . . . remains beyond the capacities of the criminal justice system."[90] The facts of *McCleskey* itself highlight this problem with the Stevens and Blackmun proposal. According to Professor Baldus,

McCleskey's murder was located in the middle range of aggravated murders. In his view, the crime was not among the most heinous murders for which people have been condemned to death in Georgia. It is difficult, however, to see why this is so. McCleskey's crime involved, after all, the murder of a policeman during a robbery by a recidivist who is said to have boasted of the killing. Surely there are many, including potential judges and jurors, who would rank this crime in the same category of heinousness as some of the murders which Professor Baldus does place in the "worst case" category.*

Another alternative would be for the Court to retract its rejection of mandatory death sentences. As we have seen, in 1972 the Court struck down all existing state death penalty statutes on the grounds that, by delegating unguided discretionary power to sentencing authorities, they provided insufficient protection against arbitrariness or discrimination. Ten states responded by enacting statutes prescribing capital punishment as the mandatory sentence for the commission of certain crimes. In 1976, the Court invalidated these laws on the grounds that they were inconsistent with fundamental trends in social mores, encouraged juries to shape their verdicts to avoid the harshness of mandatory sentences, and that the procedures established by mandatory sentencing failed to consider each defendant in a sufficiently individualized manner.[91] The justices imposed a constitutional requirement that sentencers in capital trial be provided with discretion to extend mercy.[92] Yet it is precisely this power to grant leniency that opens the door to the *McCleskey* problem. As Kenneth Culp Davis observes, "The discretionary power to be lenient has a deceptive quality that is dangerous to justice. . . . The power to be lenient is the power to discriminate."[93]

*For example, Professor Baldus and his associates ranked as a worst case crime a murder committed during a robbery that the defendant and his co-perpetrator were hired to perform. The defendant was apparently designated as the triggerman, although the co-perpetrator seems to have actually done the killing. The defendant had only one prior offense on his record, and that was nonviolent. It is not at all clear to me, however, that the murder for which McCleskey was sentenced to die warrants less punishment than this murder which Baldus and his colleagues place in the worst case category. See Kennedy, *"McCleskey v. Kemp:* Race, Capital Punishment, and The Supreme Court," *Harvard Law Review* 1388, 1431–1433 (1988).

It is by no means clear, moreover, that mandatory capital sentencing would affect racial disparities. First, even if mandatory capital sentencing were allowed, there would remain the possibility that juries would continue to extend relatively more leniency to the killers of blacks, declining more frequently to convict such killers of crimes that trigger automatic death sentences. Second, and probably more important, the institutional actors who have the most to do with the prevalence and incidence of capital sentences are prosecutors, not jurors. Prosecutors decide whether and for what to charge a defendant. Prosecutors further decide whether to charge a person with a capital crime or to accept a plea bargain for a noncapital offense.[94] That prosecutors can be strongly influenced by racial bias is clear.[95] Yet mandatory sentencing schemes do little to address the problem of race-dependent leniency on the part of prosecutors. Although mandatory sentencing provisions would limit, to some extent, the discretion of jurors or judges in responding to choices framed by prosecutors, such laws would do nothing to constrain the prior exercise of prosecutorial discretion.

In his *McCleskey* dissent, Justice Blackmun noted that prosecutors in Georgia are governed by virtually no authoritative instructions regarding how they should decide whom to charge with capital crimes. He suggested that a second possible remedy for racial disparities in capital sentencing would be the establishment of "guidelines" setting forth the appropriate bases for exercising prosecutorial discretion in homicide cases that potentially implicate capital punishment.[96] Blackmun was silent, however, about the substantive content of the guidelines he had in mind. In light of the failure of statutory guidelines that supposedly channel juror discretion, it is difficult to imagine instructions to prosecutors that would compel, or even facilitate, the consistency that Justice Blackmun envisioned.*

*At the time of Justice Blackmun's dissent in *McCleskey*, he believed that it was possible to administer capital punishment in a constitutionally acceptable way. In the waning days of his tenure as an active Justice, however, he changed his mind and became a death penalty abolitionist. See *Callins* v. *Collins*, 114 S. Ct. 1127, 1128 (1994) (Blackmun, J., dissenting from denial of certiorai).

The Level-up Solution to Racial Discrimination in Capital Sentencing

The level-up solution to the *McCleskey* problem would entail purposefully securing more death sentences against murderers of blacks. One way to pursue this aim would be to impose a choice upon jurisdictions with *McCleskey*-like sentencing patterns: Either respond as vigorously to the murders of blacks by condemning perpetrators of such crimes to death (as is done to murderers of whites), or relinquish the power to put anyone to death.

One problem with using race-conscious measures to reform the administration of capital punishment is that to many observers doing so will seem bizarre at first blush. That reaction, however, is likely to be based, at least in part, upon an exaggerated perception of the extent to which notions of individual dessert currently infuse sentencing practices. Sentencing is typically keyed not only to the perceived moral dessert of individual defendants but also to utilitarian calculations regarding society's needs. Punishment is used by those pronouncing sentence upon convicted defendants to instruct an onlooking society.

Another problem with the level-up alternative is that even those who favor, or at least tolerate, race-conscious remedies in some contexts reach a point where they find that such remedies are simply too severe to impose upon individuals who themselves played no direct part in inflicting the initial injury. The Supreme Court, for instance, has drawn a bright line of prohibition against affirmative action in the context of employment layoffs.[97] Affirmative action for racial minorities that decreases the chances that white applicants will be *hired* is sometimes allowable, because the burden to be borne "is diffused to a considerable extent among society generally."[98] Affirmative action that results in the *layoff* of white workers, however, is deemed a burden that is "too intrusive" to accept.[99] Transposed to the death penalty context, the argument would run that sentencing individuals to death pursuant to a race-conscious plan to equalize the provision of death penalty services is simply too harsh a social tax to impose even upon convicted murderers who are, because of their own conduct, "eligible" for execution.

This argument, however, rests heavily upon the "death is different" distinction. It loses considerable force to the extent that one sees the death penalty as part of a continuum of punishments rather than a

unique phenomenon occupying a wholly different moral plane. For those who eschew the "death is different" idea, it is not self-evident why, if race can and should be taken into account in redressing racial injustice in employment, housing, voting, and education, race cannot also be taken into account in reforming capital sentencing. They might well recognize the real danger of creating incentives to sentence certain defendants to death primarily to create "good" statistics. They might conclude, however, that this is a danger worth risking in order to encourage officials to take more seriously the security and suffering of black communities and in order to symbolize the affirmative constitutional obligation to insure some rough measure of substantive racial equality in every sphere of American life—including the provision of law enforcement resources.*

The Racial Justice Act

In 1988, Representative John Conyers (D.-MI) and Senator Edward Kennedy (D.-MA) proposed legislation, the Racial Justice Act (RJA), that would have established as prima facie evidence of racial discrimination the very type of statistical evidence that Warren McCleskey had relied upon.[100] In *McCleskey* the Supreme Court held that, in order to prevail on a constitutional claim, a petitioner would have to show purposeful racial discrimination in his own particular case. By contrast, the

*Several readers of drafts of this chapter have asked where I stand on the question of the constitutionality of capital punishment. This question is different from the one I address in the text, which is the narrower issue of racial fairness in the administration of capital punishment. Still, I shall answer their question, albeit in a necessarily summary fashion. I do not regard capital punishment as unconstitutional per se. I oppose capital punishment as a matter of policy because of anxiety over the risks of error, my sense that the benefits derived from capital punishment are quite matginal, and my fear of the lethal, collective, bureaucratic anger that the state displays when it puts a person to death. I am not, however, a fervent abolitionist. To put the matter plainly, many other concerns rank higher on my political agenda than abolishing capital punishment. I was much more deeply committed to the abolition of capital punishment before I clerked for Justice Thurgood Marshall in 1982. Constantly reading about the horrible crimes perpetrated by murderers sentenced to death gave me a better understanding of the sentiments that prompt many to insist upon retaining, and in some instances, inflicting capital punishment.

proposed RJA required no showing of purposeful discrimination and created for a petitioner the rebuttable presumption that a statistically significant racial disparity in death sentences in a given locale meant that wrongful racial discrimination tainted his sentence too.

Under the RJA, a petitioner would have confronted an uphill climb in order to prevail. The RJA put the initial burden of proof on petitioners. Moreover, even if a petitioner succeeded in making out a prima facie case, the RJA allowed the government to rebut the charge by showing by a preponderance of the evidence either (a) that there are nonracial reasons that persuasively explain the apparently racial sentencing disparities or (b) that even in the absence of racial discrimination the petitioner at issue would still have been sentenced to death in light of the enormity of his crime.

Despite these moderating features, the RJA has failed thus far to receive sufficient political support to become law. It twice passed the House of Representatives. The second time it did so, some supporters in Congress threatened to torpedo a massive and electorally sensitive anticrime bill unless the RJA was included.[101] When the smoke cleared, however, the crime bill passed without the RJA. The RJA lacked the support of Democratic President Bill Clinton[102] and would have faced unyielding resistance from opponents (mainly Republicans) in the Senate.*

Many motivations activated opposition to the RJA. One is merely a crass desire by politicians to be perceived as "tough" on crime, a stance that has become identified with support for capital punishment. Politicians in this camp go where the political winds blow.

Another motivation is a covert desire to vent or exploit the antiblack

*The remarks in opposition of Senator Orrin Hatch (R.-UT) are representative:

> The so-called Racial Justice Act has nothing to do with racial justice and everything to do with abolishing the death penalty. [The RJA] would instead impose an unreliable and manipulable statistical quota on imposition of the death penalty. It would convert every death penalty case into a massive sideshow of statistical squabbles and quota quarrels.

Cong. R. S4602 (April 21, 1994). See also Cong. R. S5210 (May 5, 1994) (remarks of Senator Grassley); Cong. R. 4328 (May 6, 1994) (remarks of Senator D'Amato). Another statement that articulates objections to the RJA is found in the dissent to the Report of the House Committee on the Judiciary which supported the RJA. See Report 103-458, 103D Congress, 2d Session.

racism that animates a hard to measure but appreciable number of Americans who remain committed to the notion that blacks are racially inferior to whites and who abhor the racial egalitarianism that has become the official ideology of the United States. For this community, the death penalty retains an assuring symbolic association with the racial hierarchies of the past and becomes even more significant symbolically when challenged directly on grounds of racial justice.

Another motivation is a sincere belief in three propositions: (a) that some people commit crimes that are so awful that justice demands extinguishing their lives; (b) that the RJA would pose a large threat to the ability of some jurisdictions to implement capital punishment; and (c) that racial justice would not be substantially furthered by the RJA. Holders of this set of beliefs disapprove of racial discrimination but are unwilling to support a law that would offer a reprieve to a murderer based on statistical evidence of racial discrimination in cases other than his own. These policymakers place at the center of their concern the horror wreaked upon society by a convicted murderer. They demand that priority be given to avenging that horror.

They also argue that "leveling up" is the logical response to complaints of race-of-the-victim racial discrimination. They do not raise that prospect to embrace it; leveling up would entail a mode of formal race-conscious decisionmaking to which they simply disapprove.[103] Rather, they raise the prospect of leveling up to highlight the fact that the RJA's supporters do not advance ***that*** solution. Dissenting from the favorable report on the RJA promulgated by the House of Representatives Committee on the Judiciary, Henry Hyde (R.-IL) and others maintained that if the RJA were really designed to remedy race-of-the-victim discrimination, "the solution would be to seek the death penalty in more cases in which black defendants murder black defendants."[104] The inference Hyde and others draw is that the total neglect of the leveling-up alternative by supporters of the RJA evidences a concern not so much with racial justice as with impeding the administration of capital punishment by all available means.

Of these three camps of opponents to the RJA, only the third warrants an extended response; the other two are virtually impervious to argument. The great failing of this camp is complacency in the face of what should certainly be disturbing evidence that, in fact, in some jurisdictions, authorities do respond with less vigor and empathy to black-

victim homicides than white-victim homicides. One feature of this complacency takes the form of denying that a problem exists. The following statement by congressional opponents of the RJA is representative: "While it may be true that killers of white victims are more likely to receive the death penalty than killers of blacks, this statistical disparity is easily explained by the presence of mitigating or aggravating factors which account for the differences in sentences."[105] In light of the experience with capital punishment for rape and the Baldus study and the many other investigations that have consistently reached similar conclusions, it cannot sensibly be said that the racial disparities revealed are "*easily* explained" by nonracial factors. Indeed, given the past and present realities of racial conflict in the United States, it would be absolutely extraordinary if racial bias did not affect sentencing, including (or maybe especially) capital sentencing. I am not ignoring or minimizing the changes that have significantly bettered race relations over the past half-century. But alongside notable discontinuities in American race relations are ugly continuities as well, including willful blindness to invidious racial discrimination in punishment.

One could acknowledge the presence of racial discrimination but nonetheless oppose the RJA on the grounds that the benefits of capital punishment outweigh the costs created by racial distortions in its administration. Opponents of the RJA, however, obsessively committed to making no concessions useful to the other side, decline even to acknowledge the obvious. In this regard they mirror the deniers who refuse to admit that blacks do in fact commit a disproportionate share of street crime. The opponents of the RJA refuse to admit that, on a racial basis, in a substantial (albeit hard to specify) number of instances, individuals in America—police and prosecutors, judges and jurors, editors and readers—react more to the murder of white than black persons. Recognizing this obvious but repressed fact is an essential step toward creating a more decent and equitable administration of criminal law.*

*During the same period that Congress repeatedly rejected the RJA, it made scores of federal offenses into capital crimes. See Bureau of Justice Statistics Bulletin, "Capital Punishment 1994," 11–13, February 1996. Thus far, racial minorities hare predominated among those for whom death sentences have been sought,. Of the first thirty-seven federal death penalty prosecutions brought under the new statutes, all

Race, Parochialism, and the Marketplace of Emotion

The statistics revealed by the Baldus study pose a difficult set of problems in part because Americans are deeply ambivalent about the social dynamics that give rise to these statistics. On the one hand, many subscribe to the idea that racial sentiments should play no role in social judgments. They say that they share the vision of a society in which people are judged solely on the quality of their character and not the color of their skin. On the other hand, many of these same people believe that it is proper for race to serve as a basis for pride, solidarity, loyalty, and affection. Every true man, Justice John Marshall Harlan declared, "has pride of race."[106] That many people of all hues agree is illustrated by racially exclusive private clubs, racial selectivity in advertisements for companionship, demonstrations such as the Million Man March, and the entire gamut of cultural practices by which individuals, on a racial basis, prefer "their people" over others. It should come as no surprise, then, that the enforcement of criminal law in jurisdictions dominated politically by whites would generate statistics suggesting that, in these locales, officials respond more empathetically to white than black victims of crime. That response is simply a reflection of a race-conscious society which continually reproduces a racially stratified marketplace of emotion.

This stratification stems from America's tragic history of race relations. It also stems, however, from a wider, perhaps even universal

but four were against people of color. (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. 3 [March 1994]). The new federal death penalty legislation does offer one concession to those concerned about racial discrimination in sentencing. 18 U.S.C. § 3593 (1994) directs a judge to instruct a jury that "in considering whether a sentence of death is justified, it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim." The statute also provides that, in the event a jury sentences a defendant to death, every member of the jury must submit to the court a signed affidavit stating that no consideration of race or any other prohibited identification was involved in reaching his or her decision.

problem. Thousands of people die every day, yet most of us grieve only for those few with whom we most identify: parents, children, siblings, spouses, friends. In a sense, we all devalue the rest of the world in relation to our own small circle of loved ones; hence Jean Jacques Rousseau's charge that the preferences of friendship are "thefts" against humanity.[107] Typically, when we speak in sorrow about those killed in war, we refer to the casualties on *our* side. When an airplane disaster occurs, local newspapers typically highlight only the lives of *local* victims. The *McCleskey* statistics, in other words, do not represent something confined to race relations. Along many dimensions, we all engage in differential valuations of human life according to clannish criteria—family, locality, nationality. Recognizing the extent to which the *McCleskey* problem is related to a universal dilemma in human relations might help to facilitate a more candid discussion of this problem, a discussion in which judges, legislators, and other influential policymakers might more easily acknowledge, reflect upon, and change the realities of racial sentiment in American life.

143. Ibid., 716, 717.
144. See U.S. Department of Justice, Bureau of Justice Statistics, *1994 Sourcebook of Criminal Justice Statistics*, 172, 178 (1994).
145. Butler, "Racially Based Jury Nullification," 719.
146. See "In Her Own Disputed Words: Transcript of Interview That Spawned Souljah's Story," *Washington Post*, June 16, 1992; David Mills, "Sister Souljah's Call to Arms: The Rapper Says the Riots Were Payback. Are You Paying Attention?" *Washington Post*, May 13, 1992.
147. Butler, "Racially Based Jury Nullification," 719, 722.
148. Ibid., 716.
149. See Butler, "O.J. Reckoning."
150. Compare Michael Walzer, "The Obligations of Oppressed Minorities," in *Obligations: Essays on Disobedience, War, and Citizenship* (1970).
151. Butler, "Racially Based Jury Nullification," 706 n.158.

9. Race, Law, and Punishment: The Death Penalty

1. This notable case has been unfortunately neglected even within the ranks of death penalty abolitionists. Perhaps it will begin to receive the attention it warrants in light of Professor Eric Rise's recent and excellent study of the case. See Eric W. Rise, *The Martinsville Seven: Race, Rape, and Capital Punishment* (1995).
2. *Hampton* v. *Commonwealth*, 58 S.E.2d 288, 298 (Va. Sup.Ct. 1950).
3. Ibid.
4. See Rise, *The Martinsville Seven*, 120.
5. *Hampton*, 58 S.E. 2d at 298.
6. Ibid.
7. Ibid.
8. Ibid., 299.
9. Ibid.
10. Ibid.
11. See Rise, *The Martinsville Seven*, 125.
12. See *State ex rel. Copeland* v. *Mayo*, 87 So.2d 501 (Fla. Sup. Ct. 1956); *Thomas* v. *State*, 92 So.2d 621 (Fla. Sup. Ct. 1957). See also *Williams* v. *State*, 110 So.2d 654 (1959) (thirty-three blacks but only one white executed for rape between 1925 and 1959).
13. *State ex rel. Copeland*, 87 So.2d at 503.
14. See Michael Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment*, 86–87 (1973). Meltsner's book offers a close and vivid look at

the LDF's campaign against capital punishment by an insightful participant-observer.

15. See *Moorer* v. *State of South Carolina*, 368 F.2d 458 (CA 4 1966).
16. See *Maxwell* v. *State*, 370 S.W.2d 113 (Ark. Sup. Ct. 1963); *Maxwell* v. *Stephens*, 229 F.Supp. 205 (E.D. Ark. 1964); *Maxwell* v. *Stephens*, 348 F.2d 325 (CA 8 1965), *cert. denied*, 382 U.S. 944 (1965); *Maxwell* v. *Bishop*, 257 F.Supp. 710 (E.D. Ark. 1966); *Maxwell* v. *Bishop*, 398 F.2d 138 (CA 8 1968), *vacated and remanded*, 398 U.S. 262 (1970).
17. See Marvin E. Wolfgang and Marc Riedel, "Rape, Racial Discrimination, and the Death Penalty," in *Capital Punishment in the United States*, eds., Hugo Adam Bedau and Chester M. Pierce (1976); Wolfgang, "The Social Scientist in Court," 65 *Journal of Criminal Law and Criminology* 239 (1974); Wolfgang, "The Death Penalty: Social Philosophy and Social Science Research," 14 *Criminal Law Bulletin* 18 (1978).
18. *Maxwell*, 257 F.Supp. at 718.
19. Ibid., 719.
20. Ibid., 720.
21. Ibid., 720–721. On this point, Judge Henley was largely following the lead of Judge Gordon E. Young, who had raised this issue at an earlier proceeding. *Maxwell* v. *Stephens*, 229 F.Supp. at 216–217. A useful discussion of this matter is provided by Dennis B. Dorin in his excellent article, "Two Different Worlds: Criminologists, Justices and Racial Discrimination in the Imposition of Criminal Punishment in Rape Cases," 72 *Journal of Criminal Law and Criminology* 1667 (1981). Wolfgang suggests that he accounted for the consent defense variable, but as Dorin notes, without interviewing all defense lawyers in all of the rape cases studied—something that does not seem to have been done (and even if it were done, one would still face the problem of how much to credit the recollections of losing counsel)—it is impossible to test the alternative hypothesis that Judge Henley suggested. Ibid., 1678–1679.
22. *Maxwell* v. *Bishop*, 257 F.Supp. 720.
23. Ibid., 720.
24. Ibid., 719 n.9.
25. Blackmun had earlier written an opinion upholding the initial denial of federal habeas corpus relief to Maxwell. See *Maxwell* v. *Stephens*, 348 F.2d 325 (CA 8 1965).
26. *Maxwell* v. *Bishop*, 398 F.2d at 147.
27. Ibid., 148.
28. Ibid.

29. 433 U.S. 584 (1977).
30. See Gerhard Casper and Phillip Kurland, eds., *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law*, vol. 97, 1976 Term Supplement, 891 (1978).
31. Ibid., 871.
32. See *Eberheart* v. *Georgia*, 206 S.E.2d 12 (1974), and *Hooks* v. *Georgia*, 210 S.E.2d 668 (1974). The U.S. Supreme Court vacated the death sentences in both of these cases. See 433 U.S. 917 (1977).
33. Ibid.
34. See Kimberle Crenshaw, "Mapping the Merging: Intersectionality, Identity Politics, and Violence against Women of Color," 43 *Stanford Law Review* 1241, 1265–1282 (1991).
35. 408 U.S. 238 (1972).
36. Robert Weisberg, "Deregulating Death," *Supreme Court Review* 305, 315 (1983).
37. *Furman*, 408 U.S. at 313 (White, J., concurring).
38. Ibid., 309 (Steward, J., concurring).
39. 428 U.S. 153 (1976). See also *Proffitt* v. *Florida*, 428 U.S. 242 (1976); *Jurek* v. *Texas*, 428 U.S. 262 (1976).
40. *Gregg*, 428 U.S. at 189.
41. See, e.g., *Sullivan* v. *Wainwright*, 464 U.S. 109 (1983) (denying application for stay of execution for a petitioner raising a claim of racial discrimination in application of capital punishment); *Shaw* v. *Martin*, 733 F.2d 304, 311–314 (CA 4 1984), *rehearing denied*, 469 U.S. 1067 (1984); *Smith* v. *Balkcom*, 660 F.2d 573, 584–585 (CA 5 1981), *modified*, 671 F.2d 858, 859–860 (CA 5), *cert. denied*, 459 U.S. 882 (1982); *Spinkelink* v. *Wainwright*, 578 F.2d 582, 612–616 (CA 5 1978), *cert. denied*, 440 U.S. 976 (1979).
42. 481 U.S. 279 (1987).
43. For judicial descriptions of the Baldus study, see *McCleskey* v. *Kemp*, 481 U.S. at 286–289. *McCleskey* v. *Kemp*, 753 F.2d 887 (CA 11 1987); and *McCleskey* v. *Zant*, 580 F.Supp. 338, 352–379 (N.D. Ga. 1984). For a view of the Baldus study from the perspective of McCleskey's attorneys, see Petitioner's Post-Hearing Memorandum in Support of His Claims of Arbitrariness and Racial Discrimination, 3–41, 54–56, *McCleskey* v. *Zant*, 580 F.Supp. 338 (N.D. Ga. 1984) (No. C81-2434A) [hereinafter, Petitioner's Post-Hearing Memorandum]; and Brief for Petitioner, *McCleskey* v. *Kemp*, 107 S.Ct. 1756 (1987) (No. 84-6811). For a defense of the Baldus study by its authors, seeD. Baldus, G. Woodworth, and C. Pulaski, *McCleskey v. Zant and McCleskey v. Kemp: A Methodological Critique* (supplement to D. Baldus

and J. Cole, *Statistical Proof of Discrimination* (1988)) [hereinafter, *A Methodological Critique*]. For published research by Professor Baldus and his associates related to the testimony they offered on behalf of McCleskey, see David C. Baldus, Charles Pulaski, and George Woodworth, "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience," 74 *Journal of Criminal Law and Criminology* 661 (1983); David C. Baldus, Charles A. Pulaski, Jr., George Woodworth, and Frederick D. Kyle, "Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach," 33 *Stanford Law Review* 1 (1980); David C. Baldus, Charles Pulaski, and George Woodworth, "Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts," 15 *Stetson Law Review* 133 (1986); and Baldus, "Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia," 18 *University of California at Davis Law Review* 1375 (1985).

44. See Baldus, Woodworth, and Pulaski, "Arbitrariness," 158.
45. See Brief for Petitioner, *McCleskey* v. *Kemp*, in Casper and Kurland, eds., *Landmark Briefs*, Vol. 171, 597, 646 (1988).
46. See 431 U.S. 355 (Blackmun, J., dissenting).
47. 580 F.Supp. at 379.
48. See David C. Baldus, George Woodworth, and Charles A. Pulaski, Jr., *Equal Justice and the Death Penalty: A Legal and Empirical Study* (1990).
49. Brief for Petitioner, 67, *McCleskey* v. *Kemp*, 107 S.Ct. 1756 (1987) (No. 84-6811), quoting Federal Trial Transcript at 1740, *McCleskey* v. *Zant*, 580 F.Supp. 338 (N.D. Ga. 1984).
50. Brief Amici Curiae for Dr. Franklin M. Fisher, Dr. Richard O. Lempert, Dr. Peter W. Sperlich, Dr. Marvin E. Wolfgang, Professor Hans Zeisel, and Professor Franklin E. Zimring in Support of Petitioner Warren McCleskey, 3. *McCleskey* (No. 84-6811) [hereinafter, Brief Amici Curiae for Dr. Fisher].
51. For commentary on this research, see William J. Bowers, with Glenn L. Pierce and John F. McDevitt, *Legal Homicide*, 67–102 (1984); Sarah T. Dike, *Capital Punishment in the United States*, 30–51 (1982); Samuel R. Gross and Robert Mauro, "Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization," 37 *Stanford Law Review* 27, 38–49 (1984); and Gary Kleck, "Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty," 46 *American Sociological Review* 783 (1981).

One exception to the agreement with Baldus is a study conducted by the *Stanford Law Review* which found that neither the race of the defendant nor the race of the victim was associated with patterns of capital sentencing in California between 1958 and 1966. See "A Study of the California Penalty Jury in First-Degree Murder Cases," 21 *Stanford Law Review* 1297, 1421 (1967). The contrast between the *Stanford Law Review* study and most of the other research on capital sentencing may reflect real differences in the jurisdictions examined or methodological deficiencies in the Stanford study, which might have obscured racial influences upon capital sentencing in California. See Gross and Mauro, "Patterns of Death," 41 n.55.

Studies consistent with Baldus's findings include William Bowers, G. Pierce, and J. McDevitt, *Legal Homicide* (1984) (covering sentencing patterns in Florida, Georgia, Ohio, and Texas from the effective date of each state's post-*Furman* capital sentencing statute until 1978); Harold Garfinkel, "Research Note on Inter- and Intra-Racial Homicides," 27 *Social Forces* 369 (1949) (studying ten counties in North Carolina between 1930 and 1940); Gross and Mauro, "Patterns of Death" (examining racial patterns in capital sentencing in Arkansas, Florida, Georgia, Illinois, Mississippi, North Carolina, Oklahoma, and Virginia between 1976 and 1980); Michael L. Radelet, "Racial Characteristics and the Imposition of the Death Penalty," 46 *American Sociological Review* 918 (1981) (studying twenty counties in Florida between 1976 and 1977); Marc Riedel, "Discrimination in the Imposition of the Death Penalty: A Comparison of the Characteristics of Offenders Sentenced Pre-Furman and Post-Furman," 49 *Temple Law Quarterly* 291 (1976) (finding continued disproportionate death sentencing of nonwhites after the *Furman* decision); Hans Zeisel, "Race Bias in the Administration of the Death Penalty: The Florida Experience," 95 *Harvard Law Review* 466–468 (1981); Franklin E. Zimring, Joel Eigen, and Sheila O'Malley, "Punishing Homicide in Philadelphia: Perspectives on the Death Penalty," 43 *University of Chicago Law Review* 227 (1976) (reporting on response to homicides in Philadelphia during a portion of 1970); Note, "Discrimination and Arbitrariness in Capital Punishment: An Analysis of Post-*Furman* Murder Cases in Dade County, Florida, 1973–1976," 33 *Stanford Law Review* 75 (1980).

52. See, e.g., William Wilbanks, *The Myth of a Racist Criminal Justice System*, 120 (1987).
53. Brief Amici Curiae for Dr. Fisher, 3, stating that Judge Forrester's critique of the Baldus study was "uninformed and indefensible"; see also Gross and

Mauro, "Patterns of Death," 91–92, arguing that several of Judge Forrester's forays into statistical methodology were "ill-informed and wrong." Professors Gross and Mauro highlight five instances in which the judge's assertions are contradicted by academic authorities.

54. 580 F.Supp. at 356.
55. See 753 F.2d 914–917 (Johnson, J., dissenting).
56. See Brief Amici Curiae for Dr. Fisher, 23.
57. Ibid., 896.
58. Ibid., 895.
59. Ibid., 897.
60. Ibid.
61. 481 U.S. 279 (1987).
62. Ibid., 297.
63. Ibid., 309.
64. Ibid., 277, 312.
65. Ibid., 315.
66. Ibid., 319 (internal citations omitted).
67. Ibid., 344 (Brennan, J., dissenting).
68. Ibid., 325.
69 Ibid., 339.
70. Ibid., 345 (Blackmun, J., dissenting).
71. Ibid., 367.
72. Ibid., 367 (Stevens, J., dissenting).
73. Ibid., 312.
74. Ibid., 313.
75. See *Furman*, 408 U.S. at 249–251 (Douglas, J., concurring); ibid., 310 (Stewart, J., concurring).
76. See, e.g., *Amadeo* v. *Kemp*, 486 U.S. 214 (1988) (describing covert effort by prosecutor to minimize jury service of women and blacks).
77. *McCleskey*, 481 U.S. at 298 (internal quotation marks omitted).
78. Ibid., 332 (Brennan, J., dissenting).
79. Ibid., 347 (Blackmun, J., dissenting).
80. Ibid., 316–317.
81. Ibid.
82. For examples of special solicitude, see *Reid* v. *Covert*, 354 U.S. 1, 77 (1957) (Harlan, J., concurring) ("So far as capital cases are concerned, I think they stand on quite a different footing than other offenses. In such cases the law is especially sensitive to demands for . . . procedural fairness"); and *Stein* v. *New York*, 346 U.S. 156, 196 (1953) ("When the penalty is death, we, like

state court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance"). See also *Hamilton* v. *Alabama*, 368 U.S. 52, 55 (1961); *Williams* v. *Georgia*, 349 U.S. 375, 391 (1955); *Andres* v. *United States*, 33 U.S. 740, 752 (1948); *Powell* v. *Alabama*, 287 U.S. 45, 71–72 (1932); *Diaz* v. *United States*, 223 U.S. 442, 455 (1912).

83. *McCleskey*, 481 U.S. at 347–348 (Blackmun, J., dissenting); Anthony Amsterdam, "In Favorem Mortis: The Supreme Court and Capital Punishment," *Human Rights* 14 (Winter 1987).
84. *McCleskey*, 481 U.S. at 344.
85. See Weisberg, "Deregulating Death."
86. Cf. *District Attorney for the Suffolk District* v. *Watson*, 381 Mass. 648 (1962) (invalidating state death penalty law in part on grounds of racial discrimination).
87. See U.S. Department of Justice, Bureau of Justice Statistics, *1994 Sourcebook of Criminal Justice Statistics*, 200–201 (1994), noting that 72 percent of Americans in 1993 favored the death penalty for murder while 21 percent opposed it. Clearly, though, most Americans, including many who are highly mobilized politically, support the retention of capital punishment. See Phoebe C. Ellsworth and Samuel R. Gross, "Hardening of the Attitudes: Americans' Views on the Death Penalty," in *The Death Penalty in America*, Hugo Adem Bedan, ed. (1997).
88. See, e.g., Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, Title VI (codified as included in scattered sections of 18 U.S.C.).

    Capital punishment has also made gains at the state level. In 1995, New York became the thirty-eighth state to provide for capital punishment. See James Dao, "Death Penalty in New York Reinstated after 18 Years; Pataki Sees Justice Served," *New York Times*, March 8, 1995.

    Because support for the death penalty is so widespread and intense, many officials work hard to court proponents of capital punishment or at least avoid offending them. See Stephen B. Bright and Patrick Keenan, "Judges and the Politics of Death: Deciding between the Bill of Rights and the Next Election in Capital Cases," 75 *Boston University Law Review* 759 (1995).
89. See *Hawkins* v. *Town of Shaw*, 461 F.2d 1171 (CA 5 1972) (en banc) (per curiam); Michael Ratner, "Inter-Neighborhood Denials of Equal Protection in the Provision of Municipal Services," 4 *Harvard Civil Rights–Civil Liberties Law Review* 1 (1968).

90. *Godfrey* v. *Georgia*, 446 U.S. 420, 442 (1980) (Marshall, J., concurring). Compare, e.g., *Woodson* v. *North Carolina*, 428 U.S. 280, 316 (1976) (Rehnquist, J., dissenting) (arguing that appellate review of death sentences will not afford meaningful protection against vagaries or biases set loose by jury discretion in sentencing), with *Godfrey* v. *Georgia*, 446 U.S. at 437–442 (1980) (Marshall, J., concurring) (arguing that appellate review of capital sentencing cannot assure objectivity and evenhandedness). For a prescient warning against attempts to inject due process within the anarchical domain of capital sentencing, see *McGautha* v. *California*, 402 U.S. 183, 204 (1971), in which Justice Harlan observed that "to identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."

    For a scathing abolitionist attack on the Court's attempts to rationalize capital sentencing, see C. Black, Jr., *Capital Punishment: The Inevitability of Caprice and Mistake*, 2d ed., 111–156 (1981). But it is Professor Weisberg who provides the most rounded evaluation of the attempt to affirm legal formality within the death penalty context:

> Capital punishment is at once the best and worst subject for legal rules. The state's decision to kill is so serious, and the cost of error so high, that we feel impelled to discipline the human power of the death sentence with rational legal rules. Yet a judge or jury's decision is an intensely moral, subjective matter that seems to defy the designers of general formulas for legal decision.

    Weisberg, "Deregulating Death" at 308.

91. See, e.g., *Roberts* v. *Louisiana*, 428 U.S. 325 (1976); *Woodson* v. *North Carolina*, 428 U.S. 280 (1986).

92. Underlining the insistence that sentencing authorities must be allowed to extend mercy, the Court has held that sentencers must also be allowed to consider any mitigating evidence that a defendant seeks to introduce. See *Eddings* v. *Oklahoma*, 455 U.S. 104, 113–114 (1982); *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978).

93. Kenneth Culp Davis, *Discretionary Justice*, 170 (1969). Compare *Gregg* v. *Georgia*, 428 U.S. 153, 199 (1976) (plurality opinion) ("Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution").

94. On the power of prosecutors in Georgia's system of capital punishment, see Ursula Bentele, "The Death Penalty in Georgia: Still Arbitrary," 62 *Wash-*

ington University Law Quarterly 573, 609–620 (1985). See also Barry Nakell and Kenneth Hardy, *The Arbitrariness of the Death Penalty*, 152–158 (1987). The influence of prosecutors in the context of capital cases is only the most dramatic instance of their extraordinary power in the administration of criminal justice as a whole. See, generally, James Vorenberg, "Decent Restraint of Prosecutorial Power," 94 *Harvard Law Review* 1521 (1981); "Developments in the Law—Race and the Criminal Process," 101 *Harvard Law Review* 1472, 1520–1557, 1588–1595 (1988).

95. See, e.g., Joseph E. Jacoby and Raymond Paternoster, "Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty," 73 *Journal of Criminal Law and Criminology* 379 (1982); Raymond Paternoster, "Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina," 74 *Journal of Criminal Law and Criminology* 754 (1983); Michael L. Radelet and Glenn L. Pierce, "Race and Prosecutorial Discretion in Homicide Cases," 19 *Law and Society Review* 587 (1985).
96. *McCleskey*, 481 U.S. at 365 (Blackmun J., dissenting).
97. See *Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986).
98. Ibid., 282.
99. Ibid., 283.
100. See Vada Berger, et al., "Too Much Justice: A Legislative Response to *McCleskey* v. *Kemp*," 24 *Harvard Civil Rights–Civil Liberties Law Review* 437 (1989); Paul Schoeman, "Easing the Fear of Too Much Justice: A Compromise Proposal to Revise the Racial Justice Act," 30 *Harvard Civil Rights–Civil Liberties Law Review* 543 (1995).
101. See Naftali Bendavid, "Black Lawmakers Hold Balance on Crime; Legislative Endgame Reveals Caucus's Power, Divisions," *Legal Times*, August 22, 1994; Harvey Berkman, "Race and Death Stymie Crime Bill," *National Law Journal*, August 1, 1994.
102. The evolution of Bill Clinton's views on capital punishment, from evident disapproval to open embrace, vividly reflects the growing influence of public sentiment favoring retention and enforcement of capital punishment. See Marshall Frady, "Annals of Law and Politics: Death in Arkansas," *New Yorker* 105 (February 22, 1993); George E. Jordan, "Campaign '92: Clinton and Crime; Supports Capital Punishment as Sign of Toughness," *Newsday*, May 4, 1992. Clinton neither openly opposed nor openly supported the RJA, a remarkable stance that reflects the tortured state of public opinion over race relations and the death penalty. See William Douglas, "Clinton Won't Back Racial Justice Act," *Newsday*, July 15, 1994; Mitchell Locin, "Clinton's Crime Bill Gamble; President Shunts Aside Black Allies, Wows

Right," *Chicago Tribune*, July 25, 1994; Katherine Q. Seelye, "White House Offers Compromise to Free Logjam on Crime Measure," *New York Times*, July 21, 1994; "The Silent White House," *New York Times*, July 15, 1994.

103. Many of those who opposed the RJA on the grounds that it would inevitably create pressures for race-norming in prosecutorial decisionmaking have similarly opposed other measures that define racial discrimination more broadly than the intent to discriminate and that shift burdens of persuasion upon showings of racial disparity. One significant episode of opposition culminated in President George Bush's veto of antidiscrimination legislation in 1990, on the grounds that it encouraged racial quotas in hiring. See Message to the Senate Returning without Approval the Civil Rights Act of 1990, 26 Weekly Compilation of Presidential Documents 1632 (October 22, 1990).
104. See Dissenting Views on Racial Justice Act, Report 103-458, House Committee on the Judiciary, 103d Congress, 2d Sess., March 24, 1994, at 13.
105. Ibid., 14.
106. *Plessy* v. *Ferguson*, 163 U.S. 537, 554 (Harlan, Jr., dissenting) (1896).
107. "We are justly punished for those exclusive attachments which make us blind and unjust, and limit our universe to the persons we love. All the preferences of friendship are thefts committed against the human race and the fatherland. Men are all our brothers, they should all be our friends." J. Rousseau, *Correspondence générale*, IV:82 (1925), quoted in Sanford Levinson, "Testimonial Privileges and the Preferences of Friendship," 1984 *Duke Law Journal* 631.

10. Race, Law, and Punishment: The War on Drugs

1. See Eva Bertram, Morris Blachman, Kenneth Sharpe, and Peter Andreas, *Drug War Politics: The Price of Denial* (1996); Steven B. Duke and Albert C. Gross, *America's Longest War: Rethinking Our Tragic Crusade against Drugs* (1993).
2. See Michael Tonry, *Malign Neglect: Race, Crime, and Punishment in America*, 81–124 (1995); Alfred Blumstein, "Prisons," in *Crime*, ed., James Q. Wilson and Joan Petersilia, 398–401 (1995).
3. See Patricia A. Turner, *I Heard It through the Grapevine: Rumor in African-American Culture*, 180–201 (1993). A poll conducted in New York City in 1990, for instance, found that of the blacks interviewed, one quarter said that "the government deliberately makes sure that drugs are easily available in poor black neighborhoods in order to harm black people." See Jason