LEGALIZED LYNCH MOBS IN THE 21ST CENTURY: RACIAL IMPROPRIETIES IN THE DEATH PENALTY

Betsy A Daniller, *Florida Agricultural and Mechanical University*
LEGALIZED LYCH MOBS IN THE 21ST CENTURY: RACIAL IMPROPRIETIES IN THE DEATH PENALTY

Betsy Daniller

INTRODUCTION

“Race is more likely to affect death sentencing than smoking affects the likelihood of dying from heart disease. The latter evidence has produced enormous changes in law and societal practice, while racism in the death penalty has been largely ignored.”¹ The United States has had a long relationship with race and death.²

In the 1980’s two major cases dealt with the issue of racial discrimination in sentencing. In the first case, Batson v. Kentucky, a defendant was able to show a of pattern racial discrimination in jury selection, which was found to be unconstitutional.³ Just a year later, in McCleskey v. Kemp, a pattern of racial disparity in death sentencing was discovered.⁴ A study of death penalty sentencing showed a pattern and history of racially based sentencing.⁵ The Court rejected this study and refused to view the pattern of discrimination when making a determination about death.⁶ The Supreme Court tells us that “death is different.”⁷ But, how is death different when the Court is less stringent about discrimination when it comes to the difference between life and death?

⁵ Id. at 279.
⁶ Id.
David C. Baldus, a law professor and an expert in race and the law, studied the problem of racial disparity in the death penalty in conjunction with the McCleskey v. Kemp case. His work was the center of this decision and showed the racial implications of the death penalty in Georgia. He focused on the race of the victims, stating, “[p]erhaps most important, in my estimation, is that race-of-victim discrimination does not raise the same sort of moral concerns as race-of-defendant discrimination — even though, from a constitutional standpoint, discrimination on the basis of any racial aspect of the case is illegitimate.” He stressed that “the principal concern about racial discrimination in the administration of the death penalty relates to the unequal treatment of similarly situated defendants who are in fact guilty of capital murder. The core ethical concern is fairness- treating like cases alike- especially when the consequences of the decision are so severe.”

The McCleskey Court did not take this ethical concern into consideration when making a decision. Thus, it is important to study the evolving view of the Court with respect to this important issue. Specifically, it is essential to study the individual approaches of each justice who used the Baldus report in deciding McCleskey. While it is obviously too late to affect the decision in McCleskey, the changing views of the justices may yield a different result in the future. One possible way to address this problem would be through a Supreme Court decision; however, no similar case is on the docket today. Another possible solution lays in the form of federal statutory law- the Racial Justice Act. Unfortunately, the federal government has failed

---

9 Id.
10 Id.
to enact sweeping legislation on this issue.\textsuperscript{14} Currently, states are left to their own devices to grapple with this problem individually.\textsuperscript{15} However, the decision of\textit{McCluskey} has allowed for racial disparities to exist in death for over twenty-five years.

I. A \textbf{HISTORICAL PERSPECTIVE OF THE RACIAL DISPARITY IN DEATH}

A. \textit{The Antebellum Era}

The United States has had a long relationship with the death penalty, beginning in 1608, just a few months after founding the first colony.\textsuperscript{16} This relationship has been and continues to be marked by racial inequality.\textsuperscript{17} From the founding of the United States until the ratification of Thirteenth Amendment in 1865, the United States engaged in the “particular institution” of slavery.\textsuperscript{18} Prior to the Civil War, slavery was codified as law.\textsuperscript{19} Enslaved African Americans\textsuperscript{20} were treated as chattel.\textsuperscript{21} Slaves were subjected to both the whims of their masters as well as the slave codes.\textsuperscript{22} The Slave Codes mandated the death penalty for slaves for infractions such as helping another slave escape or destroying property.\textsuperscript{23} Most slaves were not punished by the arm of the legal system. Instead, because they were viewed as chattel, their masters had the right to

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item \textsc{Howard} W. \textsc{Allen} \& \textsc{Jerome} M. \textsc{Clubb}, \textsc{Race}, \textsc{Class}, \textsc{and} \textsc{the} \textsc{Death} \textsc{Penalty}: \textsc{Capital} \textsc{Punishment} \textsc{in} \textsc{American} \textsc{History} 9 (State Univ. of New York Press 2008).
\item \textsc{Charles} J. \textsc{Ogletree} Jr. \& \textsc{Austin} \textsc{Sarat}, \textit{Introduction}, in \textsc{From} \textsc{Lynch} \textsc{Mobs} \textsc{to} \textsc{the} \textsc{Killing} \textsc{State}: \textsc{Race} \textsc{and} \textsc{the} \textsc{Death} \textsc{Penalty} \textsc{in} \textsc{America} 1 (Charles J. Ogletree Jr. \& Austin Sarat eds., 2006).
\item U.S. Const. amend. XIV.
\item \textsc{A History of Racial Injustice}, \textsc{Equal} \textsc{Justice} \textsc{Initiative}, http://racialinjustice.eji.org/timeline/ (last visited April 10, 2013).
\item While there are many terms to describe members of this racial group, the author, for sake of continuity, chooses to use the term African American.
\item \textsc{Johnathan} \textsc{Walker}, \textit{A Brief View of American Chatelized Humanity, and Its Supports}, \textsc{Library} \textsc{of} \textsc{Congress} (1846), http://memory.loc.gov/cgi-bin/ampage?collId=gcmisc&fileName=lst/lst0050//gcmisclst0050.db&recNum=0&itemLink=r?ammem/lstbib:@field(NUMBER+@band(gcmisc+lst0050)):@linkText=0.
\item \textsc{Slave Code for the District of Columbia}, \textsc{Library} \textsc{of} \textsc{Congress}, http://memory.loc.gov/ammem/sthtm/stpres02.html (last visited April 16, 2013).
\item An \textsc{ACT} \textsc{For} \textsc{the} \textsc{better} \textsc{Ordering} \textsc{and} \textsc{Governing} \textsc{Negroes} \textsc{and} \textsc{other} \textsc{Slaves} \textsc{in} \textsc{this} \textsc{Province}.(March 7, 1755) \textit{reprinted in} \textsc{The Colonial Records of the State of Georgia, Volume XVIII, Statutes Enacted by the Royal Legislature of Georgia from Its First Session in 1754 to 1768, 102-144} (Candler, Allen D., ed. Chas. P. Byrd, State Printer, 1910).
\end{enumerate}
\end{footnotesize}
punish them as property. Considering their economic value, masters often only chose to physically punish slaves; however, some slaves were punished by death. From 1695-1785, “approximately 65% of those executed in the South and 46% in the Border colonies” were African American.

B. The Post-Civil War Landscape

During the Civil War some African American men fought for the Union Army. In 1864, only 3 or 4% of the Union Army was African American; however, 13% of soldiers executed by the army were African American. In 1865 the number of African American soldiers serving slightly increased but comprised of 41% of the soldiers executed by the army.

After the abolition of slavery in 1865, the southern states enacted the Black Codes, to establish social roles between African Americans and whites. Under these codes many African American men were legally killed for minor offenses. For example, an African American man was killed for failing to remove his hat in the presence of a white man. In 1866, as a part of Reconstruction, the Black Codes were repealed and replaced with the Jim Crow Laws.

---

26 ALLEN & CLUEBB, supra note 16 at 33.
27 Id. at 58.
28 Id.
29 Id.
30 U.S. CONST. amend. XIV
32 Id. at 58.
33 Id. at 57.
35 Id.
Jim Crow laws provided a way for whites to remain dominant in society. This included vagrancy laws, which were used to force African Americans to remain in servitude. These laws punished African Americans who either broke contracts or were not employed, by forcing them to serve jail time or into manual labor. An example of this type of Jim Crow Law is the 1896 Code of Alabama § 4730, which was amended in 1903 and 1907 and states, "[a]nd the refusal of any person who enters into such contract to perform such act or service, or refund such money, or pay for such property, without just cause, shall be prima facie evidence of the intent to injure his employer, or to defraud him." 

During this time period, many states applied capital punishment for offenses which resulted in death, rape or attempted rape and burglary. While whites were generally only put to death for the killing of another, African Americans were often put to death for nonlethal offenses. For example, from 1866-1945 there were more than 500 total executions for rape and attempted rape; over 475 of those executed were African American. Additionally, an Arkansas study showed that from 1945-1965, an African American man had a fifty percent chance of being sentenced to death for raping a white woman whereas a non-African American man only had a fourteen percent chance of receiving a death sentence for rape in Arkansas. In 1927, George W. Hays, a former Arkansas governor stated,

40 ALLEN & CLUDB, supra note 16 at 74.
41 Id.
42 Id.
43 Id.
44 Philadelphia, supra note 11, at 1730.
One of the South’s most serious problems is the negro question. The legal system is exactly the same for both white and black, although the latter race is still quite primitive, and in general culture and advancement in a childish state of progress.

If the death penalty were to be removed from our statute-books, the tendency to commit deeds of violence would be heightened owing to this negro problem. The greater number of the race do not maintain the same ideals as the whites.45

When the state carried out the death penalty, it did so after a trial in which a jury convicted the accused in the court of law.46 These trials were often over as soon as they began. By way of example, in 1906 an African American man was convicted and executed for raping a white woman within fifty minutes of the jury being sworn in.47

African Americans were not only at risk within the judicial system, but outside of it as well. During this time period, many citizens took the law into their own hands, through lynching.48 Legal scholar, Timothy V. Kaufman-Osborn, explained that “[L]ynching became a lethal means of regenerating the social contract once the racial polity could no longer be secured through the institution of chattel slavery.”49 Lynching often became a spectators sport and “spectacle lynching,” which involved mutilation and torture, became popular.50 These lynchings were open to the public and those who attended were expected to help mutilate the victim’s body.51

47 Id.
48 See Bhalul Negroes Lynched,: Excited People Taking the Law into Their Own Hands, NEW YORK TIMES (June 15, 1883), http://query.nytimes.com/mem/archive-free/pdf?res=F10C15FB395411738DDDAF0994DE405B8384F0D3.
These lynch mobs were not often punished which “affirmed the public’s tacit complicity: no persons had committed a crime, because the lynching had been an expression of the community’s will.”\textsuperscript{52} In Kentucky, there were 229 executions from 1865-1940; however, in that time period there were 353 lynchings.\textsuperscript{53}

The United States federal government did not formally address the issue of lynching until 2005,\textsuperscript{54} one hundred and five years after the first anti-lynching bill was proposed.\textsuperscript{55} This bill, which had the mission of “[a]pologizing to the victims of lynching and the descendants of those victims for the failure of the Senate to enact anti-lynching legislation,”\textsuperscript{56} was proposed three times in the history of the United States.\textsuperscript{57} The Bill stated:

\begin{quote}
Whereas the crime of lynching succeeded slavery as the ultimate expression of racism in the United States following Reconstruction; Whereas lynching was a widely acknowledged practice in the United States until the middle of the 20th century; Whereas lynching was a crime that occurred throughout the United States, with documented incidents in all but 4 States; Whereas at least 4,742 people, predominantly African-Americans, were reported lynched in the United States between 1882 and 1968; Whereas 99 percent of all perpetrators of lynching escaped from punishment by State or local officials.\textsuperscript{58}
\end{quote}

The Senate also used this bill to officially recognize and apologize for the nation’s history of lynching.\textsuperscript{59} However, only eighty of the one-hundred members of the senate co-sponsored the bill.\textsuperscript{60} Since the birth of the United States, our nation has struggled with the issues of racial equality. The nation has only recently begun to address these issues through legislation,

\textsuperscript{52} Steven F. Lawson & David R. Colburn, Groveland: Florida's Little Scottsboro, 65 FLA. HIST. Q.1, 16 (1986).
\textsuperscript{55} Id.
\textsuperscript{56} S.Res No. 39, 109\textsuperscript{th} Cong. (2005).
\textsuperscript{57} Thomas-Lester, supra note 54.
\textsuperscript{58} S.Res No. 39, 109\textsuperscript{th} Cong. (2005).
\textsuperscript{59} Id.
\textsuperscript{60} Thomas-Lester, supra note 54.
however it may appear to be too little too late. However, legislation is not the only solution to these issues. The judiciary is charged with how to apply the law and the Supreme Court of the United States has considered and reconsidered these issues over time.

II. RACE, DEATH AND SUPREME COURT RULINGS

A. Furman v. Georgia

Lynching had waned in popularity by the end of World War II$^{61}$ but, the Court’s ability to impose the death penalty had not yet been reviewed. In 1972 the Supreme Court heard the Furman v. Georgia case, which combined the cases of three African American men.$^{62}$ Furman was convicted of murder for shooting someone after breaking into their home.$^{63}$ The other two defendants had raped women in their homes. The Court determined that the death penalty in these cases was cruel and unusual and violated the Eighth Amendment.$^{64}$ In this opinion the Court stated that “the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.”$^{65}$ Justice Blackmun, dissenting, described the result of Furman as having widespread consequences: ‘Not only are the capital punishment laws of thirty-nine States and the District of Columbia struck down, but also all those provisions of the federal statutory structure that permit the death penalty apparently are voided.’$^{66}$

B. Gregg v. Georgia

---


$^{63}$ Id. at 315.

$^{64}$ Id. at 240.

$^{65}$ Id. at 186-187.

$^{66}$ Id. at 411.
As a result of this decision, thirty-nine states were forced to amend their death penalty laws. In 1976, the Court heard the Gregg v. Georgia case. This case involved a man who had killed two men and stolen their car. He was charged with two counts of armed robbery and two counts of murder. The jury found him guilty and his trial was separated into two parts: a guilt stage and a sentencing stage. The jury found Gregg guilty and he was sentenced to death. The defendant formally questioned whether his race was considered a factor in sentencing. The Court ruled that the current sentencing schemes did not violate the Constitution and negated the concerns of racial bias. The decision, written by Justice Stewart, explained that the Court wanted to prevent an arbitrary or capricious death sentence. “As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.” This decision validated the new sentencing scheme created by Georgia after Furman. Gregg reestablished the constitutionality of the death penalty.

C. Batson v. Kentucky

The Court revisited the issue of race as a factor in sentencing in 1986 in the Batson v. Kentucky case. In this case an African American man, James Batson, was charged with second

---

68 Id. at 153.
69 Id. at 158.
70 Id. at 158.
71 Id. at 158.
72 Id. at 158.
73 Gregg, 428 U.S. at 167.
74 Id. at 195.
75 Id. at 195.
76 Id. at 195.
77 Id. at 195.
78 See Id. at 195.
degree burglary and the receipt of stolen goods. On the first day of trial, during voir dire, all four of the African American jurors were excused from the case; therefore, the jury that heard Batson was composed entirely of white people. The defense attempted to discharge the jury because the dismissal of the African American jurors violated Batson’s rights under the Sixth and Fourteenth Amendments “to a jury drawn from a cross section of the community and under the Fourteenth Amendment to equal protection of the laws.” Batson attempted to challenge the peremptory challenges used to dismiss the jurors, but the objection was struck down. The judge reasoned that the cross section requirement applies only to selection of the venire and not to the selection of the petit jury itself. Batson was then convicted by an all-white jury.

On appeal, Batson argued that his rights under the Sixth Amendment of the United States constitution and the Kentucky constitution were violated. He also alleged that the “prosecutor had engaged in a ‘pattern’ of discriminatory challenges in this case and established an equal protection violation…” He relied upon the ruling of Swain v. Alabama which determined that “a State’s purposeful or deliberate denial to Negros on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause.” The Court reasoned that the intention for a trial by jury is, ”[t]he very idea that a jury is a body […] composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his

80 Id. at 83.
81 Id. at 83.
82 Id. at 83.
83 Id. at 83.
84 Id. at 83.
85 Batson, 476 U.S. at 83.
86 Id. at 83.
87 Id. at 84.
neighbors fellows, associates, persons having the same legal status in society as that which he holds.”

The Court determined that a person is denied “equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded.” While the Court did not determine that a defendant has a right to a jury composed only of members of his own race, it did hold that defendants have the right to be tried by jury members who are selected for non-discriminatory reasons. The court affirmed that “[a] person’s race is simply ‘unrelated to their fitness as a juror.’” A juror may be dismissed through a preemptory challenge “for any reason at all, as long as that reason is related to his view concerning the outcome,” however race is rarely considered a valid reason. The Court held that “a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of preemptory challenges at the defendant's trial.” To show that the preemptory challenges were a violation of equal protection, a defendant must show “purposeful discrimination.” The state is then required to show a race-neutral reason for dismissing the African American jurors. The Court reversed Batson’s conviction in this case in light of the racially charged use of preemptory challenges. The results of this case are difficult to reconcile with McCleskey v. Kemp, which the court decided the following year.

D. McCleskey v. Kemp

---

89 *Batson*, 476 U.S. at 87.
90 Id. at 85.
91 Id. at 85.
92 Id. at 87.
93 Id. at 89.
94 Id. at 96.
95 *Batson*, 476 U.S. at 94.
96 Id. at 97.
97 Id. at 82.
The next year, during the 1987 term, the Court heard another case that discussed racial considerations in sentencing: *McCleskey v. Kemp*. Warren McCleskey, an African American man along with three other men robbed a furniture store. The store manager gave the men some store receipts, his watch and six dollars. Their intrusion triggered an alarm and a police officer responded to the scene. The police officer died from wounds caused by a shot fired from a .38 caliber Rossi revolver. This was the type of gun McCleskey carried during the robbery.

Warren McCleskey was charged and convicted of two counts of armed robbery and one count of murder.

The Georgia’s court system “bifurcates guilt and sentencing proceedings so that the jury can receive all relevant information for sentencing without the risk that evidence irrelevant to the defendant’s guilt will influence the jury’s consideration of that issue.” In the state of Georgia, a “jury could not consider imposing the death penalty unless it found beyond a reasonable doubt that the murder was accompanied by one of the statutory aggravating circumstances.” In this case the jury found two aggravating factors: “the murder was committed in the commission of an armed robbery, § 17-10-30(b)(2), and the murder was committed upon a peace officer engaged in the performance of his duties § 17-10-30(b)(8).” McCleskey was sentenced to death for this crime. He appealed the sentence, stating that Georgia capital sentencing process violated the

---

99 *Id.* at 283.
101 *McCleskey*, 481 U.S. at 283.
102 *Id.* at 283.
103 *Id.* at 283.
104 *Id.* at 283.
105 *Id.* at 302.
106 *Id.* at 282.
108 *Id.* at 308.
Eighth and Fourteenth Amendments because the death penalty was administered in a racially discriminatory manner.\textsuperscript{109}

The Court considered the factor of racial prejudice in McCleskey’s sentencing and determined, while that there “is some risk of racial prejudice influencing a jury’s decision in a criminal case,”\textsuperscript{110} “[t]here are similar risks that other kinds of prejudice will influence other criminal trials.”\textsuperscript{111} The Court summarized by saying, “[t]he question is at what point that risk becomes constitutionally unacceptable.”\textsuperscript{112} The Justices then determined that in this case “McCleskey’s death sentence was not ‘wantonly and freakishly’ imposed, and thus that the sentence is not disproportionate within any recognized meaning under the Eighth Amendment.”\textsuperscript{113} Warren McCleskey was executed in Georgia by electrocution on September 26, 1991.\textsuperscript{114}

III. THE RESEARCH OF DAVID C. BALDUS

A. The 1983 Georgia Study

McCleskey went beyond the anecdotal evidence of racism in Batson and offered compelling research evincing a clear pattern and history of racial disparity in sentencing.\textsuperscript{115} The Court, after reviewing statistics on the likelihood that race affected death penalty sentencing,\textsuperscript{116} stated that, “[s]tatistics at most may show only a likelihood that a particular factor entered into some decisions. There is, of course, some risk of racial prejudice influencing a jury's decision in a criminal case. There are similar risks that other kinds of prejudice will influence other criminal

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{109}] Id. at 308.
\item[\textsuperscript{110}] Id. at 308.
\item[\textsuperscript{111}] Id. at 308.
\item[\textsuperscript{112}] Id. at 309.
\item[\textsuperscript{113}] McCleskey, 481 U.S. at 308.
\item[\textsuperscript{115}] McCleskey, 481 U.S. at 286.
\item[\textsuperscript{116}] Id. at 287.
\end{itemize}
\end{footnotesize}
trials.”117 The Court ultimately decided that the study, “does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.”118 The Court determined that this study was “clearly insufficient to support an inference that any of the decision makers in McCleskey’s case acted with discriminatory purpose.”119 It stated that at most the “study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system.”120 Through this decision the Court acknowledged and remained complacent in the face of racial impropriety in sentencing.121

Georgia was an ideal forum for this study for a multitude of reasons.122 First, the Georgia Death Penalty statute has served as a model to other states.123 Second, the Court in Gregg v. Georgia “stressed the requirement of a comparative sentence review in every death penalty case as a means of preventing arbitrary, capricious or discriminatory death sentences.”124 Third, the crime and sentencing statistics in Georgia were large enough that they are easily adapted for reviewal.125 Finally, studying Georgia created “an opportunity to evaluate the significance, if any, of the differences between the manner in which the United States Supreme Court in Gregg assumed the Georgia Statute would operate and what has actually occurred.”126

This study, which the Court ultimately disregarded, is known as the Baldus study.127 David C. Baldus, Charles Pulaski and George Woodworth conducted a comparative analysis of “jury death-sentencing patterns from 1973 to 1978 for evidence of arbitrariness and comparative

117 Id. at 308.
118 Id. at 313.
119 Id. at 297.
120 Id. at 312.
121 See McCleskey, 481 U.S. at 297.
123 Id. at 672.
124 Id.
125 Id.
126 Id.
excessiveness.” Baldus explained that, “[a] death sentence is comparatively excessive if other defendants with similar characteristics generally receive sentences other than death for committing factually similar offenses in the same jurisdiction.” To determine if cases were similar the study looked at five features: “(1) the place of the crime and the defendant’s mode of entry, (2) premeditation and lying in wait, (3) a contemporaneous crime—burglary, (4) a brutal, painful method of killing, or (5) commission of a subsequent crime by the defendant.”

The study compared 130 pre-Furman defendants who were tried and sentenced for murder between January 1, 1970 and September 29, 1972 (the date that Furman v. Georgia was decided) with 594 defendants who were tried and sentenced for murder through (from March 28, 1973- June 30, 1978) Georgia’s post-Furman death sentencing law. Of the pre-Furman defendants, twenty (of the 130 defendants) were given the death sentence. Of the 594 defendants sentenced under the post-Furman laws there were 203 penalty trials. From the 203 penalty trials 113 death sentences were handed out to 100 defendants (17%). Baldus then turned his attention to the individuals who were sentenced to death.

The researchers then analyzed capital sentencing decisions by looking at the defendant (prior record, motive, role in the crime), the victim’s characteristics (public servant or female, relationship to the victim), contemporaneous offenses (in the commission of a dangerous felony), method of killing, special aggravating factors (victim as a hostage, public risk created in the

---

128 Georgia, supra note 122, at 679.
130 Georgia, supra note 122, at 676.
131 Id. at 680.
132 Id. at 680.
133 Id. at 680.
134 See Id. at 674. A penalty trial may be waived by either the prosecutor or the judge. This would grant the defendant an automatic life sentence instead of the death penalty.
135 Id. at 680.
commission of the crime, resisting arrest) and special mitigating factors (such as showing remorse, drug abuse no intent to kill, etc.).

The study also looked at the status of the victim, including race. In 40% of the cases studied the victims were African American. In the 246 cases where the victim was African American, only fifteen defendants, or 6%, received the death penalty. In the 348 cases where the victim was white, eighty-five defendants, or 24%, received the death penalty. The study determined that the race of the victim influenced the decision to pursue a death sentence. The study cautioned that, “[w]hen a majority of death-eligible defendants do not receive a death sentence, the evenhandedness of the process by which a relatively few defendants do receive death sentences remains in doubt.”

B. The 1998 Pennsylvania Study

The racial history of the southern states might imply that the issue of disproportionate death penalty sentencing is a southern issue; however, in 1998, Baldus repeated his study of capital charging and sentencing in Philadelphia, Pennsylvania from 1983-1993. In Pennsylvania, like Georgia, prosecutors have discretion to seek the death penalty. In 60% of death-eligible cases, Pennsylvania-prosecutors seek the death penalty. Baldus described Pennsylvania’s capital punishment statutes as “fairly typical of statutes found in ‘weighing’ death penalty jurisdictions.” Pennsylvania uses eighteen statutory aggravating circumstances

---

136 Georgia, supra note 122, at 685.
137 Id. at 690.
138 Id. at 707.
139 Id. at 709.
140 Id.
141 Id. at 710.
142 Georgia, supra note 122, at 702.
143 Philadelphia, supra note 11, at 1644.
144 Id. at 1644.
145 Id. at 1646.
146 Id. at 1644.
to impose a death sentence.\textsuperscript{147} The jury must determine whether statutory mitigating circumstances exist, and if the court finds aggravating circumstance, it must return a death sentence.\textsuperscript{148} In 22\% of these cases the jury delivered a death sentence.\textsuperscript{149}

Determining racially motivated sentencing in Pennsylvania, like Georgia, is difficult, at least on the surface. As Baldus noted, “[i]n the absence of an admission by the prosecutor or individual jurors that race was a factor in their decision (which is virtually unheard of), discriminatory behavior by either of these actors is essentially outside the scope of review in the numerous appeals that generally follow the imposition of a death sentence.” \textsuperscript{150} Nonetheless, Baldus expressed concerns about racial discrimination in sentencing because at that time African Americans comprised 13\% of the nationwide population at large, but 41\% of the national death row population.\textsuperscript{151} In Philadelphia alone, 78\% of death penalty defendants were African American and 67\% of the victims were African American.\textsuperscript{152} However, Baldus found a 15\% increase in death sentences where the defendant was African American and the victim was not.\textsuperscript{153} He also found that an African American defendant is 1.6 times more likely to receive a death sentence then a similarly situated non-African American defendant.\textsuperscript{154} The researchers then looked for reasons as to why this disproportionality in sentencing existed.

To explain this disparity, Baldus pointed to: “overt, conscious racial discrimination,”\textsuperscript{155} “community outrage,”\textsuperscript{156} “the perceived unimportance of Black-on Black murder cases”\textsuperscript{157} and

\begin{flushleft}
\textsuperscript{147} Id. at 1638.
\textsuperscript{148} Id. at 1647.
\textsuperscript{149} Id. at 1648.
\textsuperscript{150} Id. at 1648.
\textsuperscript{151} Id. at 1656.
\textsuperscript{152} Id. at 1724.
\textsuperscript{153} Id. at 1684.
\textsuperscript{154} Id. at 1726.
\textsuperscript{155} Id. at 1723.
\textsuperscript{156} Id. at 1723.
\textsuperscript{157} Id. at 1724.
\end{flushleft}
“the predominance of white control of the criminal justice system”\textsuperscript{158} as possible reasons for the discrepancies in racial sentencing. However Baldus stated that he “consider[ed] it implausible that the estimated disparities are either a product of chance or reflect a failure to control for important omitted case characteristic.”\textsuperscript{159} The research, done by Baldus, determined that there is disproportionate sentencing based on race in multiple jurisdictions. One of his contemporaries, psychologist Jennifer Eberhardt, explored what it might be about African Americans that cause this increased likelihood of the death penalty.

C. Jennifer Eberhardt’s Study of the Baldus Defendants

In 2006, Eberhardt, conducted a study using Baldus’ Philadelphia results to determine whether the appearance of stereotypical African features of a defendant increased the likelihood of a death sentence.\textsuperscript{160} To conduct this study, Eberhardt showed photographs of forty-four of the black defendants from the Baldus Study to a group of Stanford students.\textsuperscript{161} She had the students rate the defendants’ features as being stereotypically African American.\textsuperscript{162} This was meant to test the hypothesis that “people more readily apply racial stereotypes to Blacks who are thought to look more stereotypically Black, compared with Blacks who are thought to look less stereotypically Black”\textsuperscript{163}

This experiment found that defendants with stereotypical African features were more likely to receive the death penalty.\textsuperscript{164} Whereas only 24.4\% of the defendants studied with less stereotypical features were given a death sentence.\textsuperscript{165} Of the defendants studied, 57.5\% of those

\textsuperscript{158} Id. at 1724.
\textsuperscript{159} Id. at 1715.
\textsuperscript{161} Id. at 384.
\textsuperscript{162} Id.
\textsuperscript{163} Id. at 383.
\textsuperscript{164} Id. at 384.
\textsuperscript{165} Id.
with greater stereotypical features were given a death sentence.\textsuperscript{166} Eberhardt concluded that, “\textit{our} findings suggest that in cases involving a Black defendant and a White victim- cases in which the likelihood of the death penalty is already high- jurors are influenced not simply by the knowledge that the defendant is Black, but also by the extent to which the defendant appears stereotypically Black.”\textsuperscript{167} Social science has processed from correlating African American race with an increased likelihood of the death penalty. Now, with Eberhardt’s study, psychologists have now identified particular African American Features as a heightened risk factor.

\textbf{IV. \textsc{The McCleskey Court}}

During the \textit{McCleskey} case the Supreme Court consisted of Chief Justice William Rehnquist, Justice William J. Brennan, Jr., Justice Byron White, Justice Thurgood Marshall, Justice Harry Blackmun, Justice Lewis F. Powell, Jr., Justice John P. Stevens, Justice Sandra Day O’Connor and Justice Antonin Scalia.\textsuperscript{168} This was a different court then ruled on the Batson case, a year earlier.\textsuperscript{169} Chief Justice Warren E. Burger retired from the bench and was replaced by Justice Scalia.\textsuperscript{170}

\textbf{A. The \textsc{McCleskey Decision}}

The \textit{McCleskey} decision was written by Powell and joined by Chief Justice Rehnquist, and Associate Justices White, O’Conner and Scalia. This majority held that the Baldus statistics were insufficient to support a discriminatory purpose that violated the equal protection clause of the Fourteenth Amendment because McCleskey could not show that he was specifically racially discriminated against.\textsuperscript{171} The opinion also stated that the Baldus study failed to show that (1) the

\begin{footnotes}{
\footnote{\textsuperscript{166} \textit{Eberhardt supra} note 160, at 384.}\footnote{\textsuperscript{167} \textit{Id.} at 385.}\footnote{\textsuperscript{168} \textit{McCleskey v. Kemp}, 481 U.S. 279, 279 (U.S. 1987).}\footnote{\textsuperscript{169} \textit{Supreme Court of the United States: Members of the Supreme Court of the United States}, SUPREMECOURT.GOV, http://www.supremecourt.gov/about/members.aspx (last visited 4/14/2013).}\footnote{\textsuperscript{170} \textit{Id.}}\footnote{\textsuperscript{171} \textit{McCleskey}, 481 U.S. at 279.}}
state violated equal protection by using allegedly discriminatory capital punishment and (2) that the application of the death penalty was arbitrary or capricious. 172

Justices Brennan and Marshall, who were joined in part by Justices Blackmun and Stevens dissented,173 stating that the death penalty violated the Equal Protection clause of the Fourteenth Amendment because McCleskey was a member of a racial group which was given different treatment to a substantial degree, and the Georgia death penalty scheme was still vulnerable to abuse.174 Justice Stevens, who was joined by Justice Blackmun, dissented and wanted to reverse and remand the McCleskey decision to make further determinations about the validity of the Baldus study.175

In the twenty-six years since McCleskey was decided on April 22, 1987 the Justices have had time to reflect on this important decision. Justice Powell, who wrote the McCleskey opinion, has expressed regret for that decision. In 1991, when asked, by his biographer John C. Jeffries, Jr., if he would change his vote in any case, he responded:

“Yes, McCleskey v. Kemp.”
“Do you mean you would now accept the argument from statistics?”
“No, I would vote the other way in any capital case.”
“In any capital case?”
“Yes.”
“Even in Furman v. Georgia?”176
“Yes. I have come to think that capital punishment should be abolished.”177

Justice Powell’s regrets about the McCleskey decision shows the Justice’s discomfort with the decision.

172 Id.
173 Justice Blackmun also wrote a dissent joined by Justice Marshall and Justice Stevens joining and Justice Brennan joined in all but one part.
174 McCleskey, 481 U.S. at 279.
175 Id. at 279.
176 In Furman v. Georgia, Justice Powell was in the dissent and argued that the death penalty had always been considered an appropriate punishment.

20
Another Justice who joined Powell’s opinion but has since publicly criticized the death penalty is Justice O’Conner. In a speech made to a group of Minnesota lawyers in 2001 O’Conner stated that "[i]f statistics are any indication, the system may well be allowing some innocent defendants to be executed." 178 She went on to tell these lawyers, who practiced in a state without the death penalty, "[y]ou must breathe a big sigh of relief every day." 179

Justice Scalia, the newest member of the court, also joined Justice Powell in the McCleskey decision. 180 A memo, published in the Thurgood Marshall Papers, written by Justice Scalia explains his reasoning for joining the majority. 181 He stated:

I disagree with the argument that the inferences that can be drawn from the Baldus study are weakened by the fact that each jury and each trial is unique, or by the large number of variables at issue. And I do not share the view, implicit in the opinion, that an effect of racial factors upon sentencing, if it could be shown by sufficiently strong statistical evidence, would require reversal. 182

He went on to state that the “unconscious operation” of racial and other factors in jury decisions were real and engrained in the jury box and thus, “I cannot honestly say that all I need is more proof.” 183 Scalia had planned to write a separate opinion after reading the dissent. 184 However, he ultimately joined Powell’s opinion.

Justice White, who also joined the McCleskey majority, wrote the opinion in Coker v. Georgia ten years earlier. 185 In that case, he stated his beliefs about the death penalty; that it “is not invariably cruel and unusual punishment within the meaning of the Eighth Amendment; it is

179 Id.
182 Id.
183 Id.
184 Id.
185 A 1977 case in which rape was determined to not be a death penalty eligible offense because it is disproportionate to the offense.
not inherently barbaric or an unacceptable mode of punishment for crime; neither is it always disproportionate to the crime for which it is imposed.”¹⁸⁶ Justice White only furthered his support of capital punishment through the McCleskey decision.¹⁸⁷

After McCleskey, Justice Rehnquist spoke out against the death penalty process. ¹⁸⁸ However, his issue with the death penalty is that the system “verges on the chaotic.”¹⁸⁹ He felt that the death penalty appeal process, which often takes years, created a “serious malfunction in our legal system.”¹⁹⁰ Justice Rehnquist sought to limit appeals made by death sentenced defendants.¹⁹¹

B. The McCleskey Dissents

Four Associate Justices, Marshall, Stevens, Brennan and Blackmun, dissented in McCleskey, with three separate dissents.¹⁹² Justice Brennan’s dissent¹⁹³ seriously considered the Baldus study. The Justices were disturbed that the “sentencing rate for all white-victim cases was almost 11 times greater than the rate for black-victim cases.”¹⁹⁴ Brennan stated that the Court demands “a uniquely high degree of rationality” when making death penalty decisions.¹⁹⁵ He found that “[a] capital sentencing system in which race more likely than not plays a role does not meet this standard.”¹⁹⁶ Justice Brennan explained the problem this creates because, “[i]t is

¹⁸⁹ Id.
¹⁹⁰ Id.
¹⁹¹ Id.
¹⁹² McCleskey, 481 U.S. at 279
¹⁹³ See Gregg v. Georgia, 428 U.S. 153, 230 (U.S. 1976). Justice Brennan is against the death penalty and explained his stance in the dissent of Gregg v. Georgia, “Death is not only an unusually severe punishment, unusual in its pain, in its finality, and in its enormity, but it serves no penal purpose more effectively than a less severe punishment; therefore the principle inherent in the Clause that prohibits pointless infliction of excessive punishment when less severe punishment can adequately achieve the same purposes invalidates the punishment.”
¹⁹⁴ McCleskey, 481 U.S. at 326-327.
¹⁹⁵ Id. at 335.
¹⁹⁶ Id. at 335.
tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die.” 197 However, this attitude cannot be adopted by the Court because “[s]uch an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined.” 198

Justice Marshall joined Justice Brennan in his McCleskey opinion. Justice Marshall had already spoken out against the death penalty, as evidenced in his concurrence in Furman, in which he explained that “even if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history.” 199 A sentence is considered to be morally unacceptable if it "it shocks the conscience and sense of justice of the people." 200 He mentioned a known racial bias in sentencing that existed prior to the Baldus study. He explained that;

A total of 3,859 persons have been executed since 1930, of whom 1,751 were white and 2,066 were Negro. Of the executions, 3,334 were for murder; 1,664 of the executed murderers were white and 1,630 were Negro; 455 persons, including 48 whites and 405 Negroes, were executed for rape. It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population. Studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination. 201

In the Justice Blackmun’s dissent, which Justice Stevens and Justice Brennan joined, he discussed a solution to the racial indications of the decision. 202 The Justices were reminded that, “[i]n cases where racial discrimination in the administration of the criminal justice system is
established, it has held that setting aside the conviction is the appropriate remedy.”\textsuperscript{203} In 1994, seven years after the McCleskey decision, Justice Blackmun famously declared:

> From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored -- indeed, I have struggled -- along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.\textsuperscript{204}

Justice Stevens also wrote a dissent, joined by Justice Blackmun, where he noted that the results of the Baldus study were quite distressing.\textsuperscript{205} He wrote about “the fact that McCleskey is black and his victim was white, and that this same outrage would not have been generated if he had killed a member of his own race. This sort of disparity is constitutionally intolerable.”\textsuperscript{206} Justice Stevens suggested a solution to the issue of racially based death sentences.\textsuperscript{207} He advised that the findings of “extremely serious crimes” where the death penalty is imposed without regard to any party’s race, shows that if the death penalty were limited to these extreme cases it would become less arbitrary and discriminatory.\textsuperscript{208} In 2010, Justice Stevens reflected on the findings of the Baldus study and the history of the death penalty in the United States.\textsuperscript{209} He opined “[t]hat the murder of black victims is treated as less culpable than the murder of white victims provides a haunting reminder of once-prevalent Southern lynchings.”\textsuperscript{210} The majority of the Justices who disregarded the Baldus study have now changed their minds. It seems that if the case were retried today, with the same bench that heard it originally, then McCleskey would

\textsuperscript{203} \textit{Id.}
\textsuperscript{204} \textit{Callins v. Collins}, 510 U.S. 1141, 1145 (U.S. 1994).
\textsuperscript{205} \textit{McCleskey}, 481 U.S. at 366.
\textsuperscript{206} \textit{Id.}
\textsuperscript{207} \textit{Id.} at 367.
\textsuperscript{208} \textit{Id.}
\textsuperscript{210} \textit{Id.}
have been sentenced to life instead of death. It is for that reason a change of this type is better suited for the legislative branch of the government.

V. A POSSIBLE SOLUTION: THE RACIAL JUSTICE ACT

The above historical, psychological and judicial materials showcase both how important this issue is and how difficult it is to address. Given that the current Court has not addressed this issue and may not have a related case before them for some time, a more immediate solution exists in the legislative process. The Federal government has attempted to create legislation which would allow defendants to challenge a death sentence if they could show that race played a “statically significant role” in sentencing.\(^{211}\) There have been multiple\(^{212}\) attempts to pass the Federal Racial Justice Act \(^{213}\) but none have succeeded. Without federal guidance on this issue states have begun to attempt to address this serious problem.

In 1998, Kentucky became the first state to pass a Racial Justice Act.\(^ {214}\) The act states that “[n]o person shall be subject to or given a sentence of death that was sought on the basis of race. A finding that race was the basis of the decision to seek a death sentence may be established if the court finds that race was a significant factor in decisions to seek the sentence of death....”\(^ {215}\) However, this act does not apply retro actively and does not apply to any sentences.\(^ {216}\) This Act may be in reaction to the pattern of discrimination found in Kentucky after \textit{Baston}.\(^ {217}\)

\(^{211}\) H.R. 4017, 103d Cong. § 2921(b) (2d Sess. 1994).
\(^{212}\) H.R. 4017, 103d Cong. (2d Sess. 1994).
\(^{213}\) H.R. 4442, 100th Cong. (2d Sess. 1988).
\(^{214}\) KRS § 532.305 (1998).
\(^{215}\) Id.
\(^{216}\) Id.
In 2010, North Carolina became the second state to enact a Racial Justice Act.\(^{218}\) The act stated\(^ {219}\), “[n]o person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race.”\(^ {220}\) This law considers the decision of the prosecutor to seek death and the decision of the jury to impose the death penalty and prohibits a death sentence when either decision was affected by race.\(^ {221}\) The South Carolina Racial Justice Act allows the use of statistical evidence to determine if race was a factor in sentencing.\(^ {222}\) By allowing the use of statistical evidence, South Carolina is ensuring that the results in \textit{McCleskey} will not occur within the state. Furthermore, by allowing retroactive review, unlike Kentucky, death row defendants are able rectify the past mistakes of the Court and enjoy racially neutral sentences.

One of the first sentences reviewed under this South Carolina law was overturned.\(^ {223}\) The state judge, Judge Weeks, said "race was a materially, practically and statistically significant factor in the decision to exercise peremptory challenges during jury selection by prosecutors" which supported “an inference of intentional discrimination.”\(^ {224}\) This made South Carolina the first state to allow death row defendants to convert their sentences to life in prison by proving race played a factor in a sentencing decision.\(^ {225}\) However; this law was short lived and was repealed in 2012.\(^ {226}\)


\(^{219}\) This act defines racial discrimination as, “A finding that race was the basis of the decision to seek or impose a death sentence may be established if the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed.”


\(^{221}\) \textit{Id.}


\(^{224}\) \textit{Id.}


These state-based Race Justice laws allow for death penalty defendants to alter their sentences based upon a showing of racial discrimination. The defendant has the initial burden to show that race was a significant factor in the decision to seek a death sentence.\textsuperscript{227} The State may then rebut the claims of the defendant.\textsuperscript{228}

This process parallels the establishment of discrimination findings in employment discrimination-cases. In that context, a complainant carries the initial burden\textsuperscript{229} of showing racial discrimination in the employment setting.\textsuperscript{230} Then the employer must show a legitimate and non-discriminatory reason for rejecting the employee.\textsuperscript{231} These cases also allow for the use of statistical information and analysis to determine issues of discrimination.\textsuperscript{232}

Enacting a Federal Racial Justice Act, particularly one that operates similarly to the South Carolina Act, would likely dramatically decrease the use of race as a factor in sentencing decisions. By mirroring employment discrimination laws, racial justice laws would force the government to respond to allegations of racially-based sentencing.\textsuperscript{233} If the Act also allowed for retroactive application, like the South Carolina law, defendants who have been sentenced to death may be able to address past racially-based discrimination.

A Federal Racial Justice Act would force both the government and the accused to look at race as a factor in sentencing—past and present. Through putting responsibility on the defendant to initially show the use of race and on government to respond may force the criminal justice system to begin to police itself against such impermissible considerations.

\textsuperscript{228} \textit{Id.}
\textsuperscript{229} This is shown by the claimant being a member of a racial minority, who applied for a job which he was qualified for and was then rejected. After the claimant is rejected from the position remained open.
\textsuperscript{230} McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (U.S. 1973).
\textsuperscript{231} \textit{Id.}
VI. ABOLITION AS A SOLUTION

Many states have turned to the option of abolishing the death penalty. In 2013, Maryland became the 18th state to abolish the death penalty.\textsuperscript{234} From 1773 until May 2, 2013 Maryland has used the death penalty.\textsuperscript{235} Before the abolition of the death penalty, in Maryland, a death penalty eligible crime had to be proven with biological or DNA evidence, a videotaped confession or a videotape that directly linked the accused of a first degree murder.\textsuperscript{236} These restrictions resulted in only five people being on Maryland’s death row in 2013\textsuperscript{237}, despite Maryland having been ranked the 9th most dangerous state in 2011.\textsuperscript{238} In 2005 Maryland was tied with Louisiana for the highest murder rate in the country.\textsuperscript{239}

However a 2008 report showed that a black man accused of killing a white person is two and a half times more likely to receive the death penalty in Maryland.\textsuperscript{240} Of the ten cases which resulted in a death sentence in Maryland, from 1978 until 2013, 70\% of those given a death sentence were black men accused of killing a white person.\textsuperscript{241} These ten cases only made up 23\% of the death eligible offenses that were prosecuted in Maryland, during this time period.\textsuperscript{242} As a result of these racially charged findings Maryland elected to repel the death penalty.\textsuperscript{243} Other

\begin{footnotesize}
\textsuperscript{234} Joe Sutton,\textit{ Maryland Governor signs death penalty repeal}, CNN, May 2, 2013, http://www.cnn.com/2013/05/02/us/maryland-death-penalty
\textsuperscript{235} Maryland, \textit{DEATH PENALTY INFORMATION CENTER} (August 27, 2013) http://www.deathpenaltyinfo.org/maryland-1.
\textsuperscript{236} Id.
\textsuperscript{237} Id.
\textsuperscript{238} America’s Most Violent States, \textit{24/7 WALL STREET} (October 31, 2012, 6:30am), http://247wallst.com/special-report/2012/10/31/americas-most-violent-states/2/.
\textsuperscript{239} The Death Penalty in Maryland, \textit{MARYLAND CITIZENS AGAINST STATE EXECUTIONS} (August 27, 2013) http://mdcase.org/node/92.
\textsuperscript{241} Id.
\textsuperscript{242} Id.
\end{footnotesize}
states may begin to follow the trend of abolishing the death penalty after researching the racial disparities that exist in the death penalty.

CONCLUSION

The death penalty has been a part of the criminal justice system in the United States since before the inception of the nation. This is the most powerful punishment a State may wield. However, this form of punishment may be abused and misused. One of the ways the death penalty may be misused is through racially based death sentences.

While it may serve an important and legitimate judicial purpose, the death penalty cannot appear to be arbitrary or capricious. By handing out racially based sentences the court undermines the purpose of the death penalty. The lives of victims should be treated equally despite race. Likewise the race of the defendant should not matter. With current sentencing patterns this does not appear to occur.

While the court has attempted to address these problems, through cases like Batson and McCleskey, they have not successfully solved them. The studies of Baldus and Eberhardt show us that racially based sentencing still exists. The Justices have grappled with the legality death penalty as it currently exists.

---

244 HOWARD W. ALLEN & JEROME M. CLUBB, RACE, CLASS, AND THE DEATH PENALTY: CAPITAL PUNISHMENT IN AMERICAN HISTORY 9 (State Univ. of New York Press 2008).
245 See Philadelphia, supra note 11 at 1651.
246 See generally Philadelphia, supra note 11. See Generally Georgia, supra note 122
248 See generally Philadelphia, supra note 11. See Generally Georgia, supra note 122. See generally Eberhardt, supra note 160.
The solution may not lay with the Court and instead should be a role of the legislature. Now that states, particularly Kentucky\textsuperscript{250} and South Carolina\textsuperscript{251}, have acted as a laboratory for this statutory experiment, it is time to address this issue head-on at the federal level. Congress should regulate the death penalty to ensure that it is not wielded based on racial bias. There have been numerous attempts by the Congress to pass a Federal Racial Justice Act\textsuperscript{252}. Even though Congress has previously failed to enact this important legislation, it does not mean that Congress cannot give up. Citizens should engage their Congressmen and request that they push for enactment of this essential piece of legislation. With a Federal Racial Justice Act we can finally begin to treat death as being “different.”

\textsuperscript{250} KRS § 532.305
\textsuperscript{252} H.R. 4017, 103d Cong. (2d Sess. 1994).