Race, Death and Disproportionality (Symposium Article)

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Statistical studies showing unconscious racial bias in capital selection matter under the Eighth Amendment. In McCleskey v. Kemp,1 the Court appeared to shun such evidence as irrelevant to Eighth Amendment challenges to capital punishment.2 Yet, this kind of evidence has influenced some of the Justices’ views on the constitutionality of the death penalty and has sometimes caused the Court to restrict the use of that sanction under the Eighth Amendment.3 My goal, therefore, is to explain why statistical studies concerning racial bias in capital selection simultaneously have both limitations as proof and suggestive power that some death sentences amount to “cruel and unusual punishments.”4 Ultimately, I address how such studies, despite their limitations, might influence the Court in its regulation of the death penalty in the future.5

My project proceeds in five parts. Part I contends that the Eighth Amendment regulates capital selection not, as is commonly asserted, through a consistency mandate but, instead, through a deserts limitation – a mandate that only a person who deserves the death penalty should receive that sanction. Part II shows how the capital selection process allows for multiple opportunities for reprieves of offenders who deserve the death penalty but also provides a two-phase trial to try to ensure that nobody receives a death sentence who does not deserve it. Part III briefly describes the statistical efforts to determine whether racial biases concerning defendants and victims influence decisions along the selection process. Part IV shows, however, why studies that do not focus on the sentencing trial have only limited Eighth Amendment meaning and why even studies that have that focus cannot establish with much certainty that violations

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2. The Court in McCleskey rejected claims based on a sophisticated investigation, known as the “Baldus study,” that the Court assumed had validly demonstrated a substantial risk that racial biases continued to influence post-Furman capital selection in Georgia. 481 U.S. at 291 n.7. A detailed account of the study that supported the challenge appears in DAVID C. BALDUS, GEORGE WOODWORTH, & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY 40-228, 306-69 (1990) [hereinafter BALDUS STUDY].
3. See infra Part V.
4. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).
5. I focus here only on the Eighth Amendment. The Supreme Court concluded in McCleskey that the statistical evidence presented in the Baldus study did not reveal purposeful, racial discrimination in McCleskey’s case, and that evidence of such purposeful discrimination by a decisionmaker in the defendant’s case is required to make out a violation of the Equal Protection Clause. See 481 U.S. at 292.

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of the deserts limitation frequently occur. Statistical evidence of racial bias even at the sentencing trial might reflect mostly the effect of race in the dispensation of merciful reprieves. Yet, this Part also explains that such evidence can spur our intuitions that some sentencer findings of deserts underlying some death sentences, in addition to some reprieves, are racially influenced. In fact, Part V contends that, despite the Court’s general unwillingness to acknowledge that racial-bias studies reveal that death sentences are sometimes disproportional, the studies have influenced the Court— and will continue to influence it—to confine the use of the death penalty.

I. THE DESERTS LIMITATION IN THE EIGHTH AMENDMENT

Regarding capital selection, the Eighth Amendment imposes one predominant rule: the government can impose a death sentence only on a person who deserves it. For this rule plausibly to support the regulation of capital sentencing, we must conclude that some criminals deserve the death penalty and that our criminal justice system can, at least in some category of cases, determine offenders’ deserts. These notions are somewhat controversial. 6 However, Eighth Amendment doctrine on the use of the death penalty assumes that they are true. 7 In previous articles, I have examined how this deserts limitation can find grounding in the language of the Eighth Amendment and how the Supreme Court’s doctrine on capital sentencing since Furman v. Georgia 8 implements and reveals it. 9 Without repeating that explanation in full, I aim here briefly to address a confounding idea and to elaborate on what a deserts limitation implies.

[footnotes]

6. See, e.g., Margaret Jane Radin, Cruel Punishment and Respect for Persons: Super Due Process for Death, 53 S. CAL. L. REV. 1143, 1168 n.85 & 1181-82 (1980) (“[N]ot much philosophical progress has been made on the issue of how punishment can ‘fit’ crime since Immanuel Kant suggested that rape and pederasty be punished by castration.”); RANDY E. BARNETT, THE STRUCTURE OF LIBERTY 318 (1998) (“Any effort to do so will confront very serious problems of knowledge, interest, and power.”); WALTER KAUFMANN, WITHOUT GUILT AND JUSTICE 64 (1973) (“Not only is it impossible to measure desert with the sort of precision on which many believers in retributive justice staked their case, but the whole concept of a man’s desert is confused and untenable.”); Youngjae Lee, The Constitutional Right Against Excessive Punishment, 91 VA. L. REV. 677, 700 (2005) (describing as “profoundly mysterious” the notion of “a crime having some ‘fit’ with a punishment”).

7. For instances in which the Court’s doctrine reflects doubt about the ability of the criminal justice system to reach accurate deserts assessments on an individual basis, see infra notes 157-64 & 170-78 and accompanying text.

8. 408 U.S. 238 (1972) (per curiam).

There is a widespread belief, based on oft-repeated statements from the
Supreme Court, that the Eighth Amendment requires from capital selection
something other than a valid finding that a death-sentenced offender deserves
death: “consistency” or “non-arbitrariness” or “equality.”\textsuperscript{10} Some of the Justices
have even concluded that the inability to achieve consistency in capital selection
justifies abolition under the Eighth Amendment.\textsuperscript{11} However, the notion that
consistency is required misleads in that it reflects what the Court has said but not
what the Court has done. In the realm of deciding who dies, all of the Court’s
Eighth Amendment doctrine is best explained as an effort to prevent undeserved
death sentences — and this notion of proportionality does not merge with a
mandate of consistency.\textsuperscript{12}

We can see the confusion caused by the consistency view by focusing on
two questions:

(1) Do all factually guilty and death-eligible capital offenders
deserve the death penalty,\textsuperscript{13} or do some of them deserve only the lesser
sanction of imprisonment?

(2) Does the Eighth Amendment demand consistency in the
distribution of death sentences among those who deserve them or only
that the death penalty be reserved for those who deserve it?

Consistency or equality claims tend to focus only on the second question.\textsuperscript{14}
These claims often either ignore or concede the answer to the first question.\textsuperscript{15}

\textsuperscript{10} See Howe, Furman’s Mythical Mandate, supra note 9, at 435-40.
\textsuperscript{11} Justice Blackmun perhaps most clearly articulated this view in advocating abolition. See,
e.g., Callins v. Collins, 510 U.S. 1141, 1147, 1153 (1994) (Blackmun, J., dissenting from denial of
cert.) (interpreting Furman v. Georgia, 408 U.S. 238 (1972) (per curiam), to mean that “if the death
penalty cannot be administered consistently and rationally, it may not be administered at all”).
More recently, Justice Stevens has also advocated abolition under the Eighth Amendment. See
Baze v. Rees, 128 S. Ct. 1520, 1551 (2008) (Stevens, J., concurring). However, his argument for
abolition appeared to align more with a theory of disproportionality — that there is an unacceptable
“risk of error” in capital cases that results from several factors, including the risk of racial
discrimination. Id.
\textsuperscript{12} See infra note 179 and accompanying text (regarding the main doctrines that comprise the
Court’s Eighth Amendment regulation of capital selection). For a view based on the “expressive
dimension” of punishment that proportionality could contemplate a requirement of consistency in
the use of a sanction, see Lee, supra note 6, at 712-13 (“[A] punishment imposed on a criminal
would be ‘undeserved’ if it is more severe than the punishment imposed on those who have
committed more serious crimes or crimes of the same seriousness, because the judgment it
expresses about the seriousness of the criminal’s behavior would be inappropriate.”).
\textsuperscript{13} By “death-eligible” capital offenders, I mean those factually guilty capital offenders 1) who
are not protected from a possible death sentence by one of the Supreme Court’s categorical
proscriptions on the use of that sanction, see, e.g., Atkins v. Virginia, 536 U.S. 304 (2002)
(protecting mentally retarded offenders); and 2) who have an aggravating circumstance in their case
that satisfies the Supreme Court’s requirement for narrowing of the death-eligible group, see
Godfrey v. Georgia, 446 U.S. 420, 428-29 (1978) (plurality opinion) (requiring that a state narrow
the group).
They assume that the death penalty is not disproportional – or undeserved – for death-eligible and guilty capital offenders.16 However, they conclude that the Eighth Amendment demands consistency in the distribution of death sentences among the deserving.17 On this basis, they call for judicial intervention to remedy the statistical evidence of racial discrimination throughout the capital-selection process.18

The claim that the Eighth Amendment should require consistency among those who deserve the death penalty is hard to maintain. First, there is a “profound contradiction” in any assertion that a prohibition on cruel and unusual punishments disallows merciful or otherwise undeserved reprieves.19 Such a claim views the language of the clause in a strange way, holding that the death penalty becomes less “cruel and unusual” when administered under a system demanding unrelenting harshness than under one allowing the sentencer uninhibited freedom to dispense mercy.20 Also, to the extent that the claim assumes that we should remedy inconsistency by reducing rather than increasing

14. Some persons might reject the assumption that we can answer the first question on grounds that the determination of deserts in the real world is either so elusive or so tied up with comparative analysis that “apparent equal treatment [is] all we can readily rely on to satisfy our aspirations of fairness.” Radin, supra note 6, at 1151 (noting without endorsing the possibility of such a claim). However, the Eighth Amendment explanation for the Supreme Court’s rejection of death penalties that are mandatory upon conviction disintegrates if we believe that deathworthiness cannot be determined on an individualized basis. See infra notes 25-26 and accompanying text. Moreover, we cannot determine whether equality exists without reference to some external substantive measure, which, in this case, is the deserts standard. See Howe, The Troubling Influence of Equality, supra note 9, at 365-76.

15. See, e.g., BALDUS STUDY, supra note 2, at 417 (“Certainly, the imposition of death sentences in such cases may not offend notions of disproportionality or ‘just deserts’. . . .”); id. at 14 (“The problem is not that the defendant’s crime and past record necessarily make a death sentence unthinkable and thereby excessive in the traditional sense . . . .”).

16. BALDUS STUDY, supra note 2, at 14, 417.

17. See BALDUS STUDY, supra note 2, at 417 (“Nevertheless, trying to achieve consistency and rationality in capital sentencing is essential if we wish to maintain as a principle the dignity of the individual (including individuals convicted of capital crimes) and, equally important, to avoid the corrosive effect on society of judicially condoned racial discrimination.”).

18. A claim that not all factually guilty and death-eligible capital offenders deserve the death penalty, but that the Eighth Amendment demands consistency in the distribution of death sentences among those who deserve them, has two problems. First, it fails to explain how a sentencing inquiry could produce an accurate finding of offender deserts and still ensure consistency. See Radin, supra note 6, at 1151 (“We cannot simultaneously maximize the extent to which we satisfy both of these moral requirements.”). Second, it fails to comport with the Supreme Court’s doctrine. The Court has not required consistency of treatment in the overall selection process or at any stage of that process. See, e.g., infra Part II (discussing the Georgia system, which the Court has approved).

19. Daniel D. Polsby, The Death of Capital Punishment? Furman v. Georgia, 1972 SUP. CT. REV. 1, 27 (noting a “profound contradiction” in such a claim, because it means that “a punishment imposed under a system of unmitigated harshness would be less cruel” than one allowing merciful reprieves).

20. See, e.g., Kyron Huijgens, Rethinking the Penalty Phase, 32 ARIZ. ST. L.J. 1195, 1202 (2000) (“Equality in death sentencing is not a negligible value, but it is an odd one to pursue under the rubric of cruel and unusual punishment.”).
the number of death sentences, it ignores that those capital offenders who
deserve and receive the death penalty do not deserve death any less simply
because others who also deserve death escape that sanction.21 As even two
prominent progressive scholars have acknowledged, “our failure to respond
justly in [some death-penalty cases] hardly explains why we should also fail to
do justice in [others].”22

I contend that the answers to both of the questions presented are just the
opposite of those involved in the “consistency” approach. As for the second
question, the Eighth Amendment does not demand “consistency” or “non-
arbitraryness” among those who deserve the death penalty. The Eighth
Amendment demands only that government reserve the death penalty for those
who deserve it.23 At the same time, the answer to the first question is that not all
constitutionally death-eligible and guilty capital offenders deserve the death
penalty.24 For some of them, the death penalty is disproportional.

As the Court has applied it to capital selection, the Eighth Amendment is,
thus, about a substantive rule—the deserts limitation.25 A call for “consistency”
or “non-arbitraryness” in capital selection makes sense only as a reiteration to
follow that rule. Such a call is not separate from—but rather derives from—the
substantive command. If a person is sentenced to death who does not deserve
that punishment, the sentence is improper because it violates the substantive rule.
We can also say that the sentence is not “consistent” with that governing rule or
that it is “arbitrary” in that it does not accord with that rule. Yet, it is the
substantive rule—the deserts limitation—that gives meaning to the Eighth
Amendment, not a vacuous notion of “consistency” or “non-arbitraryness.”26

21. See, e.g., Barry Latzer, The Failure of Comparative Proportionality Review of Capital
Cases (With Lessons From New Jersey), 64 ALB. L. REV. 1161, 1165-66 (2001) (“Indeed, such a
demand for equal justice is as pernicious as it is pointless, since the remission of desired death
sentences undermines retributive justice.”); RANDALL COYNE & LYN ENTZEROTH, CAPITAL
that racial discrimination in no way diminishes either the culpability of the defendants who are
sentenced to death or society’s justification for executing them.”).


23. See Huigens, supra note 20, at 1203 (“The Court’s real concern is not equality in
punishment, but proportionality in punishment.”).

(striking down mandatory death penalty that precluded the sentencer from considering “the
possibility of compassionate or mitigating factors stemming from the diverse frailties of
humankind”).

25. See Howe, Furman’s Mythical Mandate, supra note 9, at 441-56; see also David McCord,
Judging the Effectiveness of the Supreme Court’s Death Penalty Jurisprudence According to the
Court’s Own Goals: Mild Success or Major Disaster?, 24 FLA. ST. U. L. REV. 545, 548 (1997)
(“[T]he Court has had only one primary goal for its regulation of capital punishment: decreasing
overinclusion . . . .”).

(asserting that equality is a vacuous notion because its meaning depends on some external
substantive measure).
At the same time, evidence of racial bias retains significance under this “substantive” view of the Eighth Amendment, although violations are hard to detect and hard to prevent, except through partial or total abolition. The deserts limitation is unidirectional and, thus, while forgiving of unconscious non-rational bias in favor of mercy, is not indifferent when racial bias influences a desert finding in support of a death sentence. The rule has meaning for capital sentencing because of the prevailing view that not every death-eligible and legitimately convicted capital murderer deserves death. This idea means that, as a prerequisite to a death sentence, a state must conduct a capital sentencing hearing at which the offender is entitled to present a broad array of evidence and to argue for his life. The very purpose, under the Eighth Amendment, of the sentencing hearing is to determine, as a prerequisite to a death sentence, whether the offender deserves death. Although we cannot define with precision the factors that should weigh in a deserts calculus, or how much those factors should weigh, we can agree that racial factors should play no part in it. This is true whether the factor is the race of the offender or of the victim. Thus, a death sentence based on a sentencer’s deserts finding influenced by racial bias is unreliable and, in that sense, disproportional.

II. THE CAPITAL SELECTION PROCESS AND THE DESERTS LIMITATION

The capital selection process in every death-penalty state comes much closer to complying with the deserts limitation than to ensuring that all persons who deserve the death penalty receive it. From the moment of arrest to the moment of execution, multiple opportunities exist for actors along the way to spare a

27. See Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (rejecting Ohio “special question” scheme as too mandatory, and declaring that the capital sentencer must remain free to reject the death penalty based on “any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death”).

28. See, e.g., Scott E. Sundby, The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing, 38 UCLA L. REV. 1147, 1178 (1991) (noting that the Court’s wide definition of potentially mitigating evidence in Lockett is “tied to the ultimate issue of whether the defendant deserves the death penalty”).

29. See, e.g., SEIDMAN & TUSINER, supra note 22, at 150-51 (contending that the Court’s rejection of mandatory death penalties led to “determinism’s slippery slope” and the problem that “we have wildly conflicting and inconsistent intuitions about where to dig in our heels” in judging the deserts of murderers).

30. See, e.g., Richard O. Lempert, Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment, 79 MICH. L. REV. 1177, 1178 n.5 (1981) (“To my knowledge no modern retributivist has argued that unalterable personal characteristics such as race and sex may be properly considered in assessing culpability for crime.”); Sundby, supra note 28, at 1178 (asserting that “no reasonable person would argue that invidious factors like race or poverty . . . properly bear on whether the defendant deserves death”).

31. See, e.g., McCleskey v. Kemp, 481 U.S. 279, 341 (1987) (Brennan, J., dissenting) (“That a decision to impose the death penalty could be influenced by race is thus a particularly repugnant prospect, and evidence that race may play even a modest role in levying a death sentence should be enough to characterize that sentence as “cruel and unusual.”).
defendant who deserves death. Most states make no pretense of trying to stop these non-deserved reprieves. Their goal, instead, is to provide a fair guilt-or-innocence trial followed by a fair sentencing trial, which can help ensure that nobody receives a death sentence who does not deserve it.

The Georgia system, which the Supreme Court first upheld in 1976, exemplifies this deserts-limitation approach to capital selection. In Georgia, a person who commits a homicide may face a death-sentencing trial if he is found guilty of common-law murder. Despite the availability of strong evidence of his guilt of murder, however, a defendant will probably avoid such a trial. The police do not investigate all homicides with maximum intensity, and, in some cases, the police may not feel pressure to develop overwhelming evidence of guilt. For this and other reasons, when an arrest occurs, the prosecutor handling the case might decide to charge the defendant merely with manslaughter or some lesser form of criminal homicide. Assuming the prosecutor charges the defendant with murder, a grand jury might only indict the defendant on a lesser charge. If the grand jury indicts the defendant for murder, the prosecutor can still offer to reduce the charge to manslaughter or to not seek the death penalty if the defendant pleads guilty. If the prosecutor does not offer a plea bargain but instead proceeds to trial, a jury can still “nullify” the law by finding the defendant guilty of a lesser form of homicide. Moreover, even if a jury finds the defendant guilty of murder, the prosecutor can still decline to pursue a death sentence.

Most murder cases do not proceed to a capital sentencing trial even if the defendant is guilty and death-eligible. Usually, a murder charge results in a plea

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33. See McCleskey v.剧烈 U.S. at 284 n.1 (discussing the Georgia statute providing the penalty options for murder).
35. Id. at 221 (“Often, the amount of available evidence differs because the local sheriffs and police departments investigate crime in the white community much more aggressively than crime in the black community.”).
37. The United States Supreme Court has concluded that plea-bargaining to avoid the possibility of a death sentence is constitutional. Brady v. United States, 397 U.S. 742 (1970).
38. Jurors have the power to acquit even in the face of overwhelming evidence of guilt. See generally WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE 1027-28 (3d ed. 2000).
39. See BALDUS STUDY, supra note 2, at 106 (“In Georgia, even after the defendant’s conviction for capital murder, a prosecutor who considers a death sentence to be inappropriate or unwarranted may waive the penalty trial.”).
bargain that spares the defendant from death. Among the small proportion of cases that proceed to trial and result in murder convictions, a capital-sentencing hearing is still not the norm. One post-Furman study found that, during one extended period in Georgia, prosecutors declined to pursue the death penalty in a large majority of the murder cases in which a jury had already convicted the defendant of that crime.

The basis for these reprieves need not have anything to do with the deserts of the defendant. The decision of a prosecutor to spare a defendant from the death penalty is essentially unreviewable absent proof of a conscious purpose to discriminate based on race or some other forbidden basis under the Equal Protection Clause. Thus, the prosecutor may ground such a decision on considerations related, for example, to his own political career, on the desire to save public resources, on the desire to focus prosecutorial efforts on other offenders or even on unconscious, personal biases regarding the defendant or the victim. Likewise, jurors at the grand jury stage or at a guilt-or-innocence trial may not indict the defendant for murder or may acquit him on that charge for reasons that have nothing to do with his deserts. The trial jurors may, for example, find him guilty of only a lesser charge because they feel sympathy for the defendant’s family but little kinship with the victim, who was from out-of-state. A jury’s decision to acquit is also unreviewable.

Assuming a murder arrest results in a murder conviction and proceeds to a sentencing trial, the jury would still retain broad discretion to spare the offender on grounds having nothing to do with his deserts. In Georgia, at a capital-sentencing hearing, both the defense and the prosecution can present evidence that relates to the offender’s character, record, or crime. Both parties also can present arguments on whether the offender warrants the capital sanction.

40. See Welsh S. White, The Death Penalty in the Nineties 62 (1991) (“Since plea bargaining is widely employed in capital cases, its effect on the selection of those sentenced to death will be pervasive . . .”).
41. See Baldus Study, supra note 2, at 106 (“[In 59 percent of the death-eligible cases, a life sentence was imposed by default when the prosecutor unilaterally waived the penalty trial.”).
42. See, e.g., Latzer, supra note 21, at 1188 (“[E]ven a purposeful selective enforcement policy does not deny equal protection, unless it is based on an invidious standard.”).
43. See White, supra note 40, at 54-57; see also Latzer, supra note 21, at 1190 (“To establish an Equal Protection violation, the challenger would have to prove purposeful discrimination on a racial or some other similarly forbidden basis.”).
44. See Interview with Alan M. Dershowitz, Professor at Harvard Law School, in Cambridge, Mass. (Mar. 2, 1988), in A Punishment in Search of a Crime 330, 331 (Ian Gray & Moira Stanley eds., 1989) (asserting that capital sentencing juries favor those who are residents of their area rather than those who are from other regions).
45. See, e.g., Fong Foo v. United States, 369 U.S. 141 (1962) (per curiam) (concluding that Court of Appeals erred in ordering retrial after trial judge had erroneously instructed jury to acquit defendants and entered judgment of acquittal).
46. See Gregg v. Georgia, 428 U.S. 153, 163-64 (1976) (plurality opinion) (noting that Georgia statute allowed for the presentation of such evidence by the defense and the prosecution).
47. Id.
judge instructs the jury that it must find at least one aggravating circumstance from a statutory list as a prerequisite to imposing a death sentence. However, the list of statutory aggravators covers almost all murders, so this requirement rarely poses an obstacle for the prosecution. If the jury finds an aggravating circumstance, it may consider any other evidence that it deems either aggravating or mitigating in determining the sentence. At this final stage, the jury retains “absolute discretion.” Thus, a jury may spare an offender on non-desert grounds. At the same time, the hope is that a jury will render a verdict for a death sentence only if it determines that the offender deserves that sanction.

48. The statutory aggravating circumstances in the post-Furman Georgia statute were as follows:

(1) The offense . . . was committed by a person with a prior record of conviction for a capital felony, or the offense . . . was committed by a person who has a substantial history of serious assaultive criminal convictions.
(2) The offense . . . was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.
(3) The offender by his act . . . knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.
(4) The offender committed the offense . . . for himself or another, for the purpose of receiving money or any other thing of monetary value.
(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor [was committed] during or because of the exercise of his official duty.
(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.
(7) The offense . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.
(8) The offense . . . was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.
(9) The offense . . . was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.
(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.


50. See BALDUS STUDY, supra note 2, at 102-04. For a forceful argument that states should eschew the “one-aggravator-is-sufficient-and-all-are-equal” model in favor of a more nuanced list of depravity factors and a requirement of “an accumulation of them for death-eligibility;” see David McCord, Should Commission of a Contemporaneous Arson, Burglary, Kidnapping, Rape, or Robbery be Sufficient to Make a Murderer Eligible for a Death Sentence? – An Empirical and Normative Analysis, 49 SANTA CLARA L. REV. 1, 2-3 (2009).


52. See, e.g., McKoy v. North Carolina, 494 U.S. 433, 443 (1990) ("[I]t is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant’s
Yet, this final deserts assessment is highly subjective; there are no standards that
guide the jury to a verdict. 53

If an offender receives a death sentence – which happens in Georgia to only
about two percent of those arrested for murder 54 – he may still be reprieved for
reasons that have nothing to do with his deserts. Appeals may result in a reversal
of his conviction or death sentence based on errors that occurred in the trials. 55
As a result, the case may be returned to the trial level, and the many
prosecutorial and jury decisions would have to be repeated for him to again
receive a death sentence. Along the way, the defendant might again gain a
repite on non-desert grounds.

This kind of system focuses on ensuring deserved death sentences rather
than on ensuring deserved reprieves. Consistency of outcomes among all
potential murder defendants or even among convicted murderers is not a
plausible expectation. Nothing about such a system tends to provide a
meaningful basis for distinguishing cases resulting in death sentences from those
involving reprieves. Still, if all or virtually all death-sentenced persons deserve
that punishment, the system satisfies the deserts limitation.

III. THE STATISTICAL STUDIES OF RACIAL INFLUENCES IN THE SELECTION
PROCESS

Given that death-selection systems provide the opportunity for many highly
discretionary decisions along the path to a death verdict, the biases of the
decision-makers would seem likely sometimes to influence their decisions. 56
The presence of these influences does not necessarily refute that those who

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53. See Zant, 462 U.S. at 874 (noting that “the finding of an aggravating circumstance does
not play any role in guiding the sentencing body in the exercise of its discretion, apart from its
function of narrowing the class of persons convicted of murder who are eligible for the death
penalty”).

54. See John Blume, Theodore Eisenberg & Martin T. Wells, Explaining Death Row’s
that the death sentence rate among murder arrestees in Georgia from 1977-99 was 0.022 (243 death
sentences out of 10,912 murder arrests)).

55. See, e.g., James S. Liebman, Jeffrey Fagan, Valerie West & Jonathan Lloyd, Capital
that reviewing courts had reversed more than 75% of all death sentences imposed in Georgia from
1973 through 1995).

When the Supreme Court first reviewed the post-Furman Georgia statute in Gregg v. Georgia,
428 U.S. 153 (1976) (plurality opinion), the plurality noted that the Georgia statute called for the
Georgia Supreme Court to conduct an appellate review to ensure that a death sentence did not
appear disproportionate to the sentences imposed in similar cases. See id. at 198. However, the
plurality could not reasonably have placed significant reliance on this feature of the system to
ensure consistency. See Howe, Furman’s Mythical Mandate, supra note 9, at 448 n.59.

56. See LINDA E. CARTER, ELLEN S. KREITZBERG & SCOTT W. HOWE, UNDERSTANDING CAPITAL
PUNISHMENT LAW 281 (2d ed. 2008).
receive death sentences deserve them. Nonetheless, in a society in which racial biases often operate, one would expect racial biases occasionally to influence capital selection. 57

Many published, statistical studies have reached conclusions consistent with this intuition. A few were conducted in the pre-Furman era, 58 but the vast majority address post-Furman sentencing schemes. 59 The studies vary greatly in their foci, in their thoroughness and in their conclusions. Nonetheless, a large proportion of even the post-Furman studies have found a substantial risk that some racial bias affects one or more stages of the capital selection process in certain jurisdictions. 60 The studies have tended to indicate that unconscious discrimination against black capital defendants generally is far less prevalent than in the pre-Furman era. 61 At the same time, a significant number have found a risk of unconscious discrimination against those defendants who kill white victims and, especially within that group, some studies have also found a risk of unconscious discrimination against black defendants. 62

The most famous of the studies focused on the operation of Georgia’s system in the 1970s and gave rise to the litigation that produced the Supreme Court decision in McCleskey. 63 A research team led by Professor David Baldus of the University of Iowa College of Law tried to determine the influence of racial and other illegitimate factors on the death-selection process in Georgia, from indictment through sentencing verdict. 64 For all suspects charged with murder throughout the state between 1973 and 1979, the researchers discovered the following death-sentencing rates in four categories of race-of-defendant and race-of-victim combinations:

57. See id. at 14 (“[O]pponents cite studies that show defendants are more likely to receive the death penalty if the victim is white.”).
59. See, e.g., Howe, The Futile Quest, supra note 9, at 2106-19 (discussing post-Furman statistical studies).
60. See Howe, The Futile Quest, supra note 9, at 2120 (discussing such studies).
61. See Howe, The Futile Quest, supra note 9, at 2120.
62. See Howe, The Futile Quest, supra note 9, at 2120; Ronald J. Tabak, Is Racism Irrelevant? Or Should the Fairness in Death Sentencing Act Be Enacted to Substantially Diminish Racial Discrimination in Capital Sentencing?, 18 N.Y.U. REV. L. & SOC. CHANGE 777, 778 (1990-91) (“[i]n state after state, a defendant is far more likely to receive the death penalty for a particular capital murder if his victim is white than if his victim is black.”) (footnote omitted).
63. See BALDUS STUDY, supra note 2, at 3 (noting that the study provided the basis for the McCleskey v. Kemp, 481 U.S. 279 (1987) litigation in the Supreme Court over the claim of racial bias).
64. See BALDUS STUDY, supra note 2, at 45 (“[T]he primary emphasis … was on the extent to which racial and other illegitimate or suspect case characteristics influenced the flow of cases from the point of indictment up to and including the penalty-trial death-sentencing decision.”).
Race of Defendant & Victim | Death Sentencing Rate  
--- | ---  
1. black defendant/white victim | .21 (50/233)  
2. white defendant/white victim | .08 (58/748)  
3. black defendant/black victim | .01 (18/1443)  
4. white defendant/black victim | .03 (2/60)  
TOTAL | .05 (128/2488)  

These figures might hint at the influence of racial bias, but they do not prove it. They reveal that defendants much more often received the death penalty in white-victim cases than in black-victim cases. They also show that, within the white-victim cases, black defendants received the death penalty much more often than white defendants. We might suspect the influence of racial bias based on the country’s long history of racial bias by whites in favor of whites and against blacks. Still, one might posit that legitimate factors could coincidentally correlate with the racial factors and thereby explain the disparities on non-racial grounds. To investigate that possibility, the researchers searched for any such factors.

The researchers did not find latent factors that would explain the racial disparities. They investigated 230 variables for each case and defendant, but ultimately focused on a core model of thirty-nine variables. Employing cross-tabulations and multiple-regression analysis, the researchers determined that no combination of legitimate variables could come close to explaining the results without the consideration of race. Criticisms of their methodologies caused the federal district court to reject the study as flawed, but the Supreme Court assumed that the study was statistically valid.

The Baldus researchers ultimately found that “the race of the victim [was] a potent influence in the system.” Among all murder cases, they did not find that

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65. See BALDUS STUDY, supra note 2, at 315 tbl. 50.
67. See BALDUS STUDY, supra note 2, at 46, 316-17.
68. See BALDUS STUDY, supra note 2, at 318 (“[R]ace of the victim has an importance of the same order of magnitude as ‘multiple stabbing,’ ‘serious prior record,’ and ‘armed robbery involved,’ and its effect is larger than several variables of well-recognized importance, such as the victim having been a stranger.”).
69. See BALDUS STUDY, supra note 2, at 317-18.
70. See BALDUS STUDY, supra note 2, at 316-17.
73. BALDUS STUDY, supra note 2, at 185.
black defendants faced greater odds of receiving a death sentence because of their race. However, they concluded that defendants who murdered a white person rather than a black person faced much greater odds of receiving a death sentence. Also, among the white-victim cases, black defendants faced greater odds of receiving a death sentence because of their race. The risk of racial influences operated mostly in cases that the authors classified in the mid-range of defendant culpability. The researchers also concluded that the race effects arose not only from the actions of prosecutors but from the decisions of capital-sentencing jurors.

Many other multiple-regression studies have reached similar conclusions, although they often account for a relatively small number of non-racial factors. Social scientists have conducted these studies in a variety of death-penalty jurisdictions and over a period that includes the current decade. Several reviews of the studies have concluded that racial effects appear in at least some parts of the selection process in many jurisdictions. For example, the U.S. General Accounting Office reviewed twenty-eight studies that were published from 1972 to 1990. Likewise, Baldus and Woodworth reviewed eighteen studies that were published from 1990 to 2003. Both reviews concluded that, while a risk of race-of-defendant bias finds support in only a small minority of the studies, evidence of race-of-victim bias shows up in most of them.

Generalizations about the studies, however, should not mask that, assuming that we accept their methodological validity, their foci and conclusions vary greatly. The findings regarding racial effects are not unanimous. The studies also do not cover some of the most important death-penalty jurisdictions, and attitudes about race have progressed and hopefully will continue to progress.

74. See BALDUS STUDY, supra note 2, at 328.
75. See BALDUS STUDY, supra note 2, at 328.
76. See BALDUS STUDY, supra note 2, at 328.
77. See BALDUS STUDY, supra note 2, at 145.
78. See, e.g., BALDUS STUDY, supra note 2, at 187 tbl. 44.
79. See, e.g., Howe, The Futile Quest, supra note 9, at 2110-19 (summarizing the more prominent studies).
80. See Howe, The Futile Quest, supra note 9, at 2110-19.
83. See U.S. GEN. ACCT. OFF., supra note 81, at 5-6; Baldus & Woodworth, supra note 82, at 203-13.
84. See David C. Baldus, George Woodworth, Catherine M. Grosso & Aaron M. Christ, Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999), 81 Neb. L. Rev. 486, 500 (2002) (noting that the race disparities “are highly sensitive to locality and vary significantly”).
85. See Scott Phillips, Racial Disparities in the Capital of Capital Punishment, 45 Hous. L. Rev. 807, 808-09 (2008) (noting that good statistical studies have not covered some of the most active death penalty states).
Also, the studies do not all focus on the same parts of the selection process, with some centered on prosecutorial decisions or the overall process, and only a fraction separating out the decisions of sentencers.\textsuperscript{86} Many commentators believe that the studies support a generalized conclusion that racial bias sometimes influences some parts of the capital selection process in some jurisdictions.\textsuperscript{87} The relevant issue under the proportionality view of the Eighth Amendment, however, is whether they reveal that some offenders receive death sentences that they do not deserve. We now turn to that question.

IV. THE EIGHTH AMENDMENT SIGNIFICANCE OF THE STUDIES

Racial-bias studies can have major policy implications, but if the prohibition on cruel and unusual punishments is about proportionality and that idea does not merge with consistency, even excellent studies can only hint that some death sentences infringe the Eighth Amendment. My goal in this part is to explain why statistical studies have limitations as proof that some offenders receive undeserved death sentences,\textsuperscript{88} but why they can suggest that outcome.\textsuperscript{89} In the end, we must rely heavily on our intuitions to conclude that death sentences frequently amount to excessive retribution.\textsuperscript{90}

A. Limitations of Statistical Studies as Proof of Disproportionality

As proof of disproportionality in the use of the death penalty, statistical studies actually pose several problems. I will discuss three of them here. I do not address claims that a study can fail sufficiently to investigate case variables that might legitimately explain racial effects.\textsuperscript{91} This concern bears on whether a


\textsuperscript{87} I have previously asserted as much. See Howe, The Futile Quest, supra note 9, at 2120.

\textsuperscript{88} See infra Part IV.A.

\textsuperscript{89} See infra Part IV.B.

\textsuperscript{90} See infra Part IV.B.

\textsuperscript{91} For an article discussing factors other than the race of the defendant or victim that can explain racial effects in sentences, see Kenneth E. Fernandez & Timothy Bowman, Race, Political
study can even tend to show that racial bias operates within a capital-selection system. I acknowledge at the outset the need for reasonably well-controlled studies. I also do not address claims that a statewide study can fail to analyze data at an intrastate level and, thus, either falsely imply or else mask the existence and degree of racial effects that are occurring within the state. I acknowledge as well the benefits of analysis at both state and intrastate levels.

Assuming a reasonably well-controlled study with intrastate analysis, an initial challenge in establishing disproportionality stems from the benefits of concentrating separately on several phases of the selection process. Studies lose some probative value if they do not focus separately on the sentencing trial, which is where the deserts limitation is enforced. If a sentencing jury has correctly concluded that a guilty and convicted capital murderer deserves the death penalty, his deserts do not change merely because unconscious racial bias

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92. See Howe, The Futile Quest, supra note 9, at 2120 (“[I]n about one-fourth of that group [of studies], white defendants rather than black defendants were disfavored, at least on a state-wide basis.”).

93. For example, statewide findings can mask latent variables related to political pressures and racial or socio-economic differences among geographically diverse decision-makers. If counties with largely white populations, as compared with counties with largely black populations, produce a larger proportion of death sentences from among the number of death-eligible defendants, the overall state figures may skew towards more death sentences in white-victim cases. Even after logistic regression analysis, the lack of legitimate distinctions among the cases themselves may appear to suggest unconscious discrimination based on the race of the victim. The reality may be, however, that the disparities have another explanation. They may only reflect that prosecutors in largely white counties feel more political pressure to pursue death sentences than prosecutors in largely black counties. See BALDUS STUDY, supra note 2, at 173-78. The disparities may also reflect that juries from largely white counties are more likely to impose death sentences than juries from largely black counties. Such disparities based on the differing views of prosecutors and juries in racially distinct counties may themselves give ground for concern about the use of the death penalty. However, they would not reflect discrimination based on the race of the victim. See Kent Scheidegger, Peel Off Hype, Examine Data, USA Today, Apr. 29, 2003, at 14A (contending that such intrastate variations explain statewide findings of race-of-victim disparities in Maryland study).

In the Baldus study in Georgia, however, the researchers examined the data on a localized level and found no basis to believe the racial effects they identified resulted from these effects. See BALDUS STUDY, supra note 2, at 178.

These same sorts of effects may also operate to obscure racial bias in statewide studies, although such bias would stand out in more localized studies. Statewide data, for example, may mask harsh treatment of black defendants in rural regions that is offset by lenient treatment of black defendants in one or more urban areas. See David C. Baldus & George Woodworth, Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception, 53 DePaul L. Rev. 1411, 1420 (2004).

One of the problems with highly localized studies can be an insufficient number of cases or death verdicts to produce valid statistical conclusions. See, e.g., BALDUS STUDY, supra note 2, at 178 (noting the inability for this reason to separately analyze cases from each judicial circuit in Georgia).

94. See supra Part II.
motivated the prosecutor to pursue the death penalty. The prosecutor’s
motivation for pursuing the death sentence would not, without more, render the
jury’s determination unreliable. This means that the statistical studies that could
best show disproportionality would focus on whether race has influenced the
decision-makers at the sentencing trial. Many of the existing studies do not
have this focus.

Another potential problem, of course, is that a study may not show
significant racial effects at the sentencing stage. Among existing studies that
have focused separately on capital-sentencing juries, some have not found
significant indications that juries act out of bias against black defendants or
against killers of white victims. For example, Professor Scott Phillips found no
such evidence in a recent study regarding capital selection in Harris County,
Texas, which encompasses Houston. This study is especially important,
because Harris County is the source of more executions than any other county in
the nation in the post-Furman era. If Harris County were a state, it would rank
second in executions, trailing only its home state of Texas. Also, Phillips
examined a large number of cases over a long period --all 504 that involved
defendants who were indicted for capital murder in Harris County from 1992 to
1999. He also gathered extensive data concerning the victims, defendants and
crimes, relying in part on newspaper accounts. Using logistic regression

95. If the prosecutor acts with a conscious purpose to discriminate based on race, those actions
will violate equal protection principles. See supra note 5.

96. At the same time, studies that focus only on the sentencing stage are suspect because of
their potential for “sample selection bias.” Racial discrimination by decision makers earlier in the
selection process can tend to mask the influence of race on the sentencer. See Samuel R. Gross &
Robert Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and
Homicide Victimization, 37 STAN. L. REV. 27, 46-48 (1984); Justin D. Levinson, Race, Death, and

97. Could a statewide, statistical study that reveals pronounced racial effects in the decisions of
prosecutors but not in the decisions of sentencing juries justify a disproportionality conclusion?
One could say that the disproportionality idea carries a limited comparative aspect even if
proportionality does not merge with consistency. The explanation could perhaps be that, at some
point, the expressive function of punishment should assume overriding importance in cases of
racial disparity. See Lee, supra note 6, at 712-13. On this view, the tipping point for a finding of
proportionality could remain much higher than a mere finding of inconsistency. Nonetheless,
this theory does not have a firm foundation in the Supreme Court’s existing capital-sentencing
holdings.

98. See, e.g., Stephen P. Klein & John E. Rolph, Relationship of Offender and Victim Race to

99. See Phillips, supra note 85.
100. See Phillips, supra note 85, at 809.
101. See Phillips, supra note 85, at 809.
102. See Phillips, supra note 85, at 817.
103. One commentator has noted that, because media accounts could mischaracterize facts in
racially biased ways, heavy reliance on media sources for information about cases could
unintentionally mask disproportionate treatment based on race. See Levinson, supra note 96, at
632-43.
analysis, he also analyzed the actions both of the Harris County District Attorney’s Office and of the capital sentencing juries.104

While Phillips found evidence that black defendants and killers of white victims were disfavored in the overall selection process,105 the evidence was not similar at all of the selection stages.106 The concern centered on the Harris County District Attorney’s Office.107 That office was significantly more likely to pursue death sentences in black-defendant and white-victim cases.108 Phillips found no indication that capital-sentencing juries in Harris County favored white defendants or killers of black victims.109 To the contrary, he found a slight racial effect favoring black defendants and killers of white victims.110 Phillips’s findings arguably support equal protection challenges based on the actions of the Harris County District Attorney’s Office, even after McCleskey.111 However, the study provides little basis to conclude that juries in Harris County systematically rendered flawed desert findings regarding those who received death sentences.

Some statistical researchers, nonetheless, have obtained results tending to show that race sometimes influences capital-sentencing juries.112 The Baldus study in Georgia that was the subject of the litigation in McCleskey is one example, and a study by Keil and Vito in Kentucky is another.113 Likewise, in the late 1990s, Professor Baldus led an investigation that concluded that significant race-of-defendant and race-of-victim effects appeared in a sample of capital cases from Philadelphia.114 This study examined all phases of the capital selection process for a group of 425 death-eligible defendants who were prosecuted from 1983 through 1993.115 After gathering detailed information about the cases, the researchers analyzed the data in multiple ways, including

104. See Phillips, supra note 85, at 816-17, 837.
106. See Phillips, supra note 85, at 830.
107. See Phillips, supra note 85, at 830, 834.
108. Phillips incorporated conclusions regarding Hispanic defendants and victims, but he concluded that they were treated no differently than whites by both the District Attorney’s Office and capital sentencing juries. See Phillips, supra note 85, at 830, 834.
109. See Phillips, supra note 85, at 834.
110. See Phillips, supra note 85, at 837.
111. See John H. Blume, Theodore Eisenberg & Sheri Lynn Johnson, Post-McCleskey Racial Discrimination Claims in Capital Cases, 83 CORNELL L. REV. 1771, 1805 (1998) (explaining why county-level statistical studies of prosecutorial decisions are distinguishable from the statewide study found inadequate to support an equal protection claim in McCleskey).
112. Professor Baldus, for example, was appointed by the New Jersey Supreme Court in 1992 as Special Master to conduct a continuing review of capital selection in the state. In 1998, he concluded that cases analyzed from 1989 forward showed both unexplained race-of-victim disparity in prosecutorial decision-making and unexplained and pronounced race-of-defendant disparities in the decision-making by penalty-phase juries. See Baldus et al., supra note 86, at 1664.
113. See supra note 78 and accompanying text; Keil & Vito, supra note 86, at 203 (noting that, at the sentencing stage, in Kentucky, blacks who killed whites faced a higher risk of receiving a death sentence than blacks who killed blacks).
114. See Baldus et al., supra note 86, at 1657-1710.
115. See Baldus et al., supra note 86, at 1667-69.
logistic regression analysis. They concluded that the study indicated bias in the overall process against black defendants and killers of non-black victims. They also concluded that the principal source of the problem was capital-sentencing juries rather than the prosecutor.

A final obstacle in proving disproportionality with a statistical study, however, stems from the difficulty of parsing the bases for decision-makers’ actions. This problem confronts even studies that focus on the sentencing trial and that find racial effects in jury decision-making. The problem is that even these studies cannot distinguish between two kinds of unconscious discrimination at the sentencing trial, one not prohibited under the disproportionality view of the Eighth Amendment and the other prohibited. Evidence of racial bias by sentencing juries does not necessarily prove that they regularly condemn capital offenders to death who do not deserve it. The discrimination could merely reflect that some juries more readily extend mercy or other non-desert based leniency to white defendants than to black defendants and to killers of blacks than to killers of whites. As the McCleskey court implicitly acknowledged in finding the Baldus study inadequate, the Eighth Amendment does not prescribe non-deserved reprieves. Moreover, if the racial discrimination is all about non-desert-based leniency, sentencing jurors are not condemning anyone to death who does not deserve it. There is no violation of the prohibition in the Eighth Amendment.

B. Suggestive Power of the Studies Regarding Disproportionality

While statistical studies cannot offer iron-clad proof that death sentences often rest on flawed findings of desert, they can add to our reasonable suspicions that these tainted findings regularly occur. First, we should consider the studies not in a vacuum but in light of historical and contemporary evidence of racial prejudice. There can be no doubt that “race unfortunately still matters” in

116. See Baldus et al., supra note 86, at 1684.
117. See Baldus et al., supra note 86, at 1676, 1678.
118. See Baldus et al., supra note 86, at 1715.
119. See supra note 93.
120. Gregg v. Georgia, 428 U.S. 153, 173 (1976) (“[T]he inquiry into ‘excessiveness’ has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime.”) (internal citations omitted).
121. See McCleskey v. Kemp, 481 U.S. 279, 306-07 (1987) (“[A]bsent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, [McCleskey] cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did not receive the death penalty.”) (emphasis in original).
American society. Despite much progress since the 1960s, racial bias, at least in unconscious form, still seems prevalent.

Likewise, we cannot ignore the "absolute discretion" conferred on sentencers at the verdict stage of the penalty trial, even in post-Furman systems. The need to assess deserts individually appears to be the most plausible Eighth Amendment explanation for the Court to require an individualized sentencing inquiry in all capital cases. However, there is no consensus – certainly not one identifiable by the Court – about how sentencers should assess deserts on an individualized basis, which is perhaps why the Court has not required that jurors receive any instruction that truly directs them in how to make that judgment. Because their ultimate assessment is so subjective, we have good reason to suspect that their unconscious biases will sometimes influence their conclusions. Thus, statistical studies only add to the inferences that we already can draw from our existing knowledge of the risk that some of their decisions will reflect racial bias.

In this light, even studies that find a risk that race influences the overall selection process or prosecutorial decisions have relevance to the Eighth Amendment question. Studies that find race effects in an overall selection process raise misgivings that racial bias affects the sentencing stage. Studies that focus only on prosecutors and find a risk of racial bias also raise reasonable


123. See, e.g., Steve McGonigle et al., A Process of Juror Elimination: Dallas Prosecutors Say They Don’t Discriminate, But Analysis Shows They Are More Likely to Reject Black Jurors, DALLAS MORNING NEWS, Aug. 21, 2005, at 1A (finding, based on sophisticated study that included logistic regression analysis, that Dallas prosecutors continued to frequently use peremptory strikes to exclude black prospective jurors because of their race).


125. Jurors may not always reach a deserts finding as a prerequisite to a death sentence. The Supreme Court has not required that sentencing juries receive information about the substantive question they ultimately are to answer in deciding whether to impose a death sentence. Consequently, juries generally remain uninformed about whether the central issue concerns offender deserts or a utilitarian question, such as whether a death sentence will deter other potential offenders or at best incapacitate the defendant from committing acts of future violence. Likewise, prosecutors are not prohibited at the sentencing trial from presenting evidence focused on utilitarian issues, such as predictions of the offender’s future dangerousness, or from urging utilitarian arguments for a death sentence, such as the need to deter future offenders. See Howe, The Failed Case, supra note 9, at 834.

126. See Howe, The Futile Quest, supra note 9, at 2141-43. However, for a broader view of the function of the hearing, grounded on virtue ethics, that has much to commend and that perhaps could find acceptance as the Eighth Amendment explanation, see Huijgens, supra note 20, at 1254-57.

127. See supra notes 51-53 and accompanying text.

128. See, e.g., Turner v. Murray, 476 U.S. 28, 35 (1986) (“Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected.”).

129. See infra note 131.
If law-trained prosecutors often cannot put aside their racial prejudices, we have reason to doubt that sentencing juries will almost always do so.

When we see studies that indicate that race sometimes influences penalty-phase juries, we are also hard-pressed to conclude that the bias is all about mercy. The more intuitive view is that race influences some deserts decisions to condemn, even if we cannot say which ones or how many. Such studies can give us reason to doubt that all or almost all death sentences are deserved.\textsuperscript{131}

In the end, statistical studies cannot prove indisputably that people systematically receive death sentences that they do not deserve. Statistical studies can only suggest that outcome. A belief that widespread racially-based disproportionality occurs must rest in part on intuition, which some might call “speculation.” The decision of the McCleskey majority that the Baldus study was inadequate to establish an Eighth Amendment violation is at least plausibly explained from this disproportionality perspective.\textsuperscript{132} The decision is not convincingly explained on the view that the Baldus study was statistically valid but failed to establish a serious risk of racially-based decision-making.\textsuperscript{133} Nonetheless, one should not infer that the statistical studies have little influence on the Supreme Court’s Eighth Amendment doctrine on capital punishment. The following Part shows why that inference is inaccurate.

V. THE INFLUENCE OF THE STUDIES ON THE SUPREME COURT

Despite their limitations as proof of disproportionality, the statistical studies on race in capital selection have influenced the Supreme Court. After Furman, and even after McCleskey, concerns about racial bias have sometimes played an animating, if unspoken, role in the Court’s effort to manage the death penalty.\textsuperscript{134} We might wonder whether the concern about racial bias has largely played itself out. Attitudes about race have advanced and may continue to advance, resulting in progressively more limited racial effects in capital selection.\textsuperscript{135} However, one

\textsuperscript{130} See infra note 131.

\textsuperscript{131} Regarding studies that identify race effects in prosecutorial decision-making but not in the actions of penalty-phase jurors, we should also be wary of concluding an absence of disproportionality, particularly if the study does not cover many variables in a highly sophisticated way. Racial discrimination by decision makers earlier in the selection process complicates the determinations whether capital sentencers have acted based on race. Bias in the selection of the group subject to sentence consideration can easily tend to mask the influence of race on the sentence. See, e.g., Gross & Mauro, supra note 96, at 46-48. For example, if prosecutors, based purely on racial bias, charge certain capital defendants with more contemporaneous felonies, the difference in the number of charged contemporaneous felonies could appear to explain on non-racial grounds the actions of sentencing juries in more frequently sentencing members of that group to death.

\textsuperscript{132} See McCleskey v. Kemp, 481 U.S. 279 (1986).

\textsuperscript{133} See id.

\textsuperscript{134} See infra Part V.A.

\textsuperscript{135} See infra Part V.A.
can reasonably doubt that the distorting effects will disappear soon. Moreover, I believe that there is a plausible scenario under which a future Supreme Court would be ready to limit the use of the death penalty to a small category of truly extraordinary crimes. If that happens, the many statistical studies that have suggested the existence of unconscious racial discrimination certainly will have contributed to the outcome.

A. The Past

Concern about racial prejudice has played a central role in the Court’s effort to regulate the death penalty under the Eighth Amendment. Anxiety over racial bias helped spur the decision to strike down the death sentences in Furman. The Furman Justices were well aware of earlier statistical studies revealing pronounced racial disparities in capital selection. The brief per curiam opinion in Furman did not address the claims of racial discrimination that the petitioners had raised. However, among the five concurring Justices—who each wrote a separate opinion in which no other Justice joined—Marshall and Douglas referred explicitly to the problem of racial discrimination, and others hinted that the standardless sentencing systems under review presented a dangerous opportunity for racial discrimination. Indeed, many commentators still assert that the decision was about inequality. I believe the correct view, in light of the Court’s subsequent decisions, is that Furman was about disproportionality. Still, Furman was about disproportionality resulting in

136. See, e.g., Graham v. Collins, 506 U.S. 461, 479 (1993) (Thomas, J., concurring) (“Furman v. Georgia was decided in an atmosphere suffused with concern about race bias in the administration of the death penalty . . . .”); Robert A. Burt, Disorder in the Court: The Death Penalty and the Constitution, 85 Mich. L. Rev. 1741, 1795 (1987) (“From its very beginning, the charge of racism in the administration of the death penalty was often the text and always the subtext of the abolitionist litigative campaign.”).

137. Only four years earlier, in Maxwell v. Bishop, 393 U.S. 997 (1968) (granting certiorari limited to questions two and three), the Justices had confronted, but then avoided, a claim supported by a major study showing racial bias in the use of the death penalty in rape cases. See also Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968).


139. See id. at 364 (Marshall, J., concurring) (“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.”); id. at 257 (Douglas, J., concurring) (asserting that capital punishment as then administered was “pregnant with discrimination” against minorities and the underprivileged).

140. See, e.g., id. at 310 (Stewart, J., concurring) (while concluding that “discrimination has not been proved,” agreeing that “[m]any concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race”); id. at 295 (Brennan, J., concurring) (“If our procedures are not constructed to guard against the totally capricious selection of criminals for the punishment of death.”).

141. See Howe, Furman’s Mythical Mandate, supra note 9, at 438-39 (noting some of the commentary).

142. The McCleskey majority later viewed Furman and its progeny in this fashion, even though it rejected the Baldus study as adequate proof of racially-based disproportionality. See McCleskey
part from racial bias, although also from poverty and the human frailties of those charged with administering capital selection.\textsuperscript{143} The concern that racial bias systematically tainted decisions to impose death in capital cases did not rest on iron-clad, empirical proof,\textsuperscript{144} but on a dose of intuition, based on experience and knowledge of history, combined with fragmentary statistical evidence, particularly strong in rape cases, that suggested systematic poisoning.\textsuperscript{145}

Concerns that underlay Furman also continued to influence the Court to manage the use of the death penalty after Furman. The concurring Justices in Furman had hoped that the decision would cause all states to abandon the capital sanction.\textsuperscript{146} When the gamble failed,\textsuperscript{147} the Court faced a mess in determining how to address the wave of new death-penalty statutes – many of them calling for mandatory death penalties upon conviction – that state legislatures had passed.\textsuperscript{148} The Court was unwilling to directly command the abolition of the death penalty but was also unwilling to revert to its pre-Furman position of no regulation.\textsuperscript{149} The latter course effectively would have endorsed the Draconian mandatory statutes that states had promulgated only in response to Furman.\textsuperscript{150} The compromise reached in 1976 was an imperfect effort to promote proportional death sentences. A fractured Court voted to uphold statutes from Georgia, Florida and Texas that allowed the defendant to make a separate sentencing presentation and plea for his life, but to strike down mandatory death penalties from North Carolina and Louisiana.\textsuperscript{151} These decisions could not be

\textsuperscript{v. Kemp, 481 U.S. 279, 312 (1987) (“At most, the Baldus study indicates a discrepancy that appears to correlate with race.””). The majority described Furman as grounded on a conclusion that the death sentences at issue were “excessive” and not “proportionate to the crime.” Id. at 301. See also Janet C. Hoeffel, Risking the Eighth Amendment: Arbitrariness, Juries, and Discretion in Capital Cases, 46 B.C. L. Rev. 771, 787 (2005) (contending that the concurring Justices in Furman were more concerned about “arbitrariness in an individual case” than with “arbitrariness between cases” and, thus, “consistency was not, and has not been, the Court’s end goal”) (emphasis in original)).

\textsuperscript{143. See, e.g., Furman, 408 U.S. at 364-67 (Marshall, J., concurring).

\textsuperscript{144. Justice Stewart noted, for example, that a pre-Furman study sponsored by the Stanford Law Review had found no substantial evidence of racial bias by capital-sentencing juries in California. See id. at 310 (Stewart, J., concurring) (citing Note, A Study of the California Penalty Jury in First-Degree-Murder Cases, 21 STAN. L. Rev. 1297 (1969)).

\textsuperscript{145. See Wolfgang & Riedel, supra note 58, at 123-33.

\textsuperscript{146. See, e.g., JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 413-14 (1994).

\textsuperscript{147. Within four years, thirty-five states had passed new death penalty statutes, and nearly 400 persons had received death sentences under them. See id. at 414-16.

\textsuperscript{148. See id. at 422-30.

\textsuperscript{149. See id.

\textsuperscript{150. See id.

reconciled convincingly with a characterization of Furman as a mandate for consistency in capital selection. However, they could easily be reconciled with a construction of Furman as focused on disproportionality – a disproportionality caused in part by racial bias. The decisions appeared to ensure that each capital offender could try to persuade the sentencer with mitigating evidence and argument that he did not deserve the death sanction. This guarantee at least might lead to more accurate desert assessments than the truncated capital sentencing inquiry – generally in the context of a unitary trial – that prevailed in the pre-Furman era. Hence, the concern about racial bias that underlay Furman also carried forward to help induce the first of two central requirements in modern capital-sentencing law under the Eighth Amendment: individualized capital sentencing.

Since 1976, the Court has also developed a second important doctrine on capital punishment – concerning categorical disproportionality – which also seemed to stem in part from concerns about racial bias. The ground-breaking case was Coker v. Georgia, in which the Court outlawed the death penalty as categorically disproportional for the rape of an adult victim. The starkest racial disparities in the use of capital punishment in the pre-Furman era had

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152. See Howe, Furman’s Mythical Mandate, supra note 9, at 443-50.
153. See Woodson, 428 U.S. at 304 (invalidating mandatory death penalty upon conviction because it precluded sentencer from considering “the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind”).
154. Once we know not only the kind of offense a person has committed, but the circumstances in which it was performed, whether he did it deliberately, the kind of pressures on him when he did it, his whole psychological “set,” and a host of other factors, we have much more data for deciding what he deserves than when we know only the type of crime he committed and then attempt to correlate the gravity of that type of crime with the gravity of the punishment. John Hospers, Retribution: The Ethics of Punishment, in ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 181, 190 (Randy E. Barnett & John Hagel III eds., 1977) (emphasis in original).
155. In the pre-Furman era, most death-penalty states employed unitary capital trials, in which a jury resolved the questions of guilt and sentence after a single evidentiary proceeding, and, even in states that had begun to employ bifurcated hearings, the breadth of evidence allowed on the sentencing question was often quite limited. See Scott W. Howe, Reassessing the Individualization Mandate in Capital Sentencing: Darrow’s Defense of Leopold and Loeb, 79 IOWA L. REV. 989, 1061-63 (1994).
157. See id. (describing “the more recent proliferation of categorical exemptions” as the second of the two profound changes caused by the Justices).
The racial-bias studies have also affected the Court’s rulings on jury selection. Approximately one year after receiving McCleskey’s certiorari petition setting forth the conclusions of the Baldus study and two months before granting it, the Court decided Turner v. Murray and Batson v. Kentucky. Both decisions overruled well-settled precedent. Turner held that a capital defendant charged with an interracial murder can inform potential jurors of the race of the victim and can question them about racial bias. Batson limited the ability of prosecutors in cases involving minority defendants to use peremptory strikes to eliminate prospective jurors of the defendant’s race. The Court did not mention the Baldus study in its opinions in these cases. However, the

160. See id. at 193.
161. See Wolfgang & Riedel, supra note 58, at 126-33.
162. See Johnson, supra note 159, at 195.
163. See Johnson, supra note 159, at 195-96.
164. See Johnson, supra note 159, at 193-96.
timing of the decisions in relation to the presentation of the study to the Justices could hardly have been coincidence.\footnote{172}

The concern about racial bias that helped explain Furman and Coker is also not easily divorced from the Court’s more recent confinement of the death penalty on disproportionality grounds. Since 2002, the Court has issued three disproportionality rulings that have exempted large numbers of offenders from capital punishment. In 2002, the Court protected mentally retarded offenders in Atkins v. Virginia.\footnote{173} In 2005, juvenile offenders gained protection in Roper v. Simmons.\footnote{174} In 2008, in Kennedy v. Louisiana, the Court exempted offenders convicted of child rape.\footnote{175} Before these decisions, jurors were permitted to determine the deserts of capital offenders in these groups through individualized assessment at the capital sentencing trial.\footnote{176} The Court’s recent rulings reflect its distrust in the reliability of that endeavor, a distrust that is not entirely separate from the Court’s historical concern over racial bias in capital sentencing.\footnote{177} The Court came closest to acknowledging the connection in Kennedy, in which a five-Justice majority admitted “no confidence” that use of the death penalty to punish child rape could avoid the same problem that confronted the Court in Furman.\footnote{178}

In the end, racial-bias studies have affected the Court in its development of modern Eighth Amendment law governing the use of the death penalty. As Professor Carol Steiker has noted, “[t]he two most profound changes to the practice of capital punishment that have ensued under the Eighth Amendment have been 1) the absolute protection of individualized capital sentencing, and 2) the more recent proliferation of categorical exemptions of groups of offenders and offenses from execution . . . .”\footnote{179} She also has explained that “the intellectual and doctrinal origins of these developments” lie in the Furman decision,\footnote{180} particularly in the notions of “human dignity” and “excessiveness”

\footnote{172. The Court has also recently reversed two death sentences on Batson grounds. See Snyder v. Louisiana, 552 U.S. 472 (2008); Miller-El v. Dretke, 545 U.S. 231 (2005).}
\footnote{173. 536 U.S. 304 (2002).}
\footnote{174. 543 U.S. 551 (2005).}
\footnote{175. 128 S. Ct. 2641 (2008).}
\footnote{176. See supra Part II.}
\footnote{177. No doubt other factors as well, such as the large number of death row inmates exonerated based on DNA evidence beginning in the 1990s, contributed to a revived concern both within American society and within the Court over the use of the death penalty in these cases. See Corinna Barrett Lairn, Deciding Death, 57 Duke L.J. 1, 35-57 (2007).}
\footnote{178. 128 S. Ct. at 2661.}
\footnote{179. See Steiker, supra note 156, at 118. The third doctrine that makes up the Court’s Eighth Amendment regulation of capital selection is the requirement that a state narrow the group of offenders eligible for the death penalty. See, e.g., Godfrey v. Georgia, 446 U.S. 420 (1980). This doctrine has turned out to be of minor significance and lacks a good explanation. However, it is more plausibly explained as an effort to promote proportionality than as an effort to promote consistency. See Howe, The Failed Case, supra note 9, at 833.}
\footnote{180. Steiker, supra note 156, at 118.}
developed in the opinions of Justices Brennan and Marshall.\textsuperscript{181} Both doctrines, as we have seen, appeared to be spurred in part from concerns about disproportionality based on race. One might wish that the Court had more directly and aggressively confronted the problem of racial bias in capital sentencing, starting with Furman. Nonetheless, we should not conclude that the Court has been oblivious.

B. The Future

Abolition of the death penalty is probably not imminent, but the Court may well continue to narrow the application of the penalty to exclude the least culpable murderers from death eligibility. Various observers, including Justice Stevens, have long promoted a narrowing of the application of the sanction to the worst murderers as a way to reduce the influence of racial prejudice in the use of the penalty.\textsuperscript{182} There also remain easily identifiable categories of marginal capital cases for which abolition of the death penalty would promote proportionality and, perhaps, less racial disparity.

Two areas that call for categorical protections immediately come to mind. First, after the Hinckley acquittal,\textsuperscript{183} several states passed legislation to eliminate the insanity defense.\textsuperscript{184} Other states narrowed their test of insanity to a point that was even more restrictive than the traditional M’Naghten test.\textsuperscript{185} Given these changes, a risk arises that some offenders who would qualify as insane in most

\textsuperscript{181} Steiker, supra note 156, at 118-23.

\textsuperscript{182} See McCleskey v. Kemp, 481 U.S. 279, 367 (1987) (Stevens, J., dissenting) (“If Georgia were to narrow the class of death-eligible defendants to [categories of highly aggravated murders], the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated.”); BALDUS STUDY, supra note 2, at 386 (“[B]y declining to endorse such a system, the Supreme Court majority acted so as to preserve the ability of the state to impose death sentences in cases in which death sentences usually do not occur.”).

\textsuperscript{183} John Hinckley was acquitted after wounding President Reagan and several other persons in a failed assassination attempt. The jury acquitted Hinckley because, based on the American Law Institute’s (ALI) instruction on insanity that was required by federal law, there was a reasonable doubt about Hinckley’s sanity during the incident. The ALI standard provides that “A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect, he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.” See PHILLIP E. JOHNSON & MORGAN CLOUD, CRIMINAL LAW: CASES, MATERIALS AND TEXT 327-28, 323-24 (7th ed. 2002).

\textsuperscript{184} These states have abolished the insanity defense but allow a defendant to offer evidence of a mental illness or defect to disprove the existence of the mental state required as an element of the crime. See, e.g., IDAHO CODE § 18-207 (2008); MONT. CODE ANN. § 46-14-102 (2007); UTAH CODE ANN. § 76-2-305(1) (2008).

\textsuperscript{185} The M’Naghten test permits acquittal only when it is proved that, “at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.” M’Naghten’s Case, 8 Eng. Rep. 718 (H.L. 1843).

Many states have narrowed their insanity tests even further than the M’Naghten test by restricting the types of mental defects and illnesses that would make a defendant eligible for the insanity defense. See, e.g., ARIZ. REV. STAT. § 13-502 (2008).
states could suffer both a conviction and a sentence of death. If such a case comes before the Supreme Court, the Justices could easily conclude that an exemption from the death penalty based on disproportionality should apply for offenders who were insane at the time of their crimes under nationally prevailing definitions of insanity.

The Justices could also confine the death penalty to a more restricted category of murders. The Court has done little to protect relatively low-culpability offenders who currently qualify for death eligibility based on the felony-murder doctrine. A small fringe of offenders who are guilty of felony murder only through vicarious-liability doctrines are protected if they did not act recklessly or were not substantially involved in the felony. Yet, many other persons who are guilty of murder and eligible for the death penalty because they committed a contemporaneous felony are of relatively low culpability. Restricting the application of the death penalty to murderers who acted with a premeditated and deliberated intent to kill would help confine the death penalty to a group of the more deserving offenders.

Statistical studies that show racial effects in the decisions of penalty-phase juries in marginal categories might help to support an exemption. For example, cases in which the defendant lacked a premeditated and deliberated intent to kill might involve substantially more race-of-victim discrimination than cases in which the defendant possessed that mental state. If this is so, that kind of evidence could influence the Court, just as statistical studies on racial effects surely influenced the Court in Coker. The Court might not use the study as the principal evidence of disproportionality or even mention it. The evidence also would surely not reflect the virulent discrimination that existed regarding rape in the pre-Furman era. Nonetheless, the evidence could help the Court see the benefits of the categorical protection.

Predicting how far the Court eventually could go in narrowing the use of the death penalty under the Eighth Amendment requires, like predicting judicial abolition, major assumptions about changes in the composition of the Court and continuing change in the states’ use of the sanction. However, the question about narrowing suggests alternative outcomes that the question about total abolition does not. Pursuit of narrowing suggests, for example, that the Court could eventually reject the death penalty as categorically disproportional for

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187. See, e.g., McCord, supra note 50, at 3 (noting that the prevailing model of death eligibility “allows prosecutors to push for the death penalty for many relatively commonplace murders, rather than only for the most depraved murders”).
188. For a more nuanced approach that could work well, if states were willing to pursue it on their own, see McCord, supra note 50, at 44-50.
189. See supra notes 157-65 and accompanying text.
190. See Johnson, supra note 159, at 192-93.
aggravated murder but except a category of egregious crimes against the state and against humanity. Such an outcome would avoid arguments, based on language in the Fifth and Fourteenth Amendments contemplating capital punishment,\(^\text{191}\) that total abolition by the Court is unconstitutional.\(^\text{192}\) Likewise, it would allow the death penalty to carry real meaning in staking out the “worst of the worst” offenders;\(^\text{193}\) the act of Timothy McVeigh would fall in a separate class from a robbery of a liquor store gone awry. Finally, it would still answer in a meaningful way the concern about disproportionality based on race and poverty and the human frailties of those who influence capital selection that underlay Furman.\(^\text{194}\)

CONCLUSION

The influence of unconscious racial bias in capital selection remains a serious concern for the use of the death penalty. Claims brought under the Eighth Amendment can express some of this concern. The prohibition on cruel and unusual punishments forbids disproportional death sentences, and evidence that some death sentences rest on deserts findings poisoned by unconscious racial bias amounts to evidence of disproportionality in the use of capital punishment. Because the “deserts limitation” embodied in the Eighth Amendment is unidirectional, however, this kind of claim cannot address all of the racial bias that affects capital selection. Given also the Supreme Court’s conclusion in McCleskey that equal protection principles apply only to purposeful discrimination, there remains much room for action by legislatures and state courts interpreting state constitutions to promote greater fairness in capital selection.\(^\text{195}\) One might wish that the Supreme Court would have done

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191. The Fifth Amendment provides in pertinent part: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

U.S. CONST. amend. V.

The due process clause in the fourteenth amendment provides: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .” U.S. CONST. amend XIV, § 1.

192. See, e.g., Baze v. Rees, 128 S. Ct. 1520, 1552-53 (2008) (Scalia, J., concurring in the judgment) (rejecting argument by Justice Stevens for abolition by the Court and noting that death penalty is “explicitly sanctioned by the Constitution”).


195. The Kentucky Racial Justice Act represents one of the few legislative efforts to promote such fairness. See KY. REV. STAT. ANN. § 532.300 (West 2009). North Carolina also recently
more under the U.S. Constitution. However, we should not conclude that the Court has been unaffected by concerns about racial bias or that it has taken no meaningful action. Particularly through its decisions finding categorical disproportionality, the Court has protected a significant group of offenders from the capital sanction. Some of these decisions bear a strong connection to concerns about disproportionality caused by racial prejudice.

The Court may well continue to narrow the application of the capital sanction. Evidence of racial bias has served as a symptom for a deeper problem with our capital punishment systems. The deeper problem is the risk of disproportionality caused by a variety of circumstances that conspire to prevent accurate desert assessments of those who receive death sentences. These circumstances include not only the numerous biases of the decision makers regarding defendants and victims but the often poor quality of lawyering and judging and the imperfection of witnesses. The existence of these problems calls for a humility in judging criminals, which, in turn, warrants, if not abolition of the death sanction, at least extraordinary restraint in its application.

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197. Regarding the problem of poor trial counsel in capital cases, see David R. Dow, Bell v. Cone: The Fatal Consequences of Incomplete Failure, in DEATH PENALTY STORIES, 389, 414 (John H. Blume & Jordan M. Steiker eds., 2009) (“If one is looking for actual cases to demonstrate that the very arbitrariness which led the Court in Furman to strike the death penalty down still rampages through the machinery of death, one need not look much further than [the Court’s cases on ineffective assistance of counsel].”).