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THE DEATH PENALTY: CAN IT BE FIXED?

Kenneth Williams†

I. INTRODUCTION

In 1997, the American Bar Association called for a moratorium on the death penalty.1 Since then, calls for a moratorium have been widespread; those urging a moratorium include a current United States Supreme Court Justice,2 a former President of the United States,3 several major newspapers,4 and numerous political5 and religious leaders.6 Calls for a

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1. See James Rodgers, Time Out for Executions, 83 A.B.A. J. 26 (1997). The resolution identified four specific areas of concern: 1) competency of counsel; 2) the system of habeas corpus; 3) racial discrimination; and 4) execution of the mentally retarded and persons under eighteen. Id.


5. See Corzine Urges Death Penalty Delay, N.Y. TIMES, May 15, 2001, at B4 (announcing U.S. Senator Jon Corzine's support for a moratorium); Felix G. Rohatyn, U.S. Leadership Is Compromised by Death Penalty, NEWSDAY, Feb. 21, 2001 (stating that a former U.S. ambassador to France supports a moratorium “while we review the whole issue of capital punishment”); Delay in U.S. Death Sentences Is Urged, CHI. TRIB., June 16, 2001, at 16; Prominent Leaders Urge President Clinton To Halt Federal Executions, at http://www.deathpenaltyinfo.org/newvoices.html (last visited Apr. 4, 2002) (stating that a federal moratorium was urged by Julian Bond, chairman of the National Association for the Advancement of Colored People; Robert Litt, Associate Deputy Attorney General in the Clinton Administration; and thirty-one others).

6. Cardinal Theodore E. McCarrick of Washington indicated support for the death penalty moratorium in Maryland. See Caryle Murphy, McCarrick Objects to Execution Viewing: 'Vengeance Belongs to God,' Cardinal Says, WASH. POST, Apr. 20, 2001, at A4; see also Henry Weinstein, Group Calls for a Moratorium on Federal Executions, L.A. TIMES, Nov. 22, 2000, at A34 (reporting on a letter to former President Clinton urging a
moratorium have come from both conservatives and liberals. The high point in the moratorium movement occurred in February 2000 when Governor George Ryan of Illinois declared an indefinite halt to executions in his state because of serious flaws in the death penalty process. Several states are considering similar action, and the Nebraska legislature voted to halt executions in the state. By the end of 2000, more than twenty-four municipalities passed resolutions asking their states to stop executions.

Some individuals calling for a moratorium are actually abolitionists who hope that instituting a moratorium will be the first step toward abolition, as was the case in many European nations. Others support capital punishment but have called for a moratorium because they are concerned about the manner in which the death penalty is administered.

7. Those supporting a moratorium include religious broadcaster and former Republican presidential candidate Pat Robertson. See Robertson Backs Moratorium, Says Death Penalty Used Unfairly, CHI. TRIB., Apr. 8, 2000, at A12. Concerns about capital punishment have also been expressed by conservative columnist George Will and conservative radio talk show host and Iran-Contra figure Oliver North. See Death Penalty Repeal Ok'd by Lawmakers in New Hampshire, SAN DIEGO UNION-TRIBUNE, May 19, 2000, at A1.


11. The bill was subsequently vetoed by the Nebraska governor. See Robynn Tysver, Moratorium Vetoes Death Penalty Timeout Is Poor Policy, Johanns Says, OMAHA WORLD-HERALD, May 26, 1999, at A1.

12. See Fixing the Death Penalty, supra note 10.

13. For example, the United Kingdom abolished the death penalty in 1973 but carried out its last execution in 1964; France abolished the death penalty in 1981 but carried out its last execution in 1977; Finland abolished the death penalty in 1949 but carried out its last execution in 1944; Greece abolished the death penalty in 1993 but carried out its last execution in 1972; and Belgium did not abolish capital punishment until 1996 but carried out its last execution in 1950. See David Baldus, Reflections on the Use of Capital Punishment in Europe and the United States, Mar. 31, 2001 (handout on file with author).

14. For instance, although Governor George Ryan imposed a moratorium in Illinois pending an investigation by a special commission that was formed to review the death penalty system and to propose recommendations for improvement, he spent his political
These individuals sincerely believe that the death penalty can be “fixed” once executions have been halted and reforms have been implemented. In asking the Texas legislature for a moratorium, a Texas representative illustrated this sentiment by saying: “Let’s fix the whole system once and for all.”

So far, the moratorium movement has been effective. Public opinion polls indicate that a majority of Americans support suspending executions. However, this paper argues that the movement has made a tremendous mistake in expending its political capital on a moratorium. While the movement is likely to succeed in temporarily suspending executions in a number of states and at the federal level, it is unlikely that it will succeed in ensuring that the death penalty is carried out in a fair manner. In fact, proponents have failed to demonstrate how a moratorium will cure the death penalty’s ills. This paper argues that the moratorium movement is likely to have the effect of simply legitimating the death penalty.

This paper begins by identifying the major problems associated with the implementation of capital punishment in the United States. This paper then discusses potential solutions for each problem and provides a critical analysis of each proposed solution. Part III demonstrates that even if every proposed reform were implemented, the death penalty still cannot be “fixed,” primarily because of the intractable problem of racism. Finally, Part IV shows that the death penalty should be limited to war criminals and mass murderers because those are the only situations in which the death penalty can be administered in a manner that is compatible with our legal system’s commitment to fair and equal treatment.

career ardently supporting capital punishment. See Fixing the Death Penalty, supra note 10.
15. See id.
17. See Morin & Deane, supra note 10. A survey showed that fifty-one percent of Americans favored “halting all executions until a commission is established to determine whether the death penalty is being administered fairly.” Id. Support for a moratorium rose to fifty-seven percent when respondents were informed of the Illinois governor’s imposition of a moratorium in his state. Id. A bipartisan survey found that nearly two-thirds of voters polled support suspending the death penalty until its fairness can be assessed. See Mark Stricherz, Survey Finds Support for Moratorium on Executions, Chi. Trib., Sept. 15, 2000, at A13.
II. PROBLEMS

This section identifies the major problems with the administration of the death penalty. It then analyzes proposed solutions and their potential to “fix” the death penalty.

A. Racism

One of the most persistent and difficult problems with the death penalty in the United States is that it has been administered in a racially discriminatory manner. During slavery, “certain crimes committed against whites were punishable by death for black offenders but not for white offenders,” and blacks were “prohibited from testifying in their own defense and from serving on juries.” Even after the abolition of slavery, black defendants have been sentenced to death in numbers disproportionate to their percentage of the population and disproportionate to white defendants. In fact, prior to the abolition of the death penalty for rape, black defendants convicted of raping whites were sentenced to death in vast disproportion to other offender-victim racial combinations. Even today, the death penalty is more likely to be sought and imposed in cases involving white victims.

19. Id.
22. See Bowers et al., supra note 18, at 175 (citing Marvin E. Wolfgang & Marc Riedel, Race, Judicial Discretion, and the Death Penalty, 407 ANNALS 119, 125 (1973), which concluded that “black men accused of raping white women were eighteen times more likely to be sentenced to death than white defendants”).
23. See, e.g., David Baldus et al., Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience, 74 J. CRIM. L. & CRIMINOLOGY 661, 709-10 (1983). Professor David Baldus studied the imposition of the death penalty in Georgia and found that the prosecutor sought the death penalty in seventy percent of cases involving a black defendant and a white victim; fifteen percent of cases involving a black defendant and a black victim; and nineteen percent of cases involving a white defendant and a black victim. Id. Furthermore, Professor Baldus found that, controlling for 230
Moreover, studies have shown that various actors in the death penalty process have engaged in racial discrimination. For example, studies have demonstrated that prosecutors were more likely to seek the death penalty where the defendant was black and the victim was white. In Texas, an audit of criminal trials revealed that, in at least eight capital cases, the prosecution may have presented testimony of an expert witness who cited the convicted defendant’s ethnic background — that is, Hispanic or African-American — as evidence of his future dangerousness. This was a key element in deciding whether to give a defendant the death penalty. In addition, even after the Supreme Court struck down a law excluding blacks from jury service, prosecutors have used peremptory challenges to remove blacks during jury selection in order to maintain all-white juries. There have been studies and direct proof that indicate that racist attitudes of jurors have resulted in the imposition of the death penalty against black defendants. Finally, judges and defense attorneys have made statements on the record indicating their racial biases against black defendants.

non-racial factors, a person accused of murdering a white individual was 4.3 times more likely to be sentenced to death than a person accused of murdering a black individual. Id. See generally McCleskey v. Kemp, 481 U.S. 279, 287 (1987).


25. Id.


27. See id.


29. See Bowers et al., supra note 18, at 176.

30. Id. at 244-66 (providing narrative accounts of how jurors reached their sentencing decisions); see also Nancy J. King, Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions, 92 MICH. L. REV. 63, 75-100 (examining the impact of jury discrimination on jury verdicts); Erwin Chemerinsky, Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act, 35 SANTA CLARA L. REV. 519, 528 (1995) (quoting a memo written by Justice Scalia, in which he acknowledges “that unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable”).


32. See Goodwin v. Balkom, 684 F.2d 794, 805 n.13 (11th Cir. 1982) (recognizing that defense counsel called defendant “a little old nigger boy” during closing argument).
Given these trends, the most daunting challenge in “fixing” the death penalty is to eliminate racial bias in its imposition. However, the United States Supreme Court has refused to do so. In *McCleskey v. Kemp*, the defendant argued that Georgia administered its capital punishment process in a racially discriminatory manner in violation of the Equal Protection Clause. Specifically, the defendant proffered a study that examined over 2000 homicide cases in Georgia and controlled for 230 non-racial factors. The results demonstrated that a person accused of murdering a white victim was 4.3 times more likely to be sentenced to death than a person accused of murdering a black victim. The Supreme Court rejected the defendant’s claim and held that an Equal Protection claim could only be proven by demonstrating that the decision-makers in a particular case had used race as the basis for their decision.

Because evidence of intentional discrimination by the prosecutor, judge, or jury would only be available in the unlikely event of an admission, legal challenges to the death penalty on account of its racist imposition are not likely to succeed. Thus, eliminating racism must be accomplished through legislation. Three specific legislative proposals have either been advanced or adopted as solutions.

1. *The Racial Justice Act*

In 1994, the United States House of Representatives passed the Racial Justice Act (the Act). The Act did not prohibit the death penalty. Rather, it allowed a defendant the use of statistical evidence to show racial bias in the imposition of the death sentence in a particular case. Although it never became law, the Act would have worked as follows:

A defendant challenging a death sentence as racist would be required to prove a pattern of racially discriminatory death sentences in the relevant jurisdiction. The Act requires the showing of bias in the particular sentence being challenged. It would not be enough to show that blacks get the death penalty significantly more frequently than whites for the same type of

34. *Id.* at 286.
35. *Id.* at 286-87.
36. *Id.* at 287.
37. *Id.* at 292-93.
39. *Id.*
offense. Any statistical analysis would need to compare cases similar in level of aggravation to the case being challenged.

The Act provides that the court must independently evaluate the validity of the evidence presented to establish the inference of racial discrimination and must determine if it is sufficient to provide a basis for the inference. The defendant must make a statistically significant showing of discrimination that takes into account the relevant non-racial aggravating and mitigating factors. Then, the court must have concluded that the evidence is accurate and valid and supports an inference of racial discrimination.

If the court found that the defendant produced such proof, the burden then would have shifted to the government to provide a non-race based explanation for the sentence. Prosecutors could meet this burden by showing by a preponderance of the evidence that there is an explanation other than race bias to explain the death sentence in the particular case . . . . The death sentence would stand so long as the prosecutor could prove by a simple preponderance of the evidence, a non-race based reason for the sentence.\textsuperscript{41}

The Act's approach mirrored the approach that the Supreme Court adopted in order to eliminate racism in jury selection in \textit{Batson v. Kentucky}.\textsuperscript{42} Although it was rejected at the federal level, similar laws have been proposed on the state level, but to date, only Kentucky has adopted such a law.\textsuperscript{43}

\begin{footnotesize}
\textsuperscript{41} Id. at 530-31 (citations omitted).
\textsuperscript{42} 476 U.S. 79, 96-98 (1986).
\textsuperscript{43} KY. REV. STAT. ANN. § 532.300 (Michie 1999). The Kentucky Racial Justice Act, which differs somewhat from the proposed federal Racial Justice Act, reads as follows:
(1) No person shall be subject to or given a sentence of death that was sought on the basis of race.
(2) 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 in the Commonwealth at the time the death sentence was sought.
(3) Evidence relevant to establish a finding that race was the basis of the decision to seek a death sentence may include statistical evidence or other evidence, or both, that death sentences were sought significantly more frequently:
   (a) Upon persons of one race than upon persons of another race; or
   (b) As punishment for capital offenses against persons of one race than as punishment for capital offenses against persons of another race.
(4) The defendant shall state with particularity how the evidence supports a claim that racial considerations played a significant part in the decision to seek a death sentence in his or her case. The claim shall be raised by the defendant at the pre-trial conference. The court shall schedule a hearing on the claim and shall prescribe a time for the submission of evidence by both parties. If the court
\end{footnotesize}
While passage of the Racial Justice Act or similar state legislation would be laudable, its potential effectiveness in eliminating racism in the imposition of the death penalty is unlikely. Claims under the Racial Justice Act would likely meet the same fate as claims alleging racial discrimination in jury selection under *Batson*. Despite *Batson*, race continues to be a major determinant in the use of peremptory challenges.  

For example, a study of 317 capital murder cases tried by jury in Philadelphia between 1981 and 1997 found that “discrimination in the use of peremptory challenges on the basis of race and gender by both prosecutors and defense counsel is widespread” and that “United States Supreme Court decisions banning these practices appear to have had only a marginal impact.”

Race continues to be used in the exercise of peremptory challenges because courts rarely sustain challenges to such practices. *Batson*, like the proposed Racial Justice Act, requires a defendant to put forth a prima facie case of “purposeful discrimination.” Once the defendant has put forth such a case, the prosecutor is required to offer a neutral explanation for the strikes. Courts are then required to examine the prosecutor’s explanation, and if the explanation is insufficient or pretextual, the defendant’s objection should be sustained. However, *Batson* objections are rarely sustained because of courts’ hostility toward such claims. Courts simply accept as neutral the prosecutor’s explanation that race was the basis of the decision to seek the death sentence, the court shall order that a death sentence shall not be sought.

The defendant has the burden of proving by clear and convincing evidence that race was the basis of the decision to seek the death penalty. The Commonwealth may offer evidence in rebuttal of the claims or evidence of the defendant.

*Id.*


45. *Id.* at 10.

46. *Id.*


48. *Id.* at 97.

49. *Id.* at 98.

50. Concerning *Batson*, one federal judge remarked:

What the courts have done, as a practical matter, is to redefine the word peremptory to a point where on a challenge by anyone regardless of the race, nationality, religion, sex, minority or majority status or whatever, a valid reason must be given, i.e., they have all but eliminated the word peremptory from all jury selection statutes and rules and decreed that cause must be shown for all questioned challenges.

In addition, as a practical matter, the appellate court, in holding that punishment for the prosecutor’s having (allegedly) deprived two or three jurors
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explanation for eliminating black venire members, no matter how implausible. In one Texas murder case, the prosecutor eliminated three of four black venire members based on their beliefs that the O.J. Simpson verdict was correct, which resulted in the defendant being tried by an all-white jury. After the defendant made a Batson objection, the prosecutor claimed that the prospective jurors were struck because of the similarities between the case at hand and the O.J. Simpson case. Both the trial and appellate courts refused to sustain the defendant's Batson objection; however,

> [t]he fact that [the prosecutor] did not inquire into the thought processes of the African American members to determine if their opinions were based on the quality of the evidence, or just part of a group bias caused by the polarizing effect that developed when the Simpson case received national attention in the media, is evidence . . . [that] the prosecutor intended to eliminate all African Americans from the jury panel, regardless of how their opinions were formulated.

Furthermore, the Philadelphia study regarding peremptory challenges found that “[a]mong the twenty-four capital cases in this study in which [Batson] claims appear to have been made, appellate relief does not appear to have been granted in a single case.” Similarly, a LEXIS search of decisions of the United States Court of Appeals for the Fifth

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51. Shelling v. State, 52 S.W.3d 213, 217-20, 224 (Tex. 2001). The prosecution used the fact that the fourth African American was employed by Goodwill as a reason to strike her. Id. at 228 (Price, J., dissenting).

52. Id. at 217.

53. Id. at 227-28 (Price, J., dissenting) (footnote omitted).

Circuit—which encompasses Louisiana, Texas, and Mississippi, three Southern states with large minority populations—turned up only one criminal case in which relief was granted under Batson. In one case involving a Hispanic death row inmate, the Fifth Circuit refused to sustain a Batson objection despite the fact that "[t]he prosecution and the defense counsel explicitly agreed to exclude all eight black venire members from the jury, and the trial judge approved the agreement." Given the explosiveness and emotion of capital murder cases, courts are likely to be just as unreceptive to claims under legislation like the Racial Justice Act as they have been under Batson.

Finally, racial justice acts modeled after Kentucky’s are not likely to be any more effective in combating racism. The Kentucky statute focuses on the prosecutor’s decision to seek the death penalty. It permits an attack on the prosecutor’s decision to seek the death penalty in the event that the defendant is able to prove “by clear and convincing evidence” that the decision was motivated by race. Given the defendant’s high burden of proof, an attack on the prosecution’s decision to seek the death penalty will be difficult to sustain except in the unlikely event of an admission by the prosecutor.

2. Jury Instructions

Two federal statutes seek to eliminate racism from the jury deliberation process in the federal death penalty system. First, at the end of the sentencing phase, the judge instructs the jury members that they may not in any way consider the race, national origin, sex, or religious

55. Searching Batson turned up a total of 239 decisions of the U.S. Court of Appeals for the Fifth Circuit. In United States v. Romero-Reyna, 867 F.2d 834 (5th Cir. 1989), the prosecutor used six peremptory challenges to strike Mexican-Americans from the jury. Id. at 836. Since the district court made no Batson findings, the case was remanded. Id. at 838.

56. Mata v. Johnson, 99 F.3d 1261, 1268 (5th Cir. 1996); see also United States v. Munoz, 15 F.3d 395, 398 (5th Cir. 1994) (allowing the prosecutor to strike Spanish-speaking jurors and an African-American juror because “she has got children who were on welfare”); United States v. Wallace, 32 F.3d 921, 925 (5th Cir. 1994) (noting that the government used six of its nine peremptory strikes to exclude African Americans from the jury.) The government struck a black female police officer because one of the prosecutors had prosecuted several police officers and had said, “[A]lthough she may not know me, I don’t want her to hold it against me.” Id. The Fifth Circuit indicated that the trial court judge made “no specific credibility findings, but merely listened to the government’s race-neutral reasons and stated that ‘I don’t see any racial problem’ with the jury.” Id. The Fifth Circuit found “no basis for reversal.” Id.


58. Id.
beliefs of the defendant or the victim in reaching a verdict.\textsuperscript{59} Second, after a verdict has been rendered, all jurors must certify that they did not, in fact, consider the race, national origin, sex, or religious beliefs of the defendant or the victim in reaching their determinations and that their determinations would have been the same regardless of those factors.\textsuperscript{60} In spite of these statutes, federal juries have disproportionately sentenced racial minorities, particularly African-American defendants, to death. From 1995 to 2000, sixteen of twenty defendants sentenced to death were racial minorities, thirteen of whom were African Americans.\textsuperscript{61} In addition, between 1995 and 2000, federal juries recommended that thirteen of twenty-five African-American defendants convicted of capital murder be sentenced to death and that two of two Hispanic defendants be sentenced to death, but that only four of eleven white defendants convicted of capital murder be sentenced to death.\textsuperscript{62} The disparity in sentencing is greater in federal cases than in individual states, leading President Clinton, Attorney General Reno, and others to question the fairness of the federal death penalty process.\textsuperscript{63}

3. Limits on Prosecutorial Discretion

In the federal system, the prosecutor’s discretion to seek the death penalty has been limited by the executive branch. United States Department of Justice policy provides that “bias based on characteristics such as an individual’s race [or] ethnicity must play no role in a United States Attorney’s decision to recommend the death penalty.”\textsuperscript{64} A U.S. Attorney “must recommend to the Attorney General whether he or she believes that the death penalty should be authorized” in a particular

\begin{footnotes}
\item[60] Id.
\item[62] Id.
\item[63] Former President Clinton said that he was concerned about “the disturbing racial composition” of the federal death penalty population and the geographic disparities, “which raises the question of whether, even though there is a uniform law across the country, what your prosecution is may turn solely on where you committed the crime.” Raymond Bonner & Marc Lacey, U.S. Plans to Delay First Execution in Four Decades, N.Y. TIMES, July 7, 2000, at A1. See also Marc Lacey & Raymond Bonner, Reno Troubled by Death Penalty Statistics, N.Y. TIMES, Sept. 12, 2001, at A17. Attorney General Reno noted that she was “sorely troubled” by the Justice Department’s data demonstrating racial disparities in the federal system, and Deputy Attorney General Eric Holder stated that he was “both personally and professionally disturbed by the numbers.” Id.
\item[64] See Federal Death Penalty System Survey, supra note 61, at 2-3.
\end{footnotes}
case.\(^65\) He or she must also submit to the Attorney General for review all cases in which a defendant is charged with a capital-eligible offense, regardless of whether the U.S. Attorney actually desires to seek the death penalty in that case.\(^66\) Before submitting the case to the Attorney General, the U.S. Attorney or his or her designee must meet with defense counsel and "allow them to make [a] written and oral presentation as to why the death penalty should not be sought in the case."\(^67\) Furthermore, many U.S. Attorneys employ committees of senior prosecutors to review all capital-eligible cases; others appoint an internal review committee when necessary.\(^68\)

The U.S. Attorneys' submissions are considered by a committee of senior attorneys at the Department of Justice in Washington, D.C., known as the Attorney General’s Review Committee on Capital Cases (Review Committee), which makes an independent recommendation to the Attorney General.\(^69\) The Review Committee meets with defense counsel before making its recommendation to the Attorney General, and defense counsel is permitted to make an oral presentation to the committee as to why the Attorney General should not authorize the U.S. Attorney to seek the death penalty.\(^70\) The Attorney General then receives the recommendations of the U.S. Attorney and the Review Committee and reviews the U.S. Attorney’s materials, including defense counsel’s submissions.\(^71\) The Attorney General concludes the process by signing a letter, which either authorizes the filing of a notice of intent to seek the death penalty or instructs the U.S. Attorney not to seek the death penalty.\(^72\)

This extensive review process has led to a lower percentage of recommendations to seek the death penalty against black defendants.\(^73\) There are additional facts, however, which indicate that the review process has not been successful in eliminating racism in the decision-making process. For example, federal prosecutors still possess a tremendous amount of discretion. U.S. Attorneys can defer prosecution

\(^{65}\) Id. at 10.
\(^{66}\) Id. at 9.
\(^{67}\) Id. at 10.
\(^{68}\) Id. at 10-11.
\(^{69}\) See id. at 18.
\(^{70}\) Id.
\(^{71}\) Id. at 23.
\(^{72}\) Id.
\(^{73}\) Id. at T-4.
to state authorities. They have discretion not to charge defendants "with a capital-eligible offense if they do not believe the charge could be sustained," and they can conclude a plea agreement with the defendant. Undeniably, the majority of those charged with capital offenses have been racial minorities. Another example that illustrates how the review process has failed to eliminate racism is that U.S. Attorneys were almost twice as likely to recommend the death penalty for black defendants when the victim was non-black, as compared to situations in which the victim was black. These examples demonstrate that the federal death penalty process is unfair.

Limiting prosecutorial discretion will not eliminate racism from the decision to seek the death penalty because it is impossible to completely limit prosecutorial discretion. Unfortunately, our experiences with Batson, attempts to make jurors conscious of racism by instructing them both before and after deliberations, and attempts to limit prosecutorial discretion demonstrate that no amount of legislation will remove race as a determinant in the death penalty process. This point will be discussed further in Part III of the article.

B. Incompetent Counsel

Justice Ruth Bader Ginsburg has said, "I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial." Another serious problem with the imposition of the death penalty is that many defendants have been represented by substandard counsel. In capital cases, it is not uncommon for defendants to be represented by counsel insufficiently skilled in capital cases in particular or in criminal law generally. Attorneys in capital cases are often underpaid and lack

74. Id. at 9.
75. Id.
76. Id. at 9.
77. Id. at T-4.
78. Between 1995 and 2000, U.S. Attorneys recommended the death penalty in thirty-six percent of cases in which a black defendant killed a non-black victim. See Bob Dart, Racial Disparity Seen as Federal Executions Resume, ATLANTA J. & CONST., May 6, 2001, at 4A. A recommendation to seek the death penalty where a black defendant killed a black victim was made in twenty percent of the cases. Id.
80. See, e.g., Paradis v. Arave, 954 F.2d 1483, 1490 (9th Cir. 1992) (noting that the state trial court assigned a capital case to a lawyer who had passed the bar examination only a few months earlier); Tyler v. Kemp, 755 F.2d 741, 746 (11th Cir. 1985) (noting that the defendant's lawyer had been a member of the bar for only six months); Bell v. Watkins, 692 F.2d 999 (5th Cir. 1982) (noting that the lawyer appointed in the capital case
the resources to conduct adequate investigations.\textsuperscript{81} The problem stems in large part from the Supreme Court’s failure to articulate minimum standards for determining effective lawyering in criminal cases and in the Court’s adoption of an extremely high legal standard for establishing ineffective assistance of counsel. In \textit{Strickland v. Washington},\textsuperscript{82} the Court held that in order to establish ineffective assistance of counsel, a defendant must show that counsel made errors so serious that he was not functioning as the counsel guaranteed by the Sixth Amendment and that this performance prejudiced the defense.\textsuperscript{83}

As a result of \textit{Strickland}, it has been extremely difficult for defendants to establish that the representation they received was constitutionally ineffective. Courts have held that lawyers who: 1) failed to investigate potentially exculpatory evidence;\textsuperscript{84} 2) represented both the victim and the defendant;\textsuperscript{85} 3) used racial slurs in referring to their clients;\textsuperscript{86} 4) filed appellate briefs consisting of one page of argument;\textsuperscript{87} 5) were intoxicated during trial;\textsuperscript{88} and 6) failed to present mitigating evidence during the sentencing phase\textsuperscript{89} did not necessarily render constitutionally ineffective assistance of counsel. One of the most absurd holdings occurred in \textit{Burdine v. Johnson}.\textsuperscript{90} In \textit{Burdine}, the defendant alleged and the court found that trial counsel slept during portions of defendant’s capital

\begin{itemize}
\item had never finished a criminal trial of any kind); Smith v. State, 581 So. 2d 497 (Ala. Crim. App. 1990) (noting that defense counsel asked for extra time between the guilt and sentencing phases of a capital case in order to read the state death penalty statute for the first time); Leatherwood v. State, 548 So. 2d 389 (Miss. 1989) (noting that a third-year law student was allowed to handle most of a capital trial).
\item 466 U.S. 668 (1984).
\item See id. at 687-88, 694.
\item Graham v. Johnson, 94 F.3d 958 (5th Cir. 1996) (vacating the lower court’s decision on procedural grounds).
\item See Goodwin v. Balkcom, 684 F.2d 794, 805 n.13 (11th Cir. 1982) (reproducing counsel’s opening statements referring to the defendant as a “nigger”); \textit{Ex parte Guzman}, 730 S.W.2d 724, 736 (Tex. Crim. App. 1987) (holding that the defendant was “afforded ineffective assistance of counsel” at trial because his counsel referred to the defendant as an unpredictable and irresponsible “wet-back”).
\item See People v. Garrison, 47 Cal. 3d 746, 785-88 (1986) (rejecting the defendant’s assertion that counsel’s performance was deficient).
\item See Romero v. Lynaugh, 884 F.2d 871 (5th Cir. 1989).
\item 231 F.3d 950 (5th Cir. 2000), \textit{reh’g granted en banc, vacated by} 234 F.3d 1339 (5th Cir. 2000).
\end{itemize}
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murder trial. A panel of the U.S. Court of Appeals for the Fifth Circuit, however, held that trial counsel's performance was not ineffective because it was "impossible to determine - instead only to speculate - that counsel's sleeping was at a critical stage of the trial." 2

The American Bar Association and several states have recognized the problem and have attempted to address it. They have recommended that minimum standards be adopted to govern the appointment of counsel in capital cases, that appointments be made by a neutral authority, and that counsel in capital cases be adequately compensated and provided with the support necessary to conduct investigations and represent their client. 3 In addition, Professor James S. Liebman of Columbia Law School has suggested that in order to address the problem of imbalance of resources between prosecutors and defense counsel in capital cases, the state post-conviction proceeding should be eliminated. According to Professor Liebman:

The best way to improve the accuracy of capital verdicts and the efficiency of the capital review process is to use resources now devoted to largely ineffectual state collateral review to improve the adversarial balance at the more crucial trial phase of capital cases. By appointing well-qualified defense attorneys at the outset of the case, and by giving them the financial support needed so they can reliably test the state's case, present available exculpatory and extenuating evidence, and object to procedures that compromise the reliability of the trial, states will go much further than state post-conviction proceedings currently do towards assuring the accuracy and procedural regularity of capital trials. 5

It is clear that by implementing some of the proposals suggested above, better qualified counsel would be appointed in capital cases, which would reduce some of the serious errors that occur in these cases. However,

91. Id. at 952.
92. Id. at 964.
94. Death Without Justice, supra note 93, at 5-15.
even if these proposals are implemented, the problems that have become common in capital cases will be minimized, not eliminated. For instance, in *Burdine v. Johnson*, the defendant was represented by counsel who was highly experienced and who would have met the standards had they been implemented at the time.96 Similarly, in the high profile case of Gary Graham, the Texas death row inmate executed after his trial attorney failed to conduct an investigation into the possibility of another assailant, Mr. Graham was also represented by a highly experienced lawyer.97 Just as there are incompetent lawyers who manage to graduate from law school and pass the bar examination, there will be incompetent lawyers who satisfy whatever standards may be adopted. In addition, the problem of racism in the imposition of the death penalty will not be eliminated simply by adopting minimum standards for the appointment of counsel, as will be discussed in detail later. Despite these shortcomings, however, there should be minimum standards all attorneys must satisfy before being appointed to these highly complex cases.

C. DNA Testing

Deoxyribonucleic acid, or DNA, contains “genetic code and is often present at crime scenes, either in tissue or bodily fluids.”98 It has been hailed as “the most significant advance in forensic science since the advent of fingerprinting in the early 1900s.”99 DNA tests have exonerated at least ten death-row inmates.100 As a result of the significant impact DNA evidence has already had on the criminal justice system, several states have implemented DNA testing in capital murder cases, and similar legislation has been proposed by other states and by the federal government.101 The proposed federal legislation provides for some type of post-conviction testing when an inmate claims to be innocent, requires that DNA evidence be preserved as long as an inmate is in custody, and forces states to bear the costs of the testing.102

Although some prosecutors oppose offering DNA testing to any prisoner who claims that it will prove his or her innocence on the grounds

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100. *Id.* at 43-44.
101. *Id.* at 40.
that it is expensive and time consuming, the legislation is wise and should be universally adopted. It is extremely important, particularly in capital cases, to identify the actual perpetrator of a crime. The prosecutor’s objections can be met by mandating DNA tests only in cases where physical evidence exists.

However, there is a major problem that the DNA testing legislation does not address: in most states and in federal court, an inmate is extremely restricted in his or her ability both to reopen a case following conviction and to have DNA evidence considered. For instance, in 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act, which precludes the introduction of new evidence unless it “could not have been previously discovered through the exercise of due diligence.” Similarly, in Texas, which recently enacted DNA testing legislation, courts are precluded from considering the merits of a new claim unless it has not been and could not have been presented previously. In order for DNA testing legislation to truly be effective, Congress and the states must amend their laws to permit the introduction of DNA or any new evidence indicating innocence in post-conviction proceedings.

Finally, although the enactment of DNA testing legislation is important, its potential impact is often overstated. Such legislation will not “fix” the death penalty since many cases do not involve physical evidence. To date, of the one hundred and two inmates released from death row after evidence of their innocence was accepted, only twelve involved DNA evidence. As Professor Barry Scheck has said, “The real lesson to be learned from all of this is not that DNA can free a lot of innocent people from prison, which it can, but how they got there and what we can do to prevent it from happening again.”

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106. TEX. CRIM. PROC. CODE ANN. art. 11.071, § 5 (Supp. 2002).
D. Eyewitness Testimony

The fallibility of eyewitness testimony has been demonstrated through both empirical data and common experience. For example, the Center on Wrongful Convictions at Northwestern University School of Law analyzed seventy cases in which eighty-four men and two women had been sentenced to death but were later exonerated. The Center found the following:

- Of the 86 legally exonerated persons, eyewitness testimony played a role in the convictions of 46 - 53.5%.
- Eyewitness testimony was the only evidence against 33 defendants - 38.4%.
- Only one eyewitness testified in 32 of the 46 defendants' cases - 69.6% - and multiple eyewitnesses testified in the other 14 - 30.4%.
- The eyewitnesses were strangers to 19 of the defendants - 41.3% and were non-accomplice acquaintances of 9 - 19.6%.
- Witnesses who presented themselves as combination accomplice-eyewitnesses testified against 15 of the defendants - 32.6% of the 46 - and all of these witnesses had incentives to testify, ranging from full immunity to leniency in sentencing.
- In five cases - each involving a single, non-accomplice eyewitness - the witness received consideration from the prosecution in a pending case.
- In four cases - each also involving a single, non-accomplice eyewitness - the apparently false testimony

110. "The scientific validity of the studies confirming the many weaknesses of eyewitness identification cannot be seriously questioned at this point." United States v. Moore, 786 F.2d 1308, 1312 (5th Cir. 1986) (quoting Abney, Expert Testimony and Eyewitness Identification, 91 CASE & COMMENT 26, 29 (1986)). In Moore, the Fifth Circuit noted:

[I]t is commonly believed that the accuracy of a witness' recollection increases with the certainty of the witness. In fact, the data reveal no correlation between witness certainty and accuracy. Similarly, it is commonly believed that witnesses remember better when they are under stress. The data indicate that the opposite is true. The studies also show that a group consensus among witnesses as to an alleged criminal's identity is far more likely to be inaccurate than is an individual identification. This is because of the effect of the 'feedback factor,' which serves to reinforce mistaken identifications.

Id. at 1312.

appeared to have been motivated by a grudge; in one case, the defendant and the purported eyewitness were in a love triangle. . . .

• The average (mean) time between the arrest of the defendant and his or her exoneration in the eyewitness cases was 95 months - just short of 12 years.\footnote{Id.}

Another powerful example of the fallacy of eyewitness testimony was provided by a rape victim in the New York Times:

In 1984 I was a 22-year-old college student with a grade point average of 4.0, and I really wanted to do something with my life. One night someone broke into my apartment, put a knife to my throat and raped me.

During my ordeal, some of my determination took an urgent new direction. I studied every single detail on the rapist's face. I looked at his hairline; I looked for scars, for tattoos, for anything that would help me identify him. When and if I survived the attack, I was going to make sure that he was put in prison and he was going to rot.

When I went to the police department later that day, I worked on a composite sketch to the very best of my ability. I looked through hundreds of noses and eyes and eyebrows and hairlines and nostrils and lips. Several days later, looking at a series of police photos, I identified my attacker. I knew this was the man. I was completely confident. I was sure.

I picked the same man in a lineup. Again, I was sure. I knew it. . . .

When the case went to trial in 1986, I stood up on the stand, put my hand on the Bible and swore to tell the truth. Based on my testimony, Ronald Junior Cotton was sentenced to prison for life. It was the happiest day of my life because I could begin to put it all behind me.

In 1987, the case was retried because an appellate court had overturned Ronald Cotton's conviction. During a pretrial hearing, I learned that another man had supposedly claimed to be my attacker and was bragging about it in the same prison wing where Ronald Cotton was being held. This man, Bobby Poole, was brought into court, and I was asked, "Ms. Thompson, have you ever seen this man?"

I answered: "I have never seen him in my life. I have no idea who he is." . . .
In 1995, 11 years after I had first identified Ronald Cotton, I was asked to provide a blood sample so that DNA tests could be run on evidence from the rape. . . .

I will never forget the day I learned about the DNA results. I was standing in my kitchen when the detective and the district attorney visited. They were good and decent people who were trying to do their jobs - - as I had done mine, as anyone would try to do the right thing. They told me: "Ronald Cotton didn't rape you. It was Bobby Poole."

The man I was so sure I had never seen in my life was the man who was inches from my throat, who raped me, who hurt me, who took my spirit away, who robbed me of my soul. And the man I had identified so emphatically on so many occasions was absolutely innocent.

Ronald Cotton was released from prison after serving 11 years. Bobby Poole pleaded guilty to raping me.113

Despite its unreliability, juries often give eyewitness testimony considerable weight. What then can be done to minimize the impact of eyewitness testimony? One potential solution is that in any capital case in which eyewitness testimony will be offered, an expert should be routinely appointed by the court to testify as to the limitations of eyewitness testimony. This proposal would not require any new enactment. The current Federal Rules of Evidence114 and a number of states115 explicitly permit the appointment of experts upon the motion of the court or of any party. More frequent use of court-appointed experts might assist lay juries in evaluating eyewitness testimony and weighing it properly.116

E. Jailhouse Informants

Unreliable jailhouse informant testimony is frequently a factor in capital convictions. For instance, the Chicago Tribune reported that jailhouse informant testimony had been a factor in at least 46 out of 295 capital convictions since the reinstatement of the death penalty in

113. Jennifer Thompson, 'I Was Certain, but I Was Wrong,' N.Y. TIMES, June 18, 2000, at D15 (emphasis added).
114. See Fed. R. Evid. 706(a).
115. See, e.g., 17A ARIZ. REV. STAT. ANN. § 706 (2002); MD. CODE ANN. EVID. § 5-706 (2002); CAL. EVID. CODE § 730 (1986).
Illinois. The newspaper also reported that in at least half of the cases that relied on jailhouse informants, the informant’s testimony played a crucial role in obtaining convictions. In addition, Northwestern University’s Center on Wrongful Convictions found that jailhouse informant testimony was a significant factor in the wrongful conviction of capital defendants.

A major problem with informant testimony is that it is inherently unreliable. Although it is usually offered into evidence as a confession against the defendant, it has none of the safeguards that a similar confession to the police would have. Furthermore, the individuals presenting the testimony are inmates who have received a deal or who hope to receive a deal from the state in exchange for their testimony.

In one case, Rolando Cruz was sentenced to death for the kidnaping, rape, and murder of Jeanine Nicarico. The evidence against him was largely testimonial, including the testimony of several jailhouse informants. Mr. Cruz’s conviction was later reversed on appeal.

In Rolando Cruz’s case, one jailhouse informant was awaiting re-sentencing when he testified against Cruz. After the testimony was presented and Cruz was sentenced to death, the prosecutor testified on behalf of the informant, Turner, at his re-sentencing hearing. On cross-examination, the prosecutor admitted that “before testifying in the Cruz case, [Turner] wanted to make certain that [the prosecutor] would testify on [Turner’s] behalf at [Turner’s] re-sentencing hearing.” Another jailhouse informant in the Cruz case was accused of telling other death row inmates “that he knew of a way to ‘get time’ (obtain a natural life sentence) by finding out some facts about a case and then fabricating additional information.” These witnesses, as is usually the case with
jailhouse informants, had much to gain and almost nothing to lose by fabricating testimony against Cruz.

Because of these problems, jailhouse informant testimony should undergo thorough scrutiny before it is admitted into evidence. First, the defendant should have an opportunity to depose the witness, as is presently the case in Illinois.128 Second, a pretrial hearing should be held before any informant testimony is admitted in order to afford the trial judge an opportunity to assess its reliability. Finally, informant testimony should never be admitted when it is the primary evidence against a defendant and should rarely be admitted in other instances. Rules of evidence already prohibit the admission of evidence that is highly prejudicial, unreliable, and provides minimal probative value,129 and jailhouse informant testimony is such evidence. At best, it merely corroborates evidence presented at trial, but given the witness' strong incentive to fabricate, it is inherently suspect and unreliable and should therefore be barred from most capital trials.

F. Prosecutorial Misconduct

Prosecutorial misconduct is a systemic problem in capital cases. One study found that prosecutorial misconduct accounted for more reversals of capital cases than any other error except ineffective assistance of counsel.130 Another study of capital cases in Ohio found that “[s]ome ethical issue involving the prosecutor has arisen in 14 of the 48 cases where the death penalty was successfully sought.”131 Northwestern University's Center on Wrongful Convictions' study of wrongfully convicted capital defendants found that prosecutorial misconduct was one of the most significant factors leading to conviction in seven defendants' cases.132 Finally, a Chicago Tribune investigation found

128. See People v. Bakalis, 752 N.E.2d 1107, 1109 (Ill. 2001).
129. See FED. R. EVID. 403.
130. See James S. Liebman et al., Capital Attrition: Error Rates in Capital Cases, 1973-1995, 78 TEx. L. REV. 1839, 1850 (2000) (finding that one of the most common errors at the state post-conviction stage is "prosecutorial suppression of evidence that the defendant is innocent or does not deserve the death penalty," which accounts for sixteen percent of state post-conviction reversals).
132. See Warden, supra note 111.
hundreds of homicide cases in which the prosecutors concealed or fabricated evidence.133

What, if anything, can be done to stop prosecutorial misconduct from occurring so frequently? Some suggestions are to require full discovery, to require identification of exculpatory evidence, to lower the standard for reversing convictions in cases of prosecutorial misconduct, to impose severe discipline, and to eliminate absolute immunity.134

In regard to requiring full discovery, full discovery is now routine in civil cases.135 It should also be mandated in criminal cases, particularly capital cases. Presently, prosecutors are only required in most states to turn over exculpatory evidence to the defendant.136

If discovery is mandated, it will also be necessary to mandate that prosecutors identify exculpatory evidence and evidence favorable to the defendant. Otherwise, there is a danger that favorable evidence may be buried among other voluminous material.

In addition, the standard for reversing convictions in cases of prosecutorial misconduct should be lowered. Presently, convictions are only reversed if prosecutorial misconduct had a prejudicial effect on the outcome of the case.137 Thus, the law provides prosecutors with an incentive to commit misconduct because, even if their misdeeds are


134. For other suggestions, see Angela J. Davis, The American Prosecutor: Independence, Power, and the Threat of Tyranny, 86 IOWA L. REV. 393, 462-63 (2001) (suggesting the adoption of a Public Information Department in all prosecution offices to “enhance public knowledge of the prosecutorial function” and the creation of Prosecution Review Board “to review complaints and conduct random reviews of prosecution decisions to deter misconduct and arbitrary decision making”)

135. See, e.g., FED. R. CIV. P. 26-37.

136. In Brady v. Maryland, 373 U.S. 83, 87-88 (1963), the U.S. Supreme Court held: [T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution . . . .

. . . A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice.

Id. The courts have been reluctant to permit any further discovery by defendants. See, e.g., United States v. Armstrong, 517 U.S. 456 (1996) (holding that a defendant was not entitled to discovery on a claim that the prosecuting attorney singled him out for persecution on the basis of his race).

discovered, the likelihood of reversal is minimal. Convictions should be reversed whenever favorable evidence is intentionally withheld from the defendant, regardless of the withheld evidence's likely impact on the verdict. Prosecutors would then have strong incentives to turn over potentially exculpatory evidence.

Furthermore, prosecutors must be severely disciplined for their misconduct. Presently, however, that is not the case. For instance, Professor Edward Brewer III "was unable to find any published decisions of disciplinary action for prosecutorial misconduct in death-penalty cases" despite the frequency at which it occurs. Prosecutors should be named in court opinions finding prosecutorial misconduct and judges should automatically refer their names to state bar disciplinary committees. Disciplinary committees should severely sanction prosecutors for misconduct to send the message that such behavior will not be tolerated.

Moreover, reforms should abolish prosecutors’ absolute immunity from civil liability for acts “intimately associated with the judicial phase of the criminal process.” This absolute immunity exists because of the “concern that harassment by unfounded litigation would cause a deflection of the prosecutor’s energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.”

However, prosecutors should be civilly liable for intentional misconduct in capital cases. The only more effective deterrent is making prosecutors criminally liable, but given the difficulties and awkwardness of prosecuting prosecutors for misconduct, subjecting them to civil liability is the next best alternative. There are obvious objections to

140. Brewer, supra note 131, at 36.
142. Id. at 423.
143. See Maurice Possley & Ken Armstrong, Historic Case Sent Ripples Through Legal Community, Chi. Trib., June 6, 1999, at A1. One of the most aggressive efforts ever to hold prosecutors criminally accountable occurred in DuPage County, Illinois. Following the release of a wrongly convicted capital defendant, charges were brought against three prosecutors for conspiring to frame the defendant and send him to death row. See Maurice Possley & Ted Gregory, DuPage 5 Win Acquittal; Jurors Join Courtroom
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this proposal, such as the objections articulated by the Supreme Court in Imbler: subjecting prosecutors to civil suits will take them away from their duties and will constrain decision-making. This is of minimal concern, however, because the number of capital cases is small, and a civil suit would only occur after a finding of misconduct in the criminal proceeding. The finding in the criminal proceeding need not be relitigated in the civil proceeding; in fact, rules of preclusion will usually

Celebrations After Verdicts, CHI. TRIB., June 5, 1999. Each defendant was exonerated, either by the trial judge before the case reached the jury or by the jury. Id. As an indication of how difficult it is to obtain a conviction against prosecutors, the Chicago Tribune reported that the jurors bonded with the prosecutor-defendants:

Almost all of [the jurors] were either out of the courtroom or filing through the door when Knight [a defendant] walked over from his defense table and extended his hand to a woman juror. As they shook hands, Knight thanked her. Other jurors turned around and Knight extended his hand again.

It happened just that simply. Suddenly, all the jurors were filing back into the courtroom. All the other defendants were on their feet, some of them hugging wives and children. And they began hugging the jurors, some of them -- jurors and family members alike -- had tears in their eyes. High-fives were exchanged.

Defense lawyers and prosecutors gaped, as did spectators. The scene lasted more than 10 minutes and courtroom veterans of more than 30 years said such a celebration between jurors and defendants was unprecedented. . . .

But what happened later that night was stunning -- the jurors went to a nearby restaurant and tavern to join the defendants, their families and their lawyers in celebration.

Maurice Possley, Perspective, CHI. TRIB., June 13, 1999, at C1. Furthermore, the Chicago Tribune reported that the prosecutors in DuPage also bonded with the defendants.

As is typical in many high profile criminal cases, a large number of assistant state's attorneys came to the courtroom to hear the verdicts. But these DuPage prosecutors were not there to support Special Prosecutor William Kunkle and his team. They came to support the defendants and they, too, joined in the cheers and applause for the defendants.

Id.

144. Imbler, 424 U.S. at 427. In Imbler, the Court expressed its concern with any holding that might subject prosecutors to civil liability on the ground that the liability of a prosecutor for unconstitutional behavior might induce a federal court in a habeas corpus proceeding to deny a valid constitutional claim in order to protect the prosecutor. See id. However, Justice White responded that “these adverse consequences are present with respect to suits against policemen, school teachers, and other executives, and have never before been thought sufficient to immunize an official absolutely no matter how outrageous his conduct. Indeed, these reasons are present with respect to suits against all state officials. . . .” Id. at 436 (White, J., concurring) (footnote omitted). Justice White further noted:

We simply rely on the ability of federal judges correctly to apply the law to the facts with the knowledge that the overturning of a conviction on constitutional grounds hardly dooms the official in question to payment of a damage award in light of the qualified immunity which he possesses. . . .

Id. at 436 n.3.
bar relitigation of the issue.\textsuperscript{145} Such preclusion also means that prosecutors will not be required to expend an inordinate amount of time defending themselves. Additionally, reasonable prosecutorial decision-making will not be affected by eliminating absolute immunity. Prosecutors will still be vested with qualified immunity for most of their decisions.\textsuperscript{146} Finally, while there is a possible concern that the elimination of absolute immunity might constrain prosecutorial decision-making, the decision to seek the death penalty should be made only after thoughtful deliberation and thus should be constrained. Justice White poignantly stated, "[T]he judicial process would be protected—and indeed its integrity enhanced—by denial of immunity to prosecutors who engage in unconstitutional conduct."\textsuperscript{147}

\textbf{G. Other Reforms}

In order to minimize the problem of coerced confessions,\textsuperscript{148} interrogation of suspects should be videotaped.\textsuperscript{149} In addition, because police lineups are often suggestive, sequential lineups should be utilized.\textsuperscript{150} Furthermore, eligibility for the death penalty should be limited. The United States violates international law by executing

\begin{footnotes}

\textsuperscript{146} Public officials who have not been granted absolute immunity are entitled to qualified immunity. "Under 'qualified immunity,' government officials are not subject to damages liability for the performance of their discretionary functions when 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' ROYDEN A. SMOLLA, FEDERAL CIVIL RIGHTS ACTS § 14.29, at 14-35 (3d ed. 1994)(footnote omitted).

\textsuperscript{147} Imbler, 424 U.S. at 442.

\textsuperscript{148} JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 92 (2000) ("Among DNA exonerations studied by the Innocence Project, 23 percent of the convictions were based on false confessions or admissions.").

\textsuperscript{149} See, e.g., Steven A. Drizin & Beth A. Colgan, Let the Cameras Roll: Mandatory Videotaping of Interrogations Is the Solution to Illinois' Problem of False Confessions, 32 LOY. U. CHI. L.J. 337 (2001); Wefing, supra note 107, at 887 (suggesting that in addition to videotaping confessions, suspects should not be questioned without counsel present and that questioning “of persons who are retarded or who have severe emotional problems” should be prohibited).

\textsuperscript{150} See, e.g., Gina Kolata & Iver Peterson, New Jersey Is Trying New Way for Witness To Say "It's Him," N.Y. TIMES, July 21, 2001. During sequential lineups, individuals will be presented to victims and other eyewitnesses one at a time. See \textit{id}. At present, individuals are presented all at the same time, allowing comparisons, contrasts, and re-studying of suspects. \textit{id}. The problem with the present approach is that eyewitnesses often choose the individual in a lineup who most closely resembles the perpetrator and not necessarily the perpetrator himself.
\end{footnotes}
juveniles,\textsuperscript{151} and few nations execute the mentally retarded.\textsuperscript{152} Both of these practices should cease in the United States as well. Only those defendants who kill or intended to kill should be eligible for the death penalty.\textsuperscript{153} Finally, jurors should be given the option of sentencing defendants to life without parole.\textsuperscript{154}

III. WHY ALL THE REFORMS STILL WILL NOT “FIX” THE PROBLEM: RACISM

The preceding section discussed major problems in the administration of the death penalty and proposed some solutions. However, even in the unlikely event that every possible reform is implemented, the death penalty will still be fraught with problems. This section will discuss reasons that explain why the death penalty is not “fixable.”

As discussed earlier, there is an abundance of evidence to indicate that the death penalty is presently administered in a racially discriminatory manner. The death penalty will never be fair and thus will never gain acceptance by a significant segment of the community. One major challenge for proponents of the death penalty is to find a way to administer it in a manner in which race is not a key determinant of who is sentenced to death and who is not. Is this possible? Earlier, this article indicated that attempts have been made to eliminate racism in the imposition of the death penalty and that these attempts have proven unsuccessful. However, most of these reforms have been implemented piecemeal. What if most, if not all, of the proposed reforms are implemented? Would this ensure a racially neutral death penalty?


\textsuperscript{152} Only Kyrgyzstan is known regularly to execute people with mental retardation. \textit{See} Harold Hongju Koh, \textit{A Dismal Record on Executing the Retarded}, N.Y. Times, June 14, 2001, at A33.

\textsuperscript{153} At present, those who kill, those who intend to kill, and those who were major participants in a felony who acted with “reckless indifference to human life” can be executed. Tison v. Arizona, 481 U.S. 137, 158 (1987).

\textsuperscript{154} Studies have shown that jurors are less likely to impose the death penalty if given the option of life without parole. \textit{See} Theodore Eisenberg et al., \textit{Forecasting Life and Death: Juror Race, Religion and Attitude Toward the Death Penalty}, 30 J. of Legal Stud. 277 (2001) (finding that “the more time a juror believes the defendant will remain in prison, the more likely he is to vote for life; the less time, the more likely he is to vote for death”).
While most of the proposed reforms are well-intentioned and should be implemented as long as capital punishment exists, they will not eliminate race from infecting the process. Minorities, particularly African Americans, will continue to be sentenced to death disproportionately, and those who kill whites will continue to be sentenced to death at a higher rate than killers of minorities. This will continue to be the case, as indicated by: 1) our experience with the federal death penalty, 2) the military's death penalty process, 3) jurors continued discrimination in these cases, and 4) evidence of racism in the broader society.

A. The Federal Death Penalty

Most of the reforms that have been proposed have been implemented at the federal level. As a result, "the federal system does not appear to be subject to many of the ills that may plague some state systems." For example, indigent capital defendants are entitled to the appointment of two experienced, adequately paid attorneys to represent them at trial, on direct appeal, and during the collateral review of their cases. As discussed in Part II, the discretion of federal prosecutors is severely limited, and there are measures to ensure that jurors do not consider race during their deliberations. In addition, federal capital trials are presided over by life-tenured judges. At the sentencing phase, the prosecution must prove beyond a reasonable doubt that the defendant committed the capital offense with a certain level of intent.

155. See Jim Yardley, Texas Set To Shift in Wake of Furor on the Death Penalty, N.Y. TIMES, June 1, 2001, at A1 (noting that while the Texas legislature instituted several criminal justice reforms during its 2001 session, the main motivation appears to have been a desire to improve its national image after the exposure of the state's flawed system during then-Governor George W. Bush's presidential campaign); Bruce Hight, Crime Bills Stress Justice, Not Toughness, AUSTIN-AM. STATESMAN, Apr. 30, 2001, at A1; Steve Mills, Texas Revisits Death Penalty, CHI. TRIB., Mar. 25, 2001, at C1.


157. Upon the request of an indigent capital defendant, a federal judge must appoint two attorneys to represent the defendant and make available sufficient funds for reasonable investigative and expert services. The attorneys appointed to represent an indigent defendant must have the "background, knowledge, or experience [that] would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation." 21 U.S.C. § 848(q)(7) (2000). Furthermore, at least one of the defense attorneys must be "learned in the law applicable to capital cases." 18 U.S.C. § 3005 (2000).


Furthermore, the prosecution must prove any aggravating factors beyond a reasonable doubt and must prove at least one from a list of specific factors. The defendant need only prove mitigating factors by a preponderance of the evidence, and each juror can make an individual decision as to which factors have been proven. A jury verdict to sentence a defendant to death must be unanimous. Moreover, federal law prohibits the execution of juveniles, the mentally retarded, and pregnant women. Finally, in reviewing capital cases, appellate courts must, in addition to determining the points of error raised by the defendant, determine "whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor and whether the evidence supports the special finding of the existence of an aggravating factor. . .".

Despite these safeguards designed to ensure that the death penalty is administered fairly and in a non-arbitrary, non-discriminatory manner, pervasive racial and other disparities exist in the implementation of the federal death penalty. According to the Justice Department's own study, the federal death row population consists primarily of minorities, particularly African Americans. The study found that from 1995 to 2000, ten of fourteen death row inmates were African-American. Furthermore, in seventy-five percent of the cases in which a federal

161. The statutory list of aggravating factors includes: killing multiple victims; committing the capital offense against particularly vulnerable victims or high-level public officials; paying someone else to commit the murder; committing the murder for pecuniary gain; committing the murder while committing other serious crimes; causing a grave risk of death to persons other than the actual victims; committing the offense in a particularly heinous manner; engaging in substantial planning or premeditation in committing the murder; or having previous convictions for other serious offenses. See 18 U.S.C. § 3592(b)-(d) (2000); 21 U.S.C. § 848(n) (2000).

162. The mitigating factors enumerated by statute are impaired capacity, duress, minor participation, equally culpable defendants who will not be punished by death, lack of a prior criminal record, mental or emotional disturbance, and consent by the victim. See 18 U.S.C. § 3592 (2000). See also 21 U.S.C. § 848(m) (2000).


164. 18 U.S.C. § 3591(b) (2000). The statute mandates that "no person may be sentenced to death who was less than 18 years of age at the time of the offense." Id.


166. 18 U.S.C. § 3596(b) (2000). ("A sentence of death shall not be carried out upon a woman while she is pregnant.").


169. See id.
prosecutor sought the death penalty during the same time period, the defendant was a member of a minority group, and in more than half of the cases, an African American.\footnote{170} Federal prosecutors are still almost twice as likely to reach a plea agreement with a white defendant than with a black or Hispanic defendant.\footnote{171} Finally, black defendants who are convicted of killing whites are significantly more likely to be sentenced to death than black defendants convicted of killing other blacks.\footnote{172}

These disturbing statistics were produced as a result of a Justice Department study. As a result, the Justice Department conducted a further study to determine whether these statistics were proof of racial and ethnic bias in the administration of the federal death penalty.\footnote{173} Not surprisingly, the Justice Department concluded that there is “no evidence of racial bias in the administration of the federal death penalty.”\footnote{174} The Department provided primarily three explanations for its conclusion.

[First,] the proportion of minority defendants in federal capital cases exceeds the proportion of minority individuals in the general population. The information gathered by the Department indicates that the cause of this disproportion is not racial or ethnic bias, but the representation of minorities in the pool of potential federal capital cases. A factor of particular importance is the focus of federal enforcement efforts on drug trafficking enterprises and related criminal violence. In areas where large-scale, organized drug trafficking is largely carried out by gangs whose membership is drawn from minority groups, the active federal role in investigating and prosecuting these crimes results in a high proportion of minority defendants in federal cases, including a high proportion of minority defendants in potential capital cases arising from the lethal violence associated with the drug trade.\footnote{175}

Second, recommendations and decisions to seek the death penalty were less likely at each stage of the process for black and Hispanic defendants than for white defendants. The report indicated that, “[i]n
the cases considered by the Attorney General, the Attorney General approved seeking the death penalty for 38% of white defendants, 25% of black defendants, and 20% of the Hispanic defendants.\footnote{176}

Finally, as the Department of Justice explained, “[i]t takes two to make a plea agreement. Inferring bias from disparities in such agreements would not be justified unless non-invidious causes could be excluded, including possible differences in the inclination of defendants from different groups to seek or accept plea agreements.”\footnote{177}

The Justice Department’s explanations are unconvincing and continue to adhere to the view that race has always been and will continue to be a factor in the capital sentencing decision. Thus, the Department’s response should be viewed with suspicion. Both the Clinton\footnote{178} and Bush\footnote{179} administrations were strong supporters of capital punishment. As a result, the Department was unlikely to conclude that the death penalty was infected with racial bias. It would not be politically or morally possible to reach such a conclusion and then continue with the pending executions. At a minimum, such a conclusion would have mandated a moratorium and further study, actions to which both administrations were opposed, even before the Justice Department study was completed.\footnote{180}

The Department’s study has several major flaws. First, the Department’s study makes no mention of cases not submitted to the review process. As discussed in Part II, U.S. Attorneys are not required

\footnote{176. Id.}
\footnote{177. Id.}
\footnote{178. See ROBERT JAY LIFTON & GREG MITCHELL, WHO OWNS DEATH? 100-01 (2000). Former President Clinton was such a strong supporter of capital punishment that during his 1992 campaign for president, he left the campaign trail to return home and oversee the execution of Ricky Ray Rector. Id. Rector was so mentally impaired that when he was taken from his cell to be executed, he asked the prison guards to save the piece of pecan pie left on his tray for when he returned. Id. He also helped the executioners find a vein for his lethal injection. Id. For a further discussion of Clinton’s views on capital punishment, see GEORGE STEPHANOPOULOS, ALL TOO HUMAN 62-64 (1999).}
\footnote{179. As governor of Texas, George W. Bush presided over 152 executions. See Tony Allen & Mills Washington, Bush Faces Challenge on Death Row, TIMES (London), Mar. 4, 2001.}
\footnote{180. See Dan Eggen, New Administration Casts Doubt on Halting Federal Executions, WASH. POST, May 10, 2001, at A11. When asked about a moratorium, Attorney General John Ashcroft said: “When we have people who have committed heinous crimes, and there’s no question about their guilt, I don’t know any reason to suspend the imposition of an appropriate penalty.” Id. Former Attorney General Janet Reno, while acknowledging that she was troubled over the racial disparities in death sentencing, said that she saw no need for a moratorium. Id.}
to submit for review all potentially capital-eligible defendants. U.S. Attorneys have discretion to defer cases to state authorities, conclude plea agreements, and not charge defendants with capital offenses if they do not believe the charges could be sustained. Only if a U.S. Attorney decides to charge a defendant with a capital offense does the case undergo the previously discussed review. Because a large number of cases do not undergo the review process, important information about the racial demographics of these cases is missing.

Knowing the disposition of these cases is important. It is already known that drug offenses involving crack cocaine are punished more severely than offenses involving powder cocaine. It is also known that black defendants are more likely to use crack cocaine and white defendants more likely to use powder cocaine. It is quite possible that U.S. Attorneys will also treat the two offenses differently when making charging decisions in capital cases. For instance, they may seek the death penalty for murders involving crack but seek lesser sentences if powder cocaine is involved. Thus, it is extremely difficult to conclude that racism is not a part of the charging decision when there are a large number of cases about which there is no data.

Second, a main theme of the study is that the death penalty authorization rate is higher for whites (thirty-eight percent) than it is for blacks (twenty-five percent) and Hispanics (twenty percent). As Professor David Baldus points out, this aspect of the study is flawed in that it fails to take account of the fact that "white defendants are more likely to have killed whites . . . and the U.S. Attorney charging and DOJ..."

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181. See supra Part II; see also Federal Death Penalty System Survey, supra note 61, at 9.
183. Id.
185. See generally Brown, supra note 184; Spade, supra note 184; Lowney, supra note 184.
186. Any person who kills during the manufacture, distribution, dispensing or possession with the intent to manufacture, distribute, or dispense of a controlled substance may be sentenced to death. See 21 U.S.C. §§ 848, 841 (2000).
authorization rates are much higher in white-victim cases than in minority-victim cases.\textsuperscript{188}

Third, the report fails to present any data or compelling reason for the larger number of plea agreements concluded with white defendants (forty-eight percent) than with black defendants (twenty-five percent) and Hispanic defendants (twenty-eight).\textsuperscript{189} Some make the weak argument that non-invidious reasons, such as culture, may result in minorities being less inclined to plea bargain.\textsuperscript{190} Most criminal cases, by some estimates more than ninety percent, result in plea bargains.\textsuperscript{191} If minorities truly are less inclined to plea bargain than whites, this figure would certainly be lower. However, the contrast is often true. Minorities frequently plea bargain because they are indigent and are encouraged to plea bargain by public defenders with heavy caseloads or appointed counsel hoping to curry favor with a trial judge who wants to move the docket along.\textsuperscript{192}

The federal death penalty is in need of very few of the reforms discussed earlier, yet racism in its implementation persists. For example, conservative commentator Pat Robertson, when questioned about the Justice Department's study and its finding that there was no racial bias in the administration of capital punishment, noted:

Well, you know, the current Attorney General is a dear friend of mine and I would hesitate to take issue with him, but on this one, I think he's wrong if he — if that's his statement. Of course, [John] Gotti could afford the very best lawyers, with all the motions and procedures and summary motions that he wants. And he walks where these [minorities] are executed.\textsuperscript{193}

If the federal government, with all these procedures and safeguards in place, has been unable to eliminate racism in its death penalty process, it would be unreasonable to expect the states, many with fewer resources and a history of racism, to be successful in doing so.

\begin{itemize}
\item \textsuperscript{188} Statement of Professor David Baldus, available at http://www.deathpenaltyinfo.org/BaldusStatement.html (last visited Apr. 3, 2002).
\item \textsuperscript{189} See Federal Death Penalty System: Revised Protocols, supra note 173, at 16.
\item \textsuperscript{190} See id.
\item \textsuperscript{192} See, e.g., Michael Tigar, Lawyers, Jails, and the Law’s Fake Bargains, 53 MONTHLY REV. 29, 38-39 (2001) (“To be sure, many defendants who plead are in fact guilty and are saving the state the trouble of trying them. But every year a distressing number of cases come to light where defendants are railroaded into plea bargains.”).
\item \textsuperscript{193} These remarks were made by Reverend Pat Robertson during a June 23, 2001 interview with Al Hunt that was broadcast on CNN’s The Capital Gang. The transcript is available at www.cnn.com/transcripts/0106/23/cg.00.html.
\end{itemize}
B. The United States Military

Since World War II, the vast majority of service members sentenced to death and executed have been African-American. During World War II, although African Americans accounted for less than ten percent of the Army, seventy-nine percent of those executed were African-American. In 1948, President Truman ended segregation in the armed forces. However, the racial disparity in executions continued. Between 1954 and 1961, the military executed twelve individuals, eleven of whom were African-American. The military's death penalty was reinstated in 1984.

The United States Constitution and its protections generally apply with equal force to service members. Thus, service members accused of crimes, like their civilian counterparts, have the right to counsel, to confront witnesses, to a speedy trial, and to have only legally seized evidence used against them. However, an accused service member is provided with greater procedural protections than his or her civilian counterpart. For instance, an accused service member has some choice in the selection of counsel. The accused service member has the right to take depositions. Before formal charges are brought against an

195. Id.
196. Id.
197. Id.
200. Article 38 of the Uniform Code of Military Justice provides that “[t]he accused shall have the right to be represented . . . by military counsel of his own selection if [that counsel] is reasonably available. . . .” UNIF CODE OF MIL. JUST. art. 38. In contrast, an accused civilian has no constitutional right to choose a particular counsel. See Morris v. Slappy, 461 U.S. 1 (1983) (holding that no Sixth Amendment violation of right to counsel occurred when defendant was not allowed to have the lawyer of his choosing try the case).
201. See UNIF. CODE OF MIL. JUST. art 49. In contrast, in most jurisdictions, the question of whether to grant the defendant an opportunity to conduct discovery is within the discretion of the trial court. See Barry Nekel, Criminal Discovery for the Defense and the Prosecution -- The Developing Constitutional Considerations, 50 N.C. L. REV. 437, 474-75 (1972). The decision to grant discovery can also be done by the grace of the prosecutor. See Richard Lempter & Stephen Salzburg, A Modern Approach to Evidence 127-28 (2d ed. 1982)("Some might think such discovery by grace adequately protects the
accused service member, an investigation must occur. This investigation is the military's counterpart to the civilian grand jury. The rights of a service member during investigation are much greater than the rights of an accused civilian at a grand jury proceeding. At the investigation, the accused has the right to be present and to have counsel present throughout the investigation, rights not available during the civilian grand jury proceedings. The accused service member also has the right to conduct discovery, to cross-examine and confront witnesses, and to "present anything in defense, extenuation, or mitigation" during the investigation, none of which are available to the accused during civilian grand jury proceedings. A service member charged with a capital offense also has appellate rights that are more extensive than those of his civilian counterpart, and none of his appeals will be considered by elected judges.

202. UNIF. CODE OF MIL. JUST. art. 32.
203. See R.C.M. 405(f)(3).
204. See, e.g., FED. R. CRIM. PROC. 6(d)(1)-(2). The rules provide:
(d) Who May Be Present.
(1) While Grand Jury Is in Session. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session.
(2) During Deliberations and Voting. No person other than the jurors . . . may be present while the grand jury is deliberating or voting.

Id.
206. Id. at § 7-2(B)(4), at 321.
207. Id. at § 7-2(B)(7), at 324.
208. See, e.g., FED. R. CRIM. PROC. 6(e)(2). The rule provides:
(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury . . . .

Furthermore, the Supreme Court has held that the prosecutor does not have an obligation to present exculpatory evidence to the grand jury. United States v. Williams, 504 U.S. 36, 51-55 (1992).


210. For a discussion of the problems that result from elected judges deciding capital cases, see Stephan B. Bright, et al., Breaking the Most Vulnerable Branch: Do Rising
Today's military is also considered to be one of America's most enlightened institutions when it comes to race relations.\textsuperscript{211} It is more racially integrated than most universities, schools, corporations, foundations, and the civilian government.\textsuperscript{212} The military is integrated not only at the lower levels of service but also at the highest officer rankings.\textsuperscript{213} In the military, racist behavior effectively terminates one's career.\textsuperscript{214} Yet, despite its greater procedural protections and its perceived tolerance and diversity, the military's death row continues to be populated overwhelmingly with minorities, particularly African Americans. As of April 2001, six of the seven inmates on the military's death row were minorities, five of whom were African-American.\textsuperscript{215} Thus, the military's history of disproportionately sentencing and executing African Americans to death has continued into its more "enlightened" era. If racial discrimination in death sentences cannot be eliminated in an institution such as the military, which has worked diligently and aggressively to root out racism in its ranks, it is hard to imagine that it can be eliminated anywhere else.

C. Jurors

There is ample evidence that juror bias contributes substantially to the racial disparity in capital sentencing.\textsuperscript{216} This evidence exists in the form

\begin{quote}
\end{quote}

\textsuperscript{211} See, e.g., \textit{Clinton Thanks Military for Vigilance}, DALLAS MORNING NEWS, Nov. 23, 1998, at 7A. President Clinton remarked:

As I look at this vast sea of highly representative and diverse faces, I am reminded that it was 50 years ago this year, in 1948, when President Harry Truman courageously ordered the integration of America's armed forces. . . . Now our armed forces are a model of unity and diversity for the entire world -- people of different origins coming together, working together, for the common good.


\textsuperscript{212} See F. Michael Higginbotham, \textit{A Military Strike Against Racism}, BOSTON GLOBE, July 25, 1998, at A15 (stating that “[t]he military is one of the most racially integrated institutions in the country.”).

\textsuperscript{213} Id.


\textsuperscript{215} See \textit{The U.S. Military Death Penalty}, supra note 194.

of juror sentencing decisions in federal capital cases, studies of actual jury decision making, and mock jury studies.

One of the most astonishing and under-reported aspects of the Justice Department's statistical study of federal capital cases was the racial disparity in sentencing by jurors.\footnote{217} Once a defendant is convicted of a federal capital defense, he is more likely to be sentenced to death by a jury if he is black or Hispanic than if he is white.\footnote{218} The Justice Department's study indicated that between 1995 and 2000, forty-one defendants were convicted of capital offenses.\footnote{219} Eleven of these defendants were white.\footnote{220} Juries recommended that four, or thirty-six percent, of these defendants be sentenced to death.\footnote{221} Twenty-five of the defendants convicted of a capital crime were black.\footnote{222} Juries recommended that thirteen, or fifty-two percent, be sentenced to death.\footnote{223} Juries also recommended that both of the Hispanic defendants who had been convicted of capital offenses be sentenced to death.\footnote{224}

These statistics should raise a serious red flag because it is difficult to find non-racial explanations for these disparities. One possibility is that the white defendants had fewer aggravating factors and more mitigating factors than the minority defendants. However, this is unlikely to account for the disparity, given the fact that each federal capital case is subject to a stringent multi-layered review process\footnote{225} and that this review most likely results in uniform decisions about when to seek a death sentence. Another possible reason for the disparity is that white defendants had better trial counsel. However, this is also an unlikely explanation, given the fact that the same standards exist for the appointment of trial counsel in federal capital cases.\footnote{226} Thus, there is only one conclusion; jurors were likely affected by either conscious or unconscious biases in favor of the white defendants and against minority defendants, and instructions given to the jurors before their deliberations and certification requirements after the deliberations\footnote{227} were ineffective in overcoming these biases.

\footnote{217}{See generally Federal Death Penalty System Survey, supra note 61, at T-4.}
\footnote{218}{See id.}
\footnote{219}{Id.}
\footnote{220}{Id.}
\footnote{221}{Id.}
\footnote{222}{Id.}
\footnote{223}{Id.}
\footnote{224}{Id.}
\footnote{225}{See id. at 2-3.}
\footnote{226}{See 21 U.S.C. § 848(q).}
\footnote{227}{See 18 U.S.C. § 3593.
Studies of actual jury decisions also indicate that jurors are biased against black defendants. One such study examined 252 defendants and 41 co-defendants in Philadelphia capital trials over the period from 1984 to 1994. Three dominant conclusions emerge. First, the study found that "predominately non-black juries [ones with fewer than five blacks] sentenced black and non-black defendants to death at a sixteen percentage point black defendant disparity." Second, this disparity increased in cases involving white victims. Third, "black defendants [were] treated less punitively vis-à-vis non-black defendants as the proportion of blacks on the juries increase[d]." Another study involved interviews with 187 jurors who served on 53 capital cases tried in South Carolina between 1986 and 1997. This study also found that black jurors were more likely than white jurors to vote for life in prison. In addition, several studies of mock jurors in simulated cases demonstrated a pattern of race-linked guilt and punishment decision-making. These mock studies found that whites were more likely to impose death on a black defendant, more likely to judge black defendants as guilty, more likely to convict if the victim was white, and most likely to convict if the defendant was black and the victim was white. Finally, most disturbing was the finding that the defendant's race was most influential in mid-range cases (cases in which the decision could go either way). When the decision could go either way, "black defendants were more likely to be given death sentences than were white defendants." Thus, in close cases, race ended up being the determining factor.

228. See Bowers et al., supra note 18, at 188.
230. Id. at Table 8.
231. Baldus et al., Racial Discrimination and the Death Penalty in the Post-Furman Era, supra note 216, at 1721 n.159.
232. Eisenberg et al., supra note 154, at 278.
233. Id.
237. See Bowers et al., supra note 18, at 182-83.
238. Id. at 183-84.
These statistics and studies indicate that white jurors are more punitive in sentencing black defendants in general and black defendants who kill whites in particular. This is a continuation of the decade-old practice of punishing blacks more severely when they commit crimes against whites. For instance, before rape was outlawed as a capital crime, ninety percent of the those legally executed for rape were black men and almost all of these black men were convicted of raping white women. These statistics and studies also suggest that by punishing defendants who kill whites more severely than those who kill blacks, jurors are placing a higher value on white life.

Why are white jurors more punitive toward black defendants? These statistics and studies are not intended to suggest that white jurors are engaging in overt bigotry; that is, during deliberation, jurors are not openly suggesting that a black defendant should be executed because he killed a white person. In the vast majority of cases, overt racism does not affect jury decisions. Rather, a more subtle, subconscious, systemic racism is at work. White jurors probably identify more with white victims, and they fail to see remorse in black defendants.


243. In a 1986 training tape for Philadelphia prosecutors, then-homicide prosecutor Jack McMahon argued that a reasonable representation of blacks on the jury is necessary to protect against possible jury nullification by non-black jurors in black-on-black homicides because these cases may not generate much concern for the victim by non-black jurors. See Baldus et al., The Use of Peremptory Challenges in Capital Murder Trials, supra note 44, at 43.

244. However, there are still examples of overt juror bigotry towards black defendants. See, e.g., Bob Herbert, Texas Travesty, N.Y. Times, Aug. 2, 2001, at A21. In the case of Napoleon Beazley, a juvenile sentenced to death for the murder of a federal appellate judge's father, one of the jurors was a member of the United Daughters of the Confederacy and flew the Confederate flag from her home. Id.

A fellow juror, when contacted by a defense investigator during the appeals process, was heard to say, “The nigger got what he deserved.” That juror's wife gave the defense team an affidavit that said her husband was “racially prejudiced” and that she found it difficult to believe he could have “set his prejudice aside” for Mr. Beazley's trial. Bob Herbert, Tainted Justice, N.Y. Times, Aug. 6, 2001, at A13.

245. See Bowers et al., supra note 18, at 215 (“Beliefs that the defendant was remorseful for the crime were more common among black than white jurors and most
 jurors believe that black defendants are more dangerous, which leads them to find that black defendants pose a continuing danger to society. They are less likely to look at lower education levels, past drug use, mental illness, and disadvantaged upbringings as mitigating circumstances. One commentator stated:

Unconsciously perhaps, whites as jurors carry into the jury box and the jury room this cultural baggage of the dangerous black male predator and the need for punitiveness. Prosecutors seek to take advantage of this cultural paraphernalia at the sentencing stage of death penalty trials by making arguments that embody negative racial imagery and stereotypes.

One of the main reasons to believe that racism will affect decision-making in capital cases in the foreseeable future, and that the death penalty therefore cannot be fixed, is the difficulty of eradicating this type of racism. These attitudes, because they are subconscious and not even acknowledged, are difficult to eliminate or even to address. These attitudes will persist among jurors as long as they persist in broader society.

Very little that has not already been done can be done to overcome such juror biases. Jurors are rightly given autonomy during deliberations, and they do not have to justify their decisions. However, two suggestions made by other academics are worthy of examination. First, a jury that includes African Americans is less likely to sentence any

common among black jurors in B/W cases; white jurors were least likely to see black defendants as remorseful.

246. See id. at 219-27; see generally Kim Taylor Thompson, Empty Votes in Jury Deliberations, 113 HARV. L. REV. 1261 (2001) (citing studies that demonstrate that juror perceptions of aggressiveness and dangerousness are affected by racial considerations).

247. In some states, in order to sentence a defendant to death, the jury must find that the defendant “would commit criminal acts of violence that would constitute a continuing threat to society.” TEX. CRIM. CODE PROC. ANN. art. 37.071, § 2 (Vernon 2002); see also OR. REV. STAT. § 163.150 (1999).

248. See Bowers et al., supra note 18, at 248-50 (noting that black jurors saw a black defendant as having a “[d]isadvantaged [u]pbringing, [r]emorse, and [s]incerity,” while white jurors saw the same defendant as incorrigible, with little emotion and capable of “[d]eceptive [b]ehavior”); Lynch & Haney, supra note 234, at 353 (In this mock juror study, white jurors “were significantly more likely to undervalue, disregard, and even improperly use mitigating evidence” in a black defendant case as opposed to a white defendant case.).

249. Bowers et al., supra note 18, at 180.

250. See, e.g., Harris v. Alabama, 513 U.S. 504, 518 (1995) (Stevens, J., dissenting) (“Jurors' responsibilities terminate when their case ends; they answer only to their consciences; they rarely have any concern about possible reprisals after their work is done.”).
defendant to death. A jury composed of African Americans will not be as punitive toward African-American defendants. In addition, an African-American presence on a jury is likely to deter overt bigotry and challenge unfounded stereotypes white jurors may have about blacks. Thus, one way of minimizing juror bias is to ensure that juries, particularly capital juries, include African Americans. The Supreme Court’s Batson decision was supposed to diversify juries, but that has not happened. Minorities, particularly African Americans, continue to be removed from juries, and the courts have refused to police these practices. Professor Kenneth Nunn suggests that whenever racial issues might affect a criminal trial, the litigants should be prohibited from using their peremptory challenges to exclude black jurors. Furthermore, he argues that black defendants should “be free to peremptorily challenge white jurors for the purpose of increasing the probability of [b]lack participation on his or her jury.”

Although provocative and academically appealing, Professor Nunn’s proposal is not a realistic solution to the problem of underrepresentation of blacks on juries. First, it is extremely unlikely that the current Supreme Court would approve of a measure permitting the removal of white, but not black, jurors or would otherwise permit the use of race in addressing the problem. Second, any proposal to increase the pool of minority jurors must take into account the fact that blacks are more likely to be disqualified from serving on the jury. For instance, about seven percent of African Americans and one in seven black men are ineligible for jury service because of their criminal records.

251. See Baldus et al., supra note 44, at 3.
252. See generally id.
254. Id. at 115.
256. See Butler, supra note 24, at 707 (stating that “one in seven black men is legally disenfranchised because of a criminal record”); John Mark Hansen, Disenfranchisement of Felons, July 2001, available at http://millercenter.virginia.edu/pdf/commission_final_report/task_force_report/hansen_chap8_disenfranchisement.pdf (last visited Apr. 11, 2002). In the more active death penalty states, the percentage of blacks ineligible for jury service as a result of a felony conviction is larger than the national average of seven percent and several times larger than it is for whites. See id. For instance, in Alabama, 12.41% of blacks have felony convictions, compared to 4.26% of whites. Id. In Florida, 13.77% of blacks have felony convictions, while 5.07% of whites do. Id. In Texas, 8.77% of blacks have felony convictions, compared to 2.95% of whites. Id. In Virginia, 13.82% of blacks
addition, because blacks are more likely to oppose capital punishment, they are likely to be challenged and removed for cause. Finally, in communities with small African-American populations, the problem is even more pronounced. In Utah, for example, blacks make up only one percent of the state's population but "of the eight death sentences affirmed on appeal between 1973 and 1986, four of those sentences were against black men," and in "all of those cases, the victims were white." Thus, in those states with a small African-American population, it is impossible to increase black participation on juries.

Professor David McCord suggests that, because juries are not well-trained, they should no longer be involved in capital sentencing decisions. According to Professor McCord, "[m]any of the errors in capital cases arise from ill-fated efforts to educate jurors concerning their sentencing duties." Thus, Professor McCord believes that judges should do the sentencing. In many states, however, judges are elected and thus would likely be inclined to impose death. Furthermore, it is

have felony convictions, compared to 3.35% of whites. See id. In addition, there are many other impediments to minority jury service. For example, minorities are more likely to fail to register for elections or with the state motor-vehicle department and thus are automatically excluded from the selection process. See HIROSHI FUKURAI ET AL., RACE AND THE JURY 44-47 (1993). Statutory qualifications, such as being mentally and physically sound and having good character, often rely on subjective criteria in determining the eligibility of potential jurors. "There is no doubt that such subjective evaluations have played an important role in creating racially demarcated juries in the race-conscious court structure in the South." Id. at 52. Finally, blacks and Hispanics are more likely to request to be excused from jury service as a result of personal obligations or difficulty in traveling to the courthouse. Id. at 55.


258. The U.S. Supreme Court has held that a juror whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of his duties at the sentencing phase of a capital trial may be removed for cause. See Lockhart v. McCree, 476 U.S. 162, 179-84 (1986); Wainwright v. Witt, 469 U.S. 412, 424-25, 430 (1985).


261. Id. at 463 (footnotes omitted).

262. "There are currently thirty-eight states that have capital punishment statutes. Thirty-two states both elect their judges and sentence people to death." Stephen B. Bright & Patrick Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 B.U. L. Rev. 759, 779 (1995)(footnotes omitted).

263. Harris v. Alabama, 513 U.S. 504, 521 (1995) (Stevens, J., dissenting) ("Not surprisingly, given the political pressures they face, judges are far more likely than juries to
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incorrect to blame jurors for most of the errors in capital cases. A recent study found that ineffective assistance of counsel and prosecutorial misconduct accounted for most of the appellate reversals of capital cases. The responsibility for ineffective lawyers rests with the judges who appoint them and observe their performance at trial. The responsibility for prosecutorial misconduct rests with the prosecutor. Thus, Professor McCord's proposal to eliminate juries from the sentencing process is unlikely to make the process any better and would likely make it worse.

D. Societal Racism

Almost all aspects of American life—employment, voting, legal education, the legal profession, schools, access to medical care, impose the death penalty.); see also id. at 521-22 n.8 (citing statistics from Florida and Indiana that demonstrate that judges "override juries' life recommendations far more often than their death recommendations").

264. See Liebman et al., supra note 130, at 1850.


266. Following the disputed presidential election in Florida, allegations were made that a large number of black voters were misidentified as felons, causing them to be purged from the voter rolls. ALAN DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 213 n.20, 227 n.15 (2001). In addition, a disproportionate number of disqualified ballots came from predominately minority sections of the state, outdated voting machines were often employed in predominately minority areas, and there were allegations that local police employed roadblocks in minority areas as a form of intimidation. Id.

267. See, e.g., William Glaberson, Accusations of Bias Roil Florida Law School, N.Y. TIMES, Oct. 30, 2000, at A12 (stating that a black associate dean at the University of Florida's law school resigned because, allegedly, professors were blocking the hiring of black professors and had resisted the promotion of black professors who had already been hired).

268. See Jonathan D. Glater, Few Minorities Rising to Law Partner, N.Y. TIMES, Aug. 7, 2001, at A1 (A study of the seven highest grossing law firms in America showed that minority lawyers accounted for about five percent of the new partners in recent years).

269. See, e.g., Breaking the Hickory Stick, N.Y. TIMES, May 7, 2001, at A16 ("Disadvantaged and minority children face corporal punishment at a higher rate than others.").

270. See, e.g., Peter T. Kilborn, Health Gap Grows, With Black Americans Trailing Whites, Studies Say, N.Y. TIMES, Jan. 26, 1998, at A16. Academic research shows a widening gap between blacks and others in incidences of infant mortality (blacks - 15.1 out of 1000 births, all people - 7.6), maternal mortality (blacks - 22.1 out of 100,000 births, all people - 7.1), tuberculosis (blacks - 23.9 for every 100,000 people, all people 8.7), diabetes-
the criminal justice system, commercial transactions and even access to a taxi are influenced by race. The criminal justice system is presently grappling with the issue of racial profiling. Sixty percent of African-American men report that they have been unfairly stopped by the police because of their race. The Missouri Attorney General studied traffic stops and searches in Missouri to determine whether and to what extent racial profiling existed in his state. The study determined that blacks were thirty percent more likely to be stopped by police than whites and seventy percent more likely to be searched following a routine traffic stop. Traffic offenses represent the most minor offenses in our criminal justice system, yet they are meted out in a racially discriminatory manner. If racism continues to exist in issuing traffic tickets, how can it be eradicated in meting out punishment in highly emotional capital cases often involving horrific murders? There is simply no way to eliminate racism in the death penalty process without eliminating racism in broader society. Any attempt to do so will prove futile. As long as racism exists in society, it will produce racist results in many aspects of American life.

related deaths (blacks - 76 of every 100,000 people, all people - 40), cancer (blacks - 172 deaths for every 100,000 people, all people - 130), heart disease (blacks - 147 deaths for every 100,000 people, all people - 108), and stroke (blacks - 45 for every 100,000, all people - 26.7). These disparities in death rates are attributed to the fact that blacks receive worse health care than whites. See id. Limited education, violence and addiction are also factors. See id.


272. See, e.g., Diana B. Henriques, Review of Nissan Car Loans Finds That Blacks Pay More, N.Y. TIMES, July 4, 2001, at A1 (discussing statistical study that shows “black customers in 33 states consistently paid more than white customers, regardless of their credit histories”).


276. See, e.g, id.
Mistakes in capital cases are inevitable. Professor Charles Black made this argument in 1974, yet despite advances in science and technology, such as DNA and lie detectors, his words are as true today as they were then. Humans are fallible, and they make mistakes. Police, prosecutors, judges, and jurors are all human and will continue to make mistakes.

In addition, capital cases are especially prone to mistakes. There is usually tremendous pressure on law enforcement officials to solve the murder. In addition, capital cases are highly emotional and extremely complicated. As a result, an entire body of law exists, applicable solely to capital cases.

Serious mistakes have been acknowledged since the reinstatement of capital punishment in 1976. To date, approximately one hundred inmates in twenty-four states have been wrongly convicted and have been released from death row, and the list continues to grow. A Supreme Court Justice recently stated her belief that innocent individuals may have already been executed. Finally, what better illustration that mistakes are inevitable in capital cases than the case of Timothy McVeigh. McVeigh was one of the most dangerous terrorists in American history. The government spent millions of dollars on his case. Yet, on the eve of his execution, the government announced that it had made a mistake by failing to turn over documents to McVeigh's lawyers. If a mistake of this magnitude can occur in McVeigh's case—in spite of its publicity, the amount of resources expended, and the extensive federal procedures designed to prevent mistakes from

280. In a July 2, 2001 address to the Minnesota Women Lawyer's group, Justice Sandra O'Connor said: "If statistics are any indication, the system may well be allowing some innocent defendants to be executed." See Justice O'Connor Questions Death Penalty, available at http://www.deathpenaltyinfo.org/newvoices.html.
283. See Bragg, supra note 281.
occurring—one cringes when imagining the mistakes that are made in less publicized cases involving indigent defendants, without many resources and represented by less than able counsel. With regard to mistakes, a Texas federal judge stated: “[T]he state probably ought not be allowed to do things it cannot undo because it is at least as error prone as other human organizations.”

This paper has demonstrated that the death penalty, as presently applied in the United States, cannot be completely reformed. There is simply too much racism and too many mistakes for it to be an effective and morally justifiable form of punishment. The conclusions in this article, however, are subject to two possible attacks. First, a detractor might argue that racism and mistakes are not unique to the death penalty. These problems are endemic to the entire criminal justice system, yet no one would advocate that the criminal justice system be dispensed with because of these problems. Just as the criminal justice system should be reformed rather than abolished, capital punishment should also be reformed, not abolished. In response, an argument can be made that, as flawed as the criminal justice system may be, there is no alternative to it that would adequately protect society. A just society must punish wrongdoers, and some of these individuals must be incarcerated to protect its citizens. Moreover, the threat of criminal punishment deters crime. In contrast, there is an alternative to capital punishment that adequately protects society: incarcerating individuals convicted of capital murder. Most of the modern evidence suggests that the threat of capital punishment does not deter murder and other capital crimes. Furthermore, the Supreme Court has long recognized the obvious—that death is different. It is, of course, repugnant that innocent individuals are incarcerated and have their liberty taken away from them. However, this pales in comparison to wrongfully executing someone. While it may be inevitable that some mistakes have to be tolerated in the criminal justice system, these same mistakes are intolerable when death is involved.

A second attack on this article’s conclusions might be that several measures, which were intended to reform the death penalty, have been implemented throughout the criminal justice system, and if the death penalty no longer existed, the rationale for these reforms would no

longer exist. For instance, the greater availability of DNA testing resulted from concerns over wrongfully convicted capital defendants, but this reform has been adopted throughout the criminal justice system and has helped to free other wrongfully convicted inmates.\(^{287}\) Although the criminal justice system has benefitted from these reforms, it is certainly in need of further reform. Rigorous analysis of the death penalty has helped to expose numerous flaws in the criminal justice system as a whole and has been a catalyst for change. However, it is illogical to retain the unjust system of capital punishment in order to introduce further reform to the entire criminal justice system. Rather, it is incumbent upon academics, defense lawyers, judges, conscientious prosecutors, and others to continue to expose the flaws in the system and to pursue much needed reforms.

The movement internationally, particularly in Europe, is away from capital punishment. What should the United States do about capital punishment? What about the growing moratorium movement? Should individuals concerned with the way in which the death penalty is imposed in this country support this movement? The next section addresses these questions.

IV. PROPOSAL

The moratorium movement, while well-intentioned, will have the effect of legitimating the death penalty. The movement represents a concession on the part of abolitionists that the death penalty can be “fixed” as long as certain measures have been implemented. Obviously, once the death penalty is “fixed,” its proponents will argue that these reforms will need sufficient time to work. During this time, the death penalty will continue to be imposed in a racially discriminatory manner and mistakes will persist, resulting in the continued execution of innocent individuals. In the meantime, critics will be precluded from arguing for the death penalty’s abolition because they urged a moratorium and participated in its “reform.” As scholars Carol and Jordan Steiker state:

There are at least two ways . . . in which legislative reform of the death penalty could legitimate the practice of capital punishment. The first is virtually identical to the kind of legitimization we described as a by-product of judicial reform of the death penalty—that is, some reforms may do very little to

\(^{287}\) See Innocence Project: Cardozo School of Law, at http://www.cardozo.yu.edu/innocence_project/index.html (last visited Apr. 11, 2002) (stating that since the advent of DNA testing, at least sixty-three people have been legally exonerated through DNA testing and set free).
change the underlying practice but may offer the appearance of much greater procedural regularity than they actually produce, thus inducing a false or exaggerated belief in the fairness of the entire system of capital punishment. . . .

The second form of legitimation, which was implicated though to a much lesser degree by judicial reform, is the legitimation inherent in every kind of incremental change. That is, even when reform does not induce a false or exaggerated belief in the progress being made, it will always induce at least some satisfaction in the real improvements achieved, and thus, will make people more comfortable than they otherwise would be with the underlying practice, thereby dissipating continued scrutiny of the death penalty and energy toward abolition.288

Rather than legitimate the death penalty by calling for a moratorium, opponents should call for its abolition on the ground that it cannot be fixed because it will never be fairly implemented. No further political capital should be spent pursuing a moratorium. Opponents of capital punishment should seek instead to educate the public about capital punishment. Opponents should point out the fact that capital punishment is not a deterrent to murder.289 Furthermore, the public should be informed that no nation in the world has been successful in administering the death penalty. Unlike socialism or national health care, whose proponents can identify nations in which these systems have at least arguably been successfully employed, proponents of capital punishment can point to no nation where capital punishment has been even arguably successful.

Does this mean that society can never reserve the right to execute anyone? It is apparent that executions can be carried out and are morally justifiable only if they are truly necessary to protect society. During the sentencing phase of capital cases, juries are routinely required to determine whether the defendant is a continuing threat to society. In the overwhelming majority of cases, society would be protected by incarcerating the defendant for life. In addition, inmates convicted of

murder rarely commit other homicides. Furthermore, those sentenced to death represent only a tiny fraction of murderers. Most murderers who are incarcerated and remain in prison do not inflict any further harm on others. Thus, juries have not been truly honest in answering this question.

There are two types of murderers who may potentially pose a continuing threat to society: war criminals and mass murderers. Many European nations that have abolished the death penalty have reserved capital punishment for war criminals. These nations were almost destroyed by such individuals and know firsthand the havoc they can wreak on a society. War criminals are a continuing threat because they often have followers and may be able to mastermind criminal schemes from prison and have them carried out by their followers. The classic example of such an individual was Adolph Hitler. No society would have been safe from Hitler. His rise to power was initially conceived from prison, and had he survived World War II, he would have been a continuing threat to the world given his worldwide following. Society should reserve the right to execute someone like him in the future. Mass murderers pose similar threats. Individuals such as Osama bin Laden are a continuing threat because, like war criminals, they may have a following and may pose a danger to society even if incarcerated.

The death penalty ought to be retained for these two types of killers despite the problems normally associated with the death penalty. Such problems will usually not be present in these cases, which are always very high profile and receive heavy media and public scrutiny. As a result, superb counsel usually step forward to represent these defendants. Adequate resources will be provided to the defense. Importantly, race will not be a factor because these crimes are so heinous that death will
usually be sought and imposed irrespective of race. Mistakes are still possible, however, as the McVeigh case illustrates. Nonetheless, because of the publicity and amount of resources devoted to the case, it is likely that any mistakes will come to light and be remedied, as in the McVeigh case. Finally, as a result of the resources expended on these cases and the publicity and scrutiny they generate, we can usually rest assured that the defendant, if convicted, is in fact guilty of the offense and was properly convicted and sentenced.

V. CONCLUSION

The death penalty is being studied by several states. Other groups and individuals have also studied the issue, and many reforms have been proposed. However, most of these studies and proposed reforms fail to sufficiently address the issue of race and capital punishment. Rather, the assumption these groups and individuals make is that once the death penalty system has been reformed, race will no longer be an issue. This is a naïve and dangerous assumption given this nation’s history with racism. Race is still a major issue in this nation, and studies of the death penalty must acknowledge this fact. On the same day that a majority of the judges on the Fifth Circuit finally conceded that a sleeping lawyer is indeed ineffective, the Supreme Court refused to stop the execution of an African-American juvenile sentenced to death by an all-white jury, which included one juror who was the president of the United Daughters of the Confederacy and another who believed that “the nigger got what he deserved.” These two cases illustrate the point this article attempts to make—that as long as race is a dominant issue in this society, it will be a dominant issue in the administration of the death penalty.

296. See McCleskey v. Kemp, 481 U.S. 279, 367 (1987) (Stevens, J., dissenting) (“[T]here exist certain categories of extremely serious crimes for which . . . juries consistently impose the death penalty without regard to . . . race. . . .”).

297. See supra notes 277-84 and accompanying text.

298. For example, Arizona released a study of how capital punishment is administered in Arizona. See Capital Case Commission Interim Report, available at http://www.ag.state.az.us/CCC/Intrpt.html (last visited Apr. 12, 2002). The report made several recommendations designed to improve the system, but it failed to discuss any of the racial issues that have been a barrier to the fair administration of the death penalty. Id.


300. See Herbert, supra note 244 and accompanying text.