

**BLACKER THAN DEATH ROW: HOW CURRENT EQUAL
PROTECTION ANALYSIS FAILS MINORITIES FACING
CAPITAL PUNISHMENT**

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INTRODUCTION

[I]t has been scarcely a generation since this Court's first decision striking down racial segregation [W]e cannot pretend that in three decades we have completely escaped the grip of a historical legacy spanning centuries. . . . [F]or we remain imprisoned by the past as long as we deny its influence in the present.¹

Justice Brennan wrote these words in his dissent in *McCleskey v. Kemp*, where the Supreme Court required the defendant, who had been sentenced to death and who claimed to be a victim of discrimination, to prove that purposeful racial animus motivated a state actor in his particular case.² While there is evidence that overt and unconscious racism permeate American society, an unavailability of tangible evidence of such in particular capital cases makes it almost impossible for one to meet this standard in proving the existence of overt racism. The framers of the Fourteenth Amendment to the Constitution specifically included the Equal Protection Clause to deal with racial discrimination in our criminal justice system.³ Yet, the Supreme Court has failed to interpret the Equal Protection Clause in a way that will ameliorate racial discrimination in capital sentencing. Instead, courts have repeatedly upheld the constitutionality of sending a disproportionate number of minorities to their deaths.

Our legal system should not tolerate this horrible consequence of the current interpretation of the Equal Protection Clause. Judges across the country must rekindle the dying flames that once burned behind Fourteenth

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¹ *McCleskey v. Kemp*, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting).

² *Id.* at 292.

³ SAMUEL R. GROSS & ROBERT MAURO, *DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* 119 (1989).

Amendment jurisprudence by holding that a strong statistical study alone can be used to prove purposeful discrimination in capital sentencing. Although allowing statistics alone to support an equal protection claim in capital cases will often result in an injunction preventing execution, this remains the only reasonable solution to the problem of racial disparity in capital sentencing, especially when there is an alternative of imprisonment for life without the possibility of parole.

Part I of this Comment discusses the background of the Equal Protection Clause of the Fourteenth Amendment. First, it briefly explores the history of the Amendment and its attempt to deal with post-Civil War racism in the South. A more detailed exploration of the Court's application of this Amendment in specific cases follows, illustrating the development of the purposeful discrimination requirement. Part I then focuses on capital punishment. It discusses the various studies that have concluded that the death penalty is disproportionately applied to blacks, specifically focusing on black defendants convicted of killing white victims. Finally, it focuses on numerous cases in which individuals have unsuccessfully challenged such racial disparity on equal protection grounds.

Part II explores three different problems with the Court's current interpretation of the Equal Protection Clause. First, because racial animosity exists in all actors and in all stages of the criminal justice system, a defendant cannot readily attribute purposeful discrimination to a particular point in time or to a specific state actor. Second, even if one does discover evidence of purposeful discrimination, a defendant often lacks the assistance of a competent attorney to raise an equal protection claim. Finally, an interpretation that requires purposeful discrimination fails to account for the unconscious racism that predominates our society.

Part III explores why judges hearing an equal protection claim should allow a capital defendant to use statistics alone to prove purposeful discrimination. This would not run contrary to *stare decisis*, because the Supreme Court has already recognized numerous instances in which statistics alone can support an equal protection claim. Moreover, although this relaxed evidentiary showing on the defendant's part may lead to an injunction precluding use of the death penalty, the alternative sentence—life without the possibility of parole—stands as an equally viable option that will create no extra burden on society.

I. BACKGROUND OF THE EQUAL PROTECTION CLAUSE

A. *The Creation of the Current Equal Protection Test*

Historical documents illustrate the existence of a direct link between the Fourteenth Amendment and racial disparities in our country's penal system. Those who ratified the Fourteenth Amendment specifically wished to overrule the laws passed after the Civil War, known as the Black Codes, which legislators implemented to maintain white supremacy.⁴ Many of these codes mandated more severe treatment for black defendants charged with a crime.⁵ Through the Equal Protection Clause, our nation "constitutionalize[d]" the Civil Rights Act of 1866, by guaranteeing that "inhabitants of every race and color . . . shall be subject to like punishment, pains and penalties, and no other."⁶

Although multiple sources confirm that the purpose behind the Fourteenth Amendment was to eradicate racial disparity in sentencing,⁷ constitutional researchers have been unable to locate statements that would help to decipher how the originalists intended to apply the Equal Protection Clause.⁸ Because of this, the Supreme Court uses few texts, beyond the Amendment itself, when interpreting whether an equal protection violation has occurred.⁹

In some cases, lawmakers blatantly write racial discrimination on the face of a law; courts quickly conclude that such laws offend the Constitution. For instance, a hypothetical law that requires African

⁴ *Id.* For instance,

Georgia law provided that the rape of a white female by a black man was punishable by death, while the rape of a white female by anyone else was punishable by a prison term not less than two nor more than twenty years. The rape of a black woman was punishable "by fine and imprisonment, at the discretion of the court."

Stephen B. Bright, *Discrimination, Death, and Denial: Race and the Death Penalty*, in *MACHINERY OF DEATH: THE REALITY OF AMERICA'S DEATH PENALTY REGIME* 45, 45 (David R. Dow & Mark Dow eds., 2002) (citation omitted) (quoting A. LEON HIGGINBOTHAM JR., *IN THE MATTER OF COLOR: RACE IN THE AMERICAN LEGAL PROCESS* 256 (1978)).

⁵ GROSS & MAURO, *supra* note 3.

⁶ *Id.* (quoting Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866)).

⁷ *Id.* at 120.

⁸ *See id.*

⁹ *See* LOUIS MICHAEL SEIDMAN, *CONSTITUTIONAL LAW: EQUAL PROTECTION OF THE LAWS* 23–38 (2003) (showing the Supreme Court's efforts to interpret the Equal Protection Clause and the fact that the Court rarely uses outside texts for its interpretations).

Americans to wait until age eighteen to apply for a driver's license, but permits Caucasians to apply at age sixteen, would clearly be struck down as a violation of the Equal Protection Clause.¹⁰

In other cases, a law appears to be facially neutral, but it disparately impacts racial minorities. The Supreme Court first addressed this issue in *Washington v. Davis*,¹¹ where two African Americans sued the Commissioner of the District of Columbia, the Chief of the District's Metropolitan Police Department, and the Commissioners of the United States Civil Service Commission,¹² alleging that the police department's practices discriminated against blacks in violation of the Due Process Clause of the Fifth Amendment.¹³ The department's hiring policy required that all candidates for a position take a written examination, known as "Test 21,"¹⁴ which examined verbal ability, vocabulary, reading, and comprehension.¹⁵ Statistics revealed that blacks failed this test at a rate roughly four times that of whites.¹⁶

Justice White, writing the Opinion of the Court, declared:

[A] law, neutral on its face and serving ends otherwise within the power of government to pursue, is [not] invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact . . . is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.¹⁷

According to the Court, a plaintiff challenging a law as a violation of equal protection must demonstrate that lawmakers acted with a discriminatory purpose.¹⁸

The Supreme Court reaffirmed the requirement of purposeful discrimination a year later in *Village of Arlington Heights v. Metropolitan*

¹⁰ *Id.* at 76.

¹¹ 426 U.S. 229 (1976).

¹² *Id.* at 232.

¹³ *Id.* at 234. The Court acknowledged in *Davis*, "[T]he Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups." *Id.* at 239.

¹⁴ *Id.* at 234.

¹⁵ *Id.* at 235.

¹⁶ *Id.* at 237.

¹⁷ *Id.* at 242.

¹⁸ *Id.* at 239.

*Housing Development Corp.*¹⁹ In that case, a predominately white, upper-middle class Chicago suburb refused to allow rezoning of a fifteen-acre parcel from single-family to multiple-family units for lower-income tenants.²⁰ The plaintiff, Metropolitan Housing Development Corporation, claimed the denial was racially motivated and challenged it on equal protection grounds.²¹ Again, the Court announced, “Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”²² The Court found that the plaintiff failed to carry its burden of proving such motivation.²³

B. The Equal Protection Test Applied to Capital Cases

1. Race-Based Statistics on Capital Sentences

For approximately twenty-eight hundred people locked in state and federal prisons, life is unlike that in any other institution. . . . These are America’s death row residents: men and women who walk the razor’s edge between half-life and certain death.

You will find a blacker world on death row than anywhere else.²⁴

Historically, this “blacker world on death row”²⁵ existed in the United States because those who utilized the death penalty were “openly and unashamedly” biased against racial minorities.²⁶ Before the Civil War, explicit racism played a normative part of the capital statutes in many states.²⁷ For instance, Georgia punished a black man convicted of raping a white woman with death, but a white man who committed a similar crime was punished with two to twenty years of imprisonment.²⁸

Although the Fourteenth Amendment overturned all criminal statutes that were facially discriminatory, disparate treatment of African Americans

¹⁹ 429 U.S. 252 (1977).

²⁰ *Id.* at 254.

²¹ *Id.*

²² *Id.* at 265.

²³ *Id.* at 270.

²⁴ MUMIA ABU-JAMAL, ALL THINGS CENSORED 38 (Noelle Hanrahan ed., 2000).

²⁵ *Id.*

²⁶ AMNESTY INT’L USA, KILLING WITH PREJUDICE: RACE AND THE DEATH PENALTY 1 (1999).

²⁷ *Id.* at 3.

²⁸ *Id.*

in the application of the death penalty continued.²⁹ Between 1908 and 1972 in Virginia, although almost half of the men convicted of rape were white, all of those executed for this crime were black.³⁰

In 1972, the Supreme Court's landmark decision in *Furman v. Georgia*³¹ temporarily ended the practice of capital punishment in the United States.³² In *Furman*, three black defendants sentenced to death by their respective state's statutes—two for rape and one for murder—appealed the decisions on the ground that the imposition and carrying out of the death penalty constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.³³ The Court issued a single-page, per curiam decision that confirmed that these death sentences violated the Constitution.³⁴ The decision was followed by five extensive concurring opinions, written separately by Justices Douglas, Brennan, Stewart, White, and Marshall, and by four dissents, written separately by Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist.³⁵ This decision prompted states to rewrite their capital sentencing statutes in a way that complied with the recommendations of the Court.³⁶

Despite measures taken to minimize prosecutorial discretion in the implementation of the death penalty, studies of eight states between 1976 and 1980 show that disparities in capital sentencing based on both the race of the defendant and on the race of the victim continued.³⁷ In 1991, blacks comprised only 11% of the total population in the United States.³⁸ However, in 1999, 43% of the men on death row in thirty-nine of the fifty states were black.³⁹ The most recent studies show that even though blacks

²⁹ David C. Baldus & George Woodworth, *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION* 385, 386 (James R. Acker, Robert M. Bohm & Charles S. Lanier eds., 1998).

³⁰ AMNESTY INT'L USA, *supra* note 26, at 3. The Supreme Court later declared that executing an individual for the crime of rape constitutes cruel and unusual punishment in violation of the Eighth Amendment. *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

³¹ 408 U.S. 238 (1972).

³² *See id.* at 239–40.

³³ *Id.* at 239.

³⁴ *Id.* at 239–40.

³⁵ *Id.* at 240.

³⁶ *See* AMNESTY INT'L USA, *supra* note 26, at 6 & n.12.

³⁷ GROSS & MAURO, *supra* note 3, at 35, 43.

³⁸ ABU-JAMAL, *supra* note 24, at 203.

³⁹ *Id.*

comprise only 12.8% of the total population,⁴⁰ 41.7% of individuals on death row are black.⁴¹

Statistical studies focusing both on federal sentencing and on individual states generate similar findings. A study from the Justice Department demonstrates that from 1995 to 2000, racial minorities comprised 80% of the 682 defendants who faced capital charges in federal court.⁴² As of 1999, nineteen of the twenty-two cases in which the prosecution sought the death penalty in Houston County, Alabama, involved black defendants.⁴³ Similarly, between 1990 and 1995 in Orleans Parish, Louisiana, the prosecution sought the death penalty in 72.7% of the cases involving a black defendant and a white victim, but subjected only 21.4% of white defendants who killed whites to capital charges.⁴⁴ Finally, for approximately the last thirty years in Danville, Virginia, sixteen of the eighteen people charged with capital murder were black, and all of the men eventually sentenced to death were of minority status.⁴⁵

The most convincing evidence that defendants receive different treatment based on their race arises from studies that take into consideration the facts of each particular case. In the 1990s, researchers conducting a study of capital sentencing in Philadelphia manipulated multiple variables to take into account the race of the defendant, the aggravating circumstances of the crime, and the defendant's record.⁴⁶ The results illustrate that blacks were substantially more likely to receive capital sentences than whites, and that if race were considered an "aggravating factor," it would rank third highest.⁴⁷ Of the 124 prisoners in Philadelphia on death row as of October 1998, only fifteen were white.⁴⁸

2. *Unsuccessful Equal Protection Challenges to Capital Sentences*

Historically, both state and federal courts have discredited claims made by minorities that they were unfairly sentenced to death by the criminal

⁴⁰ U.S. CENSUS BUREAU, RACE AND HISPANIC ORIGIN IN 2005, at 3 (2005), <http://www.census.gov/population/pop-profile/dynamic/RACEHO.pdf>.

⁴¹ Death Penalty Information Center, <http://www.deathpenaltyinfo.org> (follow "Death Row" hyperlink; then follow "Inmates by Race" hyperlink) (last visited Sept. 12, 2007).

⁴² *Deadly Disparities*, N.Y. TIMES, Sept. 17, 2000, § 4, at 18.

⁴³ AMNESTY INT'L USA, *supra* note 26, at 10–11.

⁴⁴ *Id.* at 11.

⁴⁵ *Id.* at 9.

⁴⁶ *Id.* at 9–10.

⁴⁷ *Id.* at 10.

⁴⁸ *Id.* at 9.

justice system. The first equal protection challenge dealing with race and capital punishment involved William Maxwell, an African American sentenced to death for the rape of a white woman in Arkansas.⁴⁹ Maxwell offered as evidence a study conducted by Dr. Marvin Wolfgang, a sociologist and criminologist at the University of Pennsylvania,⁵⁰ demonstrating that black men who were convicted of raping white women had a 50% chance of receiving a death sentence, but a white man who committed a similar crime had only a 14% chance of being executed.⁵¹ The federal district court rejected Maxwell's claim because, among other things, the defendant could not prove that his particular sentence was a product of racial discrimination.⁵²

Following *Maxwell*, other lower federal and state courts rejected equal protection claims because a capital defendant could not prove the existence of racial animus in his particular case.⁵³ In *Adams v. Wainwright*, defendant James Adams appealed the denial of his petition for habeas corpus relief after he was convicted and sentenced to death for the murder of Edgar Brown,⁵⁴ arguing, among other things, that in Saint Lucie County the death penalty was disproportionately imposed in cases involving black defendants and white victims.⁵⁵ Although it rejected Adams's statistical data as proof of an equal protection violation, the Eleventh Circuit did state that intent can sometimes be inferred from statistics alone, but "[o]nly if the evidence of disparate impact is so strong that the only permissible inference is one of intentional discrimination."⁵⁶

In 1950, seven black men in Virginia also appealed their death sentences based on claims that the state's death penalty statute was disproportionately applied to blacks.⁵⁷ The Virginia Supreme Court was unreceptive, finding "not a scintilla of evidence" to support the claim of racial discrimination.⁵⁸

⁴⁹ *Maxwell v. Bishop*, 257 F. Supp. 710, 711–12 (E.D. Ark. 1966), *aff'd*, 398 F.2d 138 (8th Cir. 1968), *vacated and remanded on other grounds*, 398 U.S. 262 (1970).

⁵⁰ *Id.* at 717–18.

⁵¹ *Id.* at 719.

⁵² *Id.*

⁵³ *E.g.*, *Spinkellink v. Wainwright*, 578 F.2d 582, 614–15 (5th Cir. 1978); *Adams v. Wainwright*, 709 F.2d 1443, 1449 (11th Cir. 1983).

⁵⁴ *Adams*, 709 F.2d at 1445.

⁵⁵ *Id.* at 1449.

⁵⁶ *Id.*

⁵⁷ AMNESTY INT'L USA, *supra* note 26, at 3.

⁵⁸ *Id.*

In 1987, the Supreme Court first addressed this issue in *McCleskey v. Kemp*, where jurors in the Superior Court of Fulton County, Georgia, convicted Warren McCleskey, a black man, of two counts of armed robbery and one count of murder for killing a white police officer during the robbery of a furniture store.⁵⁹ The jury sentenced McCleskey to death, having found that the prosecution met the statutory requirement of proving the existence of two aggravating factors beyond a reasonable doubt.⁶⁰

McCleskey appealed his conviction, arguing that racism motivated actors at every stage of the Georgia criminal justice system—from the prosecutor who sought the death penalty, to the jury that unanimously agreed upon the sentence, to the state that took no action to alleviate such discrimination—in violation of the Fourteenth Amendment’s Equal Protection Clause.⁶¹ As evidence, McCleskey submitted a statistical study conducted by Professors David C. Baldus, Charles Pulaski, and George Woodworth, who examined over 2000 murder cases that occurred in Georgia in the 1970s.⁶² Baldus and his colleagues focused on both the race of the defendant and the race of the victim, while considering 230 other variables that could explain any disparities through aggravating factors or other nonracial grounds.⁶³ The three discovered that the government implemented the death penalty in 22% of the cases involving a black defendant and a white victim, 8% of the cases involving a white defendant and a white victim, 1% of the cases involving a black defendant and a black victim, and 3% of the cases involving a white defendant and a black victim.⁶⁴ Also focusing on the discretion exercised in seeking the death penalty, the study demonstrated that Georgia prosecutors sought death in 70% of the cases involving a black defendant and a white victim, 32% of the cases involving a white defendant and a white victim, 15% of the cases involving a black defendant and a black victim, and 19% of the cases involving a white defendant and a black victim.⁶⁵

Despite such solid statistical data, a majority of the Court rejected McCleskey’s equal protection claim.⁶⁶ Justice Powell, writing the Opinion of the Court, based the rationale on the fact that those averring such

⁵⁹ 481 U.S. 279, 283 (1987).

⁶⁰ *Id.* at 285.

⁶¹ *Id.* at 292.

⁶² *Id.* at 286.

⁶³ *Id.* at 287.

⁶⁴ *Id.* at 286.

⁶⁵ *Id.* at 287.

⁶⁶ *Id.* at 319.

violations must prove the existence of purposeful discrimination, which, according to the Court, requires a showing that the decisionmakers in McCleskey's particular case were motivated by racial animosity.⁶⁷ "Even a sophisticated multiple-regression analysis such as the Baldus study can only demonstrate a *risk* that the factor of race factored into *some* capital sentencing decisions"⁶⁸

Justice Brennan delivered a strong dissent, criticizing as ridiculous the majority's reasoning that one must demonstrate "to a moral certainty" that race influenced a decision before statistics can block a defendant's death sentence.⁶⁹ However, the most notable criticism of this decision came years later, and from the most unlikely source. When an interviewer asked Justice Powell if he regretted any decision made during his service on the Supreme Court, Powell responded with *McCleskey v. Kemp*, and admitted that at that point he supported the abolishment of the death penalty.⁷⁰

II. PROBLEMS WITH REQUIRING A DEFENDANT TO PROVE PURPOSEFUL DISCRIMINATION IN HIS PARTICULAR CASE

The Supreme Court's current requirement that an individual prove that purposeful discrimination affected his particular case provides a straightforward approach when dealing with the equal protection claims of minorities sentenced to death. However, this approach dilutes our legal system's ability to attack anything but the most overt racial animosity. For a capital defendant to succeed on an equal protection claim, he has to prove that the actors in his particular case intended to execute him because of his race.⁷¹ This standard places an almost impossible burden on an individual victimized by racism.⁷²

A capital defendant attempting to prove that purposeful discrimination affected his particular case will experience difficulty for several reasons. First, both statistical studies and detailed descriptions of capital trials produce overwhelming evidence that racial bias does not exist in a vacuum, affecting only one part in the assembly line of our criminal justice system.⁷³ Rather, every actor through the process exhibits overt racism: the prosecutor, who retains unbridled discretion in deciding who to expose

⁶⁷ *Id.* at 292.

⁶⁸ *Id.* at 291 n.7 (second emphasis added).

⁶⁹ *Id.* at 322 (Brennan, J., dissenting).

⁷⁰ AMNESTY INT'L USA, *supra* note 26, at 22.

⁷¹ *See* McCleskey, 481 U.S. at 292.

⁷² *See* GROSS & MAURO, *supra* note 3, at 120–21.

⁷³ *See* AMNESTY INT'L USA, *supra* note 26.

to government-sanctioned execution; the twelve jurors, who collectively decide an individual's sentence; and the judge, who decides what evidence to allow in a trial.⁷⁴ Racism manifested by multiple actors prevents an individual from locating the source of racial animus and from conducting a narrow investigation into the motive of one particular state actor.

Second, a capital defendant often lacks the assistance of a competent attorney to demonstrate that racial animus exists. This problem occurs due to ineffective assistance of counsel during the trial portion of a capital case,⁷⁵ as well as to the total lack of legal representation during the majority of the appeals process.⁷⁶ Therefore, even if a death row inmate has uncovered the necessary proof of a discriminatory purpose, he will not have the tools necessary to succeed on an equal protection claim.

Finally, the greatest problem with requiring a showing of purposeful discrimination in each particular case stems from the standard's failure to account for the pervasive, unconscious racism present in the beliefs and attitudes of many individuals in our society.⁷⁷ Even though this institutional racism is equally brutal in the eyes of its victims, third parties cannot locate it through investigation, because the individual motivated by unconscious racism is not aware of his or her racist attitude.⁷⁸

A. The Problem of Racism Exhibited by Multiple Actors in the Criminal Justice System

To uncover evidence of purposeful discrimination, a claimant must first identify who is exhibiting such invidious behavior. Most equal protection cases involve few state actors,⁷⁹ and so this discovery process is usually fairly uncomplicated. For instance, in a case where an African American claims that he or she was refused a job because of race, one

⁷⁴ *Id.*

⁷⁵ See Michael Mello & Paul J. Perkins, *Closing the Circle: The Illusion of Lawyers for People Litigating for Their Lives at the Fin de Siècle*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION* 245, 261 (James R. Acker, Robert M. Bohm & Charles S. Lanier eds., 1998).

⁷⁶ See *id.* at 255.

⁷⁷ See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN. L. REV.* 317, 319 (1987).

⁷⁸ See *id.* at 319–20 & nn.7–8.

⁷⁹ See Jason Walbourn, Comment, *Strict in Theory, but Not Fatal in Fact: Hunter v. Regents of the University of California and the Case for Educational Research as a New Compelling State Interest*, 83 *MINN. L. REV.* 183, 212–13 (1998).

would immediately investigate those who made the hiring decision to uncover possible racial discrimination. In contrast, strong evidence proves that in capital cases, *multiple* actors—the prosecutor, jury, and judge—exhibit racist attitudes and behaviors, making it much more difficult to locate the offending actor.⁸⁰

The prosecutor has been described as the “quintessential state actor in a criminal proceeding,”⁸¹ because he or she possesses broad discretion as to whether to pursue the death penalty in a particular case.⁸² Although one cannot realistically allege that racial animosity motivates all prosecutors’ decisions, it is equally implausible to conclude that prosecutors “always isolate themselves from the racial divisions that effect US society.”⁸³ In fact, unsettling evidence exists that indicates that many prosecutors exhibit racist attitudes.⁸⁴

Michael Goggin, the former prosecutor of Cook County, Illinois, recently discussed an office “contest” in which prosecutors competed to be first to convict as many defendants needed to equal a combined weight of 4000 pounds.⁸⁵ Local officials referred to this competition as “Niggers by the Pound.”⁸⁶

Moreover, disturbing evidence exists that prosecutors purposely use their preemptory challenges to exclude black jurors.⁸⁷ Despite the Supreme Court’s decision in *Batson v. Kentucky*,⁸⁸ which prohibited jury exclusion based on race,⁸⁹ researchers have uncovered evidence that prosecutors continue to engage in such practices.⁹⁰ One year after the decision in *Batson*, Philadelphia’s Assistant District Attorney compiled a videotape for fellow prosecutors with instructions on how to win a conviction: “Let’s face it, the blacks from the low-income areas are less likely to convict. . . . You don’t want those guys on your jury If you get a white teacher in a black school who’s sick of these guys, that may be

⁸⁰ AMNESTY INT’L USA, *supra* note 26.

⁸¹ *McCleskey v. Kemp*, 481 U.S. 279, 350 (1987) (Blackmun, J., dissenting).

⁸² AMNESTY INT’L USA, *supra* note 26, at 8.

⁸³ *Id.* at 9.

⁸⁴ *See id.* at 1–2.

⁸⁵ *Id.* at 10.

⁸⁶ *Id.*

⁸⁷ *Id.* at 12.

⁸⁸ 476 U.S. 79 (1986).

⁸⁹ *Id.* at 84.

⁹⁰ AMNESTY INT’L USA, *supra* note 26, at 12.

the one to accept.”⁹¹ Following the release of this video in 1997, evidence suggested that such practices continued in Philadelphia.⁹²

Overt racism also exists among jurors, who hold the key to the death chamber in their hands. Recent studies focusing on the deliberation process reveal that many jurors are far from colorblind.⁹³ The Capital Jury Project conducted interviews with over one thousand jurors who served on capital cases in fourteen states.⁹⁴ When asked to discuss the defendant, one juror responded, “Just a typical nigger. Sorry, that’s the way I feel about it.”⁹⁵ Another stated, “He [the defendant] was a big man who looked like a criminal He was big and black and kind of ugly. So, I guess when I saw him I thought this fits the part.”⁹⁶ A third explained his or her feelings about the crime: “[W]hen I heard about the killing, I thought, well, they’re just wiping each other out again. You know, if they’d been white people, I would’ve had a different attitude.”⁹⁷

Minority jurors have also relayed accounts of white jurors using racial slurs during deliberations. During the deliberation process at the trial of Louis Truesdale, a black man who murdered a white woman in South Carolina, the sole minority woman among eleven whites heard several jurors stating, “[T]his nigger had to fry.”⁹⁸ Originally, she voted for a life sentence, but she later changed her vote after feeling intimidated by fellow jurors.⁹⁹ The State of South Carolina executed Mr. Truesdale in 1998.¹⁰⁰

These disturbing attitudes also exist at the pinnacle of our criminal justice system—in the minds and attitudes of judges. Judges are expected to apply the law in a fair and objective manner, yet in many instances, they fail to fulfill this obligation. In 1991, Judge Earl Blackwell from Missouri presided over the trial of Brian Kinder, a black man accused of murder.¹⁰¹ Blackwell opposed racial integration in Missouri schools during his term as a state senator, and, six days before the trial, he released the following

⁹¹ *Id.*

⁹² *Id.* at 13.

⁹³ *See id.* at 13–14.

⁹⁴ *Id.* at 14.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 15–16.

⁹⁹ *Id.* at 16.

¹⁰⁰ *Id.* at 15.

¹⁰¹ *Id.* at 18; *see also* *Kinder v. Bowersox*, 272 F.3d 532, 537 (8th Cir. 2001) (indicating that Kinder was convicted of rape and first-degree murder).

statement regarding his decision to switch political parties: “[T]he Democratic party places far too much emphasis on representing minorities such as . . . people with a skin that’s any color but white.”¹⁰² Following this statement, Kinder’s counsel unsuccessfully attempted to have Blackwell removed, and the state sentenced Kinder to death.¹⁰³

Similarly, in 1985, Anthony Peek was sentenced to death in Florida.¹⁰⁴ However, evidence that the trial judge had used racial slurs when referring to the defendant’s family was later uncovered.¹⁰⁵ The state subsequently granted Mr. Peek a new trial, during which he was found not guilty.¹⁰⁶

A claimant bringing forth evidence that a prosecutor, juror, or judge in his case behaved in such ways would definitely succeed in proving purposeful discrimination. However, the problem lies in defense counsel’s inability to uncover such evidence in a system where multiple state actors engage in wrongdoing. A broad attack on the district attorney’s office, all twelve jurors, and the judge would produce an unmanageable amount of data throughout the discovery process. Such lack of focus could be devastating to a defendant on death row who has a limited amount of resources to conduct a thorough investigation. With an inability to narrow the search to find purposeful discrimination among one or two state actors, a defendant must depend on inferences and statistical analysis, which the Supreme Court has already rejected as inadequate.¹⁰⁷ Because of the difficulty of locating the offending state actor, constitutional interpreters who demand proof of intentional discrimination in a particular capital case disserve the purpose behind the Fourteenth Amendment.

B. The Problem of Capital Defendants Proceeding Without Counsel

Proving that purposeful discrimination affected one’s particular case is also problematic because current law does not adequately equip a capital defendant with the most important tool necessary to meet this burden: the assistance of effective counsel in every stage of the criminal justice system. The Supreme Court has stated that the Sixth Amendment guarantees an indigent defendant the right to appointed counsel at all felony proceedings,

¹⁰² AMNESTY INT’L USA, *supra* note 26, at 18.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 18–19.

¹⁰⁶ *Id.* at 19.

¹⁰⁷ *See McCleskey v. Kemp*, 481 U.S. 279, 292–93 (1987).

ending at sentencing,¹⁰⁸ and that the Fourteenth Amendment's Due Process Clause guarantees this same right for the first mandatory appeal.¹⁰⁹ However, the federal Constitution does not require states to provide counsel throughout the remainder of the appellate process,¹¹⁰ which includes habeas corpus proceedings.¹¹¹ According to estimates by the American Bar Association, 99% of death row inmates are poor.¹¹² Therefore, unless an inmate can recruit an attorney willing to offer his or her services free, most death row inmates must proceed through the majority of the appeals process pro se. For example, a study conducted in the late 1990s revealed that as of May 1996, 125 of Texas's death row inmates lacked attorneys.¹¹³ Similarly, as of January 1996, 100 to 125 of Pennsylvania's 187 death row inmates lacked post-conviction lawyers.¹¹⁴

Forcing a death row inmate to navigate through the appeals process alone is problematic for several reasons. After *Furman*, numerous states—to withstand future constitutional challenges—remodeled their death penalty statutes, thereby implementing an array of complex, new procedures.¹¹⁵ These procedures eradicated the simple one trial, one verdict, one appeal approach, and replaced it with a more complicated trial—requiring both bifurcation and a balance of aggravating and mitigating circumstances—followed by an automatic appeal, post-conviction relief, habeas corpus relief, and executive clemency.¹¹⁶ Because of this complication, many post-*Furman* lawyers experienced difficulty navigating this new system.¹¹⁷

In contrast to these attorneys who comprise the financially privileged and well-educated segment of society, most individuals on death row fall below the poverty line, and many can neither read nor write.¹¹⁸ Surely, one

¹⁰⁸ See *Gideon v. Wainwright*, 372 U.S. 335, 337–39 (1963). This landmark case overruled the previous holding of *Betts v. Brady*, 316 U.S. 455 (1942), in which the Court denied the existence of a Sixth Amendment right to counsel, absent special circumstances, in noncapital criminal cases. *Gideon*, 372 U.S. at 337–39.

¹⁰⁹ See *Douglas v. California*, 372 U.S. 353, 355–56 (1963).

¹¹⁰ See *Ross v. Moffitt*, 417 U.S. 600, 610 (1974).

¹¹¹ *Mello & Perkins*, *supra* note 75, at 255.

¹¹² *Id.* at 279.

¹¹³ *Id.* at 278.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 259.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 279.

cannot expect an inmate with no formal legal education and a substandard primary and secondary education to succeed where trained attorneys have experienced problems. Without the assistance of counsel on appeal, most death row inmates will fail to meet the procedural requirements, and the court will quickly reject the inmate's plea for reconsideration. Moreover, even if an inmate meets the procedural requirements, his arguments will not likely rest on valid legal ground, because most inmates cannot comprehend the complex constitutional and evidentiary issues typically raised during the appellate process. Therefore, even if one can locate a discriminatory purpose behind the actions of a particular state actor, most pro se defendants cannot effectively raise an equal protection claim.

Furthermore, the alarming number of ineffective attorneys acting in capital cases significantly decreases the chance of uncovering acts of racial discrimination. Scholarly literature, documents from the American Bar Association, and accounts of criminal trials overflow with evidence of ineffective performances by attorneys in capital cases.¹¹⁹ Investigations have generated findings of

lawyers who are trying their first cases or [who have] little or no experience in trying serious cases, lawyers who were senile or intoxicated or under the influence of drugs while trying the cases, lawyers who were completely ignorant of the law and procedures governing a capital trial, lawyers who used racial slurs to refer to their clients, lawyers who handled cases without any investigative or expert assistance, lawyers who slept or were absent during crucial parts of the trial.¹²⁰

In 1980, Chief Justice Warren Burger addressed these concerns, claiming that between one third and one half of courtroom attorneys inadequately represent their clients.¹²¹ Similarly, former D.C. Circuit Chief Justice David Bazelon, after twenty-three years on the bench, argued that “a great many—if not most—indigent defendants do not receive the effective assistance of counsel guaranteed them by the [Sixth] Amendment.”¹²² Contemporary studies indicate that in the nine southern

¹¹⁹ *Id.* at 261.

¹²⁰ *Id.* (quoting S.B. Bright & P.J. Keenan, *Judges and the Politics of Death*, 75 B.U. L. REV. 759, 800–01 (1996)).

¹²¹ *Id.* at 267.

¹²² *Id.* (quoting David Bazelon, *The Defective Assistance of Counsel*, 64 U. CIN. L. REV. 1, 2 (1973)).

states considered the “death belt,” more than 10% of attorneys who represented indigent defendants in capital cases were later disbarred, suspended, or otherwise disciplined.¹²³

Receiving representation from ineffective counsel causes several problems for minority defendants raising equal protection claims. First, state actors in a capital trial will not openly attest to racial bias during questioning or otherwise generously hand over evidence the defense needs to make its case. Uncovering racial prejudice requires an adept, meticulous defense attorney who will delve into the motivations behind, for instance, a district attorney’s decision to seek the death penalty. However, a lawyer who falls asleep during trial or who is under the influence of drugs cannot conduct a thorough investigation. Therefore, even if purposeful racial discrimination exists, an incompetent attorney can easily overlook such discrimination.

Furthermore, a defendant attempting to overturn his death sentence because of an incompetent attorney faces many obstacles. Although the Sixth Amendment right to counsel has been considered the “most pervasive right,”¹²⁴ the Supreme Court has articulated an extremely low effectiveness standard for attorneys representing defendants at trial,¹²⁵ thereby stripping the Sixth Amendment of its teeth. In *Strickland v. Washington*, Justice O’Connor established a two-prong test that must be satisfied for a defendant to show ineffectiveness.¹²⁶ First, a defendant must demonstrate that counsel’s performance was deficient; that is, “counsel’s representation fell below an objective standard of reasonableness.”¹²⁷ In such cases, there is a strong presumption of adequacy.¹²⁸ Furthermore, a defendant must prove that the deficiency actually caused prejudice.¹²⁹ This requires the defendant to prove that but for the deficient performance, there is a reasonable probability that the outcome would have been different.¹³⁰

The requirement that the defendant prove prejudice creates an incredible burden, for he must venture into the realm of the hypothetical and demonstrate how a situation *would have* played out. Every deficient

¹²³ *Id.* at 268.

¹²⁴ *Id.* at 266 (quoting David Bazelon, *The Defective Assistance of Counsel*, 64 U. CIN. L. REV. 1, 5 (1973)).

¹²⁵ See *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

¹²⁶ *Id.* at 687.

¹²⁷ *Id.* at 688.

¹²⁸ *Id.* at 690.

¹²⁹ *Id.* at 694.

¹³⁰ *Id.*

action by an attorney may sway a juror one step closer to believing that a defendant is guilty beyond a reasonable doubt. Therefore, without entering the mind of every juror to discover how he or she perceived an error by defense counsel, one cannot accurately demonstrate what would have happened if the attorney had not made such errors. Because of *Strickland*'s near-impossible standard, many appellate attorneys cannot demonstrate that a defendant's trial lawyer was in fact ineffective.

Finally, a defendant disadvantaged by an ineffective lawyer during trial has no right to a competent attorney on appeal to prove that the previous attorney was incompetent.¹³¹ To even comprehend the two-prong *Strickland* standard, one needs the assistance of someone trained in the law and familiar with the standard. However, most defendants assert claims of ineffectiveness through habeas corpus proceedings,¹³² and, as discussed earlier, the Constitution does not guarantee counsel's assistance at this stage.¹³³ The majority of pro se defendants cannot understand the legal requirements needed to prove ineffectiveness; as a result, they will fail at any attempt to receive a new and fair trial. Although the law technically allows a defendant to raise a claim of ineffectiveness,¹³⁴ this promise is hollow.

C. The Problem of Unconscious Racism

In his dissent in *McCleskey*, Justice Blackmun recognized that “[m]ore subtle, less consciously held racial attitudes could also influence” capital sentencing schemes.¹³⁵ In fact, the greatest problem with the requirement of proving purposeful discrimination is that it overlooks the presence of unconscious racism in our society. Racism exists as more than just a “conscious conspiracy of a power elite or the simple delusion of a few ignorant bigots.”¹³⁶ It is ingrained into our history and our culture, primarily learned from our families and solidified by our need to categorize people and events.¹³⁷

¹³¹ Mello & Perkins, *supra* note 75, at 262.

¹³² *See id.* at 261.

¹³³ *Id.* at 262.

¹³⁴ *See Strickland*, 466 U.S. at 687.

¹³⁵ *McCleskey v. Kemp*, 481 U.S. 279, 364 (Blackmun, J., dissenting) (quoting *Turner v. Murray*, 476 U.S. 28, 35 (1986)).

¹³⁶ Lawrence, *supra* note 77, at 330.

¹³⁷ *Id.*

Most individuals are first exposed to racial issues by their parents.¹³⁸ This exposure arises not through intellectual discussion but through a subconscious, emotional process in which the child identifies “with who their parents are and what they see and feel their parents do.”¹³⁹ Therefore, children of racist parents adopt their beliefs in a way that makes the children unaware that it has occurred.¹⁴⁰

A human’s natural tendency to make sense of his or her experiences through categorizing also cultivates unconscious racism.¹⁴¹ In some ways, categorization functions as a healthy process that the mind uses to process new information.¹⁴² However, this practice also causes individuals to stereotype other people, which influences the way these individuals “allocate their attention, how they interpret what they perceive, whether they remember what they saw, and how they recall the information that they remember.”¹⁴³ Due to this need to categorize, people fixate on experiences that align with their stereotype and ignore those experiences that disprove it, thereby reaffirming the stereotype.¹⁴⁴

Although these feelings continue to develop throughout an individual’s lifetime, many conceal them.¹⁴⁵ According to Sigmund Freud, the human mind protects itself by refusing to recognize that which conflicts with one’s beliefs about right and wrong.¹⁴⁶ Therefore, to reconcile racist thoughts with the more recent denouncing of such attitudes in our culture, an individual will repress these thoughts from his or her consciousness.¹⁴⁷

Like the general population, actors in capital murder cases also possess unconscious racist beliefs.¹⁴⁸ Cultural attitudes, combined with an individual’s need to categorize, foster negative stereotypes about blacks: that blacks are more violent, strong, and threatening.¹⁴⁹ Because of these negative stereotypes, whites interpret actions by blacks as more violent

¹³⁸ *Id.* at 338.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 337.

¹⁴² *See id.* at 336.

¹⁴³ GROSS & MAURO, *supra* note 3, at 111 (citations omitted).

¹⁴⁴ Lawrence, *supra* note 77, at 337.

¹⁴⁵ *See id.* at 322–23.

¹⁴⁶ *Id.* at 322.

¹⁴⁷ *Id.* at 323.

¹⁴⁸ AMNESTY INT’L USA, *supra* note 26, at 4.

¹⁴⁹ GROSS & MAURO, *supra* note 3, at 111.

than the same actions done by whites.¹⁵⁰ Similarly, they attribute a violent murder committed by a black person to his naturally aggressive personality, while they write off the same crime perpetrated by a white person as a product of his circumstance.¹⁵¹ The belief that a black capital defendant is more threatening and naturally aggressive would lead one to conclude that that defendant is both more culpable and less likely to reform than a similarly situated white defendant. As such, jurors will feel more justified in sending him to death row.

The mental categorization of state actors in a capital case negatively affects black defendants in another way. A white prosecutor who seeks the death penalty for a black defendant or a white juror who chooses a death sentence may do so with a conscious emphasis on the brutal nature of the crime or on the harm society suffered as a result of the defendant's actions. However, unbeknownst to these actors, the defendant's race partly motivates their decisions.¹⁵² Because the prosecutor or the juror does not identify with the black defendant, the defendant's family and friends, and the black community as a whole, a white prosecutor, juror, or judge will have less empathy when making decisions that will negatively affect the lives of minorities.¹⁵³ Many decisionmakers will be "unaware that [they have] devalued the cost of a chosen path"—i.e., imposition of the death penalty—because a group that they are not a part of will bear the cost.¹⁵⁴

The Supreme Court first articulated the purposeful discrimination requirement when lawmakers blatantly wrote discrimination into statutes or adamantly expressed their racist sentiments in other ways.¹⁵⁵ Today, racism in the United States rarely manifests itself in public statements of racial animosity by a prosecutor, juror, or judge.¹⁵⁶ Instead, racial stereotypes exist internally in a person's subconscious, leaving no evidence either to the individuals holding such beliefs or to third parties who wish to prove such beliefs exist.¹⁵⁷ Therefore, a capital defendant will be unable to

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See Lawrence, *supra* note 77, at 347.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–68 (1977).

¹⁵⁶ See AMNESTY INT'L USA, *supra* note 26, at 16.

¹⁵⁷ See Lawrence, *supra* note 77, at 333–34 (discussing subconscious racism as a problem unaddressed by mainstream legal interpretations of the Equal Protection Clause).

offer evidence of unconscious racism held by a particular prosecutor, juror, or judge.

III. THE SOLUTION: ALLOWING STATISTICS ALONE TO SUPPORT A CLAIM OF PURPOSEFUL DISCRIMINATION

The requirement that each capital defendant must prove that purposeful discrimination affected his particular case has stripped the Fourteenth Amendment of its power to eradicate our society's racial disparities. If they wish to breathe life into the Equal Protection Clause once again, courts must allow defendants to rely on statistics alone as proof of purposeful discrimination in capital cases. Some studies fail to take into account nonracial factors that could explain aberrant results,¹⁵⁸ and judges should not automatically accept the conclusions reached in these faulty studies. However, a calculated study like the one relied on in *McCleskey*—one that accounts for factors other than race, which could possibly explain any disparity¹⁵⁹—should be respected for the reality that it communicates: although statistics cannot conclusively prove that racism influenced a particular defendant's case, statistics do prove that there is a high likelihood that at least one actor in a defendant's case was motivated by racial animus. Once a defendant has made a strong statistical showing that this high likelihood exists, the judicial system should enjoin a state from following through with that defendant's execution.

Some may view this remedy as too extreme. However, it is the most logical solution to the equal protection problem for two important legal and social reasons. First, the Supreme Court has on multiple occasions accepted statistics alone in proving equal protection violations.¹⁶⁰ Therefore, from a legal perspective, allowing numerical data on capital cases to stand alone as evidence of purposeful discrimination is consistent with extant law. Second, eradicating the death penalty will not negatively affect society, because the state will remain equipped with an equally effective, alternative option: life imprisonment without the possibility of parole.

¹⁵⁸ *Contra* *McCleskey v. Kemp*, 481 U.S. 279, 287 (1987).

¹⁵⁹ *Id.*

¹⁶⁰ *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886); *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960); *Batson v. Kentucky*, 476 U.S. 79, 95 (1986).

A. Allowing Statistics Alone to Prove Purposeful Discrimination is Compatible with Existing Law

One who argues that the Supreme Court should overrule, extend, retract, or otherwise alter existing law must remain mindful of stare decisis, which mandates that each decision by the Court must remain consistent with existing case law.¹⁶¹ Even though stare decisis may prevent the Court from adopting an otherwise sound legal argument, the Court experiences no such limitation when deciding whether to accept statistics as evidence of purposeful discrimination. Although the Supreme Court has held that statistics cannot prove purposeful discrimination when challenging a capital sentence,¹⁶² the Court in other contexts has recognized that convincing statistical data, standing alone, can make a successful case.¹⁶³

In *Yick Wo v. Hopkins*, the city of San Francisco denied two hundred Chinese individuals permits to operate laundries, but it granted eighty similarly situated, non-Chinese individuals such permits.¹⁶⁴ The Court, because of the “stark” statistical showing,¹⁶⁵ agreed that racial animus motivated the state actors’ decisions.¹⁶⁶ Similarly, in *Gomillion v. Lightfoot*, a redistricting act transformed a square-shaped city into an irregular twenty-eight sided figure, which eliminated all but four or five of the 400 black voters from the district and preserved every white resident.¹⁶⁷ Here, too, the Court, noting the extreme pattern that could not be explained on nonracial grounds, agreed with the plaintiffs that, if the allegations could be proven, the redistricting act should be invalidated.¹⁶⁸

None of the statistics compiled as evidence of equal protection violations in capital cases have contained as stark of patterns as those in *Yick Wo* and *Gomillion*; there is much stronger proof of purposeful discrimination in *Yick Wo* and *Gomillion* than in cases utilizing a Baldus-

¹⁶¹ BLACK’S LAW DICTIONARY 1443 (8th ed. 2004).

¹⁶² See *McCleskey*, 481 U.S. at 292–94.

¹⁶³ See *Yick Wo*, 118 U.S. at 373; *Gomillion*, 364 U.S. at 341.

¹⁶⁴ *Yick Wo*, 118 U.S. at 374.

¹⁶⁵ See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

¹⁶⁶ *Yick Wo*, 118 U.S. at 374.

¹⁶⁷ *Gomillion*, 364 U.S. at 341.

¹⁶⁸ *Id.* Although the majority’s decision rested on the Fifteenth Amendment, Justice Whittaker, in his concurring opinion, argued that it should have been struck down using the Equal Protection Clause. *Id.* at 349 (Whittaker, J., concurring).

like study. However, the consequences of unsuccessful equal protection claims in capital cases are much more severe than those in *Yick Wo* and *Gomillion*. In *Yick Wo*, the plaintiffs were denied permits to operate laundry facilities,¹⁶⁹ and in *Gomillion*, the plaintiffs were stripped of an effective vote.¹⁷⁰ While the right to earn a living and the right to participate in the political process are certainly important, they are insignificant when compared to the right to life and the right to be free from racial discrimination. Therefore, the law should prescribe more weight than it has to less-than-stark statistical patterns that otherwise implicate racial discrimination in capital cases.

The Supreme Court has also accepted less-than-stark statistical patterns as support for equal protection claims. A number of these cases involved the voir dire process of jury selection in criminal cases.¹⁷¹ In *Batson v. Kentucky*, the Supreme Court overruled its earlier decision in *Swain v. Alabama*¹⁷² and declared that a criminal defendant may establish a prima facie case of purposeful racial discrimination in the voir dire process based solely on the prosecutor's use of preemptory challenges to exclude all black jurors.¹⁷³

The Court's decision in *Batson* to accept less-than-stark evidence reveals its willingness to afford special protection to criminal defendants that is not given to individuals asserting equal protection claims in a noncriminal context. Criminal defendants require this special protection because of the serious consequence of loss of liberty that he or she faces if convicted. Similarly, because of the greater consequences that follow a capital sentence, a criminal defendant facing the executioner's chamber must be afforded even more protection than those charged with a misdemeanor or with a noncapital felony. This can be done by guaranteeing that the entire criminal process, and not simply jury selection, is conducted in a racially neutral manner. Therefore, statistics must be given their proper significance. Courts must permit a capital defendant to rely on them to prove racial discrimination by any actor, at any stage of the criminal process.

¹⁶⁹ *Yick Wo*, 118 U.S. at 357.

¹⁷⁰ *Gomillion*, 364 U.S. at 341.

¹⁷¹ *E.g.*, *Batson v. Kentucky*, 476 U.S. 79, 96 (1986).

¹⁷² 380 U.S. 202 (1965).

¹⁷³ *Batson*, 476 U.S. at 95.

B. Enjoining a Capital Sentence Will Not Negatively Affect Society

Many death penalty proponents praise the Supreme Court's interpretation of the Equal Protection Clause in capital cases,¹⁷⁴ fearing that a relaxed burden of proof may have unintended, negative consequences on society. For instance, one might fear that a defendant armed with strong statistical evidence will automatically have his conviction overturned and be released into society. However, this Comment does not address cases in which the defendant challenges his conviction. Rather, it only applies to cases in which the defendant challenges the death sentence on racial grounds. The remedy, therefore, would not be an overturning of the conviction, but an alternative sentence to execution: life imprisonment without the possibility of parole.

Many proponents fear that the societal benefits of the death penalty will be eliminated if the worst punishment for murderers is life without the possibility of parole,¹⁷⁵ and many studies have been conducted in an attempt to confirm this.¹⁷⁶ However, these multiple studies have uncovered no evidence that the death penalty achieves for society that which cannot be obtained by incarcerating a murderer for life.

Researchers have unearthed no evidence that the threat of execution deters future murderers any more than the threat of imprisonment for life without the possibility of parole. General deterrence, or "how the threat and application of the death penalty discourages would-be killers,"¹⁷⁷ has been described as "the most important instrumental benefit of punishment."¹⁷⁸ Hypothetically, murderers on death row repay society through their death by discouraging others from engaging in the same behavior for fear of receiving the same punishment.¹⁷⁹

Proponents of general deterrence assume that potential criminals weigh the costs and benefits of committing the crime versus not committing the

¹⁷⁴ See, e.g., Ernest van den Haag, *Justice, Deterrence and the Death Penalty*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 139, 149 (James R. Acker, Robert M. Bohm & Charles S. Lanier eds., 1998).

¹⁷⁵ *Id.* at 145.

¹⁷⁶ *Id.*

¹⁷⁷ Ruth D. Peterson & William C. Bailey, *Is Capital Punishment an Effective Deterrent for Murder? An Examination of Social Science Research*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT, *supra* note 174 at 157, 157.

¹⁷⁸ Van den Haag, *supra* note 174, at 140.

¹⁷⁹ *Id.*

crime, and that they ultimately choose the behavior that produces the greatest profit at the least cost.¹⁸⁰ Therefore, proponents of the death penalty argue that individuals, after contemplating committing murder, will conclude that the threat of execution is too great of a cost in light of any benefits that may arise from the murder.¹⁸¹ However, criminologists disagree with the assessment that potential murderers rationalize through their actions.¹⁸² Rather, they argue that most murders are “acts of passion” that are devoid of premeditated, rational calculation.¹⁸³ Because of this, threat of execution does not influence a future murderer’s decision.¹⁸⁴

In fact, numerous studies confirm, “[T]he presence of the death penalty in law and practice has no discernible effect as a deterrent to murder.”¹⁸⁵ These studies compare mean homicide rates for capital punishment states with those of abolitionist states; homicide rates in capital punishment states with those of neighboring, nondeath penalty states; and homicide rates of some states before and after abolition or reinstatement of the death penalty.¹⁸⁶ None uncovered evidence that the death penalty deters murder.¹⁸⁷ In fact, one cross-state study focusing on the period between 1980 and 1995 confirmed that the murder rate was actually higher in states with the death penalty.¹⁸⁸

Proponents of the death penalty argue that these statistics can be attributed to the sociological differences between death penalty and abolitionist states.¹⁸⁹ Proponents claim that because death penalty states are more often made up of “large urban, black, youthful, and poor populations,” this both explains the higher murder rate and masks the deterrent effect of the death penalty.¹⁹⁰ However, this explanation cannot account for corresponding statistical studies that, rather than compare different states, focus on the same state and differentiate between years when the death penalty was utilized versus those when it was not.¹⁹¹ The

¹⁸⁰ Peterson & Bailey, *supra* note 177, at 158.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 159 (quoting THORSTEN SELLIN, CAPITAL PUNISHMENT 138 (1967)).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 160.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 161.

use or abolition of the death penalty in such states does not correlate with any unusual increase or decrease in killing.¹⁹² In fact, any increase or decrease in killing in death penalty states coincides with the same increase or decrease in neighboring, abolitionist states.¹⁹³

Other studies tested the hypothesis that as the actual utilization of death penalty increases, the deterrent effect will simultaneously increase, thus decreasing the murder rate.¹⁹⁴ Researchers focused on the correlation between the number of times the death penalty was implemented in a particular state and the homicide rate in that state.¹⁹⁵ A 1952 study, which examined the execution rates between 1937 and 1941 in forty-one death penalty states, concluded that homicide rates do not fall consistently as the certainty of execution increases.¹⁹⁶ Furthermore, recent “time-series capital punishment studies,” which examined periods dating back to the early part of the century, produced no evidence of a deterrent effect based on the certainty of execution.¹⁹⁷

Death penalty proponents respond that if a state administered a death sentence in a timely fashion, the threat of execution would be an effective deterrent.¹⁹⁸ “The lesson to be learned from capital punishment is not that punishment does not deter, but that the improper and sloppy use of punishment does not deter.”¹⁹⁹ One study tested this hypothesis by examining the length of time between the sentencing and the execution in a capital case.²⁰⁰ Bailey’s cross-state analysis of the period between 1951 and 1960 focused on both the certainty of execution for homicide and the celerity of the death penalty, using various sociological factors as variables.²⁰¹ This produced no evidence that speedy executions deterred murder any more than delayed ones.²⁰²

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 164.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 166. These studies were conducted in the following states: California, Illinois, New York, North Carolina, Ohio, Oregon, Utah, and Washington, D.C., as well as in other states. *Id.*

¹⁹⁸ *Id.* at 167.

¹⁹⁹ *Id.* (quoting C. Ray Jeffery, *Criminal Behavior and Learning Theory*, 56 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 294, 299 (1965)).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

Finally, some argue that the state's use of the death penalty must be communicated to the public to prevent murder.²⁰³ One study examined whether the large amount of coverage given to the first four post-*Furman* executions produced a significant decline in homicides; it found no such fluctuation in homicides.²⁰⁴ Other studies focusing on the amount of newspaper and television coverage devoted to executions have produced "no credible evidence that the level or type of print or electronic media attention devoted to executions significantly discourages murder."²⁰⁵

Aside from deterrence, the death penalty also functions as a way to incapacitate dangerous individuals from committing future heinous crimes.²⁰⁶ However, placing a criminal in a maximum security prison until his natural death will also successfully remove a violent individual from society.

Proponents of the death penalty argue that life without the possibility of parole poses threats to society that execution does not.²⁰⁷ Such individuals believe that, because "without the death penalty there is no further punishment to deter him," convicts might escape—posing a danger to the overall public—or may attack guards or other prisoners inside the institution.²⁰⁸

This argument is flawed for two reasons. First, a typical death row inmate remains incarcerated for over a decade before being executed, and some have been on death row for over twenty years.²⁰⁹ In fact, death row inmates are more likely to die of old age than by execution.²¹⁰ Therefore, the threat of inmates escaping or exhibiting violent behavior in prison continues even when the death penalty is utilized.

²⁰³ *Id.* at 168.

²⁰⁴ *Id.* There was a decline in the homicide rate for two weeks following the 1977 execution of Gary Gilmore in Utah. *Id.* However, this decline was only confined to parts of the country that experienced abnormally severe winter conditions during that period. *Id.* In the western states, where weather was normal, there was no notable decline in homicides. *Id.*

²⁰⁵ *Id.* at 170.

²⁰⁶ Jon Sorensen & James Marquart, *Future Dangerousness and Incapacitation*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT, *supra* note 174 at 183, 183.

²⁰⁷ Van den Haag, *supra* note 174, at 145.

²⁰⁸ *Id.*

²⁰⁹ Death Penalty Information Center, *supra* note 41 (follow "Death Row" hyperlink; then follow "Time on Death Row" hyperlink).

²¹⁰ Van den Haag, *supra* note 174, at 148.

Second, a study by Sorensen and Wrinkle in 1996 showed that capital murderers sentenced to life without the possibility of parole pose no more threat to prisoners or correctional staff than death-sentenced inmates or other murderers sentenced to lesser terms of imprisonment.²¹¹ Even though incapacitation of convicted murderers is an important and necessary societal function, the utilitarian function of incapacitation can be achieved just as effectively by incarcerating an individual for life.

Besides arguing that life imprisonment lacks effectiveness in deterring future murder and in incapacitating convicted murderers, death penalty proponents also argue that incarcerating the perpetrator for life, as opposed to executing him, will result in an increased financial cost that society must bear.²¹² Supporters of the current interpretation of the Equal Protection Clause argue that innocent government actors should not bear the burden of fixing a problem that they did not create.²¹³ Specifically, death penalty proponents believe capital punishment to be the least expensive penalty the state could administer, and that the alternative of life without the possibility of parole would increase the tax burden on society.²¹⁴ In fact, 80% of death penalty supporters hold this belief.²¹⁵

This belief, however, proves false. In reality, taxpayers bear a greater financial burden when the state executes someone than when it keeps a convict incarcerated for life.²¹⁶ Currently, the pretrial, trial, and post-trial process of a capital case costs the taxpayers two to three million dollars per execution.²¹⁷ In extraordinary cases, the expenses can be astronomical.²¹⁸ In comparison, the alternative of life without the possibility of parole—calculated by multiplying the average annual cost of imprisonment,

²¹¹ Robert M. Bohm, *The Economic Costs of Capital Punishment: Past, Present, and Future*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT, *supra* note 174 at 437, 455 n.17.

²¹² *Id.* at 437.

²¹³ Lawrence, *supra* note 77, at 320.

²¹⁴ Bohm, *supra* note 212, at 437.

²¹⁵ *Id.*

²¹⁶ *Id.* at 439.

²¹⁷ *Id.*

²¹⁸ *Id.* (“[T]he state of Florida reportedly spent \$10 million to execute serial murderer Ted Bundy.”).

\$20,000, by the estimated fifty years a defendant will remain incarcerated—costs only one million dollars per inmate.²¹⁹

Capital cases cost more for numerous reasons. The prosecution and defense rarely agree to a plea bargain and instead proceed to trial ten times more often in capital cases than in other felony cases.²²⁰ Capital cases generate more investigation by police and forensics investigators, due to the fact that both sides must prepare for the bifurcated guilt and sentencing stages.²²¹ Capital cases typically have more witnesses,²²² a lengthier and more complicated voir dire process,²²³ and more experts.²²⁴ On the defense side, attorneys file two to six times more pretrial motions in capital cases than in any other to preserve issues on appeal.²²⁵

The appeals process produces the greatest expense.²²⁶ Because the Due Process Clause of the Fourteenth Amendment affords the right to counsel for the first appeal, the state must pay for the attorney's time, traveling, and photocopying.²²⁷ Furthermore, although they are not guaranteed appointed counsel during the discretionary appeals process, defendants have at least nine or ten levels of discretionary appeal.²²⁸ Unlike capital cases, the Supreme Court has ruled such "super due process" to be unnecessary in noncapital murder cases.²²⁹ Therefore, the alternative of life without the possibility of parole costs considerably less than the option of death.

Death penalty proponents may argue that our lawmakers should eradicate the extensive appeals process to minimize expenses, instead of eliminate the death penalty. Other than the fact that this would fail to rectify the problem of racial discrimination in the capital sentencing scheme, this argument contains several flaws. First, eliminating super due process would revert state capital punishment statutes to their pre-*Furman*

²¹⁹ *Id.* In actuality, due to prison violence, HIV, and poor health and living conditions, the average inmate serving life without parole only lives for an estimated thirty-one years behind bars. *Id.* n.3.

²²⁰ *Id.* at 442–43.

²²¹ *Id.* at 440.

²²² *Id.* at 445.

²²³ *Id.* at 444.

²²⁴ *Id.* at 442.

²²⁵ *Id.*

²²⁶ *Id.* at 446.

²²⁷ *Id.*

²²⁸ *Id.* at 447.

²²⁹ *Id.* at 455.

forms. The Supreme Court has already considered states' capital punishment statutes with such minimal safeguards and has declared that they violate the Constitution.²³⁰ Second, refusing to afford persons faced with execution extra protection increases the likelihood of killing the innocent. As of February 23, 2006, 123 death row inmates in twenty-five states have been exonerated and released from prison.²³¹ This means that from 1973 to 2006, there has been an average of 1.43 exonerations per year.²³² From 2000 to 2006, this average rose to 6.5 individuals per year.²³³ Without the extensive appeals process, the evidence needed to prove the innocence of over one hundred individuals might not have been uncovered before they were put to death. Our justice system needs this costly yet effective super due process.

Finally, capital punishment functions as retribution by punishing individuals for crimes performed in the past.²³⁴ Death penalty proponents may argue that removing the death penalty as an option will negatively impact society in that individuals will be stripped of an effective vehicle through which they can express their desire for vengeance. The assertion that the death penalty is necessary for its retributive function is the most difficult pro-death penalty argument to attack in that the two camps debate the very foundation of this argument. Death penalty opponents and proponents agree that both deterrence and incapacitation are important goals, but they disagree about whether the death penalty actually serves these goals more effectively than other options.²³⁵ Unlike theories of deterrence and incapacitation, death penalty proponents and opponents argue about the value of the underlying goal of retribution.²³⁶ Therefore, one refuting the pro-retribution argument must attack the very assertion that society in fact seeks retribution through the death penalty and that society's laws should reflect this.

One can attack the assumption that the majority of society supports capital punishment as a form of retribution over life imprisonment without the possibility of parole—several contemporary studies have generated results that refute this claim. A recent poll shows that when questioned about the death penalty in the abstract, 77% of individuals claimed to be

²³⁰ See *Furman v. Georgia*, 408 U.S. 238, 256–57 (1972) (Douglas, J., concurring).

²³¹ Death Penalty Information Center, *supra* note 41 (follow “Innocence” hyperlink).

²³² *Id.*

²³³ *Id.*

²³⁴ Van den Haag, *supra* note 174, at 140.

²³⁵ *Id.* at 145–46.

²³⁶ See *id.* at 139–40.

supporters.²³⁷ However, when given the option of life without the possibility of parole coupled with restitution for the victims' families, 44% chose life, 41% chose death, and 15% were undecided.²³⁸ In another study, an alarming number of individuals communicated doubts about the effectiveness of the death penalty.²³⁹ Fifty-eight percent expressed concerns about convicting the innocent, 48% agreed that racism exists in the application of the death penalty, 46% disfavored the excessive costs, and 42% believed the death penalty failed to deter murder.²⁴⁰ According to these statistics, many Americans do not in fact view the death penalty favorably and therefore would accept the use of the alternative of life imprisonment without parole.

More importantly, one must attack the very idea that courts should interpret the Constitution in a way that will reflect the subjective views of the majority. In the past, the Supreme Court has overturned or extended laws in ways that were extremely unpopular with society.²⁴¹ *Brown v. Board of Education*, the landmark decision ending racial segregation throughout the land, was met with hostility by many individuals.²⁴² At the time, society adamantly clung to the notion of separate but equal, so much so that many resorted to violence to protest integration.²⁴³ However, nine individuals on the Supreme Court ignored this subjective, collective view, because they believed segregation to be contrary to the Fourteenth Amendment.²⁴⁴ Although society did not automatically accept the Court's decision, resistance to *Brown* declined over time, and many later accepted the reality of integration.²⁴⁵

Similarly, many individuals advocate the subjective view that society should be allowed to seek retribution through the execution of a human being.²⁴⁶ However, when evaluating the Equal Protection Clause in

²³⁷ Death Penalty Information Center, *supra* note 41 (follow "Public Opinion" hyperlink; then follow "Sentencing for Life" hyperlink).

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *See, e.g., Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (holding that "segregation of children in public schools solely on the basis of race . . . deprive[s] the children of the minority group of equal educational opportunities").

²⁴² SEIDMAN, *supra* note 9, at 141.

²⁴³ *Id.*

²⁴⁴ *Brown*, 347 U.S. at 495.

²⁴⁵ SEIDMAN, *supra* note 9, at 144.

²⁴⁶ *See, e.g., Van den Haag, supra* note 174, at 139–40.

relation to racial discrimination in capital cases, the Supreme Court must focus on the purpose behind the constitutional provision while remaining blind to societal demands for retribution. Not every individual will immediately concede that the Court made the right decision. However, as it did with *Brown*, public opinion will likely shift over time in the same direction that the law has taken.

CONCLUSION

In 2006, fifty-three individuals were executed in the United States.²⁴⁷ Eleven of those executed were black defendants convicted of killing white victims, but only three cases involved a white defendant convicted of killing a black victim.²⁴⁸ Furthermore, as of April 11, 2007, 41.7% of inmates on death row are black.²⁴⁹ Despite continuous claims that death penalty skeptics are in the minority, almost half of society acknowledges the reality of racial discrimination in the application of death sentencing.²⁵⁰

Hundreds of books, articles, law reviews, editorials, and studies have explored the controversial subject of capital punishment in the United States, with each medium tackling various legal, moral, philosophical, and personal perspectives.²⁵¹ Despite this expansive list spanning several decades, current death row statistics indicate that the issues raised in *McCleskey* are far from being resolved.²⁵² In fact, changing legal jurisprudence as well as altering public opinion about its use continues to thrust death penalty discussion to the forefront of society's consciousness and to stimulate new debate.

Several years ago, the Supreme Court overturned its decision in *Penry v. Lynaugh*²⁵³ by declaring that the Eighth Amendment prohibits the execution of the mentally retarded.²⁵⁴ More recently, the Court in *Roper v. Simmons*²⁵⁵ banned the death sentencing of individuals who were minors at

²⁴⁷ Death Penalty Information Center, *supra* note 41 (follow "Executions" hyperlink; then follow "Executions in 2006" hyperlink).

²⁴⁸ *Id.*

²⁴⁹ *Id.* (follow "Death Row" hyperlink; then follow "Inmates by Race" hyperlink).

²⁵⁰ *Id.* (follow "Public Opinion" hyperlink; then follow "Sentencing for Life" hyperlink).

²⁵¹ *See id.* (follow "Resources" hyperlink).

²⁵² *See id.* (follow "Death Row" hyperlink; then follow "Inmates by Race" hyperlink).

²⁵³ 492 U.S. 302, 335 (1989).

²⁵⁴ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

²⁵⁵ 543 U.S. 551 (2005).

the time that they committed the offense.²⁵⁶ Clearly, the Court is willing to receive challenges to the use of the death penalty with an open mind and to interpret the Constitution boldly, in ways that dramatically alter precedent. To continue down the path of race-neutral justice first envisioned by those who passed the Civil Rights Act of 1866, the current Supreme Court must remain equally eager to reconsider the interpretation of the Fourteenth Amendment's Equal Protection Clause as it was applied in *McCleskey*.

In his dissent in *McCleskey*, Justice Brennan pointed out, “[W]e refuse to convict if the chance of error is simply less likely than not. Surely, we should not be willing to take a person’s life if the chance that his death sentence was irrationally imposed is *more* likely than not.”²⁵⁷ A capital defendant armed with a carefully calculated statistical study does prove that it is more likely than not that racial animus motivated one or more actors in his case. In fact, this probability rises beyond the level of “more probable than not” when one considers the numerous examples of overt racism exhibited by white prosecutors, jurors, and judges in our criminal justice system, as well as the phenomenon of collective, unconscious racism that influences whites’ decisions. With a combination of statistics, evidence of racist attitudes and statements about black defendants, and the presence of unconscious racism, one cannot deny that there is a high likelihood that race plays a factor in who lives and who dies. If this “high likelihood” continues to loom like a dark cloud over our justice system, the promise first articulated by those who passed the Civil Rights Act of 1866, that “inhabitants of every race and color . . . shall be subject to like punishment, pains and penalties, and no other,”²⁵⁸ will never be fulfilled.

The Supreme Court must take a small step forward and expand existing law by allowing a criminal defendant confronted with death to use statistics alone to prove purposeful discrimination. In many instances, justice requires a revolutionary change in society, such as the mass integration that occurred after *Brown v. Board of Education*.²⁵⁹ However, this issue demands far less. Because of the alternative of life without the possibility of parole for criminal defendants who have proved discrimination in their death sentencing, society’s utilitarian purposes behind punishment can be achieved just as effectively.

²⁵⁶ *See id.* at 559–60.

²⁵⁷ *McCleskey v. Kemp*, 481 U.S. 279, 328 (1987) (Brennan, J., dissenting).

²⁵⁸ GROSS & MAURO, *supra* note 3 (quoting Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866)).

²⁵⁹ SEIDMAN, *supra* note 9, at 144.

The revolution will not occur in society's parks, schools, or restaurants. Rather, the revolution will take place in the message communicated by those who vow to uphold the Constitution to those who are subject to its laws. This change will relay to society that those who interpret the Constitution are serious in their affirmation to abide by both the text and the spirit of the Fourteenth Amendment. This will instruct all who are attune to the racial dynamics in this country that judges wish to guarantee that every individual is judged by his deeds, whether they be meritorious or despicable, and not by the color of his skin.