

TABLE 8.6 Race/Ethnicity and the Federal Death Penalty: 1995–2000

	Race of the Defendant				
	Total	White	African American	Hispanic	Other
Number (% of total) of cases submitted for review	682	134 (20%)	324 (48%)	195 (29%)	29 (4%)
Rate at which U.S. attorneys recommended seeking the death penalty	0.27	0.36	0.25	0.20	0.52
Rate at which the Review Committee recommended seeking the death penalty	0.30	0.40	0.27	0.25	0.59
Rate at which the attorney general approved filing of notice of intent to seek the death penalty	0.27	0.38	0.25	0.20	0.46
Rate at which the U.S. Department of Justice sought the death penalty	0.23	0.33	0.22	0.16	0.43

SOURCE: U.S. Department of Justice, *The Federal Death Penalty System: A Statistical Survey (1988–2000)*. Washington, DC: U.S. Department of Justice, pp. 10–11.

stated that she was “sorely troubled” by these findings, adding that “we must do all we can in the federal government to root out bias at every step.” Reno’s comments were echoed by then-Deputy Attorney General of the United States (and later Attorney General of the United States from 2009 to 2015) Eric Holder, an African American prosecutor who oversaw the study. He said that he was “both personally and professionally disturbed by the numbers.”¹⁵² Publication of the report led then-President Clinton to grant a six-month reprieve to Juan Raul Garcia, a Mexican American from Texas who was scheduled to be executed in January 2001. In granting the reprieve, Clinton stated that “the examination of possible racial and regional bias should be completed before the United States goes forward with an execution in a case that may implicate the very questions raised by the Justice Department’s continuing study.”¹⁵³

Attorney General Reno ordered the Department of Justice to gather additional data about the federal capital sentencing process. The results of this study, which was overseen by Janet Reno’s successor, John Ashcroft, were released in 2001.¹⁵⁴ Unlike the first study, which examined only those cases that were charged as capital crimes and submitted for review, this study included an analysis of cases in which the facts would have supported a capital charge but the defendants were not charged with a capital crime (and thus the case was not submitted for review). The results of the second study were generally similar to those of the first. Within the larger pool of cases examined in the follow-up study, which included 973 defendants, 17 percent (166) were white, 42 percent (408) were African American, and 36 percent (350) were Hispanic. Consistent with

the results of the 2000 study, "potential capital cases involving Black or Hispanic defendants were less likely to result in capital charges and submission of the case to the review procedure . . . likewise [these cases] were less likely to result in decisions to seek the death penalty."¹⁵⁵

The 2001 report, which noted that the proportion of racial minorities in federal capital cases was substantially greater than the proportion of racial minorities in the general population, concluded 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."¹⁵⁶ The report attributed the overrepresentation of African Americans and Hispanics in the federal capital case pool to a number of factors, including the fact that federal law enforcement officers focused their attention on drug trafficking and related criminal violence. According to the report,

In areas where large-scale, organized drug trafficking is largely carried out by gangs whose memberships 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. This is not the result of any form of bias, but reflects the normal factors that affect the division of federal and state prosecutorial responsibility.¹⁵⁷

Opponents of the death penalty criticized the 2001 report, and the Justice Department's interpretation of the data, on a number of grounds. The American Civil Liberties Union (ACLU), for example, asserted that there were a number of problems with the study, which the organization characterized as "fatally flawed."¹⁵⁸ The ACLU noted that the report did not address questions regarding the prosecution of cases in the federal system rather than the state system or examine whether race/ethnicity played a role in these decisions or in U.S. attorneys' decisions to enter into plea bargains. The ACLU asserted that Attorney General Ashcroft reached a "premature" conclusion that "racial bias has not played a role in who is on federal death row in America," adding that "This remarkable conclusion is not only inaccurate, but also dangerous, because it seeks to give Americans the impression that our justice system is fair when in fact there is substantial evidence that it is not."¹⁵⁹

On June 11, 2001, Timothy McVeigh, who was convicted of a number of counts stemming from the 1995 Oklahoma City bombing, became the first federal offender since 1963 to be put to death. The execution of Juan Ramon Garza, a Texas marijuana distributor who was sentenced to death in 1993 for the murder of three other drug traffickers, followed eight days later. A third federal offender, Louis Jones, who was sentenced to death for kidnapping and murdering a white female soldier, was executed in March 2003. By June 2003, there were 62 offenders on federal death row: 27 were African American, 25 were white, 8 were Hispanic, 1 was Native American, and 1 was Asian American.¹⁶⁰

Explanations for Disparate Treatment

Researchers have advanced two interrelated explanations for the higher death penalty rates for homicides involving African-American offenders and white victims and the lower rates for homicides involving African-American offenders and African-American victims.

The first explanation builds on conflict theory's premise that the law is applied to maintain the power of the dominant group and to control the behavior of individuals who threaten that power.¹⁶¹ It suggests that crimes involving African-American offenders and white victims are punished most harshly because they pose the greatest threat to "the system of racially stratified state authority."¹⁶² Some commentators further suggest that in the South, the death penalty may be imposed more often on African Americans who kill whites "because of a continuing adherence to traditional southern norms of racial etiquette."¹⁶³

The second explanation for the harsher penalties imposed on those who victimize whites emphasizes the race of the victim rather than the racial composition of the victim-offender dyad. This explanation suggests that crimes involving African-American victims are not taken seriously and/or that crimes involving white victims are taken very seriously. It also suggests that the lives of African-American victims are devalued relative to the lives of white victims. Thus, crimes against whites will be punished more severely than crimes against African Americans regardless of the offender's race. Some commentators suggest that these beliefs are encouraged by the media, which plays up the murders of wealthy whites but ignores those involving poor African Americans and Hispanics. The publicity accorded crimes involving middle-class and wealthy white victims also influence prosecutors to seek the death penalty more often in these types of cases than in cases involving poor racial minorities. According to David Baldus, "If the victim is black, particularly if he's an unsavory character, a drug dealer, for example, prosecutors are likely to say, 'No jury would return a death verdict.'"¹⁶⁴

Most researchers have failed to explain adequately *why* those who victimize whites are treated more harshly than those who victimize African Americans. Gross and Mauro¹⁶⁵ suggest that the explanation, at least in capital cases, may hinge on the degree to which jurors are able to identify with the victim. The authors argue that jurors take the life-or-death decision in a capital case very seriously. To condemn a murderer to death thus requires something more than sympathy for the victim. Jurors will not sentence the defendant to death unless they are particularly horrified by the crime, and they will not be particularly horrified by the crime unless they can identify or empathize with the victim. According to Gross and Mauro:

In a society that remains segregated socially if not legally, and in which the great majority of jurors are white, jurors are not likely to identify with black victims or to see them as family or friends. Thus jurors are more likely to be horrified by the killing of a white than of a black, and more likely to act against the killer of a white than the killer of a black.¹⁶⁶

Bright¹⁶⁷ offers a somewhat different explanation. He contends that the unconscious racism and racial stereotypes of prosecutors, judges, and jurors, the majority of whom are white, "may well be 'stirred up'" in cases involving an African-American offender and a white victim.¹⁶⁸ In these types of cases, in other words, officials' and jurors' beliefs that African Americans are violent or morally inferior, coupled with their fear of African Americans, might incline them to seek or to impose the death penalty. Bright also asserts that black-on-white murder generate more publicity and evoke greater horror than other types of crimes. As he notes, "Community outrage, . . . the social and political clout of the family in the community, and the amount of publicity regarding the crime are often far more important in determining whether death is sought than the facts of the crime or the defendant's record and background."¹⁶⁹

McCLESKEY v. KEMP: THE SUPREME COURT AND RACIAL DISCRIMINATION IN THE APPLICATION OF THE DEATH PENALTY

Empirical evidence of racial discrimination in the capital sentencing process has been used to mount constitutional challenges to the imposition of the death penalty. African-American defendants convicted of raping or murdering whites have claimed that the death penalty is applied in a racially discriminatory manner in violation of both the equal protection clause of the Fourteenth Amendment and the cruel and unusual punishment clause of the Eighth Amendment.

These claims have been consistently rejected by state and federal appellate courts. The case of the Martinsville Seven, a group of African-American men who were sentenced to death for the gang rape of a white woman, was the first case in which defendants explicitly argued that the death penalty was administered in a racially discriminatory manner.¹⁷⁰ It also was the first case in which lawyers presented statistical evidence to prove systematic racial discrimination in capital cases. As explained in more detail in "In the Courts: The Case of the Martinsville Seven," the defendants' contention that the Virginia rape statute had "been applied and administered with an evil eye and an unequal hand"¹⁷¹ was repeatedly denied by Virginia appellate courts.

The question of racial discrimination in the application of the death penalty also has been addressed in federal court. In a series of decisions, U.S. Court of Appeals ruled, first, that the empirical studies used to document systematic racial discrimination did not take every variable related to capital sentencing into account and, second, that the evidence presented did not demonstrate that the appellant's *own* sentence was the product of discrimination.¹⁷²

The Supreme Court directly addressed the issue of victim-based racial discrimination in the application of the death penalty in the case of *McCleskey v. Kemp*.¹⁷³ Warren McCleskey, an African American, was convicted and sentenced to death in Georgia for killing a white police officer during the course of an armed robbery. McCleskey claimed that the Georgia capital sentencing process

In the Courts: The Case of the Martinsville Seven

Just after dark on January 8, 1949, Ruby Floyd, a 32-year-old white woman, was assaulted and repeatedly raped by several men as she walked in a predominately black neighborhood in Martinsville, Virginia.¹⁷⁴ Within a day and a half, seven African-American men had been arrested; when confronted with incriminating statements made by their codefendants, all of them confessed. Two months later, a grand jury composed of four white men and three African-American men indicted each defendant on one count of rape and six counts of aiding and abetting a rape by the other defendants.

The defendants were tried in the Seventh Judicial Circuit Court, located in Martinsville. Before the legal proceedings began, Judge Kennon Caithness Whittle, who presided over all of the trials, called the prosecutors and defense attorneys into his chambers to remind them of their duty to protect the defendants' right to a fair trial and to plead with them to "downplay the racial overtones" of the case. He emphasized that the case "must be tried as though both parties were members of the same race."¹⁷⁵

Although prosecutors took Judge Whittle's admonitions to heart and emphasized the seriousness of the crime and the defendants' evident guilt rather than the fact that the crime involved the rape of a white woman by African-American men, the "racial overtones" of the case inevitably surfaced. Defense attorneys, for example, moved for a change of venue, arguing that inflammatory publicity about the case, coupled with widespread community sentiment that the defendants were guilty and "ought to get the works,"¹⁷⁶ meant that the defendants could not get a fair trial in Martinsville. Judge Whittle, who admitted that it might be difficult to find impartial jurors and acknowledged that some jurors might be biased against the defendants because of their race, denied the motion, asserting that "no mass feeling about these defendants"¹⁷⁷ had surfaced. Later, prosecutors used their peremptory challenges to exclude the few African Americans who remained in the jury pool after those who opposed the death penalty had been excused for cause. As a result, each case was decided by an all-white jury. The result of each day-long trial was the same: all seven defendants were found guilty of rape and sentenced to death. On May 3, 1949, less than four months after the assault on Ruby Floyd, Judge Whittle officially pronounced sentence and announced that four of the defendants were to be executed on July 15, the remaining three on July 22. Noting that this gave the defendants more than 60 days to appeal, he stated, "If errors have been made I pray God they may be corrected."¹⁷⁸

The next 19 months witnessed several rounds of appeals challenging the convictions and death sentences of the Martinsville Seven. The initial petition submitted by attorneys for the NAACP Legal Defense Fund, which represented the defendants on appeal, charged the trial court with four violations of due process. Although none of the charges focused directly on racially discriminatory practices, allegations of racial prejudice were interwoven with a number of the arguments. Appellants noted, for example, that prior to 1866 Virginia law specified that the death penalty for rape could be imposed only on African-American men convicted of raping white women and that even after the law was repealed virtually all of those sentenced to death for rape had been African American. They also stated that the trial judge's questioning of prospective jurors about capital punishment and subsequent exclusion of those who were opposed to the imposition of the death penalty sent the unmistakable message that "only one penalty would be appropriate for the offenders."¹⁷⁹

(Continued)

These appeals failed at both the state and federal level. The Virginia Supreme Court of Appeals voted unanimously to affirm the convictions. Chief Justice Edward W. Hudgins, who wrote the opinion, vehemently denied appellants' assertions that the death penalty was reserved for blacks, noting that there was not "a scintilla of evidence" to support it.¹⁸⁰ Hudgins also chastised the defendants' attorneys for ever raising the issue, contending that it was nothing more than "an abortive attempt to inject into the proceedings racial prejudice."¹⁸¹

The defendants appealed the decision to the U.S. Supreme Court, but the Court declined to review the case. This prompted the NAACP attorneys to adopt a radically different strategy for the next round of appeals. Rather than challenging the defendants' convictions and death sentences on traditional due process grounds, the attorneys mounted a direct attack on the discriminatory application of the death penalty in Virginia. Martin Martin and Samuel Tucker, the NAACP attorneys who argued in support of the defendants' *habeas corpus* petition, presented statistical evidence documenting a double standard of justice in Virginia rape cases. Noting that 45 African Americans, but not a single white, had been executed for rape since 1908, Tucker stated that African Americans were entitled to the same protection of the law as whites and concluded "if you can't equalize upward [by executing more whites], we must equalize downward."¹⁸²

In an opinion that foreshadowed the Supreme Court's decision in *McCleskey v. Kemp* a quarter of a century later, Judge Doubles, who was presiding over the Hustings Court of the City of Richmond, denied the petition. Judge Doubles stated that there was no evidence of racial discrimination in the actions of the six juries that sentenced the Martinsville Seven to death or in the performance of other juries in similar cases. He then concluded that even if one assumed that those juries had been motivated by racial prejudice, "the petitioners could not demonstrate that an official policy of discrimination, rather than the independent actions of separate juries, resulted in the death verdicts."¹⁸³ As a result, there was no constitutional violation.

The case then was appealed to the Virginia Supreme Court and, when that appeal failed, to the U.S. Supreme Court. In January 1951, the Supreme Court again declined to review the case. Last-minute efforts to save the Martinsville Seven failed. Four of the men were executed on February 2, the remaining three on February 5. "After two years, six trials, five stays of execution, ten opportunities for judicial review, and two denials of executive clemency, the legal odyssey of the Martinsville Seven had ended."¹⁸⁴

was administered in a racially discriminatory manner. In support of his claim, he offered the results of the study conducted by Baldus and his colleagues. As noted earlier, this study found that African Americans convicted of murder with whites had the greatest likelihood of receiving the death penalty.

The Supreme Court rejected McCleskey's Fourteenth and Eighth Amendment claims. Although the majority accepted the validity of the Baldus study, they nonetheless refused to accept McCleskey's argument that the disparities documented by Baldus signaled the presence of unconstitutional racial discrimination. Justice Powell, writing for the majority, argued that the disparities were "unexplained" and stated that "At most, the Baldus study indicates a discrepancy that appears to correlate with race."¹⁸⁶ The Court stated that the Baldus study was "clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose."¹⁸⁷

The Court also expressed its concern that accepting McCleskey's claim would open a Pandora's box of litigation. "McCleskey's claim, taken to its logical conclusion," Powell wrote, "throws into serious question the principles that underlie our entire criminal justice system . . . if we accepted McCleskey's claim that racial bias impermissibly tainted the capital sentencing decision, we would soon be faced with similar claims as to other types of penalty."¹⁸⁸ A ruling in McCleskey's favor, in other words, would open the door to constitutional challenges to the legitimacy not only of the capital sentencing process but also of sentencing in general.

The four dissenting justices were outraged. Justice Brennan, who was joined in dissent by Justices Blackmun, Marshall, and Stevens, wrote, "The Court today holds that Warren McCleskey's sentence was constitutionally imposed. It finds no fault with a system in which lawyers must tell their clients that race casts a large shadow on the capital sentencing process." Brennan also characterized the majority's concern that upholding McCleskey's claim would encourage other groups—"even women"¹⁸⁹—to challenge the criminal sentencing process "as a fear of too much justice" and "a complete abdication of our judicial role."¹⁹⁰

Legal scholars were similarly outraged. Anthony Amsterdam, who was the lead attorney in a 1968 U.S. Court of Appeals case in which an African-American man challenged his death sentence for the rape of a white woman,¹⁹¹ wrote,

I suggest that any self-respecting criminal justice professional is obliged to speak out against this Supreme Court's conception of the criminal justice system. We must reaffirm that there can be no justice in a system which treats people of color differently from white people, or treats crimes against people of color differently from crimes against white people.¹⁹²

Randall Kennedy's analysis was similarly harsh. He challenged Justice Powell's assertion that the Baldus study indicated nothing more "than a discrepancy that appears to correlate with race," which he characterized as "a statement as vacuous as one declaring, say, that 'at most' studies on lung cancer indicate a discrepancy that appears to correlate with smoking."¹⁹³ Bright characterized the decision as "a badge of shame upon America's system of justice,"¹⁹⁴ while Gross and Mauro concluded that "The central message of the *McCleskey* case is all too plain: de facto racial discrimination in capital sentencing is legal in the United States."¹⁹⁵ (See Box 8.7 for a discussion of the possible remedies for racial discrimination in the application of the death penalty.)

The Execution of Warren McCleskey The Court's decision in *McCleskey v. Kemp* did not mark the end of Warren McCleskey's odyssey through the appellate courts. He filed another appeal in 1987, alleging that the testimony of a jail-house informant, which was used to rebut his alibi defense, was obtained illegally. Offie Evans testified at McCleskey's trial in 1978 that McCleskey admitted to and boasted about killing the police officer. McCleskey argued that the state placed Evans in the jail cell next to his cell and instructed Evans to try to get him to talk about the crime. He contended that because he did not have the assistance of

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Box 8.7 Racial Discrimination in Capital Sentencing: The Problem of Remedy

A number of commentators have suggested that the Court's reluctance to accept *McCleskey's* claim reflected its anxiety about the practical consequences of ruling that race impermissibly affected the capital sentencing process.¹⁹⁶ The Court's decision, in other words, reflected its concern about the appropriate remedy if it found a constitutional violation.

The remedies that have been suggested include the following:

1. Abolish the death penalty and vacate all existing death sentences nationwide.
 - The problem with this remedy, of course, is that it is impractical, given the level of public support for the death penalty and the current emphasis on crime control. As Gross and Mauro note "Although abolition is a perfectly practical solution to the problems of capital punishment . . . it is not a serious option in America now."¹⁹⁷
2. Vacate all death sentences in each state where there is compelling evidence of racial disparities in the application of the death penalty.
 - Although this state-by-state approach would not completely satisfy the abolitionists, according to Kennedy, it would place "a large question mark over the legitimacy of any death penalty system generating unexplained racial disparities of the sort at issue in *McCleskey*."¹⁹⁸
3. Limit the class of persons eligible for the death penalty to those who commit the most heinous, the most aggravated homicides. As Justice Stevens suggested in his dissent in *McCleskey*, the Court could narrow the class of death-eligible defendants to those "categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender."¹⁹⁹
 - Although not an "ideal" solution for a number of reasons, this would, as Baldus and his colleagues contend, impart "a greater degree of rationality and consistency into state death-sentencing systems than any of the other procedural safeguards that the Supreme Court has heretofore endorsed."²⁰⁰
4. Reinstate mandatory death sentences for certain crimes.
 - This remedy would, of course, require the Supreme Court to retract its invalidation of mandatory death penalty statutes.
 - Kennedy contends that this would not solve the problem, since prosecutors could refuse to charge the killers of African Americans with a capital crime and juries could decline to convict those who killed African Americans of crimes that triggered the mandatory death sentence.²⁰¹
5. Opt for the "level-up solution,"²⁰² which would require courts to purposely impose more death sentences on those who murdered African Americans.
 - According to Kennedy, states in which there are documented racial disparities in the use of the death penalty could be given a choice: either condemn those who kill African Americans to death at the same rate as those who kill whites or "relinquish the power to put anyone to death."²⁰³

counsel at the time he made the incriminating statements, they could not be used against him.

In 1991, the Supreme Court denied McCleskey's claim, asserting that the issue should have been raised in his first appeal.²⁰⁴ The Court stated that McCleskey would have been allowed to raise a new issue if he had been able to demonstrate that the alleged violation resulted in the conviction of an innocent person. However, according to the Court, "the violation, if it be one, resulted in the admission at trial of truthful inculpatory evidence which did not affect the reliability of the guilt determination. The very statement that McCleskey now embraces confirms his guilt."²⁰⁵

After a series of last-minute appeals, requests for clemency, and requests for commutation were denied, Warren McCleskey was strapped into the electric chair at the state prison in Jacksonville, Georgia. He was pronounced dead at 3:13 A.M., September 26, 1991.

Justice Thurgood Marshall, one of the three dissenters from the Supreme Court's decision not to grant a stay of execution, wrote, "In refusing to grant a stay to review fully McCleskey's claims, the court values expediency over human life. Repeatedly denying Warren McCleskey his constitutional rights is unacceptable. Executing him is inexcusable."²⁰⁶

The Aftermath of *McCleskey*: Calls for Reform or Abolition of the Death Penalty

Opponents of the death penalty viewed the issues raised in *McCleskey v. Kemp* as the only remaining challenge to the constitutionality of the death penalty. They predicted that the Court's decision, which effectively closed the door to similar appeals, would speed up the pace of executions. Data on the number of people executed since 1987 provide support for this. Although only 25 people were executed in 1987, 11 in 1988, 16 in 1989, 23 in 1990, and 14 in 1991, the numbers began to increase in 1992. As shown in Figure 8.5, 31 people were put to death in 1992, and the number of executions reached a *post-McCleskey* high of 98 in 1999.

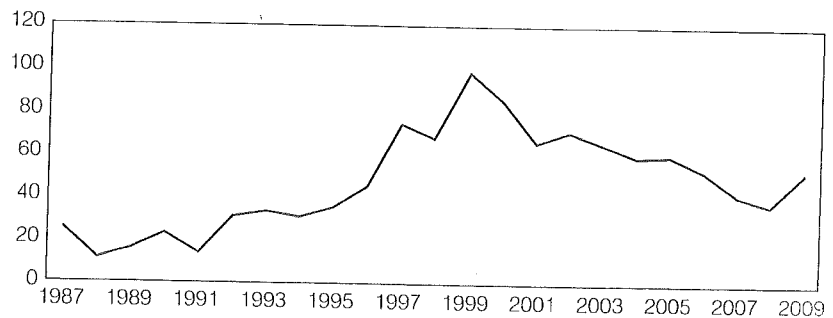


FIGURE 8.5 Executions in the United States, 1987–2004

SOURCE: Death Penalty Information Center, Facts about the Death Penalty. <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>

Beginning in 2000, the number of executions began to decline, reaching a low of 28 in 2015.²⁰⁷

The increase in executions since 1991 no doubt reflects the impact of two recent Supreme Court decisions sharply limiting death-row appeals. As noted above, in 1991, the Court ruled that with few exceptions death row inmates and other state prisoners must raise constitutional claims on their first appeals.²⁰⁸ The ruling, coupled with a 1993 decision stating that "late claims of innocence" raised by death row inmates who have exhausted other federal appeals do not automatically qualify for a hearing in federal court,²⁰⁹ severely curtailed the ability of death row inmates to pursue multiple federal court appeals.

The Racial Justice Act

The U.S. House of Representatives responded to the Supreme Court's ruling in *McCleskey v. Kemp* by adding the Racial Justice Act to the Omnibus Crime Bill of 1994. A slim majority of the House voted for the provision, which would have allowed condemned defendants to challenge their death sentences by showing a *pattern* of racial discrimination in the capital sentencing process in the jurisdictions. Under this provision, in other words, the defendant would not have to show that criminal justice officials acted with discriminatory purpose in his or her case; rather, the defendant could use statistical evidence indicating the disproportionate number of those sentenced to death in the jurisdiction who were African Americans or had killed whites. Once this pattern of racial discrimination had been established, the state would be required to prove that its death penalty decisions were racially neutral. The state might rebut an apparent pattern of racial discrimination in a case involving an African American convicted of killing a white police officer, for example, by showing a consistent pattern of seeking the death penalty for defendants, regardless of race, who were accused of killing police officers.

Opponents of the Racial Justice Act argued that it would effectively abolish the death penalty in the United States. As Senator Orrin Hatch remarked, "so-called Racial Justice Act has nothing to do with racial justice and everything to do with abolishing the death penalty."²¹⁰ The provision was a source of heated debate before it was eventually eliminated from the 1994 Omnibus Crime Bill.

In 1998, Kentucky became the first state to enact a Racial Justice Act. It was followed by the adoption of a similar law in North Carolina in 2009; passage of the North Carolina law was motivated in part by the fact that over a five-year period, five African-American men on death row were exonerated after having spent a total of 60 years in prison. As of 2010, these are the only states that have adopted such laws.

Both the Kentucky and the North Carolina laws permit the defense to introduce statistical evidence of racial bias in the capital sentencing process. In these states, the defense has the burden of proof and the state can rebut the evidence with its own statistical data. A judge determines whether the data prove that the death penalty was sought or imposed on the basis of race.

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The North Carolina law allowed defendants who were on death row at the time of the law’s adoption to file racial bias claims. By the August 2010 deadline, 152 of the 159 inmates had filed such a claim.²¹¹ Included among those who filed claims was Kenneth Bernard Rouse, an African American who was tried by an all-white jury and sentenced to death for the murder of a 63-year-old white woman. Although Rouse cited these facts in his claim, he also presented more specific evidence of racial bias. His petition claimed that when his lawyer interviewed one of the jurors in his case, the juror used a racial epithet to describe African Americans and said that “Black men rape white women so that they can brag to their friends about having done so.”²¹² According to Rouse’s attorney, “If the Racial Justice Act covers anything, it covers Kenneth Rouse.”

The North Carolina Racial Justice Act was repealed by the state legislature in 2013. Critics charged that the legislation provided too many opportunities and made it too easy for death row inmates to challenge their death sentences. By contrast, a supporter of the act, Rep. Darren Jackson, stated that “[W]e voted for the RJA because we wanted the death penalty to be applied uniformly, without regard to race. Be it the perpetrator, the victim, or an individual juror, race should play no part in the process.”²¹³

B o x 8.8 Death and Discrimination in Texas

On June 5, 2000, the U.S. Supreme Court set aside Victor Saldano’s death sentence after lawyers for the state of Texas admitted that the decision had been based in part on the fact that he is Hispanic.²¹⁴ Saldano kidnapped Paul Green at gunpoint from a grocery store parking lot, took him to an isolated area, shot him five times, and stole his watch and wallet. At his sentencing hearing, a psychologist testified about Saldano’s “future dangerousness.” He noted that blacks and Hispanics were overrepresented in prison and stated that the fact that Saldano was Hispanic was an indicator of his future dangerousness. The Texas Court of Criminal Appeals upheld Saldano’s death sentence, stating that allowing his ethnicity to be used as an indicator of dangerousness was not a “fundamental error.”

In his appeal to the U.S. Supreme Court, Saldano disagreed with that conclusion. He stated that it is “fundamentally unfair for the prosecution to use racial and ethnic stereotypes in order to obtain a death penalty.” The Texas Attorney General conceded Saldano’s point. He admitted that the state had erred and joined Saldano in asking the Supreme Court to order a new sentencing hearing. After the Court’s decision was announced, a spokesperson for the Texas Attorney General’s Office stated that an audit had uncovered eight additional cases that might raise similar issues regarding testimony linking race and ethnicity to assessments of future dangerousness.

Questions about the fairness of the Texas death penalty process have been raised in other forums. During the summer of 2000, for example, the *Chicago Tribune* published a two-part series that focused on the 131 executions that were carried out during Texas Governor George W. Bush’s tenure.²¹⁵ (Since 1977, Texas has executed 218 people, which is more than three times the number executed by any

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other state.²¹⁶ The report noted that in 40 of the 131 cases, the defense attorney either presented no mitigating evidence at all or called only one witness during the sentencing hearing. In 43 of the cases, the defendant was represented by an attorney who had been (or was subsequent to the trial) publicly sanctioned for misconduct by the State Bar of Texas. One attorney, for example, who had been practicing for only 17 months, was appointed to represent Davis Losada, who was accused of rape and murder. Losada was found guilty and sentenced to death after the attorney delivered a "disjointed and brief argument" in which he told the jury: "The System. Justice. I don't know. But that's what y'all are going to do." He later admitted that he had a conflict of interest in the case (he previously had represented the key witness against his client), and in 1994 he was disbarred for stealing money from his clients.

Other problems cited in the *Tribune* report included the use of unreliable evidence, such as testimony by jailhouse informants; the use of questionable testimony from a psychiatrist, nicknamed "Dr. Death," regarding the potential dangerousness of capital offenders; and the refusal of the Texas Court of Criminal Appeals to order new trials or sentencing hearings despite allegations of fundamental violations of defendants' rights. The report noted that since Governor Bush took office in 1995, the Court of Criminal Appeals affirmed 270 capital convictions, granted new trials eight times, and ordered new sentencing hearings only six times.

In September 2000, the Texas Civil Rights Project issued a comprehensive report on "The Death Penalty in Texas" that identified many of the same problems.²¹⁷ The authors of the report stated that there were "six areas where the probability of error and the probability of wrongful execution grow dramatically": appointment of counsel to represent indigent defendants; the prosecutor's decision to seek the death penalty; the jury selection process; the sentencing process; the appellate process; and the review of cases by the Board of Pardons and Parole. The report emphasized that the issue was not "a possible break at one juncture, but a probable break at two or more critical junctures." To remedy these deficiencies, the Texas Civil Rights Project recommended that Governor Bush call for a moratorium on the death penalty in Texas. They also recommended that Governor Bush appoint a commission to review the convictions of those currently on death row; the commission would be charged with determining whether the defendant's rights to due process had been violated and whether race and/or social class affected the death penalty process.²¹⁸ According to the report, "[i]f the State of Texas is going to continue to take the lives of people, then it needs to repair the system . . ." The report concluded that "The frightening truth of the matter is that Texas is at greater risk than at anytime [sic] since it resumed executions in 1982 of killing innocent people."²¹⁹

THE DEATH PENALTY IN THE TWENTY-FIRST CENTURY

Opponents of the death penalty assumed that the Supreme Court's decision *McCleskey v. Kemp*, coupled with the defeat of the Racial Justice Act by Congress, sounded a death knell for attempts to abolish the death penalty. They predicted that these decisions would dampen—if not extinguish—the controversy surrounding the death penalty. Contrary to their predictions, however, the controversy did not die down. In fact, a series of events at the turn of the century pushed the issue back on the public agenda:

- In February 1997, the American Bar Association (ABA) went on record as being formally opposed to the current capital sentencing system and called

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for an immediate moratorium on executions in the United States. The ABA report cited the following concerns: lack of adequate counsel in death penalty cases; restrictions on access to appellate courts; and racial disparities in the administration of capital punishment.²²⁰

- In January 2000, George Ryan, the governor of Illinois, issued a moratorium on the use of the death penalty in that state. His decision was motivated by the fact that since the death penalty was reinstated in Illinois, 12 people were executed but 13 were exonerated. Governor Ryan, who called for a “public dialogue” on “the question of the fairness of the application of the death penalty in Illinois,” stated that he favored a moratorium because of his “grave concerns about our state’s shameful record of convicting innocent people and putting them on death row.”²²¹ Three years later, Governor Ryan commuted the sentences of all of the state’s 167 death row inmates to life in prison. In March 2011, Illinois Governor Patrick Quinn signed into law a bill repealing the death penalty.
- In May 2000, the New Hampshire legislature voted to repeal the death penalty. One legislator—a Republican and a longtime supporter of the death penalty—justified his vote for repeal by saying, “There are no millionaires on death row. Can you honestly say that you’re going to get equal justice under the law when, if you’ve got the money, you are going to get away with it.”²²² Although the legislation was subsequently vetoed by the governor, it was the first time in more than two decades that a state legislature had voted to repeal the death penalty.
- In October 2000, the Texas Civil Rights Project (TCRP) released a report on the death penalty in Texas (see Box 8.8: Death and Discrimination in Texas). The report identified six critical issues, including the competency of attorneys appointed to represent defendants charged with capital murder, that “decrease due process for low-income death penalty defendants and increase the probability of wrongful convictions.” The report called on then-Governor George Bush to institute a moratorium on the death penalty pending the results of two studies, one of which would determine whether race and social class influenced the use of the death penalty in Texas.²²³
- In 2004, the New York State Court of Appeals ruled that the state’s death penalty statute was unconstitutional. Efforts to reinstate the death penalty through legislation were unsuccessful.
- In 2007, New Jersey became the first state in the nation to pass legislation abolishing the death penalty since the use of capital punishment was reinstated by *Gregg v. Georgia* in 1976. Two years later, New Mexico also enacted legislation abolishing the death penalty. Maryland abolished the death penalty in 2013 and Nebraska abolished it in 2015.
- In October 2009, the American Law Institute voted to disavow the framework for capital punishment that it had created in 1962 as part of the Model Penal Code, “in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital

punishment.” A study commissioned by the institute said that experience proved that the goal of individualized decisions about who should be executed and the goal of systemic fairness for minorities and others could not be reconciled.²²⁴

- In March 2016, a Jefferson County (Alabama) circuit judge ruled that Alabama’s capital sentencing procedures, which allow judges to override a jury’s recommendation for a life sentence and instead impose a death sentence, were constitutional. Also in March 2016, Delaware public defenders filed a brief with the Delaware Supreme Court arguing that the state’s death penalty procedures were unconstitutional.

As these examples illustrate, concerns about the fairness and accuracy of the capital sentencing process led many to conclude that it was time to rethink the death penalty. This period of “rethinking” spawned two distinct movements, one for reform of the capital sentencing process and one for abolishing the death penalty.

The Movement to Reform the Death Penalty

Advocates of reform contend that the capital sentencing process can be “fixed.” While acknowledging that the system is not infallible, they argue that the enactment of reforms designed to ensure that innocent persons are not convicted and sentenced to death will remedy the situation. The reforms that have been proposed include increasing access to post-conviction DNA testing and providing funding to pay for DNA tests requested by indigent inmates; banning the execution of the mentally retarded; and establishing standards on qualifications and experience for defense counsel in death penalty cases.

Typical of this approach is the Innocence Protection Act of 2004 (HR 5107), a package of criminal justice reforms that President George W. Bush signed into law on October 30, 2004. The act was part of the larger Justice for All Act, which had broad bipartisan support in the U.S. Senate and House of Representatives; this bill enhanced protection for victims of federal crimes, increased federal resources available to state and local governments to combat crimes with DNA technology, and provided safeguards designed to prevent wrongful conviction and executions. The Innocence Protection Act (Title VI of the Justice for All Act) has three important provisions. The first provision allows a person convicted of federal crime to obtain DNA testing to support a claim of innocence, prohibit the destruction of DNA evidence in federal criminal cases while a defendant remains incarcerated, and provides funding to states to help defray the costs of post-conviction DNA testing. The second provision authorizes a grant program to improve the quality of legal representation provided to indigent defendants in state capital cases. The third provision increases the maximum amount of damage that can be awarded in cases of unjust imprisonment to \$100,000 per year in capital cases.²²⁵

One of the act’s main supporters in the Senate, Patrick Leahy (Democrat from Vermont), characterized the Innocence Protection Act as “the most significant step we have taken in many years to improve the quality of justice in the

country." Leahy added that DNA testing, which he called the "miracle forensic tool of our lifetimes," had revealed the flaws in the death penalty process. He also stated that the bill's provisions regarding provision of counsel represent "a modest step toward addressing one of the most frequent causes of wrongful convictions in capital cases, the lack of adequate legal counsel."²²⁶

A similar approach was taken by the bipartisan commission appointed by Illinois Governor George Ryan after he halted executions in January 2000. The commission's report, which was issued in April 2002, recommended 85 changes in the capital sentencing process in Illinois. Included were proposals to prohibit the imposition of the death penalty based solely on the testimony of a single eyewitness, a jailhouse informant, or an accomplice; videotape interrogations of suspects; establish an independent forensics laboratory; and establish a state panel to review prosecutors' decisions to seek the death penalty. The report also proposed eliminating several categories of capital crimes, including murder committed in the course of a felony. The co-chairman of the commission, Thomas P. Sullivan, a former federal prosecutor, stated that the options were to "repair or repeal" the death penalty. "Fix the capital punishment system or abolish it," he said. "There is no other principled recourse."²³³

The Movement to Abolish the Death Penalty

In contrast to those who advocate reform of the capital sentencing system, proponents of abolishing the death penalty contend that the system is fatally flawed. To support their position, these "new abolitionists"²³⁴ cite mounting evidence of wrongful conviction of those on death row (see Box 8.9), as well as evidence that

Box 8.9 The Death Penalty and Wrongful Convictions

Opponents of the death penalty consistently note the possibility that an individual will be sentenced to death for a crime that he or she did not commit. Hugo A. Bedau and Michael L. Radelet²²⁷ have identified 350 cases in which defendants were wrongfully convicted of a homicide for which they could have received the death penalty or of a rape in which the death penalty was imposed. Of those individuals, 139 were sentenced to die; 23 eventually were executed. Another 22 people came within 72 hours of being executed.

These wrongful convictions include a number of people sentenced to death in the post-*Furman* era. In 1987, for example, Walter McMillian, an African-American man who was dating a white woman, was charged with the death of an 18-year-old white female store clerk in Alabama. In spite of testimony from a dozen witnesses, who swore he was at home on the day of the murder, and despite the lack of any physical evidence, McMillian was convicted after a one-and-a-half-day trial. His conviction hinged on the testimony of Ralph Myers, a 30-year-old with a long criminal record. The jury recommended life in prison without parole, but the judge hearing

(Continued)

the case, citing the "vicious and brutal killing of a young lady in the full flower of adulthood,"²²⁸ sentenced McMillian to death.

Six years later, Myers recanted his testimony. He said he had been pressured by law enforcement officials to accuse McMillian and to testify against him in court. McMillian was freed in March 1993, after prosecutors conceded that his conviction was based on perjured testimony and that evidence had been withheld from his lawyers. He had spent six years on death row for a crime he did not commit.

A similar fate awaited Rolando Cruz, a Hispanic American who, along with co-defendant Alejandro Hernandez, was convicted of the 1983 kidnapping, rape, and murder of 10-year-old Jeanine Nicarico in DuPage County (Illinois) Circuit Court. Cruz was twice convicted and condemned to death for the crime, but both verdicts were overturned by appellate courts because of procedural errors at trial. He spent nearly 10 years on death row before he was acquitted at a third trial in November 1995. Hernandez also was convicted twice and sentenced to death once before his case was dropped following the acquittal of Cruz.²²⁹

This case attracted national attention for what many believed was the "rail-roading" of Cruz and Hernandez. Prosecutors presented no physical evidence or eyewitness testimony linking the two to the crime but relied almost exclusively on the testimony of jailhouse informants, who stated that the defendants had admitted the crime, and on questionable testimony regarding a dream about the crime that Cruz allegedly described to sheriff's deputies. They also ignored compelling evidence that another man, Brian Dugan, had committed the crime. According to one commentator, "The crime had been 'solved' by cobbling together a shabby case against Rolando Cruz and Alex Hernandez of Aurora and presenting it to a jury that convicted them and sent them to Death Row."²³⁰

On November 3, 1995, Judge Ronald Mehling, who was presiding at Cruz's third trial, acquitted Cruz of the charges. In a strongly worded address from the bench, Mehling stated that the murder investigation was "sloppy" and that the government's case against Cruz was "riddled with lies and mistakes." He also sharply criticized prosecutors for their handling of the "vision statement" and suggested that investigators had lied about the statement and about other evidence. "What troubles me in this case," Mehling said, "is what the evidence does not show."²³¹ Cruz was set free that day; Hernandez was released several weeks later.

One year later, a grand jury handed down a 47-count indictment against three of the prosecutors and four of the sheriff's deputies involved in the case. The indictment charged the deputies with repeated acts of perjury and alleged that prosecutors knowingly presented perjured testimony and buried the notes of an interview with Dugan that could have exonerated Cruz.²³² The defendants, dubbed the "DuPage Seven," were acquitted of all charges in 1999. Lawyers for Rolando Cruz, Alejandro Hernandez, and Stephen Buckley (a third defendant who had been charged in the crime) then filed a federal civil rights suit. In October 2000, the DuPage County State's Attorney agreed to pay the defendants an out-of-court settlement of \$3.5 million.

These two cases are not isolated incidents. In April 2002, Ray Krone, who was convicted and sentenced to death for the murder of a cocktail waitress in 1991, became the 100th former death-row prisoner to be exonerated since 1973. Krone was freed after DNA tests revealed that he was not the killer. In 2005, Derrick Jamison became the 121st death-row inmate to be exonerated. He was freed and all charges were dismissed after it came to light that prosecutors in the case had withheld critical eyewitness statements and other evidence from his attorneys.

the death penalty is administered in an arbitrary and a discriminatory manner. Like former Supreme Court Justice Harry Blackmun, they argue that it is futile to continue to "tinker with the machinery of death."

Whereas traditional abolitionists base their opposition to the death penalty on the immorality of state killing, the sanctity of human life, or the inherent cruelty of death as a punishment, the new abolitionists claim that the death penalty "has not been, and cannot be, administered in a manner that is compatible with our legal system's fundamental commitments to fair and equal treatment."²³⁵ They contend that the implementation of procedural rules, such as those proposed by the advocates of reform, has not solved—indeed, cannot solve—the problems inherent in the capital sentencing process: the post-*Furman* reforms notwithstanding, "the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake."²³⁶ Like Justice Blackmun, the advocates of abolition insist that "no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies."²³⁷

Concerns about fairness and discrimination in the capital sentencing process prompted death penalty opponents to call not for procedural reforms but for a moratorium on executions in the United States. Although these resolutions typically call for a cessation of executions until reforms designed to ensure due process and equal protection have been implemented, Sarat maintains that they "amount to a call for the abolition, not merely the cessation, of capital punishment."²³⁸

Sarat contends that the reforms needed to "fix" the capital sentencing process—provision of competent counsel for all capital defendants, expansion of death row inmates' rights to appeal, guaranteed access to DNA testing, and review of prosecutors' decisions to seek the death penalty—while feasible, are "hardly a likely or near-term possibility."²³⁹ He notes, for example, that one of the reasons the American Bar Association cites in its call for a moratorium on the death penalty is the "longstanding patterns of racial discrimination . . . in courts around the country." To address this problem, the ABA calls for the development of "effective mechanisms" to eliminate racial discrimination in capital cases. Similar to the National Death Penalty Moratorium Act, which was introduced in both houses of Congress in 2001 but which did not pass, would have set up a National Commission on the Death Penalty; the commission would have been charged with "establishing guidelines and procedures which . . . ensure that the death penalty is not administered in a racially discriminatory manner."²⁴⁰ The problem, according to Sarat, is that it is not clear that any such "mechanisms," "guidelines," or "procedures" exist. As he contends,

The pernicious effects of race in capital sentencing are a function of the persistence of racial prejudice throughout society combined with the wide degree of discretion necessary to afford individualized justice in capital prosecutions and capital trials. Prosecutors with limited resources may be inclined to allocate resources to cases that attract the greatest public attention, which often will mean cases where the victim was white and his or her assailant black. Participants in the legal system—a brother

white or black—demonize young black males, seeing them as more deserving of death as a punishment because of their perceived danger. These cultural effects are not remediable in the near term . . .²⁴¹

Because it may be impossible to ensure that the capital sentencing process is operated in a racially neutral manner, in other words, Sarat and others who embrace the new abolitionism maintain that the only solution is to abolish the death penalty.

CONCLUSION

The findings of research examining the effect of race on the capital sentencing process are consistent. Study after study has demonstrated that those who murder whites are much more likely to be sentenced to death than those who murder African Americans. Many of these studies also have shown that African Americans convicted of murdering whites receive the death penalty more often than whites who murder other whites. These results come from studies conducted before *Furman*, in the decade following the *Gregg* decision, and in the 1980s, 1990s, and beyond. They come from studies conducted in both southern and non-southern jurisdictions and from studies examining prosecutors' charging decisions as well as jurors' sentencing decisions.

These results suggest that racial disparities in the application of the death penalty reflect racial discrimination. Some might argue that these results signal contextual, rather than systematic, racial discrimination. As noted earlier, although research consistently has revealed that those who murder whites are sentenced to death at a disproportionately high rate, not all studies have found that African-American offenders are more likely than white offenders to be sentenced to death.

We contend that the type of discrimination found in the capital sentencing process falls closer to the systematic end of the discrimination continuum presented in Chapter 1. Racial discrimination in the capital sentencing process is not limited to the South, where historical evidence of racial bias would lead one to expect differential treatment, but is applicable to other regions of the country as well. It is not confined to one stage of the decision-making process but affects decisions made by prosecutors as well as juries. It also is not confined to the pre-*Furman* period, when statutes offered little or no guidance to judges and juries charged with deciding whether to impose the death penalty, but is found too, under the more restrictive guided discretion statutes enacted since *Furman*. Moreover, this effect does not disappear when legally relevant predictors of sentence severity are taken into consideration.

With respect to the capital sentencing process, then, empirical studies suggest that the Supreme Court was overly optimistic in predicting that the statutory reforms adopted since *Furman* would eliminate racial discrimination. To the contrary, these studies document "a clear pattern unexplainable on grounds other than race."²⁴²