THE LAST LINE OF DEFENSE: A COMPARATIVE ANALYSIS OF UNITED STATES SUPREME COURT AND NEW JERSEY SUPREME COURT APPROACHES TO RACIAL BIAS IN THE IMPOSITION OF THE DEATH PENALTY

J. Randy Sawyer

I. INTRODUCTION

Currently pending before the New Jersey Supreme Court is a challenge to the constitutionality of the New Jersey Death Penalty Act. The challenge asserts that New Jersey juries impose the sentence of death more often on black defendants than non-black defendants.[1] A similar challenge was rejected by the United States Supreme Court in *McCleskey v. Kemp*.[2] The New Jersey Supreme Court, however, has vehemently rejected the holding in *McCleskey*.[3] Aside from the validity of the statistical studies involved, this difference in opinion between the two tribunals presents many questions regarding the two courts' respective approaches to the underlying constitutional problems presented by the statistical evidence. How the New Jersey Supreme Court's approach to this issue will differ from that of the United States Supreme Court will be instructive to those concerned about how the court will ultimately dispose of the challenge to capital punishment in New Jersey.

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[1]State v. Loftin, 146 N.J. 295, 680 A.2d 677 (1996). *See* Rocco Cammarere, *New Data Confirms Death Penalty Bias*, NEW JERSEY LAWYER, Oct. 28, 1996, at 2304.

[2]481 U.S. 279 (1987) (holding that (1) a defendant, in order to show that his sentence violates the Equal Protection Clause of the Fourteenth Amendment, must prove that the decision-makers acted with discriminatory purpose directed specifically toward such defendant, and (2) sentencing discrepancies are an unavoidable part of our criminal justice system and, although a proffered statistical study provides a strong showing of a discrepancy in capital sentencing based on race, such statistical evidence does not prove that race played a part in the defendant's sentence under review).

[3]State v. Marshall, 106 N.J. 123, 613 A.2d 1059 (1992) (asserting, *inter alia*, that the people of New Jersey would never tolerate racial bias in the administration of capital punishment).

This Comment will review the respective approaches of the two Supreme Courts and compare them in an effort to ascertain the outcome of the challenge to New Jersey's death penalty. Part II of this Comment will provide a brief history of the abolitionist movement's successes and failures in an effort to shed light on the strategy behind bringing this challenge before the New Jersey Supreme Court. Part III will review three seminal cases of the United States Supreme Court that provide a foundation for understanding the Court's approach to arbitrary death sentencing, as well as its reasoning in rejecting a strong statistical showing of racial discrimination.[4] Previewing the New Jersey Supreme Court's treatment of racial bias in death sentencing, Part IV will analyze the Baldus Proportionality Review study,[5] which compared sentences of black defendants with those of non-black defendants, as well as several cases where the court has addressed the issue.[6] Part V will compare the ap-

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[4]*See* Furman v. Georgia, 408 U.S. 238 (1972) (holding that unguided jury sentencing discretion results in arbitrary imposition of capital punishment which violates the Eighth and Fourteenth Amendments); Gregg v. Georgia, 428 U.S. 153 (1976) (determining that capital punishment is not unconstitutional *per se*, and may be imposed under a sentencing scheme that adequately guides jury discretion); *McCleskey*, 481 U.S. 279 (rejecting a statistical study as proof of either an actual intent to discriminate against the defendant, or an actual influence of racial bias on the defendant's sentence). *See also infra* notes 43-116 and accompanying text (discussing *Furman*, *Gregg* and *McCleskey*).

[5]David C. Baldus, *Death Penalty Proportionality Review Project: Final Report to the New Jersey Supreme Court* (Sept. 24, 1991). Mr. Baldus is responsible for both the statistical study at issue in *McCleskey* and the proportionality review study at issue in *Marshall*. Mr. Baldus performed the Death Penalty Proportionality Review Project at the request of the New Jersey Supreme Court. *Marshall*, 130 N.J. at 117, 613 A.2d at 1063. The purpose of the project was to provide New Jersey with a viable system of comparison for capital cases to ensure that death sentences will not be disproportionate. The New Jersey Administrative Office of the Courts is responsible for maintaining the database of cases used for proportionality review and provides the New Jersey Supreme Court with an updated study of that data for each proportionality review the court performs. *See* Cammarere, *supra* note 1, at 2304.

[6]*See* State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987) (finding, *inter alia*, that both capital punishment and the New Jersey Death Penalty Act are constitutional under the United States Constitution and the New Jersey Constitution); *Marshall*, 130 N.J. 109, 613 A.2d 1059 (holding, *inter alia*, that the universe of cases used for proportionality review is too small to support a sound statistical showing of racial disparities in sentencing); State v. Bey, 137 N.J. 334, 645 A.2d 685 (1994) (reaffirming the *Marshall* court's determination that a statistical showing of racial bias in New Jersey's capital sentencing cannot be supported by the available universe of cases); State v. Martini, 139 N.J. 3, 651 A.2d 949 (1994) (reaffirming the *Marshall* and *Bey* courts' determination that a statistical showing of racial bias in New Jersey's capital sentencing cannot be supported by the available universe of cases); State v. DiFrisco, 142 N.J. 148, 662 A.2d 442 (1995) (reaffirming the *Marshall*, *Bey* and *Martini* courts' determination that a statistical showing of racial bias in New Jersey's capital sentencing cannot be supported by the available universe of cases). *See also infra*

proaches of the two courts in an effort to ascertain a possible outcome to the challenge to New Jersey's death penalty. Part VI will conclude with a suggested course of action for dealing with a showing of substantial risk that the imposition of the death penalty in New Jersey is affected by racial discrimination.

II. A BRIEF HISTORY OF THE ABOLITIONIST MOVEMENT IN AMERICA

The use of capital punishment is deeply rooted in American history, as is the debate over its legal and moral implications. Although the death penalty has been accepted as an appropriate punishment for various crimes from the very inception of our Nation,[7] it has never been without opposition. This opposition, collectively termed the abolitionist movement (hereinafter "the movement"), has fluctuated in effectiveness throughout its history, seemingly gaining momentum at one point in time only to quickly lose it in the next.[8] Some commentators have linked the movement's fortunes to social and political changes which have shaped America's growth over the years. During the advent of slavery, for instance, capital punishment experienced an expansion in many southern states where statutes were passed imposing death for various crimes involving interference with slave ownership.[9] In contrast, the post World War II period saw a decline in executions based on what some thought to be a reaction to the brutality of that war.[10] In any event, the movement has never succeeded in abolishing the death penalty in America; a goal which is possibly unattainable under a Constitution that specifically acknowledges capital punishment.[11] The power of the states to kill, however, has been signifi-

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notes 123-225 and accompanying text (discussing *Ramseur*, *Marshall*, *Bey*, *Martini* and *DiFrisco*).

[7]Information Plus, *A General History of Capital Punishment in America*, *in* PUNISHMENT AND THE DEATH PENALTY: THE CURRENT DEBATE 103 (Robert M. Baird & Stewart E. Rosenbaum ed., 1995) (hereinafter Baird & Rosenbaum).

[8]*See generally* WILLIAM J. BOWERS, LEGAL HOMOCIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982 7-15 (1984).

[9]*Id.* at 139.

[10]WILLIAM J. BOWERS, EXECUTIONS IN AMERICA 29 (1974).

[11]*See, e.g.*, U.S. CONST. amend. V (stating that "[n]o person shall be held to answer for a *capital*, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger;. . . ." (emphasis added)). The terms "capital" and

cantly shaped by abolitionist moralistic efforts, as well as legal challenges brought before the United States Supreme Court.

The movement against capital punishment in America was founded in the late eighteenth century by Dr. Benjamin Rush, who attracted many followers with his arguments condemning the death penalty.[12] Rush's early efforts gained support from such notable statesman as Benjamin Franklin and Philadelphia Attorney General William Bradford, resulting in the abolition of the death penalty in Pennsylvania for all crimes except first degree murder.[13] This success led to expansion of the movement's efforts to other states, including Ohio, New Jersey, New York, and Massachusetts; however, abolitionist campaigns failed to influence the legislatures of those states to reverse their death penalty laws.[14]

It was not until the mid-nineteenth century, in the wake of substantial penal reform, that the movement experienced significant success.[15] The Territory of Michigan abolished the death penalty in 1846, soon to be followed by Rhode Island and Wisconsin, while most other states began limiting capital punishment to the crimes of murder and treason.[16] After the movement suffered a brief setback in the midst of the Civil War, Maine and Iowa joined those states that had outlawed the death penalty.[17] Their legislatures, however, quickly recanted by reinstating capital punishment almost immediately after eliminating it.[18] A similar change of heart occurred in Colorado when its legislature abol-

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"infamous" have been interpreted by the United States Supreme Court as defining the punishment attendant to conviction of any given crime. Ex parte Wilson, 114 U.S. 417, 423-24 (1885). The Court in *Ex parte Wilson* supported this interpretation by referring to language used in proposals for the Fifth Amendment prior to its adoption, as introduced by Mr. Madison in 1789 to the House of Representatives, which stated that "[i]n all crimes *punishable with loss of life or member*, presentment or indictment by a grand jury shall be an essential preliminary." *Id.* at 424 (citing 1 ANNALS OF CONGRESS 435, 760 (emphasis added)).

[12]Baird & Rosenbaum, *supra* note 7, at 104.

[13]*Id.*

[14]*Id.*

[15]DONALD D. HOOK, DEATH IN THE BALANCE: THE DEBATE OVER CAPITAL PUNISHMENT 24 (1989).

[16]Baird & Rosenbaum, *supra* note 7, at 104.

[17]BOWERS, *supra* note 8, at 10.

[18]*Id.*

ished the death penalty, only to quickly reinstate it in response to citizen reaction in the form of several lynchings.[19]

In the early twentieth century, the movement once again gained slight momentum, sparked by reform efforts aimed at the criminal justice system.[20] By 1917, nine states had abolished capital punishment.[21] This success was short-lived, however, as five of the states reinstated the death penalty by 1921.[22] In fact, the movement nearly lost all support during the Prohibition Era, a period marked by widespread disrespect for the law.[23] Consequently, between 1917 and 1957, no other states did away with capital punishment, leaving only six of the fifteen states that had abolished the death penalty after 1845 without any capital statute on the books.[24]

In the late 1950s the movement appeared to recover when Alaska, Hawaii, and Delaware outlawed capital punishment.[25] The victory in Delaware, consistent with the movement's spotty success, was also short-lived as the death penalty returned within three years.[26] Despite the setback in Delaware, however, the abolitionists gained support in the 1960s, bolstered by growing humanitarianism fostered by the efforts of the Civil Rights movement.[27] By 1965, Oregon, Iowa, and West Virginia had abolished their death penalty laws, and many other states were redefining their capital statutes to apply to only a narrow class of crimes.[28]

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[19]Baird & Rosenbaum, *supra* note 7, at 105.

[20]*Id.*

[21]BOWERS, *supra* note 8, at 9. From 1907 to 1917, the nine states which had abolished the death penalty included Kansas, Minnesota, Washington, Oregon, North Dakota, South Dakota, Tennessee, Arizona and Missouri. *Id.*

[22]*Id.* Five states reinstated the death penalty shortly after abolishing it including Washington, Oregon, Tennessee, Arizona and Missouri. *Id.* The longest hold-out of these states retained the death penalty for only six years. *Id.*

[23]Baird & Rosenbaum, *supra* note 7, at 105.

[24]*Id.* The six remaining states included Michigan, Rhode Island, Wisconsin, Maine, North Dakota and Minnesota (as well as the territory of Puerto Rico). *Id.*

[25]HOOK, *supra* note 15, at 25.

[26]*Id.*

[27]Baird & Rosenbaum, *supra* note 7, at 105.

[28]*Id.*

Prior to the 1960s, the legality of capital punishment under the United States Constitution had never been questioned.[29] On the heels of legal reform brought about by civil rights activists, the movement shifted its focus from moral and philosophical opposition to challenging the death penalty on legal grounds.[30] In the late 1960s, the NAACP instituted a nation-wide assault on the constitutionality of capital punishment.[31] The NAACP used a strategy whereby a large number of appeals were brought on behalf of death row inmates across America in order to overload the United States Supreme Court's docket and force a ruling on the constitutionality of the death penalty.[32] This strategy resulted in an implied moratorium on executions in anticipation of the Supreme Court's decision.[33]

In 1972, in an apparent victory for the movement, the Supreme Court impliedly invalidated capital punishment by finding that several states' death penalty statutes violated the Eighth and Fourteenth Amendments.[34] The Court,

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[29]*Id.* at 106.

[30]HOOK, *supra* note 15, at 25. *See, e.g.*, Aikens v. California, 403 U.S. 952 (1971) (granting *certiorari* to the Supreme Court of California limited to the question: "Does the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments"); McGautha v. California, 398 U.S. 936 (1970) (granting *certiorari* to the Supreme Court of California limited to the question: "Does California's practice of allowing capital juries absolute discretion, uncontrolled by standards or directions of any kind, to impose the death penalty upon a defendant convicted of a crime of murder violate the Due Process Clause of the Fourteenth Amendment"); Maxwell v. Bishop, 393 U.S. 997 (1968) (granting *certiorari* to the United States Court of Appeals for the Eighth Circuit limited to the question: "Whether Arkansas' practice of permitting the trial jury absolute discretion, uncontrolled by standards or directions of any kind, to impose the death penalty violates the Due Process Clause of the Fourteenth Amendment").

[31]BOWERS, *supra* note 8, at 16.

[32]*Id.*

[33]Baird & Rosenbaum, *supra* note 7, at 106.

[34]Furman v. Georgia, 408 U.S. 238, 239-40 (1972). The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. Section one of the Fourteenth Amendment, which contains the Equal Protection Clause applicable to the states, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any

however, held only that the statutes under review were flawed, not that the death penalty itself was unconstitutional.[35] It was not until 1976 that the Court finally addressed the constitutionality issue.[36] At that point, the Court found that capital punishment was not unconstitutional *per se*, and that carefully structured death penalty statutes could be permissible under the Eighth Amendment.[37] Soon thereafter, in 1977, the moratorium on executions ended when Utah put to death inmate Gary Gilmore.[38]

Since the 1976 decision upholding the constitutionality of capital punishment, the Supreme Court has repeatedly faced death penalty issues.[39] One undeniable conclusion emerging from the Court's capital jurisprudence is the fact that the death penalty is an acceptable form of punishment in America. An indication that this "acceptance" will endure was the replacement of the death

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person of life, liberty, or property without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*

U.S.C. amend. XIV, §1 (emphasis added) (emphasis indicates the Equal Protection Clause).

[35]In its brief *per curiam* opinion, the Court in *Furman* held that "the imposition and carrying out of the death penalty *in these cases* constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Furman*, 408 U.S. at 239-40 (emphasis added). *See also id.* at 310-11 (White, J., concurring) ("I do not at all intimate that the death penalty is unconstitutional *per se* or that there is no system of capital punishment that would comport with the Eighth Amendment.").

[36]Gregg v. Georgia, 428 U.S. 153, 187 (1976) (holding, *inter alia*, that the death penalty is not unconstitutional *per se*).

[37]*Id.*

[38]Gilmore v. Utah, 429 U.S. 1056 (1977) (denying an application for stay of execution). *See also* HOOK, *supra* note 15, at 25.

[39]*See, e.g.*, Coker v. Georgia, 433 U.S. 584 (1977) (holding that a death sentence for the crime of rape of an adult woman was grossly disproportionate and excessive punishment forbidden by the Eighth Amendment); Eddings v. Oklahoma, 455 U.S. 104 (1982) (vacating a death sentence where state court refused to consider petitioner's unhappy childhood, abuse by his father, and emotional disturbance as mitigating circumstances); Caldwell v. Mississippi, 472 U.S. 320 (1985) (holding that resting imposition of a death sentence on a determination made by a sentencer who was led to believe that responsibility for determining the appropriateness of defendant's death rests elsewhere is constitutionally impermissible); Booth v. Maryland, 482 U.S. 496 (1987) (holding that introduction of a victim impact statement at the sentencing phase of a capital murder trial violated the Eighth Amendment); Harris v. Alabama, 513 U.S. 504 (1995) (holding that a state law, which vests sentencing authority in the trial judge but requires that judge to consider an advisory jury verdict, is not unconstitutional because the law does not specify the weight to be given to the jury's recommendation).

penalty's strongest opponents, Justices Brennan and Marshall, with Justices Souter and Thomas, who generally support capital punishment.[40] The current pro-death penalty Court has consistently rejected substantive constitutional challenges to capital punishment brought by abolitionists hoping to change the Court's stance on the issue.[41] Consequently, the movement has shifted its focus from federal to state constitutional law, with advocates launching attacks against the death penalty under the constitutions of those states that have capital statutes.[42] This new strategy affords the supreme court of each state the opportunity to either follow the United States Supreme Court's lead in interpreting substantive constitutional issues, or to invalidate use of capital punishment under its own state constitutional doctrine.

III. THE UNITED STATES SUPREME COURT'S APPROACH TO ARBITRARINESS IN CAPITAL PUNISHMENT AND RACIAL DISCRIMINATION IN THE IMPOSITION OF DEATH SENTENCES

A. *FURMAN V. GEORGIA*

In 1972, the United States Supreme Court marked a turning point in capital punishment litigation through its ruling in *Furman v. Georgia*[43] and related cases.[44] By a 5-4 margin, the Court held that the imposition and execution of

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[40]Baird & Rosenbaum, *supra* note 7, at 106.

[41]*See, e.g.*, Tuilaepa v. California, 512 U.S. 967 (1994) (holding, by an 8-1 margin, that California's death penalty statute, which required the sentencer to consider circumstances of the crime and the defendant, was not unconstitutionally vague); Loving v. U.S., 116 S.Ct. 1737 (1996) (unanimously upholding Congress' right to delegate authority to the President to promulgate rules concerning the imposition of a death sentence in military court martial cases). Another strong indication that the death penalty will not soon be found unconstitutional is Justice Blackmun's statement in his dissenting opinion in Callins v. Collins, 114 S.Ct. 1127, 1130 (1994), where the Justice announced that he would "no longer . . . tinker with the machinery of death." *Id.* Justice Blackmun was often the sole advocate of an anti-death penalty stance similar to that of Justices Brennan and Marshall.

[42]Baird & Rosenbaum, *supra* note 7, at 106.

[43]408 U.S. 238 (1972).

[44]In addition to *Furman*, the Court granted *certiorari* in Jackson v. Georgia, 225 Ga. 790, 171 S.E.2d 501 (1969), and Branch v. Texas, 447 S.W.2d 932 (Ct. Crim. App. Texas 1969). In *Furman*, the petitioner was convicted of murder and given a death sentence, while both *Jackson* and *Branch* involved petitioners who had been convicted of rape and sentenced to death. The three cases were consolidated and *certiorari* was limited to the question: "Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and un-

the death penalty under the state capital sentencing statutes in Georgia and Texas violated the ban on cruel and unusual punishment provided by the Eighth and Fourteenth Amendments.[45] The decisive ground in *Furman*, widely seen as the convincing factor for those marginal Justices needed for a majority, was the arbitrary and apparently random application of the death penalty.[46] This arbitrariness resulted from state capital sentencing schemes, like that of Georgia and Texas, which gave complete and undirected discretion to a jury in deciding whether to impose the sentence of death.[47] The Court's ruling made it clear that unguided jury discretion resulted in death sentences so randomly imposed as to amount to cruel and unusual punishment.[48] Moreover, among those Justices concerned with the inconsistent and arbitrary application of capital sentences, some noted the influence of racial and economic discrimination as possible factors in a jury's determination of punishment in capital sentencing cases.[49] Underlying these concerns was the racial animus inherent in the criminal justice system which had clearly infected the equal administration of the death penalty: a situation well documented by studies conducted as far back as the 1940s.[50] Despite this common theme, each Justice wrote a

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usual punishment in violation of the Eighth and Fourteenth Amendments?" *Furman,* 408 U.S. at 239.

[45]*Id.* at 239-40. *See also supra* note 34 (providing the relevant text of the Eighth and Fourteenth Amendments).

[46]Stephen Nathanson, *Does It Matter If the Death Penalty Is Arbitrarily Administered?*, 1985 PHILOSOPHY AND PUBLIC AFFAIRS 14, no. 2 (citing CHARLES L. BLACK, CAPITAL PUNISHMENT : THE INEVITABILITY OF CAPRICE AND MISTAKE, 2d ed. 20 (1981)).

[47]Ronald J. Mann, *The Individualized-Consideration Principle and the Death Penalty as Cruel and Unusual Punishment*, 29 HOUS. L. REV. 493, 500 (1992). Mr. Mann explains that "[b]y present standards, the results of the system appear unacceptably arbitrary, with there being little or nothing to separate the few cases in which the death penalty was imposed from the much larger number of cases in which it was not." *Id.*

[48]BOWERS, *supra* note 8, at 18.

[49]*See* Furman v. Georgia, 408 U.S. 238, 249-51 (Douglas, J., concurring); *Id.* at 365-66 (Marshall, J., concurring). *See also* Nathanson, *supra* note 46, at 18.

[50]*See* BOWERS, *supra* note 8, at 22-3. Bowers refers to several studies of discrimination in capital punishment including: CHARLES MANGUM, THE LEGAL STATUS OF THE NEGRO (1940) (finding that among those sentenced to death in nine southern and border states, blacks were more likely than whites to have their death sentences carried out in every state); Guy Johnson, *The Negro and Crime,* 271 ANNALS 93 (1941) (finding for selected jurisdictions in Virginia, North Carolina, and Georgia, that in murder cases the death sentence was disproportionately imposed when the defendant was black and his victim was white). BOWERS, *supra* note 8, at 22-3. Bowers also refers to research conducted in various states

separate opinion, displaying the division on the Court regarding the underlying constitutional issues.[51]

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providing evidence that blacks on death row were less likely than whites to have their death sentence commuted to a life term of imprisonment including: E.H. Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165 (1957) (North Carolina); M.E. Wolfgang et al., *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J.C.L.C. & P.S. 301 (1962) (Pennsylvania); Ohio Legislative Service Comm., CAPITAL PUNISHMENT, STAFF RESEARCH REPORT no. 46 (1961) (Ohio); Hugo A. Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. (1964) (New Jersey); R.C. Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 CRIME AND DELIQUENCY 132 (1969) (Texas). BOWERS, *supra* note 8, at 22-23.

[51]The Court's ruling was delivered in a brief *per curiam* opinion. *Furman*, 408 U.S. 328, 239. Justices Douglas, Brennan, Stewart, White, and Marshall filed separate opinions in support of the judgment. The Chief Justice, and Justices Blackmun, Powell, and Rehnquist each filed separate dissenting opinions.

Justice Douglas' concurring opinion rested more squarely on the arbitrary sentencing results under the statutes before the Court than did the opinions of the other Justices. *Furman*, 408 U.S. at 240 (Douglas, J., concurring). Justice Douglas argued that giving full discretion to judges and juries in imposing the death penalty allowed the punishment to be applied selectively. *Id.* at 255 (Douglas, J., concurring). This type of selective capital sentencing, the Justice opined, made room for the influence of prejudices against defendants who lacked "political clout" or were members of a "suspect or unpopular minority," and would protect those defendants who could afford to acquire experienced and often expensive legal counsel. *Id.* Justice Douglas concluded that imposing the death penalty under a statute that allowed for the play of such prejudices violated the idea of equal protection of the laws which he found to be an integral part of the ban on cruel and unusual punishments provided by the Eighth Amendment. *Id.* at 256-57 (Douglas, J., concurring).

Justice Stewart also found that undirected discretion to impose the death penalty was violative of the Eighth Amendment, but did not share Justice Douglas' reliance on the notion of implied equal protection under that amendment's provisions. *Furman*, 408 U.S. at 309 (Stewart, J., concurring). Because the Legislature had not made the death penalty mandatory or necessary, Justice Stewart argued that the sentences under review "excessively go beyond, not in degree but in kind, the punishments that the state legislatures have determined to be necessary." *Id.* (citing Weems v. United States, 217 U.S. 349 (1910)). Justice Stewart further argued that the sentences were "unusual" because the penalty of death was too infrequently imposed for murder, and even less often for rape convictions, resulting in sentencing as irregular as "being struck by lightening[,]" with the petitioners being among a "capriciously selected random handful" who had been chosen for the punishment out of many convicted of similar crimes. *Id.* at 309-10 (Stewart, J., concurring). Although noting that racial discrimination had not been proven as a cause of the random application of the death penalty, Justice Stewart concluded that the Eighth and Fourteenth Amendments cannot tolerate a system which imposes the unique penalty of death in such a "wanton" and "freakish" manner. *Id.* at 310 (Stewart, J., concurring).

Justice White's concurring opinion decided the issue on the narrowest constitutional grounds of all the Justices. *Id.* at 311 (White, J., concurring). Justice White argued that the

Although erroneously thought by many to have nullified the death penalty in America, the decision in *Furman* was a major victory for opponents of capital punishment.[52] Only Justices Brennan and Marshall found that capital punishment was universally unconstitutional, leaving the true impact of *Furman* best understood by focusing on the remaining Justices' discussion of arbitrariness in applying the death penalty.[53] Accordingly, *Furman* sent a clear

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death penalty, when imposed infrequently and without any meaningful basis, ceases to serve any substantial goals of criminal justice. *Id.* The Justice, therefore, found that a death penalty administered with such "negligible" returns would be "patently excessive" and "cruel and unusual" in violation of the Eighth and Fourteenth Amendments. *Id.* at 312 (White, J., concurring). The Justice also recognized that the practice of assigning juries full sentencing discretion has so effectively accomplished its aims of reducing harshness in the law and giving the community a voice in the punishment that the death penalty has "for all practical purposes run its course." *Id.* at 313 (White, J., concurring).

Justices Brennan and Marshall joined the majority in finding the death penalty as administered in Georgia and Texas unconstitutional, but did not rely on the presence or absence of consistent, non-arbitrary sentencing practices. *Id.* at 257-306 (Brennan, J., concurring); *Id.* at 314-74 (Marshall, J., concurring). Instead, both Justices' opinions can be read to prohibit the death penalty in all circumstances. *See* Mann, *supra* note 47, at 500. Emphasizing that the Eighth Amendment bans punishments that do not "comport with human dignity," *Furman*, 408 U.S. at 270 (Brennan, J., concurring), Justice Brennan formulated four principles to apply the Eighth Amendment's proscription: (1) a punishment's severity must not violate the dignity of human beings; (2) a state must not inconsistently inflict a severe punishment; (3) a punishment must not be rejected by contemporary society; (4) a severe punishment must not be excessive or unnecessary. *Id.* at 305 (Brennan, J., concurring). *See also* Note, *Cruel and Unusual Punishments in The Supreme Court, 1971 Term*, 86 HARV. L. REV. 76, 77 (1972). Justice Brennan found the capital sentencing schemes under review failed all four tests, and therefore violated the Eighth and Fourteenth Amendments. *Furman*, 408 U.S. at 305 (Brennan, J., concurring).

Justice Marshall's concurring opinion also condemned the death penalty, placing no reliance on the arbitrary sentencing results which had concerned his colleagues. *Id.* at 314-74 (Marshall, J., concurring). *See also* Note, *Cruel and Unusual Punishments in The Supreme Court, supra*, at 80. Justice Marshall argued that a punishment may be cruel and unusual for any of four reasons: (1) the punishment involves physical pain and suffering such that civilized people cannot tolerate it; (2) the punishment is one not normally imposed for a particular offense; (3) the punishment is unnecessary and serves no valid legislative goals; (4) society rejects the punishment as hateful. *Furman*, 408 U.S. at 314-74 (Marshall, J., concurring). Under these strictures, Justice Marshall concluded that the death penalty amounted to cruel and unusual punishment offensive to the Constitution because it was "excessive" and repugnant to "contemporary moral values." *Id.* at 358-60 (Marshall, J., concurring).

[52]Note, *Leading Cases: Death Penalty - Racial Discrimination*, 101 HARV. L. REV. 119, 149 (1987).

[53]Mann, *supra* note 47, at 500. *See also supra* note 51 (discussing the opinions in *Fur-*

message to state legislatures that arbitrary sentencing in capital cases would no longer be tolerated under the Eighth Amendment.[54]

Another reasonable interpretation of *Furman*, although not expressly admitted by the Court, was that eradication of the influence of racial discrimination in administering the death penalty was essential to allowing the use of capital punishment in America. Although reasonable, such an interpretation would later prove to be misguided.[55] Those states whose citizens wanted a capital statute on the books quickly accepted the challenge of *Furman* and legislated various schemes designed to eliminate arbitrary imposition of the death penalty.[56] The eventual challenge to these statutes represented the next step for the Supreme Court in its overhaul of capital punishment in America.

B. *GREGG V. GEORGIA*

Due to the Court's failure to decide whether the death penalty was unconstitutional in all circumstances, *Furman* prompted a nationwide legislative response in which thirty-five states passed capital statutes designed to remedy the Court's concerns about arbitrary sentencing.[57] Eventual challenges to several of these statutes reached the Court four years after *Furman*,[58] the results of

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[54]Fredric J. Bendremer et al., *McCleskey v. Kemp: Constitutional Tolerance for Racially Disparate Capital Sentencing*, 41 U. MIAMI L. REV. 295, 301 (1986).

[55]*See infra* notes 79-116 (discussing *McCleskey*). Civil rights activists who considered *Furman* a major step toward equality in the criminal justice system undoubtedly had their convictions shaken to the core upon the Court's ruling in *McCleskey*, which effectively ignored substantial evidence of racially disparate treatment in death sentencing.

[56]*See* Note, *Developments in The Law: VIII Race and Capital Sentencing*, 101 HARV. L. REV. 1472, 1607 (1988) (noting that "*Furman* left open the possibility. . . that the death penalty would be constitutional under less discretionary sentencing schemes"). *See also* J. Gordon Melton, *The Crusade Against Capital Punishment*, *in* PUNISHMENT AND THE DEATH PENALTY: THE CURRENT DEBATE 111, 123 (Robert M. Baird & Stewart E. Rosenbaum ed., 1995).

[57]Gregg v. Georgia, 428 U.S. 153, 179 n.23 (1976) (Stewart, J., plurality). The following states passed capital statutes in the four years between the judgments in *Furman* and *Gregg* designed to respond to the Court's concerns in *Furman*: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Montana, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, Wyoming. *Id.*

[58]In addition to *Gregg*, the Court decided challenges to four other capital statutes: Profitt

which would later prove to have major implications for the Court's attitude toward equal protection claims regarding death sentencing. An analysis of the plurality opinion in *Gregg v. Georgia* offers the best understanding of the Court's approach to the new capital statutes at issue and is useful in understanding the rationale which would later develop in the subsequent challenges to capital punishment.[59]

The plurality opinion in *Gregg* contains three distinct segments including: 1) a summary of Georgia's new capital punishment statute,[60] 2) an analysis of whether the death penalty can ever be constitutional under the Eighth Amendment,[61] and 3) a review of the constitutionality of Georgia's death penalty under the new sentencing scheme.[62] Justice Stewart, writing for the plurality, began by examining Georgia's new death penalty system, the essence of which is the separation of the stages of determining guilt and imposing a sentence in a bifurcated trial proceeding.[63]

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v. Florida, 428 U.S. 242 (1976) (upholding statute by 7-2 margin); Jurek v. Texas, 428 U.S. 262 (1976) (upholding statute by 7-2 margin); Woodson v. North Carolina, 428 U.S. 280 (1976) (invalidated statute by 5-4 margin); Roberts v. Louisiana, 428 U.S. 325 (1976) (invalidated statute by 5-4 margin). *See also* Mann, *supra* note 47, at 506.

[59]*Gregg*, 428 U.S. at 206-07 (Stewart, J., plurality). *See also* Mann, *supra* note 47, at 506-16. The judgment of the Court was delivered by Justices Stevens, Powell and Stewart, the latter having written the opinion. *Gregg*, 428 U.S. at 158 (Stewart, J., plurality). Justice White concurred in the judgment with an opinion joined by Chief Justice Burger and Justice Rehnquist. *Id.* at 207 (White, J., concurring). Justice Blackmun filed a statement concurring in the judgment. *Id.* at 227 (Blackmun, J., concurring). Justices Brennan and Marshall, holding true to form, dissented in separately filed opinions. *Id.* at 227 (Brennan, J., dissenting); *Id.* at 231 (Marshall, J., dissenting).

[60]*Id.* at 162-68 (Stewart, J., plurality).

[61]*Id.* at 168-95 (Stewart, J., plurality).

[62]*Id.* at 196-207 (Stewart, J., plurality).

[63]*Id.* at 163 (Stewart, J., plurality) (citations omitted). Once a defendant is found guilty (phase 1), a separate pre-sentencing hearing is held before whomever determined guilt (phase 2). *Id.* (citation omitted). The sentencing body (either judge or jury) then reviews the evidence in extenuation, mitigation or aggravation of punishment in deciding its recommendation for sentencing. GA. CODE ANN. § 27-2503 (1975). A sentence of death, however, may not be imposed unless the sentencing body finds beyond a reasonable doubt one of ten aggravating factors specified in the statute, and then decides to recommend capital punishment. GA. CODE ANN. § 26-3102 (1975). *Accord Gregg*, 428 U.S. at 164 (Stewart, J., plurality) (recognizing that the section does not contain the "beyond a reasonable doubt" language, however, the Supreme Court held that the standard must be met before a jury's recommendation will bind the sentencing judge). In addition, the Georgia statute provides for direct review by the state supreme court of the "appropriateness" of the death sentence in the cir-

After reviewing the statutory procedures, Justice Stewart turned to the question the Court failed to resolve in *Furman*: whether the death penalty was constitutional *per se*.[64] In answering this question, the Justice offered five reasons why the death penalty is a valid, constitutional punishment under the Eighth Amendment: 1) society has historically accepted the punishment of death, 2) it is consistent with the idea of protecting human dignity, 3) it expresses and channels society's outrage toward particularly vulgar behavior, 4) it does not violate the idea of federalism, and 5) the punishment of death is not disproportionate to the crime of murder.[65] In reaching this conclusion, Justice Stewart, *inter alia*, relied heavily on the legislative response to the decision in *Furman* as an indication that the death penalty was consistent with contemporary standards of decency.[66]

Having found the death penalty to be constitutional *per se*, Justice Stewart turned to an assessment of whether Georgia's new capital statute adequately remedied the problems recognized in *Furman* in a manner which passed constitutional muster.[67] After initially examining *Furman* to ascertain its requirements for a constitutional sentencing statute, the Justice reviewed the Georgia statute to determine if it met those requirements.[68] Justice Stewart concluded that Georgia's statute, with its bifurcated trial in which the jury (or judge) is provided all pertinent information and is carefully and adequately guided by appropriate standards, would be sufficient to meet the concerns of arbitrariness

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cumstances of the particular case. *Gregg*, 428 U.S. at 166 (Stewart, J., plurality) (referring to GA. CODE ANN. § 27-2537 (1975)). The supreme court reviews the entire record to determine, *inter alia*, "[w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor," GA. CODE ANN. § 27-2537(c)(1) (1975), and "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," GA. CODE ANN. § 27-2537(c)(3) (1975).

[64]*Gregg*, 428 U.S. at 168 (Stewart, J., plurality).

[65]*Id.* at 168-87 (Stewart, J., plurality). *See also* Chaka Patterson, *Race and the Death Penalty: The Tension Between Individualized Justice and Racially Neutral Standards*, 2 TEX. WESLEYAN L. REV. 45, 59 (1995).

[66]*Gregg*, 428 U.S. at 179-80 (Stewart, J., plurality).

[67]*Id.* at 196 (Stewart, J., plurality).

[68]*Id.* The Court interpreted *Furman* as demanding that the discretion of a sentencing body to impose the penalty of death be "suitably directed and limited" in order to "minimize the risk" of arbitrary or capricious sentences. *Id.* at 189 (Stewart, J., plurality). *See also* Mann, *supra* note 47, at 513-14.

set forth in *Furman*.[69] One point emphasized by Justice Stewart, however, was that the judgment should not be read as endorsing a bifurcated system as the only constitutional scheme available, but rather as recognition that it was possible to construct a system which could satisfy the mandates of *Furman*.[70]

Gregg represented the Court's effort to reconcile its holding in *Furman* with the need to provide the nation with a system of capital punishment that passes constitutional muster.[71] The significance of the decision lies in the Court's limitation on the scope of *Furman*.[72] In other words, the *Furman* decision could have been interpreted to demand the invalidation of any death sentence imposed under a system which was any less then one hundred percent free of arbitrariness, caprice, or discrimination. Arguably, such a sentencing scheme cannot be created. The Court, perhaps motivated by the legislative response to *Furman*,[73] or by concerns over unattainable standards on an already frail criminal justice system,[74] limited *Furman* to require only that a sentencing scheme "minimize the risk of wholly arbitrary and capricious action."[75] The

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[69]*Gregg*, 428 U.S. at 195 (Stewart, J., plurality). Georgia's new statute, the Court opined, adequately guided sentencing discretion by "clear and objective standards." *Id.* at 198 (Stewart, J., plurality) (citation omitted). The Court argued that the procedures outlined in the statute produce non-discriminatory application of the death penalty by requiring, *inter alia*, specific findings as to circumstances of the crime and the character of the defendant, as well as one of a pre-defined list of aggravating factors beyond a reasonable doubt. *Id.* at 206-07 (Stewart, J., plurality). These guidelines, the Court concluded, reduce substantially the risk that impermissible considerations will influence the decision to impose death as a sentence in Georgia. *Id.* In addition, the Court recognized with approval the provision of Georgia's statute providing for direct review by the state supreme court. *Id.* at 204-06 (Stewart, J., plurality). This direct review, the Court concluded, provided an "important additional safeguard" against arbitrariness and caprice. *Id.* at 198 (Stewart, J., plurality).

[70]*Id.* at 195 (Stewart, J., plurality).

[71]*See* Patterson, *supra* note 65, at 59. Patterson characterizes the *Gregg* decision as the Supreme Court's attempt to "develop a rationale designed to serve the two-fold purpose of saving both the death penalty and its *Furman* decision." *Id.* (citation omitted).

[72]*See* Bendremer, *supra* note 54, at 301-05.

[73]*See supra* note 57 (providing a list of those states that responded to the *Furman* decision by passing new death penalty statutes designed to remedy arbitrary sentencing).

[74]*See generally* Mann, *supra* note 47, at 515-16. Mr. Mann argues that the *Gregg* decision is best understood as approving sentencing schemes that provide guidance adequate to promote individualized consideration of defendants, rather than requiring strict consistency in death sentencing. *Id.* Requiring that all death sentences be consistent could lead to unattainable standards which would invalidate the use of capital punishment.

[75]Gregg v. Georgia, 428 U.S. 153, 189 (1976) (Stewart, J., plurality).

Court's unwillingness to expand *Furman* was clearly evident in its rejection of the argument that the sentencing body's ability to exercise mercy was the equivalent of unguided discretion to impose a death sentence.[76] In essence, such discretion to exercise "mercy" is open to the influence of prejudices, such as those which were at the core of the Court's concerns in *Furman*,[77] to the same extent as discretion to impose the death penalty. These oversights would return to haunt the Court in subsequent challenges.

C. *McCLESKEY V. KEMP*

The Court's decision in *Gregg* struck a balance between the Constitution's dual demands of equal protection of the laws and individualized consideration of the circumstances surrounding a particular defendant when imposing the sentence of death.[78] At this point, federal death penalty jurisprudence began to show that the Supreme Court had gone as far as it would in purging capital punishment of possible arbitrariness or caprice, concluding that some discretion in imposing the death penalty was both inevitable and required.[79] This inevitable and constitutionally required discretion, as was undoubtedly anticipated by the Court, was the basis for a challenge to capital punishment on the grounds that such discretion resulted in racially disparate sentencing repugnant to the Constitution. The seminal case of *McCleskey v. Kemp*[80] represented the Court's resolution of this issue, as well as the final broad-based substantive challenge to capital punishment at the federal level.

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[76]*Id.* at 199 (Stewart, J., plurality). The petitioner in *Gregg* argued that under Georgia's new statute the sentencing body could decide not to impose the death penalty even though authorized to do so, and such discretion in effect allowed for sentences to be arbitrarily imposed. *Id.* The Court, distinguishing *Furman* as dealing only with the guidance needed to impose the death penalty, rejected the argument by stating that "[n]othing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." *Id.* This conclusion fails to recognize that the jury's ability to "afford an individual defendant mercy" is the equivalent to unguided discretion as to whether or not to impose the death penalty.

[77]*See generally supra* note 51 (discussing the Justices' opinions in *Furman*).

[78]*See* Patterson, *supra* note 65, at 88.

[79]*See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 605 (1978) (holding that the Eighth Amendment requires treatment of capital defendants consistent with that "degree of respect due the uniqueness of the individual"); Woodson v. North Carolina, 428 U.S. 280 (1976) (where the Court struck down a mandatory death sentencing scheme because it failed to allow a jury to consider the individual circumstances of each defendant, which the Court found to be constitutionally required under the Eighth Amendment).

[80]481 U.S. 279 (1987).

Warren McCleskey, an African-American, was convicted for the murder of a white police officer during the robbery of a furniture store.[81] At the penalty phase, the jury found the existence of two statutory aggravating factors and recommended a sentence of death.[82] McCleskey's conviction subsequently survived Georgia's appeals process.[83] McCleskey then petitioned for a *writ of habeas corpus* in federal district court.[84] One of McCleskey's claims was that Georgia's death penalty was "administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments of the United States Constitution."[85] McCleskey supported his contention by submitting a statistical analysis known as the Baldus study, which purported to show that the death penalty in Georgia is imposed disparately based on the race of the murder victim, and, less significantly, the race of the defendant.[86] The significance of the Baldus study's assertions is that black defendants who kill white victims have the greatest chance of being sentenced to die for their crimes.[87] McCleskey

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[81] *Id.* at 283.

[82] *Id.* at 284-85.

[83] McCleskey v. State, 263 S.E.2d 146 (1980) (finding McCleskey guilty of murder).

[84] *McCleskey*, 481 U.S. at 286.

[85] *Id.* *See supra* note 34 (providing the relevant text of the Eighth and Fourteenth Amendments).

[86] *McCleskey*, 481 U.S. at 286; *see also* David C. Baldus et. al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); David C. Baldus et. al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133 (1986); David C. Baldus et. al., *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia*, 18 U.C. DAVIS L. REV. 1375 (1985).

[87] *McCleskey*, 481 U.S. at 286. The Baldus study included 2,000 murder cases which occurred in Georgia during the 1970s. *Id.* at 286-87. Baldus' analysis method created eight different ranges, or culpability levels, with the cases divided into them according to various aggravating and mitigating circumstances. *Id.* at 287 n.5. The racial effects were found to exist mostly in the middle range category where the chance of a defendant receiving the death penalty was about fifty-fifty, thereby making the decision more susceptible to racial bias. *Id.* According to Baldus' study, a defendant charged with killing a white victim received the death penalty in 11% of the cases, whereas defendants charged with killing black victims only received the death penalty in 1% of the cases. *Id.* at 286. The study's findings were even more pronounced in the various combinations of race of defendant and victim. *Id.* A black defendant who killed a white victim received the death penalty in 22% of the cases; a white defendant with a black victim received a death sentence in 3% of the cases; a black defendant with a black victim received death in 1% of the cases; and a white defendant with a white victim received death in 8% of the cases. *Id.* at 286-87.

argued the Baldus study showed that the concerns of discrimination in *Furman* were never adequately remedied, and that the new capital scheme approved in *Gregg* was still resulting in discriminatory application of the death penalty in violation of the Eighth and Fourteenth Amendments of the Constitution.[88]

Writing for a 5-4 majority, Justice Powell affirmed the lower court's dismissal of the claims.[89] In so holding, the Justice addressed McCleskey's arguments under the Eighth and Fourteenth Amendments separately. In reviewing each claim, the Court assumed the validity of the Baldus study.[90]

Commencing the analysis with McCleskey's equal protection claim,[91] Justice Powell reiterated the basic principle that such a claim requires proof of "the existence of purposeful discrimination" which "had a discriminatory effect" on the defendant.[92] Moreover, the Justice noted that McCleskey's chal-

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[88]*Id.* at 291-92.

[89]*Id.* at 314-20. The Court cited several other cases in which the courts had rejected claims similar to McCleskey's: Shaw v. Martin, 733 F.2d 304 (4th Cir. 1984) (holding, *inter alia*, that a study proffered by the defendant failed to show discrimination in the imposition of the death penalty sufficient to warrant an evidentiary hearing); Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983) (holding, *inter alia*, that the defendant, who failed to provide any evidence that the death penalty in his case was the product of intentional discrimination, was not entitled to relief based on his claim that Florida's death penalty was imposed disproportionately in cases involving a white victim); Smith v. Balkom, 660 F.2d 573 (5th Cir. 1981) (holding, *inter alia*, that the defendant was not entitled to relief based on the claim that the death penalty in Georgia was imposed in a discriminatory manner on the basis of race, sex and poverty in the absence of proof of intentional discrimination against him); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978) (holding, *inter alia*, that Florida's death penalty statute was not being administered in a discriminatory fashion against defendants convicted of killing whites, as opposed to blacks, in violation of the Eighth and Fourteenth Amendments). *McCleskey*, 481 U.S. at 292 n.9.

[90]*McCleskey*, 481 U.S. at 291 n.7.

[91]*Id.* at 291.

[92]*Id.* at 292. Justice Powell recognized, however, that the Court has accepted statistics as proof of discriminatory intent in limited circumstances including jury venire selection and Title VII civil rights cases. *Id.* at 293. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960) (declaring city alterations of its boundaries showed a statistical pattern of discriminatory impact which was accepted as proof of intent to discriminate against black voters); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (discriminatory impact was inferred to a statute based on a statistical showing of its disparate impact on Chinese laundry operators). These types of cases, the Justice opined, were distinguishable from capital cases based on the differences in the decision-making processes and their relative predictability through statistics. *McCleskey*, 481 U.S. at 294. Additionally, Justice Powell emphasized that in capital cases, unlike venire and Title VII cases, the decision-maker is unable to explain the statistical disparity. *Id.* at 296.

lenge, if accepted, would "strike at the heart of the State's criminal justice system."[93] These concerns resulted in the Court's conclusion that "exceptionally clear proof" is needed before inferring an abuse of discretion by decision-makers in a capital case, and that the Baldus study was "clearly insufficient" to support such an inference.[94] The Court similarly refused to infer discriminatory intent to the State of Georgia, which McCleskey claimed had violated the Equal Protection Clause by adopting a death sentencing scheme that was applied in a discriminatory manner.[95] The Court concluded that proof was needed that would show Georgia intentionally adopted its capital statute "*because* of an anticipated racially discriminatory effect."[96]

Justice Powell next turned to McCleskey's claim that his sentence was excessive and in violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment.[97] The Court found that its death penalty cases from *Furman* to *Gregg* established a constitutionally permissible amount of discretion in death sentencing.[98] This discretion, under *Gregg*, had to be guided to minimize the "risk of wholly arbitrary and capricious action," but was nonetheless necessary to afford individualized consideration to defendants in the sentencing process.[99] Justice Powell concluded that because McCleskey was convicted under Georgia's capital scheme, which focused on "particularized characteristics of the individual defendant," it could be assumed that his sentence was not imposed arbitrarily and therefore was not disproportionate or excessive under the Eighth Amendment.[100]

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[93] *McCleskey*, 481 U.S. at 297.

[94] *Id.*

[95] *Id.* at 298-99.

[96] *Id.* at 298 (emphasis in original).

[97] *Id.* at 299.

[98] *Id.* at 305. In contrast to the holding in *Gregg*, the Court noted its decision in Woodson v. North Carolina, 428 U.S. 280 (1976), where it held that a mandatory capital sentencing scheme violated the constitutional "respect for humanity" implicit in the Eighth Amendment's Cruel and Unusual Punishment Clause, which required the consideration of the individual's record and circumstances as part of imposing a death sentence upon him. McCleskey v. Kemp, 481 U.S. 279, 304 (1987) (citing *Woodson*, 428 U.S. 280). This is an indication of the Court's unwillingness to allow the complete elimination of jury discretion in a capital scheme.

[99] *McCleskey*, 481 U.S. at 303.

[100] *Id.* at 308.

McCleskey made the additional claim that the discretion allowed juries in the Georgia capital statute resulted in sentences being imposed arbitrarily because of the influence of racial considerations.[101] McCleskey offered the Baldus study as evidence of a constitutionally unacceptable risk of racial prejudice in sentencing which would make his sentence excessive under the Eighth Amendment.[102] Justice Powell's opinion rejected this claim, holding that "disparities in sentencing are an inevitable part of our criminal justice system."[103] The Court downplayed the Baldus study as merely indicating a disparity that "appears to correlate with race"[104] and noted that it was "a far cry from the major systematic defects identified in *Furman*."[105] Justice Powell concluded that, in light of the safeguards of the Georgia sentencing process and the value of jury discretion to a functional criminal justice system, the Baldus study failed to show a "constitutionally significant risk of racial bias affecting the Georgia capital sentencing process."[106]

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[101] *Id.*

[102] *Id.* at 309.

[103] *Id.* at 312.

[104] *Id.*

[105] *Id.* at 313.

[106] *Id.* In support of the Court's rejection of McCleskey's Eighth and Fourteenth Amendment claims, Justice Powell cited two additional concerns. The first was that McCleskey's arguments, if accepted, could lead to the opening of a Pandora's box of similar claims which would threaten the "principles that underlie our entire criminal justice system." *Id.* at 315. The Court was concerned that statistical evidence would be offered to attack any type of criminal sentence and could be extended to claims based on sex, religion, facial characteristics or physical attractiveness. *Id.* at 315-18. Second, the Court suggested that McCleskey's claims would be more appropriately brought before the Legislature, who were better equipped to evaluate the statistics and determine the correct cause of action. *Id.* at 319.

Dissenting, Justice Brennan attacked the majority's rationale in rejecting McCleskey's Eighth Amendment claim. *Id.* at 320-45 (Brennan, J., dissenting). Justice Brennan argued that the Court's prior decisions had only required a showing of an unacceptable risk of arbitrariness in sentencing, not definitive proof that a sentence was in fact arbitrary. *Id.* at 322 (Brennan, J., dissenting). Therefore, Brennan concluded that the Baldus study was more than adequate to show an unacceptable risk that racial prejudice had influenced McCleskey's sentence. *Id.* at 335 (Brennan, J., dissenting). In addition, Justice Brennan responded to the Court's concern over opening a floodgate of claims similar to McCleskey's by stating, with a ring of irony, that the Court seemed to have a "fear of too much justice." *Id.* at 339 (Brennan, J., dissenting).

The Court's decision in *McCleskey* has been widely criticized on many levels.[107] The Court's rationale in rejecting significant statistical evidence of racially disparate sentencing has caused commentators to compare *McCleskey* to such infamous cases as *Dredd Scott*[108] and *Plessey v. Fergusson*.[109] In any event, the outcome has major implications for civil rights. The Supreme Court has effectively ignored strong evidence that the ultimate penalty of death is being imposed in a discriminatory manner. The Court's application of an intentional discrimination standard for McCleskey's equal protection claims has

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Justice Blackmun also filed a dissent, but focused instead on the Court's rejection of McCleskey's Fourteenth Amendment claim. *Id.* at 345-65 (Blackmun, J., dissenting). Justice Blackmun criticized the majority's equal protection analysis and concluded that the Baldus study was adequate to present a *prima facie* case of purposeful discrimination. *Id.* at 359 (Blackmun, J., dissenting). The majority's rejection of the study as constitutionally insignificant, the Justice argued, was the result of applying too low of a standard where heightened scrutiny was required under the Equal Protection Clause. *Id.* at 348 (Blackmun, J., dissenting). Therefore, Justice Blackmun concluded, McCleskey's statistical evidence was sufficient to shift the burden to the state to show that his sentence was based on neutral criteria; a burden it failed to meet. *Id.* at 359-61 (Blackmun, J., dissenting).

Justice Stevens filed a separate dissent. *Id.* at 366-67 (Stevens, J., dissenting). The Justice recognized that the majority was apparently concerned that acceptance of McCleskey's claim would abolish the death penalty in Georgia. *Id.* at 367 (Stevens, J., dissenting). Justice Stevens, however, opined that such a concern was erroneous because the death penalty could still be imposed on those defendants convicted in the higher range of aggravating factors where the death penalty is almost always imposed. *Id.* In this higher range, the Justice pointed out, the Baldus study showed there was no influence of racial bias. *Id.* Therefore, the Justice opined that confining the use of the death penalty to defendants whose circumstances place them in one of these higher ranges would eliminate the possibility of racial bias influencing a death sentence, while at the same time preserving the use of capital punishment. *Id.* In light of these findings, the Justice concluded that a remand was necessary to determine the validity of the Baldus study. *Id.*

[107]*See, e.g.*, Mary E. Holland, *McCleskey v. Kemp: Racism and The Death Penalty*, 20 CONN. L. REV. 1029, 1070 (1988); Randall Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988).

[108]Dredd Scott v. Sandford, 60 U.S. 393 (1857) (holding that slaves were not citizens within the meaning of the Constitution and therefore were not entitled to the rights that belong to citizens).

[109]Plessey v. Fergusson, 163 U.S. 537 (1896) (holding that "separate but equal" facilities for the white and black races was constitutional). *See* Kennedy, *supra* note 107, at 1389 (citing Hugo A. Bedau, *Someday McCleskey Will Be Death Penalty's Dredd Scott*, L.A. TIMES, May 1, 1987 §2, at 5, col. I). The intended affect of such a comparison is to characterize the *McCleskey* decision as inherently wrong and unconstitutional, as the *Dredd Scott* and *Plessey* decisions were later recognized to be.

created an element of proof which is arguably unattainable.[110] Short of an outright confession by a decision-maker in the sentencing process, defendants will be hard-pressed to establish that their sentences were the result of the judge or jury's specific intent to discriminate against them based on race.[111] As Justice Brennan pointed out, the Court in pre-*McCleskey* cases had approached challenges to capital punishment by analyzing the system as a whole.[112] Parting substantially from this approach, the Court required a particularized showing of discrimination against McCleskey as an individual.

The Court's treatment of statistical analysis as evidence of discrimination has also been met with criticism. Commentators have argued that the Court did not sufficiently distinguish those cases where a "stark disparity" shown by statistics was accepted as proof of intentional discrimination from McCleskey's case.[113] Additionally, it is difficult to understand how statistical evidence is accepted by the Court as proof of discriminatory intent in cases involving jury venire selection or Title VII cases, but rejected in capital cases where the stakes are much higher.[114] Surely the taking of a human life demands the assurance that the process by which death is chosen is one-hundred percent free of constitutionally impermissible considerations.

The Court's expressed concerns about opening a floodgate of claims similar to McCleskey's does little to reinforce its decision.[115] It can hardly be con-

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[110]*See* Rebecca Rafferty, *In the Shadow of McCleskey v. Kemp: The Discriminatory Impact of the Death Sentencing Process*, 21 NEW ENG. J. ON CRIM & CIV. CONFINEMENT 271, 294 (1995).

[111]*Id.*

[112]*See supra* note 106 (discussing, *inter alia*, Justice Brennan's dissenting opinion in *McCleskey*).

[113]*See* Stan R. Gregory, *Capital Punishment and Equal Protection: Constitutional Problems, Race and The Death Penalty*, 5 ST. THOMAS L. REV. 257, 264 (1992). *See also supra* note 92 (discussing that part of Justice Powell's opinion in *McCleskey* that attempts to distinguish cases where the Court accepted statistical evidence as proof of discrimination).

[114]*See supra* note 92. *See also generally* Robert Nelson, *To Infer Or Not To Infer A Discriminatory Purpose: Rethinking Equal Protection Doctrine*, 61 N.Y.U. L. REV. 334, 357 (1986) (arguing that an impact-inference standard, i.e., inferring intent to discriminate from the impact of a legislative scheme, should be applied in assessing a statistical showing of racial disparity in death sentencing).

[115]*See generally* Note, *Developments in the Law: VIII Race and Capital Sentencing*, *supra* note 56, at 1611. *See also supra* note 106 (discussing, *inter alia*, the *McCleskey* Court's concerns over excessive equal protection claims based on statistics).

tested that a grave injustice would befall a defendant whose legitimate constitutional claim was rejected solely based on the fear that similar claims may follow. Justice Brennan captured the error in such reasoning by recognizing that the Court seemed to "fear . . . too much justice."[116] Indeed, what value would our criminal justice system have if its appointed guardians failed to consistently strive for perfection out of fear that perfection is unreachable?

IV. THE NEW JERSEY SUPREME COURT'S APPROACH TO ARBITRARINESS IN CAPITAL PUNISHMENT AND RACIAL DISCRIMINATION IN THE IMPOSITION OF DEATH SENTENCES

As noted, the decision in *McCleskey v. Kemp* represented the last broad-based substantive challenge to capital punishment at the federal level. Accordingly, opponents of the death penalty have concentrated on bringing system-oriented challenges of their client's death sentences to the various state supreme courts. This strategy is premised on the expectation that the individual state supreme courts will, through independent analysis of their respective state constitutions, be more receptive to the argument of racial discrimination in death sentencing.[117]

Currently pending before the New Jersey Supreme Court is the proportionality review of the death sentence of Donald Loftin.[118] Loftin is advancing the argument that his sentence is disproportionate based on a recent statistical study showing that New Jersey juries tend to impose the death penalty on black defendants more often than white defendants.[119] This challenge raises issues identical to those faced by the United States Supreme Court in *McCleskey*, as well as questions about how New Jersey's highest court will handle this sensitive issue.

The New Jersey State Constitution has traditionally been interpreted by the New Jersey Supreme Court as affording more expansive protection for New Jersey citizens than the federal constitution, especially in the areas of civil

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[116]McCleskey v. Kemp, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

[117]*See, e.g.*, Stewart F. Hancock et al., *Race, Unbridled Discretion, and The State Constitutional Validity of New York's Death Penalty Statute—Two Questions*, 59 ALB. L. REV. 1545 (1996) (arguing, *inter alia*, that the New York Court of Appeals, through its tradition of interpreting the New York Constitution as affording more expansive protection for New York citizens than the federal constitution, will invalidate the death penalty upon a showing of racial disparity in sentencing).

[118]State v. Loftin, 146 N.J. 295, 680 A.2d 677 (1996).

[119]*See* Cammarere, *supra* note 1, at 2304.

rights and equal protection.[120] In light of this tradition, confidence is strong that New Jersey's highest court will not tolerate a capital punishment system infected with racial discrimination.[121] Although the New Jersey Supreme Court has expressly rejected the holding of *McCleskey*,[122] a review of New Jersey death penalty decisions reveals that the court's ultimate resolution of the challenge in *Loftin* may not be a foregone conclusion.

B. *STATE V. RAMSEUR*

In *State v. Ramseur*,[123] the New Jersey Supreme Court addressed one of the first substantive challenges to the constitutionality of New Jersey's death penalty. The analysis in that case followed along the same lines as the United States Supreme Court's opinion in *Gregg*,[124] based on the fact that New Jer-

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[120]State v. Ramseur, 106 N.J. 123, 346, 524 A.2d 188, 301 (1987) (Handler, J., dissenting) ("This Court has not hesitated to find for its citizens greater protections than are afforded under the federal Constitution."). Justice Handler offered several examples of this point including: State v. Novembrino, 105 N.J. 95, 519 A.2d 820 (1987) (holding that the exclusionary rule, unmodified by the good-faith exception, is an integral element of the state constitutional guarantee that search warrants will not issue without probable cause); State v. Gilmore, 103 N.J. 508, 511 A.2d 1150 (1986) (holding that, under the state Constitution, defendants in all criminal prosecutions are entitled to a trial by an impartial jury without discrimination on the basis of religious principles, race, color, ancestry, national origin or sex); State v. Hunt, 91 N.J. 338, 450 A.2d 952 (1982) (holding that telephone conversations carried on by people in their homes or offices are fully protected from governmental intrusions); Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982) (holding that a woman's right to choose to protect her health by terminating pregnancy outweighed the state's asserted interest in protecting potential life at the expense of the woman's health, and thus the statute restricting Medicaid funding to abortions necessary to save the life of the mother violated New Jersey Constitution); State v. Alston, 88 N.J. 211, 440 A.2d 1311 (1981) (recognizing that the basic principle of American federalism confers upon the Supreme Court of New Jersey the power to afford citizens of New Jersey greater protection against unreasonable searches and seizures than may be required by the United States Supreme Court's interpretation of the Fourth Amendment). *Id.*

[121]Support for this conclusion is found in the New Jersey Supreme Court's language in *Marshall*, which states that "New Jersey's history and traditions would never countenance racial disparity in capital sentencing." State v. Marshall, 130 N.J. 109, 207, 613 A.2d 1059, 1108 (1992).

[122]*Id.* at 207, 613 A.2d at 1109. *See infra* notes 195-96 and accompanying text (discussing the *Marshall* decision).

[123]106 N.J. 123, 524 A.2d 188 (1987)

[124]Gregg v. Georgia, 428 U.S. 153, 162-207 (1976) (Stewart, J., plurality); *see also supra* notes 57-78 and accompanying text (discussing the *Gregg* analysis).

sey's Death Penalty Act was modeled substantively on the Georgia Death Penalty Act at issue in that case.[125] Although explicitly noting that it was not bound by Supreme Court decisions when reviewing a challenge of state action under the New Jersey Constitution,[126] the New Jersey Supreme Court stated that it frequently relied on the opinion in *Gregg* to support its conclusions.[127]

1. THE NEW JERSEY DEATH PENALTY ACT

In 1982, the New Jersey Legislature restored capital punishment by passing the Death Penalty Act (hereinafter "the Act") in the form of an amendment to the murder provisions of the State Code of Criminal Justice.[128] The Act implemented a bifurcated trial system similar to the one used in Georgia's Act, but significant differences between the two exist.[129] Under the New Jersey

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[125]*Ramseur*, 106 N.J. at 185, 524 A.2d at 218.

[126]*Id.* at 167, 524 A.2d at 209.

[127]*Id.* at 168, 524 A.2d at 209.

[128]*Id.* at 156, 524 A.2d at 203. *See* N. J. STAT. ANN. § 2C:11-3 (West 1995) (L.1978, c. 95, § 2C:11-3, eff. Sept. 1, 1979) (Amended by L.1982, c. 111, §1, eff. Aug. 6, 1982) (Further amendments prior to the decision in *Ramseur* by L.1979, c. 178, §21, eff. Sept. 1, 1979; L.1981, c. 290, §12, eff. Sept. 24, 1981; L.1985, c. 178, §2, eff. June 10, 1985; L.1985, c. 478, §1, eff. Jan. 17, 1986) (Amended after the decision in *Ramseur* by L.1992, c. 5, §1, eff. May 12, 1992; L.1992, c. 76, §1, eff. July 31, 1992; L.1993, c. 27, §1, eff. Jan. 26, 1993; L.1993, c. 111, §1, eff. May 5, 1993; L.1993, c. 206, §1, eff. July 28, 1993; L.1994, c. 132, §1, eff. Oct. 31, 1994; L.1995, c. 123, §1, eff. June 19, 1995). All subsequent cites to the New Jersey Death Penalty Act refer to the statutory version effective at the time of the *Ramseur* decision. Amendments subsequent to the *Ramseur* decision do not affect the substantive discussion of this Comment.

[129]N. J. STAT. ANN. § 2C:11-3(c)(1) (West 1995). Section 2C:11-3(c)(1) provides:

> (1) The court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or pursuant to the provisions of subsection b. of this section. Where the defendant has been tried by a jury, the proceeding shall be conducted by the judge who presided at the trial and before the jury which determined the defendant's guilt, except that, for good cause, the court may discharge that jury and conduct the proceeding before a jury impaneled for the purpose of the proceeding. Where the defendant has entered a plea of guilty or has been tried without a jury, the proceeding shall be conducted by the judge who accepted the defendant's plea or who determined the defendant's guilt and before a jury impaneled for the purpose of the proceeding. On motion of the defendant and with consent of the prosecuting attorney the court may conduct a proceeding without a jury. Nothing in this subsection shall be

Act, a defendant is subject to a separate penalty proceeding only if it is established at the guilt phase that he is guilty of "purposeful and knowing murder and [that he] committed the murder by his own hand or paid someone else to do so."[130] Once it is established that the defendant acted in this manner, he is considered "death eligible" and a sentencing phase is conducted to decide whether the penalty of death will be imposed.[131]

Similar to Georgia's scheme, the state is required to prove at the sentencing proceeding one of eight statutory aggravating factors beyond a reasonable doubt.[132] If this burden is not met, the defendant is sentenced to the lesser

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> construed to prevent the participation of an alternate juror in the sentencing proceeding if one of the jurors who rendered the guilty verdict becomes ill or is otherwise unable to proceed before or during the sentencing proceeding.

Id. *See also supra* note 63 and accompanying text (describing Georgia's Death Penalty Act).

[130]State v. Ramseur, 106 N.J. 123, 156, 524 A.2d 188, 203 (1987) (citing N. J. STAT. ANN. § 2C:11-3(c) (West 1995)).

[131]*Id.*

[132]N. J. STAT. ANN. § 2C:11-3(c)(4)(a)-(h) (West 1995). Sections 2C:11-3(c)(4)(a)-(h) provide:

> (4) The aggravating factors which may be found by the jury or the court are: (a) The defendant has been convicted, at any time, of another murder. For purposes of this section, a conviction shall be deemed final when sentence is imposed and may be used as an aggravating factor regardless of whether it is on appeal; (b) In the commission of the murder, the defendant purposely or knowingly created a grave risk of death to another person in addition to the victim; (c) The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim; (d) The defendant committed the murder as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value; (e) The defendant procured the commission of the offense by payment or promise of payment of anything of pecuniary value; (f) The murder was committed for the purpose of escaping detection, apprehension, trial, punishment or confinement for another offense committed by the defendant or another; (g) The offense was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit murder, robbery, sexual assault, arson, burglary or kidnapping; (h) The defendant murdered a public servant, as defined in N.J.S. 2C:27-1, while the victim was engaged in the performance of his official duties, or because of the victim's status as a public servant.

Id.

penalty of a thirty-year term without parole.[133] If the burden is met, the defendant may then submit evidence of any mitigating factors as outlined by the Act, in order to offset the aggravating factors.[134] Once all relevant evidence in aggravation or mitigation is presented, the jury (or judge) must balance the proven factors to decide if the aggravating factors outweigh the mitigating factors "beyond a reasonable doubt."[135] If the jury reaches such a conclusion,

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[133]N. J. STAT. ANN. § 2C:11-3(b). Section 2C:11-3(b) provides:

> b. Murder is a crime of the first degree but a person convicted of murder shall be sentenced, except as provided in subsection c. of this section, by the court to a term of 30 years, during which the person shall not be eligible for parole or to a specific term of years which shall be between 30 years and life imprisonment of which the person shall serve 30 years before being eligible for parole.

Id.

[134]N. J. STAT. ANN. § 2C:11-3(c)(5)(a)-(h). Sections 2C:11-3(c)(5)(a)-(h) provide:

> (5) The mitigating factors which may be found by the jury or the court are: (a) The defendant was under the influence of extreme mental or emotional disturbance insufficient to constitute a defense to prosecution; (b) The victim solicited, participated in or consented to the conduct which resulted in his death; (c) The age of the defendant at the time of the murder; (d) The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired as the result of mental disease or defect or intoxication, but not to a degree sufficient to constitute a defense to prosecution; (e) The defendant was under unusual and substantial duress insufficient to constitute a defense to prosecution; (f) The defendant has no significant history of prior criminal activity; (g) The defendant rendered substantial assistance to the State in the prosecution of another person for the crime of murder; or (h) Any other factor which is relevant to the defendant's character or record or to the circumstances of the offense.

Id.

[135]N. J. STAT. ANN. § 2C:11-3(c)(3)(a) (1985) (as amended by L.1985, c. 178). Section 2C:11-3(c)(3)(a) provides:

> (3) The jury or, if there is no jury, the court shall return a special verdict setting forth in writing the existence or nonexistence of each of the aggravating and mitigating factors set forth in paragraphs (4) and (5) of this subsection. If any aggravating factor is found to exist, the verdict shall also state whether it outweighs beyond a reasonable doubt any one or more mitigating factors.

the Court must sentence the defendant to death.[136] The Act also requires a unanimous jury determination that death be imposed,[137] or the defendant receives the lesser sentence of thirty years without parole.[138]

The Act also provides for direct review as that found in Georgia's system.[139] A defendant sentenced to death is entitled to an appeal to the New Jersey Supreme Court as a matter or right, and such an appeal must be taken regardless of the defendant's wishes.[140] In addition, proportionality review is

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> (a) If the jury or the court finds that any aggravating factors exist and that all of the aggravating factors outweigh beyond a reasonable doubt all of the mitigating factors, the court shall sentence the defendant to death.

Id.

[136]*Id.*

[137]N. J. STAT. ANN. § 2C:11-3(f) (West 1985) (added to the code by L.1985, c. 178). Section 2C:11-3(f) provides:

> f. Prior to the jury's sentencing deliberations, the trial court shall inform the jury of the sentences which may be imposed pursuant to subsection b. of this section on the defendant if the defendant is not sentenced to death. The jury shall also be informed that a failure to reach a unanimous verdict shall result in sentencing by the court pursuant to subsection b.

Id.

[138]N. J. STAT. ANN. § 2C:11-3(b) (West 1995). *See supra* note 133 (providing text of 2C:11-3(b)).

[139]*See supra* note 63 and accompanying text (describing Georgia's Death Penalty Act).

[140]N. J. STAT. ANN. § 2C:11-3(e) (as amended by L.1985 c.478). Section 2C:11-3(e) provides:

> e. Every judgment of conviction which results in a sentence of death under this section shall be appealed, pursuant to the Rules of Court, to the Supreme Court. Upon the request of the defendant, the Supreme Court shall also determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Proportionality review under this section shall be limited to a comparison of similar cases in which a sentence of death has been imposed under subsection c. of this section. In any instance in which the defendant fails, or refuses to appeal, the appeal shall be taken by the Office of the Public Defender or other counsel appointed by the Supreme Court for that purpose.

provided at the defendant's request whereby the state supreme court must determine "whether the [defendant's] sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[141]

2. *PER SE* CONSTITUTIONALITY OF THE DEATH PENALTY

Chief Justice Wilentz began the court's assessment of the Act's constitutionality in *Ramseur* in the same manner as the Supreme Court in *Gregg*; that is, by reviewing the *per se* constitutionality of the death penalty.[142] The Chief Justice applied the same three-part test used in *Gregg* to determine whether the death penalty violated the Eighth Amendment of the United States Constitution or Article I, Paragraph Twelve of the New Jersey Constitution.[143] As mentioned, that test consists of three inquiries: 1) does the punishment conform with "contemporary standards of decency;" 2) is the punishment "grossly disproportionate to the crime;" and 3) does the punishment "go beyond what is necessary to accomplish any legitimate penological objective."[144]

Id. The amendment codified the holding in State v. Koedatich, 98 N.J. 553, 489 A.2d 659 (1984) (allowing a public defender to file an appeal on behalf of a defendant who did not wish to appeal his death sentence).

[141]N. J. STAT. ANN. § 2C:11-3(e) (West 1995). *See supra* note 133 (providing text of 2C:11-3(e)). Formerly, this section "required" the Court to undertake proportionality review. The amendment's implementation of proportionality review "only at the defendant's request" is considered a reaction to the United States Supreme Court's ruling in Pulley v. Harris, 465 U.S. 37 (1984) (holding that proportionality review is not a constitutionally required process). State v. Ramseur, 106 N.J. 123, 160 n.6, 524 A.2d 188, 206 n.6 (1987).

[142]*See supra* notes 64-70 and accompanying text (discussing the United States Supreme Court's decision in *Gregg* where the constitutionality of the death penalty was addressed).

[143]*Ramseur*, 106 N.J. at 169, 524 A.2d at 210. *See supra* note 34 (providing the relevant text of the Eighth and Fourteenth Amendments). Article I, Paragraph Twelve of the New Jersey Constitution provides:

> Excessive bail shall not be required, excessive fines shall not be imposed, and cruel and unusual punishments shall not be inflicted. It shall not be cruel and unusual punishment to impose the death penalty on a person convicted of purposely or knowingly causing death or purposely or knowingly causing serious bodily injury resulting in death who committed the homicidal act by his own conduct or who as an accomplice procured the commission of the offense by payment or promise of payment of anything of pecuniary value.

N.J. CONST. art. I, para. 12.

[144]*Ramseur*, 106 N.J. at 169, 524 A.2d at 210.

The court's rationale in answering these queries significantly mirrored the Supreme Court's conclusions in *Gregg*.[145] First, the court found that New Jersey's history revealed an acceptance of the death penalty indicative of its conformance with "contemporary standards of decency."[146] Specifically, the court concluded that the passage of the 1982 Act created a presumption that the punishment was acceptable, and that no evidence of "community standards" existed to rebut this conclusion.[147] Notably, the court rebutted the argument that the death penalty was disfavored because no executions have taken place in New Jersey since 1963 by stating that the failure to execute anyone was more likely a result of close judicial scrutiny of death sentences rather than any changing community standards.[148] Second, the court noted that the disproportionality question was actually only a "short-hand" method of applying the tests of "excessiveness" and "contemporary standards of decency."[149] Therefore, the court tersely agreed with the opinion in *Gregg* that the death penalty was not disproportionate to the crime of murder.[150] In response to the last inquiry, the court again agreed with the conclusion in *Gregg* that "retribution" was a valid "penological objective for the death penalty."[151] In essence, the court refused to supplant its reasoning for that of the legislature's.[152]

The court concluded review of the *per se* constitutionality of the death penalty by addressing the defendant's argument that capital punishment "inherently discriminates on the basis of race and hence is unconstitutional."[153] In light of this claim, the court acknowledged the history of racial bias in America and the part it played in the decision in *Furman*.[154] The requirement

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[145]Gregg v. Georgia, 428 U.S. 153, 162-207 (1976) (Stewart, J., plurality). *See also supra* notes 57-78 and accompanying text (discussing the *Gregg* decision in detail).

[146]*Ramseur*, 106 N.J. at 169-74, 524 A.2d at 210-13.

[147]*Id.* at 172, 524 A.2d at 211-12.

[148]*Id.* at 173, 524 A.2d at 212.

[149]*Id.* at 175, 524 A.2d at 213.

[150]*Id.* *See* Gregg v. Georgia, 428 U.S. 153, 187 (1976) (Stewart, J., plurality).

[151]State v. Ramseur, 106 N.J. 123, 179, 524 A.2d 188, 215 (1987). *See Gregg*, 428 U.S. at 183-87.

[152]*Ramseur*, 106 N.J. at 179, 524 A.2d at 215.

[153]*Id.* at 181, 524 A.2d at 216.

[154]*Id.* The court stated that it was "well aware of the history of discrimination against

that the discretion of capital sentencing juries be suitably directed, the court opined, offered special protection for black defendants against this historical discrimination.[155] Furthermore, the court noted that no jurisdiction had yet found "significant evidence of racial discrimination" in the administration of the death penalty, and it was not convinced that the requirement of guided discretion had failed, in New Jersey or other states, to adequately protect black defendants from such impermissible considerations.[156] In a statement with the literary effect of foreshadowing, the court noted that it would be receptive to any evidence of racial bias in New Jersey's death penalty, and would "attempt to monitor the racial aspects of the application of the Act."[157] The court refused, however, to find New Jersey's Death Penalty Act unconstitutional based only on the possibility that it could be applied in a racially discriminatory fashion.[158]

3. CONSTITUTIONALITY OF THE NEW JERSEY DEATH PENALTY ACT

Chief Justice Wilentz next turned to the constitutionality of the New Jersey Death Penalty Act under the Eighth Amendment of the United States Constitution and Article I, Paragraph Twelve of the New Jersey Constitution.[159] Ac-

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blacks in this country and of the role that discrimination played in the decision in *Furman* to strike down all then-existing death penalty statutes." *Id.* (citation omitted).

[155] *Id.*

[156] *Id.*

[157] *Id.* at 182, 524 A.2d at 216.

[158] *Id.*

[159] *Id.*, 524 A.2d at 217. *See supra* note 34 (providing the relevant text of the Eighth and Fourteenth Amendments of the United States Constitution). *See also supra* note 143 (providing the relevant text of Art. I Paragraph 12 of the New Jersey Constitution). The *Ramseur* court held that New Jersey's Death Penalty Act was constitutional under the Eighth Amendment of the Federal Constitution because it contains all the "essential" requirements set forth by the Supreme Court for a capital punishment scheme. State v. Ramseur, 106 N.J. 123, 186, 524 A.2d 188, 218 (1987). These essential requirements include: a narrowing of the class of defendants eligible for death, a bifurcated trial proceeding, a requirement for finding at least one statutory aggravating factor and a subsequent balancing of aggravating and mitigating factors, a provision for mitigating factors which allows for any relevant information, no mandatory death sentencing, and direct appellate review by the Supreme Court. *Id.* In addition, the Court noted that the Act contains additional safeguards not required by the Supreme Court's decisions. *Id.*, 524 A.2d at 219. These additional safeguards include: a jury must find that the aggravating factors outweigh the mitigating ones beyond a reasonable doubt; in addition to mandatory appellate review, the Supreme court must conduct a proportionality review at the defendant's request; and a jury must be unanimous in its

cording to the court, the decisions from *Furman* to *Gregg* and beyond offered two principles under the Eighth Amendment which require that capital jury discretion be adequately guided: (1) that the penalty of death be imposed consistently, i.e., without arbitrariness or caprice; and (2) that death sentences be reliable, i.e., not disproportionate with regard to individual defendants.[160] Consistent with these principles, the court found that the New Jersey Constitution also required that death sentences be imposed consistently and reliably.[161] These requirements under Article I, Paragraph Twelve of the New Jersey Constitution, as interpreted by the court, provide additional and sometimes more expansive protection against arbitrary sentencing than those under the Eighth Amendment.[162] The court had little difficulty in concluding that New Jersey's Death Penalty Act contains procedures sufficient to meet the constitutionally required mandates of consistency and reliability and, therefore, is constitutional under the New Jersey Constitution.[163]

At this point of the analysis, the *Ramseur* court made some significant comments concerning the United States Supreme Court's apparent departure from "vigorous enforcement" of the principles of consistency and reliability in death sentencing.[164] In dissent, Justice Handler offered the argument that the United States Supreme Court had withdrawn from the pursuit of consistency and reliability because those principles are "fundamentally contradictory [and] perhaps unattainable."[165] Rejecting this argument, the majority noted that it was not constrained to following the Supreme Court's lead in interpreting challenges under the New Jersey Constitution.[166] The court concluded that the

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finding that death shall be imposed. *Id.* Statutory procedures such as those found in the New Jersey Death Penalty Act, the Court found, give support to the conclusion that New Jersey's capital scheme is adequately structured to produce consistent and reliable sentences. *Id.*

[160] *Id.* at 185, 524 A.2d at 218.

[161] *Id.* at 190, 524 A.2d at 220.

[162] *Id.*

[163] *Id.* at 197, 524 A.2d at 224.

[164] *Id.* at 190, 524 A.2d at 220.

[165] *Id.* at 347, 524 A.2d at 302 (Handler, J., dissenting).

[166] *Id.* at 191, 524 A.2d at 221 ("We must therefore arrive at an independent determination under our Constitution that the Act contains sufficient safeguards to prevent both arbitrary and non-individualized infliction of the death penalty, whether or not the United States Supreme Court would require those safeguards under the federal Constitution.").

existence of a "doctrinal tension" between the principles of consistency and reliability should not deprive society of the use of the death penalty if society deems it acceptable.[167]

4. PROPORTIONALITY REVIEW

Although not an issue in the decision in *Ramseur*, the court made some important preliminary observations regarding proportionality review under the Act.[168] The court noted that the purpose of proportionality review was to inquire whether the death penalty is excessive in a particular case because it is "disproportionate to the punishment imposed on others convicted of the same crime."[169] This inquiry, the court concluded, provides a method of monitoring the administration of the death penalty to prevent "impermissible discrimination" in imposing death sentences so as to avoid the arbitrariness which concerned the Supreme Court in *Furman* and *Gregg*.[170]

Observing that the Act provided little guidance in developing a process for proportionality review, the court acknowledged that the task would be an "evolving process."[171] The court outlined a three-step process which would be used to conduct proportionality review: 1) a "universe of cases" must be established against which the case under review will be compared, 2) a determination of what types of crimes are "similar" must be made, and 3) once these similar crimes are identified, those defendants must be compared to the defen-

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[167]*Id.* at 190, 524 A.2d at 221. Justice Handler also argued that the procedures of the Act were insufficient to meet the constitutional requirement of minimizing the risk of arbitrariness, and more safeguards were needed to "maximize" consistency and reliability in sentencing. *Id.* at 370, 524 A.2d at 314 (Handler, J., dissenting). In rejecting Justice Handler's rationale on this point, the court took a position which seemed to be in conflict with its attitude toward the principles of reliability and consistency implicit in the *Ramseur* opinion thus far. The court stated that if Justice Handler was suggesting that defendants are entitled to "perfection, to totally consistent, accurate and reliable procedures, obviously. . .any death penalty act would be unconstitutional." *Id.* at 192, 524 A.2d at 222. The court concluded that "[s]ociety has never been required to conform to such an impossible standard," and they would not impose requirements that could never be met. *Id.*

[168]N. J. STAT. ANN. § 2C:11-3(e) (West 1982). *See also supra* note 140 (providing the text of 2c:11-3(e)).

[169]State v. Ramseur, 106 N.J. 123, 326, 524 A.2d 188, 292 (1987).

[170]*Id.* at 327, 524 A.2d at 292. *See also supra* notes 43-78 (discussing the *Furman* and *Gregg* decisions).

[171]*Ramseur*, 106 N.J. at 328, 524 A.2d at 292-93 (1987).

dant before the court.[172] In preparation for this process, the court advised those parties who expected to participate in proportionality review to begin compiling data for use in the comparison of similar crimes and defendants.[173] This data would be helpful, the court determined, in deciding "whether there is race and gender discrimination in the imposition of the death penalty."[174]

Appropriate proportionality review, the New Jersey Supreme Court averred, "must ensure that discriminatory factors are not shifting the balance between life and death."[175] To this end, the court expressed the hope that it would be able to develop a process for proportionality review that would prevent impermissible discrimination in sentencing.[176] Placing an apparent limitation on that hope, however, the court recognized an obstacle to such a process in the tension between the need for consistency in sentencing and the requirement of individualized consideration of defendants faced with the loss of their lives.[177] Having already noted this "doctrinal tension" earlier in the *Ramseur* opinion, and having also suggested that it would not abandon the pursuit for a solution as did the United States Supreme Court, the New Jersey court nonetheless acknowledged that the proper course to be taken was as yet unrevealed.[178]

C. BALDUS' PROPORTIONALITY REVIEW STUDY

Shortly after the decision in *Ramseur*, the New Jersey Supreme Court appointed a "Special Master," David C. Baldus (Baldus), to assist in developing a system for comparing capital cases.[179] The court directed Baldus to compile

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[172]*Id.* at 328-30, 524 A.2d at 293-94.

[173]*Id.* at 328, 524 A.2d at 292.

[174]*Id.*

[175]*Id.* at 330, 524 A.2d at 294.

[176]*Id.*

[177]*Id.* at 330-31, 524 A.2d at 294.

[178]*Id.* at 331, 524 A.2d at 294.

[179]By order dated July 29, 1988, the New Jersey Supreme Court appointed Professor David C. Baldus of the University of Iowa Law School as Special Master. State v. Marshall, 130 N.J. 109, 117, 613 A.2d 1059, 1063 (1992). Notably, Mr. Baldus was also responsible for producing the statistical study which was at issue in *McCleskey*. *See supra* note 87 (describing Mr. Baldus' statistical study involved in *McCleskey*).

a database which could be used to fulfill its statutory duty of conducting proportionality review.[180] On September 24, 1991, Baldus submitted his final report to the court detailing his suggestions for data gathering and statistical analysis for a reliable system of proportionality review.[181] In this final report, Baldus outlined some disturbing findings that his study had produced regarding possible effects of racial discrimination.[182]

Baldus acknowledged that the court had not requested an analysis of "arbitrariness and discrimination in New Jersey's capital charging and sentencing system."[183] In order to produce a "reliable database," however, Baldus noted that the analysis required the inclusion of racial bias considerations.[184] The results, termed preliminary because racial discrimination was not the primary focus of the study, showed a possible effect of race in capital sentencing.[185] The study presented analysis of the effects of racial bias in two tables. The first, dealing with decisions in the penalty phase, showed that black defendants are sentenced to die at a rate twelve percentage points higher than non-black defendants.[186] The second table, dealing with the process of decid-

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[180]*Marshall*, 130 N.J. at 117-18, 613 A.2d at 1063. *See* N. J. STAT. ANN. 2C:11-3(e) (1985). *See also supra* note 140 (providing the text of 2C:11-3(e)).

[181]Baldus, *supra* note 5.

[182]*Id.* at 100-06.

[183]*Id.* at 100.

[184]*Id.*

[185]*Id.* at 101.

[186]*Id.* at 102 n.113. *See also* State v. Marshall, 130 N.J. 109, 210, 613 A.2d 1059, 1110 (1991). *See also supra* note 87 (describing the Baldus study at issue in *McCleskey*). Recall Baldus' methodology of dividing cases into different ranges known as "culpability levels," with each range covering cases with similar circumstances. Individual defendants are assigned a culpability level based on an analysis of the aggravating and mitigating circumstances present in their particular case. Therefore, a mid-range culpability level would encompass those cases that would fall somewhere between an extremely heinous crime, such as raping and murdering a small child, and, for example, a crime of murder committed by a father in retaliation for the rape and murder of his small child.

To illustrate, consider a model which divides cases into ten ranges or "culpability levels." Cases are analyzed by considering all the relevant mitigating and aggravating circumstances applicable to each. This analysis is then used to place the cases into the appropriate culpability level along with other cases with similar circumstances. Therefore, crimes of a severe or heinous nature would be placed in level one, and conversely, crimes of lesser severity would be placed in level ten. The remaining cases would be placed in levels two through

ing what cases go to the penalty phase, showed that white-victim cases are 1.4 times more likely to be brought to a penalty trial than cases with other victims.[187] Baldus qualified these findings as merely preliminary and stated that additional analysis was required to ascertain their validity and legal significance.[188]

D. *STATE V. MARSHALL*

In *State v. Marshall*,[189] the New Jersey Supreme Court conducted a proportionality review of the death sentence of Robert O. Marshall. Marshall had been convicted of paying another man to murder his wife, Maria, at a rest stop on the Garden State Parkway.[190] The New Jersey Supreme Court affirmed Marshall's conviction,[191] however reserved proportionality review until after it received the Special Master's final report.[192] The court devoted the bulk of its opinion to explaining "the process of record-gathering and the methods of analysis, both of science and law, that can be used to conduct proportionality review and to assess the relevance of the data to system-wide claims of unconstitutional infliction of the death penalty."[193] Relevant to the focus of this Comment, the court also addressed Baldus' findings regarding the possibility of racial bias affecting New Jersey's death penalty, an issue identical to the one decided in *McCleskey*.[194]

The *Marshall* court began by expressly rejecting the Supreme Court's

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nine depending on the varying degree of blameworthiness of the particular defendant involved. According to Baldus' studies the strongest evidence of racial bias usually exists in the mid-range levels, which in the above illustration would be levels four through six.

[187]Baldus, *supra* note 5, at 103.

[188]*Id.* at 101.

[189]130 N.J. 109, 613 A.2d 1059 (1992).

[190]*Id.* at 123, 613 A.2d at 1065-66.

[191]State v. Marshall, 123 N.J. 1, 586 A.2d 85 (1991) (affirming Marshall's conviction for murder).

[192]*Id.* at 170, 586 A.2d at 174-75.

[193]*Marshall*, 130 N.J. at 119, 613 A.2d at 1064.

[194]*Id.* at 207-15, 613 A.2d at 1108-113.

holding in *McCleskey*[195] that absent purposeful discrimination, racial disparities in sentencing are "an inevitable part of our criminal justice system."[196] To allow capital sentences to be imposed based on race, the court opined, would be "at war with [the] basic concepts of a democratic society and a representative government."[197] Simply put, the court concluded that, if in the position of reviewing evidence that the death penalty was being imposed in a discriminatory manner, the court would not hesitate to invalidate the death sentence of the defendant who offered such proof.[198]

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[195]*Id.* at 207, 613 A.2d at 1108-109.

[196]McCleskey v. Kemp, 481 U.S. 279, 312 (1987). *See also* notes 79-116 and accompanying text (describing the United States Supreme Court's rationale in *McCleskey* for rejecting a strong statistical showing of racial bias in the administration of Georgia's death penalty absent a showing of intentional discrimination on the part of decision-makers in the Georgia sentencing process). The New Jersey Supreme Court emphatically expressed its position on this point with the following:

> New Jersey's history and traditions would never countenance racial disparity in capital sentencing. As a people, we are uniquely committed to the elimination of racial discrimination. All of our institutions reflect that commitment. We were among the first of the states that enacted a civil rights law. '[Racial] discrimination threatens not only the rights and proper privileges of the inhabitants of the States but menaces the institutions and foundation of a free democratic State.' Our decisional law has always reflected the 'strength of the State's policy' in this area. To countenance racial discrimination in capital sentencing would mock that tradition and our own constitutional guarantee of equal protection of the laws under New Jersey Constitution Article I, Paragraph 1.

Marshall, 130 N.J. at 207, 613 A.2d at 1108-09 (citations omitted). Article I, Paragraph 1 of the New Jersey Constitution provides that "[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. CONST. art. I, para. 1.

[197]*Marshall*, 130 N.J. at 208, 613 A.2d at 1109.

[198]*Id.* at 213, 613 A.2d at 1112. The court also criticized the United States Supreme Court's concern that accepting statistical evidence of racial bias in capital punishment would threaten the foundations of our entire criminal justice system by opening a "floodgate" of similar challenges. *Id.* at 209, 613 A.2d at 1109-110. Relying on its aforementioned commitment to eradicating racial discrimination wherever found, the Supreme Court of New Jersey noted that if the events feared by the *McCleskey* Court came to pass, it could not "refuse to confront those terrible realities." *Id.* The court concluded that if it were to believe that racial bias had a significant effect on capital sentencing in New Jersey it would seek "corrective measures." *Id.* If such measures failed, the court stated that it "could not, consistent with our State's policy, tolerate discrimination that threatened the foundation of our

Having made its position fairly clear as to how it would react to evidence such as was presented in *McCleskey*, the court nonetheless found that the Special Master's findings were insufficient to establish a "constitutionally significant race-based disparit[y] in sentencing."[199] Noting the Special Master's admission that his findings were preliminary, the court downplayed the final report's results as falling short of the extensive statistical analysis presented in *McCleskey*.[200] The court also emphasized the Special Master's warning that the data which showed a possible race-of-defendant disparity at the mid-range culpability level failed to show a race-of-victim effect in the penalty-trial decisions.[201] Furthermore, the Special Master warned that the race-of-victim effects for cases advancing to a penalty trial were less stable than the apparent race-of-defendant effects in penalty-trial decisions.[202] In other words, the findings in Baldus' final report were admittedly incomplete and would require further development before they could be given constitutional significance.

The New Jersey Supreme Court concluded that the findings reported by the Special Master did not supply a record of statistical evidence which "'relentlessly document[ed] a risk that [Marshall's] sentence was influenced by racial considerations.'"[203] In support of this conclusion, the court, while ex-

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system of law." *Id.*

[199]*Marshall*, 130 N.J. at 210, 613 A.2d at 1110.

[200]*Id.* The Baldus Proportionality Review Project, for example, provided analysis of race-of-defendant and race-of-victim effects in different stages of the capital process in New Jersey, but failed to provide analysis of various combinations of the two effects as had the study in *McCleskey*. *Id.* *See also* Baldus, *supra* note 5.

[201]*Marshall*, 130 N.J. at 212-13, 613 A.2d at 1111-112 (citing Baldus, *supra* note 5, at 101 n.109). In other words, Mr. Baldus cautioned that although the data showed a possible effect of racial bias based on the defendant's race in the middle range of culpability, the same data did not show a corresponding effect of the victim's race, indicating that the data was not as reliable as it might appear to be at first glance. *See* Baldus, *supra* note 5, at 101 n.109. *See also supra* note 87 (describing the Baldus study at issue in *McCleskey*). *See also supra* note 186 (discussing Baldus' method of analysis using "culpability levels" and providing an illustration).

[202]*Marshall*, 130 N.J. at 213, 613 A.2d at 1111 (citing Baldus, *supra* note 5, at 104 n.114). One reason offered by Baldus for the instability of the statistical analysis was simply that there were not enough cases involving black and non-black defendants with comparable culpability levels to support a concrete conclusion that racial bias was present. Baldus, *supra* note 5, at 103.

[203]*Marshall*, 130 N.J. at 213, 613 A.2d at 1111 (quoting McCleskey v. Kemp, 481 U.S. 279, 328 (1987)).

pressing concerns over the apparent racial disparities shown by Baldus' study, recognized the limitation of a statistical analysis conducted using a database with too few cases to support definitive conclusions.[204] Plainly stated, the court found that the limited number of death penalty cases available involving black and non-black defendants with comparable crimes was not enough for a sound statistical study. In light of this conclusion, however, the court recognized its duty to monitor the administration of the death penalty over time to ensure possible racial bias does not exist.[205] The court acknowledged that this duty was its inherent responsibility, whether exercised in proportionality review or enforcement of the constitutional requirements of equal protection and due process.[206]

In its analysis of Baldus' findings, the court discussed the focus of judicial review when confronted with significant statistical evidence of discrimination in terms of the jury selection process.[207] In summary form, the court outlined the steps to be taken when statistics clearly show that constitutionally impermissible racial bias has affected jury selection.[208] This summation was qualified, however, by the warning that although these principles offered the court guidance, they were not "clearly applicable to the circumstances of [Marshall's] case . . . ."[209] Whether applicable or not, the court apparently applied these standards when it noted that Baldus' final report failed to show

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[204] *Id.*, 613 A.2d at 1112. *See also supra* notes 183-88 and accompanying text (discussing the Baldus Proportionality Review Project at issue in *Marshall*).

[205] *Marshall*, 130 N.J. at 214, 613 A.2d at 1112.

[206] *Id.*

[207] *Id.* at 212, 613 A.2d at 1111 (citing State v. Ramseur, 106 N.J. 123, 221 (1987)).

[208] *Id.*

[209] *Id.* The court summarized the process as follows:

> If a court concludes that the statistical evidence is so deviant as to compel a conclusion of substantial significance, the court must then look to the circumstances surrounding that statistical showing to determine its full constitutional import. The constitutional importance of the statistical showing depends in part on the degree of subjectivity involved in the selection mechanism. The more discretionary the selection process, the more concern for bias. In addition, courts consider the time period over which violations are alleged to have occurred, and finally courts will look at the State's efforts to deal with the problem of potential bias.

Id. (citation omitted).

"deviations" (i.e., disparities) sufficient to show a "substantial" discriminatory effect.[210] Although the court's rejection of the Baldus study as inconclusive stalled its application of the principles dealing with significant statistical evidence, the language in the *Marshall* opinion suggests that the court might follow those guidelines if the opportunity arises.

E. *STATE V. BEY*, *STATE V. MARTINI*, AND *STATE V. DIFRISCO*

Since the decision in *Marshall*, additional proportionality review requests brought before the New Jersey Supreme Court have challenged the constitutionality of New Jersey's Death Penalty Act based on the presence of racial bias in imposing death sentences.[211] These challenges have relied on studies that supplemented the database used in Baldus' 1991 final report by adding new death penalty cases to the information available for analysis.[212]

In *State v. Bey*,[213] the defendant challenged his sentence by contending that it was racially disproportionate. Bey's argument was based on a statistical study designed to correct the deficiencies of the *Marshall* data, i.e., that there were not enough cases available to support a sound statistical analysis.[214] The *Bey* study added some forty additional cases to the data used in *Marshall*, and was itself supplemented by an additional thirty cases from a report completed in connection with *State v. Martini*.[215] Bey argued that this updated study bolstered the findings reported by the Special Master in 1991 which indicated a discriminatory application of the death penalty.[216] In order to show a statisti-

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[210]*Id.*

[211]*See* State v. Bey, 137 N.J. 334, 645 A.2d 685 (1994); State v. Martini, 139 N.J. 3, 651 A.2d 949 (1994); State v. DiFrisco, 142 N.J. 148, 662 A.2d 442 (1995).

[212]The Administrative Office of the Courts is the entity in New Jersey responsible for maintaining the database used by the Supreme Court for proportionality review. The Death Penalty Proportionality Review Project (DPPRP), headed by the AOC, continuously updates the "universe" of cases used for proportionality review by adding new death penalty cases as they are decided. Each new study performed by the DPPRP is done using the most current information available. *See* Cammarere, *supra* note 1, at 2304.

[213]137 N.J. 334, 645 A.2d 685 (1994).

[214]*Id.* at 390, 645 A.2d at 713.

[215]139 N.J. 3, 651 A.2d 949 (1994). *See Bey*, 137 N.J. at 390-91, 645 A.2d at 713.

[216]*Id.* at 391, 645 A.2d at 713. *See* Baldus, *supra* note 5.

cally reliable comparison at the mid-range culpability level,[217] however, Bey expanded the category's range to include additional cases.[218] Based on this redefinition of the categories originally used by the Special Master,[219] the court found Bey's analysis to be flawed.[220] Specifically, the court found that the expansion of culpability level four, as proposed by Bey, brought within that category cases which were dissimilar to each other and, therefore, could not be used in proportionality review.[221]

The court proceeded to re-examine the data presented in *Bey* using the original levels of culpability proposed by the Special Master.[222] The court found that there was still an insufficient number of cases to support a reliable determination of racial disparities in death sentencing, as was the case in *Marshall*.[223] Without enough cases for comparison, the court stated "we cannot

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[217]*See supra* note 87 (describing the Baldus study at issue in *McCleskey*). *See also supra* note 186 (discussing Baldus' method of analysis using "culpability levels" and providing an illustration).

[218]*Bey*, 137 N.J. at 391, 645 A.2d at 713. Bey attempted to modify the mid-range culpability level because the circumstances of his case placed him in that level. *Id.* Therefore, by expanding the range of the culpability level, Bey tried to increase the number of cases available for statistical analysis in order to support a showing of racial bias. *Id.*

[219]The Special Master, David Baldus, in his final report on proportionality review to the Supreme Court in 1991, used five categories of culpability, with each category having a range of twenty percent, in order to assure that each category would contain cases which were similar in terms of blameworthiness. *Id.* at 392, 645 A.2d at 714. *See also* Baldus, *supra* note 5. Recall that in the study presented in McCleskey v. Kemp, 481 U.S. 279 (1987), Baldus used a model with eight different ranges. *See supra* note 87 (describing the Baldus study at issue in *McCleskey*). *See also supra* note 186 (discussing Baldus' method of analysis using "culpability levels" and providing an illustration).

[220]*Bey*, 137 N.J. at 392, 645 A.2d at 714.

[221]*Id.* Cases are compared in terms of blameworthiness. The probability of being sentenced to death for each defendant is computed by using all the relevant aggravating and mitigating circumstances. Each category of cases within proportionality review is assigned a range of probability (for instance .20 to .40) designed to include only those defendants with similar blameworthiness. By broadening the range of probability, the defense expanded the category to include defendants who were not equally or comparably blameworthy for their crimes. *See supra* note 186 (discussing Baldus' method of analysis using "culpability levels" and providing an illustration).

[222]*Bey*, 137 N.J. at 393-94, 645 A.2d at 714-15.

[223]*Id.*

hold that race impermissibly influences the imposition of the death penalty."[224] This language indicates that a successful challenge of racial bias based on statistics would have to wait until more data was available. The universe of cases for proportionality review at the time of Bey's challenge was simply too small to support his claim that racial discrimination played a part in his death sentence.[225]

F. THE NEW CHALLENGE—*STATE V. LOFTIN*

The New Jersey Supreme Court will once again review the argument that the death penalty is imposed in a racially discriminatory manner.[226] Death-row inmate Joseph Harris first brought the challenge in a request for proportionality review of his death sentence.[227] Oral argument in Harris' case was scheduled for September of 1996. Harris, however, died of a stroke on the eve of the scheduled hearing, resulting in the court's dismissal of his case as moot.[228] The issue was not stalled for long, though, as the argument was again posed by the defendant in *State v. Loftin*.[229]

In *Loftin*, the defendant relies on a recent study performed by the Death Penalty Proportionality Review Project headed by the Administrative Office of

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[224]*Id.*, 645 A.2d at 714.

[225]*Id.* at 396-97, 645 A.2d at 716. The arguments offered by Bey were also relied on by the defendant in State v. Martini, 139 N.J. 3, 651 A.2d 949 (1994), using the same statistical analysis. The Court, in its holding in *Martini*, tersely rejected Martini's claim by referring to its holding in *Bey*. *Id.* at 80, 651 A.2d at 987. The following year, in State v. DiFrisco, 142 N.J. 148, 662 A.2d 442 (1995), the Court again rejected the argument that New Jersey's death penalty is applied with racial bias. The Court in *DiFrisco*, simply referred to the holdings in *Martini*, *Bey* and *Marshall* as grounds for its rejection of the racial bias claim. *Id.* at 210, 662 A.2d at 473. It can be safely inferred that, by the time of the proportionality review in *DiFrisco*, the Court still considered the universe of cases used for comparison too small to support a showing of a racial disparity in death sentencing through statistical analysis.

[226]State v. Loftin, 146 N.J. 295, 680 A.2d 677 (1996).

[227]State v. Harris, 141 N.J. 525, 662 A.2d 333 (1995).

[228]*See* Maureen Castellano, *With Harris Moot, So Is Chance for Precedent*, NEW JERSEY LAW JOURNAL, Oct. 7, 1996 at 25. The court followed the holding of State v. Pulverman, 12 N.J. 105, 95 A.2d 889 (1953), which ruled that a defendant's death generally renders a case moot.

[229]*Loftin*, 146 N.J. 295, 680 A.2d 677. Donald Loftin was sentenced to death for fatally shooting a gas station attendant during a robbery. *Id.*

the Courts (hereinafter the "AOC").[230] The data collected by the AOC and analyzed for the *Harris* proportionality review is said to have shown the first reliable indication that New Jersey juries impose the death penalty with racial bias.[231] This data has been updated and re-analyzed for the *Loftin* proportionality review, resulting in what is considered even more concrete proof of bias.[232] While the primary issue presented in *Loftin* is the accuracy of the study, the Public Defenders Office feels that the data presents "conclusive" evidence of racial discrimination against blacks in the imposition of New Jersey's death penalty[233] and that the study's findings will be extremely difficult to refute.[234]

Signaling the importance of the *Loftin* study, the court appointed a new "Special Master," retired Appellate Division Judge Richard S. Cohen, for the purpose of reviewing the significance of the AOC's data as it relates to the possibility of racial discrimination in death sentencing.[235] Mr. Cohen completed his study in January of 1997, and his findings present an obstacle to the challenge being brought in *Loftin*.[236] Judge Cohen's study concluded that there is no evidence of racial bias against blacks in the administration of New Jersey's death penalty.[237] In fact, Judge Cohen asserts that "[t]he numbers could hardly have come out more race-neutral. . . ."[238] While his findings do not

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[230]Cammarere, *supra* note 1, at 2289.

[231]*Id.* at 2304.

[232]*Id.*

[233]*Id.* at 2289.

[234]*Id.* at 2304.

[235]*Id.* at 2289.

[236]*See* Kathy B. Carter, *Study Finds No Racial Bias in Death Penalty: Public Defender Handed a Setback*, NEWARK STAR LEDGER, January 29, 1997, at 13, co. V.

[237]*Id.*

[238]*Id.* at 13, col. VI. Judge Cohen reported that out of the many number of murder indictments in New Jersey since the death penalty was reinstated in 1982 only 362 were found eligible for capital punishment. *Id.* Of those cases, 203 involved black defendants (56%) and 159 involved non-black defendants (44%). *Id.* Prosecutors chose to seek the death penalty in 73 of the black defendant cases and 74 of the non-black defendant cases. *Id.* Of these remaining cases, 50 defendants were sentenced to death including 28 that were black and 22 that were non-black. *Id.*

support the claims being made in *Loftin*, Judge Cohen warned that the New Jersey Supreme Court does not collect information on the death penalty in a way that can either prove or disprove the theory that juries are biased towards black defendants. [239]

The Judge did recognize, however, that the data suggested a significant disparity in what he called "transracial cases."[240] Black defendants who kill white victims, Judge Cohen noted, receive the death penalty in 21.8 percent of the cases, while white defendants who kill black victims receive a death sentence in only 7.1 percent of the cases.[241] Judge Cohen, however, warned that these findings are not reliable because the number of cases available for review is too small.[242]

The contrast between Judge Cohen's findings and the Public Defender's arguments presents a familiar choice to the New Jersey Supreme Court. The court can accept Judge Cohen's study and add another decision to the growing precedent that has held that the "universe" of cases used for proportionality review is too small for a reliable showing of racial bias. The court could also explore different methods of collecting and analyzing data in an effort to prove once and for all whether New Jersey juries discriminate based on race. In contrast, the court could put aside questions of a technical nature, acknowledge that there exists a "risk" that racial considerations play a part in death sentencing in New Jersey, and take steps to eliminate that risk.

V. COMPARATIVE ANALYSIS

Racial discrimination is a pervasive problem in our nation's criminal justice system. In light of this realization, the question that lies beneath constitutional challenges such as those brought in *McCleskey* and *Loftin* is: Can the American people tolerate the use of capital punishment in the face of strong evidence that it is being imposed in a racially discriminatory manner? The simple answer is: Absolutely not! Constitutional issues of great importance, however, are seldom so easily resolved. Important questions need to be addressed before the United States Supreme Court or the New Jersey Supreme Court will substitute

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[239] *See Study of Bias in Death Penalty*, THE NEW YORK TIMES, January 29, 1997, § B, at 1, col. I.

[240] *See* Carter, *supra* note 236, at 16, col. IV.

[241] *Id.* at 16, col. IV-V.

[242] *Id.* at 16, col. V. Judge Cohen recommended that the New Jersey Supreme Court continue to study the problem and possibly appoint a panel of judges to evaluate the various stages of death penalty trials for the existence of racial discrimination. *Id.*

its judgment for that of the American people by deciding that no system of capital punishment can ever be constitutional in the face of the racial bias of society as a whole.

The important threshold question is whether the statistical studies offered as proof of racial bias are valid. A review of the methodology of statistical analysis, however, is well beyond the scope of this Comment; therefore, for purposes of this discussion, it will be assumed that the study presented in *McCleskey*, and the study being presented in *Loftin*, are both reliable in concluding that racial bias does play a part in the administration of the death penalty.[243] The abolitionists might argue that such a conclusion mandates that the death penalty be found unconstitutional under either the Cruel and Unusual Punishments Clause or the Equal Protection Clause of the Constitution.[244] The abolitionist movement, however, has yet to succeed in persuading a court to take that first step by acknowledging statistical proof of discrimination in the imposition of the death penalty.[245] As previously discussed, the Supreme Court rejected such evidence in *McCleskey*,[246] resulting in the movement's re-

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[243]*See* McCleskey v. Kemp, 481 U.S. 279, 291 n.7 (1987). In its analysis of the constitutional questions, the *McCleskey* Court assumed that the statistical study at issue, i.e., the Baldus study, was valid. *Id.* The Court, however, qualified this assumption by stating:

> Our assumption that the Baldus study is statistically valid does not include the assumption that the study shows that racial considerations actually enter into any sentencing decisions in Georgia. Even a sophisticated multiple-regression analysis such as the Baldus study can only demonstrate a *risk* that the factor of race entered into some capital sentencing decisions and a necessarily lesser risk that race entered into any particular sentencing decision.

Id. This language, although only mentioned in a footnote, contains the essence of the *McCleskey* Court's reasoning. The Court readily admitted that the Baldus study, given statistical validity, showed a "risk" of racial bias in Georgia's capital sentencing; however, even if the study was flawless, without actual proof of an intent to discriminate by the sentencers, the Court was unwilling to give this "risk" constitutional significance. By assuming that the AOC study which will be at issue in *Loftin* is valid, we can consider and compare the possible reactions of the New Jersey Supreme Court to this same problem.

[244]*See supra* note 34 (providing the relevant text of the Eighth and Fourteenth Amendments). *See also supra* note 143 (providing the text of Article I, paragraph 12 of the New Jersey Constitution); *supra* note 196 (providing the text of Article I, paragraph 1 of the New Jersey Constitution).

[245]*See supra* note 89 (discussing other cases, in addition to *McCleskey*, that have rejected discrimination claims in capital sentencing).

[246]*McCleskey*, 481 U.S. 279 (rejecting a statistical study as proof of intentional racial discrimination on the part of decision-makers in the capital sentencing process). *See also*

liance on the alternate strategy of bringing the identical issue before a state supreme court, namely the New Jersey Supreme Court in *Loftin*. Assuming, as this Comment does, that the AOC study at issue in *Loftin* is valid, the abolitionists are confident that the New Jersey Supreme Court will find the Death Penalty Act unconstitutional.[247] A close comparison of the federal and state case law discussed in this Comment indicates that this confidence is somewhat premature. There are several questions which may be addressed by the New Jersey Supreme Court before complete invalidation of capital punishment in New Jersey is considered.

A. THE *FURMAN* FOUNDATION

Although not expressly recognized by the *Furman* majority, it is arguable that one of the underlying themes of that decision was racial discrimination. The Justices of the Supreme Court, possibly motivated by the concern which was ultimately espoused by the majority in *McCleskey*, i.e., that accepting a racial bias claim would "strike at the heart of the criminal justice system," decided to couch the discussion in terms of arbitrariness.[248] The challenge in *Furman* was unquestionably one of the abolitionist movement's strongest attacks on the constitutionality of capital punishment. Coming as it did in the wake of the Civil Rights movement and amidst the turmoil of the Vietnam War, death penalty opponents undoubtedly hoped to capitalize on the reformist atmosphere of the times by bringing to light the discriminatory aspects of capital punishment. Several of the Justices, however, effectively avoided having to deal directly with this discrimination issue by characterizing the results of the capital schemes under review in several different ways, including "freakishly rare," "irregular," "random," "capricious," "uneven," "wanton," "excessive," and "disproportionate."[249] This result arguably amounted to a foreshadowing of how the Supreme Court would eventually handle Warren McCleskey's equal protection claim over a decade later.

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supra notes 79-116 and accompanying text (discussing *McCleskey* in detail).

[247]*See* Cammarere, *supra* note 1, at 2289 (calling the new state study at issue in *Loftin*, which was commissioned by the AOC, the "strongest evidence yet that jurors have racist inclinations").

[248]*McCleskey*, 481 U.S. at 297. *See also supra* note 106 (discussing, *inter alia*, the *McCleskey* Court's concerns over weakening the criminal justice system by accepting statistics as proof of discrimination in sentencing).

[249]*See, e.g.*, Furman v. Georgia, 408 U.S. 238, 241 (1972) (Douglas, J., concurring); *Id.* at 256 (Douglas, J., concurring); *Id.* at 309 (Stewart, J., concurring); *Id.* at 294 (Brennan, J., concurring); *Id.* at 392 (Burger, C.J., dissenting). *See also* BOWERS, *supra* note 8, at 193.

Three Justices in *Furman*, however, did directly address racial discrimination and their comments form the foundation of the racial bias issue.[250] For example, Justice Douglas' opinion, arguing that unfettered jury discretion led to selective imposition of the death penalty against unpopular minorities, acted as a predictor of the basis for the claim in *McCleskey*, and the present claim in *Loftin*.[251] In contrast, Justice Stewart's opinion, although also condemning the arbitrary nature of the capital systems, expressly noted that racial discrimination had not been proven.[252] The contrast between these Justices' observations underscores the issue which is the focus of this Comment; namely, the Supreme Court's unwillingness to find the death penalty unconstitutional without specific proof of racial discrimination has opened the door to state supreme court consideration of racially disparate death sentencing. The contrast was also a clear indication that the movement's challenge was destined to fail at the federal level and would eventually have to be brought before the individual state supreme courts.

B. THE SEEDS OF CONTROVERSEY—*GREGG / RAMSEUR*

Although decided over a decade apart, the Supreme Court's decision in *Gregg*[253] and the New Jersey Supreme Court's decision in *Ramseur*[254] bear significant similarities. Despite their almost identical approaches to the attendant issues, [255] the holdings in these two cases contain the seeds of the current

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[250]*See Furman*, 408 U.S. at 249 (Douglas, J., concurring). Justice Douglas considered the conclusion of the President's Commission on Law Enforcement and Administration of Justice which stated that "there is evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow *discriminatory patterns*." *Id.* (emphasis added). *See also id.* at 365-66 (Marshall, J., concurring). Justice Marshall argued that "the burden of capital punishment falls upon the poor, the ignorant, and the under-privileged members of society." *Id. But see id.* at 310 (Stewart, J., concurring) (noting that the existence of racial discrimination had not been proven).

[251]*Furman*, 408 U.S. at 255 (Douglas, J., concurring). *See also supra* note 51 (discussing, *inter alia*, Justice Douglas' concurring opinion in *Furman*).

[252]*Furman*, 408 U.S. at 310 (Stewart, J., concurring).

[253]Gregg v. Georgia, 428 U.S. 153 (1976) (Stewart, J., plurality).

[254]State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

[255]*Id.* at 168, 524 A.2d at 209. The *Ramseur* court prefaced its constitutional analysis by stating:

disagreement between the two courts on the death penalty issue.

A noteworthy difference between the Supreme Court's constitutional review of the Georgia Death Penalty Act in *Gregg*, and the New Jersey Supreme Court's constitutional review of the New Jersey Death Penalty Act in *Ramseur*, involves the two acts' respective provisions for direct review. In *Gregg*, the Supreme Court, in finding sufficient protection against arbitrary sentencing, relied heavily on the Georgia statute's provision for direct review to the state supreme court.[256] This review was designed to, *inter alia*, determine if the death sentence was "imposed under the influence of passion, prejudice, or any other arbitrary factor," and whether the sentence was excessive or disproportionate to the individual defendant's crime.[257] The New Jersey Supreme Court in *Ramseur* found that the direct review provisions of the New Jersey Death Penalty Act provided similar safeguards in the form of mandatory review of a death sentence, as well as proportionality review at the individual defendant's request.[258]

The difference lies in the way the two courts discussed these nearly identical provisions. The Supreme Court viewed the direct review provision of the Georgia Death Penalty Act as an important safeguard to remedy the concerns of *Furman*.[259] The Supreme Court failed, however, to discuss exactly how the Georgia Supreme Court should have tested for the existence of "passion,

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> Quite frequently we rely here on the reasoning of the United States Supreme Court's plurality opinion in *Gregg v. Georgia* in support of our conclusions. We do so fully aware that in determining the validity of a state action challenged under our own constitution, we are not obliged to adhere to the reasoning or the results of the Supreme Court's federal constitutional decisions. That we are not required to follow the Supreme Court's analysis does not, however, mean that we are precluded from following that analysis where we find it persuasive, as we often do in this case.

Id. (citations omitted).

[256]Gregg v. Georgia, 428 U.S. 153, 198 (1976) (Stewart, J., plurality) (explaining that "[a]s an *important additional safeguard* against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court" (emphasis added)).

[257]GA. CODE ANN. § 27-2537(c)(1) & (3) (Supp. 1975). *See also supra* note 63.

[258]State v. Ramseur, 106 N.J. 123, 185-86, 524 A.2d 188, 218-19 (1987).

[259]*Gregg*, 428 U.S. at 198 (Stewart, J., plurality). *See supra* notes 67-70 and accompanying text (discussing the Georgia death penalty statute).

prejudice, or any other arbitrary factor."[260] Since the "passion" inquiry was obviously tailored to directly address the concerns outlined in *Furman*, it is surprising that the Supreme Court did not inquire into how the provision would be applied or what evidence would be able to show a violation of the test. In contrast, the *Ramseur* court specifically linked proportionality review to the prevention of arbitrariness in sentencing by characterizing it as a method for monitoring the administration of the death penalty to prevent "impermissible discrimination."[261]

The significance in this distinction is that the New Jersey Supreme Court in *Ramseur* directed the compilation of proportionality review data.[262] The court also stated that it would seek the help of outside experts to formulate methods for analyzing that data.[263] These statements clearly invite statistical analysis into the death penalty review process, and would make it very difficult for the New Jersey Supreme Court to later discount such evidence. Coupled with the court's promise that it would monitor the death penalty for any effects of racial considerations,[264] proportionality review was clearly the constitutional vehicle

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[260] GA. CODE ANN. § 27-2537(c)(1) (Supp. 1975). *See supra* notes 67-70 and accompanying text (discussing the Georgia death penalty statute).

[261] *Ramseur*, 106 N.J. at 327, 524 A.2d at 292. The *Ramseur* court described proportionality review as "a means through which to monitor the imposition of death sentences and thereby to prevent any impermissible discrimination in imposing the death penalty." *Id.*

[262] *Id.* at 328, 524 A.2d at 293. The court stated:

> In preparation for this review process, those parties who expect to participate in the appellant review process in future capital cases should begin gathering the data necessary for proportionality review of a death penalty in comparison to similar crimes and defendants. Moreover, *these statistics will be helpful in determining whether there is race and gender discrimination in the imposition of the death penalty*.

Id. (emphasis added). *See also supra* notes 168-78 and accompanying text (discussing the *Ramseur* court's observations regarding proportionality review).

[263] *Ramseur*, 106 N.J. at 328, 524 A.2d at 293 (recognizing the possible need to involve "experts from disciplines outside the law" in developing a system of review adequate to remedy the concerns of the United States Supreme Court in *Furman*).

[264] State v. Marshall, 130 N.J. 109, 214, 613 A.2d 1059, 1112 (1992). The court stated:

> We have no doubt that the people of New Jersey would not tolerate a system that condones disparate treatment for black and white defendants or a system that

under which a *McCleskey* type claim would eventually be dealt with by the New Jersey Supreme Court. In contrast, the Supreme Court avoided this responsibility in *Gregg* by simply accepting the "passion" inquiry as it was in the Georgia statute and leaving its application to the Georgia Supreme Court. This enabled the Supreme Court to dismiss the statistical analysis presented in *McCleskey* because it had not previously committed itself to considering such evidence, unlike the New Jersey Supreme Court.

Another significant point of contention between the two courts involves the principles of consistency and reliability in death sentencing.[265] By the time

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> would debase the value of a black victim's life. Whether in the exercise of statutory proportionality review or our constitutional duty to assure the equal protection and due process of law, we cannot escape the responsibility to review any effects of race in capital sentencing.

Id. (citations omitted).

[265]Justice Blackmun captured the dilemma of reconciling the principles of consistency and reliability in his dissenting opinion in Callins v. Collins, 114 S.Ct. 1127, 1128 (1994) (Blackmun, J., dissenting). The Justice argued that the Supreme Court had failed in its efforts at refining capital punishment to reflect the constitutionally required principles of consistency and reliability. *Id.* at 1129. The Justice stated:

> To be fair, a capital sentencing scheme must treat each person convicted of a capital offense with that 'degree of respect due the uniqueness of the individual.' That means affording the sentencer the power and discretion to grant mercy in a particular case, and providing avenues for the consideration of any and all relevant mitigating evidence that would justify a sentence less than death. Reasonable consistency, on the other hand, requires that the death penalty be inflicted evenhandedly, in accordance with reason and objective standards, rather than by whim, caprice, or prejudice. Finally, because human error is inevitable, and because our criminal justice system is less than perfect, searching appellate review of death sentences and their underlying convictions is a prerequisite to a constitutional death penalty scheme.
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> On their face, these goals of individual fairness, reasonable consistency, and absence of error appear to be attainable: Courts are in the very business of erecting procedural devices from which fair, equitable, and reliable outcomes are presumed to flow. Yet, in the death penalty area, this Court, in my view, has engaged in a futile effort to balance these constitutional demands, and now is retreating not only from the *Furman* promise of consistency and rationality, but from the requirement of individualized sentencing as well. Having virtually conceded that both fairness and rationality cannot be achieved in the administration of the death penalty, the Court has chosen to deregulate the entire enterprise, replacing, it would seem, substantive constitutional requirements with mere aesthetics, and abdicating its statutorily and constitutionally imposed duty to provide meaningful judicial oversight to the administration of death by the States.

Ramseur was decided, the Supreme Court's death penalty cases subsequent to *Gregg* had begun to indicate that the Court was stepping back from the vigorous enforcement of the principles of consistency and reliability in death sentencing.[266] The New Jersey Supreme Court offered some significant reactions to this turn of events in its response to several arguments offered by Justice Handler's dissent in *Ramseur*.[267] The court argued that it would continue to

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Id. at 1129 (citations omitted).

[266]*Id.* at 1136-137 (Blackmun, J., dissenting). The most telling example offered by Justice Blackmun of the Court's frustration with the principles of consistency and reliability in death sentencing is Justice Scalia's concurring opinion in Walton v. Arizona, 497 U.S. 639 (1990) (Scalia, J., concurring in part and concurring in judgment). In that case, Justice Scalia announced that he would no longer attempt to enforce the requirement of individualized sentencing, reasoning that either *Furman* (requiring death sentences be consistent) or *Lockett* (requiring individualized consideration of capital defendants) is wrong and a choice must be made between the two. *Id.* at 656.

[267]*Ramseur*, 106 N.J. at 190-91, 524 A.2d at 221. The *Ramseur* court stated:

> As our dissenting colleague has demonstrated, in recent years the United States Supreme Court has departed from the vigorous enforcement of these constitutional principles, particularly the principle of consistency. We are not obliged to follow the reasoning of all these United States Supreme Court decisions in interpreting our own state constitutional protections, nor do we intend to.
>
> But the fact that the Supreme Court has faltered in its pursuit of consistency and reliability does not, as the dissent suggests, mean that the goals themselves are 'fundamentally contradictory - perhaps unattainable.'. . . In the context of the death penalty, where the demand for fairness and accuracy are heightened, the principles of consistency and reliability rise to constitutional dimension. While there is an undeniable measure of 'doctrinal tension' between these principles, we cannot agree that 'doctrinal tension' is a basis for depriving society of the ability to ordain what it believes to be the appropriate sanction for murder. Here as in numerous other contexts, this Court must strike the best balance we can between competing values. Hard cases there will be, but we have always believed that the judiciary's role in such cases is to find the right answer, not to shrink from our responsibility to apply the law.

Id. (citations omitted). This language clearly indicates that the United States Supreme Court and the New Jersey Supreme Court had begun to take different views with regard to the principles of consistency and reliability in death sentencing. The reader should keep in mind that the decision in *Ramseur* came just one month before the decision in *McCleskey* was handed down. The New Jersey Supreme Court did not expressly reject the holding of *McCleskey* until its decision in *Marshall* two years later. The court's rejection of the rationale of *McCleskey*, however, could be expected from a close reading of the above quoted language of the *Ramseur* court. Although the dilemma of eradicating racial bias from death

seek a solution to the tension between consistency and reliability in death sentencing despite the Supreme Court's retreat from that goal.[268] In contrast, the court rejected Justice Handler's argument that the New Jersey Death Penalty Act needed more safeguards by stating that imposing a requirement that a system have perfect results would amount to applying an impossible standard, which the New Jersey Supreme Court refused to do.[269] These observations seem to contradict one another.

The racial bias issue presented in *Loftin* represents the dilemma of reconciling these two positions. The New Jersey Supreme Court is faced with three basic choices in resolving the issue in *Loftin*: 1) follow the Supreme Court's decision in *McCleskey*, 2) attempt to propose modifications to the New Jersey Death Penalty Act to adequately safeguard constitutional rights without elevating procedures to the level of "impossible standards," or 3) find the death penalty as administered in New Jersey unconstitutional and invalidating the New Jersey Death Penalty Act. A comparison of the Supreme Court's rejection of racial bias evidence in *McCleskey*, and the New Jersey Supreme Court's approach to the same issue in *Marshall* and its progeny, offers some insight into how the New Jersey court might decide *Loftin*.

C. DIVERGENCE OF OPINION—*MCCLESKY / MARSHALL* AND PROGENY

The Supreme Court's decision in *McCleskey*, in light of *Furman* and *Gregg*, should not have surprised the abolitionists. The Supreme Court effectively closed the door on racial disparity claims based on statistics by dismissing the evidence presented by Warren McCleskey in wholesale fashion. First, the Court required a showing of purposeful discrimination against McCleskey as an individual for his equal protection claim to be successful.[270] Second, the

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sentencing might represent an insurmountable obstacle to reconciling the constitutional principles of "consistency" and "reliability," the New Jersey Supreme Court's language in *Ramseur* indicates that it will confront the task rather than retreat from it. *Compare supra* note 259. *See also supra* notes 123-78 and accompanying text (discussing *Ramseur*).

[268]*Ramseur*, 106 N.J. at 190-91, 524 A.2d at 221; *see also supra* notes 164-67 and accompanying text.

[269]*Id.* at 192, 524 A.2d at 222; *see also supra* note 167 (discussing the *Ramseur* court's rejection of the argument that defendants are entitled to perfectly accurate and reliable procedures). These arguments seem contradictory in that striving toward a solution to the doctrinal tension between consistency and reliability might require the "impossible standards" the New Jersey Supreme Court claims it would not impose.

[270]McCleskey v. Kemp, 481 U.S. 279, 292 (1987); *see Ramseur*, 106 N.J. at 192, 524 A.2d at 222; *see also supra* notes 91-6 and accompanying text (discussing McCleskey's equal protection claim). Such a requirement could be considered, using the New Jersey Su-

Court dismissed McCleskey's Eighth Amendment claim by holding that "disparities are an inevitable part of our criminal justice system,"[271] and that the statistical evidence offered was insufficient to show a constitutionally significant risk of racial bias affecting McCleskey's sentence.[272] This decision, although highly criticized, fell directly in line with the Supreme Court's jurisprudence addressing the arbitrariness in death sentencing issue.

The Supreme Court had recognized *Furman* as requiring jury discretion be adequately guided to prevent arbitrary death sentences which violate the Eighth Amendment.[273] In *Gregg*, after a vigorous state legislative response, the Supreme Court accepted capital schemes which sufficiently guided, but did not eliminate, jury discretion to impose the death penalty.[274] The Court's subsequent retreat from vigorous enforcement of the principles of "consistency" and "reliability," leading up to the decision in *McCleskey*, is indicative of a realization that our nation's criminal justice system, by its very nature, must have some level of discretion for its decision-makers.[275] This discretion cannot be constitutionally eliminated, and will inevitably result in disparities of one kind or another. Attempting to explain such disparities necessarily involves the need to predict the effects of the myriad influences brought to the criminal jus-

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preme Court's language, an "impossible standard" to meet.

[271] *McCleskey*, 481 U.S. at 312. The *McCleskey* Court acknowledged Congress' attempt to remedy sentencing disparities by creating the United States Sentencing Commission and making it responsible for developing sentencing guidelines. *Id.* The Court qualified the Commission's efforts, however, by stating:

> No one contends that all sentencing disparities can be eliminated. The guidelines, like the safeguards in the *Gregg*-type statute, further an essential need of the Anglo-American criminal justice system—to balance the desirability of a high degree of uniformity against the necessity for the exercise of discretion.

Id. at 312-13 n.35.

[272] *Id.* at 313.

[273] Gregg v. Georgia, 428 U.S. 153, 189 (1976) (Stewart, J., plurality).

[274] *Gregg*, 428 U.S. at 198 (Stewart, J., plurality) (finding that Georgia's death penalty statute on its face satisfies *Furman*'s requirements); *see also supra* notes 67-70 and accompanying text (discussing the *Gregg* Court's review of the constitutionality of Georgia's death penalty statute).

[275] *See supra* notes 265-67 and accompanying text (discussing the principles of consistency and reliability in detail).

tice system from the various actors involved; such an endeavor is arguably impossible, with or without the benefit of statistical methodology. In addition, as the Supreme Court espoused in *McCleskey*, to acknowledge one disparity as constitutionally significant, is to acknowledge them all, which could arguably result in the eventual collapse of the entire criminal justice system under the very document that created it.[276] The Supreme Court, rightly or wrongly, refused to take a step in that direction, preferring to leave the decision to the individual states.

The New Jersey Supreme Court has expressly rejected the holding and rationale of *McCleskey*.[277] As discussed, the New Jersey Supreme Court, when dealing with the identical issue in *Loftin*, will approach the question in terms of proportionality review under Article I, Paragraph Twelve of the New Jersey Constitution; therefore, the need for proof of an intent to discriminate under equal protection analysis should not be an issue in *Loftin* as it was in *McCleskey*.[278] Furthermore, *Marshall* made it clear that the court would not have ignored the strong statistical evidence which *McCleskey* had presented.[279] The *Marshall* court, however, found the Baldus study's evidence of racial bias in the imposition of the death penalty insufficient because of a lack of enough cases for a sound analysis, thereby reaching the same result as the *McCleskey* Court in a more indirect manner.[280]

A significant criticism of *McCleskey* by the New Jersey Supreme Court in-

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[276]McCleskey v. Kemp, 481 U.S. 279, 315-19 (1987) (discussing the possibility of widespread equal protection claims based on statistical disparities of a frivolous nature).

[277]State v. Marshall, 130 N.J. 109, 207, 613 A.2d 1059, 1108-109 (1992) (expressly rejecting the holding in *McCleskey*); *see also supra* notes 195-98 and accompanying text (discussing the *Marshall* court's reaction to *McCleskey*).

[278]*See supra* notes 174-76 and accompanying text (discussing the New Jersey Supreme Court's reference to proportionality review as the means for preventing arbitrary death sentencing or discrimination in sentencing); *see also supra* note 143 (providing the relevant text of Article I Paragraph 12 of the New Jersey Constitution).

[279]*Marshall*, 130 N.J. at 207-15, 524 A.2d at 1108-113 (discussing *McCleskey* and, while rejecting its holding, dismissing Marshall's racial bias claim based on an inadequately sized "universe" of cases to support a statistical showing of racial discrimination in death sentencing).

[280]*Id.; see also supra* notes 199-206 and accompanying text (discussing the inadequacies of the Baldus Proportionality Review Project offered as proof of racial bias in *Marshall*). Subsequent racial bias challenges in *Bey*, *Martini* and *DiFrisco* were dismissed for the same reason; *see also supra* notes 211-25 and accompanying text (discussing *Bey*, *Martini* and *DiFrisco*).

volves the concerns about opening a floodgate of similar discriminatory claims based on statistical studies. The court rejected the Supreme Court's reasoning on this point, stating that it could not "refuse to confront those terrible realities."[281] A "flood" of such claims, however, could lead the New Jersey Supreme Court into a quagmire of litigation, calling for the creation of rules and constitutional tests which might rise to the level of the "impossible standards" alluded to in *Ramseur*.[282] In any event, the Supreme Court's concerns, although not sufficient to deny an individual defendant his constitutional rights, should not be so readily dismissed.

The New Jersey Supreme Court's language in discussing *McCleskey*, as well as any possible racial bias in the application of New Jersey's death penalty, provide support for the inference that the court will not find the entire New Jersey Death Penalty Act unconstitutional, as some abolitionists might hope. First, the court stated that if evidence similar to that presented in *McCleskey* was offered by a defendant on death row in New Jersey, it would not hesitate to overturn the sentence.[283] The court refrained from asserting that the entire New Jersey Death Penalty Act would be invalid, and only confined the prediction to whatever inmate's sentence was before the court at the time. This is an indication that the New Jersey Supreme Court, given definitive evidence of racial bias, will recognize that an individual defendant's sentence is disproportionate under proportionality review and thereby in violation of the state's Cruel and Unusual Punishment Clause. The court's language indicates, however, that it will not use such an individualized process to invalidate the entire capital scheme in New Jersey.[284]

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[281]*Marshall*, 130 N.J. at 209, 613 A.2d at 1110; *see also supra* note 198.

[282]State v. Ramseur, 106 N.J. 123, 192, 524 A.2d 188, 221 (1987); *see also supra* note 167.

[283]*Marshall*, 130 N.J. at 213, 613 A.2d at 1112. The court stated "[i]n short, we do not yet confront a record in which '[t]he statistical evidence . . . relentlessly documents the risk that [Marshall's] sentence was influenced by racial considerations. If that were so, *we would not hesitate to invalidate the sentence of death.*" *Id.*, 613 A.2d at 1111 (citation omitted) (emphasis added).

[284]Support for this conclusion is found in the New Jersey Supreme Court's statement that if it were to believe racial bias played a part in the administration of the death penalty in New Jersey, it would seek "corrective measures." *Id.* at 209, 613 A.2d at 1110. If such measures failed, then the court indicated that it would invalidate the death penalty by stating that it could not tolerate, under the New Jersey Constitution, a system of capital punishment which is infected with racial bias. *Id.* This language indicates that if valid evidence is presented by an individual death row defendant that shows death sentences in New Jersey are influenced by racial considerations, the New Jersey Supreme Court will first overturn his sentence, then impliedly stay all executions in the state until it can be determined whether racial bias played a part in some or all of them. Moreover, the court, in contrast to the Su-

VI. CONCLUSION

The main focus of the arguments in *Loftin* will most likely be based on the validity of the AOC's statistical study as it pertains to a showing of racial bias in death sentencing in New Jersey. Primarily, the decision will, in the first instance, determine if the "universe" of cases the AOC maintains for proportionality review is sufficient to prove or disprove the theory that New Jersey juries tend to impose the death penalty on black defendants more often than non-black defendants. As noted earlier, New Jersey's highest court appointed a new Special Master who has concluded that the current system of data gathering cannot prove or disprove racial bias in death sentencing.[285] This Comment, however, has assumed that the AOC study does show racial bias in death sentencing. In light of that assumption, this Comment has drawn the conclusion that the New Jersey Supreme Court will react to the study by staying all executions, similar to the moratorium from 1968 to 1977,[286] until it can be determined what sentences were influenced by impermissible considerations. This Comment then inferred that the New Jersey Supreme Court will take steps to correct the constitutional flaws of the New Jersey Death Penalty Act in an effort to eliminate the influence of racial bias before ultimately condemning the death penalty as unconstitutional.[287] The question remains: How

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preme Court in *McCleskey*, will take steps to define and attempt to correct the constitutional flaws in the New Jersey Death Penalty Act before ultimately pronouncing it unconstitutional. Although the New Jersey Supreme Court has acknowledged that this task may require applying "impossible standards," it has expressly stated that the citizens of New Jersey should not be deprived of the use of a death penalty, if they consider capital punishment appropriate, without first attempting to eliminate racial bias by reconciling the principles of consistency and reliability through remedial legislative or judicial efforts. *See also supra* notes 265-67 and accompanying text (discussing the principles of consistency and reliability in detail).

[285] *Study of Bias in Death Penalty*, *supra* note 239, at 1.

[286] *See supra* note 284 and accompanying text (discussing this Comment's argument that the New Jersey Supreme Court will not use an individualized process such as proportionality review to invalidate the state's death penalty statute, but rather will most likely stay all executions until the extent of the racial bias problem can be ascertained and dealt with).

will these constitutional flaws be identified and what steps can be taken to eliminate them?

The court has indicated a possible approach it might take to a valid statistical showing of racial bias in its discussion in *Marshall* of statistical evidence of discrimination in the jury selection process. This approach will involve attributing constitutional significance to the statistical showing of racial bias by evaluating the level of subjectivity in the imposition of the death penalty under the New Jersey Death Penalty Act. As discussed in Part IV(B)(1), the subjective ability to impose a death sentence is limited under the New Jersey Death Penalty Act by two requirements. First, the sentencing body must find beyond a reasonable doubt one of a list of statutory aggravating factors, and then that those aggravating factors outweigh any relevant mitigating factors beyond a reasonable doubt. Second, the sentence of death may not be imposed without unanimous agreement of all the jurors. These requirements appear to limit subjectivity to a fairly high degree. It is difficult to see how jury discretion under the New Jersey Death Penalty Act can be limited any further without completely removing it altogether, in light of the United States Supreme Court's finding that individualized consideration is constitutionally required.

This Comment suggests an alternate solution. Pursuant to the suggestion made by Justice Stevens in his dissenting opinion in *McCleskey*,[288] the death

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[287]*See supra* note 284 (discussing this Comment's argument that the New Jersey Supreme Court will take steps to remedy the New Jersey Death Penalty Act's constitutional flaws).

[288]McCleskey v. Kemp, 481 U.S. 279, 367 (1987) (Stevens, J., dissenting). Justice Stevens stated:

> One of the lessons of the Baldus study is that there exist certain 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. If Georgia were to narrow the class of death-eligible defendants to those categories, the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated. As Justice Brennan has demonstrated in his dissenting opinion, such a restructuring of the sentencing scheme is surely not too high a price to pay.

Id. On its face, this argument seems like a logical "balance between competing values." State v. Ramseur, 106 N.J. 123, 190-91, 524 A.2d 188, 221 (1987). This result, however, was most likely shunned by the *McCleskey* Court because it failed to address its concerns about opening the door to widespread equal protection claims based on statistical analysis of varying types. In addition, such a result would be contrary to the Court's refusal to accept the Baldus study as "proof" that McCleskey's sentencers intended to discriminate against him. This problem can arguably be solved by creating a rebutable presumption that a defendant's sentence was influenced by racial bias if that sentence falls within one of the categories identified by statistical analysis as showing a "risk" of the influence of racial considera-

penalty could be imposed in only those categories of blameworthiness where statistical analysis shows there is no influence of racial bias. For instance, the study conducted by Baldus and presented in *McCleskey* divided death penalty cases into eight different ranges of culpability. Baldus' analysis showed that racial disparities existed only in the mid-range levels of culpability where the decision to impose the death penalty was more likely to go one way or another based on subjective factors, as opposed to the higher levels of culpability which involved crimes so reprehensible that the death penalty was almost always imposed. The New Jersey Supreme Court could endeavor to apply proportionality review to determine if an individual defendant's circumstances placed him in a higher level of culpability, or in the mid-range level. This conclusion could be based on the aggravating and mitigating factors found "beyond a reasonable doubt" at the penalty phase, and would not need to consider the unpredictable nature of a jury's subjective actions. If a defendant's circumstances place him in the mid-range level of culpability, then a presumption could be applied that his sentence was possibly influenced by racial considerations, and the burden could then be shifted to the prosecution to prove that such considerations did not play a part in the defendant's sentencing.[289]

By using a presumption of racial bias influence for cases that fall into the mid-range of blameworthiness, the courts could deal with both the racial discrimination problem, and the problem of taking capital punishment away from the people of New Jersey by finding the New Jersey Death Penalty Act unconstitutional. As the New Jersey Supreme Court has pointed out, the people of New Jersey would never tolerate a capital sentencing system which discriminates on the basis of race. By requiring the state to overcome a presumption of racial bias for cases that fall in the range where statistics show a risk that bias may influence sentencing decisions, the courts can all but eliminate racial discrimination by ensuring that racial considerations, whether intentional or subconscious, are eradicated. Finally, by leaving the death penalty unchanged for those defendants whose crimes place them in the higher range of blameworthiness, the court can ensure that the people of New Jersey still

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tions. By doing so, the "risk" of racial bias is given constitutional significance without necessarily accepting statistics as proof that there was intentional discrimination against the defendant. Moreover, by placing the burden of showing there was no racial bias present on the prosecution, the courts can ensure that (1) the possibility of allowing race to play a part in imposing a death sentence will all but be eliminated, and (2) the state will be responsible for ensuring that the death penalty is administered in an equal manner and only in those cases where the sanction is most appropriate.

[289]*See supra* note 106 (discussing, *inter alia*, Justice Blackmun's dissent in *McCleskey*). Justice Blackmun argued that the study presented in *McCleskey* was sufficient to shift the burden to the state to show that McCleskey's sentence was based on neutral criteria; a burden it failed to meet. McCleskey, 481 U.S. at 359-61 (Blackmun, J., dissenting).

have the right to decide whether death is the appropriate punishment for certain crimes.