CHAPTER 10
Safeguarding Racial Fairness and Proportionality

In 1997, Duane Buck was convicted of shooting three people, killing two of them. During his trial in Harris County, Texas, the prosecutor elicited and relied on testimony from a psychologist that African Americans are statistically more likely to commit violence, and that Buck was more likely to be dangerous in the future because of his race. A few years after Buck was convicted, then-Texas Attorney General John Cornyn (now a U.S. Senator) singled out the psychologist for his improper and racially biased testimony in multiple trials. In 2000, Cornyn recommended that the defendants in six cases in which the psychologist offered similar testimony linking race to the likelihood of future dangerousness, including Buck, be granted new capital sentencing hearings. While the death sentences in all of the other cases were vacated and each was given a new sentencing hearing, Buck has not received such relief. The only surviving victim – Buck's stepsister - and one of the prosecutors from Buck's trial have asked for a new sentencing. More than 100 civil rights leaders, elected officials, former prosecutors and former Texas Governor and Death Penalty Committee Co-Chair Mark White have also called for a new sentencing. Mr. Buck's legal team petitioned the Texas Court of Criminal Appeals for a new sentencing hearing for Buck, which the court denied in November 2013. Buck remains on Texas's death row and has filed appeals to the U.S. Supreme Court and federal district court.

Recommendation 34. All jurisdictions that impose the death penalty should enact legislation to help ensure that racial discrimination plays no role in the capital punishment system. As a critical component of this program, each jurisdiction should adopt a framework for the rigorous collection of data on the operation of the capital punishment system and the role of race in it. A second component is to ensure racial and ethnic diversity among the decision-makers in death penalty cases, particularly defense lawyers, prosecutors, jurors and judges.

Study after study consistently has shown glaring racial disparities in the administration of capital punishment. For example, a 2011 study of the application of the death penalty in the military courts revealed that "minority service members are more than twice as likely as whites – after accounting for the crimes' circumstances and the victims' race – to be sentenced to death."[1] A 2003 Maryland study showing that the state's "death penalty system is tainted with racial bias" led to a moratorium on the death penalty and serious efforts to repeal capital punishment in the state.[2] A 2013 study by the U.S. Sentencing Commission confirms the existence of glaring racial disparities in the U.S. justice system: prison sentences of black men are nearly 20 percent longer than those of white men who commit similar crimes.[3] Though the problem is complex, it is difficult to dispute that racial disparities and racial discrimination hang over our nation's capital punishment system and raise serious questions about its fairness.

The Maryland study, discussed above, also found that geography plays a significant role in the charging of capital crimes and the sentencing of defendants to death.[4] Indeed, only a few counties are the source of the vast majority of death sentences, as reflected in Figure 7 in the Appendix of this report. Although evidence of geographic disparities is easier to examine through review of the available data on death sentences, these disparities are not contemplated at the time of sentencing. Rather, death sentences continue to be imposed at a high rate in just a few jurisdictions.

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1 Editorial, *The Military and the Death Penalty*, N.Y. Times, Sept. 1, 2011, at A28; *see also* David C. Baldus et al., *Racial Discrimination in the Administration of the Death Peanlty: The Experience of the United States Armed Forces (1984-2005)*, 101 J. Crim. L. & Criminology 1227 (2012).

2 Scott Shane, *A Death Penalty Fight Comes Home*, N.Y. Times, Feb. 6, 2013, at A14; Press Release, Death Penalty Information Center, Maryland Study Finds That Race and Geography Play Key Roles in Death Penalty (Jan. 7, 2003), at http://www.deathpenaltyinfo.org/PR-DPICMarylandStudy.pdf; *see also* Raymond Paternoster et al., An Empirical Analysis of Maryland's Death Sentencing System With Respect to the Influence of Race and Legal Jurisdiction, at http://www.newsdesk.umd.edu/pdf/finalrep.pdf. Maryland subsequently repealed the death penalty in 2013.

3 Joe Palazzolo, *Racial Gap in Men's Sentencing*, Wall. St. J., Feb. 15, 2013, at A3.

4 *See generally* Paternoster, et al., *supra* note 2.

These disparities have diminished the public's faith in the fairness of the death penalty. A September 2000 poll showed that 64 percent of Americans supported a moratorium on executions until the issue of the fairness of capital punishment could be resolved.[5] A 2013 Gallup poll similarly showed support for the death penalty at a 40-year low, driven in part by negative attitudes about how fairly the death penalty was applied.[6] If executions are to be a part of our justice system, they must be undertaken in an even-handed fashion. Moreover, the public must be assured that race, or any other improper factor such as ethnicity or gender, is never the deciding factor in determining who will live and who will die.

Given the complexity of the problem, the Committee acknowledges the difficulty of crafting a single recommendation to remedy it. There is evidence that even subconscious or implicit bias plays a role in sentencing, which is particularly likely to affect deliberations where there are no or only a small number of people of color on a jury. Instead, the Committee encourages jurisdictions to take the needed first step of gathering data, and from there, experimenting with solutions. Whatever legislative solutions or initiatives a particular jurisdiction favors, each jurisdiction should ensure that people of color are part of every decision-making process within the criminal justice system.

The first and most important of these remedial steps is the rigorous gathering of data on the operation of the jurisdiction's capital punishment system and the role or potential role of racial discrimination or geography in it. Some states have implemented data collection pursuant to legislation aimed at combating racial profiling.[7] The work of such teams in New York and New Jersey are promising guides to how such data-gathering systems should be developed.[8] One critical aspect of a successful data-gathering system is that it operates on an ongoing and continuous basis to compile data over time.

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5 *See* Death Penalty Information Center, National Polls and Studies, http://deathpenaltyinfo.org/national-polls-and-studies (last visited Dec. 2, 2013) (*citing* Press Release, The Justice Project, (Sept. 14, 2000)); *see also* Gallup Organization, Poll Analysis, Slim Majority of Americans Think Death Penalty Fairly Applied in the Country (June 30, 2000), at http://www.gallup.com/poll/2761/slim-majority-americans-think-death-penalty-applied-fairly-country.aspx.

6 Jeffrey M. Jones, U.S. Death Penalty Support Lowest in More Than 40 Years (Oct. 29, 2013), at http://www.gallup.com/poll/165626/death-penalty-support-lowest-years.aspx.

7 Conn. Gen. Stat. Ann § 54-1m (West 2013) (Connecticut law requiring each municipal police department to record traffic stop information, including race of the driver, nature of traffic stop and outcome of the traffic stop).

8 In 2007, the New Jersey Death Penalty Study Commission issued a report that examined whether the selection of defendants or sentencing in New Jersey for capital trial was arbitrary, unfair, or discriminatory in any way. The Committee recommended to the state legislature that the death penalty be abolished, an action the legislature took in 2007. *See* New Jersey Legislature, New Jersey Death Penalty Study Commission: Overview of the Commission and Its Work, at http://www.njleg.state.nj.us/committees/njdeath_penalty.asp. In 2004, the New York Assembly Committees on Codes, Judiciary and Correction commenced a series of five public hearings to solicit information on issues relevant to the death penalty including race. *See* Assembly Standing Committee on Codes et al., The Death Penalty in New York (2005), at http://assembly.state.ny.us/comm/Codes/20050403/deathpenalty.pdf.

Jurisdictions cannot identify and remedy discrimination without detailed data, particularly in contemporary America when bias or prejudice most likely operate at an unconscious rather than a purposeful level. Comprehensive data collection is critical because information that would tend to suggest that discrimination and bias played a role in capital prosecutions is often outside the trial record and, therefore, not plainly obvious upon review. For example, ordinarily, the race of the jurors dismissed by prosecutors and defense counsel is not included in the record. Nor is the race of defendants, or victims, whose cases are chosen or not chosen for capital punishment throughout a state and across jurisdictions, readily available in centralized and searchable databases. All of this information, as well as additional data points, can only be made available and analyzed if there is a specific decision or requirement to collect it and specific steps are taken for its collection. Data collection also permits states to capture and analyze other important information, such as which aggravating factors were or were not present, background information on the defendant and myriad other factors that, when examined, may reveal important facts about the practical operation of a jurisdiction's death penalty system that would not otherwise be discernable.

Once jurisdictions have gathered comprehensive data on capital prosecutions, and made it publicly available, they, along with outside researchers, will be able to identify any factors that result in the disparate application of the punishment. Jurisdictions can then carefully consider and act on the results and design solutions to any revealed problems. The U.S. Supreme Court has suggested that legislatures are the appropriate bodies for this task. In *McCleskey v. Kemp*, the Court found that a complex statistical study indicating that racial considerations entered into the decision to sentence the defendants to death did "not demonstrate a constitutionally significant risk of racial bias." [9] One reason for the Court's unwillingness to intervene in light of statistical evidence is the Court's judgment that "[l] egislatures . . . are better qualified to weigh and 'evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the court.'"[10]

In 2009, North Carolina passed the "Racial Justice Act," which allowed an individual sentenced to death to challenge his or her sentence using statistical evidence of racial bias in the state's application of the death penalty.[11] If the defendant could prove that capital charges were sought or imposed more frequently for individuals of one race than other races or as punishment for crimes against victims of one race than other races, or if race was a significant factor in decisions to exercise peremptory challenges in jury selection, the judge

9 *McCleskey v. Kemp*, 481 U.S. 279, 313 (1987).

10 *Id.* at 319 (quotations omitted).

11 N.C. Gen Stat. Ann. § 15A-2010 *et seq* (2013) ("no person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race").

was required to convert the defendant's sentence to life in prison.[12] In April 2012, a North Carolina court found that race was, in fact, "a significant factor in the prosecution's use of peremptory strikes" in one death-sentenced inmate's case and therefore granted the inmate's motion for relief under the Act and converted his sentenced to life without the possibility of parole.[13] The legislature amended the Act in the summer of 2012 to limit the presentation of statistical evidence to the county or prosecutorial district at the time the death penalty was sought or imposed.[14] The legislature subsequently repealed the Act entirely in the summer of 2013. While repeal of the Act is an unfortunate development, North Carolina's experiment encouraged other states as well as Congress to consider similar bills.

The Committee also recommends that jurisdictions ensure that people of color are included among the decision-makers within the criminal justice system. In recent years, the Supreme Court has reaffirmed its commitment to its decision in *Batson v. Kentucky*[15] that peremptory challenges striking jurors of a particular race, without a sufficient, race-neutral rationale, violate the Equal Protection Clause of the U.S. Constitution.[16] Efforts should be redoubled, through vigorously enforcing *Batson v. Kentucky* and through effective application of fair cross-section requirements, to ensure racially and ethnic diverse grand juries (where grand juries exist) that indict and petit juries that decide guilt and punishment. Given the ever-increasing diversity of the American citizenry, each jurisdiction should ensure that people of color are included within the ranks of defense counsel, prosecutors, jurors and judges involved in capital decision-making processes.

The process of safeguarding fairness in the application of the death penalty and assuring the public that the system operates without racial discrimination is admittedly very challenging. Moreover, it is critical to address fairness and public confidence that discrimination plays no role in the decisions on who should live and who should die. These issues are among the most important confronting the death penalty system, and any set of meaningful reform efforts must address these questions as forthrightly as possible. This Recommendation will not fully address the challenges of reducing racial disparities, but it is a reasonable place to begin.

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12 N.C. Gen Stat. Ann. §§ 15A-2011(b)(1)-(3), 15A-2012(3) (2009).

13 *North Carolina v. Robinson*, No. 91 CRS 23143 (N.C. Sup. Ct. Apr. 20, 2012), at http://www.deathpenaltyinfo.org/documents/RobinsonRJAOrder.pdf. In the late 1990s, Kentucky implemented a "Racial Justice Act," although the Kentucky Act has yet to be applied to vitiate a death sentence. Ky. Rev. Stat. Ann. § 532.300 (West 2013). Kentucky's law has likely had less effect than North Carolina's because it requires the defense to raise the issue of racial motivation in seeking the death penalty pretrial, and thus before the penalty has been imposed. *Id.* § 532.300(4).

14 N.C. Gen Stat. Ann. § 15A-2011(c) (2012).

15 476 U.S. 79 (1986).

16 *See Snyder v. Louisiana*, 552 U.S. 472 (2008).

In addition, implementing meaningful proportionality review – comparing the characteristics of the crime, aggravating factors and mitigating factors – between and among cases in which a death sentence was imposed or could have been imposed but was not, is the only way to achieve true proportionality between and among defendants and crimes. Proportionality review approximating this approach (although only comparing cases in which a death sentence was imposed) was conducted by Justice Stewart in the U.S. Supreme Court's 1976 plurality opinion in *Gregg v. Georgia*, upholding Georgia's death penalty law.[17] Subsequently, in *Pulley v. Harris*, the Court held that proportionality review was not required of every capital case.[18] In light of *Pulley*, even states that did engage in proportionality review began to abbreviate their review, resulting in perfunctory review of death sentences when comparative proportionality review was conducted.[19] Former U.S. Supreme Court Justice John Paul Stevens lamented that "the likely result of such a truncated review" in states that do not "cabin the jury's discretion in weighing aggravating and mitigating factors[,] is the arbitrary or discriminatory imposition of death sentences in contravention of the Eighth Amendment."[20] While proportionality review may not be considered a requirement under the Eighth Amendment, the absence of meaningful, comparative review of death sentences imposed increases the likelihood of an unconstitutional punishment.

[17] *Gregg v. Georgia*, 428 U.S. 153, 202 (1976) (opinion of Stewart, J.).

[18] *Pulley v. Harris*, 465 U.S. 37 (1984).

[19] *Walker v. Georgia*, 555 U. S. ____ (2008); 129 S.Ct. 453, 456 (2008) (Stevens, J., on the denial of certiorari).

[20] *Id.* at 457.