check for support of any legislation concerning discrimination in capital sentencing.

William L. Robinson of the District of Columbia, Chair of the Section of Individual Rights and Responsibilities, opposed the amendment, stating that the Association could not oppose racial discrimination in capital sentencing on the one hand, and adopt an amendment that would preclude the ABA from doing anything about it on the other hand.

By voice vote, the House declined to approve the amendment to delete the second paragraph of the recommendation.

Judge Maxwell Heiman of Connecticut urged the House to adopt the revised resolution and put the Association on record as willing to take practical steps to back up its position on racial discrimination.

By voice vote, the House adopted the following recommendation as revised:

**Be It Resolved,** That the American Bar Association opposes discrimination in capital sentencing on the basis of the race of either the victim or the defendant.

**Be It Further Resolved,** That the American Bar Association supports the enactment of federal and state legislation which strives to eliminate any racial discrimination in capital sentencing which may exist.

**Be It Further Resolved,** That this resolution does not create a position for the American Bar Association on whether or not capital punishment is an appropriate criminal sanction.

Address of the President. President Robert MacCrate addressed the House with a brief review of Association progress in the past year. He commented that fresh emphasis had been placed on issues of competence, law discipline, dignity in advertising, reporting of lawyer misconduct, assistance to victims of mass disaster and pro bono responsibilities. President MacCrate also stated that there was an increased awareness of the importance of professional values, aspirational codes, pro bono programs and the strengthening of legal services, as well as a willingness to face issues.

Presentation of the ABA Medal. President Robert MacCrate presented the ABA Medal to F. William McCalpin of St. Louis, Missouri, in recognition of his vision and efforts in juris prudence. In his acceptance of the award, Mr. McCalpin emphasized the calling to public service lawyers have and the many intangible rewards that come from serving the public.

Second Session

Report of the Committee on Rules and Calendar. Clarence W. Walker,
REPORT NO. 2 OF THE
SECTION OF
INDIVIDUAL RIGHTS AND RESPONSIBILITIES
PRESENTED JOINTLY WITH THE
GENERAL PRACTICE SECTION
AND THE
CRIMINAL JUSTICE SECTION

Recommendation*

*Be It Resolved, That the American Bar Association opposes discrimination in capital sentencing on the basis of the race of either the victim or the defendant.

*Be It Further Resolved, That the American Bar Association supports the enactment of federal and state legislation which alleviates racial discrimination in capital sentencing and which provides that, absent successful rebuttal, a challenge to a death sentence can result in relief when there is a valid showing of a substantial disparity in the imposition of the death penalty which is statistically explicable only by reference to the races of either victims or defendants.

*Be It Further Resolved, That this resolution does not create a position for the American Bar Association on whether or not capital punishment is an appropriate criminal sanction.

Report

A. Summary

Numerous studies indicate a widespread pattern of racial discrimination in the imposition of capital punishment. In state after state, a defendant is far more likely to receive the death penalty for a particular capital murder if his victim is white than if his victim is black.

Legislative action to deal with this discrimination is necessary, in light of the Supreme Court's decision in McCleskey v. Kemp, 107 S. Ct. 1756 (1987). In McCleskey, the Court concluded that legislative action, not a Constitutional ruling, is the appropriate way to address the manner in which race improperly affects capital sentencing. Indeed,

*The recommendation was revised and approved. See page 13.
there is ample precedent for enacting legislation which deals with racial discrimination even though the Constitution does not itself mandate relief.

Legislation could be effective in combatting racial discrimination in the imposition of capital punishment, by providing that a challenge to a death sentence can succeed when there is a valid showing of a substantial disparity which is statistically explicable only by reference to race. This legislation would not eliminate the death penalty, nor would it affect sentencing in other cases.

The American Bar Association ("ABA") has adopted numerous resolutions and statements in opposition to racial discrimination in various contexts. Accordingly, the ABA's support of legislation providing for a successful challenge to a death sentence based on a valid statistical showing of racism in capital sentencing would be entirely consistent with the ABA's longstanding rejection of racial discrimination.

B. There is A National Pattern of Racial Discrimination In Capital Sentencing Based On The Race Of The Victim

Numerous studies concerning the imposition of capital punishment under current statutes reveal the same pattern: racial discrimination based on the race of the victim. In state after state, statistical analysis reveals that under otherwise similar circumstances, the killer of a white is far more likely to receive the death penalty than the killer of a black.

Probably the best-known study was conducted by Professor David

The Supreme Court termed this study "sophisticated" and assumed that it was statistically valid, in deciding McCleskey v. Kemp, 107 S.Ct. 1756, 1766 n.7 (1987). Professor Baldus examined over 2000 cases and considered 230 nonracial variables. Under his best statistical model, using logistic regression analysis, Professor Baldus found that a Georgia defendant’s odds of receiving a death sentence were 4.3 times greater if his victim were white than if his victim were black. ld. at 1763–64. To put this in perspective, smokers are 1.7 times more likely to die of coronary artery disease than nonsmokers of similar ages. Thus, while smoking cigarettes greatly increases the risk of dying from heart disease, the impact of smoking is considerably less than the race-of-victim effect on capital punishment.1 The Baldus study also showed that nearly six of every ten defendants who were sentenced to death for killing white people in cases similar to McCleskey’s would not have been sentenced to death if their victims had been black.2

A nationwide study by Jim Henderson and Jack Taylor, reporters for the Dallas Times Herald, encompassing 11,425 capital murders from 1977–84 revealed “that the killer of a white is nearly three times more likely to be sentenced to death than the killer of a black in the 32 states where the death penalty has been imposed***.” In some states, the disparities were even higher. In Maryland, killers of whites were eight times more like-

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ly to get the death sentence than Killers of Blacks Escape the Death Penalty. Dallas Times Herald, Nov. 17, 1985, at 1. killers of blacks: in Arkansas, they were six times more likely to get it; and in Texas, they were five times more likely to get it.3

The nationwide results are supported by other studies on individual states or groups of states. A 1985 Louisiana study showed that 14.5% of those who killed whites, as compared to 4.1% of those who killed blacks, were sentenced to die, and that no whites who killed blacks were sentenced to die.5 Samuel Gross and Robert Mauro extensively studied homicides from 1976–80 and, after adjusting for background variables, found statistically significant disparities according to the victim’s race in Georgia, Florida, Illinois, Oklahoma, North Carolina and Mississippi.6 Among the results were that in Georgia, Killers of Whites were almost ten times as likely to get the death sentence as killers of blacks; in Florida, they were eight times as likely to get it; and in Illinois, they were six times as likely to get it.7 Other statistical studies have shown significant race-of-the-victim effects in South Carolina,8 Cook County, Illinois,9 Mississippi,10 New Jersey,11 and Colorado.12

C. Legislation Is Needed To Afford Redress For This Discrimination In Capital Sentencing

1. The ABA Should Consider It Intolerable For Such Discrimination To Persist


In view of the ABA’s strong record of opposition to racial discrimination in its various guises,13 the ABA should consider the significant pattern of racial discrimination in capital sentencing based on the race of the victim to be in-

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2 Possible “reporting bias in the FBI data” used in the nationwide study may cause it to underestimate the extent of race-of-victim disparities. See Baldus, Pulaski and Woodworth, Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts, 15 State L. Rev. 133, 161 n.55, 162 n.58 (1986).
5 Ibid at 55.
8 R. Berk and J. Lowery, Factors Affecting Death Penalty Decisions in Mississippi (June 1985) (unpublished manuscript).
11 See discussion at pp. 12–13 infra.
tolerable. Only last year, the ABA condemned crimes of violence based on bias or prejudice against the victim’s race. At least as unacceptable as such crimes is discrimination based on the victim’s race in selecting people for execution.

2. The Supreme Court Has Clearly Stated That Legislative Action Is An Appropriate Way To Address This Situation

Legislative action by Congress and State legislatures is an appropriate way to address racial discrimination in capital sentencing. In \textit{McCleskey v. Kemp}, 107 S.Ct. 1756 (1987), the Supreme Court rejected claims concerning such discrimination which were asserted directly under the Constitution’s Eighth and Fourteenth Amendments. But in doing so, the Court stressed that “McCleskey’s arguments are best presented to the legislative bodies***.” It said that legislative entities are better able than the Supreme Court to take action in light of such statistical studies as Professor Baldus’ “sophisticated” study of race-of-the-victim effects in capital sentencing. \textit{Id.} at 1781 and 1766 n.7.

Legislation designed to provide redress where there is a racially discriminatory pattern of capital sentencing would thus be completely consistent with the Supreme Court’s decision in \textit{McCleskey}. Indeed, the Supreme Court has held that statutes designed to provide redress against racial discrimination may constitutionally be enacted in the wake of Supreme Court decisions holding that that \textit{same} redress is not directly mandated by the Constitution. In such cases, Congress validly exercises its power under Section Five of the Fourteenth Amendment to pass remedial legislation aimed at ensuring equal protection under the law.\footnote{\textit{See Oregon v. Mitchell}, 400 U.S. 112 (1970) (upholding legislation suspending the use of literacy tests in all state and federal elections), and \textit{Katzenbach v. Morgan}, 384 U.S. 641, 649–50, 657–58 (1966) (upholding section of Voting Rights Act which invalidated New York’s English literacy requirement), both of which were in the wake of \textit{Lassiter v. Northampton County Board of Elections}, 360 U.S. 45 (1959), which held that such state literacy requirements do not violate the Equal Protection Clause; see also \textit{Thornburg v. Gingles}, 106 S.Ct. 2752, 2763 (1986) (applying amendment to Voting Rights Act making it unlawful for an electoral system to have a discriminatory effect), in the wake of \textit{Mobile v. Bolden}, 446 U.S. 55 (1980), which held that plaintiffs suing directly under the Fourteenth Amendment must prove discriminatory intent.}

The Supreme Court said in one such case that Congress was better able than the judiciary to “assess and weigh the various conflicting considerations” that were involved.\footnote{See ABA Policy and Procedures Handbook (1987–88), p. 126 (resolution adopted}

3. Legislation Could Effectively Deal With Racial Discrimination In The Imposition of Capital Punishment

Legislation providing that a challenge to a death sentence can succeed when a valid statistical showing indicates a substantial disparity in capital sentencing according to the races of either victims or defendants
could readily be implemented by the courts. Moreover, it could encourage states to take a variety of actions designed to eliminate such substantial disparities in their death penalty systems. Since such legislation could validly be confined to capital cases, it would not create confusion in the criminal justice system as a whole, as the Supreme Court feared a different holding in *McCleskey* might have done.17

(a) The Courts Could Implement Such Legislation In The Same Way As In Dealing With Racially Discriminatory Effects In Other Contexts—The type of legislation advocated herein would not create an unprecedented task for the courts. There are other types of claims for which a *prima facie* case of racial discrimination is established through the use of a statistical study to show a significantly racial discriminatory effect, and relief is granted absent effective rebuttal of the *prima facie* case. In these contexts, the courts can consider the validity of the statistical studies presented to them before granting relief. The same could be done in the context of capital sentencing.

One situation in which a *prima facie* case of racial discrimination can be established without directly proving an intention to discriminate involves jury selection. A criminal defendant can establish a *prima facie* case by showing a substantial statistical disparity between the percentage of blacks in the population and the percentage of blacks in the pool from which his grand jury and trial jury was selected.18 Similarly, the Supreme Court struck down a statute in 1985 on the basis of statistical evidence that blacks were disqualified from voting at 1.7 times the rate of whites.19

Moreover, the courts have granted relief in other contexts in which a racially discriminatory effect has been shown, without direct proof of a discriminatory purpose. They have done so in the areas of voting rights20 and prosecutors’ peremptory challenges to black trial jurors.21

It would be equally possible to grant relief in the context of capital sentencing, in which the broad discretion given to, *inter alia*, the jury affords “a unique opportunity for racial prejudice to operate but remain undetected.”22

(b) States Could Change Their Capital Punishment Systems To Eliminate The Substantial Patten Of Racial Discrimination—The substantial pattern of racial discrimination in capital sentencing need not persist.23 States could take various measures designed to prevent substantial racial disparities among their capital cases.

For example, states could provide clearer guidance to prosecutors as to when it is appropriate to seek the death penalty.24 Unfortu

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21 Justices Blackmun and Stevens recognized this, in dissenting in *McCleskey*, *supra*, at 1805 (Blackmun, J., dissenting), 1806 (Stevens, J., dissenting).
22 The State Attorney of Montgomery County, Maryland got so frustrated that he wrote an article in his state’s bar journal, pleading for the courts to give him guidance on how to exercise his tremendous discretion in seeking the death penalty. Sonnen, *Prosecutorial Discretion and the Death Penalty*, Md. B.J. Mar. 1985, at 6, 7.

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18 See *McCleskey*, *supra*, at 1779.
19 See *McCleskey*, *supra*, at 1779.
20 See *McCleskey*, *supra*, at 1779.
nately, many prosecutors have discriminated based on the race of the victim in deciding when to seek the death penalty for capital murders. Patterns of such discrimination by prosecutors have been statistically shown to exist in several states.\(^{25}\)

States should also take various measures to make it less likely that juries will act in a racially discriminatory manner. For example, states could take steps to make trial attorneys more likely to ask potential jurors questions “on the issue of racial bias.” In *Turner v. Murray*, 476 U.S. 28, 36–37 (1986) (footnote omitted), the Supreme Court held that an attorney who wishes to ask such questions in an interracial capital case must be permitted to do so. The plurality opinion said that “[m]ore subtle, less consciously held racial attitudes,” such as “[f]ear of blacks***might incline a juror to favor the death penalty.” *Id.* at 35 (plurality opinion of White, J.) (footnote omitted).

However, attorneys who represent capital defendants may not ask such questions, for two types of reasons. Many attorneys would not want to ask such questions in the presence of all prospective jurors, for fear that a single racially-oriented remark would influence the remaining veniremen. Other attorneys would not ask such questions under any circumstances, because they fear community reproach for raising a racial issue or because they are otherwise ineffective.\(^{26}\)

The states could deal with these problems by (1) requiring trial judges to ask defendants on the record whether they wish for the questioning envisioned in *Turner* to occur, (2) permitting the type of individual questioning envisioned in *Turner* to occur (under the trial judge’s supervision) outside the presence of the other prospective jurors, and (3) implementing the ABA’s February 1985 resolution concerning representation of death penalty defendants, by mandating the appointment of two trial counsel for each such defendant, with the primary attorney having substantial experience including trial work involving serious felonies.\(^{27}\)

Adopting the ABA resolution would also make it less likely that counsel would waive valid claims of racial discrimination in the composition of the venires from which grand and petit jurors are chosen in capital cases.

Another action which states could take which should diminish the impact of undetected racism in jurors is to require private, individualized voir dire of each prospective juror in capital cases on all questions related to possible bias or prejudice, even in situations not covered by *Turner, supra*. Many state courts routinely use only *en masse* questioning to determine whether any prospective juror is biased or prejudiced. Yet, as the Mississippi Supreme Court has recognized, “[e]lementary princi-

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ple of group psychology, as well as empirical findings, make clear that, where questions are put to the panel as a whole, the average potential juror will be extremely reluctant to disclose his biases.28

An important failsafe against racial discrimination according to victims' races would be true proportionality reviews in which state appeals courts would, in appropriate cases, change death sentences to life sentences. Such true proportionality reviews would consider not only cases in which the sentence was death but also capital murder cases in which a life sentence, or a lesser penalty, was imposed. This would provide an important safeguard against discrimination by race of the victim, where such discrimination is not substantially eliminated by the other types of measures discussed above. Yet up until now, even states, such as Georgia, which purport to engage in proportionality review have used a "mechanical, almost ritualistic approach,"29 in which they do not consider cases in which life (or lesser) sentences have been imposed.30

A final protection against racism in the imposition of capital punishment would be clemency proceedings in which race-of-victim discrimination would be a basis for granting clemency. In this decade, almost no one has been granted clemency in the states in which most executions have taken place, even when a compelling presentation in support of clemency has been made.31 Clemency proceedings were far more meaningful in the past,32 and they could become so again.

(c) Legislation Dealing With Racism In Capital Sentencing Would Not Eliminate The Death Penalty, Nor Would It Affect Non-Capital Cases—Legislation dealing with racism in capital sentencing would not eliminate the death penalty. It would affect only cases in which a valid statistical showing is made of racial discrimination in the imposition of the death penalty. Indeed, as discussed in the preceding section, there are many ways in which that discrimination can be combatted while retaining capital punishment. The ABA has not taken a position on whether capital punishment should or should not exist for murders committed by adults.33 That posture would be unaffected by the ABA's support for legislation attacking racial discrimination in the imposition of the death penalty.

Moreover, legislation specifically drafted to cover capital sentencing would have no effect on non-capital cases. Unlike the Supreme Court's constitutional decisions, which are based on principles whose applicability it may be difficult to limit, a legislative body can limit the scope of the laws it

28Fisher v. State, 481 So. 2d 203, 221 (Miss. 1985).
31See id. at 844-45.
enacts as long as there is some rational basis for its doing so. In balancing the competing policy issues, it would be rational to limit relief for race-of-the-victim discrimination to capital cases. To do so would be in keeping with the principle, repeatedly recognized by the Supreme Court, that the death penalty, because of its finality and irrevocability, is qualitatively different from any other criminal penalty. Hence, the enactment of legislation whose applicability is limited to capital cases would not present the danger which the Supreme Court pointed to in McCleskey when it rejected the constitutional claim presented therein, i.e., that if that constitutional claim were granted, the Court “could soon be faced with similar claims as to other types of penalty,” which could “throw[] into serious question the principles that underlie our entire criminal justice system.”

D. The ABA’s Support For Legislation To Provide Redress For Racial Discrimination In Capital Sentencing Would Be In Keeping With The ABA’s Longstanding Opposition To Racial Discrimination

The ABA’s support of the legislation discussed herein would be in keeping with its long record of opposition to racial discrimination, which it has expressed in a wide variety of contexts. As mentioned above, the ABA just last year condemned crimes of violence based on bias or prejudice against the victim’s race. In prior years, the ABA has:

1. Announced a policy not to discriminate on the basis of race;
2. Strongly condemned all discriminatory hiring practices in the legal profession;
3. Opposed discrimination against racial and ethnic minorities in law school admissions and entry into the legal profession;
4. Opposed federal financial assistance to institutions which discriminate in any of their operations; and
5. Opposed discrimination in the selection of the judiciary.

Moreover, the ABA, while taking no position on whether there should be a death penalty generally, has expressed positions on aspects of its administration. Thus, as noted above, the ABA has issued recommendations concerning the number and experience of defense counsel who should be appointed to represent a capital defendant. The ABA has also opposed in principle the imposition of capital punishment upon any person for any offense committed while under the age of 18.

38 See id., p. 126 (policy adopted August 1965).
40 See id., p. 170 (statement adopted August 1980).
41 See id., p. 127 (resolution adopted February 1986).
42 See id., p. 127 (resolution adopted August 1986).
43 See discussion at pages 9–10 & n. 27, supra.
thermore, the ABA has urged that the Supreme Court adopt a rule providing for appointment of counsel to pursue post-conviction remedies in death penalty cases and has advocated adequate compensation for such counsel. ⁴⁵

Conclusion

Racial discrimination in the imposition of capital punishment is intolerable. Accordingly, the American Bar Association supports appropriate federal and state legislation providing that a challenge to a death sentence can succeed when a valid statistical showing indicates a substantial disparity in capital sentencing according to the races of either victims or defendants.

Respectfully submitted,

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August, 1988

⁴⁵See id., p. 142 (resolution adopted February 1979); Resolution No. 125 adopted February 1988.