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Rethinking *McClesky v. Kemp*: How U.S. Ratification of the International Convention on the Elimination of All Forms of Racial Discrimination Provides a Remedy for Claims of Racial Disparity in Death Penalty Cases

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Robin H. Gise

Abstract

This Note addresses U.S. obligations under CERD in the context of racial disparity in the imposition of the death penalty and proposes courses of domestic and international action. Part I examines the historical racial disparity in the imposition of the death penalty in the United States. It discusses the U.S. Supreme Court's decision in *McClesky* to deny relief to a death row inmate who demonstrated that race influenced whether a death sentence was imposed. Part I also explores the development of CERD and discusses CERD's standard for proving discrimination based on a showing of racially discriminatory effect. Finally, Part I addresses the U.S. ratification of CERD and its reservations to the treaty. Part II explores commentators' varying positions on CERD's applicability in the United States in light of the declaration making CERD a non-self-executing treaty. Part II also addresses the divergence of U.S. standards for proving discrimination, which generally require a showing of discriminatory purpose, from those under CERD, which recognize claims based on a showing of discriminatory effect. Part III argues that despite the non-self-executing declaration, death row inmates who demonstrate that the death penalty disproportionately affects their racial group may invoke CERD as a defense. This part also asserts that because U.S. standards for proving discrimination in the criminal justice context diverge from the standards set forth under CERD, U.S. courts should address the merits of claims invoking CERD as a defense. Finally, Part III encourages State Parties besides the United States to use the treaty's enforcement mechanisms to challenge the United States' non-self-executing declaration as being incompatible with the object and purpose of the treaty and to protest its failure to address racial disparity in the imposition of the death penalty as a violation of CERD. This Note concludes that CERD has the potential to be a powerful tool to address racial disparity in death penalty cases in the United States.

NOTE

RETHINKING *McCLESKY v. KEMP*: HOW U.S. RATIFICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION PROVIDES A REMEDY FOR CLAIMS OF RACIAL DISPARITY IN DEATH PENALTY CASES

*Robin H. Gise**

INTRODUCTION

Warren McClesky, an African-American man, was convicted of murdering a white police officer¹ and sentenced to death in the Superior Court of Fulton County in Georgia in 1978.² After making several appeals to the Supreme Court of Georgia,³ McClesky filed a writ of *habeas corpus* in federal district court in the

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1. *McClesky v. Kemp*, 481 U.S. 279, 283 (1987). The murder occurred in the course of a robbery of a furniture store, which McClesky and three accomplices planned and carried out. *Id.* The store manager was forced at gunpoint to turn over the store receipts, his watch, and US\$6. *Id.* During the robbery, a police officer, answering a silent alarm, entered the store through the front door and was shot and killed. *Id.* McClesky admitted to participating in the robbery, but denied shooting the officer. *Id.* The state presented substantial evidence linking McClesky to the shooting. *Id.* The jury convicted McClesky of two counts of armed robbery and one count of murder and recommended the death penalty. *Id.* at 284. The trial court complied and sentenced McClesky to death. *Id.*

2. *Id.* at 282-83. In 1987, the U.S. Supreme Court considered whether McClesky's evidence that racial factors enter into death sentencing in Georgia proved that McClesky's death sentence violated the Eighth and Fourteenth Amendments of the U.S. Constitution. *Id.* McClesky presented a complex statistical study indicating that black defendants convicted of killing white victims were more likely to receive the death penalty in Georgia than any other racial combination. *Id.* at 287. The Court upheld his death sentence, finding that the evidence did not demonstrate a constitutional violation. *Id.* at 319-20.

3. *Id.* at 284. McClesky appealed his conviction and sentence to the Supreme Court of Georgia, which affirmed on both counts. *McClesky v. State*, 263 S.E.2d 146 (Ga. 1980). He then appealed to the U.S. Supreme Court, but it denied *certiorari*. *McClesky v. Georgia*, 449 U.S. 891 (1980). The trial court denied his motion for a new trial and his writ of *habeas corpus*, which was also denied by another Georgia trial court. *McClesky*, 481 U.S. at 285-86. McClesky appealed a second time to the Supreme Court of Georgia, which denied his petition, and then appealed to the U.S. Supreme Court, which again denied *certiorari*. *Id.* at 286.

Northern District of Georgia.⁴ His petition challenged the death sentence on the grounds that it was imposed in a racially discriminatory manner that violated his Eighth Amendment⁵ right to be free from cruel and unusual punishment and his Fourteenth Amendment⁶ right to equal protection under the laws.⁷ In support of his claim, McClesky presented a statistical study demonstrating that race influenced whether the death penalty was imposed in Georgia.⁸ In 1987, the U.S. Supreme Court in *McClesky v. Kemp* upheld the death sentence.⁹ While the Court presumed the validity of the statistical study,¹⁰ it held that the study did not establish a constitutional violation because it did not demonstrate that the decisionmakers in McClesky's case purposely discriminated against him.¹¹

In 1994, the U.S. Senate gave its advice and consent¹² to the Clinton Administration to ratify the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD" or "Convention").¹³ CERD prohibits racial discrimination, which it defines as any distinction based on race that has the purpose or effect of impairing human rights and fundamental freedoms.¹⁴ CERD requires nations that have ratified CERD

4. *Id.* McClesky's petition for a writ of *habeas corpus* in federal district court for the Northern District of Georgia raised eighteen claims, including one that the Georgia death sentencing process was administered in a racially discriminatory manner, which violated the Eighth and Fourteenth Amendments of the U.S. Constitution. *Id.*

5. See U.S. CONST. amend. VIII (stating that "cruel and unusual punishments" shall not be inflicted).

6. See U.S. CONST. amend. XIV (stating no state shall "deny to any person within its jurisdiction the equal protection of the laws").

7. *McClesky v. Kemp*, 481 U.S. at 279, 283 (1987).

8. See *id.* (noting that McClesky submitted statistical study conducted by Profs. David C. Baldus, Charles Pulaski, and George Woodworth ("Baldus Study"), which demonstrated disparity in imposition of death penalty based on race of victim and race of defendant).

9. See *id.* at 320 (affirming judgment of Court of Appeals for Eleventh Circuit).

10. See *id.* at 292 n.7 (explaining that U.S. Supreme Court assumed that Baldus Study was statistically valid and did not review factual findings of district court).

11. See *id.* at 293 (rejecting McClesky's argument that Baldus Study compelled inference of purposeful discrimination).

12. See U.S. CONST. art. II, § 2, cl. 2 (stating that two-thirds of U.S. Senate must give "advice and consent" to President in order to ratify treaties).

13. See 140 CONG. REC. S7634 (daily ed. June 24, 1994) [hereinafter *CERD Ratification*] (consenting to ratification of CERD).

14. See International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, art. 1(1), 660 U.N.T.S. 195, 216 [hereinafter CERD]. Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD" or "Convention") states:

("State Parties") to review, amend, or nullify laws and practices that have the purpose or effect of discriminating on the basis of race.¹⁵ The United States ratified CERD with three reservations, an understanding, and a declaration that qualified the extent to which the United States would adhere to the treaty.¹⁶

The declaration stated that the United States did not ratify CERD as a self-executing treaty.¹⁷ By declaring CERD to be non-self-executing, the United States asserted that CERD did not create an independent cause of action in U.S. courts.¹⁸ The United States claimed that because its laws provided extensive protections and remedies against racial discrimination, it did not need to enact additional legislation to comply with CERD.¹⁹

Critics argue that by ratifying CERD as non-self-executing, the United States prevents U.S. citizens from invoking rights under the treaty, thereby nullifying the treaty's effect in the United States.²⁰ Other critics contend that CERD could provide

In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Id.

15. *See id.* art. 2(1)(c), at 218 (stating that "[e]ach State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists").

16. *CERD Ratification*, *supra* note 13, at S7634.

17. *Id.*; *see* *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (explaining that "self-executing" treaty requires no domestic legislation to give it force of law in United States); *United States v. Thompson*, 928 F.2d 1060, 1066 (11th Cir. 1991) (finding that "a treaty must be self-executing in order for an individual citizen to have standing to protest a violation of the treaty").

18. *Hearing on the International Convention on the Elimination of All Forms of Racial Discrimination Before the Senate Comm. on Foreign Relations*, 103d Cong. 13 (1994) [hereinafter *Foreign Relations Committee Hearing*] (statement of Conrad K. Harper, Legal Advisor, U.S. Dep't of State).

19. *See id.* (noting that existing federal, state, and local regulations provide comprehensive opportunities for challenges to discriminatory statutes and other government action).

20. *See id.* at 51 (prepared statement of Wade Henderson, Dir., Washington Bureau, National Ass'n. for the Advancement of Colored Persons ("NAACP")) (claiming that non-self-executing declaration will deny U.S. citizens protection of international human rights law); *id.* at 52 (statement of William T. Lake, Member, Board of Dirs., International Human Rights Law Group ("IHLG")) (asserting that non-self-executing declaration will prevent U.S. citizens from enforcing treaty rights in U.S. courts).

additional remedies for U.S. citizens whose claims of racial discrimination are not redressed in U.S. courts.²¹ These commentators argue that although U.S. law generally requires a complainant to demonstrate discriminatory purpose in order to gain relief under the Equal Protection Clause,²² CERD recognizes proof of discrimination by showing discriminatory effect alone.²³

Most commentators maintain that by precluding private causes of action, the non-self-executing declaration effectively prevents U.S. courts from addressing the substantive provisions of CERD.²⁴ Some scholars have argued, however, that a non-self-executing treaty does not preclude a claim based on treaty rights as long as the claim invokes a cause of action under U.S. law, rather than relying on the treaty itself as a cause of action.²⁵ A

21. See Nkechi Taifa, *Codification or Castration? The Applicability of the International Convention to Eliminate All Forms of Racial Discrimination to the U.S. Criminal Justice System*, 40 How. L.J. 641, 670 (1997) (noting that issues of discrimination in U.S. criminal justice context may violate CERD provisions that prohibit laws and practices with discriminatory effect); Chris Weaver & Will Purcell, *The Prison Industrial Complex: A Modern Justification for African Enslavement*, 41 How. L.J. 349, 373 (1998) (stating that CERD's protections against discriminatory effect may avoid current obstacles under U.S. equal protection analysis).

22. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 270-71 (1977) (rejecting claim under Equal Protection Clause after finding that local housing authority did not purposefully discriminate in zoning decision); *Washington v. Davis*, 426 U.S. 229, 246 (1976) (holding that disproportionate racial impact of tests for police departments applicants did not demonstrate purposeful discrimination against blacks); *Whitus v. Georgia*, 385 U.S. 545, 550 (1967) (finding that petitioner has burden to prove existence of purposeful discrimination).

23. See Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AM. J. INT'L L. 283, 288 (1985) (noting that where discriminatory purpose cannot be shown to be within CERD's scope, it may be inferred by demonstrating discriminatory effect); Taifa, *supra* note 21, at 659 (stating that CERD condemns laws and practices with discriminatory effect regardless of purpose).

24. See *Foreign Relations Committee Hearing*, *supra* note 18, at 62 (prepared statement of American Civil Liberties Union ("ACLU")) (stating that non-self-executing declaration deprives U.S. courts of opportunity to use CERD provisions to expand individual rights); *id.* at 65 (prepared statement of Amnesty International USA) (asserting that non-self-executing declaration denies U.S. citizens of opportunities under CERD to challenge discriminatory practices in U.S. courts).

25. See David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 152 (1999) (explaining that because treaty is non-self-executing does not mean that it cannot be directly applied by U.S. courts); Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1143 (1992) (stating that cause of action under treaty itself is not necessary if treaty is invoked as defense or enforced pursuant to domestic common law forms of action).

criminal defendant, for example, could invoke a right under a non-self-executing treaty as a defense to criminal charges.²⁶

Invoking CERD as a defense to a death sentence on the grounds of disproportional racial impact would provide an opportunity for U.S. courts to reexamine *McClesky* in light of CERD.²⁷ *McClesky* has foreclosed subsequent claims by death row inmates who demonstrate that the death penalty is imposed in a racially discriminatory manner.²⁸ That more U.S. states are legalizing the death penalty²⁹ and executing more prisoners³⁰ increases the significance of racial disparity in death penalty cases.³¹

26. See Sloss, *supra* note 25, at 214 (stating that where defendant in civil or criminal proceeding by government invokes human rights treaty in defense, court should reach merits of claim unless it is frivolous, relief is available under domestic law, or there is another forum to adjudicate claim).

27. See generally *id.* at 219-20 (stating that human rights treaties such as CERD could provide remedies for individuals who allege violations of rights that are arguably protected under those treaties, but not protected under constitutional, statutory, or common law).

28. See, e.g., *Davis v. Greer*, 13 F.3d 1134, 1143 (7th Cir. 1994), *cert. denied*, 513 U.S. 933 (1994) (rejecting death row inmate's claim that Illinois death penalty statute was applied in racially discriminatory manner and basing decision on U.S. Supreme Court's holding in *McClesky*); *Fuller v. Georgia State Bd. of Pardons and Paroles*, 851 F.2d 1307, 1310 (11th Cir. 1988) (rejecting inmate's allegation of discrimination that was based on statistics that state granted white rapists parole more often than black rapists and finding that *McClesky* foreclosed inmate's claim absent showing of discriminatory purpose of decisionmakers).

29. See *Report of United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum: Mission to the United States*, U.N. Doc. E/CN.4/1998/68/Add.3, ¶ 45 (1998) (visited Mar. 2, 1999) <<http://www.unhchr.ch/html/menu4/chrrep/98chr68a3.htm>> (on file with the *Fordham International Law Journal*) [hereinafter *Special Rapporteur's Report*]. Kansas and New York reinstated the death penalty in 1994 and 1995, respectively. *Id.* Alabama, Colorado, Delaware, Florida, Georgia, Indiana, New Hampshire, North Carolina, and Tennessee have enacted laws increasing the number of aggravating circumstances that qualify a murder as a capital case. *Id.* ¶ 47. The federal government reintroduced the death penalty in 1988 through the Anti-Drug Abuse Act and expanded its use in the Federal Death Penalty Act of 1994. *Id.* ¶ 48. Currently, 40 U.S. jurisdictions, including 38 states, the federal government, and the U.S. military, have death penalty statutes. Amnesty International USA, *Retentionist Jurisdictions in the United States* (visited Mar. 2, 1999) <<http://amnestyusa.org/abolish/retentionist.html>> (on file with the *Fordham International Law Journal*).

30. See Amnesty International USA, *U.S. Executions by Year Since 1976* (visited Mar. 2, 1999) <<http://amnestyusa.org/abolish/exesince76.html>> (on file with the *Fordham International Law Journal*) (stating that there were 68 executions in 1998, 38 executions in 1993, and 11 executions in 1988).

31. See, e.g., ABA Section of Individual Rights and Responsibilities, *Recommendation 107* (1997) (calling for moratorium on all executions until death penalty cases are administered fairly and impartially without discrimination based on race).

This Note addresses U.S. obligations under CERD in the context of racial disparity in the imposition of the death penalty and proposes courses of domestic and international action. Part I examines the historical racial disparity in the imposition of the death penalty in the United States. It discusses the U.S. Supreme Court's decision in *McClesky* to deny relief to a death row inmate who demonstrated that race influenced whether a death sentence was imposed. Part I also explores the development of CERD and discusses CERD's standard for proving discrimination based on a showing of racially discriminatory effect. Finally, Part I addresses the U.S. ratification of CERD and its reservations to the treaty. Part II explores commentators' varying positions on CERD's applicability in the United States in light of the declaration making CERD a non-self-executing treaty. Part II also addresses the divergence of U.S. standards for proving discrimination, which generally require a showing of discriminatory purpose, from those under CERD, which recognize claims based on a showing of discriminatory effect. Part III argues that despite the non-self-executing declaration, death row inmates who demonstrate that the death penalty disproportionately affects their racial group may invoke CERD as a defense. This part also asserts that because U.S. standards for proving discrimination in the criminal justice context diverge from the standards set forth under CERD, U.S. courts should address the merits of claims invoking CERD as a defense. Finally, Part III encourages State Parties besides the United States to use the treaty's enforcement mechanisms to challenge the United States' non-self-executing declaration as being incompatible with the object and purpose of the treaty and to protest its failure to address racial disparity in the imposition of the death penalty as a violation of CERD. This Note concludes that CERD has the potential to be a powerful tool to address racial disparity in death penalty cases in the United States.

I. *RACIAL DISPARITY IN U.S. DEATH PENALTY CASES AND
THE STANDARDS FOR PROVING DISCRIMINATION
UNDER CERD*

Commentators in the United States and in the international community have observed that the imposition of the death penalty in the United States has a discriminatory impact on racial

minorities.³² In *McClesky*, the U.S. Supreme Court rejected a constitutional challenge to a death sentence on the grounds that the defendant failed to prove that the state acted with a racially discriminatory purpose by imposing his sentence.³³ The Court found that McClesky's evidence indicating that the death penalty had a racially disproportionate effect on blacks³⁴ was insufficient to demonstrate discriminatory purpose.³⁵ Seven years later in 1994, the United States ratified CERD, which requires State Parties to review, amend, or nullify laws and practices that have a racially discriminatory effect.³⁶ The United States, however, included a declaration stating that the Convention was non-self-executing, which precludes U.S. citizens from invoking private causes of action under CERD.³⁷ Numerous commentators have criticized the non-self-executing declaration as preventing the extension of CERD's protections to U.S. citizens,³⁸ noting that

32. See 140 CONG. REC. S12309-02, S12311 (daily ed. Aug. 23, 1994) [hereinafter *Violent Crime Act Debate*] (statement of Sen. Leahy) (stating that issues of race, class, and quality of counsel influence who receives death penalty); U.S. GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERNS OF RACIAL DISPARITIES (Feb. 1990), reprinted in 137 CONG. REC. S8263-01, S8272 (daily ed. June 20, 1991) [hereinafter GAO REPORT] (finding pattern of evidence indicating racial disparities in charging, sentencing, and imposition of death penalty in United States); *Special Rapporteur's Report*, supra note 29, ¶ 62 (noting that race, class, and economic status are considered key elements affecting imposition of death penalty); Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of the Racial Discrimination in Infliction of Death Penalty*, 35 SANTA CLARA L. REV. 433, 434 (1995) (noting that majority of those sentenced to death committed crimes against white victims); Ronald J. Tabak, *Is Racism Irrelevant? Or Should the Fairness in Death Sentencing Act Be Enacted to Substantially Diminish Racial Discrimination in Capital Sentencing*, 18 N.Y.U. REV. L. & SOC. CHANGE 777, 778 (1990-1991) (noting that defendant is more likely to receive death penalty if victim is white).

33. See *McClesky v. Kemp*, 481 U.S. 279, 297 (1987) (finding that evidence of racial disparities in imposition of death penalty does not demonstrate that decisionmakers in McClesky's case acted with discriminatory purpose).

34. See *id.* at 287 (noting that Baldus Study indicates that black defendants, such as McClesky, who kill white victims, have greatest likelihood of receiving death penalty).

35. See *id.* at 297-99 (finding that Baldus Study's suggestion that death penalty had racially disproportionate effect did not demonstrate that Georgia had violated Equal Protection Clause).

36. See CERD, supra note 14, art. 2(1)(c), at 218 (stating that State Parties must take steps to address laws and practices that have effect of creating or perpetuating discrimination).

37. *Foreign Relations Committee Hearing*, supra note 18, at 13 (statement of Conrad K. Harper, Legal Advisor, U.S. Dep't of State).

38. See Gay J. McDougall, *Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination*, 40 HOW. L.J. 571, 588 (1997) (noting that non-self-executing declaration denies U.S. citizens access

CERD's protections against discriminatory effect would provide more remedies for discrimination than currently available under U.S. law.³⁹

A. *Racial Disparity in the Imposition of the Death Penalty in the United States*

A stronger statistical connection between race and the imposition of the death penalty exists than between smoking and heart disease.⁴⁰ Commentators have linked the current disparity to the historical racial inequality in the United States.⁴¹ In the first half of the twentieth century, Southern states used the death penalty as a vehicle of racial violence against African-Americans.⁴² While the U.S. Supreme Court declared the death penalty unconstitutional in 1972 due to arbitrariness and discrimination,⁴³ it upheld the death penalty in 1976, finding that states had incorporated sufficient protections into their death penalty statutes.⁴⁴ In 1987, the Court rejected McClesky's claim that the death penalty was imposed in discriminatory manner, despite evidence indicating that race influenced the imposition of the

to domestic legal remedies under CERD); Taifa, *supra* note 21, at 650 (stating that non-self-executing declaration nullifies CERD's effect).

39. See McDougall, *supra* note 38, at 585 (stating that because courts have held that Fourteenth Amendment requires proof of discriminatory purpose in addition to effect, Article 2(1)(c) of CERD may extend beyond current constitutional protections); Taifa, *supra* note 21, at 670 (noting that issues of race discrimination in U.S. criminal justice system may violate CERD provisions condemning practices that have racially discriminatory effect).

40. Tabak, *supra* note 32, at 781. A study of race in death sentencing in Georgia showed that defendants charged with killing whites were 4.3 times more likely to receive a death sentence than those charged with killing blacks. *Id.* Smokers are 1.7 times more likely to die of coronary artery disease than non-smokers of similar ages. *Id.* Tabak notes that while smoking greatly increases the chance of dying from heart disease, smoking has a lesser impact statistically than the effect of victim's race on capital sentencing. *Id.*

41. See *McClesky v. Kemp*, 481 U.S. 279, 334-35 (1987) (Brennan, J., dissenting) (finding that Georgia's legacy of racism in criminal justice system influences current racial disparities in death penalty cases); Bright, *supra* note 32, at 439 (stating that death penalty descends from lynchings and other forms of racial violence).

42. See Bright, *supra* note 32, at 440 (noting that after abolition of slavery, Southern states implemented disparate punishments based on race of victim and defendant).

43. See *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972) (per curiam) (holding that imposition of death penalty constituted cruel and unusual punishment in violation of Eighth and Fourteenth Amendments).

44. See *Gregg v. Georgia*, 428 U.S. 153, 179-80 (1976) (finding that states' newly-enacted death penalty statutes addressed concerns in *Furman*, by specifying factors to be weighed and procedures to be followed in carrying out death sentences).

death penalty.⁴⁵

1. Historical Racial Inequality in the Imposition of the Death Penalty

Commentators note that during the period of U.S. slavery and the early twentieth century, the death penalty epitomized racial inequality in the United States.⁴⁶ Several U.S. Supreme Court Justices cited racial discrimination in the imposition of the death penalty as grounds for declaring it unconstitutional in 1972.⁴⁷ Although the Court in 1976 found that states' newly-enacted death penalty statutes met constitutional requirements,⁴⁸ critics note that race continues to influence imposition of the death penalty.⁴⁹

According to some authors, the death penalty today is a relic of slavery and racial violence in the United States.⁵⁰ From

45. See *McClesky v. Kemp*, 481 U.S. 279, 297-99 (rejecting equal protection claim on grounds that McClesky proved neither that decisionmakers acted with discriminatory purpose in his case nor that state of Georgia acted with discriminatory purpose in maintaining death penalty). The Court also rejected the petitioner's claim that the Georgia's death sentencing process violated the Eighth Amendment prohibition on cruel and unusual punishment. See *id.* at 308.

46. See Christopher R. Adamson, *Punishment After Slavery: Southern State Penal Systems, 1865-1890*, in RACE, LAW, AND AMERICAN HISTORY 1700-1990: RACE AND CRIMINAL JUSTICE 3 (Paul Finkelman ed., 1992) [hereinafter RACE AND CRIMINAL JUSTICE] (noting that slave masters forced slaves to witness public hangings to symbolize their control); Bright, *supra* note 32, at 440 (stating that lynching of blacks by whites in early twentieth century constituted means of racial control).

47. See *Furman*, 408 U.S. 238 (reversing two Georgia death sentences and one Texas death sentence as constituting cruel and unusual punishment in violation of Eighth and Fourteenth Amendments); *id.* at 255 (Douglas, J., concurring) (finding that "discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority"); *id.* at 364 (Marshall, J., concurring) (noting that "Negroes were executed far more often than whites in proportion to their percentage of their population").

48. See *Gregg* 428 U.S. at 206-07 (finding that Georgia death penalty statute sufficiently protected against arbitrariness and did not violate Eighth and Fourteenth Amendments).

49. See *Callins v. Collins*, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting from denial of *certiorari*) (finding that "despite the efforts of the states and the courts to devise legal formulas and procedural rules . . . the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake"); Hugo Adam Bedau, *The United States*, in CAPITAL PUNISHMENT: GLOBAL ISSUES AND PROSPECTS 62 (Peter Hodgkinson & Andrew Rutherford eds., 1996) (noting that death penalty in United States is more likely to be used on racial minorities and poor); Bright, *supra* note 32, at 434 (asserting that race and poverty continue to determine who receives death penalty).

50. See *McClesky v. Kemp*, 481 U.S. 279, 329 (1987) (Brennan, J., dissenting) (stat-

colonial times through the U.S. Civil War, criminal law in many states differentiated between crimes committed by and against blacks and whites.⁵¹ Between 1882 and 1927, lynch mobs killed approximately 4951 people, seventy-five percent of whom were African-American.⁵²

In the 1920s, fearing that Congress would enact an anti-lynching statute, Southern states began to substitute the judicial process for lynchings.⁵³ State officials assured lynch mobs that black defendants charged with capital offenses would receive a quick trial and a death sentence if the mobs let the criminal justice system proceed.⁵⁴ Courts conducted capital trials hastily, at times in less than an hour, often with angry mobs outside the courthouse demanding the death penalty.⁵⁵ The criminal courts in the South became a significant vehicle for racial violence.⁵⁶ Between 1924 and 1972, when the U.S. Supreme Court declared

ing that history of disparate treatment of blacks and whites in Georgia's criminal justice system influences its administration of death penalty); Bright, *supra* note 32, at 439-41 (discussing disparate punishments for blacks and whites in pre-Civil War legal codes as predecessor to current racial disparities in death penalty).

51. See *McClesky*, 481 U.S. at 329 (Brennan, J., dissenting) (noting that in colonial period, black slaves who killed whites were automatically executed irrespective of whether it was in self-defense or in defense of another). Georgia law, for example, provided that the rape of a white female by a black man was punishable by death, while the rape of a white female by anyone else was punishable by jail for two to twenty years. Bright, *supra* note 32, at 439. It provided that the rape of a black female be punished by fine and imprisonment at the discretion of the court. *Id.*

52. See *Foreign Relations Committee Hearing*, *supra* note 18, at 46 (statement of Wade Henderson, NAACP) (noting that lynchings were not recorded until 1882).

53. See Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 80 (1990) (noting that because all-white juries would routinely impose death sentences on accused blacks, there were fewer lynchings in 1930s).

54. See Bright, *supra* note 32, at 440 (describing Southern capital trials in 1930s as "legal lynchings").

55. See *id.* at 441 (noting Kentucky case in which black man was hung immediately after his trial that lasted under an hour).

56. See *id.* at 440-41 (noting that Southern legal system molded itself to lynch mobs' demands). In 1932, the U.S. Supreme Court in *Powell v. Alabama* reversed death sentences of nine black teenagers, known as the "Scottsboro Boys," who were convicted of raping two white women. See *Powell v. Alabama*, 287 U.S. 45 (1932) (reversing death sentences on grounds that defendants had inadequate defense counsel). The verdicts for the death penalty in Scottsboro, Alabama, which were reached while lynch mobs clamored outside the courthouse, caused national outrage over the lack of justice in Southern capital trials. See Dan T. Carter, *A Reasonable Doubt*, in RACE AND CRIMINAL JUSTICE, *supra* note 46, at 16-24 (discussing subsequent retrial of Scottsboro case, which revealed fabrication of victims' accounts).

the death penalty unconstitutional,⁵⁷ Georgia executed 337 blacks and seventy-five whites.⁵⁸

In 1972, the Court held in *Furman v. Georgia*, a short *per curiam* opinion, that the death penalty as then implemented was unconstitutional and constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.⁵⁹ Several Justices cited racial discrimination as a factor in their decision to declare the death penalty unconstitutional.⁶⁰ After *Furman*, states began redrafting their capital punishment statutes to conform to the Court's standards for preventing discrimination and arbitrariness.⁶¹

In 1976, the Court upheld a death sentence in *Gregg v. Georgia* and found that Georgia's new death penalty statute addressed the constitutional demands of *Furman*.⁶² In *Gregg*, the Court pointed to procedural safeguards such as separate guilt and sentencing hearings,⁶³ the requirement that the jury find at least one aggravating circumstance,⁶⁴ the opportunity for the defendant to introduce any mitigating circumstances,⁶⁵ and the automatic appeal of all death sentences.⁶⁶ Despite protections against discrimination and arbitrariness in new capital punishment laws, some commentators note that the broad discretion of

57. See *Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*) (holding that death penalty was applied in arbitrary and discriminatory manner that violated Eighth Amendment prohibition on cruel and unusual punishment).

58. Bright, *supra* note 32, at 441.

59. See *Furman*, 408 U.S. at 239-40 (reversing Georgia death sentences for defendants convicted of murder and rape and Texas death sentence for defendant convicted of rape).

60. See *id.* at 255 (Douglas, J., concurring) (finding that discretion of judges and juries allowed racial prejudices to influence imposition of death penalty); *id.* at 364 (Marshall, J., concurring) (noting that blacks are executed in numbers far higher than their proportion of population).

61. See *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (noting that at least thirty-five states re-enacted their death penalty statutes in response to *Furman*).

62. See *id.* at 206-07 (finding that Georgia's death penalty statute provided adequate protections against arbitrariness and capriciousness).

63. See *id.* at 191-92 (noting that "bifurcated" trial that allows jury to decide guilt before it decides sentence permits jury to consider evidence of aggravating or mitigating factors that may have been irrelevant in determination of guilt).

64. See *id.* at 206 (finding that this requirement channels juries' discretion in imposing death penalty).

65. See *id.* at 197 (stating that this requirement focuses juries' attention on particular characteristics of individual defendant and avoids arbitrariness).

66. See *id.* at 198 (asserting that automatic appeal permits Georgia's supreme court to review each death sentence to ensure it was not influenced by passion or prejudice).

prosecutors in deciding whether to seek the death penalty⁶⁷ and of juries⁶⁸ in deciding whether to impose the death penalty permits racial prejudices to influence their decisions.⁶⁹

2. *McClesky v. Kemp*

The U.S. Supreme Court in *McClesky* found that statistical evidence indicating that the death penalty disproportionately affected blacks was not sufficient to reverse McClesky's death sentence.⁷⁰ The majority held that to succeed on the equal protection claim, McClesky would have to demonstrate that the state acted with a discriminatory purpose when it imposed his death

67. See Bright, *supra* note 32, at 437 (noting that prosecutor who believes blacks are prone to violence and morally inferior may be more likely to seek death penalty if defendant is black, and especially if victim is white). In the Southern states, including Alabama, Florida, Louisiana, Mississippi, Georgia, and Texas, where the death penalty is most frequently used, the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions ("Special Rapporteur") noted that there were very few black district attorneys, who are elected officials with broad discretion to decide whether to seek the death penalty. See *Special Rapporteur's Report, supra* note 29, ¶ 63. In Alabama, there is one black district attorney out of 67. *Id.* In Georgia, which has 159 counties, there are none. *Id.* The Special Rapporteur's report expressed concern that the election of state judges, rather than appointment, affects their independence, particularly on the issue of death penalty. *Id.* ¶¶ 71, 74.

68. See *Turner v. Murray*, 476 U.S. 28, 35 (1986) (finding that "a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether [the] crime involved aggravating factors"). A juror's racial biases might prevent him or her from considering evidence of mitigating factors, such as the life and background of the accused. *Id.* The Special Rapporteur noted that despite protections against the use of race in peremptory jury challenges, in practice, prosecutors were able to eliminate all black jurors from the jury pool through use of peremptory challenges. See *Special Rapporteur's Report, supra* note 29, ¶ 86. This enabled black defendants to be tried and sentenced to death before all-white juries. *Id.* He also found that excluding potential jurors in capital cases if they oppose the death penalty will exclude disproportionate numbers of minorities because they are more likely to oppose it. *Id.* ¶ 88.

69. See *Callins v. Collins*, 510 U.S. 1141, 1153 (1994) (Blackmun, J., dissenting from denial of *certiorari*) (stating that "[e]ven under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die"); *Special Rapporteur's Report, supra* note 29, ¶ 62 (acknowledging that racial prejudices of lawyers, prosecutors, juries, and judges contributed to their decisions to impose death penalty); Bright, *supra* note 32, at 437 (noting that same racial prejudices that affect jurors also affect prosecutors, defense lawyers, law enforcement officials, and judges, in their attitudes towards accused and how they exercise discretion in imposing death penalty).

70. See *McClesky v. Kemp*, 481 U.S. 279, 297 (1987) (finding that statistical study was insufficient to demonstrate discriminatory purpose by those who sentenced defendant to death).

sentence.⁷¹ The dissenters agreed that discriminatory purpose was necessary to succeed on an equal protection claim,⁷² but noted that a showing of disparate impact can be sufficient to infer discriminatory purpose.⁷³

To support his claim that the death penalty was imposed in a racially discriminatory manner, McClesky presented the Baldus Study, a complex statistical analysis that examined over 2000 murder cases in Georgia in the 1970s.⁷⁴ The study demonstrated that in Georgia between 1976 and 1980, defendants charged with killing whites were 4.3 times more likely to receive the death penalty than those charged with killing blacks.⁷⁵ It concluded that black defendants charged with killing whites were more likely to receive a death sentence than any other racial combination.⁷⁶ The study also found that prosecutors would more frequently seek the death penalty when the victim was white and the defendant was black.⁷⁷ Specifically, the study found that prosecutors sought the death penalty in seventy percent of the cases involving black defendants and white victims, in thirty-two percent of the cases with white defendants and white victims, in nineteen percent of the cases with white defendants and black victims, and in fifteen percent of the cases with black defendants and black victims.⁷⁸

Justice Powell, writing for a five to four majority, rejected the equal protection claim on the grounds that McClesky failed to show that the decision makers acted with a discriminatory pur-

71. *See id.* at 292 (stating that defendant must prove that decisionmakers acted with discriminatory purpose).

72. *See id.* at 351 (Blackmun, J., dissenting) (agreeing with majority that criminal defendant must prove purposeful discrimination to allege equal protection violation).

73. *See id.* (stating that defendant may establish *prima facie* case of purposeful discrimination by demonstrating totality of circumstances giving rise to inference of discriminatory purpose) (citing *Batson v. Kentucky*, 476 U.S. 79, 94 (1986)).

74. *See id.* at 286-87 (stating that Professor Baldus subjected his data to 230 variables that could have explained disparities on nonracial grounds).

75. *See id.* at 287 (discussing findings from Baldus Study).

76. *Id.*

77. *Id.* Baldus noted that in highly aggravated cases, racial prejudices become irrelevant because the decisionmakers have less discretion. *Id.* at 287 n.5. He explained that racial factors play a significant role in "mid-range" cases where decisionmakers can exercise discretion. *Id.*

78. *Id.* Baldus took 230 variables into account that could have explained the discrepancy on non-racial grounds. *Id.* He found that the effects of racial bias were most significant in cases where the crime was not "tremendously aggravated" and where the decisionmakers had the most discretion. *Id.* at n.5.

pose.⁷⁹ Relying on *Personnel Administrator of Massachusetts v. Feeney*,⁸⁰ an employment discrimination case, the majority found that to demonstrate discriminatory purpose, McClesky would have to show that Georgia maintained its death penalty statute in order to produce a racially discriminatory result.⁸¹ Because the Court found that Georgia had a legitimate reason for adopting and maintaining its death penalty statute,⁸² it held that the discriminatory impact shown by the Baldus Study alone was not sufficient to infer discriminatory purpose.⁸³

The majority rejected the Eighth Amendment claim that Georgia applied the death penalty in an arbitrary manner in which racial prejudices influenced whether prosecutors seek the death penalty and whether juries impose the death penalty.⁸⁴ While the majority acknowledged the risk that racial prejudice may influence a jury's decision,⁸⁵ it did not find that risk to be constitutionally unacceptable.⁸⁶ The Court found that statistical disparities would inevitably result from the necessary discretion given to prosecutors and juries.⁸⁷

79. *See id.* at 297 (finding that to prevail on equal protection claim, defendant must show that Georgia enacted or maintained death penalty statute for discriminatory purpose).

80. *See Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (finding that state's awareness that civil service hiring preference for veterans operated against women was insufficient to maintain equal protection claim because decisionmaker did not act because of anticipated discriminatory impact).

81. *McClesky v. Kemp*, 481 U.S. 279, 298 (1987).

82. *See id.* at 298-99 (finding that because state legislature has wide discretion in choosing criminal laws and penalties, there were legitimate reasons for Georgia to adopt and maintain death penalty).

83. *See id.* (finding that McClesky did not show that Georgia maintains its death penalty statute to produce racially discriminatory impact suggested by Baldus Study).

84. *See id.* at 308-09 (stating that because Georgia's death sentencing procedures focus discretion on particularized nature of crime and characteristics of defendant, McClesky's sentence was not disproportionate under Eighth Amendment).

85. *See id.* at 308 (explaining that statistics only show likelihood that race entered into some decisions, but do not actually prove that race actually entered those decisions).

86. *See id.* at 308-09 (holding that Baldus study did not constitute constitutionally unacceptable risk of racial prejudice entering into death sentencing decisions); *cf. id.* at 335-36 (Brennan, J., dissenting) (noting that because death is irrevocable punishment, it demands greater degree of scrutiny than other punishments) (citing *California v. Ramos*, 463 U.S. 992, 998-99 (1983)).

87. *See McClesky*, 481 U.S. at 311-12 (noting that "prosecutorial discretion to provide individualized justice" is deep-seated in U.S. law and that juries must make "difficult and uniquely human judgments that defy codification"); *cf. id.* at 335-36 (Brennan, J., dissenting) (opining that "[d]iscretion is a means, not an end . . . bestowed in order

The majority raised the additional concern that accepting McClesky's claim would open a floodgate to numerous challenges to criminal penalties by members of minority groups.⁸⁸ It concluded that the legislature was the appropriate body to address sentencing issues rather than the courts.⁸⁹ The Court reasoned that Congress was better able to evaluate the conflicting considerations necessary to develop an appropriate remedy for discrimination.⁹⁰

Dissenting in *McClesky*, Justice Blackmun criticized the majority's equal protection analysis.⁹¹ He asserted that the Court departed from its ordinary equal protection analysis by not applying the three-part test for *prima facie* discrimination articulated in *Castaneda v. Partida*.⁹² Under that test, a defendant must show that he or she is a member of a distinct class, establish a substantial degree of differential treatment, and show that the allegedly discriminatory procedure is subject to abuse or is not racially neutral.⁹³ Justice Blackmun stated that McClesky would have fulfilled the requirements of this test because he was a member of a distinct group, because the Baldus Study demonstrated different treatment of that group, and because there was sufficient evidence that the Georgia death penalty was subject to abuse, noting broad prosecutorial discretion and the lack of

to permit the sentencer to 'trea[t] each defendant in a capital case with that degree of respect due the uniqueness of the individual'" and that importance of discretion should not prevent Court from examining evidence that race more likely than not influences capital sentencing.

88. See *McClesky*, 481 U.S. at 315-16 (explaining that accepting McClesky's claim would permit other challenges to sentences based on unexplained discrepancies that correlate to membership in any minority group or gender). The Court noted that the Eighth Amendment applies to all penalties, not solely the death penalty. *Id.* at 314 (citing *Solem v. Helm*, 463 U.S. 277, 289-90 (1983)).

89. See *id.* at 319 (finding that legislature has responsibility of determining appropriate punishment for particular crimes). The U.S. Supreme Court has upheld statutes designed to address racial discrimination where it held that such relief was not directly mandated by the Constitution. See *Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding legislation dispensing with use of literacy tests in state and federal elections); *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).

90. *McClesky v. Kemp*, 481 U.S. 279, 319 (1987).

91. See *McClesky*, 481 U.S. at 364 (Blackmun, J., dissenting) (arguing that majority's assertion that necessity of discretion in criminal justice system demanded "exceptionally clear proof," before inferring abuse "misses the point" of defendant's equal protection claim).

92. *Id.* at 361-62 (citing *Castaneda v. Partida*, 430 U.S. 482 (1977)).

93. *Id.*

guidelines.⁹⁴ When the defendant makes a *prima facie* case under *Castaneda*, the burden of proof shifts from the defendant to the prosecution to rebut the allegation.⁹⁵ Justice Blackmun concluded that because the state's evidence consisted mainly of assertions that it did not discriminate, the disparity in death sentencing was not explainable on any basis other than race and accordingly constituted an equal protection violation.⁹⁶

3. Post-*McClesky* Developments

After *McClesky*, studies conducted by the U.S. General Accounting Office⁹⁷ ("GAO") in 1990 and the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions⁹⁸ ("Special Rapporteur") in 1998 concluded that the race of defendant and the race of the victim influence whether the death penalty is imposed in the United States.⁹⁹ Moreover, in response to *McClesky*, the U.S. Congress twice attempted to pass legislation that would provide death row inmates with an opportunity to challenge a death sentence by demonstrating racial disparities.¹⁰⁰ The legislation, however, failed to attract a majority of

94. *Id.* at 353-58. Blackmun also noted that these factors, along with the history of racial discrimination in Georgia's criminal justice system, established a *prima facie* case. *Id.*

95. *Id.* at 359.

96. *Id.* at 361 (citing standard developed in *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

97. See U.S. General Accounting Office (visited May 15, 1999) <<http://www.gao.gov/>> (on file with the *Fordham International Law Journal*) (stating that U.S. General Accounting Office ("GAO") is investigative arm of U.S. Congress and performs audits and evaluations of U.S. government programs and activities).

98. See David Weissbrodt, *The Three "Theme" Special Rapporteurs of the U.N. Commission on Human Rights*, 80 AM. J. INT'L L. 685 (1986) (stating that U.N. Commission on Human Rights appointed Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions in 1982 to study those human rights problems, to receive complaints about impending or past executions, to issue appeals to governments, and to report publicly on his or her activity).

99. See *Special Rapporteur's Report*, *supra* note 29, ¶ 62 (noting that race, class, and economic status affect imposition of death penalty); GAO REPORT, *supra* note 32, at S8272 (finding pattern of evidence indicating racial disparities in charging, sentencing, and imposition of death penalty in United States).

100. See 140 CONG. REC. S5328-01 (daily ed. May 6, 1994) [hereinafter *Racial Justice Act Debate*] (setting forth debate on Racial Justice Act, which would have permitted death row inmates to challenge death sentence by demonstrating evidence of racial disparity in death sentencing); 137 CONG. REC. H8184-03 (daily ed. Oct. 22, 1991) [hereinafter *Fairness in Death Sentencing Act Debate*] (setting forth debate on Fairness in Death Sentencing Act, which was similar to Racial Justice Act).

votes.¹⁰¹

The GAO examined twenty-eight studies on racial disparities in the imposition of the death penalty.¹⁰² In February 1990, the GAO issued a report¹⁰³ ("GAO Report") affirming the validity of those studies¹⁰⁴ and determined that a defendant in the United States was far more likely to receive the death penalty in a capital murder case if the victim was white rather than black.¹⁰⁵ The GAO Report, mandated by federal statute,¹⁰⁶ found consistency in the data collection and quality of the studies¹⁰⁷ as well as a pattern of evidence indicating racial disparities in the imposition of the death penalty in many areas around the country.¹⁰⁸

International human rights observers have also recognized racial disparity in the imposition of the death penalty in the United States.¹⁰⁹ In January 1998, the Special Rapporteur issued a report¹¹⁰ indicating that the death penalty was imposed in the

101. See *Racial Justice Act Debate*, *supra* note 100, at S5328 (stating sense of Senate that it should reject Racial Justice Act and omit it from 1994 crime legislation); *Fairness in Death Sentencing Act Debate*, *supra* note 100, at H8145 (rejecting Fairness in Death Sentencing Act and voting to enact Equal Justice Act, which prohibits use of statistical evidence of racial disparities in death sentencing).

102. See GAO REPORT, *supra* note 32, at S8271 (stating that GAO initially reviewed 53 studies for appropriateness and overall quality and based its assessment on 28 of those studies).

103. *Id.*

104. See *id.* at S8272 (noting that while studies' methodologies were not of equal quality and had limitations, they were of sufficient quality to support finding of racial disparities in the charging, sentencing, and imposition of death penalty).

105. See *id.* (stating that synthesis of studies indicates "strong race of victim influence").

106. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4392 (1988), codified at 21 U.S.C. § 848(o)(2) (1994) (requiring GAO to study capital sentencing procedures to determine whether either race of victim or defendant influences likelihood that defendants will be sentenced to death).

107. See GAO REPORT, *supra* note 32, at S8271 (stating that studies addressing discrimination in death sentencing was of sufficient quality and quantity to warrant evaluation synthesis approach). In using the evaluation synthesis approach, the GAO examined the applicable studies for their quality, extracted all relevant information, and compared information across the studies to identify similarities and differences in the findings. *Id.* The major benefit of this approach is that evidence from multiple studies can provide greater support from a finding than evidence from an individual study. *Id.*

108. See *id.* at S8272 (stating that GAO's "synthesis of the 28 studies shows a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty").

109. See *Special Rapporteur's Report*, *supra* note 29, ¶ 62 (stating that race, class, and economic status are said to influence whether death penalty is imposed).

110. See *id.* ¶¶ 1-2 (noting that Special Rapporteur visited United States after receiving information about discriminatory and arbitrary use of death penalty).

United States in a discriminatory and arbitrary manner.¹¹¹ The Special Rapporteur stated that race and economic status of the defendant and the victim played a role in death sentencing.¹¹²

Noting that the *McClesky* majority placed a difficult burden on defendants to demonstrate that individual acts of discrimination affected their cases, the Special Rapporteur noted that the decision permits U.S. courts to tolerate racial bias in death penalty cases.¹¹³ Since that decision, death row inmates have raised challenges to the constitutionality of state death penalty statutes on the grounds that they have a discriminatory impact against racial minorities.¹¹⁴ Circuit courts of appeals that have considered similar cases have denied relief based largely on the Court's holding in *McClesky*.¹¹⁵

B. *The International Convention on the Elimination of All Forms of Racial Discrimination*

Since World War II, racial equality and non-discrimination have become fundamental principles of international law,¹¹⁶ which the U.N. Charter articulates.¹¹⁷ CERD codifies these prin-

111. *Id.* ¶ 2.

112. *Id.* ¶ 62.

113. See *Special Rapporteur's Report*, *supra* note 29, ¶¶ 65, 67 (noting that Racial Justice Act, which Senate defeated in 1994, would have permitted petitioners to use statistics to demonstrate racial inequities and removed need to prove discriminatory intent by individuals or institutions).

114. See, e.g., *Davis v. Greer*, 13 F.3d 1134 (7th Cir.), *cert. denied*, 513 U.S. 933 (1994) (relying on *McClesky* to reject death row inmate's constitutional challenge of Illinois death penalty statute); see also *Fuller v. Georgia State Bd. of Pardons and Paroles*, 851 F.2d 1307 (11th Cir. 1988) (relying on *McClesky* to reject inmate's claim of discrimination based on statistics that white rapists were granted parole more often than black rapists).

115. *Id.*

116. See NATAN LERNER, *GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW* 24 (1991) (stating that non-discrimination is well-established in international law); WARWICK MCKEAN, *EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW* 46 (1983) (noting post-World War II principle of universal respect for human rights and fundamental freedoms for all); McDougall, *supra* note 38, at 577-78 (discussing centrality of equality and non-discrimination in U.N. human rights system); Meron, *supra* note 23, at 283 (stating that respect for human rights and fundamental freedoms for all without discriminating based on race is norm of customary international law).

117. See U.N. CHARTER art. 1, para. 3 (promoting respect for human rights without discriminating based on race); CERD, *supra* note 14, pmb., at 212 (considering that one purpose of United Nations is to promote and encourage universal respect of human rights without discriminating based on race); see also Meron, *supra* note 23, at 283 (describing respect for human rights without discriminating based on race as fundamental norm of U.N. Charter).

ciples and its substantive provisions define the obligations of State Parties to take steps toward eradicating racially discriminatory laws and practices.¹¹⁸ CERD also creates several mechanisms to monitor State Parties' implementation of the treaty and to address violations.¹¹⁹

1. The Development of CERD

CERD contains comprehensive and legally enforceable provisions that provide the international community with an instrument to combat racial discrimination.¹²⁰ The United Nations first conceptualized CERD¹²¹ in response to anti-Semitic incidents occurring in Europe in the 1960s.¹²² CERD, however, does not specify anti-Semitism or other forms of racial hatred other than apartheid.¹²³ The Convention drew much of its political support from newly-independent African, Asian, and other developing states and reflected the desire of the United Nations to end discrimination against non-white persons.¹²⁴

118. See CERD, *supra* note 14, art. 2(1)(c), at 218 (requiring nations that have ratified CERD ("State Parties") "to review, amend, or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists"); see also Taifa, *supra* note 21, at 648 (noting that CERD requires State Parties to eliminate racial discrimination within their borders and to enact whatever laws are necessary to ensure human rights without discrimination).

119. See CERD, *supra* note 14, art. 6, at 222 (assuring individuals' right to hearing before competent national tribunal for acts that violate rights under CERD); *id.* art. 8, at 224 (establishing Committee on Elimination of Racial Discrimination ("CERD Committee")); *id.* art. 9, at 224 (requiring State Parties to file annual reports indicating their progress implementing CERD); *id.* art. 11, at 226 (authorizing State Parties to bring complaints against other State Parties that violate CERD); *id.* art. 14, at 230 (permitting State Parties to adopt optional provision authorizing CERD Committee to hear individual complaints from their jurisdictions); *id.* art. 22, at 236-38 (empowering International Court of Justice ("ICJ") to hear disputes between two or more State Parties).

120. See Meron, *supra* note 23, at 283 (discussing CERD's significance as enforceable instrument in international efforts to confront racial discrimination).

121. See *id.* at 284 (noting that U.N. organs including Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, and Economic and Social Council, participated in drafting CERD).

122. See LERNER, *supra* note 116, at 46 (explaining that pressure for international legislation against racial discrimination originated in 1960s from "swastika epidemic" and other anti-Semitic incidents occurring in Europe).

123. See CERD, *supra* note 14, art. 3, at 218 (stating that "State Parties particularly condemn racial segregation and apartheid"); see also LERNER, *supra* note 116, at 46 (describing how anti-Semitism inspired CERD, but explaining that CERD's drafters did not specify it in CERD itself).

124. See LERNER, *supra* note 116, at 46 (noting that support of Third World nations

Since the U.N. General Assembly adopted CERD in 1965¹²⁵ and CERD's entry into force in 1969,¹²⁶ more nations have ratified the Convention¹²⁷ than any other treaty other than the Geneva Conventions for the Protection of Victims of War.¹²⁸ The United States signed CERD in 1966.¹²⁹ President Jimmy Carter transmitted the convention to the U.S. Senate for its advice and consent for ratification in 1978.¹³⁰ The Senate did not authorize ratification of CERD until 1994.¹³¹

2. Standards for Proving Discrimination Under CERD

CERD defines racial discrimination as practices that have a discriminatory purpose or effect.¹³² It mandates State Parties to amend, revise, or nullify such laws and practices.¹³³ CERD also

that were eager to have anti-racist instrument adopted by United Nations was crucial to CERD's success).

125. CERD, *supra* note 14.

126. *Id.*

127. See *International Convention on the Elimination of All Forms of Racial Discrimination* (visited Feb. 5, 1999) <<http://www.un.org/depts/treaty.html>> (on file with the *Fordham International Law Journal*) (stating that 153 states have ratified CERD).

128. Meron, *supra* note 23, at 284. Currently, 177 states have ratified the Geneva Conventions for the Protection of Victims of War. See RICHARD B. LILICH & HURST HANNUM, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF POLICY, LAW AND PRACTICE* 910 (3d ed. 1995) (noting that multilateral treaties that address international human rights violations relating to armed conflicts are more widely ratified than international human rights treaties generally).

129. *Foreign Relations Committee Hearing*, *supra* note 18, at 6 (statement of Sen. Claiborne Pell, Foreign Relations Committee Chair).

130. See *id.* (noting that Reagan and Bush Administrations did not support ratification of CERD).

131. *CERD Ratification*, *supra* note 13.

132. See CERD, *supra* note 14, art. 1(1), at 216 (stating that term "racial discrimination" includes distinctions based on race that have "the purpose or effect" of impairing human rights).

133. *Id.* art. 2(1), at 216-18. Article 2(1) of CERD states in part:

State parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among races, and to this end:

- (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
- (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;
- (c) Each State Party shall take effective measures to review governmental, national, and local policies, and to amend, rescind, or nullify any

directs State Parties to provide all citizens with equality before the law and before criminal justice tribunals without discriminating on the basis of race.¹³⁴

Article 1(1) of CERD defines racial discrimination as any distinction based on race or ethnicity that has the purpose or effect of impairing the exercise of human rights and fundamental freedom in any area of public life, including the economic, political, social, or cultural spheres.¹³⁵ The subjective intent of the act shows whether its purpose is discriminatory, while its objective consequences demonstrate whether it has a discriminatory effect.¹³⁶ The presence of either discriminatory purpose or effect is sufficient to qualify as discrimination under CERD.¹³⁷

One commentator notes that when a state makes distinctions explicitly on the basis of race to impair the exercise of rights, demonstrating a violation under CERD is not difficult because the discriminatory purpose will likely be visible from the policy, law, or practice in question.¹³⁸ Showing the existence of discriminatory effect, however, may require substantial information that is sufficiently specific, yet broad enough, to demon-

laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

- (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group, or legislation.

Id.

134. *Id.* art. 5(a), at 220. Article 5 of CERD states in part:

In compliance with the fundamental obligations laid down in article 2 of this Convention, State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (a) The right to equal treatment before the tribunals and all other organs administering justice;
- (b) The right to security of person and protection by the state against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.

Id.

135. *Id.* art. 1(1), at 216.

136. LERNER, *supra* note 116, at 49.

137. *See id.* (explaining that for act to be considered discriminatory under CERD, it must be based on race and have purpose or effect of nullifying or impairing human rights and fundamental freedoms).

138. *See* Meron, *supra* note 23, at 287 (noting distinction between facts that shows discriminatory purpose and those that show discriminatory effect).

strate that effect over time.¹³⁹ For this reason, discriminatory effect can be difficult to demonstrate.¹⁴⁰

Some commentators believe that the drafters of CERD intended the Convention to apply only to those acts that had a racial motivation,¹⁴¹ which would appear to limit its reach to purposeful discrimination.¹⁴² Yet one author asserts that the word "effect" in CERD's definition of racial discrimination indicates that acts for which a discriminatory purpose could not be demonstrated may be brought within the scope of CERD by inferring discriminatory purpose from their effect.¹⁴³ The reference in CERD's preamble to the enjoyment of certain rights without any differentiation on the basis of race¹⁴⁴ demonstrates that CERD's goal is to achieve equality of result.¹⁴⁵

Article 2 obligates State Parties to develop policies to eliminate racial discrimination within their borders and to enact any laws that are necessary to ensure the exercise of fundamental human rights free from discrimination.¹⁴⁶ Article 2(2) allows States Parties to carry out their obligations when the circumstances warrant such action,¹⁴⁷ providing flexibility to State Par-

139. *See id.* (explaining that discriminatory effect can be difficult to establish, particularly when it is attributed to impact of economic policies and practices on ethnic groups that are already economically disadvantaged).

140. *See id.* (noting that sufficiently detailed information may not always be available); Taifa, *supra* note 21, at 670 (stating that disparate racial impact in context of selective prosecution may be difficult to prove, but still pervasive).

141. *See* LERNER, *supra* note 116, at 49 (noting that CERD's drafters intended definition of racial discrimination to cover all acts of discrimination as long as they were based on racial motivation); *see also Foreign Relations Committee Hearing, supra* note 18, at 33 (statement of Strobe Talbott, Acting Secretary of State) (stating that CERD does not seek to invalidate every race-neutral law that causes some adverse racial impact, only those with unjustifiable disparate impact).

142. *See* Meron, *supra* note 23, at 288 (noting that some commentators believe that CERD only addresses racially motivated discrimination).

143. *See id.* at 288 (explaining that consequences of certain acts may be indicative of decisionmaker's intent).

144. *See* CERD, *supra* note 14, pmb., at 212-14 ("[c]onsidering that . . . all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, *without distinction of any kind*, in particular as to race, colour or national origin") (emphasis added).

145. *See* Meron, *supra* note 23, at 288 (stating CERD's preamble demonstrates that its goal is *de facto* equality).

146. CERD, *supra* note 14, art. 2(1), at 218.

147. *Id.* art. 2(2), at 218. Article 2(2) of CERD states in part:

State Parties shall, when the circumstances so warrant, take in the social, economic, cultural, and other fields, certain and concrete measures to ensure adequate development and protection of certain racial groups or individuals

ties.¹⁴⁸ Article 1(4) empowers State Parties to ensure advancement and protection to certain racial groups as they see fit.¹⁴⁹ While these affirmative action measures would be premised upon race, they are not considered racial discrimination unless they lead to the maintenance of different rights for different racial groups or continued after the objectives for which they were achieved had been met.¹⁵⁰

Article 5 specifies the basic obligations stated in Article 2.¹⁵¹ The article states that State Parties must guarantee individuals equality before the law without discriminating on the basis of race.¹⁵² This guarantee has both a negative aspect, which requires State Parties to prohibit and eliminate racial discrimination, and a positive aspect, which obligates State Parties to guarantee equality before the law.¹⁵³ It has been noted that the present effects of past discrimination may be continued or even amplified by facially neutral policies that do not discriminate purposely, but that perpetuate the consequences of previous, often intentional discrimination.¹⁵⁴ Because the goal of CERD is equality in practice, some commentators assert that facially neutral policies or practices that have a disparate impact on some racial groups should be amended, even without showing a discriminatory purpose.¹⁵⁵

belonging to them, for the purpose of guaranteeing them the full enjoyment of human rights and fundamental freedoms.

Id.

148. Meron, *supra* note 23, at 289.

149. CERD, *supra* note 14, art. 1(4), at 216.

150. *Id.*

151. *Id.* art. 5, at 220-22.

152. *Id.*

153. See MCKEAN, *supra* note 116, at 162 (noting that Article 5 clearly affirms principle of "equality before the law").

154. See Meron, *supra* note 23, at 289 (stating, for example, that effect of unnecessarily stringent educational qualifications required for jobs can be to deny employment to members of racial groups who were denied access to education previously).

155. See *id.* (acknowledging that prohibition against practices that have discriminatory effect imposes greater burden on states than obligation to prohibit purposeful discrimination); e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1977) (finding that Congress intended Title VII of Civil Rights Act of 1964 to achieve equality of employment opportunities and to remove barriers that previously operated to favor identifiable group of white employees over other employees). Under Title VII, practices, procedures, or tests that are neutral on their face, and even neutral in intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices. *Id.*

3. CERD Enforcement Mechanisms

CERD's enforcement mechanisms make State Parties accountable for their policies on racial discrimination at the national and international levels.¹⁵⁶ The committee created by CERD¹⁵⁷ ("CERD Committee") to oversee the Convention's implementation mandates State Parties to submit annual reports describing their implementation of the treaty, which it then reviews.¹⁵⁸ The committee provides a state-to-state complaint mechanism¹⁵⁹ as well as an optional individual complaint mechanism.¹⁶⁰ All disputes between State Parties that cannot be resolved through negotiation go before the International Court of Justice ("ICJ").¹⁶¹

Article 6 requires State Parties to provide individuals in their jurisdictions with effective protection and remedies against acts of discrimination that violate rights under CERD.¹⁶² Remedies under Article 6 include the right to seek just and adequate reparation or satisfaction for any damage suffered as a result of

156. See *United Nations High Commissioner for Human Rights Fact Sheet No. 12: The Committee on the Elimination of Racial Discrimination* (visited Feb. 16, 1999) <<http://www.unhchr.cr/html/menu6/2/fs12/htm>> (on file with the *Fordham International Law Journal*) [hereinafter *Fact Sheet No. 12*] (stating that because State Parties are accountable to international forum on racial discrimination, they have made changes in national law to bring them into compliance with CERD).

157. See CERD, *supra* note 14, art. 8(1), at 224 (establishing committee consisting of eighteen independent experts selected by State Parties, but serving in their personal capacities).

158. See *id.* art. 9(1), at 224-26 (mandating annual reports by State Parties describing legislative, judicial, administrative, and other measures taken to give effect to CERD provisions).

159. See *id.* art. 11(1), at 226 (explaining that State Party may inform CERD Committee if another State Party is "not giving effect to the provisions" of CERD).

160. See *id.* art. 14(1), at 230 (stating that State Parties have option to empower CERD Committee to consider complaints from individuals within their jurisdictions who claim to be victims of CERD violations).

161. See *id.* art. 22, at 236-38 (permitting disputes between State Parties on "the application or interpretation" of CERD that cannot be settled by negotiation to be referred to ICJ at request of any party to dispute).

162. *Id.* art. 6, at 222. Article 6 of CERD states:

State Parties shall assure everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Id.

discrimination.¹⁶³ Article 6 contemplates that national tribunals and institutions will address rights under the Convention in order to determine whether reparation for violations is warranted.¹⁶⁴

Article 8(1) of CERD establishes the CERD Committee,¹⁶⁵ which oversees three procedures to monitor State Parties' fulfillment of their obligations under CERD.¹⁶⁶ Under Article 9's reporting procedure, State Parties agree to submit reports to the CERD Committee every two years, with the first report due within one year of a party's ratification.¹⁶⁷ The CERD Committee reviews the reports, determines whether State Parties have implemented adequate legal protections for groups that have experienced racial discrimination, and examines evidence of *de facto* discrimination.¹⁶⁸ The CERD Committee makes concluding observations about the reports and may make suggestions on how the reporting states could improve their application of CERD.¹⁶⁹ These suggestions are not legally binding.¹⁷⁰

163. *Id.*

164. See *Foreign Relations Committee Hearing*, *supra* note 18, at 24 (statement of Strobe Talbott, Acting Secretary, Dep't of State) (explaining that Article 6 of CERD includes right to seek reparation for any damage suffered from discrimination that violates human rights under Convention).

165. *Id.* art. 8(1), at 224.

166. See *Fact Sheet No. 12*, *supra* note 156 (describing reporting procedure, state-to-state complaint procedure, and individual complaint procedure).

167. See CERD, *supra* note 14, art. 9(1), at 224-26 (describing report as consisting of legislative, judicial, administrative, or other measures adopted by State Party that implement CERD). Commentators note that the annual reports required by Article 9 of CERD to be submitted to the CERD Committee provide an opportunity for U.S. domestic civil rights organizations to address U.S. obligations under CERD. See McDougall, *supra* note 38, at 594 (criticizing United States for not completing its first compliance report as required by CERD Committee and urging domestic civil rights groups to engage in dialogue with United States about their understanding of U.S. obligations under CERD); Taifa, *supra* note 21, at 684-86 (noting that Human Rights Watch, IHRLG, and NAACP Legal Defense and Educational Fund provided suggestions for U.S. report and urged it to address racial bias in death penalty cases by enacting legislation).

168. See *Foreign Relations Committee Hearing*, *supra* note 18, at 78 (statement of Minnesota Advocates for Human Rights and Minneapolis Commission on Civil Rights) [hereinafter Minnesota Human Rights Advocates] (noting that CERD Committee may use information not provided by State Party in committee's report such as statistics from non-governmental organizations).

169. See CERD, *supra* note 14, art. 9(2), at 226 (stating that CERD Committee reports annually to U.N. General Assembly on its activities and makes recommendations based on examinations of reports).

170. See *Foreign Relations Committee Hearing*, *supra* note 18, at 78 (statement of Minnesota Human Rights Advocates) (noting that since 1969, CERD Committee has issued

Under Article 11, a State Party may file a complaint with the CERD Committee alleging that another State Party has failed to fulfill its obligations under CERD.¹⁷¹ Thus far, no state-to-state complaints have been submitted to the CERD Committee under this provision.¹⁷² Under Article 14, a State Party has the option of permitting the CERD Committee to receive petitions from individuals or groups of individuals who claim to be victims of violations of rights provided in CERD.¹⁷³ If the CERD Committee accepts the petition, then it will render a decision based on all the information that it receives from the petitioner and the State Party.¹⁷⁴

C. U.S. Ratification of CERD

On June 24, 1994, the U.S. Senate authorized the United States to ratify CERD.¹⁷⁵ The ratification contained several conditions, including three reservations, a declaration, and an understanding ("RUDs").¹⁷⁶ The package of RUDs ensured that the CERD provisions that conflict with existing U.S. law or the U.S. Constitution would not bind the United States.¹⁷⁷ Com-

general recommendations discussing portions of CERD and State Parties' obligations, which provide authoritative interpretations of CERD).

171. See CERD, *supra* note 14, art. 11(1), at 226 (explaining that CERD Committee transmits complaint to offending state, which may reply with explanation or clarification of situation).

172. See *Fact Sheet No. 12*, *supra* note 156 (noting that all State Parties to CERD recognize competence of CERD Committee to receive and act on complaint by one State Party that another State Party is not giving effect to CERD).

173. See CERD, *supra* note 14, art. 14, at 230 (explaining that State Party is informed of communication and has three months to reply to CERD Committee with explanation or with information on any remedial action that it has taken). Although individual communications are confidential and the CERD Committee will not reveal the petitioner's name to the State Party without petitioner's permission, the CERD Committee will not receive anonymous petitions. *Id.* Thusfar, the CERD Committee has received very few petitions because only eighteen State Parties have authorized the Committee to consider individual complaints. See *Foreign Relations Committee Hearing*, *supra* note 18, at 79 (statement of Minnesota Advocates for Human Rights) (noting that procedures for making individual complaints under CERD are not well-known in those states).

174. See CERD, *supra* note 14, art. 14, at 230 (stating that CERD Committee publishes its decision and recommendations and State Party's observations in its annual report).

175. *CERD Ratification*, *supra* note 13, at S7634.

176. *Id.*

177. See Taifa, *supra* note 21, at 650 (noting that U.S. practice of ratifying human rights treaties with reservations restricts their impact and nullifies their effect).

mentators note that the Clinton Administration's assurance that CERD would not have any domestic impact enabled CERD's ratification by the more conservative U.S. senators on the Senate Foreign Relations Committee ("Foreign Relations Committee").¹⁷⁸

1. Conditions to U.S. Ratification of CERD

The Senate accepted the package of RUDs submitted by the Clinton Administration.¹⁷⁹ The reservations limited CERD's ability to restrict racist speech under Articles 4 and 7,¹⁸⁰ protected private conduct from governmental interference,¹⁸¹ and withheld the jurisdiction of the ICJ to resolve state-to-state disputes where the United States is a party.¹⁸² The understanding noted that the federal government would apply the Convention

178. See McDougall, *supra* note 38, at 587 (noting that many questions asked by Senate Foreign Relations Committee in discussing CERD dealt with whether ratification would have any impact on domestic law); Taifa, *supra* note 21, at 650 (noting that United States attaches uniform set of reservations, understandings, and declarations ("RUDs") to all human rights treaties that it ratifies).

179. *CERD Ratification*, *supra* note 13, at S7634.

180. *Id.* The first reservation states:

[t]hat the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression, and association. Accordingly, the United States does not accept any obligations under this Convention, in particular under Articles 4 and 7, to restrict those rights through the adoption of legislation or any other measures to the extent they are protected by the Constitution and laws of the United States.

Id.

181. *Id.* The second reservations states:

[t]hat the Constitution and laws of the United States establish extensive protections against discrimination, reaching significant areas of non-governmental activity. Individual privacy and freedom from governmental interference in private conduct, however, are also recognized as among the fundamental values which shape our free and democratic society. The United States understands that the identification of the rights protected under the Convention by reference to Article 1 to fields of "public life" reflects a similar distinction between spheres of public conduct that are customarily the subject of government regulation, and spheres of private conduct that are not. To the extent, however, that the Convention calls for a broader regulation of private conduct, the United States does not accept any obligation under this Convention to enact legislation or take other measures under paragraph (1) of Article 2, subparagraphs (1)(c) and (d) of Article 2, Article 3 and Article 5 with respect to private conduct except as mandated by the Constitution and the laws of the United States.

Id.

182. *Id.* The third reservation states "[t]hat with reference to Article 22 of the Convention, before any dispute to which the United States is a party may be submitted

only subject to the jurisdiction that it has over state and local governments.¹⁸³ The declaration stated that the United States ratified CERD as a non-self-executing treaty.¹⁸⁴

2. The Non-Self-Executing Declaration

Although Article VI of the U.S. Constitution¹⁸⁵ states that treaties are the supreme law of the United States,¹⁸⁶ treaties that are not self-executing¹⁸⁷ are not automatically considered domestic law.¹⁸⁸ The United States ratified CERD with a declara-

to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required." *Id.*

183. *Id.* The understanding states:

[t]hat the United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments. To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention.

Id.

184. *Id.* The declaration states "[t]hat the United States declares that the provisions of the Convention are not self-executing." *Id.* The ratification also included a proviso stating that nothing in the Convention required or authorized legislation or other action by the United States that was prohibited by the U.S. Constitution as interpreted by the United States. *Id.*

185. U.S. CONST. art. VI, § 2. Article VI of the U.S. Constitution states that: [t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any thing in the Constitution or Laws of any state to the Contrary notwithstanding.

Id.

186. *Id.*

187. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111, reporter's note 5 (1987) [hereinafter RESTATEMENT THIRD] (stating that distinction between self-executing and non-self-executing treaties arose from *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829)). In that case, Justice Marshall distinguished treaties that are directly applied by the judiciary from treaties that require legislation before they can provide a rule of decision for the judiciary. See *Foster*, 27 U.S. at 314 (finding that "when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court").

188. See *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (explaining that "a self-executing" treaty does not require domestic legislation to give it force of law in United States); RESTATEMENT THIRD, *supra* note 187, § 111.3 (stating that "non-self-executing" treaty will not be recognized as law without implementing legislation); Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUM. J. TRANSNAT'L L. 211, 220-21 (stating that non-self-executing declarations prevent U.S. courts from applying those treaties as domestic law). *But see* RESTATEMENT THIRD, *supra* note 187, reporter's note 5 (stating that when United States delays

tion stating that it was not self-executing.¹⁸⁹ By including the non-self-executing declaration in its ratification of CERD, the Clinton Administration intended that CERD would not create any rights directly enforceable in U.S. courts through private causes of action.¹⁹⁰

The United States had previously ratified two other human rights treaties with non-self-executing declarations¹⁹¹—the International Covenant on Civil and Political Rights¹⁹² (“ICCPR”) in 1992¹⁹³ and the U.N. Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment¹⁹⁴ (“Torture Convention”) in 1990.¹⁹⁵ Commentators have widely criticized the use of non-self-executing declarations in human rights treaties as nullifying their effect.¹⁹⁶ Yet some scholars note that the non-self-executing declarations are necessary to enable ratification of human rights treaties.¹⁹⁷

enacting legislation necessary to implement treaty, there is strong presumption that treaty has been considered self-executing by Executive and Legislative Branches and should be considered self-executing by courts); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT’L L. 760 (1988) (arguing that distinction between self-executing and non-self-executing treaties is inconsistent with U.S. Constitution).

189. *CERD Ratification*, *supra* note 13, at S7634.

190. *See Foreign Relations Committee Hearing*, *supra* note 18, at 13 (statement of Conrad K. Harper, Legal Advisor, U.S. Dept. of State) (stating that U.S. law contains extensive protections against racial discrimination, making new cause of action under CERD unnecessary).

191. *Id.*

192. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

193. *See* 138 CONG. REC. S4784 (1992) (daily ed. Apr. 2, 1992) (consenting to ratification of ICCPR).

194. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) [hereinafter Torture Convention].

195. *See* 136 CONG. REC. S17486 (1990) (daily ed. Oct. 27, 1990) (consenting to ratification of Torture Convention).

196. *See Foreign Relations Committee Hearing*, *supra* note 18, at 51 (statement of Wade Henderson, Dir., Washington Bureau, NAACP) (claiming that non-self-executing declaration “rob[s] [CERD] of its central value”); *id.* at 52 (statement of William T. Lake, Member, Bd. of Dirs., IHRLG) (stating that qualifications such as non-self-executing declaration give appearance that U.S. ratification of CERD is not legitimate); McDougall, *supra* note 38, at 588 (stating that non-self-executing declaration denies U.S. citizens important remedies for violations of CERD and deprives U.S. courts of opportunity to interpret CERD); Taifa, *supra* note 21, at 650 (asserting that non-self-executing declaration restricts CERD’s impact).

197. *See Sloss*, *supra* note 25, at 187 (noting that non-self-executing declaration was strategically necessary to ensure ratification of CERD); Taifa, *supra* note 21, at 650 (stat-

II. RAMIFICATIONS OF THE NON-SELF-EXECUTING
DECLARATION AND COMPARISON OF STANDARDS
FOR PROVING DISCRIMINATION UNDER
CERD AND U.S. LAW

The United States ratified CERD as a non-self-executing treaty to ensure that CERD would not create a new cause of action in U.S. courts.¹⁹⁸ The United States justified the non-self-executing declaration by claiming that U.S. law provides sufficient protections and remedies against racial discrimination and that no changes in domestic law were necessary to comply with CERD.¹⁹⁹ Criticisms of the non-self-executing declaration include arguments that it is legally unsound²⁰⁰ and that it nullifies the impact of CERD.²⁰¹ Commentators assert that because U.S. law requires a showing of discriminatory purpose in most cases, it conflicts with the CERD definition of racial discrimination that includes discriminatory effect.²⁰²

ing that it appears politically imperative for United States to ratify human rights treaties with extensive qualifications).

198. See *Foreign Relations Committee Hearing*, *supra* note 18, at 31 (statement of Strobe Talbott, Acting Secretary, U.S. Dep't of State) (stating that because U.S. law provides extensive protections against racial discrimination, no new cause of action would be necessary for United States to comply with CERD).

199. See *id.* at 13-14 (statement of Conrad K. Harper, Legal Advisor, U.S. Dep't of State) (stating that U.S. federal, state, and local laws already provide opportunities to challenge allegedly discriminatory statutes and practices).

200. See Paust, *supra* note 188, at 760 (claiming that distinction between self-executing and non-self-executing treaties is inconsistent with Article VI of U.S. Constitution); Charles H. Dearborn, *The Domestic Legal Effect of Declarations that Treaty Provisions Are Not Self-Executing*, 57 TEX. L. REV. 233, 233-34 (1979) (arguing that non-self-executing declarations have no binding legal effect and should not be used in construing treaties). See generally RESTATEMENT THIRD, *supra* note 187, reporter's note 5 (stating that framers of U.S. Constitution envisioned self-executing treaties as enabling United States to fulfill its international obligations).

201. See *Foreign Relations Committee Hearing*, *supra* note 18, at 51 (statement of Wade Henderson, NAACP) (stating that non-self-executing declaration denies U.S. citizens protections of international human rights law); *id.* at 53 (statement of William T. Lake, IHRLG) (stating that non-self-executing declaration "hobbles [U.S.] ratification"); McDougall, *supra* note 38, at 587 (noting that non-self-executing declaration demonstrates that U.S. commitment to international human rights standards is insincere); Taifa, *supra* note 21, at 650 (asserting that non-self-executing declaration invalidates CERD's effect).

202. See Taifa, *supra* note 21, at 670 (noting that many issues of racial discrimination in U.S. criminal justice system may be violations of CERD provisions proscribing laws and practices with racially discriminatory effect); Weaver & Purcell, *supra* note 21, at 373 (stating that U.S. equal protection jurisprudence does not effectively address

*A. Arguments that the Non-Self-Executing Declaration Should
Preclude Application of CERD Standards for Proving
Discrimination in the United States*

By ratifying CERD and other human rights treaties with RUDs, the United States endeavors to eliminate any discrepancies between the treaty and U.S. law.²⁰³ The non-self-executing declaration to CERD ensures that no new cause of action will be available under the Convention.²⁰⁴ Commentators note that the declaration was necessary to ensure the Senate's consent for ratification.²⁰⁵ Because U.S. law provides extensive protections and remedies against racial discrimination, the United States insisted that it did not need to make changes to domestic law to comply with CERD.²⁰⁶

1. Rationale for the Non-Self-Executing Declaration

The Clinton Administration believed that existing U.S. law provided extensive protections and remedies against racial discrimination to satisfy the requirements of CERD, making a new cause of action unnecessary.²⁰⁷ Through its RUDs to CERD, it endeavored to eliminate any remaining discrepancies between CERD and U.S. law.²⁰⁸ Because any claim made under CERD would be sufficiently addressed by existing U.S. law, the non-self-executing declaration merely ensures that no frivolous claims

race-neutral statutes and discretionary decisions that have racially disproportionate impact).

203. See *Foreign Relations Committee Hearing*, *supra* note 18, at 11 (statement of Conrad K. Harper, Legal Advisor, U.S. Dep't of State) (stating that U.S. reservations, understandings, and declarations make U.S. obligations under CERD consistent with U.S. law); Sloss, *supra* note 25, at 135 (explaining that U.S. executive branch encourages U.S. Senate to approve ratification of human rights treaties by assuring Senate that it has eliminated discrepancies between treaty obligations and U.S. law).

204. *Foreign Relations Committee Hearing*, *supra* note 18, at 13 (statement of Conrad K. Harper, Legal Advisor, U.S. Dep't of State).

205. See Sloss, *supra* note 25, at 174 (noting that non-self-executing declaration serves to circumvent opposition from Senators who were hostile towards U.S. ratification of human rights treaties).

206. *Foreign Relations Committee Hearing*, *supra* note 18, at 1-2 (statement of Deval Patrick, Assistant U.S. Attorney General, Civil Rights Div., Dep't of Justice).

207. See *id.* at 13 (statement of Conrad K. Harper, Legal Advisor, U.S. Dep't of State) (pointing out that federal, state, and local laws provide numerous opportunities to challenge discriminatory statutes and other government action in U.S. courts).

208. See *id.* at 11 (explaining that reservations make U.S. obligations consistent with U.S. law).

can be brought under CERD.²⁰⁹

One scholar has described the United States' ratification of human rights treaties as an effort to reconcile two conflicting policy objectives.²¹⁰ First, the United States aims to ensure that it can comply with its treaty obligations.²¹¹ In defense of allegations that it does not take its treaty obligations seriously,²¹² the United States claims that the RUDs reflect a close examination of U.S. law and practice to ensure that the United States will be able to comply with its obligations.²¹³ Second, the United States seeks to prevent human rights treaties from altering domestic law.²¹⁴ Because CERD contains more protections against racial discrimination than U.S. law,²¹⁵ the United States adopted the appropriate reservations to relieve itself of the obligation to satisfy those requirements.²¹⁶ This practice resolves the conflict between the two competing objectives in ratifying human rights treaties.²¹⁷

209. See Sloss, *supra* note 25, at 204 (noting that one purpose of non-self-executing declarations was to ensure that litigants do not flood courts with frivolous treaty-based human rights claims).

210. See *id.* at 172 (describing first objective as complying with treaty obligations and second objective as preventing human rights treaties from affecting U.S. law).

211. See *id.* at 176 (noting that if United States did not intend to comply with obligations under human rights treaties, it would ratify them with no reservations and only adhere to those provisions that provided equivalent protections to U.S. law).

212. See *id.* at 177 (stating that human rights advocates criticize reservations that United States attaches to its ratification of human rights treaties as demonstrating that it handles its treaty obligations frivolously).

213. See *Foreign Relations Committee Hearing, supra* note 18, at 14 (statement of Conrad K. Harper, Legal Advisor, U.S. Dep't of State) (noting that RUDs reflect seriousness with which United States accepts its obligations under CERD). The reservation to Article 4 of CERD, for example, which requires State Parties to condemn propaganda based on racial hatred or superiority, ensures that Article 4 could not effect changes in domestic law that conflict with the First Amendment. *Id.* at 11-12. Since the U.S. Constitution takes precedence over treaties, the reservation to Article 4 was essential to ratification of CERD. See Sloss, *supra* note 25, at 180 (noting that Article 4 reservation ensured that United States would not be in breach of obligations under CERD).

214. See Sloss, *supra* note 25, at 174 (stating that U.S. Senate has been historically suspicious of efforts to use treaties to achieve domestic legal reforms).

215. See McDougall, *supra* note 38, at 584-86 (describing how State Parties' obligations under CERD to take affirmative action measures, to eliminate policies that perpetuate racial discrimination, and to regulate racist speech are broader than current U.S. law permits).

216. See *Foreign Relations Committee Hearing, supra* note 18, at 11 (statement of Conrad K. Harper, Legal Advisor, U.S. Dep't of State) (stating that U.S. reservations make its obligations under CERD consistent with U.S. law).

217. See Sloss, *supra* note 25, at 177 (noting that United States ratified CERD,

The latter goal of avoiding any domestic impact from human rights treaties arose from Sen. John Bricker's attempt to amend the U.S. Constitution ("Bricker Amendment") in the 1950s to render all treaties non-self-executing.²¹⁸ In its effort to defeat the proposed amendment, the Eisenhower Administration convinced the Senate that action by the Executive Branch to restrain the domestic impact of human rights treaties would be more effective than a constitutional amendment.²¹⁹ When President Jimmy Carter submitted several human rights treaties to the Senate in 1978, he felt it was politically necessary to assure the Senate that the treaties would not be used to change domestic law.²²⁰ One scholar notes that for the Executive Branch, the main purpose of the non-self-executing declarations is to prevent opposition to treaty ratifications by the Senate.²²¹

Because the Clinton Administration wanted to obtain the Senate's consent for ratification of CERD, it aimed to ensure that there would be no conflicts between CERD and domestic law.²²² If the Administration indicated that changes to domestic law would be necessary, then some members of the Senate would have resisted ratification of CERD.²²³ On the other hand, if the Administration decided not to ratify CERD, then it would have met strong criticism from members of the Senate who favor U.S. ratification of human rights treaties.²²⁴ By endeavoring to elimi-

ICCPR, and Torture Convention with reservations to eliminate discrepancies treaties and U.S. law).

218. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995). Sen. John Bricker, between 1950 and 1955, proposed a constitutional amendment aimed at preventing civil rights forces from invoking international treaties to end racial segregation. *See id.* at 349 (stating that intent of Bricker Amendment was to prevent human rights treaties from having any impact on U.S. law). The Bricker Amendment would have rendered all treaties non-self-executing and would have required the U.S. Congress to pass legislation in order implement a treaty ratified by the Senate. *See id.* (noting that Bricker Amendment included the following provision: "A treaty shall become effective in the United States only through legislation which would be valid in the absence of a treaty."). While those opposed to civil rights for African-Americans supported the proposed amendment, President Eisenhower opposed it and it was ultimately defeated. *Id.* at 348-49.

219. *See Sloss, supra* note 25, at 174 (noting that after defeat of Bricker Amendment, subsequent U.S. Administrations refrained from participating in human rights treaties until Carter Administration).

220. *Id.*

221. *Id.* at 175.

222. *Id.* at 187.

223. *Id.*

224. *Id.*

nate every discrepancy between the treaty and domestic law through RUDs, the United States could fulfill its treaty obligations without having to change domestic law.²²⁵ If the Executive Branch successfully eliminated all discrepancies between CERD requirements and U.S. law through its RUDs, then the non-self-executing declaration would have no legal relevance and would merely reassure conservative senators that no changes to domestic law could result from CERD.²²⁶

2. Consistency of U.S. Civil Rights Law with CERD

U.S. law provides extensive protections and remedies against racial discrimination.²²⁷ While the Equal Protection Clause of the U.S. Constitution²²⁸ requires a showing of discriminatory purpose for courts to grant relief,²²⁹ several U.S. statutes permit a showing of discriminatory impact in the absence of discriminatory purpose.²³⁰ Conrad K. Harper, Legal Advisor for the U.S. Department of State, testified before the Foreign Relations Committee that U.S. law complies with Article 2(1)(c) of CERD,²³¹ which requires State Parties to rectify any laws that

225. See *Foreign Relations Committee Hearing, supra* note 18, at 14 (statement of Conrad K. Harper, Legal Advisor, U.S. Dep't of State) (stating that by specifying its limitations to CERD, United States meets its obligations under CERD while remaining consistent with its constitution and laws).

226. See Sloss, *supra* note 25, at 188 (noting that under this analysis, non-self-executing declaration would be merely "window dressing").

227. See *Foreign Relations Committee Hearing, supra* note 18, at 13 (statement of Conrad K. Harper, Legal Advisor, U.S. Dep't of State) (stating that U.S. law also provides numerous opportunities for individuals to challenge discriminatory statutes and other government action).

228. See U.S. CONST. amend. XIV, § 1 (stating that no state may "deny to any person within its jurisdiction the equal protection of the laws").

229. See *Whitus v. Georgia*, 385 U.S. 545, 550 (1967) (holding that defendant who alleges equal protection violation must demonstrate purposeful discrimination).

230. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (k)(1)(a)(i) (1994). This section states that:

[a]n unlawful employment practice based on disparate impact is established . . . if . . . a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.

Id.; see Voting Rights Act of 1965, 42 U.S.C. § 1973(b) (1994) (stating that violation of act is established if "it is shown that the political processes leading to nomination or election in the State are not equally open to participation by members of a class").

231. CERD, *supra* note 14, art. 2(1)(c), at 218.

have the effect of creating or perpetuating racial discrimination.²³² Based on this analysis, the United States did not make a reservation to Article 2(1)(c).²³³

Under federal statutes such as the Voting Rights Act of 1965,²³⁴ Title VII of the Civil Rights Act of 1964,²³⁵ and the Fair Housing Act of 1968,²³⁶ courts may nullify practices that have a discriminatory effect.²³⁷ In the absence of showing intentional racial discrimination, plaintiffs, under those statutes, may make out a *prima facie* case of discrimination if they show that a race-neutral practice causes statistically significant racial disparities.²³⁸ If the plaintiff meets the *prima facie* standard, the burden of proof then shifts to the defendant to rebut the plaintiff's argument and to justify the practice by demonstrating its necessity.²³⁹

The U.S. Supreme Court, however, has interpreted the equal protection clauses of the Fifth and Fourteenth Amendments as prohibiting only purposeful discrimination.²⁴⁰ Courts, nonetheless, may consider evidence of disparate impact as a factor in determining whether there is purposeful discrimina-

232. *Foreign Relations Committee Hearing, supra* note 18, at 19 (prepared statement of Conrad K. Harper, Legal Advisor, U.S. Dep't of State).

233. *See id.* (pointing out that CERD provisions relating to discriminatory purpose and effect warranted Senate's attention, but should not be included in U.S. package of reservations).

234. *See* Voting Rights Act of 1965, 42 U.S.C. §§ 1973-73c (1994) (prohibiting practices that result in denial of right to vote on account of race).

235. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(k)(1)(a)(i) (1994) (prohibiting private employment practices having discriminatory effect).

236. *See* Fair Housing Act of 1968, 42 U.S.C. §§ 3601-19 (1994) (prohibiting practices that result in discrimination in sale or rental of housing).

237. *See* *Thornburg v. Gingles*, 478 U.S. 30 (1986) (stating that violation of Voting Rights Act of 1965 could be proven by demonstrating discriminatory effect of voting district plan); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that educational requirements and standardized intelligence test for employment that disqualified blacks at higher proportion than whites and that was not significantly related to successful job performance violated Title VII of Civil Rights Act of 1964); R. SCHWEMM, *HOUSING DISCRIMINATION LAW AND LITIGATION* § 10.04 (1990) (noting that although U.S. Supreme Court has not addressed the issue, lower courts have consistently held that disparate impact claims may be brought under Fair Housing Act of 1968, without showing discriminatory intent).

238. *Foreign Relations Committee Hearing, supra* note 18, at 33 (prepared statement of Strobe Talbott, Acting Secretary, U.S. Dep't of State).

239. *Id.* at 33-34.

240. *See* *Washington v. Davis*, 426 U.S. 229, 247-48 (1976) (finding that while Title VII permits challenges to employment practices that disproportionately affect blacks without showing discrimination, alleging violation of Fifth or Fourteenth Amendments of U.S. Constitution requires showing discriminatory purpose).

tion.²⁴¹ Where racial disparities arising from a race-neutral practice are especially stark and where there is no legitimate justification for the disparity, discriminatory intent may be inferred.²⁴² Strobe Talbott, Acting Secretary of the U.S. Department of State, suggested that in most cases, disparate impact alone is not determinative and courts will analyze statistical disparities along with other evidence that may be probative of discriminatory purpose.²⁴³ If the totality of the evidence suggests that discriminatory purpose underpins the race-neutral practice, then the burden shifts to the defendant to justify the practice.²⁴⁴

Harper asserted that Article 2(1)(c) of CERD did not require the automatic invalidation of race-neutral laws, regulations, or practices that disproportionately impacted some racial groups.²⁴⁵ He cited the CERD Committee's General Recommendation 14,²⁴⁶ which states that in determining whether an action has an effect that violates CERD, the CERD Committee will examine whether that action has an unjustifiable disparate impact on a particular racial group.²⁴⁷ Harper interpreted the CERD Committee's term "unjustifiable disparate impact" to mean that CERD only addressed those race-neutral practices

241. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (finding that disparate impact "may provide an important starting point" for determining whether discriminatory purpose exists).

242. See *id.* (noting that cases where "a clear pattern [of discrimination], unexplainable on grounds other than race emerges from the effect of the state action even when the governing action is neutral on its face" are rare). Absent such a clear showing, discriminatory effect alone is not determinative. *Id.*

243. *Foreign Relations Committee Hearing*, *supra* note 18, at 33-34 (statement of Strobe Talbott, Acting Secretary, U.S. Dep't of State) (citing *Arlington Heights*, 429 U.S. at 266).

244. See *Castaneda v. Partida*, 430 U.S. 482, 495 (1977) (finding that when defendant shows "substantial underrepresentation of his group" in jury selection, he has made *prima facie* case of discrimination, and burden shifts to state to rebut claim).

245. *Foreign Relations Committee Hearing*, *supra* note 18, at 19 (statement of Conrad K. Harper, Legal Advisor, U.S. Dep't of State).

246. See U.N. High Commissioner for Human Rights, *Definition of Discrimination (Article 1, para. 1) General Recommendation 14* (visited Apr. 5, 1999) <<http://www.unhchr.ch/tbs/doc.nsf/>> [hereinafter *CERD Committee General Recommendation 14*] (on file with the *Fordham International Law Journal*) (stating that differential treatment is not considered discrimination if criteria are legitimate within objectives of CERD or fall within Article 1(4)).

247. See *Foreign Relations Committee Hearing*, *supra* note 18, at 19 (statement of Conrad K. Harper, Legal Advisor, U.S. Dep't of State) (citing CERD Committee *General Recommendation 14* as supporting United States' interpretation of Article 2(1)(c) of CERD as only invalidating those race-neutral laws that have unjustifiable disparate impact).

that create statistically significant racial disparities that are unnecessary.²⁴⁸ He concluded that the CERD Committee's view was consistent with proving violations under the Equal Protection Clause and federal civil rights statutes.²⁴⁹

B. *Arguments that the Non-Self-Executing Declaration Should Not Preclude Application of CERD Standards for Proving Discrimination in the United States*

The United States' view that the non-self-executing declaration precludes U.S. citizens from invoking CERD's protections in U.S. courts and shields U.S. law from adapting to CERD has been widely challenged.²⁵⁰ Noting the divergence between CERD standards for proving discrimination and U.S. law,²⁵¹ many commentators lament that the non-self-executing declaration makes CERD inapplicable in the United States.²⁵² Because CERD's definition of racial discrimination includes practices that have a discriminatory effect,²⁵³ some authors assert that U.S. law, which generally requires a showing of discriminatory purpose,²⁵⁴ conflicts with CERD.²⁵⁵

248. *Id.*; see *id.* at 33-34 (statement of Strobe Talbott, Acting Secretary, U.S. Dep't of State) (explaining that this reading of Article 2(1)(c) is consistent with litigation of claims under Titles VI and VII of Civil Rights Act of 1964 and Fair Housing Act of 1968). Mr. Talbott also noted that the CERD Committee's analysis was compatible with equal protection claims to the extent that statistical proof of racial disparity, especially when considered with other circumstantial evidence, was probative of the discriminatory intent necessary to make a claim under those provisions, shifting the burden of proof to the defendant to justify a race-neutral practice. *Id.*

249. *Id.*

250. See *Foreign Relations Committee Hearing*, *supra* note 18, at 51 (statement of Wade Henderson, NAACP) (stating the non-self-executing declaration denies U.S. citizens protection of human rights law); *id.* at 52 (statement of William T. Lake, IHRLG) (criticizing non-self-executing declaration as United States' refusal to let its own citizens enforce rights in U.S. courts);

251. McDougall, *supra* note 38, at 584; Taifa, *supra* note 21, at 670.

252. See McDougall, *supra* note 38, at 588 (noting that non-self-executing declaration was most troubling aspect of U.S. ratification of CERD because it prohibits private causes of action by U.S. citizens); Taifa, *supra* note 21, at 650 (stating that non-self-executing declaration nullifies effect of CERD).

253. CERD, *supra* note 14, art. 1(1), at 216.

254. *McClesky v. Kemp*, 481 U.S. 279, 292 (1987) (citing *Whitus v. Georgia*, 382 U.S. 545, 550 (1967)).

255. See McDougall, *supra* note 38, at 584-86 (pointing out that CERD's requirement that State Parties rectify state practices that have discriminatory effect may reach beyond current Fourteenth Amendment protections); Taifa, *supra* note 21, at 670 (noting that issues of discrimination in U.S. criminal justice system may violate CERD provi-

1. Challenges to the Non-Self-Executing Declaration

Many commentators oppose the non-self-executing declaration on legal²⁵⁶ and policy grounds.²⁵⁷ First, some scholars note that non-self-executing declarations are inconsistent with Article VI of the U.S. Constitution, which states that treaties are the supreme law of the land.²⁵⁸ Second, commentators argue that the non-self-executing declaration nullifies the effect of CERD in the United States by preventing U.S. citizens from causes of action under the Convention.²⁵⁹ Third, some authors note that the non-self-executing declaration only prohibits private causes of action, but does not prevent CERD from being invoked as a defense to criminal charges or under other federal statutes.²⁶⁰

Despite the U.S. government's practice of ratifying human rights treaties as non-self-executing, many scholars presume that treaties are generally self-executing.²⁶¹ One scholar notes that the U.S. Constitution does not specify that treaties must be self-executing in order to be the supreme law of the United States.²⁶² The Reporter's Note of Section 111 of the Restatement (Third) of Foreign Relations Law²⁶³ states that the Framers of the U.S. Constitution contemplated that treaties were to be self-executing

sions that proscribe laws and practices with racially discriminatory impact, regardless of intent).

256. See Paust, *supra* note 188, at 760 (claiming that non-self-executing declarations are inconsistent with Article VI of U.S. Constitution, which states that treaties are supreme law of land); RESTATEMENT THIRD, *supra* note 187, § 111, reporter's note 5 (stating intention of framers of U.S. Constitution that treaties are self-executing).

257. See *Foreign Relations Committee Hearing*, *supra* note 18, at 51 (statement of Wade Henderson, NAACP) (asserting that non-self-executing declaration impairs CERD's impact in United States); Taifa, *supra* note 21, at 655 (opining that non-self-executing declaration permits United States to "opt out" of CERD).

258. Paust, *supra* note 188, at 760; see RESTATEMENT THIRD, *supra* note 187, § 111, reporter's note 5 (noting that there is strong presumption that treaties are self-executing where Executive Branch does not request implementing legislation).

259. *Foreign Relations Committee Hearing*, *supra* note 18, at 51 (statement of Wade Henderson, NAACP); Taifa, *supra* note 21, at 655.

260. See Paust, *supra* note 188, at 781-82 (stating that non-self-executing treaties can affect domestic law indirectly and aid in interpreting constitutional, statutory, or common law provisions); Sloss, *supra* note 25, at 152 (asserting that U.S. courts can apply non-self-executing treaties directly even if those treaties do not create private causes of action); Vazquez, *supra* note 25, at 1143 (stating that right of action under treaty is not necessary if treaty is invoked as defense).

261. LILLICH & HANNUM, *supra* note 128, at 120.

262. See Paust, *supra* note 188, at 766 (stating that by its express terms, U.S. Constitution states that treaties have self-executing status).

263. RESTATEMENT THIRD, *supra* note 187, § 111, reporter's note 5.

in order to avoid delay in carrying out the obligations of the United States.²⁶⁴

William T. Lake of the International Human Rights Law Group²⁶⁵ testified before the Foreign Relations Committee that the non-self executing declaration did not absolve the United States of its duty under international law to ensure that domestic courts comply with CERD, but only sought to deny the courts a role in that capacity.²⁶⁶ One commentator noted that the declaration has prevented the U.S. judiciary from interpreting the provisions of CERD, depriving the international community from potentially valuable contributions to international jurisprudence on the application of CERD.²⁶⁷ U.S. federal courts have consistently rejected claims made under the U.N. Charter, the ICCPR, and the Torture Convention, noting that those treaties were ratified as non-self-executing.²⁶⁸ In the only published U.S.

264. *See id.* (noting intent of framers of U.S. Constitution to avoid obtaining Senate's approval for second time for implementing legislation after obtaining Senate's consent for ratification).

265. *See International Human Rights Law Group* (visited May 15, 1999) <<http://www.hrlawgroup.org/>> (on file with the *Fordham International Law Journal*) (stating that IHRLG is non-profit organization of human rights and legal professionals involved in human rights advocacy, litigation, and training internationally).

266. *See id.* at 54 (prepared statement of William T. Lake, IHRLG) (asserting that U.S. judiciary, rather than executive branch has power to decide which provisions of CERD are self-executing and that any declaration regarding self-executing status would be merely legislative history and would not overcome language of treaty). In addition, because the non-self-executing provision to CERD is in the form of a declaration, rather than a reservation, some commentators have questioned whether it has any legal significance. McDougall, *supra* note 38 at 590. A declaration is generally understood as a statement giving notice of basic principles or policies, while a reservation is a formal derogation from obligations under the treaty. JORDAN J. PAUST, *INTERNATIONAL LAW AS THE LAW OF THE UNITED STATES* 366 (1996).

267. McDougall, *supra* note 38, at 588. One author notes that international tribunals examining discrimination have referred to U.S. Supreme Court decisions interpreting the Fourteenth Amendment as supplemental sources of authority. MCKEAN, *supra* note 116, at 228.

268. *See White v. Paulsen*, 997 F. Supp. 1380, 1385 (E.D. Wash. 1998) (finding that prisoners alleging non-consensual medical experimentation had no claim under ICCPR or Convention Against Torture); *Weir v. Broadnax*, 1990 WL 195841, *7 (S.D.N.Y. 1990) (rejecting claim under Articles 55 and 56 of U.N. Charter for relief from racially discriminatory employment practices). In *Sei Fujii v. State*, a California appellate court addressed the domestic application of the Articles 55 and 56 of the U.N. Charter, which mandate protection of human rights, and held that the California Alien Land Law, which discriminated against people of Asian origin, was unenforceable because it violated the U.N. Charter. *Sei Fujii v. State*, 242 P.2d 617 (Cal. 1952). The court found that since the U.N. Charter was a treaty, it superceded inconsistent state legislation. *Id.* at 621. The California Supreme Court reversed that decision and ruled that the human

court opinion that mentioned CERD, a California federal district court rejected the plaintiff's constitutional challenge to a statute replacing public school bilingual education with English immersion education, but did not address the ramifications of the non-self-executing declaration.²⁶⁹ Some U.S. courts have implied, however, that it is for the courts to decide whether a treaty is self-executing where plaintiffs make claims under treaties that the United States ratified as non-self-executing.²⁷⁰

Most of the criticisms of the non-self-executing declaration focused on the declaration's effect on the United States's obligations under CERD.²⁷¹ Amnesty International USA²⁷² testified

rights provisions in the U.N. Charter were non-self-executing and could not supercede state law without congressional legislation. *Id.* Since this ruling was not appealed, the U.S. Supreme Court has never addressed whether the human rights provisions of the U.N. Charter are non-self-executing. Taifa, *supra* note 21, at 651 n.43.

269. See Valeria v. Wilson, 12 F. Supp. 1007, 1027 (N.D. Cal. 1998) (rejecting claim made by *amicus curiae* brief that statute violated CERD and ICCPR as "not properly within the scope of this action" because plaintiffs had not raised those claims).

270. See United States v. Postal, 589 F.2d 862, 876 (5th Cir. 1979), *cert. denied*, 444 U.S. 831 (1979) (stating that "question of whether a treaty is self-executing is a matter of interpretation for the courts when the issue presents itself in litigation"). *But see* People v. Ghent, 739 P.2d 1250, 1275 (Cal. 1987), *cert. denied*, 485 U.S. 929 (1988) (finding that treaties, international declarations, and charters had no effect on domestic law unless they were self-executing or implemented by Congress). One commentator noted the possibility that jurisdiction will ultimately fall to U.S. courts to determine the validity of the Administration's declaration that U.S. ratification of CERD does not create a cause of action without implementing legislation. *Foreign Relations Committee Hearing, supra* note 18, at 54 (statement of William T. Lake, IHRLG).

271. See *id.* at 51 (statement of Wade Henderson, NAACP) (stating that non-self-executing reservation denies U.S. citizens protection of crucial human rights law); *id.* at 62 (prepared statement of ACLU) (noting that CERD's protections should be enforceable in U.S. courts). Most commentators supported the U.S. reservation on freedom of speech. *Foreign Relations Committee Hearing, supra* note 18, at 62 (prepared statement of ACLU); *id.* at 55 (prepared statement of William T. Lake, IHRLG). Many opposed the U.S. reservation from the jurisdiction of the ICJ. See *id.* at 54 (prepared statement of William T. Lake, IHRLG) (stating that ICJ plays crucial role in international disputes). Lake noted that the United States need not fear frivolous claims through the ICJ for two reasons: one, the interstate provision of CERD had never been used, and two, frivolous cases would be dismissed at earlier stages of that procedure. *Id.* The Lawyers Committee for Human Rights stated that the ICJ reservation was particularly unjustifiable given that when the United States ratified the ICCPR, it submitted to the jurisdiction of the Human Rights Committee, an international dispute resolution body. *Id.* at 72 (prepared statement of Lawyers Committee for Human Rights). It also noted that the United States is already a party to over 75 treaties that provide for submission of disputes to the ICJ and had no reason to doubt that it would render a fair and impartial verdict. *Id.*

272. Amnesty International USA (visited May 15, 1999) <<http://www.amnesty-usa.org/>> (on file with the *Fordham International Law Journal*). Amnesty International

before the Foreign Relations Committee that while ratifying CERD signaled that the United States was committed to eliminating all traces of racial discrimination from its law and practice, the non-self-executing declaration indicated that the United States would not provide its citizens with all available means to challenge discriminatory practices in U.S. courts.²⁷³ Noting that the United States attached a similar package of RUDs to the ratification of the ICCPR and the Torture Convention, one author commented that the United States merely intended a symbolic commitment to international human rights standards, while essentially maintaining the U.S. practice of isolating itself from international scrutiny.²⁷⁴ Prof. Louis Henkin notes that the current U.S. practice of attaching non-self-executing declarations to human rights treaties that it ratifies accomplishes the goal of the Bricker Amendment, which was to nullify the effect of international human rights standards in U.S. law.²⁷⁵

Some commentators note, however, that while a non-self-executing treaty may preclude private causes of action, the treaty may still be applied directly by the courts.²⁷⁶ A private cause of action is not necessary if the treaty is being invoked as a defense to criminal or civil charges brought by the government or pursuant to another cause of action²⁷⁷ such as Section 1983 of Chapter 42 of the United States Code²⁷⁸ ("Section 1983") or by means of

USA is the U.S. section of Amnesty International, a grassroots organization dedicated to freeing prisoners of conscience, to gaining fair trials for political prisoners, to ending torture, and to abolishing the death penalty worldwide. *Id.*

273. *Foreign Relations Committee Hearing*, *supra* note 18, at 65 (prepared statement of Amnesty International USA).

274. Taifa, *supra* note 21, at 649-50.

275. Henkin, *supra* note 218, at 348.

276. Sloss, *supra* note 25, at 151.

277. *See* Sloss, *supra* note 25, at 216 (noting that plaintiffs could raise treaty-based claims by relying on federal, state, or common law to establish private cause of action); Vazquez, *supra* note 25, at 1143-44 (stating that defendant who is prosecuted or sued under state law or prior federal law that is inconsistent with non-self-executing treaty may invoke that treaty to supersede inconsistent law without having to show that treaty creates private right of action).

278. 42 U.S.C. § 1983 (1994). The statute states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

Id.

a writ of *habeas corpus*.²⁷⁹ To interpret the non-self-executing declaration as prohibiting all claims deriving from CERD even if they are based on a domestic statutory relief provision would violate the obligation of the United States under Article 6 of CERD to provide a hearing before a competent national tribunal to an aggrieved individual.²⁸⁰ Despite the best efforts of the Clinton Administration to eliminate all discrepancies between CERD requirements and existing U.S. law, individuals might still be able to raise legitimate claims under the treaty.²⁸¹ In these cases, the non-self-executing declaration should not prevent judges from reaching the merits of these claims.²⁸² One scholar suggests that in each case, courts balance the need to give effect to the non-self-executing declaration against the need to promote compliance with U.S. treaty obligations.²⁸³

2. Non-Self-Executing Declaration as Violating CERD's Object and Purpose

By codifying the concept of equality between all races,²⁸⁴ CERD's primary object is to extend protections against racial discrimination to all citizens in its State Parties.²⁸⁵ Article 20(2) of CERD²⁸⁶ specifically prohibits reservations that are incompatible

279. See 28 U.S.C. § 2241(c)(3) (1994) (providing that writ of *habeas corpus* extends to prisoners who are "in custody in violation of the Constitution or laws or treaties of the United States").

280. See generally Sloss, *supra* note 25, at 197 (stating that courts' refusal to reach merits of all claims raised under non-self-executing treaties would conflict with U.S. obligation to ensure aggrieved citizens hearing before impartial tribunal).

281. See *id.* at 219 (noting that Executive Branch mistakenly assured Senate during ratification of CERD, ICCPR, and Torture Convention that non-self-executing declarations were consistent with U.S. law and arguing that Executive Branch should now acknowledge that certain discrepancies remain, making those declarations inconsistent with U.S. treaty obligations).

282. See *id.* at 219-20 (noting that Executive Branch has primary responsibility for ensuring U.S. compliance with treaty obligations).

283. See *id.* at 217 (recommending that U.S. Executive Branch submit *amicus curiae* brief in support of plaintiff who claims human rights treaty violation and noting that courts are likely to give great weight to views of Executive Branch).

284. See Egon Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 INT'L & COMP. L.Q. 996, 1057 (1966) (stating that CERD codifies idea of equality among races in treaty form).

285. See McDougall, *supra* note 38, at 588-89 (noting that non-self-executing declaration may violate CERD's object and purpose).

286. CERD, *supra* note 14, art 20(2), at 236. Article 20(2) of CERD states that: [a] reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit

with its object and purpose.²⁸⁷ One author notes that the United States' non-self-executing declaration violates CERD's object and purpose because it limits the extension of rights under CERD to U.S. citizens.²⁸⁸ In 1994, the Human Rights Committee, which administers the ICCPR, issued General Comment 24, a statement asserting that broad reservations to the ICCPR, particularly those that limit its applicability to the extent of protections provided by domestic law, violate the object and purpose of the ICCPR.²⁸⁹ Although the Human Rights Committee's statement refers specifically to the ICCPR, it has been noted that it could apply equally well to CERD.²⁹⁰

General Comment 24 addressed the Human Rights Committee's concern that broad, sweeping reservations essentially abrogate treaty provisions that require any change to national law.²⁹¹ Such reservations, it noted, establish that the State Party has accepted no international obligations.²⁹² It stated that reservations to human rights treaties must be specific and distinct.²⁹³ The Human Rights Committee further noted that declarations must not pronounce ICCPR obligations identical, or to be accepted only in so far as they are identical, with existing provi-

the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two-thirds of the State Parties to this Convention object to it.

Id.

287. *Id.* Moreover, the Vienna Convention on the Law of Treaties prohibits reservations that violate a treaty's object and purpose. Vienna Convention on the Law of Treaties, May 23, 1969, art. 19(c), 1155 U.N.T.S. 331, 337 [hereinafter Vienna Convention].

288. McDougall, *supra* note 38, at 588-89.

289. See *General Comment No. 24 (52) of 2 November 1994 on Issues Relating to Reservations Made upon or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.6, ¶ 19 (1994), reprinted in 15 HUMAN RIGHTS L.J. 464, 467 (1994) [hereinafter *General Comment 24*] (stating that Human Rights Committee views overly broad reservations as incompatible with object and purpose of ICCPR).

290. See McDougall, *supra* note 38, at 589 (finding that Human Rights Committee's General Comment 24 that addresses permissibility of reservations to ICCPR may be applicable to CERD).

291. See *General Comment 24*, *supra* note 289, ¶ 19 (stating that reservations must refer to specific provision of ICCPR and indicate its scope in precise terms).

292. See *id.* (noting that reservations that seek to limit obligations to those currently existing in domestic law undermine attainment of international human rights standards).

293. See *id.* (explaining that reservations or declarations should not seek to alter meaning of ICCPR obligations by proclaiming identical to domestic law).

sions of domestic law.²⁹⁴ Where the Human Rights Committee finds that a reservation is incompatible with the object and purpose of the ICCPR, the reservation will be severed, requiring the reserving party to fulfill its obligations under the treaty without the benefit of the reservation.²⁹⁵ Under this analysis, one author notes that the non-self-executing declaration to CERD should be severed from the U.S. ratification.²⁹⁶

3. Inconsistency of U.S. Standards for Proving Discrimination with CERD Standards in the Criminal Justice Context

Commentators note that CERD provides more protections against discriminatory impact of race-neutral laws and practices than is currently available under U.S. law.²⁹⁷ In the criminal justice context, U.S. courts have found that a showing of discriminatory purpose is required to make a claim under the Equal Protection Clause.²⁹⁸ CERD, in contrast, mandates State Parties to consider whether the effect of its laws or practices is discriminatory,²⁹⁹ and specifically extends this obligation to the criminal justice context.³⁰⁰

Although under U.S. law discriminatory effect alone generally cannot demonstrate a constitutional violation,³⁰¹ the U.S.

294. See *id.* (stating that states should not seek to determine meaning of ICCPR provision by attaching interpretive reservations or declarations).

295. *Id.* The United States expressed concern over General Comment 24, asserting that the Human Rights Committee lacks the authority to issue to binding interpretations. See *Observations by the Governments of the United States and the United Kingdom on General Comment 24 (52) Relating to Reservations*, 16 HUM. RTS. L.J. 422, 423 (1995) (stating U.S. position that reservations are integral part of its consent to be bound by ICCPR and are not severable).

296. McDougall, *supra* note 38, at 589.

297. See Taifa, *supra* note 21, at 670 (noting that many issues of racial discrimination in U.S. criminal justice system may violate CERD provisions that prohibit laws and practices having discriminatory effect); Weaver & Purcell, *supra* note 21, at 373 (stating that CERD addresses discriminatory effect of race-neutral statutes and discretionary decisions not recognized under U.S. equal protection analysis).

298. See *McClesky v. Kemp*, 481 U.S. 279, 292 (1987) (citing *Whitus v. Georgia*, 385 U.S. 545, 549-50 (1967), (stating that burden is on petitioners to prove purposeful discrimination to claim relief under Equal Protection Clause).

299. CERD, *supra* note 14, art. 2(1)(c), at 218.

300. *Id.* art. 5(a), at 220.

301. See McDougall, *supra* note 38, at 585 (noting that Article 2(1)(c) of CERD extends beyond Fourteenth Amendment, which requires showing discriminatory purpose); Meron, *supra* note 23, at 289 (stating that while U.S. law accounts for discriminatory effect in determining discriminatory purpose, CERD prohibits discriminatory effect independently of intent).

Supreme Court has recognized certain situations where a showing of discriminatory impact is sufficient to prove discriminatory intent.³⁰² Examples of relief being granted for discriminatory effect without showing a discriminatory purpose include situations involving prosecutors' peremptory challenges to black jurors,³⁰³ voting rights,³⁰⁴ and employment discrimination.³⁰⁵ In those contexts, once a complainant makes a *prima facie* case of discrimination, the burden of proof shifts to the government, which has the opportunity to rebut the allegation.³⁰⁶ The court then evaluates whether the complainant has demonstrated discrimination in light of the government's evidence.³⁰⁷

Criminal defendants, however, have been required to demonstrate discriminatory purpose when claiming relief from

302. See *Batson v. Kentucky*, 476 U.S. 79, 93 (1986) (finding that "total or seriously disproportionate exclusion of Negroes from jury venires" . . . 'is itself such an unequal application of the law . . . as to show intentional discrimination') (quoting *Washington v. Davis*, 426 U.S. 229, 241-42 (1976)); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (holding that "a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face"); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (accepting statistical evidence of discriminatory impact as proof of violations of Civil Rights Act of 1964).

303. See *Batson*, 476 U.S. at 97 (holding that prosecutor's use of peremptory challenges to strike jurors of the defendant's race may raise inference of purposeful discrimination).

304. See *Thornburg v. Gingles*, 478 U.S. 30 (1986) (finding violation of Voting Rights Act based on discriminatory effect of redistricting plan on black electoral representation).

305. See *Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (finding that statistical evidence of race-based salary discrimination acceptable for claim of discrimination by preponderance of evidence under Title VII of Civil Rights Act of 1964).

306. See *Batson*, 476 U.S. at 97 (stating that once defendant makes *prima facie* case, burden shifts to state to demonstrate neutral explanation for challenging black jurors); *Bazemore*, 478 U.S. at 398 (noting that if defendants in employment discrimination case respond to plaintiffs' case by offering their own evidence, factfinder must decide whether plaintiffs have demonstrated discrimination); *Thornburg*, 478 U.S. at 77 (finding that state defeated claim of discrimination with respect to one voting district where it produced evidence of black electoral success). The state did not produce such evidence in the other voting districts considered in that case and for those districts, the Court upheld the District Court's finding that the redistricting plan caused black voters to have less opportunity than white voters to elect representatives of their choice. *Id.* at 80; see *Castaneda v. Partida*, 430 U.S. 482, 496-98 (1977) (finding that prisoner's showing of intentional discrimination against Mexican-Americans in grand jury selection shifted burden to state to dispel inference of intentional discrimination).

307. See, e.g., *Batson*, 476 U.S. at 98 (stating that after government has rebutted allegation of discrimination, trial court will then determine whether defendant has established purposeful discrimination).

racial discrimination under the Equal Protection Clause.³⁰⁸ The Court in *McClesky* expressed concern that by accepting the Baldus Study as proof of discrimination by showing a pattern of discriminatory effect in death penalty cases, the state would not have an effective opportunity to rebut that allegation because it would have to explain the decisions of the numerous prosecutors in those cases.³⁰⁹ The Court held that a prosecutor only has to explain his decisions if the criminal defendant demonstrated a *prima facie* case of discrimination with respect to his particular case.³¹⁰

Commentators note that racial discrimination in the U.S. criminal justice system persists as a result of the discriminatory effect of discretionary decisions by prosecutors and of race-neutral statutes.³¹¹ Article 5 of CERD requires State Parties to fulfill their obligations under Article 2 in the criminal justice context.³¹² In particular, Article 5(a) requires the right to equal treatment before tribunals and all other organs administering

308. See *McClesky v. Kemp*, 481 U.S. 279, 292 (1987) (citing *Whitus v. Georgia*, 385 U.S. 545, 550 (1967)) (stating that defendant alleging equal protection violation must prove purposeful discrimination).

309. See *McClesky*, 481 U.S. at 296-97 nn. 17-18 (finding that state would have no practical opportunity to rebut Baldus Study since it would be required to explain decisions not only in that particular case, but also in past cases involving many different prosecutors). In his dissent, Justice Blackmun noted that if the Court followed the framework set out in *Castaneda*, the state would have an opportunity to explain that legitimate neutral criteria produced the racially disproportionate result. See *id.* at 359 (Blackmun, J., dissenting) (noting that without evidence to the contrary, *McClesky*'s evidence demonstrated that racial factors entered into decision that resulted in his death sentence).

310. See *id.* at 297 n.18 (stating that "[i]f the prosecutor could be made to answer in court each time . . . a person accused him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing criminal the criminal law") (quoting *Imbler v. Pachtman*, 424 U.S. 409, 425 (1976)).

311. See *Foreign Relations Committee Hearing*, *supra* note 18, at 65 (statement of Amnesty International USA) (stating that laws and policy of non-discrimination are not executed or implemented to eliminate racial influences). Amnesty International USA testified before the U.S. Senate Foreign Relations Committee that race was a factor in the denial of rights in the United States, particularly with respect to the death penalty and police brutality. *Id.*; see Taifa, *supra* note 21, at 664-65 (noting that U.S. federal sentencing guidelines for drug-related crimes impose longer sentences for crack cocaine offenses than for powder cocaine offenses and disproportionately affect blacks, who are more likely to be convicted of cocaine offenses). Taifa also notes that prosecutors are more likely to grant downward departures from the sentencing guidelines for powder cocaine offenses than for crack cocaine offenses. *Id.* at 665. These are discretionary decisions that disproportionately affect blacks." *Id.* at 669.

312. CERD *supra* note 14, art. 5, at 220-22.

justice.³¹³ Authors assert that Article 5(a) of CERD would apply to discretionary decisions made in the criminal justice context that have a disproportionate racial impact.³¹⁴

Article 2(1)(c) of CERD would affect disparate racial impact that results from race-neutral statutes.³¹⁵ Authors note that CERD provisions recognizing discriminatory effect would avoid current obstacles of the equal protection analysis in the criminal justice context.³¹⁶ To prevail on an equal protection claim in the case of discriminatory sentencing for crack cocaine as compared with powder cocaine, for example, the complainant would have to show that the statute was enacted with a discriminatory purpose, irrespective of the fact that ninety percent of the defendants convicted under federal crack statutes are African-American.³¹⁷ Under Article 2 of CERD, such a showing of disparate impact would be sufficient to obligate the United States to change its laws.³¹⁸

III. CERD CAN PROVIDE A REMEDY FOR CLAIMS OF RACIAL DISPARITY IN U.S. DEATH PENALTY CASES

The U.S. Supreme Court's decision to uphold Warren McClesky's death sentence,³¹⁹ despite clear evidence that the death penalty disproportionately affects black defendants convicted of killing whites,³²⁰ demonstrates that U.S. law does not adequately protect against race influencing death penalty cases.³²¹ Because many U.S. states and the U.S. government are expanding the number of crimes for which the death penalty is available,³²² it is urgent that efforts be made to address this problem. U.S. ratifi-

313. *Id.* art. 5(a), at 220.

314. *Id.*; see Taifa, *supra* note 21, at 670 (noting that selective infliction of police brutality as example of discriminatory impact that could be alleviated by CERD).

315. Taifa, *supra* note 21, at 670; Weaver & Purcell, *supra* note 21, at 373.

316. Weaver & Purcell, *supra* note 21, at 373.

317. *Id.*

318. *Id.*

319. See *supra* notes 79-87 and accompanying text (examining U.S. Supreme Court's decision to uphold McClesky's death sentence).

320. See *supra* notes 98-113 and accompanying text (discussing GAO Report and Special Rapporteur's findings that race influences imposition of death penalty).

321. See *supra* note 113 and accompanying text (noting Special Rapporteur's finding that McClesky decision placed heavy burden on petitioners claiming racial discrimination in death penalty).

322. See *supra* notes 29-30 and accompanying text (illustrating that more U.S. states have legalized death penalty and that number of executions is increasing).

cation of CERD in 1994 after three decades of inaction signifies a step towards U.S. recognition of international standards for eradicating racial discrimination. CERD provides State Parties with a comprehensive set of international standards and mechanisms to address racial discrimination.³²³ Because CERD recognizes discrimination that results from race-neutral statutes that disproportionately impact certain races,³²⁴ it could be a powerful tool for addressing racial disparity in imposition of the death penalty in the United States. Unfortunately, the United States qualified its ratification with a non-self-executing declaration, which was intended to preclude U.S. citizens from bringing private causes of action under CERD and to shield the United States from complying with CERD.³²⁵ The non-self-executing declaration's prohibition on private causes of action, however, does not preclude CERD-based claims that raise the Convention as a defense to criminal charges.³²⁶ Non-governmental organizations ("NGOs") that address CERD and racial disparity in death penalty cases should raise CERD as a defense in U.S. federal courts on behalf of death row inmates similarly situated to Warren McClesky on the grounds that the death penalty is applied in a racially discriminatory manner. In the international arena, State Parties should use CERD's enforcement mechanisms³²⁷ to condemn the non-self-executing declaration as violating CERD's object and purpose and to file a complaint against the United States alleging that the *McClesky* decision violates CERD.

A. *The Non-Self-Executing Declaration Does Not Preclude U.S. Courts from Addressing CERD*

The non-self-executing declaration to CERD has been

323. See *supra* notes 132-74 and accompanying text (describing CERD provisions and enforcement mechanisms requiring State Parties to eliminate discrimination).

324. See *supra* notes 135-45 and accompanying text (discussing CERD provisions that prohibit laws and practices that have discriminatory effect).

325. See *supra* notes 207-17 and accompanying text (explaining U.S. position that non-self-executing declaration precludes private causes of action under CERD).

326. See *supra* notes 276-83 and accompanying text (examining arguments that non-self-executing declaration does not preclude treaty-based claims invoked as defense or through other domestic relief provision).

327. See *supra* notes 171-74 and accompanying text (describing CERD's enforcement mechanisms that enable State Parties to object to reservations and to file interstate complaints).

widely criticized.³²⁸ Criticisms include arguments that it contravenes Article VI of the U.S. Constitution,³²⁹ that it nullifies CERD's effect,³³⁰ that by only precluding private causes of action it does not prevent U.S. courts from addressing CERD-based claims made as a defense to criminal charges,³³¹ and that it is incompatible with the object and purpose of CERD.³³² While all four of these arguments make important contributions to the extensive scholarship criticizing U.S. ratification of human rights treaties, the first two have little likelihood affecting change in this practice.

Given that the United States has already ratified three major human rights treaties with non-self-executing declarations, arguments that the practice violates the U.S. Constitution are not likely to sway decisionmakers. In addition, arguments that non-self-executing declarations nullify the effect of CERD do not create legal avenues to challenge that conventional wisdom. The third and fourth arguments, however, provide legal avenues to challenge the non-self-executing declaration. The argument that the non-self-executing declaration, by only precluding private causes of action, does not prevent criminal defendants from raising CERD as a defense, opens the door for a *McClesky*-type death row inmate with evidence as comprehensive as the Baldus Study to raise a claim under CERD in U.S. courts. The argument that the declaration is incompatible with the object and purpose of CERD paves the way for other State Parties to use CERD enforcement mechanisms such as the CERD Committee to object to the United States' non-self-executing declaration.

The United States' intended the non-self-executing declaration to CERD to preclude private causes of action under CERD.³³³ Although many U.S. courts have been unwilling to

328. See *supra* notes 256-60 and accompanying text (noting various arguments opposing non-self-executing declaration as preventing CERD's application in United States).

329. See *supra* note 258 and accompanying text (mentioning argument that non-self-executing declaration is inconsistent with Article VI of U.S. Constitution).

330. See *supra* notes 271-75 and accompanying text (discussing commentators' views that non-self-executing declaration restricts impact of CERD in United States).

331. See *supra* notes 276-83 and accompanying text (explaining arguments that non-self-executing declaration does not prohibit treaty-based claims that invoke treaty as defense or under domestic relief provision).

332. See *supra* note 288 and accompanying text (noting commentator's argument that non-self-executing declaration violates CERD's object and purpose).

333. See *supra* notes 212-22 and accompanying text (discussing U.S. position that

recognize claims under non-self-executing treaties such as the ICCPR and the Torture Convention,³³⁴ it is far from clear that the non-self-executing declaration precludes courts from addressing those treaties altogether.³³⁵ CERD has only been mentioned once in a published federal district court opinion in which the court failed to raise its non-self-executing status.³³⁶

U.S. plaintiffs may invoke rights under non-self-executing treaties such as CERD, however, by establishing a cause of action under a domestic federal or state statute.³³⁷ A death row inmate, for example, could invoke CERD in the penalty phase of a capital trial or in a *habeas corpus* proceeding by submitting evidence demonstrating that the death penalty in that particular jurisdiction has a racially discriminatory effect. The defendant would not be relying on CERD to establish an independent cause of action. This approach avoids the obstacle of the non-self-executing declaration.

Courts must recognize that non-self-executing treaties do not automatically preclude treaty-based claims for recognition of rights. Courts should reach the merits of CERD-based human rights claims when CERD is raised as a defense to criminal charges filed by a state or the federal government.³³⁸ Constitutional challenges to death sentences on the grounds of racial discrimination should invoke CERD in the hopes that a court will consider it a duly-ratified treaty of the United States.

B. *U.S. Standards for Proving Discrimination in the Criminal Justice Context Do Not Comply with CERD Standards*

CERD mandates State Parties to address laws and practices that have a discriminatory effect.³³⁹ *McClesky's* holding that a

non-self-executing declaration would preclude private causes of action and that U.S. law contained sufficient protections against discrimination).

334. See *supra* note 268 and accompanying text (mentioning cases that rejected claims under ICCPR and Torture Convention based on non-self-executing declaration).

335. See *supra* notes 276-83 and accompanying text (noting that non-self-executing declaration only precludes private causes of action).

336. See *supra* note 269 and accompanying text (noting that only federal district court case to mention CERD did not address CERD's non-self-executing status).

337. See *supra* notes 276-77 and accompanying text (pointing out that U.S. courts may apply non-self-executing treaties directly).

338. See *supra* note 280-83 and accompanying text (noting that courts should reach merits of treaty-based human rights claims when petitioners use non-self-executing treaty as defense or pursuant to other domestic cause of action).

339. See CERD, *supra* note 14, art. 2(1)(c), at 218.

death row inmate must prove discriminatory purpose in order to obtain relief under the Equal Protection Clause³⁴⁰ is inconsistent with CERD provisions addressing the discriminatory effect of race-neutral statutes. Although the United States endeavored to eliminate all discrepancies between CERD and U.S. law through its numerous reservations to CERD,³⁴¹ it did not ensure that U.S. standards for proving discrimination in the criminal justice system complied with CERD standards.³⁴² The U.S. Supreme Court has repeatedly held that to raise an equal protection challenge in the criminal justice context other than in jury selection³⁴³ requires proof that the decisionmakers acted with a discriminatory purpose.³⁴⁴

Article 2(1)(c) of CERD mandates State Parties to address race-neutral laws and practices that have a discriminatory effect.³⁴⁵ Article 5(a) of CERD also requires State Parties to eliminate racial discrimination from the criminal justice system.³⁴⁶ The Court in *McClesky* would not permit evidence of racially discriminatory impact to affect the imposition of the death penalty,³⁴⁷ thus contravening Articles 2(1)(c) and 5(a) of CERD.

Proof of discrimination by demonstrating that the law or practice in question has a racially discriminatory effect, however, is not foreign to U.S. law. The Court and Congress have permitted plaintiffs to bring claims of racial discrimination by showing discriminatory effect in employment, voting, housing, and jury

340. See *supra* notes 79-83 and accompanying text (discussing U.S. Supreme Court's finding in *McClesky* that *McClesky* would have to show discriminatory purpose in order to get relief).

341. See *supra* notes 210-17 and accompanying text (explaining U.S. position that reservations eliminate discrepancies between CERD and domestic law).

342. See *supra* notes 308-18 and accompanying text (discussing divergence between U.S. and CERD standards for proving discrimination in criminal justice context).

343. See *Batson v. Kentucky*, 476 U.S. 79, 94-95 (1986) (finding that proof of systematic exclusion from jury pool raises inference of purposeful discrimination).

344. See *supra* notes 308-10 and accompanying text (noting that criminal defendants must demonstrate purposeful discrimination in order to obtain relief under Equal Protection Clause).

345. CERD, *supra* note 14, art. 2(1)(c), at 218.

346. See *supra* notes 312-14 and accompanying text (discussing Article 5 of CERD's relevance in criminal justice context).

347. See *supra* notes 81-87 and accompanying text (discussing *McClesky* Court's refusal to reverse death sentence based on evidence of death penalty's discriminatory effect).

selection.³⁴⁸ In those contexts, the state has been able to rebut the allegation of discrimination, by providing a legitimate, race-neutral explanation for the disproportionate racial result.³⁴⁹

Providing states with the opportunity to rebut claims of discrimination is largely consistent with the CERD Committee's General Recommendation 14, which states that it evaluates whether a State Party's action has an "unjustifiable racial impact."³⁵⁰ If a State Party could demonstrate that the action had a justifiable racial impact, presumably the CERD Committee would not consider the action a violation of CERD. In *McClesky*, however, the Court cited the necessity of maintaining discretion in the criminal justice system as a significant factor in its decision to deny relief based on discriminatory effect.³⁵¹ This holding contravenes the provisions of CERD condemning race-neutral statutes that have a discriminatory effect.

C. State Parties Should Use CERD's Enforcement Mechanisms to Object to the U.S. Non-Self-Executing Declaration and to Condemn Racial Disparity in Death Penalty Cases

CERD provides a comprehensive set of mechanisms for ensuring that State Parties adhere to CERD standards.³⁵² State Parties and the CERD Committee should utilize these mechanisms to address racial disparity in U.S. death penalty cases. The CERD Committee should adopt a clear position prohibiting broad qualifications to CERD such as the U.S. non-self-executing declaration. Next, State Parties should object to the United States' non-self-executing declaration as incompatible with the object and purpose of CERD, pursuant to Article 20(2) of CERD.³⁵³ Finally, State Parties should use the inter-state com-

348. See *supra* notes 234-37, 303-05, and accompanying text (noting U.S. statutes and cases permitting proof of discrimination by demonstrating discriminatory effect).

349. See *supra* note 306 and accompanying text (discussing *prima facie* framework that allows state to rebut claim of discrimination).

350. See *supra* notes 246-48 and accompanying text (noting that CERD Committee's General Recommendation 14 states that CERD prohibits only those actions having "unjustifiable disparate impact").

351. *McClesky v. Kemp*, 481 U.S. 279, 297 (1987)

352. See *supra* Part I.B.3 (describing CERD's mechanisms to ensure State Parties fulfill obligations under CERD).

353. See *supra* note 288 and accompanying text (noting that U.S. non-self-executing declaration may violate CERD's object and purpose).

plaint mechanism³⁵⁴ to condemn the *McClesky* decision and the United States' failure to address racial disparity in death penalty cases.

The Human Rights Committee, which administers the ICCPR, issued an authoritative policy stating that reservations that were over broad and sought to limit a State Party's ratification to the extent of its domestic law were incompatible with the ICCPR's object and purpose.³⁵⁵ The CERD Committee should take a similarly strong position on the permissibility of sweeping and far-reaching reservations. The CERD Committee should find that the United States' non-self-executing declaration is incompatible with the object and purpose of CERD because it seeks to protect the the United States from adopting the substantive provisions of CERD.

Article 20(2) of CERD states that a reservation is deemed incompatible with CERD's object and purpose if two-thirds of the State Parties object to it.³⁵⁶ State Parties should object to the United States' non-self-executing declaration and the CERD Committee should declare that it is incompatible with CERD's object and purpose. Such action by State Parties may encourage the United States to withdraw the declaration.

Although State Parties have not invoked the state-to-state provision of CERD,³⁵⁷ it could be a way to put international pressure on the United States with regards to racial disparity in the death penalty. State Parties should file state-to-state complaints with the CERD Committee pursuant to Article 11 of CERD. These complaints should argue that the United States' failure to address racial disparity in the death penalty violates U.S. obligations under CERD.

CONCLUSION

Because the United States has refused to recognize that the death penalty has a discriminatory effect on African-Americans, enforcement of international norms is essential. Domestic law has proven inadequate in providing relief to death row inmates

354. CERD, *supra* note 14, art. 11, at 226-28.

355. See *supra* notes 288-96 and accompanying text (discussing Human Rights Committee's General Comment 24 condemning overly broad reservations and its possible applicability to CERD).

356. CERD, *supra* note 14, art. 20(2), at 236.

357. *Id.* art 11, at 226.

who can prove racial disparities in the imposition of the death penalty. CERD provides a new opportunity to apply international standards for proving discrimination to U.S. death penalty cases. While ratification of CERD demonstrates U.S. commitment to complying with international standards for eradicating racial discrimination, the non-self-executing declaration shows that the United States is unwilling not only to allow its citizens to invoke CERD, but also to allow CERD to affect domestic law.

The CERD Committee and State Parties must use CERD's enforcement mechanisms to object to the United States' effort to insulate itself from international standards. The CERD Committee should adopt strong criteria discouraging qualifications to CERD that are incompatible with CERD's object and purpose. State Parties should object to the United States' non-self-executing declaration and use the state-to-state complaint mechanism to allege a violation of CERD by the United States due to its failure to address racial disparity in the death penalty.

The non-self-executing declaration only prohibits private causes of action under CERD.³⁵⁸ Under this analysis, a death row inmate similarly situated to Warren McClesky could bring a case invoking CERD Articles 2(1)(c) and 5(a) at the penalty phase of his or her trial, at a *habeas corpus* proceeding, or pursuant to Section 1983. Because this claim would not be a private cause of action under CERD, U.S. courts should have no basis for refusing to address its merits. Such a case could be a first step toward remedying racial disparity in the imposition of the death penalty.

358. See *supra* notes 276-83 and accompanying text (noting non-self-executing declaration does not preclude claims raising treaty as defense or under other domestic relief provision).