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Don Edwards

John Conyers Jr.

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Don Edwards[*]
John Conyers, Jr.[**]

I. INTRODUCTION

On September 13, 1994, President Clinton signed into law the Violent Crime Control and Law Enforcement Act, a sweeping piece of legislation designed to address the perceived increase in violent crime in the United States. Missing from this legislation was the Racial Justice Act, which would have addressed the fact that the criminal justice system in some American jurisdictions values the lives of blacks—whether those of murder victims or defendants—less than the lives of whites. Consider the following:

In Bay County, Florida, the chief investigator for the state attorney summed up the importance he attached to black murder victims by frequently referring to such victims as "just another dead nigger." Given this attitude, it is not surprising that, while forty percent of Bay County's 119 homicides between 1975 and 1987 involved black victims, in all seventeen cases in which the court imposed the death penalty, the victim was white. In factually identical cases involving black and white victims, the death penalty was rarely sought and never imposed when the victim was black.[1] The comparison includes all relevant factors such as the brutality of the offenses and the prior records of the defendants.

In one Georgia judicial circuit, where blacks make up slightly more than forty-two percent of the population, seventy-nine percent of the death penalty cases since 1974 have been against black defendants.[2] Death penalty opponents and supporters alike should be appalled by the prospect that death sentencing decisions should turn on the race of the victim or the defendant in cases that are indistinguishable *but for race*. Surely a defendant who believes that the decision to seek the death penalty in his case was motivated by racial bias should have the right to introduce evidence showing a consistent pattern of racially biased death

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* Member of Congress, Sixteenth District of California; Chairman, Subcommittee on Civil and Constitutional Rights, House Committee on the Judiciary.

** Member of Congress, Fourteenth District of Michigan; Chairman, House Committee on Government Operations.

1. Memorandum in Support of Defendant's Motion to Preclude the Death Penalty, State v. Foster, Case No. 75-486 (Fla. Cir. Ct. Apr. 18, 1990) (brief submitted by NAACP Legal Defense and Educational Fund) (on file with the *University of Dayton Law Review*) [hereinafter Motion].

2. *Death Sentencing Issues: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 1st Sess. 77-78 (1991) (testimony of Stephen B. Bright) [hereinafter *Hearings*].

sentences in cases similar to his own in the jurisdiction where he is being tried. However, in 1987, the United States Supreme Court ruled that a jurisdiction's pattern of racial bias in applying the death penalty, no matter how consistent, is irrelevant to any individual case in that jurisdiction.[3]

The Racial Justice Act is an effort to respond to *McCleskey*. The Act is a modest piece of legislation intended to ferret out race discrimination in the application of the death penalty by states and the federal government. The Act recognizes that decisionmakers in death sentencing, like those in other social endeavors, such as voting administration, employment, or jury selection rarely admit that they are racially biased. To prove bias, the Act uses a method of proof—the disparate treatment analysis—long accepted by the courts.

The Act allows courts to consider evidence of a consistent pattern of racially discriminatory death sentences in the sentencing jurisdiction. The Act would allow the courts to consider the nature of the cases being compared, the prior records of the offenders, and other non-racial factors. If a court determines there was racial bias in the challenged case, the court will set aside the death sentence but not the underlying conviction. A person who successfully overturns his death sentence under the Act will be resentenced to an appropriate term of imprisonment, up to and including life without possibility of release. The Act requires a fact-specific analysis; it does not provide grounds for a systemic or statewide challenge to the death penalty.

The Racial Justice Act does not inject race consciousness into the process of deciding whether to seek the death penalty. Rather, the Act is a response to evidence suggesting that race already plays a role in that process. The Act is intended to identify those jurisdictions and those categories of cases in which race determines who gets the death sentence.

The proposition that courts should examine and require prosecutors to explain a consistent pattern of racially biased sentences in otherwise similar cases should seem unobjectionable. The Act, however, has drawn a great deal of criticism. Much of this criticism is based on a misunderstanding of the Act and how it would work. This Article seeks to explain the Act and respond to the criticisms raised by its opponents.

II. BACKGROUND

A. *Legislative History of the Racial Justice Act*

The Racial Justice Act first passed the House of Representatives in October 1990 as part of the Comprehensive Crime Control Act of 1990.[4] The Racial

3. *See* McCleskey v. Kemp, 481 U.S. 279 (1987).

4. Previously, in 1988, the RJA had been offered and rejected as a floor amendment to a death penalty provision in an omnibus crime bill being considered in the Senate. In 1990, the Senate Judiciary Committee added the Act to another omnibus crime bill; the provision was stricken when the bill reached the Senate floor. CONGRESSIONAL QUARTERLY ALMANAC, 101st Cong., 2d Sess. 487-91 (1990).

Justice Act provision was dropped in conference along with several other highly controversial issues, and the federal crime bill adopted in 1990 contained no provisions on the death penalty.[5] In 1991, as part of H.R. 3371, the Racial Justice Act was again considered by the House.[6] That time it was rejected by a vote of 223 to 191.

In the 103d Congress, the Act was introduced again. It contained language identical to the version adopted by the House in 1990. On March 17, 1994, the Committee on the Judiciary favorably reported the bill without amendment. It was incorporated in an omnibus crime bill, H.R. 3355, which the full House approved. However, the Act was again dropped from the bill in conference with the Senate, and it was not included in the 1994 Violent Crime Control and Law Enforcement Act signed by President Clinton on September 13, 1994.[7]

B. The Failure of the Gregg v. Georgia Experiment

In 1972, in *Furman v. Georgia*,[8] the Supreme Court held that the death penalty as then applied was unconstitutional. The Court held that under procedures then in effect, the death penalty was being imposed in an arbitrary and capricious manner. In separate opinions, three justices who joined the Court's per curiam holding based their reasoning in part on racial disparities that historically and in recent times characterized the imposition of the death penalty.

A number of states responded to *Furman* by adopting "guided discretion" statutes. These statutes require jurors to focus on specific aggravating and mitigating circumstances in choosing which of the few defendants will receive the death penalty from the many who are convicted of homicide. In 1976, in *Gregg v. Georgia*,[9] the Supreme Court held that such statutes offered the possibility of eliminating bias and whim from capital sentencing. In *Gregg*, Justice White observed that unless there were facts to indicate otherwise, prosecutors must be presumed to exercise their charging duties properly.

Eighteen years after *Gregg*, it is clear that the guided discretion statutes have failed to achieve their objective of eliminating bias from capital sentencing.[10] Recent evidence overwhelmingly and consistently demonstrates that death sentencing decisions in some jurisdictions are still influenced by race.

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5. Crime Control Act of 1990, Public L. No. 101-647, 104 Stat. 4789 (1990).

6. Omnibus Crime Control Act of 1991, Report of the House Committee on the Judiciary, H.R. Rep. No. 242, 102d Cong., 1st Sess. 39-40, 153-61 (1991).

7. Violent Crime Control and Law Enforcement Act of 1994, Public L. No. 103-322, 108 Stat. 1796 (1994).

8. 408 U.S. 238 (1972).

9. 428 U.S. 153 (1976).

10. As Justice Blackmun recently stated, "I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed." Callins v. Collins, 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting), *denying cert. to* 998 F.2d 269 (5th Cir. 1993).

III. EVIDENCE OF RACE DISCRIMINATION IN CAPITAL SENTENCING

Nationwide statistics on the race of death row inmates are of little value in measuring the effect of race on death sentencing. However, when individual states and jurisdictions within states are studied, and similar cases are compared, some disturbing patterns clearly emerge. There is compelling evidence from certain jurisdictions that the race of the defendant is the primary factor governing the imposition of the death sentence. In these limited number of jurisdictions, black defendants are far more likely than white defendants to receive the death sentence for comparable crimes. For example:

> In the Ocmulgee Judicial Circuit in Georgia, the district attorney has sought the death penalty in 29 cases since 1974; in 23 of the 29 cases (79%), the defendant was black, although blacks make up only 44% of the circuit's population. In those black defendant cases, the DA used 90% of his peremptory strikes to keep blacks off the juries.[11]
>
> In Georgia's Middle Judicial Circuit, where the population is 40% black, 77% of the death penalties imposed have been against blacks—7 out of 9.[12]
>
> In Alabama, where the population is 25% black, 43% of the 117 inmates on death row are black. Since the resumption of executions in the early 1980's, 71% of the people executed in Alabama have been black.[13]

Similar evidence is emerging under the limited federal death penalty for so-called "drug kingpins," adopted in 1988. Of thirty-seven defendants against whom a federal death penalty has been sought since 1988, four defendants were white, four were Hispanic, and twenty-nine were black. All ten defendants approved for capital prosecution in the first year of the Clinton Administration were black.[14]

There is also consistent evidence that the race of the victim strongly influences the imposition of the death sentence in some jurisdictions. A body of evidence based on sentences imposed since 1972 demonstrates that in a number of jurisdictions, a defendant whose victim is white is far more likely to receive the death sentence than a defendant whose victim is black. A study by Professor David Baldus of the University of Iowa of over 2,500 homicide cases in Georgia, which controlled for 230 non-racial factors, found that a person accused of murdering a white was 4.3 times more likely to be sentenced to death than a person accused of murdering a black.[15] Although fewer than forty percent of Georgia homicide cases involved white victims, eighty-seven percent of all cases

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11. *Hearings*, *supra* note 2.

12. SOUTHERN PRISONERS' DEFENSE COMMITTEE, WHITES-ONLY JUSTICE IN GEORGIA'S MIDDLE JUDICIAL CIRCUIT (1988) (on file with the *University of Dayton Law Review*).

13. REPORT BY NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, DEATH ROW, U.S.A. (1994) (on file with the *University of Dayton Law Review*).

14. *Racial Disparities in Federal Death Penalty Prosecutions, 1988-1994, Subcomm. on Civil and Constitutional Rights, House Comm. on the Judiciary*, 103d Cong., 2d Sess. (1994).

15. DAVID BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990).

in which a death sentence has been imposed involve white victims.[16]

In one Georgia judicial circuit, where sixty-five percent of murder victims are black, eighty-five percent of the death sentences sought have been in white victim cases. Considering all murders, the district attorney sought the death penalty in thirty-four percent of the cases where the victim was white, but in only 5.8% of the cases where the victim was black.[17]

A study by Samuel Gross and Robert Mauro published in 1984 in the Stanford Law Review found significant disparities in sentencing according to the victim's race in eight states.[18] The study found that defendants in Florida convicted of killing whites were eight times more likely to receive the death sentence than those convicted of murdering blacks. In Bay County, Florida, while blacks comprise forty percent of murder victims, all seventeen cases where the death penalty was sought between 1975 and 1987 involved white victims.[19]

In February 1990, the General Accounting Office (GAO) confirmed the validity of these and similar findings in a review of twenty-eight studies, constituting twenty-three data sets. The GAO found "a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the *Furman* decision."[20] The GAO found that in eighty-two percent of the studies, "those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks. This finding was remarkably consistent across data sets, states, data collection methods and analytic techniques."[21] Thus, the race of the victim is clearly a critical factor in determining whether the death penalty should be imposed.

IV. McCLESKEY V. KEMP

Warren McCleskey was a black man sentenced to death in Fulton County, Georgia for the 1978 murder of a white policeman during the course of a robbery.[22] McCleskey, relying on the statistical study of Georgia homicide cases by Professor Baldus, alleged that his death sentence violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

In 1987, the Supreme Court ruled in *McCleskey v. Kemp*[23] that courts could not accept evidence of discriminatory death sentencing patterns to prove the purposeful racial discrimination necessary to make out a claim under the

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16. *Id.*

17. DEATH PENALTY INFORMATION CENTER, CHATTOHOOCHEE JUDICIAL DISTRICT — THE BUCKLE OF THE DEATH BELT: THE DEATH PENALTY IN MICROCOSM, *reprinted in Hearings, supra* note 2.

18. Samuel Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 153 (1984).

19. Motion, *supra* note 1.

20. U.S. GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES, GAO/GGD 90-57, at 5 (Feb. 1990).

21. *Id.*

22. In 17 cases involving the murder of a police officer in Fulton County, Georgia between 1973 and 1980, prosecutors sought the death penalty in only one other case.

23. 481 U.S. 279 (1987).

Fourteenth Amendment.[24] The Court held that someone challenging a death sentence had to prove that the prosecutor, judge, or jury in his particular case consciously intended to discriminate on the basis of race.[25] It held that the results of the decisions by prosecutors, judges, and juries over the course of many cases could not prove such intentional discrimination.[26] At the close of the majority opinion in *McCleskey*, Justice Powell stated that arguments about the persistent pattern of racially discriminatory death sentencing were "best presented to the legislative bodies,"[27] which could develop appropriate responses.

V. RACIAL JUSTICE ACT OVERVIEW

The Racial Justice Act responds to the *McCleskey* Court's invitation through the exercise of Congress' enforcement power under Section 5 of the Fourteenth Amendment.[28] The essence of the Act is embodied in a section establishing that "no person shall be put to death under color of State or Federal law in the execution of a sentence that was imposed based on race."[29] The Act would allow persons under sentence of death to challenge their sentences, but not their convictions, by using evidence showing a pattern of racially discriminatory death sentencing. The Act would permit reviewing courts to compare similar cases, taking into account the brutality of the offenses, the prior records of the offenders, or other statutorily appropriate non-racial characteristics. The Act does not purport to bar governmental entities from imposing death sentences. It does, however, prohibit states from carrying out those sentences that were based on racial considerations, as demonstrated by evidence that the particular case fits an unexplained racially discriminatory pattern.

The Act is a civil rights measure and adopts evidentiary procedures similar to those employed against racial discrimination in other civil rights laws. It is based on the realization that prosecutors, judges, and jurors will rarely, if ever, admit they were purposefully discriminatory in seeking or imposing the death penalty in a particular case. In the absence of such direct evidence of bias, the Act allows the use of statistical evidence to establish an inference of racial discrimination.

The language makes it clear that, to establish an inference of racial bias, the evidence must be valid. The evidence must also be specific to the jurisdiction

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24. *Id.* at 297.
25. *Id.* at 292.
26. *Id.* at 293-95.
27. *Id.* at 319.
28. Section 5 of the 14th Amendment provides a means for Congress to apply federal constitutional principles to the states. U.S. CONST. amend. XIV, § 5. The U.S. Supreme Court has held that racial discrimination is a constitutional issue; therefore, Section 5 empowers Congress to intervene where a state is engaging in this discrimination. A state's right to sovereignty, as Justice Rehnquist has pointed out, is "necessarily limited by the enforcement provisions of [section] 5 of the Fourteenth Amendment." Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).
29. This overview summarizes the Act as reported by the House Judiciary Committee in the 103rd Congress. *See* H.R. Rep. No. 458, 103d Cong., 2d Sess., at 7 (1994).

that imposed the challenged death sentence and specific to the time at which the sentence was imposed. The Act requires the death penalty defendant to produce a sophisticated showing of *significant* racial disparity before an inference of race discrimination is established.

Evidence to establish an inference that a particular death sentence was based on race may include evidence that the death penalty in that jurisdiction and at the relevant time was being imposed significantly more frequently in either of two circumstances. First, the defendant may show the death penalty was imposed more frequently upon persons of the defendant's race than upon persons of another race. Alternatively, the defendant may show death was used as punishment for capital offenses against persons of the race of the defendant's victim more than for capital offenses against persons of another race.

The Act imposes a substantial burden on a person seeking to invoke its protection. The death penalty defendant must compile and analyze the data showing a pattern of racial disparity in the jurisdiction where he was sentenced and at the time he was sentenced. He must collect data on death-eligible cases.

Under the Act, it is not enough to show merely that blacks get the death penalty more frequently than whites; the Act requires a defendant to show that blacks get the death penalty significantly more frequently than whites *for the same type of offense*. The evidence offered to support the inference of racial discrimination must include, to the extent that it is compiled and publicly available, evidence of the statutory aggravating factors involved. The evidence must also compare similar cases. Indeed, the death penalty defendant's case will usually consist of a statistical analysis that accounts for numerous relevant and statutorily valid variables.

For example, the defendant cannot merely say "While the population of this state is twelve percent black, fifty percent of the death sentences are against blacks. Therefore, there is racial bias and I cannot get the death sentence." Instead, the defendant must begin with data showing what percentage of murder defendants are black versus what percentage are white. Then the defendant must analyze the facts of the cases. If the evidence demonstrates that the cases involving black defendants were more highly aggravated there would be no basis for claiming discrimination.

To establish an inference under the Act, any disparity must be "significant." The courts have ample experience dealing with statistics and have developed standards for determining what is a significant racial disparity sufficient to prove impermissible discrimination.[30] The court must independently

30. For example, the Supreme Court struck down a statute in 1985 on the basis of statistical evidence that blacks were disqualified from voting at 1.7 times the rate of whites. *See* Hunter v. Underwood, 471 U.S. 222 (1985). In Castaneda v. Partida, 430 U.S. 482 (1977), the Court found that a 2 to 1 disparity between whites and Mexican-Americans selected for jury service triggered an inference of purposeful racial discrimination. In Turner v. Fouche, 396 U.S. 346 (1970), the Court held that a disparity of 1.6 to 1 between whites and blacks selected for grand jury service made out a prima facie case of discrimination. These cases make it clear that the disparity of 4.3 to 1 that Professor David Baldus found in his study of the Georgia death penalty is well within the definition of statistical significance.

evaluate the validity of the evidence presented to establish the inference and must determine if that evidence provides a basis for the inference.

To show that there was no racial disparity in death sentencing in the relevant jurisdiction, the government may challenge the sufficiency of the statistical and other evidence offered in support of the inference. The government may seek to show that the defendant's statistics are incorrect or misleading or that they fail to account for important independent variables. If the government is successful, or if the court concludes on its own that the defendant's statistics do not establish a significant racial disparity, then the defendant will have failed to raise an inference of discrimination under the Act and the claim will be dismissed. Under such circumstances, the state will have no burden to prove anything in rebuttal because the defendant will have failed to meet his burden of establishing an inference of discrimination.[31]

Once an inference is established that race was the basis of a death sentence, the burden shifts to the state. The death sentence can still be carried out if the state rebuts the inference. The state may do so by showing that pertinent non-racial factors explain the observable racial disparities. Alternatively, it may prove that the particular sentence does not fall within any racially discriminatory pattern. The government may rebut the inference by showing, for example, that the particular case falls in a category of highly aggravated cases where there is no discriminatory imposition of the death sentence. The government may also show that subsequent to the time period examined in the defendant's evidence and prior to the time the defendant was sentenced, it changed its practices and had eliminated any racial disparity or bias. The government may also show that there is no racial pattern in the political subdivision where the decision to indict and charge the defendant was made.

The government, however, cannot meet its burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties. Nor can the State meet its burden by showing that the defendant was properly found guilty of a crime for which the state's laws permit imposition of the death sentence.

If the government does not rebut the inference or show that the pattern is irrelevant to the case at hand, then the death sentence cannot be imposed or carried out *in that case*.

This orderly mechanism for proving racial discrimination in death sentencing is the same mechanism that Congress has adopted in other civil rights laws.[32] It is the same approach that the Supreme Court itself has used in judging other claims of racial discrimination in the criminal justice system.[33]

The Act imposes no data collection responsibilities on the states. It simply

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31. Courts will readily be able to determine whether an inference of discrimination has been established, based on their experience in employment discrimination cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. IV 1992).

32. The model is described in International Bhd. of Teamsters v. United States, 431 U.S. 324, 360-62 (1977).

33. *See* Batson v. Kentucky, 476 U.S. 79 (1986).

requires them to make available to defendants records they otherwise keep on death-eligible cases.

One of the most controversial issues concerning the Act was whether it would be applied retroactively. As passed by the House in 1990 and 1994, the Act applied retroactively, since it was considered unfair to deny the Act's remedy to persons already on death row who may not have been there but for the influence of race. A claim under the Act in a criminal case that came to trial after the date of enactment would have been subject to the ordinary rules governing the presentation of claims. In such a case, claims under the Act would normally be combined with other grounds of challenge to the conviction and sentence, both on direct appeal and in state and federal habeas corpus proceedings.

VI. Misconceptions About the Racial Justice Act

The Racial Justice Act will not abolish the death penalty as some opponents have claimed. Not only can the states challenge the adequacy of the statistical case itself, but they will also have an opportunity to rebut any inference of racial bias by showing that any apparent pattern of racial bias is explained by non-racial factors. Even if a state cannot explain a particular racial pattern, it can continue to carry out any sentences that do not fit within the pattern. The Act prohibits only the execution of those death sentences that are the product of racial bias.

Contrary to the claims of the opponents of the Racial Justice Act, the Act will not lead to death sentencing quotas. Quotas result in dissimilar treatment of similar cases. The purpose of the Act is just the opposite: to ensure that factually similar cases receive similar sentences. The Act encourages prosecutors (a) to develop non-racial standards for deciding when to seek the death penalty and (b) to apply those standards uniformly and consistently. A state cannot comply with the Act by adopting racial quotas; in fact, such quotas would violate the Act. If prosecutors were to seek the death sentence based on race, rather than on the circumstances of the crimes and the backgrounds of the defendants, the evidentiary principles established by the Act would reveal the discriminatory pattern. This is because the Act defines impermissible racial discrimination as a pattern of sentencing disparities that exists after accounting for non-racial factors.

VII. Use of Statistics in Proving Race Discrimination

One frequently raised argument against the Racial Justice Act is the erroneous charge that the Act would substitute statistical analysis for the individualized decisionmaking that normally characterizes the criminal justice system. In fact, the Act requires a focus on the facts of specific cases. Under the Act, the overall racial balance or imbalance in death sentences in a particular jurisdiction is irrelevant. A claim under the Act requires a showing that, in factually similar cases, black offenders or killers of whites frequently get the

death penalty, while, for the same set of facts, white offenders or killers of blacks rarely get the death sentence.

Statistical analyses are generally accepted as reliably measuring the influence of racial discrimination in complex decisionmaking processes. The Act is consistent with other civil rights laws under which an inference of racial discrimination can be established through the use of statistical evidence showing a significant racially discriminatory effect. Clearly, few people today would admit an intent to discriminate. Therefore, the Supreme Court has usually recognized that the existence of illegal discrimination can be established by showing that the results of a decisionmaking process are discriminatory.

In the criminal justice area, for example, the Supreme Court has held that a black criminal defendant can establish a prima facie case of discrimination in the jury selection process by showing a substantial statistical disparity between the percentage of blacks in the population and the percentage of blacks in the pool from which his grand jury or trial jury was selected.[34] The Supreme Court has also granted relief when the prosecutor's peremptory strikes of jurors results in the disproportionate elimination of black jurors, unless the prosecutor could provide adequate non-racial reasons for the peremptory strikes.[35]

Opponents of the Act have argued that it is a radical departure from accepted principles of law. To the contrary, the Act tracks accepted procedures for proving discrimination. In a claim under the Act, as with any equal protection case, the burden is on the defendant alleging the discrimination.[36] In deciding whether the defendant has carried his burden of persuasion, courts must engage in "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[37]

The Supreme Court has also recognized that a black defendant who alleges that members of his race have been impermissibly excluded from a venire may make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.[38] The burden of explaining the racial exclusion shifts to the State only after the defendant makes the requisite showing.[39] The State's burden is not met by mere general assertions that its officials did not discriminate or that they properly performed their official duties.[40] Rather, the State must demonstrate that "permissible racially neutral selection criteria and procedures have produced

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34. Alexander v. Louisiana, 405 U.S. 625, 629-31 (1972); *see also* Castenda v. Partida, 430 U.S. 482, 496 (1977) (dealing with Mexican-Americans).

35. Batson v. Kentucky, 476 U.S. 79, 93-94 (1986).

36. Whitus v. Georgia, 385 U.S. 545, 550 (1967) (citing Tarrance v. Florida, 188 U.S. 519 (1903)).

37. Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977). Circumstantial evidence of invidious intent may include proof of disproportionate impact. Washington v. Davis, 426 U.S. 229, 242 (1976). In some cases, proof of a discriminatory impact may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds. *Id.*

38. *Id.* at 239-242.

39. Alexander v. Louisiana, 405 U.S. 625, 632 (1972).

40. *See id.* at 632; Jones v. Georgia, 389 U.S. 24, 25 (1967).

the monochromatic result."[41]

The Supreme Court has found a prima facie case of purposeful discrimination on proof that members of the defendant's race were substantially underrepresented on the venire from which his jury was drawn, and that the venire was selected under a practice providing "the opportunity for discrimination."[42] "This combination of factors raises the necessary inference of purposeful discrimination because the Court has declined to attribute to chance the absence of black citizens on a particular jury array where the selection mechanism is subject to abuse."[43] By authorizing the use of statistics to establish a prima facie case or inference of racial bias and then shifting the burden to the government to rebut the inference by showing that non-racial factors explain the racial disparity, the Racial Justice Act largely tracks the process outlined by the Supreme Court.

The Racial Justice Act recognizes that it rarely will be possible to prove an overt intent to discriminate on the part of prosecutors or jurors. As Justice Stevens wrote in his concurring opinion in *Washington v. Davis*:[44]

> Frequently, the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor . . . . This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation. It is unrealistic . . . to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker.[45]

Clearly then, the Supreme Court has accepted the important role that statistical analyses can play as an "indirect indicator of racial discrimination,"[46] and has upheld the use of statistical evidence in proving racial discrimination.[47] Moreover, the Court has done so in situations where the broad discretion given to prosecutors and juries affords a unique opportunity for racial prejudice to operate but remain undetected.[48]

Contrary to the opponents' claims, the Racial Justice Act does not undermine or overturn the Supreme Court's decision in *McCleskey v. Kemp*.[49] Instead, the Act takes up the *McCleskey* Court's invitation to adopt a legislative solution to claims of race bias.[50] *McCleskey* held that the 14th Amendment alone does not allow the use of statistics to prove race discrimination in death sentencing. The Court determined that certain characteristics of the death sentencing process

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41. *Alexander*, 405 U.S. at 632; *see also Davis*, 426 U.S. at 241.
42. Whitus v. Georgia, 385 U.S. 545, 552 (1967); *see* Castaneda v. Partida, 430 U.S. 482, 494 (1977); *Davis*, 426 U.S. 229, 241 (1976); *Alexander*, 405 U.S. at 629-31.
43. Batson v. Kentucky, 476 U.S. 79, 93-95 (1986).
44. 426 U.S. 229 (1976).
45. *Id.* at 253.
46. Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 620 (1974).
47. Bazemore v. Friday, 478 U.S. 385, 398 (1986).
48. Turner v. Murray, 476 U.S. 28, 35 (1986).
49. 481 U.S. 279 (1987).
50. *Id.* at 319.

made statistical proof unsuitable. But the Court did not suggest that Congress did not have the power under section 5 of the 14th Amendment to conclude that death sentencing is susceptible to this type of analysis. Indeed, in *McCleskey* the Court recognized that Congress can authorize the use of statistics as proof of discrimination. As Justice Powell wrote in the majority opinion, "McCleskey's arguments are best presented to the legislative bodies."[51]

Contrary to the argument raised by opponents of the Racial Justice Act, each capital case is not so unique that statistics are meaningless. There are common standards by which to evaluate defendants who have or have not received the death penalty. Congress has long mandated that similar cases should receive similar sentences. Indeed, as a result of the strict sentencing guidelines enacted in recent years, federal law has become more rigid in its commitment to similar treatment of comparable cases, even when comparing different types of crimes.

Death sentencing is not different in this respect. Most state death penalty statutes include a system of proportionality review requiring the state supreme court to compare each death sentence on appeal with all others imposed to ensure that it is proportionate to the crime. This approach, which the Supreme Court has endorsed, assumes that death sentences can be lumped into categories and compared on the basis of the written trial court transcript and the juries' findings.

Where the Supreme Court has rejected evidence of the discriminatory impact, Congress has exercised its enforcement authority by statutorily prohibiting unexplained and unjustified racial disparities. For example, after the Supreme Court ruled that the Voting Rights Act and the Fifteenth Amendment required a showing of discriminatory intent,[52] Congress amended the Act to allow plaintiffs to base a showing of discrimination on evidence of discriminatory impact.

Congress has the power under the Fourteenth Amendment to take remedial measures that eliminate not only overt race discrimination but also practices that entail a significant risk that persons of different races will be treated differently. The exercise of Congress' "safeguarding" role is especially appropriate where the death penalty is involved, for there "is a qualitative difference between death and any other permissible form of punishment."[53] Hence, there is also "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."[54]

VIII. INADEQUACIES IN THE CURRENT CAPITAL SENTENCING PROTECTIONS

Opponents of the Racial Justice Act argue that the Act is unnecessary because the death sentencing system affords sufficient protections against race

51. *Id.* at 311.
52. City of Mobile v. Bolden, 446 U.S. 55 (1980).
53. Zant v. Stephens, 462 U.S. 862, 884-85 (1983).
54. *Id.*

bias. Yet the system is apparently ineffective, since numerous studies show extraordinary racial disparities in death sentencing. The validity of these studies has been confirmed by the U.S. General Accounting Office.[55]

The argument that the Act is unnecessary because procedural safeguards have been erected to protect the defendant against racial bias during the trial also overlooks a critical point. The principle cause of racial bias in capital punishment is racial bias by prosecutors, often unintended or unconscious, in selecting the cases for which they seek the death penalty. All of the procedural protections erected at trial, and all of the fairness and wisdom that jurors may bring to their task, cannot correct for bias that occurs before cases get to trial. Nor can it minimize the bias that has much to do with cases in which the prosecutor chooses not to seek the death penalty.

Finally, the argument that protections in the system make the Act unnecessary ignores the fact that those protections are often denied to black defendants. Take, for example, the right to a fair and representative jury. In the same Georgia circuit where seventy-nine percent of the cases in which the prosecutor has sought the death penalty involved a black defendant, the district attorney used ninety percent of his peremptory strikes to keep blacks off the jury.

Indeed, one of the most compelling arguments in favor of the Act is the way that courts routinely refuse to enforce the "protections" against racial bias that opponents of the Act cite. Courts have ignored direct, case-specific evidence of intentional bias. For example, in one Florida case, the trial judge on the record referred to the parents of the black defendant in a capital case as "niggers."[56] The Florida Supreme Court held that this judge was not impermissibly biased, and upheld the death sentence against the defendant.

In a Georgia case, two jurors who sentenced a black man to death for killing a white victim admitted after trial that they used the slur "nigger" and two jurors said that they found blacks "scarier than whites."[57] The trial judge referred to the defendant, a grown man, as "colored boy."[58] The federal habeas court held that a trial with such jurors and such a judge offered the defendant adequate "protection" and upheld the death sentence.[59] In *Edwards v. Scroggy*,[60] where a black man was sentenced to death by an all-white jury in a community that was thirty-four percent black, the district attorney admitted that it was his policy to "get rid of as many [blacks jurors as possible]," yet the habeas court upheld the death sentence.[61] The above examples clearly illustrate that current protections against racial bias are not sufficient, and that the Racial Justice Act is necessary to fulfill this Nation's commitment to equal justice under law.

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55. *See supra* note 20 and accompanying text.

56. Peek v. Florida, 488 So.2d 52, 55 (1986).

57. Dobbs v. Zant, 720 F. Supp. 1566, 1576-77, 1576 n.22 (N.D. Ga. 1989), *aff'd*, 963 F.2d 1403 (11th Cir. 1991), *rev'd on other grounds*, 113 S. Ct. 835 (1993).

58. *Id.* at 1578.

59. *Id.* at 1573.

60. 849 F.2d 204, 207 (5th Cir. 1988), *cert. denied*, 489 U.S. 1059 (1989).

61. *Id.* For more examples, see *Hearings*, *supra* note 2.

IX. HOW STATES CAN RESPOND TO THE ACT

The Act will not bar any state from using the death penalty. Each state can change its capital sentencing practices to eliminate any significant pattern of racial discrimination.

Contrary to opponents' arguments, the Act does not violate the Eighth Amendment requirement that prosecutors have discretion in capital charging. The Act merely prohibits prosecutors from exercising their discretion in a racially discriminatory manner.

The Supreme Court has stated that prosecutors must have discretion in capital sentencing decisions because discretion allows a decisionmaker to exercise leniency—a substantial potential protection for criminal defendants. The Act does not take away this legitimate discretion. It only abolishes discretion based on race. No provision prevents prosecutors from considering aggravating and mitigating factors when deciding whether to pursue the death penalty.

The main source of racial disparity in death sentencing appears to be prosecutorial decisions, the area where meaningful change can be achieved most readily. Under guided discretion statutes, prosecutors retain wide discretion in deciding when to seek the death penalty. States could thus provide clearer guidance to prosecutors through statutory change or other directives. In so doing, the State could focus prosecutors on the most highly aggravated cases where there is little evidence of racial discrimination. As Justice Stevens pointed out in his dissent in *McCleskey*:

> One of the lessons of the Baldus study is that there exist certain categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender. If Georgia were to narrow the class of death-eligible defendants to those categories, the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated.[62]

Another mechanism that could provide protection against racial discrimination is the proportionality review that most state supreme courts are required to conduct in each capital case. The purpose of this review is to determine whether the sentence is proportionate to the penalties imposed in other cases. Many supreme courts only look to other cases in which the death sentence was imposed. The proportionality review would be much more likely to identify and correct racial bias if the reviewing court considered not only cases in which it was imposed but also death eligible cases in which it was not. In addition, states could allow private, individualized *voir dire* of prospective jurors to inquire into potential racial bias.

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62. 481 U.S. 279 at 367.

X. CONCLUSION

The Fourteenth Amendment's guarantee of equality under the law is tested most profoundly by whether race plays a role in determining who is put to death in carrying out a criminal sentence. Today in America the death penalty is being administered in some jurisdictions in a pattern that evidences a significant risk that the race of the defendant or of the victim influences the imposition of this ultimate penalty. The persistent racial patterns reflected in the implementation of the death penalty in some parts of this nation require Congress to adopt remedial legislation that will counteract the lingering effects of racial bias and enforce the constitutional guarantee of equal justice for all.