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PROBING THE CAPITAL PROSECUTOR'S PERSPECTIVE: RACE OF THE DISCRETIONARY ACTORS

Jeffrey J. Pokorak†

I got stones in my passway
and all my roads seem dark at night
I got stones in my passway
and all my roads seem dark at night
I have pains in my heart
they have taken my appetite

— Robert Johnson, "Stones in My Passway"[1]

INTRODUCTION

Over half a century after blues singer Robert Johnson bemoaned the "stones in [his] passway," a different Robert Johnson finds himself in much the same position. This modern Robert Johnson, the district attorney for the Bronx, sits at the center of a controversy that stems in part from his own uniqueness. First, this Robert Johnson is an African American—indeed the only minority district attorney in New York.[2] Second, this Robert Johnson was elected by his majority African American district on a platform of open opposition to the death penalty.[3]

In mid-March 1996 Kevin Gillespie, a police officer, was shot and killed in the Bronx during a gun battle with suspected carjackers.[4] Almost immediately, New York Mayor Rudolph Giuliani and Governor George Pataki clamored for the imposition of the state's newly enacted death penalty.[5] Even before District Attorney Johnson could as-

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1 ROBERT JOHNSON, *Stones in My Passway, on* ROBERT JOHNSON: THE COMPLETE RECORDINGS (Columbia Records 1990).

2 *See* Table 1.

3 *See* Don Singleton & Jorge Fitz-Gibbon, *DA Hit on Anti-Death Penalty View*, DAILY NEWS (New York), Mar. 16, 1996, at 3 (characterizing Johnson as "[a]n outspoken opponent of capital punishment").

4 *See* Bob Kappstatter et al., *Mayor, Gov Demand Gunmen's Execution*, DAILY NEWS (New York), Mar. 16, 1996, at 3.

5 *See* Singleton & Fitz-Gibbon, *supra* note 3.

sess the evidence and decide whether the death penalty would be appropriate, Governor Pataki threatened to replace Johnson with someone who would seek the death penalty without reservation.[6] The dispute ended when the suspect hanged himself in jail.[7]

The incident, however, demonstrates the effect of race on the enforcement of the death penalty across the country. In this case, the white governor of a majority white state, who strongly supports the death penalty, threatened to replace an African American district attorney who won election from a majority African American community on a platform opposing the death penalty. Another racial issue further complicated the situation—the police officer-victim was white and the assailant was Hispanic.[8] Although it would be foolish to believe that race wholly motivated these events, it also would be equally naive to suggest that race was irrelevant.

The threats of Governor Pataki and Mayor Giuliani to replace Robert Johnson with a death penalty supporter raise the question of who has the power to seek the death penalty in this country. This inquiry becomes even more important in the context of the striking racial disparities in the enforcement of the modern death penalty.[9] Between 1976 and July 31, 1997, 403 persons were executed,[10] representing 228 whites (56.6%), 147 blacks (36.5%), and twenty-three Latinos (5.7%).[11] In contrast, the victims of those executed include 455 whites (83.2%), sixty-six blacks (12.1%), and nineteen Latinos (3.5%).[12] This Article contributes to the efforts to explain this racial-composition disparity between the nation's death row and its victim populations by presenting a study of the race of prosecutors who possess the power to seek the death penalty. Based upon the results of

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6 *See id.*

7 *See* Jon R. Sorensen & Corky Siemaszko, *Gov's DA Yank in Death Case Upheld*, DAILY NEWS (New York), Dec. 5, 1997, at 20.

8 *See* Jorge Fitz-Gibbons and William K. Rashbaum, *Vicious Gang of Robbers: Accused Killers Preyed on Bodegas in Bronx*, DAILY NEWS (New York), Mar. 16, 1996, at 8.

9 The Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), resulted in a four-year legal ban on the death penalty. For the purposes of this Article, the phase "modern death penalty period" dates from the Supreme Court's decisions in 1976 that reinstated the death penalty, *see* Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

10 *See* NAACP LEGAL DEFENSE AND EDUC. FUND, DEATH ROW U.S.A. REPORTER 1040 (1997) [hereinafter DEATH ROW U.S.A.]. Before 1984, only 11 people were executed in the country: two in Florida, and one each in Alabama, Georgia, Indiana, Lousiana, Mississippi, Nevada, Utah, Texas, and Virginia. *See* Raymond J. Pascucci et al., *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1130 & n.2 (1984).

11 *See* DEATH ROW U.S.A., *supra* note 10, at 1040. The number executed also includes four Native Americans (1.0%) and one Asian (0.2%). *See id.*

12 *See id.* The victims of those executed also include seven Asians (1.3%). *See id.*

this study, the Article then suggests that the existence of an unconscious prosecutorial bias may contribute to this disparity.

PROSECUTORIAL DISCRETION AND THE DEATH PENALTY

Prosecutorial discretion plays a pervasive role in the administration of criminal justice.[13] Limited resources and crowded criminal dockets force prosecutors to make quasi-judicial decisions, regarding whom to charge, the severity of the charge, whether to offer a plea bargain, and whether to proceed to trial.[14] Prosecutors exercise this extensive power beyond public view, without objective criteria, and in an "essentially unreviewable" manner.[15] In fact, the presumption that prosecutors act in good faith gives prosecutors virtual impunity in their pretrial decisions.[16]

The broad scope of capital statutes and the recent increase in both the number and the type of capital crimes have expanded, by necessity, the prosecutors' discretion.[17] Of the many death-eligible defendants, only a relatively small number actually will go to trial, and even fewer will face a capital penalty trial.[18] Yet, in most cases, there are no clear policies, procedures, or other objective criteria that govern the exercise of prosecutorial discretion.[19] Prosecutors enjoy almost complete freedom to "decline to charge, offer a plea bargain, or decline to seek a death sentence in any particular case."[20]

With this prosecutorial freedom, however, comes the danger that invidious considerations will prompt these death penalty decision

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13 *See* James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1522 (1981).

14 *See id.* at 1524-25.

15 *Id.* at 1522.

16 *See, e.g.*, Wayte v. United States, 470 U.S. 598, 607 (1985) (noting that a prosecutor has "broad discretion" to decide whether and for what purpose to prosecute an arrestee); United States v. Batchelder, 442 U.S. 114, 124 (1979) ("Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion."). The prosecutor's discretion "is not 'unfettered'" because the "[s]electivity in the enforcement of criminal laws is, of course, subject to constitutional constraints" like the Equal Protection Clause. *Id.* at 125 & n.9.

17 *See* John A. Horowitz, Note, *Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty*, 65 FORDHAM L. REV. 2571, 2578 (1997) ("[Prosecutorial discretion] has increased as legislatures have broadened the criminal code without providing prosecutors additional resources. With more conduct being considered criminal and a limited resource pool, prosecutors cannot enforce every criminal statute. As a result, some crimes go unpunished . . . ." (footnotes omitted)).

18 *See* DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 233-35 (1990) (noting that "prosecutors . . . dominate the nation's capital-sentencing system" and frequently do not seek the death penalty).

19 *See* Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 L. & SOC'Y REV. 437, 471 (1984); Vorenberg, *supra* note 13, at 1523-37.

20 McCleskey v. Kemp, 481 U.S. 279, 312 (1987) (footnote omitted).

makers. These considerations may take the form of either a conscious intent to discriminate or an "unconscious racial motivation" shaped by "a common historical and cultural heritage in which racism has played and still plays a dominant role."[21]

The Supreme Court dealt for the first time with the effect of race on death penalty decision makers in *McCleskey v. Kemp*.[22] In *McCleskey*, the Court considered a comprehensive study ("Baldus Study"), which showed serious racial disparities in the imposition of the death penalty in Georgia.[23] McCleskey claimed that these racial disparities demonstrated systematic racism in capital sentencing.[24] By a five-to-four vote, the Court held that the general statistical studies did not provide sufficient evidence that the decision maker impermissibly had considered race in the defendant's particular case.[25] Commentators, however, have criticized the Court's narrow decision as the death penalty's *Dred Scott*[26] and have likened it to *Plessy v. Ferguson*,[27] *Korematsu v. United States*,[28] and similar cases.[29] Indeed, Justice Brennan clearly shared these sentiments, writing in dissent in *McCleskey*:

> At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of McCleskey's past criminal conduct were more important than the fact that his victim was white. Furthermore, counsel would feel bound to tell McCleskey that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks. In addition, frankness would compel the disclosure that it was more likely than not that the race of McCleskey's victim would determine whether he received a death sentence: 6 of every 11 defendants convicted of kill-

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21 Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987); *see also* Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1024 (1988) (condemning the approach of the Supreme Court and of other courts for "fail[ing] to attend to the impact of unconscious racism"); Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509, 510 (1994) (criticizing the Supreme Court for "accept[ing] the inevitability of racial bias in an area as serious and final as capital punishment").

22 481 U.S. 279 (1987).

23 *See id.* at 286. For a presentation of the type of data the Court considered, see BALDUS ET AL., *supra* note 18, at 80-197 (discussing from an empirical perspective the influence of race on the imposition of the death penalty in the State of Georgia).

24 *See McCleskey*, 481 U.S. at 286.

25 *See id.* at 297.

26 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

27 163 U.S. 537 (1896).

28 323 U.S. 214 (1944).

29 *See* Hugo Adam Bedau, *Someday* McCleskey *Will Be Death Penalty's* Dred Scott, L.A. TIMES, May 1, 1987, § 2, at 5.

> ing a white person would not have received the death penalty if their victims had been black, while, among defendants with aggravating and mitigating factors comparable to McCleskey's, 20 of every 34 would not have been sentenced to die if their victims had been black. Finally, the assessment would not be complete without the information that cases involving black defendants and white victims are more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim. The story could be told in a variety of ways, but McCleskey could not fail to grasp its essential narrative line: there was a significant chance that race would play a prominent role in determining if he lived or died.[30]

In this area in which race plays such a vital role, one key piece of information is noticeably absent: data on the race of those who possess the discretion to seek the death penalty. This study seeks to fill this gap.

WHO DECIDES WHO IS DEATH ELIGIBLE?

The first phase of this project involved the collection of data on those officials who have the power to prosecute capital offenses. Though the title for these public officials differs from state to state, this study uses the term "District Attorney" to denote the chief prosecuting official who holds the power to determine charging levels. The data that this project gathered include the race of the District Attorneys, the manner in which they obtain office—by election or by appointment—, and the length of their terms of office. The study covered the thirty-eight state jurisdictions[31] with capital punishment

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30 *McCleskey*, 481 U.S. at 321 (Brennan, J., dissenting) (citations omitted).

31 *See* ALA. CODE § 13A-5-40 (Supp. 1997); ARIZ. REV. STAT. ANN. § 13-1105 (West Supp. 1997); ARK. CODE ANN. § 5-10-101 (Michie 1997); CAL. PENAL CODE § 190 (West Supp. 1998); COLO. REV. STAT. § 16-11-103 (1997); CONN. GEN. STAT. ANN. §§ 53a-46a, -54b (West Supp. 1998); DEL. CODE ANN. tit. 11, § 4209 (1995); FLA. STAT. ANN. §§ 782.04, 775.082 (West Supp. 1998); GA. CODE ANN. § 16-5-1(d) (1996); IDAHO CODE §§ 18-4003, -4004 (1997); 720 ILL. COMP. STAT. ANN. 5/9-1 (West Supp. 1998); IND. CODE ANN. § 35-50-2-3 (West Supp. 1997); KAN. STAT. ANN. § 21-4624 (1995); KY. REV. STAT. ANN. § 507.020 (Banks-Baldwin 1997); LA. REV. STAT. ANN. § 14:30 (West 1997); MD. ANN. CODE art. 27, § 412 (Supp. 1997); MISS. CODE ANN. § 97-3-21 (1994); MO. ANN. STAT. § 565.020 (West Supp. 1998); MONT. CODE ANN. §45-5-102 (1997); NEB. REV. STAT. §§ 29-2520, -2524 (1995); NEV. REV. STAT. § 200.030 (1997); N.H. REV. STAT. ANN. § 630:5 (1996); N.J. STAT. ANN. § 2C:11-3 (West Supp. 1997); N.M. STAT. ANN. § 30-2-1 (Michie 1994); N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 1998); N.C. GEN. STAT. § 14-17 (Supp. 1997); OHIO REV. CODE ANN. § 2929.02 (Anderson 1996); OKLA. STAT. ANN. tit. 21, §§ 701.7, 701.9 (West Supp. 1998); OR. REV. STAT. § 163.150 (Supp. 1996); 18 PA. CONS. STAT. ANN. § 1102 (West Supp. 1997); S.C. CODE ANN. § 16-3-20 (Law. Co-op. Supp. 1997); S.D. CODIFIED LAWS § 23A- 27A-4 (Michie 1998); TENN. CODE ANN. § 39-13 202 (1997); TEX. PENAL CODE ANN. § 19.03 (West 1994); UTAH CODE ANN. §§ 76-5-202, 76-3-206 (Supp. 1997); VA. CODE ANN. § 18.2-31 (Michie Supp. 1997); WASH. REV. CODE ANN. § 10.95.030 (West Supp. 1998); WYO. STAT. ANN. § 6-2-101 (Michie 1997).

statutes, excluding only the United States government[32] and military.[33]

In each state, as far as practicable, the study compiled the data and cross-checked them using two different study methods. Initially, the project contacted each District Attorney and gathered the relevant information. It then cross-checked the information with various other corroborating sources, including central state repositories, state and local bar associations, state public defender agencies, and state attorney general offices. This portion of the inquiry covered data from October 1993 until February 1998. The study computed the racial percentages of the District Attorneys in each of the thirty-eight jurisdictions, compiling the results into Table 1. Because some District Attorneys have authority over several jurisdictions and because some states have judicial districts or circuits that include or exclude a number of counties in the state, the percentages reflect the number of District Attorneys, not the number of counties or judicial districts, as of February 1998. In addition, the number, as well as the racial and ethnic identity, of the death row inmates in each state, if known, is included to provide a simple correlation.[34]

The second phase of this project compared the District Attorney population of each state with the 1990 United States Census data for that state. The 1990 Census lists the main categories of races as "white," "black," "American Indian, Eskimo, or Aleut," and "Asian or Pacific Islander" and includes the Hispanic population as an ethnic subgroup of these populations.[35] For instance, the Census identifies "[w]hite[, n]ot of Hispanic origin" as a category.[36] By using the percentage of identified white inhabitants as the base to calculate the difference between the white, Hispanic, and other minority populations, this study isolates Hispanics as an ethnic subgroup of the larger white population. This study does not separate Hispanics from other populations, such as Native Americans or blacks because it intends to highlight only the racial disparity between the District Attorneys and the general population. Table 2 expresses these figures.

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32 Of course, Attorneys General for the United States Government, appointed by the President with the advice and consent of the Senate, all have been white, and with the exception of the current Attorney General, Janet Reno, all have been male.

33 As of July 31, 1997, eight persons await execution by the United States military: five blacks, one white, and two Asians. *See* DEATH ROW U.S.A., *supra* note 10, at 1082. Fifteen await the same fate from the United States government: nine blacks, four whites, one Latino, and one Asian. *See id.*

34 The figures in the analysis indicate the number of inmates on death row in each state as of July 31, 1997. *See* DEATH ROW U.S.A., *supra* note 10, at 1050-81.

35 1 BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION 3 tbl.3 (1992).

36 1 *id.*

TABLE 1
RACIAL CHARACTERISTICS OF DEATH PENALTY DECISION MAKERS AND DEATH ROW POPULATIONS

	Death penalty decision makers statewide				Death row population			
	Number	White (%)	Black (%)	Hispanic (%)	Number	White (%)	Black (%)	Hispanic (%)
Alabama	40	97.5	2.5	0.0	153	58.8	39.9	0.7
Arizona	15	100.0	0.0	0.0	125	65.6	12.0	16.8
Arkansas	24	100.0	0.0	0.0	35	48.6	42.9	5.7
California	58	95.0	0.0	5.0	474	35.9	31.4	12.5
Colorado	22	95.5	0.0	4.5	5	40.0	40.0	20.0
Connecticut	12	100.0	0.0	0.0	4	50.0	50.0	0.0
Delaware	3	100.0	0.0	0.0	14	42.9	57.1	0.0
Florida	20	95.0	0.0	5.0	350	54.9	35.1	9.1
Georgia	46	97.8	2.2	0.0	109	56.9	43.1	0.0
Idaho	44	100.0	0.0	0.0	19	100.0	0.0	0.0
Illinois	102	100.0	0.0	0.0	171	32.8	62.0	2.9
Indiana	92	97.8	1.1	1.1	45	66.7	31.1	2.2
Kansas	105	99.0	1.0	0.0	0	—	—	—
Kentucky	56	100.0	0.0	0.0	28	75.0	25.0	0.0
Louisiana	40	97.5	2.5	0.0	64	26.6	68.8	4.7
Maryland	25	92.0	8.0	0.0	17	17.7	82.4	0.0
Mississippi	22	95.5	4.5	0.0	64	43.8	56.3	0.0
Missouri	115	100.0	0.0	0.0	96	55.2	44.8	0.0
Montana	57[a]	98.3	0.0	0.0	7	100.0	0.0	0.0
Nebraska	89	100.0	0.0	0.0	11	72.7	18.2	0.0
Nevada	17	100.0	0.0	0.0	84	48.8	39.3	9.5
New Hampshire	10	100.0	0.0	0.0	0	—	—	—
New Jersey	21	95.2	4.8	0.0	19	47.4	47.4	5.3
New Mexico	14	64.3	0.0	35.7	4	75.0	0.0	25.0
New York	62	98.4	1.6	0.0	0	—	—	—
North Carolina	39	94.9	5.1	0.0	193	45.6	49.7	0.5
Ohio	88	98.9	1.1	0.0	180	47.8	48.9	1.7
Oklahoma	27[b]	96.3	0.0	0.0	123	56.1	30.1	2.4
Oregon	36	100.0	0.0	0.0	24	83.3	4.2	0.0
Pennsylvania	67	100.0	0.0	0.0	210	31.0	62.4	5.7
South Carolina	16	93.8	6.2	0.0	73	43.8	54.8	0.0
South Dakota	66	100.0	0.0	0.0	2	100.0	0.0	0.0
Tennessee	31	100.0	0.0	0.0	107	63.6	32.7	0.0
Texas	148	92.6	0.0	7.4	372	40.6	37.9	18.0
Utah	29	100.0	0.0	0.0	10	70.0	20.0	10.0
Virginia	121	93.4	6.6	0.0	43	41.9	55.8	2.3
Washington	39	100.0	0.0	0.0	11	81.8	9.1	0.0
Wyoming	22	100.0	0.0	0.0	0	—	—	—

[a] Montana has one Native American prosecutor, representing 1.7% of the total.
[b] Oklahoma has one Native American prosecutor, representing 3.7% of the total.

TABLE HIGHLIGHTS

The study reveals that the prosecutors with ultimate charging discretion in death penalty states are almost entirely white. Of the 1838 total prosecutors in death penalty states, 1794 are white (97.5%), twenty-two are black (1.2%), and twenty-two are Hispanic (1.2%). In fact, in eighteen of the thirty-eight death penalty states, whites com-

TABLE 2
RACIAL CHARACTERISTICS OF DEATH PENALTY DECISION MAKERS AND THE OVERALL STATE POPULATION

	Death penalty decision makers statewide			Overall state population	
	White (%)	Black (%)	Hispanic (%)	White (%)	Minority (%)
Alabama	97.5	2.5	0.0	73.3	26.7
Arizona	100.0	0.0	0.0	71.7	28.3
Arkansas	100.0	0.0	0.0	82.2	17.8
California	95.0	0.0	5.0	57.2	42.8
Colorado	95.5	0.0	4.5	80.7	19.3
Connecticut	100.0	0.0	0.0	83.8	16.2
Delaware	100.0	0.0	0.0	79.3	20.7
Florida	95.0	0.0	5.0	73.2	26.8
Georgia	97.8	2.2	0.0	70.1	29.9
Idaho	100.0	0.0	0.0	92.2	7.8
Illinois	100.0	0.0	0.0	74.8	25.2
Indiana	97.8	1.1	1.1	89.6	10.4
Kansas	99.0	1.0	0.0	88.4	11.6
Kentucky	100.0	0.0	0.0	91.7	8.3
Louisiana	97.5	2.5	0.0	65.8	34.2
Maryland	92.0	8.0	0.0	69.6	30.4
Mississippi	95.5	4.5	0.0	63.1	36.9
Missouri	100.0	0.0	0.0	86.9	13.1
Montana	98.3	0.0	0.0	91.8	8.2
Nebraska	100.0	0.0	0.0	92.5	7.5
Nevada	100.0	0.0	0.0	78.7	21.3
New Hampshire	100.0	0.0	0.0	97.3	2.7
New Jersey	95.2	4.8	0.0	74.0	26.0
New Mexico	64.3	0.0	35.7	50.4	49.6
New York	98.4	1.6	0.0	69.3	30.7
North Carolina	94.9	5.1	0.0	75.0	25.0
Ohio	98.9	1.1	0.0	87.1	12.9
Oklahoma	96.3	0.0	0.0	81.0	19.0
Oregon	100.0	0.0	0.0	91.0	9.0
Pennsylvania	100.0	0.0	0.0	87.7	12.3
South Carolina	93.8	6.2	0.0	68.5	31.5
South Dakota	100.0	0.0	0.0	91.2	8.8
Tennessee	100.0	0.0	0.0	82.6	17.4
Texas	92.6	0.0	7.4	60.6	39.4
Utah	100.0	0.0	0.0	91.2	8.8
Virginia	93.4	6.6	0.0	76.0	24.0
Washington	100.0	0.0	0.0	86.7	13.3
Wyoming	100.0	0.0	0.0	92.0	8.0

prise 100% of the prosecutors.[37] In contrast, 1538 of the 3269 people on death row are white (47.1%), 1340 are black (41.0%), and 227 are Latino (6.9%).[38]

This study thus suggests two ways in which unconscious bias might enter the system. The first and most obvious channel for this

37 The 18 states are as follows: Arizona, Arkansas, Connecticut, Delaware, Idaho, Illinois, Kentucky, Missouri, Nebraska, Nevada, New Hampshire, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Washington, and Wyoming.

38 *See* DEATH ROW U.S.A., *supra* note 10, at 1040.

bias arises from the racial disparity between the prosecutors and the death row population. The predominantly white prosecutors are more likely to have absorbed the "cultural stereotype" of black inferiority[39] and thus perceive black defendants as more "violent" and more "dangerous" than their white counterparts. The dynamic of this disparity may help explain the Baldus study's finding that black defendants are 1.1 times more likely to receive a death sentence than defendants of other races.[40]

The second and more subtle expression of unconscious bias may result from the similarity between the prosecutor and the victim populations. The victim population's racial makeup, 83.2% white, 12.1% black, and 3.5% Latino,[41] resembles the prosecutor population's more closely than it resembles the death row prisoner population's. As a result, unconscious bias may creep into the prosecutors' decisions to seek the death penalty. The predominantly white prosecutors may perceive violent crimes against whites as more serious than similar crimes against minorities and thus seek the death penalty more frequently against defendants accused of killing white victims. Conversely, white prosecutors may have an unconscious perception of blacks as inferior and may view violent crimes against blacks as less serious and less worthy of the death penalty than similar crimes against whites. The similarity of the prosecutor and victim populations may help explain the Baldus study's finding that "prosecutors seek the death penalty for 70% of black defendants with white victims, but for only 15% of black defendants with black victims, and only 19% of white defendants with black victims."[42]

CONCLUSION

Since the decision in *McCleskey*, numerous studies have confirmed the racial disparities in death sentencing[43] and have produced overwhelming evidence that the primary source of arbitrary and discriminatory decision making in capital cases rests with the prosecutor. Despite this evidence, the *McCleskey* Court refused to address seriously the role that prosecutorial bias plays in death sentencing. Instead, the majority chose to reaffirm the traditional discretion of prosecutors. In extolling the Court's "'unceasing efforts' to eradicate racial prejudice from our criminal justice system,"[44] the majority apparently mistook

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39 *See* Lawrence, *supra* note 21, at 323.

40 *See* McCleskey v. Kemp, 481 U.S. 279, 287 (1987).

41 *See* DEATH ROW U.S.A., *supra* note 10, at 1040.

42 *See McCleskey*, 481 U.S. at 327.

43 *See* Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 434-35 (1995).

44 *McCleskey*, 481 U.S. at 309 (quoting Batson v. Kentucky, 476 U.S. 79, 85 (1986)).

the effort for the deed and ignored the dangers of discrimination, which are inherent in the system's unfettered prosecutorial discretion.

This study considers and treats seriously an area in which the Supreme Court has failed: addressing the special dangers of unconscious bias in prosecutors' life and death decisions. Knowing who wields this discretionary power gives academics, practitioners, courts, and legislatures the information needed to fashion a system that strives to minimize prejudicial influences and to maximize fairness in this potentially life-ending decision.