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ELIMINATING DISCRIMINATION IN ADMINISTERING THE DEATH PENALTY: THE NEED FOR THE RACIAL JUSTICE ACT

Erwin Chemerinsky*

I. INTRODUCTION

What if 65% of the applicants for positions in a government office were African-American, but 80% of those hired were white?¹ A black applicant certainly could bring a suit under Title VII of the 1964 Civil Rights Act² and force the employer to show that race was not a factor in the hiring decisions.

What if the prosecutor used peremptory challenges to strike prospective jurors who were black four times more than to exclude those who were white? Under *Batson v. Kentucky*,³ it is clear that the defense could require the prosecutor to demonstrate that the peremptory challenges were not exercised based on race.

What if more than 60% of murder cases involved African-American victims, but in cases where the death penalty is sought more than 80% involved white victims? What if an African-American who kills a white victim is more than five times as likely to be given the death penalty than a white who kills a white? What if an African-American who kills a white is 60 times more likely to be sentenced to death than an African-American who kills an African-American? Does the law require that this racial disparity be explained on non-racial grounds? It should, but as of now, it clearly does not.

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1. The analogy is drawn from an article written by two former United States Attorneys General, Elliot L. Richardson and Nicholas deB. Katzenbach. Elliot L. Richardson and Nicholas deB. Katzenbach, *Base Death Sentences on the Facts, Not Race*, CHRISTIAN SCI. MONITOR, June 13, 1993, at 19.

2. 42 U.S.C. § 2000e-5, 16 (1964).

3. 476 U.S. 79 (1986).

In almost every important area—employment, housing, public benefits, preemptory challenges—proof of racially disparate impact can be used to require the government to prove a non-racial explanation for its actions.⁴ Not, however, with regard to the one area where the government determines who lives and who dies.

This is what the Racial Justice Act⁵ would have done; proof of significant racial discrimination in the administration of the death penalty would have required the prosecutor to show a non-race based explanation for a death sentence.⁶ The Racial Justice Act was passed by the House of Representatives in 1994 as part of the Crime Bill.⁷ Unfortunately, the threat of a Republican filibuster in the Senate caused it to be deleted in Conference Committee from the final version of the law.⁸

In this essay, I make three points. First, the death penalty is administered in a racially discriminatory manner. Second, current law is inadequate to deal with this problem. Third, the Racial Justice Act would be a desirable solution.

My focus is not on whether there should be a death penalty. Realistically, the death penalty is going to remain a part of American law for the foreseeable future. My central argument is that it is imperative that steps be taken to ensure that capital punishment is administered in a racially neutral fashion. Who lives and who dies, who gets sentenced to death and who to life imprisonment, should not be a function of the race of the defendant or the race of the victim.

Since I delivered these remarks at the symposium in October, the Republicans have taken control of both the House of Representatives and the Senate. This, of course, makes enactment of the Racial Justice Act even less likely. It does not, however, make it less necessary or less right. Also, states that have the death penalty can adopt their own versions of such a law.

4. See *infra* notes 104-08 and accompanying text.

5. H.R. 4017, 103rd Cong., 2d Sess. (1994).

6. *Id.*

7. H.R. 3355, 103rd Cong., 2d Sess. (1994).

8. *Anti-Crime Legislation*, THE LEGAL INTELLIGENCER, July 19, 1994, at 6.

II. CAPITAL PUNISHMENT IN THE UNITED STATES IS
ADMINISTERED IN RACIALLY DISCRIMINATORY
MANNER

Understanding the role of race in capital punishment decision-making requires a broader sense of the racism that pervades the American justice system. Statistics clearly show that the criminal justice system treats African-Americans worse than Caucasians at every step of the process.⁹

In contacts with the police, blacks are much more likely to be subjected to abuse than are whites.¹⁰ It was not a coincidence that Rodney King was black and his assailants were four white police officers. In one study, focusing on Memphis, Tennessee, it was shown that blacks were ten times more likely than whites to have been shot at by police officers, eighteen times more likely to have been wounded, and five times more likely to have been killed.¹¹

When prosecutors make decisions concerning bail recommendations and charging, blacks again are treated much worse than whites arrested for similar offenses and with comparable records.¹² A task force in Minnesota found that over a three year period, whites with prior criminal records were released without bail more often than minorities without a criminal record.¹³ Study after study has documented that prosecutorial charging decisions are very much influenced by the race of the accused perpetrator and the race of the victim.¹⁴

At the sentencing stage as well, blacks are likely to receive much higher sentences for similar crimes than whites with comparable criminal records.¹⁵ On average, sentences

9. See *infra* notes 10-17.

10. James J. Fyfe, *Blind Justice: Police Shootings in Memphis*, 73 J. OF CRIMINAL LAW & CRIMINOLOGY 707, 718-20 (1982).

11. *Id.*

12. See generally, *Developments in the Law: Race and the Criminal Process: I-IX*, 101 HARV. L. REV. 1472-641 (1988).

13. Erwin Chemerinsky, *Underlying Causes of Injustice*, L.A. DAILY J., Nov. 16, 1993, at 4.

14. See, e.g., *Developments in the Law: Race and the Criminal Process: IV. Race and the Prosecutor's Charging Decision*, 101 HARV. L. REV. 1520 (1988); Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587, 615-19 (1985).

15. Joan Petersilia, *Racial Disparities in the Criminal Justice System* (Rand Corp., 1983)(documenting that African-Americans serve longer sentences from comparable offenses than do whites).

for blacks are ten percent greater than those imposed on whites.¹⁶ A study by the National Sentencing Commission found that blacks are receive an average sentence of 68.5 months under the federal sentencing guidelines compared to an average sentence of about 44.7 months for whites.¹⁷ State laws and federal guidelines, of course, are written in race-neutral language; but discretion in sentencing inevitably exists and provides the opportunity for racial discrimination.

In this context, it is not surprising that race matters greatly in decisions concerning the death penalty. The most famous study was conducted by law professor David Baldus who examined the imposition of the death penalty in Georgia.¹⁸ The Baldus study found that the prosecutor sought the death penalty in 70% of cases involving a black defendant and a white victim; 15% of cases involving a black defendant and a black victim; and 19% of cases involving a white defendant and a black victim.¹⁹

Many other studies confirm this discriminatory pattern in capital decision-making. In Alabama, where the population is 24% black, 43% of the 117 inmates on death row are black.²⁰ In Philadelphia, where the population is 19% black, a single judge is responsible for sentencing 26 people to death, 92% of whom were black.²¹

A nationwide study by the Dallas Times Herald of 11,425 capital murders from 1977 to 1984 revealed that a killer of a white is nearly three times more likely to be sentenced to death than a killer of a black.²² A study by Samuel Gross and Robert Mauro of capital sentencing in eight states found that race was a key factor in death penalty decision-making.²³ For example, the study found that defendants in Flor-

16. Samuel L. Myers, *Racial Disparities in Sentencing: Can Sentencing Reforms Reduce Discrimination in Punishment*, 64 U. COLO. L. REV. 781, 793 (1993).

17. Charles Ogletree, *Does Race Matter in Criminal Prosecutions*, THE CHAMPION, July 1991, at 13.

18. David Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 709-10 (1983).

19. *Id.* at 707-12.

20. H.R. REP. ON H.R. 4017, THE RACIAL JUSTICE ACT (1994).

21. *Id.*

22. *Id.*

23. Samuel R. Gross & Robert Mauro, *DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* 35-94 (1989).

ida convicted of killing whites were eight times more likely to receive the death penalty than those convicted of murdering blacks.²⁴ In Georgia, where 63.5% of homicide victims were black, those who killed whites were ten times more likely to receive a death sentence than defendants with black victims.²⁵

Similar evidence is emerging under the limited federal death penalty adopted in 1988²⁶ for so-called "drug kingpins." Of 36 defendants against whom a federal death penalty has been sought, four defendants were white, four were Hispanic, and 28 were black.²⁷ All ten defendants approved thus far for capital prosecution by Attorney General Janet Reno have been black.²⁸

The overall statistics from across the country paint a stark and unequivocal picture. Of the 236 people executed in this country since 1976, over 80% of the cases involved a white victim while nearly 50% of the homicide victims each year are nonwhite.²⁹ A 1990 report by the General Accounting Office reviewed 28 different studies and found that they clearly documented a pattern "indicating racial disparities in the charging, sentencing, and imposition of the death penalty."³⁰

What explains these statistics? Surely, virtually all of the participants in the criminal justice system would deny that they are racists. Yet, unconscious racism exists at every step along the way in the criminal justice system.³¹ As documented above, prosecutors are more likely to charge blacks with first degree murder than whites for comparable crimes.³² Blacks are less likely to be successful in negotiating a plea bargain that would reduce the charge or the sen-

24. *Id.* at 44.

25. *Id.* at 43-44.

26. 21 U.S.C. § 848(e)(1988).

27. H. R. REP. ON H.R. 4017, *supra* note 20.

28. Lori Montgomery, *After Three Decades, U.S. Returning to Death Row, 6 Men Await Federal Execution*, MIAMI HERALD, April 11, 1994, at A1.

29. Elliot Richardson & Nicholas deB. Katzenbach, *Base Death Sentences on the Facts, Not Race*, CHRISTIAN SCI. MONITOR, June 13, 1994, at 19.

30. Carol Moseley-Braun, *Racial Justice and the Death Penalty*, WASH. POST, May 28, 1994, at A27.

31. For an excellent discussion of unconscious racism in the legal system see Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

32. See *supra* notes 12-14, 30-31 and accompanying text.

tence.³³ Prosecutors are more likely to seek the death penalty against blacks than against whites.³⁴

Perhaps most importantly, the Supreme Court has emphasized that juries must have discretion in deciding whether to impose the death penalty,³⁵ and this discretion provides the opportunity for the manifestation of racism. The Court has recognized that in a capital sentencing proceeding, the jury is called upon to make "a highly subjective, 'unique individualized judgment regarding the punishment that a particular person deserves.'"³⁶ For example, the Court has held that every capital jury must be free to weigh relevant aggravating and mitigating factors before deciding whether to impose the death penalty.³⁷

The Supreme Court, itself, has recognized that this discretion provides the opportunity for race to infect decision-making in capital cases. In *Turner v. Murray*, upon reviewing a case where the trial judge refused to question prospective jurors about race bias during voir dire, the Court stated: "Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected."³⁸ Juries subconsciously may be less likely to sympathize with black defendants and more likely to fear them. Likewise, juries may be more likely to feel the need for retribution when the victim of a crime is white than when the victim is black.

The overall result is that the most fundamental decisions that a society can make—who shall live and who shall die—are racially biased. Controlling for all other variables, the differences shown in the studies are explainable only by the race of the defendant and the race of the victim.

III. CURRENT LAW FAILS TO PROVIDE A REMEDY FOR THE RACIST ADMINISTRATION OF THE DEATH PENALTY

The Supreme Court has held that proof of disparate impact is generally insufficient to demonstrate a denial of equal

33. See *supra* notes 12-14, 30-31 and accompanying text.

34. See *supra* notes 12-14, 30-31 and accompanying text.

35. See Lawrence, *supra* note 31.

36. *Caldwell v. Mississippi*, 472 U.S. 320, 340 n.7 (1985) (citing *Zant v. Stephens*, 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring)).

37. *E.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982); *Lockett v. Ohio*, 438 U.S. 586, 597-609 (1978) (plurality opinion).

38. 476 U.S. 28, 35 (1986).

protection.³⁹ If a law is facially race neutral, proving a violation of equal protection requires showing a discriminatory purpose for the government's action.⁴⁰ Under federal anti-discrimination statutes, such as Title VII of the 1964 Civil Rights Act Amendments which prohibits employment discrimination⁴¹ or the 1982 Voting Rights Act which prohibits discriminatory voting arrangements,⁴² disparate impact is sufficient. But under the Constitution, the Supreme Court has consistently held that there must be proof of a discriminatory purpose.⁴³

There are many ways of demonstrating impermissible intent. In *Arlington Heights v. Metropolitan Development Corporation*,⁴⁴ the Supreme Court expressly recognized that a statistical pattern so stark as to leave no other explanation but racial discrimination would suffice to prove an equal protection violation.⁴⁵ In fact, in the seminal case of *Washington v. Davis*,⁴⁶ which had created the requirement for proof of discriminatory purpose in equal protection cases, Justice Stevens in a concurring opinion recognized that "[f]requently 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."⁴⁷

This is certainly not a new or novel proposition. The Court has recognized the role of statistical proof in demonstrating equal protection violations both before and after *Washington v. Davis*. For instance, in 1973, in *Mayor of Philadelphia v. Educational Equality League*,⁴⁸ the Court flatly declared: "Statistical analyses have served and will continue

39. See *Washington v. Davis*, 426 U.S. 229, 239-40 (1976)(holding that proof of discriminatory impact of a test in hiring police officers was insufficient to demonstrate a denial of equal protection); see also *Personnel Administrator v. Feeney*, 442 U.S. 256, 271-81 (1977)(holding that discriminatory impact against women because of a state law giving benefits to veterans in hiring for state jobs was not a violation of equal protection due to the absence of proof of a discriminatory purpose).

40. *Washington*, 426 U.S. at 241-47.

41. Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 (Supp. IV 1993).

42. Voting Rights Act of 1982, 42 U.S.C. § 1973(b) (1988).

43. See *Washington v. Davis*, 426 U.S. 229, 241-47 (1976); see also *Personnel Administrator v. Feeney*, 442 U.S. 256, 278-80 (1979).

44. 429 U.S. 252 (1977).

45. *Id.* at 266.

46. 426 U.S. 229 (1976).

47. *Id.* at 253 (Stevens, J., concurring).

48. 415 U.S. 605 (1974).

to serve an important role as one indirect indicator of racial discrimination.⁴⁹ More recently, in cases such as *Bazemore v. Friday*,⁵⁰ in 1986, the Court upheld the use of statistical evidence to prove discriminatory purpose and an equal protection violation by the North Carolina Agricultural Extension Service in setting salaries for black and white employees.⁵¹

Therefore, in light of the statistics proving racism in the administration of the death penalty, it was to be expected that the Supreme Court would be asked to find that there is a denial of equal protection if the defendant can show a statistical pattern so stark as to leave no other explanation than that the death penalty was administered in a racially discriminatory manner. However, in *McCleskey v. Kemp*,⁵² the Supreme Court, by a five to four decision, held that statistics are insufficient to prove race discrimination in death penalty sentencing.⁵³ Justice Powell authored the opinion for the Court and was joined by Chief Justice Rehnquist and Justices White, O'Connor, and Scalia.⁵⁴ Justices Brennan, Marshall, Blackmun, and Stevens dissented.⁵⁵

The defendant, Warren McCleskey, was an African-American sentenced to death for murder in Georgia.⁵⁶ In his petition for a writ of habeas corpus, McCleskey argued that Georgia administered its capital sentencing process in a racially discriminatory manner and, thus, violated both the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment.⁵⁷ At the heart of his claim was a statistical study, mentioned above, that was conducted by Professor David Baldus.⁵⁸ The study examined over 2,000 homicide cases in Georgia and controlled for 230 non-racial factors.⁵⁹ The results showed that a person accused of murdering a white individual was 4.3 times more likely to be sen-

49. *Id.* at 620.

50. 474 U.S. 1080 (1986).

51. *Id.* For the underlying facts see *Bazemore v. Friday*, 751 F.2d 662 (4th Cir. 1984).

52. 481 U.S. 279 (1987).

53. *Id.* at 306, 313.

54. *Id.* at 282.

55. *Id.* at 320.

56. *Id.* at 283.

57. *McCleskey v. Kemp*, 481 U.S. 279, 286 (1987).

58. *Id.*

59. *Id.* at 286-87.

tenced to death than a person accused of murdering a black individual.⁶⁰

The Court rejected this claim and the use of statistical proof to demonstrate an equal protection violation in capital cases.⁶¹ The Court explained that there was no evidence that decision-makers had used race as the basis for their decision.⁶² There was no proof that the Georgia legislature had a racist purpose in adopting the laws authorizing capital punishment.⁶³ Nor was there proof that the jury sentencing McCleskey used race as the basis for its sentencing decision.⁶⁴ The Court explained that the Baldus study at most proved a correlation between race and capital sentencing; the study did not prove that race was actually the basis for the jury's decision.⁶⁵ The Court emphasized that there are many checks against the manifestation of racism in capital cases, including limits on prosecutorial bias in charging decisions and aggressive questioning of prospective jurors during voir dire about their racial sentiments.⁶⁶

The Court concluded its opinion by expressing concern that if McCleskey's argument was accepted, the judiciary would be confronted with similar challenges to other penalties.⁶⁷ The Court refused to open the courthouse doors to such challenges based on disproportionate impact in sentencing.⁶⁸

In other words, despite the stark statistical pattern and a study that controlled for every other variable, the Court still was unwilling to find that the data proved racial discrimination in capital decision-making.⁶⁹ Interestingly, last year, a memorandum from Justice Antonin Scalia to the other Justices was made public which reveals that Scalia accepted that the statistics proved discrimination.⁷⁰ After Justice

60. *Id.* at 287.

61. *Id.* at 299.

62. *McCleskey v. Kemp*, 481 U.S. 279, 292-93, 297 (1987).

63. *Id.* at 298-99.

64. *Id.* at 297, 310-11.

65. *Id.* at 312.

66. *Id.* at 313.

67. *McCleskey v. Kemp*, 481 U.S. 279, 315 (1987).

68. *Id.* at 315-19.

69. *Id.* at 297.

70. This memorandum is discussed in Dennis D. Dorin, *Far Right of the Mainstream: Racism, Rights, and Remedies from the Perspective of Justice Antonin Scalia's McCleskey Memorandum*, 14 *MERCER L. REV.* 999 (1994).

Thurgood Marshall's death, his papers were made public by the Library of Congress. Amongst them was a memo written by Scalia in the *McCleskey* case. The memo is only a paragraph long and worth quoting in its entirety. The memorandum was dated January 6, 1987; it states:

Re: No. 84-6811—*McCleskey v. Kemp*

MEMORANDUM TO THE CONFERENCE: I plan to join Lewis's opinion in this case, with two reservations. I disagree with the argument that the inferences that can be drawn from the Baldus study are weakened by the fact that each jury and each trial is unique, or by the large number of variables at issue. And I do not share the view, implicit in the opinion, that an effect of racial factors upon sentencing, if it could only be shown by sufficiently strong statistical evidence, would require reversal. Since it is my view that unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof. I expect to write separately to make these points, but not until I see the dissent.⁷¹

The memorandum was signed, in hand, "Nino".⁷²

The implications of this memorandum are enormous. The memo clearly states that Scalia believes that the Baldus study successfully proves racial discrimination in the administration of the death penalty. Indeed, Justice Scalia expressly recognizes that unconscious racism infects the capital sentencing process. But he nonetheless concludes that there is not a denial of equal protection even though statistics prove racism and even though he believes that the process is inherently racist. Justice Scalia stated that, no matter what the statistical proof, he would not find a denial of equal protection.

This means that in *McCleskey*, five of the Justices—the four dissenting Justices and Justice Scalia—believed that *McCleskey* successfully proved racial bias in the imposition of the death penalty. Nonetheless, *McCleskey's* sentence was affirmed and ultimately he was executed.⁷³

71. Memorandum on file with the *Santa Clara Law Review*.

72. Signature representing Justice Antonin Scalia.

73. *McCleskey v. Kemp*, 481 U.S. 279, 291 (1987).

After *McCleskey*, statistical proof of racially disparate impact is not enough even to shift the burden of proof to the prosecutor to offer a non-race based explanation. A defendant could only challenge a death sentence as a denial of equal protection if there was specific evidence that the jury in his or her case consciously used race as a basis for its decision-making. Because racism is often unconscious, or usually, at the least, not openly expressed, such proof will rarely be available.

In fact, cases since *McCleskey* indicate that death sentences are upheld even when there is other evidence of racism. Consider a few examples. In one Florida case, the trial judge on the record referred to the parents of the black defendant in a capital case as "niggers."⁷⁴ The Florida Supreme Court upheld the death sentence and rejected the argument that there was sufficient proof of impermissible bias by the trial court.⁷⁵

In a Georgia case that involved a black man sentenced to death for killing a white victim, the trial judge referred to the defendant, a grown man, as a "colored boy."⁷⁶ Additionally, after the trial, two of the jurors admitted that during deliberations they used the slur, "nigger," and two jurors said that they found blacks to be scarier than whites.⁷⁷ Nonetheless, the federal court rejected a habeas corpus petition and found the death sentence to be constitutional.⁷⁸

After *McCleskey*, it will be extremely difficult to successfully challenge a death sentence on equal protection grounds. Even though a majority of the Justices on the Supreme Court have recognized that racism seriously infects the capital process, current law simply fails to provide any remedy.

IV. THE RACIAL JUSTICE ACT AS A SOLUTION

In September 1994, President Clinton signed into law an omnibus crime bill.⁷⁹ Absent from the bill was a provision known as the Racial Justice Act. The Racial Justice Act was introduced as H.R. 4017 and would have amended Title 28 of

74. *Peek v. Florida*, 488 So. 2d 52, 56 (Fla. 1986).

75. *Id.* at 55.

76. *Dobbs v. Zant*, 720 F. Supp. 1566, 1578 (N.D. Ga. 1989).

77. *Id.* at 1576-78.

78. *Id.* at 1579-81.

79. H.R. 3355, *supra* note 7.

the United States Code by adding Chapter 177, entitled "Racially Discriminatory Capital Sentencing."⁸⁰ The bill passed the House of Representatives, but there was a threat of a Republican filibuster in the Senate if the crime bill included such a provision.⁸¹ In an effort to secure approval of the crime bill, in July 1994, the White House supported its removal from the bill.⁸²

The Racial Justice Act has one purpose: to allow the use of statistics as evidence of racial bias in the imposition of the death sentence in a particular case.⁸³ The Act specifically seeks to overturn effects of *McCleskey* which, as described above, has the effect that statistical evidence of bias no matter how comprehensive and compelling, cannot be used in death penalty cases to prove a constitutional violation.⁸⁴

The Racial Justice Act does not prohibit the death penalty. Rather, it provides that no person shall be put to death under federal or state law if the sentence was imposed because of the race of the defendant or the victim.⁸⁵ A defendant challenging a death sentence as racist would be required to prove a pattern of racially discriminatory death sentences in the relevant jurisdiction.⁸⁶ The Act requires the showing of bias in the particular sentence being challenged.⁸⁷ It would not be enough to show that blacks get the death penalty significantly more frequently than whites for the same type of offense.⁸⁸ Any statistical analysis would need to compare cases similar in level of aggravation to the case being challenged.⁸⁹

The Act provides that the court must independently evaluate the validity of the evidence presented to establish the inference of racial discrimination and must determine if it is sufficient to provide a basis for the inference.⁹⁰ The defendant must make a statistically significant showing of discrimination that takes into account the relevant non-racial aggra-

80. House Report on H.R. 4017, *supra* note 20.

81. THE LEGAL INTELLIGENCER, *supra* note 8.

82. *Id.*

83. H.R. 4017, *supra* note 5.

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

85. *See generally*, H.R. 4017, 103rd Cong., 2d Sess. (1994).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

vating and mitigating factors.⁹¹ Then, the court must have concluded that the evidence is accurate and valid and supports an inference of racial discrimination.⁹²

If the court found that the defendant produced such proof, the burden then would have shifted to the government to provide a non-race based explanation for the sentence.⁹³ Prosecutors could meet this burden by showing by a preponderance of the evidence that there is an explanation other than race bias to explain the death sentence in the particular case.⁹⁴ For example, the prosecutor might meet this burden by comparing the defendant's crime to other crimes for which the death penalty was not imposed. Or the prosecutor might justify the death sentence by pointing to the defendant's prior record compared to others not sentenced to death. The death sentence would stand so long as the prosecutor could prove, by a simple preponderance of the evidence, a non-race based reason for the sentence.⁹⁵

This approach to discrimination is hardly new. For example, under the equal protection clause, the Supreme Court has endorsed an almost identical approach to eliminating racism in jury selection. In *Batson v. Kentucky*,⁹⁶ the Supreme Court held that discriminatory use of peremptory challenges denies equal protection.⁹⁷ Under *Batson*, a defendant must present a prima facie case of discrimination in striking prospective jurors.⁹⁸ If such a pattern is demonstrated, the burden then shifts to the prosecution to provide non-race based reasons for the peremptory challenges.⁹⁹

Similarly, under federal civil rights laws, proof of disparate impact is sufficient to establish a prima facie case and require that a defendant present a non-race based explanation for the conduct.¹⁰⁰ The Racial Justice Act would apply this approach to death penalty sentencing.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. 476 U.S. 79 (1986).

97. *Id.*

98. *Id.* at 93.

99. *Id.* at 94.

100. See 1964 Civil Rights Act, Title VII, *supra* note 2; 1982 Voting Rights Act, *supra* note 42.

In *McCleskey*, the Supreme Court expressly declared that the issue of racism in administering the death penalty was best dealt with by legislatures and not the judiciary.¹⁰¹ The Racial Justice Act responds to this invitation. Congress has the authority to adopt it pursuant to its powers under Section 5 of the Fourteenth Amendment.¹⁰² The Supreme Court has long recognized that Congress has authority under this provision to expand protection from government discrimination beyond the Constitution's requirements.¹⁰³

For instance, in *Mobile v. Bolden*,¹⁰⁴ the Supreme Court held that proof of discriminatory impact in voting arrangements is not sufficient to demonstrate a violation of equal protection.¹⁰⁵ In 1982, Congress amended the Voting Rights Act specifically to prohibit voting discrimination cases that are proven by evidence of a disparate impact.¹⁰⁶ Likewise, the Racial Justice Act would use congressional authority under Section 5 of the Fourteenth Amendment¹⁰⁷ to prevent racial discrimination in capital sentencing.¹⁰⁸

Professor Laurence Tribe has identified three grounds on which Congress could adopt the Racial Justice Act under the Fourteenth Amendment.¹⁰⁹ First, Congress could enact the Racial Justice Act to remedy race discrimination against defendants charged with capital crimes.¹¹⁰ Second, Congress could enact the Racial Justice Act to remedy race discrimination against victims of capital crimes.¹¹¹ Third, Congress could enact the Racial Justice Act to remedy "society's demeaning vision of blacks as second-class citizens."¹¹²

Opponents of the Racial Justice Act argue that it would effectively end the administration of capital punishment. Conservative columnist George Will contends that "[t]he real

101. *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987).

102. See Matt Pawa, Comment, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us?: An Examination of Section 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029 (1993).

103. See *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

104. 446 U.S. 55 (1980).

105. *Mobile v. Bolden*, 446 U.S. 55, 55 (1980).

106. 1982 Voting Rights Act, *supra* note 42.

107. U.S. CONST. amend. XIV, § 5.

108. H.R. 4017, *supra* note 5.

109. 136 CONG. REC. S6891-2 (daily ed. May 24, 1990) (reprinting letter from Professor Tribe to Senator Edward Kennedy).

110. *Id.*

111. *Id.*

112. *Id.* at S6892.

purpose of the act is to end all executions."¹¹³ But this is no more true than the contention that allowing statistical proof of discrimination in employment cases is meant to end all hiring. The Racial Justice Act would allow executions to continue unless the defendant can prove discrimination, the court finds the proof to be statistically significant, and the prosecutor fails to offer sufficient racially neutral explanations for the discriminatory pattern.

The Racial Justice Act would not create a quota in the administration of the death penalty. Each case would be considered individually.¹¹⁴ A prosecutor could justify a particular capital sentence by pointing to factors justifying the punishment in that case and distinguishing it from others where the death penalty was not imposed. The Racial Justice Act simply would apply traditional principles of discrimination to death penalty decision-making.

V. CONCLUSION

In January 1994, Justice Harry Blackmun wrote:

Twenty years have passed since this Court declared that the death penalty must be administered fairly, and with reasonable consistency, or not at all, and despite the effort of the states courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake.¹¹⁵

This caprice is most evident and most unacceptable when it comes to race and the death penalty. Countless studies prove that capital punishment is administered in a racially discriminatory fashion in the United States. Yet, under current law, there is no remedy. The Racial Justice Act would solve the problem, but its passage is now even less likely with Republicans in control of the House and Senate. It is a cruel irony that racism is most tolerated in the place where it should be least allowed: where the government determines who lives and who dies.

113. George F. Will, *Racial Justice Act is Ploy to Kill Death Penalty*, CHICAGO SUN TIMES, May 19, 1994, at 31.

114. H.R. 4017, *supra* note 5.

115. *Callins v. Callins*, 114 S. Ct. 1127, 1129 (1994).

