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Race and the Death Penalty After *McCleskey*: A Case Study of Kentucky's Racial Justice Act

Justin R. Arnold*

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I. Introduction: *McCleskey v. Kemp*

In 1987, the United States Supreme Court decided the case of *McCleskey v. Kemp*.¹ In that case, a black male defendant was convicted of two counts of armed robbery and murder. The victim was a white male. *McCleskey*, from a Fulton County, Georgia jail, sought relief from his death sentence on the basis that the Georgia sentencing process was administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution.² *McCleskey* supported his claim with a statistical study indicating that the death penalty in Georgia was imposed more often on black defendants and killers of white victims than on white defendants and killers of black victims.³

The study, conducted by Professors David Baldus, Charles Pulaski, and George Woodworth, was based on an examination of over 2,000 murder cases that occurred in Georgia during the 1970s.⁴ According to the study,

* Associate, Dickstein Shapiro Morin & Oshinsky; J.D., Washington and Lee School of Law, May 2005; B.A. Washington and Lee University, 2002.

¹ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

² *Id.* at 291–319.

³ *Id.* at 292–93.

⁴ *Id.* at 286.

defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases.⁵ Further, prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims, but a death sentence was sought in only 19% of cases involving white defendants and black victims.⁶

The authors of the study attempted to account for 230 variables that could have explained the disparities on nonracial grounds.⁷ Even after taking into account these variables, the study concluded that defendants charged with killing white victims were significantly more likely to receive a death sentence than defendants charged with killing blacks, and black defendants as a whole were more likely to receive a death sentence than other defendants.⁸

McCleskey argued that the study indicated that black defendants who killed white victims had the greatest likelihood of receiving the death penalty.⁹ As the Court stated, his claim of discrimination extended "to every actor in the Georgia capital sentencing process, from the prosecutor who sought the death penalty and the jury that imposed the sentence, to the state itself that enacted the capital punishment statute and allows it to remain in effect despite its allegedly discriminatory application."¹⁰

In an opinion authored by Justice Lewis Powell, the majority rejected McCleskey's claims, stating that the study failed to establish that any of the decision makers in McCleskey's case acted with discriminatory purpose in violation of the Equal Protection Clause.¹¹ Further, the study at most indicated a discrepancy that appeared merely to correlate with race, not "a constitutionally significant risk of racial bias affecting Georgia's capital sentencing process."¹² The Court stated that every mode for determining guilt or punishment has weaknesses and the potential for misuse.¹³ Despite such imperfections, constitutional guarantees are met when the mode for determining guilt or punishment is surrounded with safeguards to make it as fair as possible.¹⁴ Therefore, the study demonstrated no constitutional violation.¹⁵

⁵ *Id.*

⁶ *Id.* at 287.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 292.

¹¹ *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987).

¹² *Id.* at 312-13.

¹³ *Id.* at 313.

¹⁴ *Id.* (quoting *Singer v. United States*, 380 U.S. 24, 35 (1965)).

¹⁵ *McCleskey*, 481 U.S. at 313.

In his dissenting opinion, Justice Brennan wrote that the majority "seems to fear too much justice."¹⁶ He argued that the majority's unwillingness to view McCleskey's statistical evidence as sufficient to support a claim of racial discrimination stemmed from a fear that such recognition might lead to widespread challenges to all aspects of criminal sentencing.¹⁷ In Brennan's view, the prospect that there might be widespread abuses in criminal sentencing was no excuse for the Court's abdication of its judicial role of preventing the arbitrary administration of punishment.¹⁸

II. The Congressional Aftermath of McCleskey

The *McCleskey* decision prompted the introduction of the Racial Justice Act (RJA) in Congress.¹⁹ The proposal, which was first introduced in the House of Representatives in 1988 by Representative John Conyers of Michigan, would have permitted defendants sentenced to death to challenge those sentences using the type of statistical proof of racial discrimination presented in the Baldus study.²⁰ After failing to pass in 1988, a version of the RJA subsequently passed the House in 1990 as part of the Comprehensive Crime Control Act of 1990, but was dropped by the conference committee.²¹ In 1991, the RJA was introduced in the House²² and the Senate,²³ but was defeated in both chambers.²⁴ The proposal again passed the House in 1994, by a vote of 217–212.²⁵ However, the proposal died in conference during a highly publicized national debate over President Clinton's crime bill.²⁶

Several versions of the RJA appeared before Congress between 1988 and 1994.²⁷ The provisions of the various versions were essentially the same insofar as they responded to *McCleskey* by prohibiting imposition of the

¹⁶ *Id.* at 339.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ H.R. 4442, 100th Cong. (2d Sess. 1988).

²⁰ *Id.*

²¹ H.R. 5269, 101st Cong. (2d Sess. 1990).

²² H.R. 1249, 102d Cong. (1st Sess. 1991).

²³ H.R. 2851, 102d Cong. (1st Sess. 1991).

²⁴ 137 CONG. REC. S8300 (daily ed. June 20, 1991). Clifford Krauss, *House Approves Anti-Crime Bill with Something for Both Camps*, N.Y. TIMES, Oct. 23, 1991, at A1, A18.

²⁵ H.R. 4017, 103d Cong. (2d Sess. 1994). This version of the RJA was the same as the proposal contained in the 1991 House bill.

²⁶ Naftali Bendavid, *Black Lawmakers Hold Balance on Crime; Legislative Endgame Reveals Caucus's Power, Divisions*, LEGAL TIMES, Aug. 22, 1994, at 1; Harvey Berkman, *Race and Death Stymie Crime Bill*, NAT'L L.J., Aug. 1, 1994, at A11.

²⁷ See *supra* notes 19–25 and accompanying text (discussing the introduction and subsequent defeat of proposed bills designed to eliminate racial discrimination in applying the death penalty).

death penalty unless it was applied in a race-neutral manner.²⁸ Under the RJA, a defendant could challenge a death sentence by showing that race played a statistically significant role in capital sentencing in the jurisdiction in which he was tried.²⁹ Specifically, a defendant could show that the race of either defendants or victims had affected past death sentencing decisions in the jurisdiction where the crime was committed.³⁰ Upon such a showing, the proposal shifted the burden to state and federal authorities, who would have to demonstrate that any racial disparities in sentencing were "clearly and convincingly" explained by nonracial factors.³¹ Thus, the bill would have created substantial procedural obstacles to the imposition of capital punishment at both the federal and state levels.

Over the years, the provisions of the RJA changed slightly. "In general, the changes reveal a pattern: a consistent watering down of the proposal so as to bar fewer death sentences and make it easier for the government to defeat claims of discrimination."³² For example, originally, the government had the burden to rebut the petitioner's prima facie case of discrimination by clear and convincing evidence.³³ The 1994 proposal only required the government to rebut by a preponderance of the evidence.³⁴ Another minor alteration involved data collection requirements. The original version required all federal and state law enforcement jurisdictions to collect data on capital crimes and make it available to legal counsel.³⁵ The 1994 version did not require public officials to collect any data, but required whatever data was collected to be made available to the public.³⁶

Of all of the attempts to pass the RJA through Congress, 1994 presented the best opportunity because of efforts made over the years to water down the legislation in order to garner greater support. The proposal engendered strong opposition, however, and politics ultimately defeated it.³⁷ Republicans strongly opposed the RJA, arguing that it would effectively block the imposition of death sentences altogether.³⁸ Excerpts from the Senate debate over the issue reveal strong GOP opposition:

²⁸ H.R. 4017, 103d Cong. § 2(a) (2d Sess. 1994).

²⁹ *Id.* § 2921(b).

³⁰ *Id.* § 2921(c).

³¹ H.R. 4442, 100th Cong. § 3(c) (2d Sess. 1988).

³² Paul Schoeman, *Easing the Fear of Too Much Justice: A Compromise Proposal to Revise the Racial Justice Act*, 30 HARV. C.R.-C.L. L. REV. 543, 552 (1995).

³³ *Id.* at 553.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Bill McCollum, *The Struggle for Effective Anti-Crime Legislation – An Analysis of the Violent Crime Control and Law Enforcement Act of 1994*, <http://www.saf.org/LawReviews/McCollum1.htm> (last visited Oct. 17, 2005).

³⁸ *Id.*

Mr. President, I have been a judge and a practicing attorney. It has always been my understanding that individuals are tried on the facts of his or her case, not on the facts, circumstances or statistics from unrelated cases. This has been a fundamental precept in our criminal justice system. Passage of the so-called Racial Justice Act would relegate the outcome of capital cases to statistical assertions from other unrelated capital cases. Needless to say, the focus of the trial should be whether the defendant committed the offense for which he was charged and it should not be overshadowed by statistical jousting.³⁹

Mr. President, the Racial Justice Act is part of a long tradition here in Congress where bad legislation is given a great-sounding name. In some businesses, this is called false advertising. The bottom line is that the Racial Justice Act won't do much to advance the cause of civil rights, but it will do a great deal to clog the courts and make the death penalty virtually unenforceable in every jurisdiction where it is currently carried out.⁴⁰

Those in Congress supporting the RJA argued that the use of statistics to show that racism plays a part in sentencing was appropriate in light of the fact that statistics could be used to show discrimination in other areas such as with employment and housing.⁴¹ They insisted that the Act would merely prohibit states from carrying out death sentences that were based on racial considerations as demonstrated by evidence that the particular case in question fits an unexplained racially discriminatory pattern:

This will not impose an undue burden on the courts. Every major civil rights bill in modern times has allowed the use of statistics to prove discrimination, whether in housing or employment or education or voting for that matter. The courts have proved quite capable of analyzing statistical evidence in each of these situations. All that proponents of the Racial Justice Act are asking is for Congress to grant someone sentenced to death the same opportunity to present a discrimination claim as we have granted to someone turned down for an apartment.⁴²

Opponents of the RJA countered with a proposal of their own, the Equal Justice Act (EJA), which sought to codify safeguards against racial

³⁹ 140 CONG. REC. S5519 (daily ed. May 11, 1994) (statement of Sen. Thurmond).

⁴⁰ 140 CONG. REC. S5520 (daily ed. May 11, 1994) (statement of Sen. Dole).

⁴¹ 140 CONG. REC. S5517 (daily ed. May 11, 1994) (statement of Sen. Moseley-Braun).

⁴² *Id.*

discrimination when the defendant is charged and tried, rather than when the defendant is sentenced.⁴³ Democrats rejected the EJA for a myriad of reasons, and insisted on taking the RJA to the House-Senate conference in 1994.⁴⁴ The RJA was politically unpopular for the Clinton Administration, however, and in the end, White House officials convinced members of the Congressional Black Caucus to agree to drop the issue from the final version of the 1994 crime bill.⁴⁵ The RJA has not resurfaced before Congress since its 1994 defeat. With Republicans in control of the Congress since 1994 and the White House since 2000, the future of the RJA before Congress remains dubious.

III. *The Aftermath of McCleskey in Kentucky*

In 1992, a group of people in Kentucky began to advocate for a state version of the Racial Justice Act.⁴⁶ At the time, Kentucky's death row was exclusively populated by blacks who had murdered a white person.⁴⁷ That same year, the Kentucky General Assembly commissioned a study of all homicides in Kentucky between 1976 and 1991.⁴⁸ The study, *Race and the Death Penalty in Kentucky Murder Trials, 1976-1991: A Study of Racial Bias as a Factor in Capital Sentencing*, was conducted by Professors Thomas Keil and Gennaro Vito of the University of Louisville.⁴⁹ They searched for racial disparity in the decisions of prosecutors who asked for the death penalty.⁵⁰ The study demonstrated that race was a factor in Kentucky capital sentencing.⁵¹ Specifically, the study found that "blacks accused of killing whites had a higher average probability of being charged with capital crimes by the prosecutor and sentenced to die by the jury than other homicide offenders."⁵²

⁴³ S. 1356, 103d Cong. §§ 651-55 (1st Sess. 1993).

⁴⁴ McCollum, *supra* note 37.

⁴⁵ *Id.*

⁴⁶ See KENTUCKY DEP'T OF PUBLIC ADVOCACY, *Racial Justice Act Becomes Law: Not Soft on Crime, But Strong on Justice*, 20 THE ADVOCATE: J. OF CRIM. JUST. & EDUC. 4 (July 1998), <http://dpa.state.ky.us/library/advocate/july98/Racial.html> (last visited Oct. 7, 2005) [hereinafter *Racial Justice*] (citing the Department of Public Advocacy, the Catholic Diocese, and various civil rights organizations).

⁴⁷ Editorial, *Who Gets to Death Row*, KENTUCKY COURIER-JOURNAL, Mar. 7, 1996.

⁴⁸ *Id.*

⁴⁹ Thomas Keil & Gennaro Vito, *Race and the Death Penalty in Kentucky Murder Trials, 1976-1991: A Study of Racial Bias as a Factor in Capital Sentencing*, 20 AM. J. CRIM. JUST. 17 (1995).

⁵⁰ *Id.*

⁵¹ *Racial Justice*, *supra* note 46; Gerald Neal, KENTUCKY DEP'T OF PUBLIC ADVOCACY, *Not Soft on Crime, But Strong on Justice: The Kentucky Racial Justice Act: A Symbol; A Statement of Legal Principle; and a Commitment to Systematic Fundamental Fairness*, 26 THE ADVOCATE: J. OF CRIM. JUST. & EDUC. 2 (Mar. 2004).

⁵² *Racial Justice*, *supra* note 46.

As of the time of the Keil-Vito study, 100% of the 33 inmates on Kentucky's death row were there for murdering a white victim.⁵³ None were there for the murder of a black victim, despite the fact that there had been over 1,000 African-Americans murdered in Kentucky since the death penalty was reinstated.⁵⁴

A. *The Death Penalty in Kentucky*

Keil and Vito began their analysis by describing the "guided discretion" capital sentencing system in Kentucky.⁵⁵ Under that system, the prosecutor may file a motion to seek the death penalty.⁵⁶ The prosecutor may not seek the death penalty unless at least one of the several aggravating circumstances listed in the statute is present.⁵⁷ Even if one of the factors is present, the prosecutor may decline to try the case as a capital crime.⁵⁸ If the prosecution does not seek capital punishment, it cannot be imposed.⁵⁹ Juries may decide not to impose the death penalty even upon the prosecutor's recommendation.⁶⁰ Although the Kentucky Supreme Court has stated that the judge has "the ultimate responsibility of fixing the penalty in capital cases," no judge in the state has ever imposed the death penalty after a jury's recommendation for some other sentence.⁶¹ Trial judges have, however, imposed lesser penalties after the jury has recommended death.⁶²

In 1986, the Kentucky legislature passed "truth-in-sentencing" legislation that provided for a bifurcated trial in all felony cases.⁶³ During the sentencing phase, the prosecution can introduce evidence concerning parole eligibility guidelines and the prior record of the defendant, including the nature of prior offenses and his history of incarceration.⁶⁴ "In effect, this law empowered juries to sentence convicted offenders to a sentence of life without parole."⁶⁵

⁵³ Amnesty International, *Killing with Prejudice: Race and the Death Penalty in the USA*, May 1, 1999, <http://web.amnesty.org/library/Index/ENGAMR510521999?open&of=ENG-2M4> [hereinafter *Killing with Prejudice*]; *Racial Justice*, *supra* note 46.

⁵⁴ *Killing with Prejudice*, *supra* note 53; *Racial Justice*, *supra* note 46.

⁵⁵ Keil & Vito, *supra* note 49, at 20.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 21.

⁶² *Id.*

⁶³ *Id.* at 28.

⁶⁴ *Id.*

⁶⁵ *Id.*

B. The Impact of Race

Keil and Vito sought to determine whether or not racial bias existed in the deliberations of prosecutors and jurors in the capital sentencing process.⁶⁶ They studied a total of 956 cases, including all persons charged and indicted, convicted, and sentenced (for murder or a lesser offense) in Kentucky between December 22, 1976 (the effective date of the most recent Kentucky statute governing capital punishment) and December 31, 1991.⁶⁷ Out of the 956 cases, they focused on a subset of 577 cases in which individuals met the minimum legal requirements for receiving a death sentence and were sentenced by a jury rather than a judge.⁶⁸

The study found that capital charges were sought against blacks who killed whites in 33% of the cases, followed by whites who killed whites in 20% of the cases, whites who killed blacks in 17% of the cases, and blacks who killed blacks in 14% of the cases.⁶⁹ However, none of the whites who killed blacks actually received a death sentence.⁷⁰ Blacks who killed whites had the highest percentage of cases receiving a death sentence from the jury (12%).⁷¹ The authors pointed out that the impact of race upon prosecutorial deliberations could not be justified by the presence of other legitimate factors because those variables in the equation had been controlled.⁷² Likewise, the finding that blacks who killed whites were more likely to be sentenced to die by the jury holds, even when other important factors are controlled.⁷³ Finally, the study suggested that the use of "truth-in-sentencing," or a life without the possibility of parole sentencing option could be applied in a nondiscriminatory manner.⁷⁴

Keil and Vito concluded that Kentucky's system of capital sentencing was "fraught with discrimination that defies elimination or control," because it is often subtle and difficult to discern.⁷⁵ They offered several explanations for the findings of discrimination.⁷⁶ First, they suggested that punishments for crimes have been based on the social status of the offender and the victim.⁷⁷ "Blacks who killed whites were singled out for death in Kentucky primarily because of social status and the threat to

⁶⁶ *Id.* at 20.

⁶⁷ *Id.* at 21.

⁶⁸ *Id.* at 22.

⁶⁹ *Id.* at 25.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 26.

⁷³ *Id.* at 27.

⁷⁴ *Id.* at 28.

⁷⁵ *Id.* 31-32.

⁷⁶ *Id.* at 30.

⁷⁷ *Id.*

social structure that this crime personifies."⁷⁸ They also suggested the possibility that Kentucky's history of racial violence against blacks created a view that the murder of a white by a black is a particularly serious crime—a point of view that may have become culturally ingrained.⁷⁹ They pointed to one particularly comprehensive study of lynchings and executions in Kentucky between 1866 and 1934, a period marked by increased political activity by blacks.⁸⁰ "Some white voters viewed this event as a direct threat to their political and economic hegemony." Finally, the authors suggested several reasons why Kentucky prosecutors were more likely to seek the death penalty in cases where blacks murdered whites, including ease of conviction, political and/or media pressure, and the greater social visibility of cases where blacks kill whites.⁸¹ "Therefore, it may be politically advantageous for prosecutors to seek the death penalty in such cases."⁸²

The data in the Kentucky study revealed systemic discrimination that likely will not be cured by judicial review.⁸³ As an example, the authors pointed to a case in which the victim was described as a "young white woman" in the indictment.⁸⁴ In that case, the defendant, a black man, was charged with the murder of a white female during the course of a robbery.⁸⁵ The defense counsel filed a motion objecting to the specification of the victim as a "white woman" in the indictment out of fear that the characterization would impact the jury.⁸⁶ In spite of the subtle discrimination inherent in death penalty schemes such as Kentucky's, the authors noted that given the Supreme Court's holding in *McCleskey*, it was unlikely that the Court would strike down capital punishment on the basis of social science research.⁸⁷ Therefore, any solution will need to be a legislative one.

C. Movement Towards Legislative Reform

In response to the findings of Professors Keil and Vito, the Kentucky General Assembly first considered a state version of the Racial Justice Act in 1994, the same year in which the legislation failed for the final time in Congress.⁸⁸ The bill prohibited the use of race as a basis for seeking the

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 31.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* On March 22, 1993, the indictment against William R. Stark, Jr. was dismissed without prejudice, reserving issues of prosecutorial misconduct by Circuit Judge William F. Stewart.

⁸⁷ *Id.*

⁸⁸ KY. REV. STAT. ANN. §§ 532.300-532.358 (2004).

death penalty against a particular defendant, and allowed for the use of statistical evidence of racial discrimination to show that race influenced the decision to seek the death penalty in a given case.⁸⁹ The statistical data could consist of evidence that a death sentence was sought significantly more frequently against persons of one race, or sought more frequently against defendants whose victims were of one race.⁹⁰ If the judge found that race was a factor, the death penalty would be barred.⁹¹ The legislature failed to pass the bill in 1994 and in 1996, however.⁹²

IV. *The Rebirth of the Racial Justice Act in Kentucky*

In 1998, Kentucky became the first state to pass the Racial Justice Act.⁹³ The passage of the bill, which was not retroactive,⁹⁴ appears to be the product of a concerted effort by the Kentucky Department of Public Advocacy, the Catholic Diocese, and abolition and civil rights groups in the state.⁹⁵ The Act, which was sponsored by Kentucky Senator Gerald Neal of Louisville, passed the Senate by a vote of 22–12 on February 5, 1998 after two hours of vigorous debate.⁹⁶ State Representative Jesse Crenshaw of Lexington introduced an identical bill in the House.⁹⁷ After an hour long debate in the House and the defeat of three amendments, the Senate bill passed by a vote of 70–23 on March 30, 1998.⁹⁸ During the Senate floor debate, Neal characterized the bill as a method of insuring that racism did not play a role in death sentences.⁹⁹ He noted that under the Act, defendants bore a high threshold to prove that race influenced the Commonwealth's decision to seek the death penalty.¹⁰⁰

Opponents of the legislation argued that the bill was "soft on crime."¹⁰¹ Neal responded by stating, "I'm not soft on crime. I'm strong on

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Racial Justice*, *supra* note 46.

⁹³ See Kentucky Coalition to Abolish the Death Penalty, *Welcome*, <http://www.kcadp.org/> (last visited Oct. 16, 2005) [hereinafter *Welcome*] (listing the organizations it works with to attaining its political goals); KRS § 532.300.

⁹⁴ KRS § 532.305. "KRS 532.300 shall not apply to sentences imposed prior to July 15, 1998." *Id.*

⁹⁵ *Welcome*, *supra* note 95.

⁹⁶ *Racial Justice*, *supra* note 46.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

justice."¹⁰² Neal claimed that opponents used "scare tactics" in an effort to defeat the bill.¹⁰³

In the House, Crenshaw urged passage of the bill by reading a letter from retired circuit court, Judge Benjamin Shobe, to the chair of the House Judiciary Committee concerning the Racial Justice Act.¹⁰⁴ In the letter, Shobe, an African-American, argued that passage of the Act would increase the perception of fairness in the death penalty procedures in Kentucky and "erase the perception of minorities that they do not get a fair deal before the courts."¹⁰⁵ He also rebutted claims that the bill would erase the death penalty in Kentucky and that the procedures in the bill were onerous and costly, by remarking, "Should prosecutors object to having their actions scrutinized to determine whether they are free from untoward motivations? Of course not. As a former prosecutor, I recognize the obligation of this officer to be eminently fair. This legislation requires no more."¹⁰⁶

The mechanics of the Act as approved are straightforward. At a pre-trial conference, a defendant may allege that the prosecutor is seeking the death penalty on the basis of race.¹⁰⁷ The defendant must present evidence showing that racial considerations played a significant part in the prosecution's decision to seek death in his case.¹⁰⁸ Such evidence may include statistical evidence or other evidence that a death sentence was sought significantly more frequently either upon persons of one race than upon persons of another race, or as punishment for capital offenses against persons of one race than as punishment for capital offenses against persons of another race.¹⁰⁹ The court will then schedule a hearing on the claim, and declare a time for the submission of evidence by the parties.¹¹⁰ At the hearing, the defendant bears the burden of proving by clear and convincing evidence that race was the basis of the Commonwealth's decision to seek the death penalty.¹¹¹ The Commonwealth can offer rebuttal evidence.¹¹² Finally, if the court finds that race was a basis of the decision to seek death, the court must order that a death sentence cannot be sought in that case.¹¹³

102

Id.

103

Id.

104

Id.

105

Id.

106

Id.

107

9 Ky. Prac. Crim. Prac. & Proc. § 31:32 (2005).

108

Id.

109

Id.

110

Id.

111

Id.

112

Id.

113

Id.

V. *The Meaning of the Racial Justice Act*

Kentucky's unique history with regard to race provided fertile ground for this legislative achievement. Kentucky was likely the only death penalty state that could claim that every single death sentence up to 1996 was for the murder of a white victim, despite the existence of over 1,000 black murder victims during the same time. Kentucky's history of racial discrimination in the criminal justice system is well-documented. For example, in 1906 a black man was hanged immediately after an hour-long trial for the rape of a white woman in Mayfield, Kentucky.¹¹⁴ An editorial in the local newspaper, the *Louisville Courier-Journal*, observed that: "The fact, however, that Kentucky was saved the mortification of a lynching by an indignant multitude, bent upon avenging the innocent victim of the crime, was matter for special congratulation."¹¹⁵ The editorial noted that, although the trial was hasty, "at least it was not a lynching."¹¹⁶ Adding that since a Negro had raped a white woman, "no other result could have been reached, however long the trial."¹¹⁷ Former Kentucky governor Edward Breathitt stated:

As a young lawyer in Hopkinsville [the setting for Harper Lee's *To Kill A Mockingbird*], I was distressed about the double standard of justice in murder cases. If you were African-American and were charged with killing a white person, justice was swift and severe resulting in a death sentence. If you were a white person accused of killing an African-American and could hire a good lawyer, you had a good chance of being acquitted or receiving a light sentence. If an African-American killed an African-American and the accused was needed to cut tobacco or harvest a crop, justice sometimes winked at the crime and allowed the defendant to be freed to work for the white farmer.¹¹⁸

Kentucky was also at the heart of the U.S. Supreme Court's decision in *Batson v. Kentucky*, in which the Court held that the removal of potential jurors on the ground of race was unconstitutional and that prospective jurors could only be removed on "race neutral" grounds.¹¹⁹ In that case, the

¹¹⁴ *Killing with Prejudice*, *supra* note 53.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Richard H.C. Clay, President, Kentucky Bar Association, Speech to the Department of Public Advocacy: Stamping Out All Vestiges of Racism in Our Justice System (June 15, 1998), <http://dpa.state.ky.us/library/advocate/sept98/racism.html>.

¹¹⁹ *Batson v. Kentucky*, 476 U.S. 79 (1986).

prosecutor used his peremptory challenges to strike all black persons on the venire, and a jury composed only of white persons was selected.¹²⁰

There is something fascinating about a state scarred by a history of racial discrimination against blacks leading an effort to make the capital sentencing process more just for black Americans. Perhaps more importantly, Kentucky's Racial Justice Act may suggest the imminent abolishment of capital punishment in the United States. First, Kentucky's passage of the Racial Justice Act may prompt other states to pass similar legislation. Evidence from legislative work sessions in states like Nevada suggests that as recently as 2002, other states had at least toyed with the idea of enacting Racial Justice Acts.¹²¹ Second, the fact that Kentucky passed a Racial Justice Act bolsters the notion that the capital sentencing process in the United States is fraught with discrimination and error—a notion supported by numerous studies and championed by advocacy groups and the American Bar Association for years.

For example, in 1990, a study by the U.S. General Accounting Office found a pattern of discrimination in death penalty cases based on either the race of the victim, the race of the defendant, or both.¹²²

In 1994, the U.S. Senate ratified the International Convention on the Elimination of All Forms of Racial Discrimination, a treaty that commits signatory nations to eliminating laws which have the effect of continuing racial discrimination.¹²³ It is important to note that *effective discrimination* is significantly broader than *intentional discrimination*. While the latter generally describes decisions made or policies enacted expressly on a particular protected class, the former focuses on whether facially neutral decisions or policies have a discriminatory effect, and bar them regardless of whether the effect was intentional.

In February 1997, the American Bar Association passed a resolution calling for a moratorium on the death penalty in the United States because state authorities were failing to confront the role of racial bias and poverty in application of the death penalty.¹²⁴ Since then, a number of state bar

¹²⁰ *Id.* at 83.

¹²¹ Minutes of the Meeting of the Legislative Commission's Subcommittee to Study the Death Penalty and Related DNA Testing, Jan. 24, 2002, Las Vegas, Nevada, <http://www.leg.state.nv.us/71st/Interim/Studies/DeathPenalty/Minutes/IM-DeathPenalty-20020124-329.html>.

¹²² *Welcome, supra* note 93; GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990), <http://archive.gao.gov/t2pbat11/141293.pdf>.

¹²³ International Commission of Jurists, *Administration of the Death Penalty in the United States*, 19 HUM. RTS. Q. 58–60 (1996).

¹²⁴ *Killing with Prejudice, supra* note 53.

associations have passed similar motions, including Connecticut, Ohio, and Pennsylvania.¹²⁵

In June 1998, the Death Penalty Information Center reported two studies on race and the death penalty.¹²⁶ One of the studies stated that the odds of getting the death penalty in Philadelphia were nearly four times higher if the defendant was African American.¹²⁷ The second study found that decision-makers were a potential reason for this racial bias, because 98% of the chief district attorneys in counties using the death penalty were white, and only 1% black.¹²⁸

Thus, Kentucky's response to discrimination in the capital sentencing process serves as a reminder of all that is wrong with the death penalty, and may fuel the movement to abolish it. One needs to look no further than the legislative aftermath of the Racial Justice Act in Kentucky to understand its possible impact nationally. In 1998, opponents of the Racial Justice Act argued that the legislation would erase the death penalty in Kentucky. The proponents rejected that prediction, labeling it a scare tactic. However, the prediction opponents feared so much may become reality. In February 2005, legislation was introduced in the Kentucky House of Representatives to abolish the death penalty completely.¹²⁹ The likelihood of the bill's passage is slim. Whether or not the legislation passes in the 2005 legislative session, its advocates will likely persist in their efforts as they did with the Racial Justice Act. The Racial Justice Act appears to have been part of a larger political strategy to totally abolish the death penalty. Supporters viewed the Racial Justice Act as a necessary bridge towards abolition.

Kentucky's Racial Justice Act may be properly viewed as an effort to alter the mindset of people in Kentucky towards the death penalty. It not only reminds people of the problems with capital punishment, but it also suggests the futility of trying to create a perfectly fair system that eliminates all discrimination and possibilities of error. Thus, it implies that abolition may be the only alternative. In that sense, the real importance of the passage of Kentucky's Racial Justice Act is its symbolism rather than its application. In fact, Kentucky's Racial Justice Act is too young and there have been too few capital cases since its passage to definitively judge its effectiveness. As of this point, there is no indication of whether a claim has been brought or decided under the RJA since its enactment in 1998. However, the Racial

¹²⁵ *Id.*

¹²⁶ Richard C. Deiter, DEATH PENALTY INFORMATION CENTER, *The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides* (June 1998), <http://www.deathpenaltyinfo.org/article.php?scid=45&did=539>.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ H.B. 465, 2005 Gen. Assem. (KY 2005).

Justice Act symbolizes the perception that the death penalty, and perhaps the entire criminal justice system, is unfair to minorities. It symbolizes the notion that racial discrimination pervades the death penalty system in the United States at every stage of the process. Finally, it symbolizes the growing assertion that the only way to eradicate the racial bias in death penalty procedures is to eradicate the death penalty completely.

VI. Conclusion

The Kentucky legislature took a bold step by passing the Racial Justice Act in 1998. After failing to pass in Congress throughout the 1990s, the legislation appeared dead. The RJA movement lost significant steam when the Congressional Black Caucus consented to its removal from President Clinton's 1994 crime bill. The outlook was particularly bleak in light of the Republican revolution of the early 1990s, during which the GOP took control of Congress for the first time in 60 years, and the subsequent election of Republican President George W. Bush in 2000. Congressional Republicans had strongly opposed the legislation. Yet the gloomy defeat of the Racial Justice Act in Congress did not stand in the way of advocates in Kentucky as they persevered towards legislative triumph. When no other state embraced this legislative effort to help eradicate racial bias in capital sentencing, Kentucky did.

