

## **THE GEORGIA DEATH PENALTY: A NEED FOR RACIAL JUSTICE**

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### I. INTRODUCTION

A survey of numerous studies has uncovered a notable correlation in the application of the death penalty as it relates to

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the race of the victim and the accused.<sup>1</sup> The studies tend to show that racially based components of official decisions should be subjected to legislative scrutiny and correction wherever proven.<sup>2</sup> There is no substantive argument set forth that the legislative bodies do not have the responsibility or authority to propose measures aimed at preventing, or at least minimizing, the effects of racial bias in the application of statutory laws enacted by the various legislative and governmental bodies in this nation.<sup>3</sup> The following discussion illustrates how the enactment of the Georgia Racial Justice Act would address the issue of racial discrimination in the imposition of the death penalty by allowing the accused an opportunity to challenge a prosecutor's choice to seek capital punishment.

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1. Professors David C. Baldus, Charles Pulaski, and George Woodworth, prepared and presented a statistical analysis showing a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant. The "Baldus Study" was actually two regression analyses that examined more than 2,000 murder cases in Georgia. The raw numbers collected by Professor Baldus indicated that 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. The raw numbers also indicate a reverse racial disparity according to the race of the defendant: 4% of the black defendants received the death penalty, as opposed to 7% of the white defendants. [hereinafter *Baldus Study*].

2. *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (The Fourteenth Amendment authorizes Congress to exercise its discretion in determining the need for and nature of legislation to secure compliance with the Equal Protection provisions of the Fourteenth Amendment.).

3. See *Bazemore v. Friday*, 478 U.S. 385, 400-01 (1986) (Correction of violations of racial neutrality in the application of programs under Title VII of the Civil Rights Act of 1964); *Turner v. Fouche*, 396 U.S. 346, 359 (1970) (Acts of local governing body which created a disparity between blacks and whites in county population for those eligible to be placed on grand jury lists); *Gomillion v. Lightfoot*, 364 U.S. 339, 815 (1960) (Act of a local government to exclude 395 of 400 black voters without excluding a single white voter by altering the boundaries of a city); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (A local ordinance which denied over 200 applications of Chinese laundry operators while granting all but one of the applications of white laundry owners).

## II. THE GEORGIA RACIAL JUSTICE ACT - FIRST ATTEMPT

One attempt at providing some oversight to the decisions of district attorneys came in 1999 when the Georgia General Assembly first considered legislation titled the “Georgia Racial Justice Act” (“the Act”).<sup>4</sup> The Act would have prohibited the execution of any person if the sentence was imposed based upon a showing that the race of the victim or the race of the defendant was a factor in the decision to seek the death penalty.<sup>5</sup> The Act would also have required that statistical records be kept by local district attorneys so that comparisons of similar cases could be made within each Superior Court jurisdiction.<sup>6</sup> Specifically, the Act provided that:

(a) No person shall be put to death under color of state law in the execution of a sentence which was imposed based on race.

(b) An inference that race was the basis of a death sentence is established if valid evidence is presented demonstrating that race was a statistically significant factor in decisions to seek or impose the sentence of death in the State of Georgia at the time such death sentence was sought or imposed.

(c) Evidence relevant to establish an inference that race was the basis of a death sentence may include evidence that death sentences were sought or imposed significantly more frequently:

(1) Upon persons of one race more than upon persons of another race; or

(2) As punishment for capital offenses against persons of one race more than as punishment for capital offenses against persons of another race.

(d) If statistical evidence is presented to establish an inference that race was the basis of a sentence of death, the court shall determine the validity of the evidence and if it provides a basis for that inference. The evidence shall take into account, to the extent it is compiled and publicly made

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4. H.R. 137, 145th Gen. Assem., Reg. Sess. (Ga. 1999).

5. *Id.*

6. *Id.*

available, evidence of the statutory aggravating factors and shall include comparisons of similar cases involving persons of different races.

(e) If an inference that race was the basis of a death sentence is established, the death sentence shall not be carried out unless the state rebuts the inference by clear and convincing evidence. The state cannot rely on mere assertions that it did not intend to discriminate or that the case fits the statutory criteria for seeking or imposing the death sentence.<sup>7</sup>

The original Act was sponsored by Representatives Bob Holmes (53<sup>rd</sup> District), Barbara Mobley (69<sup>th</sup> District), Tyrone Brooks (54<sup>th</sup> District), and Nan Orrock (56<sup>th</sup> District).<sup>8</sup> The legislation was assigned to the House Judiciary Committee which held one brief hearing, but never voted on the bill. Consequently, the Act was never passed out of the committee and moreover, the full membership of the General Assembly never voted on it. Although there is support for the Act in the Georgia General Assembly, the elected representatives have had little opportunity to consider passing legislation which would address the broad discretion given to district attorneys in seeking the death penalty. The Act is not aimed at repealing those laws which provide for the death penalty. The purpose of this legislation is to help ensure that racial discrimination is not a part of the imposition of the death penalty.<sup>9</sup> The Act would provide at least a modicum of oversight to the currently unfettered decisions of the district attorney to select which cases and which defendants he will subject to the death penalty.<sup>10</sup>

### III. CONTINUING NEED FOR THE RACIAL JUSTICE ACT IN GEORGIA

Georgia's death penalty statute has been held to be constitutional.<sup>11</sup> However, because its legislative scheme gives the district attorney discretion in requesting the death penalty

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7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Gregg v. Georgia*, 428 U.S. 153 (1976) (per curiam).

for capital cases,<sup>12</sup> legislative safeguards still must be implemented in order to prevent racially motivated decisions of who will become eligible for the death penalty. The proposed Act would provide the necessary legislative safeguards. The Act would provide a capital defendant the means by which he or she may present a challenge to the prosecutor's decision to seek the death penalty. The Act's provisions for a pre-trial hearing on the issue of race would ensure that race does not play a factor in the prosecutor's decision to seek the death penalty. Any indication of a racially discriminatory process for selecting cases to be singled out for the death penalty would be subject to challenge based upon a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.<sup>13</sup>

The United States Supreme Court has already held that a defendant who alleges an equal protection violation has the burden of proving the existence of purposeful discrimination.<sup>14</sup> For the purpose of demonstrating purposeful discrimination, the Act is designed to utilize local historical data of an individual prosecutor's decisions to seek the death penalty.<sup>15</sup> Specifically, the localized historical data would track the race of both victims and defendants in those cases which the prosecutor decided to seek the imposition of the death penalty. The utilization of localized data of each specific prosecutor in a case will address, in large part, the central reason for the United States Supreme Court's rejection of the data presented in the *McCleskey*<sup>16</sup> case, where statewide data from the *Baldus Study*<sup>17</sup> was used in an attempt to prove racial discrimination in the application of the death penalty in Georgia.

Under the Act, a challenge of prosecutorial discretion would be allowed only after the defendant presents sufficient statistical evidence to create an inference of racial discrimination in the process. This inference would be created by a significant showing of racial disparity in the prosecutor's selection of death

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12. *Moore v. State*, 243 S.E.2d 1 (Ga. 1978).

13. *See, e.g., Spaziano v. Florida*, 468 U.S. 447 (1984); *Gregg*, 428 U.S. 153; *Furman v. Georgia*, 408 U.S. 238 (1972).

14. *McCleskey v. Kemp*, 481 U.S. 279, 293 (1987).

15. H.R. 137.

16. *McCleskey*, 481 U.S. at 293.

17. *Baldus Study*, *see supra* note 1.

penalty cases. Once a requisite inference has been established through the statistical data, the burden would then shift to the prosecutor to present a race neutral explanation for the decision to seek the death penalty.<sup>18</sup> Although the use of statistical studies, standing alone, can be difficult in proving generalized discrimination, proving localized, specifically intended discriminatory decisions by prosecutors can be facilitated by evidence of a pattern of conduct by the specific prosecutors.<sup>19</sup> It must also be noted that statistical analysis and historical statistical data have been used in a number of instances to create inferences of racial bias and discrimination. For example, the United States Supreme Court has used statistical data as proof of an equal protection violation in the selection of the jury venire in a particular district.<sup>20</sup> This model for preventing racial discrimination in the decision making process of a trial was duly approved by the United States Supreme Court, by what is referred to as a “Batson Challenge.”<sup>21</sup> The historical background of the decisions of individual prosecutors is an important evidentiary source in proving discriminatory practices, particularly if the evidence reveals a series of official actions resulting in discriminatory outcomes. As discussed above, this model of preventing discrimination has already been effectively utilized in other trial stages.<sup>22</sup> This Article encourages the same sensible approach to an even more important decision: Which defendants will be subjected to a death penalty trial and which ones will not?

#### IV. KENTUCKY’S RACIAL JUSTICE ACT

There is precedent for the passage of this type of legislation.

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18. H.R. 137.

19. *Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218 (1964).

20. *Sims v. Georgia*, 389 U.S. 404, 407 (1967).

21. *Batson v. Kentucky*, 476 U.S. 79 (1986) (state courts are permitted to establish the standards used to evaluate the sufficiency of prima facie cases of purposeful discrimination in jury selection); *see also Georgia v McCollum*, 505 U.S. 42 (1992) (exercise of a peremptory challenge to a prospective juror must not be based on either the race of the juror or the racial stereotypes held by the party).

22. *Batson*, 476 U.S. at 79.

In 1998, the Commonwealth of Kentucky passed Kentucky's Racial Justice Act as a statement against racism in the use of the death penalty.<sup>23</sup> Before the passage of Kentucky's Racial Justice Act, Kentucky State Senator Charlie Borders, of Russell, said that the Racial Justice Act "was simply a method of ensuring racism did not play a role in death sentences." The Bill's sponsor, Senator Gerald Neal, of Louisville, said, "This is [not] a vote on whether we're soft on crime . . . I'm not soft on crime; I'm strong on justice."<sup>24</sup>

The text of Kentucky's act is substantially the same as that proposed in Georgia.<sup>25</sup> In 2006, the Kentucky Supreme Court determined that the Racial Justice Act as a part of the Commonwealth's overall capital sentencing scheme was constitutional.<sup>26</sup> No study has been conducted reviewing the effects of the Act in the short period since it was passed, but some articles suggest that the Act has increased public awareness of the racial disparities in punishment that exist throughout the nation.<sup>27</sup> There has been no showing that the act works to prevent the death penalty from being carried out.<sup>28</sup>

#### V. THE BACKGROUND CONCERNING RACIAL JUSTICE

In 1994, the United States of America ratified the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>29</sup> This international treaty provided, in part, that the parties to the treaty would:

[C]ondemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and

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23. KY. REV. STAT. ANN. § 532.300 (West 1998).

24. *Racial Justice Act Becomes Law: Not Soft on Crime, But Strong on Justice*, THE ADVOCATE, Vol. 20, No. 4 (July 1998).

25. *Comparing* KY. REV. STAT. ANN. § 532.300 to H.R. 137.

26. *Epperson v. Kentucky*, 197 S.W.3d 46, 63 (Ky. 2006).

27. Justin R. Arnold, Note, *Race and the Death Penalty After McCleskey: A Case Study of Kentucky's Racial Justice Act*, 12 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 93 (2005).

28. *Id.*

29. The International Convention on the Elimination of All Forms of Racial Discrimination, Ratified by the United States of America, October 21, 1994, with reservations. [hereinafter *Racial Discrimination Convention*].

promoting understanding among all races, and, to this end: each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.<sup>30</sup>

However, ratification by the United States was made with specific reservations and declarations.<sup>31</sup> Specifically, the United States refused to acknowledge the need for any additional laws in order to protect U.S. citizens from racial discrimination. The reservations which accompanied the signing of this international treaty stated, in part, that: “[t]he U.S. Constitution provides enough protection to citizens with regard to racial discrimination; therefore, no new laws are needed for the U.S. to meet its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination.”<sup>32</sup>

In 1999, Amnesty International issued a report on racial disparity in the imposition of the death penalty entitled “Killing with Prejudice: Race and the Death Penalty in the USA.”<sup>33</sup> This twenty-one page report cited statistics, case summaries, and other facts to document the racial disparity of the death penalty in the United States.<sup>34</sup> The report concluded that the criminal justice system in the United States is infected with prejudice against all minorities but particularly against African Americans.<sup>35</sup> Unfortunately, very little has changed in the past eight years since the issuance of that report.

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30. *Racial Discrimination Convention*, *supra* note 29. Vienna Convention on the Law of Treaties, art. 2, ¶ g (1969) (defining a “State Party” as a State which has consented to be bound by the treaty and for which the treaty is in force).

31. Vienna Convention, art. 2, § 1, ¶ d (defining a “reservation” as: “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty whereby it purports to exclude or modify the legal effects of certain provisions of the treaty in their application to that State”).

32. *Racial Discrimination Convention*, reservations submitted, *supra* note 29.

33. *Killing with Prejudice: Race and the Death Penalty in the USA*, Amnesty International Report no. 51/52/99 (May 1999).

34. *Id.*

35. *Id.*

## VI. EXECUTIONS AND RELEVANT STUDIES

Since the death penalty was reinstated in 1976, thirty-eight states, including Georgia, and the federal government have executed 362 African-Americans, 69 Hispanics, 604 Caucasians and 22 persons classified as either Asian or other.<sup>36</sup> Of these executions, Georgia accounts for the death of thirteen African Americans and twenty-six Caucasians.<sup>37</sup> According to the most recent reports from the Georgia Department of Corrections, there are currently fifty-three Caucasians, fifty African Americans, one Asian, and three Hispanics awaiting execution on death row in Jackson, Georgia.<sup>38</sup> While these statistics may not shock the conscience at first impression, they are dramatic in light of the census data on race, which has remained consistent over the past three decades. In the 2000 census, the population of Georgia was 65.1% Caucasian, and 28.7% African American,<sup>39</sup> yet these statistics show that the death penalty is imposed against nearly 50% of African American defendants.

A. *The Baldus Study*

In the late 1970's, Professors David Baldus, Charles Pulaski, and Georgia Woodworth of the University of Iowa examined over 2,000 murder cases in Georgia.<sup>40</sup> What later became known as the *Baldus Study*, became the basis for appeal to the United States Supreme Court in the case of *McCleskey v. Kemp*.<sup>41</sup> The defendant in that case, Warren McCleskey, had

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36. *Death Row U.S.A.*, Quarterly Report by the Criminal Justice Project of the NAACP Legal Defense and Educational Fund, Inc. (Jan. 2007), [http://naacpldf.org/content/pdf/pubs/drusa/-DRUSA\\_Winter\\_2007.pdf](http://naacpldf.org/content/pdf/pubs/drusa/-DRUSA_Winter_2007.pdf).

37. *Id.*

38. *Id.*

39. U.S. CENSUS BUREAU, Data Derived from Population Estimates, 2000 Census of Population and Housing, <http://www.census.gov/main/www/cen2000.html>.

40. *McCleskey*, 481 U.S. at 293; *see supra* note 14 for analysis of the Baldus Study.

41. *McCleskey*, 481 U.S. at 326 (Brennan, J. dissenting) ("Furthermore, even examination of the sentencing system as a whole, factoring in those

been convicted and sentenced to death for killing a white police officer during a burglary attempt.<sup>42</sup> The use of the *Baldus Study* was an effort to provide statistical data showing that the decision to seek the death penalty was based, in substantial part, on the race of both the defendant and the victim. While the five justice majority of the Supreme Court refused to overturn Warren McCleskey's death sentence, four Justices adamantly dissented.<sup>43</sup> The defeat notwithstanding, Justice Powell, writing for the majority of the Court stated that the data relating to systemic discrimination should be presented to legislative bodies and not to the courts.<sup>44</sup>

Additionally, the four dissenting Justices acknowledged the validity of Warren McCleskey's claim that the decision to seek the death penalty had been used in a racially discriminatory manner. Justice Blackmun, writing for himself and three other dissenting justices, said:

The *Baldus Study* demonstrates that black persons are a

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cases in which the jury exercises little discretion, indicates the influence of race on capital sentencing. For the Georgia system as a whole, race accounts for a six percentage point difference in the rate at which capital punishment is imposed. Since death is imposed in 11% of all white-victim cases, the rate in comparably aggravated black-victim cases is 5%. The rate of capital sentencing in a white-victim case is thus 120% greater than the rate in a black-victim case. Put another way, over half—55%—of defendants in white-victim crimes in Georgia would not have been sentenced to die if their victims had been black. Of the more than 200 variables potentially relevant to a sentencing decision, race of the victim is a powerful explanation for variation in death sentence rates—as powerful as nonracial aggravating factors such as a prior murder conviction or acting as the principal planner of the homicide. These adjusted figures are only the most conservative indication of the risk that race will influence the death sentence of defendants in Georgia. Data unadjusted for the mitigating or aggravating effect of other factors show an even more pronounced disparity by race. The capital sentencing rate for all white-victim cases was almost eleven times greater than the rate for black-victim cases. Furthermore, blacks who kill whites are sentenced to death at nearly twenty-two times the rate of blacks who kill blacks, and more than seven times the rate of whites who kill blacks. In addition, the 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. *Id.*

43. *Id.*

44. *Id.*

distinct group that is singled out for different treatment in the Georgia capital sentencing system. The Court acknowledges, as it must, that the raw statistics included in the *Baldus Study* and presented by petitioner indicate that it is much less likely that a death sentence will result from a murder of a black person than from a murder of a white person. White-victim cases are nearly 11 times more likely to yield a death sentence than are black-victim cases. The raw figures also indicate that even within the group of defendants who are convicted of killing white persons and are thereby more likely to receive a death sentence, black defendants are more likely than white defendants to be sentenced to death.<sup>45</sup>

Utilizing 230 non-racial variables, Professor Baldus and his associates discovered several distinctive patterns indicating that the prosecution is more likely to request the death penalty, and the courts are more likely to impose it, when the victim is Caucasian.<sup>46</sup> For example, one of his surveys utilizing thirty-nine non-racial variables demonstrate that in Georgia over the period covered by the study, district attorneys demanded the death penalty 70% of the time when the defendant was African American and the victim was Caucasian.<sup>47</sup> In contrast, when the defendant was Caucasian and the victim was African American, the same district attorneys sought the death penalty only 19% of the time.<sup>48</sup> When both defendant and the victim were African American, the district attorneys requested the death penalty only 15% of the time.<sup>49</sup> The conclusion of the *Baldus Study* showed conclusively that a defendant convicted of killing a Caucasian person in the state of Georgia was 4.3 times more likely to receive a death sentence than someone convicted of killing an African American person.<sup>50</sup>

A report by the United States General Accounting Office in 1990 (hereinafter “the report”) confirmed the *Baldus Study*’s findings.<sup>51</sup> The report, which was prepared for the Judiciary

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45. *Id.* at 353.

46. *Baldus Study*, *see supra* note 1.

47. *Id.*

48. *Id.*

49. *Id.*

50. Charles A. Pulaski, Jr. and George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983).

51. U.S. GEN. ACCOUNTING OFFICE, DEATH PENALTY SENTENCING:

Committees of the United States Senate and House, found that of twenty-eight studies examined, 82% found race to be an influential factor in the charging and sentencing of defendants to death, i.e., that African Americans who killed Caucasians were more likely to be sentenced to die than those African Americans who killed other African Americans.<sup>52</sup>

*B. Atlanta Journal-Constitution Death Penalty Study*

*The Atlanta Journal-Constitution*, Atlanta's major newspaper, released a four-part article in September 2007 based on an empirical study of the application of the death penalty in Georgia from 1995-2004.<sup>53</sup> The empirical study reviewed a total of 1,315 cases that were eligible for the death penalty over the ten-year time period. Initial analysis of these 1,315 cases revealed that Georgia prosecutors only sought the death penalty in 344 of them.<sup>54</sup> However, further analysis into the specific cases for which the death penalty was sought provided some disturbing information.

The statistics demonstrated that the geography of a crime plays a big role in whether the death penalty will be sought.<sup>55</sup> For instance, in more rural/suburban communities, like Clayton County, a person is thirteen times more likely to receive the death penalty than in an urban setting like Fulton County.<sup>56</sup> Statistics also demonstrated that the race of the victim has a determinative effect on whether the accused will be subjected to the death penalty.<sup>57</sup> In fact, the statistics showed that a person accused of killing a Caucasian victim was twice as likely to receive the death penalty as a person accused of killing an African American victim.<sup>58</sup>

The study also found a correlation between committing the crime of armed robbery and being prosecuted with the death

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RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (Feb. 1990).

52. *Id.*

53. Heather Vogell and Bill Rankin, *A Matter of Life or Death*, ATLANTA J. CONST., Sept. 23, 2007 at E8.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

penalty.<sup>59</sup> During the period of review, 1995-2004, a prosecutor was six times more likely to seek the death penalty for a person accused of armed robbery. The study found that prosecutors sought the death penalty in just over 14% (33 of 226) of the time in white victim armed robbery murders, while only 1% (2 of 193) of the time in African American victim armed robbery murders.<sup>60</sup>

## VII. THE CRIMINAL JUSTICE SYSTEM AS A WHOLE

The racial bias of the criminal justice system's sentencing decisions is not limited to the death penalty. Even the most ardent supporters of the death penalty have acknowledged that there is a grave disparity in the administration of the criminal laws in the United States.<sup>61</sup> While African Americans comprised 13.3% of the country's population in 2003,<sup>62</sup> they accounted for 43.9% of the inmates in state and federal prisons at that time.<sup>63</sup> The Bureau of Justice Statistics has estimated that 28% of African American men are sent to jail or prison at some point in their lives.<sup>64</sup> African Americans are stopped more frequently by police, charged with higher level offenses, afforded less competent counsel, and punished more severely than Caucasians convicted of the same crimes.<sup>65</sup> A similar report from Human Rights Watch found a pattern of racial disparities in arrests and sentencing for drug related cases in Georgia, as well as on a national level.<sup>66</sup> In 2000, Human Rights Watch also reported that African American inmates comprised 62.7% and Caucasian inmates comprised 36.7% of

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59. *Id.*

60. *Id.*

61. U.S. GEN. ACCOUNTING OFFICE report, *supra* note 51.

62. U.S. CENSUS BUREAU Public Information, *supra* note 39.

63. *Bureau of Justice Statistics of Prison and Jail Inmates Midyear 2003*, Table 13, DEP'T OF JUSTICE (April 6, 2003), <http://www.ojp.usdoj.gov/bjs/abstract/pjim03.htm>.

64. Paige M. Harrison and Jennifer Karberg, *Prison and Jail Inmates at Midyear 2002*, Bureau of Justice Statistics Bulletin (April 2002).

65. *Id.*

66. *Punishment and Prejudice: Racial Disparities in the War on Drugs*, HUMAN RIGHTS WATCH REPORT, Vol. 12, No. 2(G) (May 2000).

all drug offenders admitted to state prisons.<sup>67</sup> Those same studies show that there are five times as many Caucasian drug users than African American. Yet, relative to population, African American men are admitted to state prison on drug charges at a rate that is 13.4 times greater than that of Caucasian men.<sup>68</sup> In large part due to the extraordinary racial disparities in incarceration for drug offenses, African Americans are incarcerated for all offenses at 8.2 times the rate of Caucasians. In fact, one in every twenty African American men over the age of eighteen in the United States is in state or federal prison, compared to one in 180 Caucasian men.<sup>69</sup>

These statistics are even more disproportionate in some states, including Georgia, compared to the overall national statistics. For example, in seven states, African Americans constitute between 80% and 90% of all drug offenders sent to prison.<sup>70</sup> In at least fifteen states, African American men are admitted to prison on drug charges at rates that range anywhere from twenty to fifty-seven times greater than those of Caucasian men.<sup>71</sup> In two states, one in every thirteen African American men is in prison.<sup>72</sup> In seven states, African Americans are incarcerated at more than thirteen times the rate of Caucasians.<sup>73</sup>

An Amnesty International report published in April 2003 points out that racial disparities can be found throughout the criminal justice system in the United States.<sup>74</sup> One of the points made by Amnesty International follows:

Given the appallingly low standards of many court-appointed lawyers in numerous jurisdictions, there is an ever-present risk that minority defendants may be represented by lawyers who are not only incompetent, but are also openly bigoted . . . [E]ven when the attorney is not an overt racist, a lack of cultural sensitivity to other ethnic

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67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *United States of America: Death by Discrimination - The Continuing Role of Race in Capital Cases*, Amnesty International Report (April, 2003).

groups may affect their ability to prepare adequately for the case. White attorneys who are unable to relate to the black community may be unable to properly defend their black clients.”<sup>75</sup>

This 2003 report also found that the murder rates for African American and Caucasian victims are almost equal.<sup>76</sup> However, 80% of defendants executed since the death penalty was reinstated in 1973 have been executed for murders involving white victims.<sup>77</sup> In addition, this report showed that more than 20% of African American defendants who have been executed were convicted by all white juries.<sup>78</sup>

A central contributing factor making racial prejudice and bias so pervasive in the imposition of the death penalty is the fact that much of the discretion given to prosecutors and law enforcement officials is left unchecked.<sup>79</sup> A recent law review article, quoting a speech given by Professor Charles Ogletree, says:

[T]he criminal justice system is, at all levels of its operation, highly discretionary. The police have discretion to decide whom to stop and frisk. State prosecutors have discretion to determine whom to prosecute, and what charges to bring. And judges have a great deal of discretion, before trial, when the jury is selected, through the trial itself, and after the trial during sentencing. The existence of such discretion makes possible the pervasive and cumulative discrimination faced by many African Americans who come into contact with the criminal justice system.<sup>80</sup>

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75. *Id.*

76. SUNY Downstate Medical Center, *The Social & Health Landscape of Urban & Suburban America* (June 30, 2004), [http://www.hsbklyn.edu/urbansoc\\_healthdata/urban.htm](http://www.hsbklyn.edu/urbansoc_healthdata/urban.htm) (providing that “[t]he murder rate is the age-unadjusted homicide rate per 100,000 population. Homicide includes murder and non-negligent manslaughter, which is defined as the willful (non-negligent) killing of one human being by another and excludes deaths by negligence, suicide or accident.”).

77. *Id.*

78. *Id.*

79. *Id.*

80. Charles Ogletree and Matthew O. Tobriner, *Memorial Lecture: The Burdens and Benefits of Race in America*, 25 HASTINGS CONST. L.Q. 219, 228 (1998).

*A. Current State of Affairs in Georgia*

In Georgia, the decision of whether to seek the death penalty is entirely within the discretion of each county's district attorney.<sup>81</sup> An example of this unfettered discretion by a district attorney can be found in the Ocmulgee Judicial Circuit, encompassing eight counties in south central Georgia. Between 1974 and 1991, the district attorney in that circuit sought the death penalty in twenty-eight cases.<sup>82</sup> The defendants were African-American in twenty-two of those cases.

There is presently no judicial or legislative oversight of a district attorney's decision to seek the death penalty.<sup>83</sup> There is no legal recourse to challenge the prosecutor's discretion to seek the death penalty and there is no procedure in place to assure that the decision is not based upon personal or institutional racial prejudices. In recent years, the Georgia General Assembly has insisted on providing mechanisms for the oversight of the fiscal aspects of both the Executive and Judicial Branches of government. The lack of accountability by the district attorneys concerning which cases become death penalty cases should, by itself, lead to a call for at least greater scrutiny of the application of the death penalty statute. The absence of legal checks and balances with regard to this decision has led to international castigation of the United States for ignoring the reality of racial discrimination.

A question raised by the United States Supreme Court in Warren McCleskey's case<sup>84</sup> is whether the Georgia General Assembly will take steps to ensure that future cases involving imposition of the death penalty be free from contamination by racial bias and prejudice. Despite the "reservations and declaration" by the United States government that "[T]he U.S. Constitution provides enough protection to citizens with regard to racial discrimination,"<sup>85</sup> the Georgia General Assembly should not ignore the historical and current evidence of the

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81. O.C.G.A. § 17-10-32.1(b) (2007).

82. *Id.*

83. O.C.G.A. § 17-10-32.1 (providing that unless the district attorney has given notice that the state intends to seek the death penalty pursuant to the Uniform Rules of the Superior Courts, the judge shall sentence the defendant to life imprisonment.).

84. *McCleskey*, 481 U.S. at 321.

85. *Racial Discrimination Convention*, *supra* note 29.

discriminatory application of the death penalty statutes in Georgia.

*B. Georgia Should Adopt the Racial Justice Act*

Some members of the Georgia General Assembly have not been eager to support Georgia's version of the Racial Justice Act.<sup>86</sup> Some law makers are reluctant to pass the act because many district attorneys seemingly oppose objective scrutiny of their decisions to pick and choose which defendants will be subjected to the death penalty.<sup>87</sup> Some legislators apparently see the Racial Justice Act as unpopular legislation with no voter constituency, except among those who are opposed to the death penalty itself.<sup>88</sup> However, the Act is one way to correct and avoid the continuation of racial discrimination in our state. Positive protective legislation has seemingly always faced an uphill battle in our nation's history just as regressive legislation and judicial decisions have been hard to change once put into place by our courts and legislative bodies.

Throughout our history we have seen pervasively unjust laws receive popular public approval. Not only have unfair laws allowing racial discrimination received popular support, courts have, in the past, affirmed discrimination as a constitutionally sound policy on behalf of individual states.<sup>89</sup> In the 1850's, the United States Supreme Court not only affirmed slavery but declared unconstitutional a law which would have prevented the spread of slavery to the new western states.<sup>90</sup> In 1892, Louisiana

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86. *See Penalty Changes Unlikely*, AUGUSTA CHRONICLE (January 24, 1999), [http://chronicle.augusta.com/stories/012499/met\\_LG0414-3.00.shtml](http://chronicle.augusta.com/stories/012499/met_LG0414-3.00.shtml).

87. *Id.*

88. *Id.*

89. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

90. *Dred Scott*, 60 U.S. 393. Chief Justice Tanney, writing for the majority of the United States Supreme Court, stated: "Upon these considerations it is the opinion of the Court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned is not warranted by the Constitution and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner with the intention of becoming a permanent resident." *Id.* at 452.

enacted a law that required separate railway cars for blacks and whites. In an 1896 challenge to that law, Homer Adolph Plessy took a seat in a “whites only” car of a Louisiana train and refused to move to the car reserved for black passengers.<sup>91</sup> He was arrested and convicted. The United States Supreme Court upheld the Louisiana law and enunciated the infamous “separate but equal” doctrine that was not overturned until 1954.<sup>92</sup> Unbelievably, we only have to go as far back as the early nineteen-sixties to find proposed civil rights legislation and proposed voters’ rights legislation being condemned by many in the general public. In the mid-sixties, many southern states were still enforcing laws which legalized segregation and prohibited African Americans from exercising the right to vote. Courageous legislators in many southern states and courageous members of the U.S. Congress enacted laws which effectively did away with the vestiges of legal racial discrimination.<sup>93</sup> If those courageous legislators had listened to what was “popular,” it is doubtful that the Civil Rights Act of 1964 or the Voting Rights Act of 1965 would ever have been introduced, much less passed.

Notwithstanding the United States government’s reservation set forth in the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>94</sup> legislation is needed to help end racial discrimination in death penalty cases. The racial discrimination and bias is real and it continues in Georgia as in the rest of the states which employ the death penalty as a punishment option. United States Supreme Court Justice Harry Blackmun, in 1994, wrote, “Even under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die.”<sup>95</sup> The federal government’s own General Accounting Office has found credible evidence that the race of the victim influences the likelihood of a defendant being charged with capital murder or

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91. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

92. *Id.*

93. See generally DENTON L. WATSON, *LION IN THE LOBBY: CLARENCE MITCHELL, JR.’S STRUGGLE FOR THE PASSAGE OF CIVIL RIGHTS LAW* (William Morrow and Company Inc. 1990).

94. *Racial Discrimination Convention*, *supra* note 29.

95. *Callins v. Collins*, 510 U.S. 1141 (1994) (Blackmun, J., dissenting from denial of certiorari).

receiving the death penalty.<sup>96</sup> In other words, those who murder Caucasians are more likely to be sentenced to death than those who murder African-Americans.<sup>97</sup>

Selecting which individuals are going to be subjected to the death penalty in Georgia is currently in the hands, and hearts, of forty-nine elected district attorneys. There is no oversight, no control, and no recourse from the decisions made by these district attorneys to seek the death penalty. If Georgia is going to ensure “a policy of eliminating racial discrimination in all its forms,” as demanded by international treaty obligations as well as by federal and state constitutions, Georgia legislators must step forward and demand oversight of these decisions determining who will live and who will die within our justice system. The continued racially discriminatory use of the power to seek the death penalty in Georgia and our nation at large presents a moral, ethical, and legal crossroad for each member of the Georgia General Assembly, as well as for each citizen. The implementation of the Georgia Racial Justice Act would not abolish the death penalty in Georgia, but it would be the first giant step toward erasing the historically proven discrimination which exists in the manner in which death penalty cases are selected in Georgia. The citizens of Georgia should expect nothing less from their elected officials.

The Georgia Racial Justice Act should be reintroduced and enacted by the Georgia General Assembly. Currently, there are no safeguards, no protective measures, and no oversight to the use of the death penalty in Georgia. There is a legitimate and intense need for legislation aimed at providing a procedure which will afford defendants sentenced to death legal recourse when there is evidence that the district attorney’s decision to seek the death penalty was based upon any racial factor. The passage of this Act will be the first step in flushing racial bias from Georgia’s death penalty and will enhance the legitimacy of the procedure. Georgia’s General Assembly should adopt this act and remove race as a factor determining whether a defendant should face the death penalty.

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96. U.S. GEN. ACCOUNTING OFFICE, *supra* note 51.

97. *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities*, GGD-90-57, (Feb. 1990).