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Statistics and Death: The Conspicuous Role of Race Bias in the Administration of the Death Penalty

Ruth E. Friedman†

INTRODUCTION

Statistics can be very useful things. They are detached, nonpartisan, and eminently quotable. Never "damned lies" by themselves, statistics are cold calculations not amenable to much debate. It is, of course, what we think the numbers mean that makes all the difference.

This short essay looks at a few statistics on race and criminal justice and the meanings we give to them. Some of these numbers have become distressingly familiar: nearly one in three black men aged 20-29 is under the control of the justice system, either incarcerated or on probation or parole. One Fifty-one percent of the 1.1 million inmates in state and federal prisons are black. Based on current incarceration rates, an estimated 29% of black men can expect to enter prison during their lifetimes, as opposed to 4% of white men. As of 1994, 90% of those sentenced in federal court for use of crack cocaine were black.

Less well publicized, however, are other stark racial disparities in our criminal system. The death penalty is our country's most severe response to crime, and the statistics on its use are consistently racially disproportionate. For example, while blacks constitute under 13% of the American population, they make up 42% of the over 3500 inmates on the states' death rows. Of the 21 men under federal sentence of death, sixteen or 76% are people of color. The United States military,

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7. See id. at 50.
which has its own capital punishment laws, currently has eight people on its death row, of whom only one is white.8 People of color make up 43% of those executed nationally since the Supreme Court allowed reinstatement of the death penalty in 1976.9

The numbers are even more markedly disparate when it comes to the race of the victims. Eighty-three percent of the more than three hundred people executed by the states in the modern era10 had white victims.11 Every one of the men on the military's death row is there for killing a white person.12 Over 80% of the inmates of our states' death rows are there for killing whites.13

Do these numbers have any meaning? It is possible that many Americans perceive these statistics as a legitimate reflection of who commits crime and is properly held responsible for it. By this logic, prisons overflow with young black men because they most often break the law, and if death rows are disproportionately populated by people of color, it must be because the worst crimes are committed by those who are not white against those who are.

For some, however, it is not possible to hold such sanguine views of the justice system. Particularly for people of color, personal experiences with law enforcement or the courts contribute to a belief that the machinery of justice does not grind evenly for all, but instead is biased against members of minority groups. Ample reason for distrust is also found in our legal history: Criminal codes were explicitly race-based both during and after slavery, with the same act resulting in a fine if the perpetrator was white or the victim black, and incarceration or death if the perpetrator was black.14 Against this backdrop, the gross disproportions in present day criminal justice statistics can be seen not as accurate indicia of who is committing what offense, but as evidence that the administration of criminal justice remains plagued by racism.

These are very different ways of reading the same facts, leading to very different implications for law and policy. For those of us who believe that race bias is at play, it becomes imperative to demonstrate why a person of color is so often strapped into the electric chair, generally for killing someone white. To do this, we must look behind the statistics.

There are many places in the march toward death row where one can look

8. See id.
9. See id. at 4.
10. See id. at 6. This refers to the period starting in 1976, when the U.S. Supreme Court allowed reinstatement of the death penalty within certain guidelines. See Gregg v. Georgia, 428 U.S. 153 (1976).
11. See id.
12. The most recent year for which such data were available was 1995. See Dwight Sullivan, Military Death Row: Separate Not Equal, NAT'L. L. J., November 6, 1995 at A19.
for evidence of racial bias or animus. Legislatures pass laws that make certain offenses subject to the death penalty; juries convict or acquit of capital crimes; state officials execute or pardon. But one of the most critical points in the process is undoubtedly the initial decision made by the prosecutor to pursue a capital sentence. There can be no conviction or jail term without a charge, no death sentence without an official who seeks the death penalty. The charging decision by the state or federal prosecutor is where the process really begins, and where I will begin as well.

I. DECISIONS AND DEATH

As a capital defense lawyer who has represented death row inmates for over eleven years, I am most familiar with the criminal process in the state courts, particularly those in Alabama. Those of us who litigate capital cases in the South have had the opportunity to learn firsthand how charging decisions are made and, often through bitter experience, how race continues to play a major role in the machinery of death.

As in the nation as a whole, statistics reveal that the application of the death penalty in Alabama is marked by extreme racial disparities. Alabama's death row is 47% black, whereas the state population is 25% black. Although only 6% of all murders in Alabama are black-on-white, 60% of the black inmates on Alabama's death row are there for killing whites. Sixty-five percent of those executed in Alabama in the modern era have been black.

As is true in most jurisdictions, the process for charging someone with a death-eligible crime in Alabama involves a prosecuting attorney and a grand jury. Capital indictments are returned by grand juries sitting in one of the state's 67 counties. Cases are brought to the grand jury by prosecutors from the office of a district attorney who is elected in a judicial district, which sometimes covers several counties. None of Alabama's 40 elected district attorneys is black.

Grand jurors are randomly selected to serve from a list of county residents compiled from drivers' license data and other sources. Procedures for choosing the foreperson of the grand jury can vary from county to county: sometimes the presiding judge decides (with or without help from the prosecutor), sometimes the...
panel members choose, and at other times it is by lottery. Data have been collected
on grand jury forepersons in various counties in Alabama. For example, Monroe
County is 35% black. Statistics compiled for Monroe County criminal cases found
that only one black had been chosen to lead a grand jury over a period of fourteen
years. In Morgan County, as part of his appellate litigation, a death row inmate
showed that from 1927 to the time of his trial in 1994, no black person had ever
served as leader of a grand jury. Talladega County, with a population that is 31%
African American, had seen only a handful of black forepersons. The chief judge in
the county testified at a hearing that he handpicked the forepersons based on whom
he knew and liked. Thus in the grand jury, the body that affirms or rejects a
potential criminal charge, race is already a factor.

It is the district attorney, however, who decides what indictment to seek. The
fundamental decision of whether to pursue a capital conviction and the death
penalty rests entirely with him or her. Very few southern counties have “committee”
decisions, unlike the federal government, where input is included from a number of
people and is reviewed by the Attorney General. As long as a crime fits the state’s
definition of what can be deemed a capital offense—murder during a robbery, for
example, or during any other felony—the district attorney has discretion to
prosecute it as a capital case if he or she sees fit. There are rarely any other
parameters or oversight.

Because it is both highly discretionary and shielded from scrutiny, this
process is especially subject to abuse. District attorneys in states such as Alabama
are elected officials. They are aware of public responses to local crimes and of the
political advantages to appearing tough on crime. They hold their positions only so
long as they remain popular with the majority of voters. In this political climate,
rarely will they be taken to task for failing to charge a defendant with a lesser
offense.

It would, of course, be an unusual prosecutor (and not a politically savvy
one) who would state publicly that race was a factor in her choice of charge. Unstated
motivation is not easy to ferret out, particularly in the course of adversary
proceedings. Litigation has sometimes made it possible to probe the exercise of
charging discretion by prosecutors, and the results have been revealing. One such
instance arose in Muscogee County, Georgia in 1989. The prosecutor there was

714 So. 2d 332 (Ala. 1997).


23. See Pace, 714 So. 2d at 323.


25. Readers may be surprised, however, at the lack of constraint some prosecutors exhibit in
this area. In a recent Alabama case, for example, a prosecuting attorney was asked to explain why so
many of his challenges in jury selection were exercised against blacks. His response was that he had to
uphold the constitutional rights of whites. See State v. McCray, Case No. CC 94-791 (Houston County
Cir. Ct. Sept. 1995), trial record at 368-70. The trial judge felt this was a race-neutral explanation. The
1998). The State of Alabama attempted unsuccessfully to overturn this decision.
seeking the death penalty for the second time\(^{26}\) against William Anthony Brooks, a young black man accused of raping and killing a white woman. Muscogee County led death penalty convictions in the state, and had the state's greatest proportion per capita of inmates on death row. At the time of Brooks' retrial, there were sixteen people from Muscogee who had received death sentences. Half of them were black.

Attorneys at the Southern Center for Human Rights in Atlanta, where I was then practicing, looked carefully at the county data on capital cases. We discovered that not only was there a substantial overrepresentation of blacks as defendants, but nearly all the capital cases had white victims. In 78% of the cases in which the Muscogee County prosecutor had pursued the death penalty, the victims were white—despite the fact that 65% of homicide victims in the area were black.\(^{27}\) Only six of the twenty-one capital cases brought in the circuit had black victims, and in half of those cases, there was more than one victim. In other words, it seemed that it took two black lives to equal one white life in the eyes of this prosecuting attorney.

We decided to see if we could prove that race actually was a factor in the decision to seek the death penalty for Brooks. We asked the prosecutor, on the record, how he determined in which cases he should pursue the death penalty. He maintained that race had nothing to do with his decisions. He said he sought the death penalty whenever the prior record of the accused or the aggravated nature of the crime (one accompanied by a felony, or a particularly brutal case, for example) warranted it. He also claimed that the desire of the victim's family for punishment was a significant factor.

Determined to find out if this was in fact true, we sought and received discovery from the trial court to test the prosecutor's assertions. We gained access to all the files the district attorney's office kept on homicides\(^{28}\) in the ten years prior to Brooks' trial. There were about 275 cases in all. We then combed each file for information regarding the offender's prior criminal history and the aggravation attendant to the crime. We then presented the information we found to a statistician who made cross-racial comparisons among these cases with the features the prosecutor had asserted had mattered most to him in deciding whether to seek the death penalty.

The results showed that even when the circumstances of the crime were comparable, the district attorney pursued the death penalty far more often when the victim was white. For example, for murders accompanied by another felony, the prosecutor sought the death penalty 47% of the time when the victim was white but only 11% when he or she was black. In cases with more than one perpetrator, the death penalty was sought in 53% of the white victim cases and 10% of the black victim cases. Statistically significant discrepancies were found in nearly every...
category.\(^{29}\)

We also pursued the claim that the wishes of the victims’ families were a significant factor in the decisions. In Brooks’ case, the parents of the dead woman were adamant that he be sentenced to death and would not consider a plea to any lesser punishment. Working from the files of the most aggravated crimes, we went to see the family members of county murder victims who were black.

Had the prosecutor’s rationale been correct, they would have told us that they asked him not to seek the death penalty. None said this. What they did tell us, time and again, was that no one from the district attorney’s office had ever spoken to them, much less asked their opinion. I spoke with one woman who had lost both her sons to homicide. She cried so loudly during a preliminary hearing in one of the cases that she was asked to control herself or leave the room. She learned from the television news that the man accused of killing her son had pled guilty to a lesser offense. No one had contacted her about either killing.\(^{30}\)

In sum, none of the prosecutor’s reasons for seeking the death penalty turned out to be supported by the evidence. Race did play a role in his decisionmaking, so much so that he did not even concern himself with the wishes of survivors who were not white.\(^{31}\) After a change of venue, a racially-mixed jury convicted Brooks of Jeanine Galloway’s murder, but this time voted unanimously against the death penalty. His conviction was affirmed by the Georgia Supreme Court in 1992.\(^{32}\)

The findings in the Brooks case should not be totally surprising. The country is fascinated when a blonde child beauty queen is found dead in her parents’ home,\(^{33}\) or a young white British nanny is thought wrongly convicted of killing her charge.\(^{34}\) Columbus, Georgia brought out all manner of detectives, investigators and helicopter searchers when Galloway, the victim in the Brooks case, disappeared. Rarely do black defendants or people of color victimized by sexual assault or murder so capture the headlines or garner public sympathy. Since the prosecutor’s actions fit so seamlessly into the culture around him, it did not even occur to him how deeply race-based his decisions were.\(^{35}\)

\(^{29}\) See State v. Brooks, Case Nos. 38888, 54606 (Muscogee County Sept. 11-12 1990), Vol. 8C at 42-45.

\(^{30}\) Brooks’ own father had been killed in 1982. No one was ever prosecuted.

\(^{31}\) Brooks’ defense team, of which I was a member, presented this information in court in support of a pretrial motion seeking to bar the death penalty on the grounds that it was sought and applied in Muscogee County in a racially discriminatory manner. A sociologist gave expert testimony about the statistical analysis described above, and surviving relatives of black homicide victims took the stand to say that the district attorney’s office had never contacted them about their child’s, spouse’s, or parent’s death. The trial court denied the motion and allowed the state to pursue the death penalty against Brooks.


\(^{33}\) The JonBenet Ramsey case dominated headlines around the country in 1997.

\(^{34}\) The Louise Woodward case generated many editorials calling for her release. The Massachusetts trial judge later reduced her murder conviction to manslaughter and sentenced her to time served.

\(^{35}\) See generally Sheri Lynn Johnson, Unconscious Racism and the Criminal Law, 73
Racism can also rear its ugly head in plea bargaining, the stage that often follows an indictment or pretrial litigation. In an effort to avoid the electric chair, Brooks offered to forego trial, accept a life sentence and give up all right to seek or accept parole.\textsuperscript{36} Our legal team drafted contracts and sought the input of the Georgia Board of Pardons and Paroles regarding their enforceability. Resolute that this was a “death case,” the prosecutor refused to negotiate.\textsuperscript{37}

This insistence on a death sentence is often politically motivated. For example, the Muscogee County prosecutor asked one father of a white homicide victim whether he wanted the death penalty, and was told that he did. The District Attorney sought and obtained death in that case. The father later contributed $5,000 to the prosecutor’s successful campaign for judge in the next election.\textsuperscript{38} In another Georgia case on retrial, the defendant offered to plead guilty in exchange for his life but was repeatedly rebuffed. Tony Amadeo’s conviction had been reversed because at his first trial, the Putnam County District Attorney had sent a memorandum to the jury commissioners instructing them on how to avoid detection while limiting the number of minorities and women on the grand and petit jury rolls.\textsuperscript{39} The memorandum surfaced when Amadeo was in state postconviction proceedings, but the Georgia courts refused to find anything amiss. The United States Supreme Court ultimately reversed his conviction and death sentence in a unanimous opinion, noting that the prosecutor had used his office “so as to deliberately under-represent black citizens.”\textsuperscript{40}

On retrial the same prosecutor insisted on having a second chance. He maintained that this robbery/murder was a classic death penalty case and had to be prosecuted as such. During pretrial litigation, we filed a “Motion to Disqualify the Prosecutor” on the basis of his conduct at the first trial. We sent with it an amicus brief from leading ethics professors and prosecutors in Georgia and elsewhere who demanded that the district attorney recuse himself on account of his previous odious act. The next day the prosecutor agreed to plead the case to a life sentence.\textsuperscript{41}

\textsuperscript{36} CORNELL L. REV. 1016 (1988).


\textsuperscript{38} See DISCRIMINATION AND DEATH, supra note 27, at 4.

\textsuperscript{39} This was a patently unconstitutional act, and arguably a criminal one. See 28 U.S.C. § 273.

\textsuperscript{40} Amadeo v. Zant, 486 U.S. 214, 219 (1988).

\textsuperscript{41} In this same judicial circuit, blacks were the accused in 22 of the 28 capital cases tried between the years of 1973 and 1990. See DISCRIMINATION AND DEATH, supra note 27, at 3.
II.
STATISTICS AND THE JUDICIARY: THE COMFORT LEVEL OF THE COURTS

We were lucky in the *Brooks* case to be able to establish as clearly as we did that racial bias, conscious or unconscious, was inextricably bound up with the prosecutor's decision to seek the death penalty. We were able to empirically refute the reasons the prosecutor gave for his charging decisions, and to provide some insight into how these glaringly disparate numbers came to be. To us, the numbers in Muscogee County spoke volumes about the role racial bias played in who was condemned to die.

We did not rest on statistics, however, because we knew that from a legal standpoint they had little significance. In 1987, in its major pronouncement to date on race and criminal justice, the United States Supreme Court held that statistics alone, no matter how unbalanced, could not establish that race was a factor in capital sentencing. As a constitutional matter, the ruling in *McCleskey v. Kemp*\(^4\) spoke to the level of proof necessary to establish impermissible racial bias in the imposition of the death penalty; on a normative level, the opinion also suggested the majority's view of the possible meaning of those statistics.

In *McClesky*, Warren McCleskey, a black man from Georgia, challenged his sentence of death for the killing of a white police officer on the grounds that racial considerations impermissibly affected his case. To establish his claim, he presented a sophisticated statistical analysis of Georgia death sentences. The analysis looked at the race of the defendant and the victim while holding constant for numerous nonracial variables likely to influence capital sentencing. The analysis, known as the Baldus study after its primary author, David Baldus, examined over 2,000 murder cases that occurred in Georgia in the 1970s.

The study found that defendants charged with killing white victims were 4.3 times more likely to receive death sentences as those charged with killing black victims,\(^4\) and that cases with black defendants and white victims were the most likely to result in a death sentence.\(^4\) The data showed that blacks who killed whites were sentenced to death at nearly 22 times the rate of blacks who killed blacks and 7 times the rate of whites who killed blacks.\(^4\) The analysis further determined that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases with white defendants and white victims; 15% of black-on-black cases; and 19% of white-on-black cases.\(^4\)

The Supreme Court rejected McCleskey’s Fourteenth and Eighth Amendment challenges. Acknowledging that it had accepted statistical evidence in Fourteenth Amendment cases on employment discrimination and jury selection, the

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43. *See id.* at 287.
44. *See id.* at 321 (Brennan, J., dissenting).
45. *See id.* at 327 (Brennan, J., dissenting).
46. *See Id.* at 287.
Court nevertheless found that the nature of the capital sentencing decision was "fundamentally different." The Court held that sentencing decisions were not amenable to statistical analyses because they involved various actors and innumerable factors related to the unique characteristics of the offender and the crime.\textsuperscript{47} The Court ultimately rejected the equal protection claim because "[i]mplementation of these laws necessarily requires discretionary judgments," and McCleskey's numbers were insufficient to show an abuse of that discretion in his particular case.\textsuperscript{48}

The Court denied McClesky's Eighth Amendment challenge due to the systemic measures already in place to circumscribe abuse of discretion and McCleskey's inability to show through his statistics that the system operated in an arbitrary or capricious manner. The Supreme Court interpreted the Baldus study to indicate that at most there was some "risk" that race was influencing capital sentencing decisions. This was not enough for the Court:

Statistics \textit{at most may show only} a likelihood that a particular factor entered into some decisions. There is, of course, some risk of racial prejudice influencing a jury's decision in a criminal case. . . . The question "is at what point that risk becomes constitutionally unacceptable." McCleskey asks us to accept the likelihood \textit{allegedly} shown by the Baldus study as the constitutional measure of an unacceptable risk of racial prejudice influencing capital sentencing decisions. This we decline to do.\textsuperscript{49}

As to the role of the prosecutor in producing a death sentence, the Court invoked the potential \textit{benefits} to a defendant of prosecutorial discretion, (that is, declining to seek death or offering a plea) and emphasized that discretion is fundamental to the functioning of the adversary system.\textsuperscript{50}

The 5-4 decision put criminal defendants on notice that even widespread statistical disparities will not in themselves establish an "unacceptable risk" that racism is at work; intentional discrimination must be shown in each individual case. That the majority found the risk "acceptable" reveals more than their skewed view of equal protection jurisprudence. The five Justices found the statistics unproblematic:

Apparent disparities in sentencing are an inevitable part of our criminal justice system. . . . Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious.\textsuperscript{51}

\textsuperscript{47} See McClesky, 481 U.S. at 294.

\textsuperscript{48} \textit{id.} at 297.

\textsuperscript{49} \textit{id.} at 308-09 (emphasis added) (citations omitted).

\textsuperscript{50} See \textit{id.} at 311-12.

\textsuperscript{51} See \textit{id.} at 312-13.
According to the Court, if the disparate statistics are not explained by something impermissible, then they must be explained by what is permissible, i.e., the proper functioning of the system. In other words, blacks in Georgia must simply commit the worst crimes, which must also disproportionately victimize whites. To assume that the numbers did not accurately reflect reality would imply that some influence such as racism was at work. In declining to make that assumption, a majority of the Court expressed a level of comfort with the numbers, lopsided as they were.

This "comfort" with racial disparities in the criminal arena was made evident again in a more recent case. In United States v. Armstrong, black defendants who had been charged in federal court with possessing crack cocaine alleged that they were the victims of selective prosecution. They presented evidence that all 24 people prosecuted for the offense in that district in the previous year were black. The district court granted their request for discovery to determine what criteria the government used for deciding whom to prosecute. The Court of Appeals for the Ninth Circuit affirmed.

The Supreme Court reversed. It held that to establish a right to the information they wanted under the Fourteenth Amendment's equal protection clause, the defendants had to show that others who were similarly situated but not black were not being prosecuted. "All" the defendants had done was to show that 100% of those who were being prosecuted were black.

This time the Court was more explicit in relating what it thought the numbers signified:

The Court of Appeals reached its decision in part because it started "with the presumption that people of all races commit all types of crimes—not with the premise that any type of crime is the exclusive province of any particular racial or ethnic group." It cited to no authority for this proposition, which seems contradicted by the most recent statistics of the United States Sentencing Commission. Those statistics show that: More than 90% of the persons sentenced in 1994 for crack cocaine trafficking were African American; 93.4% of convicted LSD dealers were white; and 91% of those convicted for pornography or prostitution were white. Presumptions at war with presumably reliable statistics have no proper place in the analysis of this issue.

52. The Court had already accepted the study's methodology for the sake of the argument. See McClesky, 481 U.S. at 291 n.7.
54. See id. at 459.
55. See id. at 465.
56. ld. at 469-70 (emphasis added) (citations omitted).
As the dissent pointed out, the disparate sentencing figures on which the Court relied are completely consistent with a claim of selective prosecution on the basis of race: if the government is prosecuting only blacks, chances are that blacks will be those convicted. Less willing to presume that the statistics were "reliable," Justice Stevens also cited in his dissent a study showing that 65% of crack users were white and the affidavit of a local drug counselor who said that he saw equal numbers of white and minority crack addicts. To counter Armstrong's contentions regarding racial bias, the prosecution offered the names of eleven individuals prosecuted for crack offenses who were not black. All eleven were members of other racial or ethnic minorities—a fact that the majority opinion failed to mention.

In both McCleskey and Armstrong the Supreme Court took the view that the racially-skewed numbers could not possibly indicate racism. The disparities in McCleskey were explained away by unknown factors inherent in a discretionary system; in Armstrong the statistics were "presumptively reliable." Although Justice Stevens referred in his dissent to the "troubling racial patterns of enforcement," the Court as a whole appeared untroubled by those patterns.

The inquiry we undertook in the Brooks case was designed to respond to the rules McCleskey established. The Court took issue with McCleskey's proof in part because the decisionmakers had no "opportunity to explain the statistical disparity"; in our case, we took the prosecutor's explanations and proved them false. We focused on the primary decisionmaker in the case, the Muscogee County District Attorney, and on the charging decisions he alone made. We did this in part to address the Supreme Court's objection that McCleskey's data were too wide-ranging and not specific to his case. One wonders whether the Court, had it seen the evidence presented in the Brooks case, would have been compelled to view those racial disparities as something other than "inevitable."

III.
THE "EXERCISERS" OF DISCRETION

The McCleskey Court made clear that a defendant could establish an equal protection violation only by scrutinizing the decisionmakers in his case and offering "exceptionally clear proof" of abuse. Central to the opinions in both Armstrong
and McCleskey was the assumption that prosecutorial decisionmakers exercise their discretion and execute their duties in a racially neutral fashion. Contrary to its holding in other cases, the Court seemed loath to believe that conscious or unconscious bias could affect decisions to prosecute.

Experience in the state criminal courts of the South belies such blind faith. Case after case demonstrates that when called upon to exercise their authority in jury selection, prosecutors appear anything but race neutral. For example, the first time the Brooks case was tried, the District Attorney (who also had the case on retrial) excluded every black qualified for jury service. In fact, he routinely eliminated black venire members from capital cases, sometimes employing every one of his peremptory strikes in order to do so. The prosecutor who refused to plead out Tony Amadeo's case also had a practice of removing blacks at widely disproportionate rates. Of 22 capital cases tried against black defendants, that prosecutor used 90% of his jury challenges against prospective black jurors. Where the victim was white, the rate was even higher. So prevalent was the practice of discriminating against black jurors in that Georgia county that a federal court found a rare violation of Swain v. Alabama, granting relief in a capital murder case due to a long history of racial bias in jury selection.

Racially biased use of jury challenges appears to be the rule in Alabama. The prosecution removed 20 of 21 black venire members from Jesse Morrison's jury in Barbour County in 1988. All sixteen black venire members were eliminated in

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66. See id. at 297 ("Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused."); id. at 311-12 ("the capacity of prosecutorial discretion to provide individualized justice is 'firmly entrenched in American law'"). See also Armstrong, 517 U.S. at 464 (stating that "presumption of regularity" supports decisions of prosecutors; without "clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties"); id. at 465 ("Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts.").

67. See, e.g., Batson v. Kentucky, 476 U.S. 79, 96, 98 (1986) (stating that jury selection is process that allows discrimination on the part of those "who are of a mind to discriminate"; mere assertions of good faith by prosecuting attorneys will not rebut a prima facie case of discrimination).

68. It must be emphasized that this author has practiced exclusively in the South. However, my limited knowledge of other jurisdictions suggests that these practices are also prevalent elsewhere. The recent disclosure of a videotape showing a Philadelphia prosecutor instructing his subordinates to exclude blacks from juries provides a stark example.

69. See DISCRIMINATION AND DEATH, supra note 27.

70. See Horton v. Zant, 941 F.2d 1449, 1458 (11th Cir. 1990).

71. See id. at 1458.

72. 380 U.S. 202 (1965). Under Swain, a defendant could successfully challenge a prosecutor's racially biased use of peremptory strikes only by showing that the prosecutor always discriminated against black jurors in all criminal cases. Needless to say, no defendant was able to establish a Swain violation. In 1986, Batson v. Kentucky replaced Swain's onerous burden with a procedure allowing a defendant to challenge peremptory strikes solely on the basis of the prosecution's conduct in the case at hand. Batson, 476 U.S. 79. Interestingly, the few Swain wins came only once Batson became law. See, e.g., Horton, 941 F.2d 1449.

73. See Transcript of Postconviction Rec. at 122c, Morrison v. State, CC-78-10014 (Barbour
Earl McGahee’s capital trial; he faced an all white jury. The state used 21 of its 23 strikes against black jurors in Victor Stephens’ case. Albert Jefferson had three different juries in Chambers County: one to determine his competency, another for the guilt/innocence trial, and a third for a resentencing hearing. Each time, the district attorney removed every single black called to decide the fate of this mentally ill black man accused of killing a well-known white painter.

In Joe Duncan’s capital case, the prosecution used 24 out of 29 peremptory strikes to eliminate black venire members. This occurred in Selma, Alabama, promoted by the state to tourists as the home of the civil rights movement. In murder cases over a ten-year period, prosecutors in Dallas County, Alabama exercised 77% of their strikes against blacks, despite the fact that blacks comprised less than a third of the population. As a result, over two-thirds of blacks summoned for jury service were precluded from sitting on murder cases.

Again, we are dealing with numbers, now in the use of peremptory jury challenges. Again, one logical conclusion is that the numbers are evidence of intentional racism. After all, what are the chances that 24 of the jurors struck at Duncan’s trial just happened to be black, or that blacks just happen to be excluded in case after case? We can look behind the numbers for an answer, as the state did when it attempted to show that its strikes were unbiased. Batson requires that a party give reasons for its peremptory strikes when the opposing side has made a prima facie showing that the strikes were racially motivated, and all manner of reasons have been given by Alabama prosecutors. The prosecutor in Duncan’s case, for example, said that he had struck one of those 24 jurors, a Mrs. Johnson, because she was related to two men named Johnson whom he was prosecuting for murder. Far County Cir. Ct. 1988), aff’d, 551 So. 2d 435 (Ala. Crim. App. 1989).


76. Jefferson’s first death sentence was reversed when the judge mistakenly accepted an 11-to-1 vote as a verdict for death. See Ex parte Jefferson, 473 So. 2d 1110 (Ala. 1985). The sentencing part of the case was then retried.


79. In Maxine Walker’s case in Talladega County, we asked a statistician to determine what the chances were that 11 of 15 black jurors could be struck without race being a factor. He calculated the probability at 0.00178. See Transcript of Batson v. Kentucky Hearing on Return to Remand, 41 Walker v. State, CC-88-209 (Talladega County Cir. Ct. Nov. 13, 1991). See also Walker v. State, 611 So. 2d 1133 (Ala. Crim. App. 1992) (ordering new trial due to Batson violation).

80. Batson v. Kentucky, 476 U.S. at 96-98. If the defendant has established a prima facie case of race discrimination (through statistics, evidence of a past history of discrimination on the part of the state, or other means), the burden then shifts to the prosecution to rebut it. The defendant then has an opportunity to establish that the prosecution’s proffered reasons are pretextual.
from related, Juror Johnson (possessor of a terrifically common name) had never even heard of those men, and the District Attorney never asked her about them when given the chance.81 This kind of empty excuse is not unusual. The Chambers County District Attorney testified that one woman was struck because he had prosecuted her son on a drug charge. It turned out the woman’s only son had been in grammar school at the time.82 Maxine Walker’s jurors were allegedly related to various criminals, but the District Attorney was never able to prove who they were or what they were supposed to have done.83

Imaginary relations are not the only excuses given. A Montgomery County prosecutor’s sole explanation in one case was that several venire members were affiliated with Alabama State University—a predominantly black institution.84 One Georgia prosecutor said he struck a black juror for looking “dumb as a fencepost.”85 An Alabama District Attorney used 75% of his strikes against black prospective jurors because some of them “didn’t communicate well.”86 Another prosecutor said he had excluded blacks because he had “tried two or three cases where they’ve been all black, and I’ve had strange results.”87 Sometimes the prosecutor insists he was fair while offering no reason at all for eliminating black jurors.88

It would be difficult to argue that in these instances of jury selection the prosecutors were not acting on the basis of race.89 Yet these are the very same officials that the Supreme Court trusts with charging discretion. If they make one decision on the basis of race, how assured can we be that race stereotyping holds no sway elsewhere in their work?

The Supreme Court in McCleskey distinguished jury selection cases from charging decisions on the basis of several factors, including the ease with which the prosecutor can explain away statistical disparities in jury selection, and the ability of the courts to scrutinize a single decision to exclude a potential juror. But there is another, more disturbing explanation. Prospective jurors come to court untainted by accusations and having been asked to serve. Upholding the wholesale removal of blacks summoned for jury service would imply that people of color are somehow

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81. See Transcript of Batson Hearing on Return to Remand, supra note 78, at 390-91.
82. See Transcript of Postconviction Record, supra note 77, at 39-56.
86. Ex parte Yelder, 630 So. 2d 107 (Ala. 1992).
89. That is, it is hard for this writer to attempt that argument. However, it is often accepted by the courts. In most if not all of the cases mentioned above, the trial judges found no evidence of racial discrimination and thus no Batson violation. Some were ultimately reversed by an appellate court, but many were not.
not fit to be jurors. The Court has refused to endorse such exclusion, ruling instead that the jurors themselves have rights that must not be abridged. ⁹⁰

But when it comes to the disproportionate exclusion of black or Latino ⁹¹ defendants from society as a whole through prosecution and conviction, the Court has proved less uneasy. The Warren McCleskeys and Christopher Armstrongs of the world do not present their challenges unblemished. They come before the Court as accused or convicted criminals. In rejecting their claims, the Court has in essence said that the evidence they presented—that people of color are disproportionately prosecuted for crack offenses or sentenced to die—is neither so unexpected nor problematic as to require even an explanation from the state. ⁹²

This normative view is troubling at a number of levels. One is that it disregards other known facts. In Alabama, for example, 74% of the people on death row are there for killing whites, but blacks are 67% of the victims of homicide. ⁹³ Only five percent of homicides in Alabama are black-on-white. ⁹⁴ These are precisely the kinds of statistics the majority ignored in Armstrong. Virtually every other study of capital sentencing, including one by an agency of the federal government, ⁹⁵ has produced nearly the same statistical disparities.

The more intractable problem, however, may be the unconscious racism the Court’s view reveals. A majority on our highest Court has proved willing to tolerate a world in which widely disproportionate numbers of blacks are imprisoned or condemned to die. These are not statistics that should be tolerated by any of us, and certainly not without piercing inquiry. In a society with a history of racial bias—where states’ attorneys still do not want blacks on their juries and offer thinly-veiled reasons for excluding them, and where prosecutors give fraudulent rationales for why they so often seek death in black-on-white crimes—it is truly disingenuous to assume that these numbers are merely an accurate reflection ⁹⁶ of who is deserving of the ultimate punishment.

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⁹¹ Blacks are the predominant minority group in the states where I have practiced, such as Georgia and Alabama. In states such as Texas, Latinos make up a larger percentage of those on death row. Many of the points made in this piece are relevant to people of color generally.

⁹² Had the justices accepted McCleskey’s premise, they would have been compelled to examine “the principles that underlie our entire justice system,” since there was “no limiting principle” to his challenge, and since, as the Court recognized, other prisoners would be likely to point to the racial disparities in their sentences. McCleskey v. Kemp, 481 U.S. at 315, 318. Justice Brennan’s dissent called this “a fear of too much justice.” Id. at 339 (Brennan, J., dissenting).


⁹⁴ See id. at 28.


⁹⁶ See McCleskey v. Kemp, 481 U.S. at 296-97 (“[A]bsent far stronger proof, it is unnecessary to seek such a rebuttal [to the statistics], because a legitimate and unchallenged explanation for the decision is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty.”).
CONCLUSION

The numbers that characterize the administration of the death penalty in this country are staggeringly disproportionate by race. That our highest judicial decisionmakers are willing to embrace such assumptions in the administration of justice is profoundly disturbing. Until there is a recognition that racial bias is an influence in our system of criminal justice, we cannot be comfortable with the outcomes that system produces.

It is critically important that we explore these statistics, that we educate people about how they came to be, and that we continue to conduct the kinds of inquiries that exposed the biased approach in the Brooks case. Those of us concerned with racial justice should not rest until the existence of racial disparities in the criminal justice system is acknowledged and effective remedies are instituted.