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Cover Page Footnote

The authors wish to express their sincere appreciation for the many valuable suggestions on, and review of, this Article by Deputy Attorney General Susan Lee Frierson. who is recognized for her extensive background and expertise in dealing with legal issues related to the Racial Justice Act. Additionally, the authors gratefully acknowledge the comments and review of several members of the California Department of Justice Federal Habeas Corpus Reform Task Force who considered an earlier version of this Article which was circulated as a section-by-section analysis of the Racial Justice Act to members of Congress. This review included Chief Assistant Attorney General George Williamson and Deputy Attorneys General Ward A. Campbell, Edward T. Fogel, Jr., Susan Lee Frierson, Dane R. Gillette, Ronald Matthias, Karl Mayer, and Quint Hegner. Manager of the Statistical Analysis Center of the California Department of Justice. Finally, the authors are appreciative of the efforts and review of this Article by Special Assistant Attorney General Kevin P. Holsclaw.

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THE RACIAL JUSTICE ACT OF 1994—UNDERMINING ENFORCEMENT OF THE DEATH PENALTY WITHOUT PROMOTING RACIAL JUSTICE

Daniel E. Lungren[*]
Mark L. Krotoski[**]

I. OVERVIEW

During the last Congress, the so-called "Racial Justice Act" (RJA) proved to be one of the most controversial provisions in the omnibus crime bill. In fact, until it was dropped, the RJA threatened final congressional consideration of the crime bill.[1]

If the RJA were enacted, a capital defendant would be allowed to present statistics from unrelated cases to suggest that race was a factor in the decision to seek or to impose the death sentence. Once the defendant makes this bare statistical showing, prosecutors would have a heavy burden to rebut the showing. If the rebuttal is not made, the death penalty cannot be imposed. The RJA clearly is designed to overturn *McCleskey v. Kemp*,[2] where the U.S. Supreme Court denied a similar statistical claim based upon unrelated cases to establish racial discrimination in the imposition of the death penalty. The RJA would also permit a new round of litigation, unrelated to the facts of the murder and the individual background characteristics of the offender, to be used to determine whether the death penalty should be enforced.

Since 1988, the Congress has considered the RJA on several occasions. It is likely that it will be debated as an amendment to future crime measures. Little

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1. *See infra* notes 32-35.
2. 481 U.S. 279 (1987).

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has been published concerning the debilitating effects of the RJA on the enforcement of the death penalty. This Article attempts to explain the major consequences this legislation would have, not only on the enforcement of the death penalty, but also in our criminal justice system. It is important to be fully aware of its impact.

Section II of this Article includes a brief review of the history of the RJA, including the 1994 debate during the 103d Congress.

Section III identifies several fundamental, inherent flaws with the RJA, which are not amenable to compromise or corrective amendment. This includes the major change in focus from a system of individualized justice and case-specific fairness to quota-based "equivalence" premised on the use of statistics from unrelated cases. As already noted, the U.S. Supreme Court and others have rejected the premise of the RJA that statistics from other cases can reliably and fairly be used to infer whether capital punishment is being imposed in a racially discriminatory manner in any *particular* case. Moreover, a serious constitutional cloud would be raised by novel legal questions presented if the RJA were enacted, casting doubt over the validity of the RJA.

Section IV highlights other serious ramifications of the RJA on our criminal justice system. In this section, the Article explains why the RJA is actually an anti-death penalty bill and how it would establish a legal bias and presumption against the death penalty in capital litigation. The RJA would tie the hands of prosecutors to rebut the statistical showing. This would result in a "battle of statistical experts" and an exhaustive "retrial" of every capital case forming the basis of the defendant's statistics. The RJA would undermine the holding of the U.S. Supreme Court decision in *McCleskey v. Kemp*, where the Court rejected the use of statistics from unrelated cases to establish racial discrimination in the imposition of the death penalty. Additionally, the RJA would create costly and protracted delays in capital litigation, based upon the experience in California with similar statistical claims which were presented in the *Robert Alton Harris* and *Earl Lloyd Jackson* cases, but rejected on the basis of current U.S. Supreme Court case law which the RJA would overturn. The RJA would inject race consciousness into the capital decision making process. The RJA also disregards existing protections against race bias. Finally, the RJA would confuse the public and undermine its confidence in the criminal justice system. This would occur through the inevitable conflicting rulings coming out of hundreds of different hearings.

Finally, Section V contains a section-by-section analysis which notes numerous operational defects in the legislation.

II. HISTORY OF THE SO-CALLED "RACIAL JUSTICE ACT"

On two occasions, in 1990 and 1994, the U.S. House of Representatives approved the RJA. Both times, motions to strike the RJA narrowly failed, the first time by a dozen votes, the second on a virtual tie vote. In contrast, the Senate has defeated the RJA every time it has been considered, including 1988,

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1990, 1991, and 1994. On the two occasions when the RJA has been considered by a House-Senate conference committee, it was dropped from the conference report in order to permit final passage of the omnibus crime measure to which it was attached.

A. Congressional Consideration: The 100th Congress (1988)

On April 21, 1988, Congressman John Conyers, from Michigan, was the first member of Congress to introduce the RJA.[3] According to the author of the RJA, it represented a congressional response to the *McCleskey v. Kemp* decision.[4]

Senator Kennedy was the first Senator to introduce the RJA. In October 1988, he offered the RJA as an amendment to the Omnibus Drug Initiative Act of 1988.[5] Among other things, during the Senate floor debate, Senator Kennedy argued that the *McCleskey v. Kemp* decision "was wrongly decided."[6] Opponents of the amendment countered that the amendment was designed to modify this decision and preclude enforcement of capital punishment.[7] The Senate ultimately rejected the Kennedy Amendment by a thirty-five to fifty-two vote.[8]

B. The 101st Congress (1989 & 1990)

In 1989, the RJA was reintroduced in the Senate and hearings were held by the Senate Judiciary Committee.[9] Subsequently, the RJA was approved by the Senate Judiciary Committee by a one vote margin.[10] During debate on the omnibus crime bill in 1990, Senator Graham of Florida, offered a motion to strike the RJA from the crime measure, which passed fifty-eight to thirty-eight.[11] Among other things, the author of the amendment had asserted that the RJA "might more appropriately be called the Death Penalty Abolition Act of 1989."[12]

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3. H.R. 4442, 100th Cong., 2d Sess., 134 CONG. REC. E1174 (daily ed. Apr. 21, 1988); *see also* 140 CONG. REC. H2530 (daily ed. Apr. 20, 1994) (remarks of Rep. Conyers) (noting he first introduced the RJA in 1988). Congressman Conyers has reintroduced the measure on other occasions. *See* H.R. 2466, 101st Cong., 1st Sess., 135 CONG. REC. E1880 (daily ed. May 24, 1989); Racial Justice Act of 1990, H.R. 4618, 101st Cong., 2d Sess. (1990); *see also* 137 CONG. REC. H7892 (daily ed. Oct. 16, 1991) (statement of Rep. Conyers in support). The 1994 version of the RJA is reproduced in Appendix A.

4. *See* 134 CONG. REC. E1174 (daily ed. Apr. 21, 1988).

5. The Racial Justice Act of 1988, 134 CONG. REC. S15748-49 (daily ed. Oct. 13, 1988).

6. *Id.* at S15748. *See also Death Penalty, Hearings Before the Senate Judiciary Comm.*, 101st Cong., 1st Sess. 623 (1989) [hereinafter *1989 Senate Hearings*] (statement of Sen. Kennedy).

7. *See, e.g.*, 134 CONG. REC. S15749-51 (daily ed. Oct. 13, 1988) (remarks of Sen. Hatch); *id.* at S15,751-52 (remarks of Sen. McClure).

8. *Id.* at S15755-56.

9. *See* S. 32, 101st Cong., 1st Sess. § 7 (1989); S. 1270, 101st Cong., 1st Sess. § 107, 135 CONG. REC. S16,728 (daily ed. Nov. 21, 1989) (Sen. Biden); S. 1696, 101st Cong., 1st Sess., 135 CONG. REC. S12160 (daily ed. Sept. 28, 1989) (Sen. Kennedy). The Senate Judiciary Committee held hearings on these measures. *See 1989 Senate Hearings*, *supra* note 6, at 623-1197.

10. *See* 136 CONG. REC. S6887 (daily ed. May 24, 1990) (remarks of Sen. Thurmond) (noting amendment was adopted by 7 to 6 vote with one member not voting).

11. *See* S. 1970, 101st Cong., 2d Sess., 136 CONG. REC. S6910 (daily ed. May 24, 1990).

12. 136 CONG. REC. S6884 (daily ed. May 24, 1990).

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Following subcommittee hearings on the RJA,[13] the House Judiciary Committee reported out the Comprehensive Crime Control Act of 1990, which included the RJA.[14] Because the RJA had become the subject of some controversy during the floor debate on this measure, the House adopted an amendment by Congressman William J. Hughes,[15] which modified the RJA as passed by the committee.[16] Among other things, this amendment changed the rebuttal burden on the State by substituting a "preponderance of evidence" standard for the "clear and convincing" standard contained in the committee-passed bill.[17] A subsequent floor motion to strike the modified RJA was offered by Congressman Jim Sensenbrenner, Jr., which failed by twelve votes.[18] Eventually, the RJA was eliminated from the conference report on the omnibus crime bill.

C. The 102d Congress (1991)

In 1991, the RJA was reintroduced in the Senate.[19] After it was yet again included in the Senate omnibus crime bill, Senator Graham offered another motion to strike the RJA. Once again, the Senate adopted this motion.[20]

In the U.S. House of Representatives, following subcommittee hearings,[21] the House Judiciary Committee included the RJA as part of the omnibus crime bill. The title of this measure was changed to the Fairness in Death Sentencing

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13. *See Death Penalty Legislation and the Racial Justice Act, Hearings Before the House Judiciary Subcomm. on Civil and Constitutional Rights*, 101st Cong., 2d Sess. (1990) [hereinafter *1990 House Hearings*].

14. *See* H.R. 5269, 101st Cong., 2d Sess. Title XVIII (1990); *see also* H.R. REP. NO. 681, 101st Cong., 2d Sess., pt. 1, at 156-63 (1990).

15. H.R. 5269, 101st Cong., 2d Sess., 136 CONG. REC. H9001-05 (daily ed. Oct. 5, 1990) (adopted 218 to 186, with one member voting present).

16. *See* 136 CONG. REC. H9001-02 (daily ed. Oct. 5, 1994) (Rep. Hughes explaining amendment changes to RJA as reported by House Judiciary Committee).

17. Some have maintained that this modification was only cosmetic. *See, e.g.*, 136 CONG. REC. H9003 (daily ed. Oct. 5, 1990) (remarks of Rep. Sensenbrenner) (noting the "burden of proving this enormous negative is a practical impossibility under any standard"); *id.* at H9008 (remarks of Rep. Harris):

> Because there are countless facts and variables that affect a capital sentencing decision, and because cases are being added to the pool almost every week, it is impossible to quantify all of the factors and to prove by a mathematical formula that no racial factor is involved in capital sentencing.

Id.; *see also Death Sentencing Issues: Hearings Before the House Judiciary Subcomm. on Civil and Constitutional Rights*, 102d Cong., 1st Sess. 167 [hereinafter *1991 House Hearings*] (statement of Andrew G. McBride, Associate Deputy Attorney General, U.S. Dep't of Justice) (concluding that "[t]here is also no practical significance to . . . substitution of a 'preponderance of the evidence' standard in relation to the government's burden of rebuttal, as opposed to the 'clear and convincing evidence' standard that appeared in earlier versions").

18. H.R. 5269, 101st Cong., 2d Sess., 136 CONG. REC. H9011 (daily ed. Oct. 5, 1990) (motion to strike defeated by vote of 204 to 216, with one member voting present).

19. *See* S. 1249, 102d Cong., 1st Sess., 137 CONG. REC. S7381 (daily ed. June 6, 1991) (introduced by Sen. Kennedy); S. 618, 102d Cong., 1st Sess. § 207, 137 CONG. REC. S3049 (daily ed. March 12, 1991) (introduced by Sen. Biden and identical to S. 1249).

20. *See* S. 1241, 102d Cong., 1st Sess., 137 CONG. REC. S8300 (daily ed. June 20, 1991) (adopted 55 to 41).

21. *See 1991 House Hearings*, *supra* note 17.

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Act.[22] This version was similar to but slightly different from the Hughes Amendment which the House had adopted in the previous Congress.[23] During the House floor debate, Congressman Bill McCollum offered an amendment which passed, replacing the RJA (retitled as the Fairness in Death Sentencing Act) with the Equal Justice Act in the omnibus crime bill.[24]

The Equal Justice Act was introduced as an alternative to the RJA and sought to establish statutory safeguards against racial discrimination and racial bias in the administration of capital punishment and other penalties.[25] There were some significant distinctions between the two measures. The Equal Justice Act would apply to all penalties, not merely capital punishment, and would codify protections against racial bias. The Equal Justice Act would provide safeguards during the trial, not after-the-fact like the RJA.

This represented the first time that both the House and Senate had rejected the RJA in the same Congress. When the conference committee issued the conference report on the crime bill, the Equal Justice Act was not included as part of the omnibus legislation.

D. The 103d Congress (1994)

On March 24, 1994, the House Judiciary Committee reported out an omnibus crime bill which included the RJA.[26] On April 20, 1994, in an effective tie vote, the U.S. House of Representatives failed to adopt the McCollum Amendment, which would have stricken the RJA from the omnibus crime bill reported out by the Judiciary Committee and replaced it with the Equal Justice Act.[27] In light of the effective tie vote, Congressman McCollum raised the issue

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22. *See* H.R. 3371, 102d Cong., 1st Sess. Title XVI, 137 CONG. REC. H7931 (daily ed. Oct. 16, 1991); H.R. REP. NO. 242, 102d Cong., 1st Sess., pt. 1, at 153-61 (1991); *see also* H.R. 2851, 102d Cong., 1st Sess. (1991) (introduced by Rep. Edwards).

23. *See supra* note 15. There were, however, three significant differences. First, building upon the Hughes Amendment, which the House passed in the prior Congress, this version imposed on the State the burden of appointing and supporting counsel for defendants raising claims under the legislation. Second, the measure removed the States' statutory presumption of correctness to state court findings of fact, pursuant to 28 U.S.C. § 2254(d), for any non-compliance in providing the defendant with these and other services. Third, the measure would apply retroactively even if prior statistical claims had been rejected. This retroactivity provision was identical to that contained in S. 618, 102d Cong., 1st Sess. § 207 (1991) (proposed § 2925), which had been rejected by the Senate. *See* 137 CONG. REC. S8300 (daily ed. June 20, 1991).

24. *See* 137 CONG. REC. H8145-46 (daily ed. Oct. 22, 1991) (adopted 223 to 191, with one member voting present). The 1994 version of the Equal Justice Act is reproduced in Appendix B.

25. *See* H.R. 1400, 102d Cong., 1st Sess., Title X (1991) (introduced by Minority Leader Michel); *see also* McCollum Amendment, 137 CONG. REC. H8137 (daily ed. Oct. 22, 1991); *see generally 1991 House Hearings*, *supra* note 17, at 169-77 (statement of Andrew G. McBride, Associate Deputy Attorney General, U.S. Dep't of Justice) (discussing provisions of the Equal Justice Act).

26. *See* H.R. 4092, 103d Cong., 2d Sess. Title IX (1994) (reproduced in Appendix A); *see also* H.R. 4017, 103d Cong., 2d Sess. (1994) (introduced by Rep. Edwards) (identical to H.R. 4092, Title IX); H.R. REP. NO. 458, 103d Cong., 2d Sess. (1994) [hereinafter *1994 House Report*].

27. *See* 140 CONG. REC. H2655-56 (daily ed. Apr. 25, 1994); *see also* Appendix B (reproducing the Equal Justice Act). Including the votes of the five Delegates, the actual vote was 212 to 217. *See* 140 CONG. REC. H2533 (daily ed. Apr. 20, 1994). A new rule in the 103d Congress permitted the five Delegates to vote on the floor of the House for the first time. *See* 139 CONG. REC. H6 (daily ed. Jan. 5, 1993). Under the new rule, the votes of the Delegates are excluded when "a recorded vote on any question has been decided by a

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again on the House floor; this subsequent procedural motion was also defeated.[28]

The RJA was strongly opposed by a number of prosecutor organizations and victims' rights groups, as it was in the past.[29] On May 11, 1994, the U.S. Senate adopted the D'Amato Amendment expressing a "sense of the Senate that the conferees to the upcoming Senate-House conference on the omnibus crime

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margin within which the votes cast by the Delegates and the Resident Commissioner have been decisive," and the vote is retaken de novo. *Id.* During the House debate on the McCollum Amendment, the Chairman indicated that the exclusion of the five votes resulted in a tie (212 to 212) and the McCollum Amendment did not pass. 140 CONG. REC. H2534 (daily ed. Apr. 20, 1994) ("Had [the Delegates] not voted, it would have been a tie vote, and the amendment would have failed."). The votes included those of the Resident Commissioner to the United States from Puerto Rico and the Delegates from the District of Columbia, Guam, the Virgin Islands, and the American Samoa. 140 CONG. REC. H2533 (daily ed. Apr. 20, 1994).

28. Since the McCollum motion to recommit the omnibus crime bill with instructions to strike the RJA and replace it with the Equal Justice Act was seen largely as a procedural vote, it was defeated 192 to 235. *See* 140 CONG. REC. H2607-08 (daily ed. Apr. 21, 1994).

29. In the 103d Congress, this opposition included:

- The National Association of Attorneys General (Resolution adopted Mar. 21, 1994);
- The National District Attorneys Association Board of Directors (Resolution adopted July 14, 1991);
- Citizens for Law and Order (letter of Jack Collins on behalf of crime victims);
- All 58 District Attorneys in California and the California District Attorneys Association (Resolution adopted Apr. 29, 1994);
- 32 Attorneys General (joint letter to senior members of the House Judiciary Committee opposing, *inter alia*, the RJA in the House crime bill) (dated Apr. 12, 1994);
- 30 Attorneys General (joint letter to the House and Senate Conferees opposing the RJA and urging that the RJA be stricken from the conference report on the omnibus crime bill) (dated May 6, 1994);
- Arizona Prosecuting Attorneys' Advisory Council (Resolution adopted May 3, 1994);
- District Attorneys Association of Georgia (Resolution adopted May 5, 1994);
- Pennsylvania District Attorneys Association (Resolution adopted Apr. 30, 1994);
- Washington Association of Prosecuting Attorneys (Resolution adopted May 2, 1994).

Joint letters and resolutions opposing the RJA from state attorneys general, district attorneys, and other law enforcement officials, have been referred to in past congressional debates. *See* 140 CONG. REC. H2529, H2532 (daily ed. Apr. 20, 1994) (remarks of Rep. McCollum) (referring to joint letter of 32 state attorneys general); *id.* at H2532 (remarks of Rep. McCollum) (referring to letter from the National District Attorney's Association); *id.* at H2606 (daily ed. Apr. 21, 1994) (remarks of Rep. McCollum) (referring to letter from the National District Attorney's Association); *id.* (referring to letter from the Law Enforcement Alliance of America, representing 40,000 law enforcement professionals); *id.* at H4622 (daily ed. June 16, 1994) (remarks of Rep. McCollum) (referring to letter from the National District Attorney's Association President William C. O'Malley, and from Los Angeles District Attorney Gil Garcetti); *id.* at H3272-73 (daily ed. May 11, 1994) (remarks of Rep. Horn) (reproducing unanimous resolution of the California District Attorneys Association); *id.* at S5512-17 (daily ed. May 11, 1994) (remarks of Sen. Hatch) (reproducing unanimous resolutions of the California District Attorneys Association, the Arizona Prosecuting Attorneys' Advisory Council, the Washington Association of Prosecuting Attorneys, the Pennsylvania District Attorneys Association, the Alabama District Attorneys Association, and other crime victim and law enforcement groups); 137 CONG. REC. S8298 (daily ed. June 20, 1991) (remarks of Sen. Hatch) (referring to joint letter of 25 state attorneys general); *id.* at S8250 (remarks of Sen. Thurmond) (referring to joint letter of 28 state attorneys general); *id.* at H7912-13 (daily ed. Oct. 16, 1991) (remarks of Rep. Cunningham) (reproducing unanimous resolution of the California District Attorneys Association); *id.* at E3130 (daily ed. Sept. 24, 1991) (reproducing joint letter of California Attorney General Daniel E. Lungren and all 58 California District Attorneys); 136 CONG. REC. S6895 (daily ed. May 24, 1990) (remarks of Sen. Humphrey) (referring to joint letter of 23 state attorneys general); 136 CONG. REC. H9005-06 (daily ed. Oct. 5, 1990) (remarks of Rep. Sensenbrenner) (referring to opposition from California Attorney General John Van De Kamp); *id.* at H9003 (remarks of Rep. Sensenbrenner) (referring to letter from the Nebraska County Attorneys Association); *id.* at H9006 (remarks of Rep. Sensenbrenner) (referring to unanimous opposition from all 22 New Jersey County Prosecutors).

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legislation should totally reject the so-called Racial Justice Act."[30] The House adopted a similar resolution on June 16, 1994.[31]

In light of the "great controversy" generated over the RJA,[32] and as part of a compromise to resolve the deadlock over the crime bill, the Clinton Administration agreed to a proposal which would drop the RJA from the omnibus crime bill with the understanding that an Executive Order would issue permitting the use of statistical evidence to show racial bias for federal capital cases.[33] In response, Senators Bob Dole, Alfonse M. D'Amato and Orrin G. Hatch offered a funding prohibition amendment on an appropriations measure to bar the U.S. Department of Justice from using funds to this end.[34] This amendment failed, in substantial part because some members of Congress viewed it as an intrusion into executive branch matters.[35] Subsequently, the RJA was once again dropped to allow final action on the omnibus crime measure.[36]

III. FUNDAMENTAL FLAWS OF THE RJA

The RJA suffers from several fundamental flaws. Prosecutors have uniformly opposed *any* version of the RJA largely because of these structural defects. Consequently, these flaws—which inhere in the use of statistics to establish an inference of race bias in criminal cases—are not amenable to compromise or corrective amendment. For this reason, it is also unacceptable to limit the RJA to federal capital cases, as some have suggested. Prosecutors reject the unsound premise that statistics in unrelated cases have a legitimate role in the resolution of any specific criminal case at the federal or state level.

First, the RJA changes the focus of our criminal justice system from case-specific fairness to quota-based "equivalence." Second, the RJA inappropriately relies upon social science statistics to infer whether capital punishment is warranted in a particular case. Finally, the RJA raises novel constitutional issues, the resolution of which would be unduly time-consuming and costly and would

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30. 140 CONG. REC. S5526 (daily ed. May 11, 1994) (D'Amato Amendment adopted 58 to 41).

31. This motion contained instructions to the House conferees "not to agree" to the RJA "or to any similar provision." 140 CONG. REC. H4619 (daily ed. June 16, 1994).

32. 140 CONG. REC. S9540 (daily ed. July 22, 1994) (remarks of Sen. Moseley-Braun).

33. *See, e.g., Clinton Pushes For Passage Of Crime Bill, Minus Provision On Death Penalty Bias*, WALL ST. J., July 21, 1994, at A16; *"Racial Justice" Deal Is Considered, Compromise Would Apply Safeguards To Federal Death Sentences*, WASH. POST, July 18, 1994, at A5; Ronald Brownstein, *Crime Bill Likely To Omit "Racial Justice" Measure*, L.A. TIMES, July 15, 1994, at A1.

34. The amendment provided:

> No funds appropriated under the Act to the Department of Justice shall be used to implement any policy, regulation, guideline, or executive order with respect to the death penalty which permits the consideration of evidence that race was a statistically significant factor in the decision to seek or impose the sentence of death in any capital case.

140 CONG. REC. S9531 (daily ed. July 22, 1994).

35. 140 CONG. REC. S9544-45 (daily ed. July 22, 1994) (33 voted in favor, 54 voted against). Several Senators noted the funding prohibition would limit the discretion of the Attorney General and the executive branch. *See, e.g., id.* at S9535 (remarks of Sen. Biden); *id.* at S9544 (remarks of Sen. Gorton).

36. Incidentally, no Executive Order has yet been issued by the White House.

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cast doubt on the validity of the RJA until these issues are judicially resolved. Each of these matters is discussed in turn.

A. Major Change In Focus From System of Individualized Justice By Permitting Statistics From Unrelated Cases

Enactment of the RJA would result in a major change in the focus of our criminal justice system. The sentence outcome would hinge on the collective statistics in other unrelated homicide cases instead of the *particular* facts of the case and the individual culpability of the defendant charged with the offense. This is antithetical to the Constitution's requirement that each defendant be sentenced on the *specific* facts of his or her crime and background. As the U.S. Supreme Court has noted, capital sentencing statutes are designed to include protections which provide that the "sentencing discretion is guided and channeled by a *system* that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed."[37] The statistical evidence permitted under the RJA would divert the focus from the heinous facts of the murder in the particular case and the character and record of the offender to statistical results of comparisons to other unrelated cases.

In addition to this major change in capital cases, the RJA is completely contrary to our criminal justice system of jurisprudence. Prior to the RJA, it has been clear that the Constitution requires an individualized consideration of each case, commencing with the charging process, through the jury rendering of the verdict, and on appeal. Continuing this humanized, individualized focus, more recently, the courts have allowed the victims of crime to be heard as part of the sentencing process.[38] In contrast, under the RJA, cases would not be considered on an individualized basis but under a dehumanized, statistical analysis. Such a process is contrary to the Constitution, as was explained in *Woodson v. North Carolina*:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.[39]

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37. Proffitt v. Florida, 428 U.S. 242, 258 (1976) (joint opinion of Stewart, Powell, & Stevens, JJ.) (emphasis added); *see also 1991 House Hearings*, *supra* note 17, at 168 (statement of Andrew G. McBride, Associate Deputy Attorney General, U.S. Dep't of Justice) ("In its broader import, the 'Racial Justice Act' proposal represents an attack on the fundamental principle of individualized justice, and movement towards a system of race-based 'justice' in which penalties are presumptively to be meted out to achieve preconceived numerical proportions among various population groups.").

38. *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 814 (1991).

39. 428 U.S. 280, 304 (1976) (plurality opinion).

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The RJA would establish a system which has already been denounced. No statistical analysis can take into account the diverse frailties and uniqueness of individuals. The unavoidable result of the RJA would be the grouping of cases into "faceless, undifferentiated mass[es]." This would constitute a radical change in our system of criminal justice.

B. Inappropriate Use of Social Science Statistics to Infer Whether Capital Punishment Is Warranted

The RJA presumes that statistics can supply a reliable and fair basis for inferring whether capital punishment is being imposed in a racially discriminatory manner in any particular case. The U.S. Supreme Court, and others, have rejected this notion and have noted the limitations in relying upon social science statistics in the courtroom.[40]

For example, in the *McCleskey* case, which involved a statistical claim of racial discrimination, the federal district court found, after an extensive evidentiary hearing, that the data relied upon by McCleskey's experts contained "substantial flaws" and was essentially untrustworthy as evidence.[41] On appeal, the U.S. Court of Appeals for the Eleventh Circuit further recognized several reasons for limiting reliance on social science research in court, including:

> (1) the imprecise nature of the discipline; (2) the potential inaccuracies in presenting data; (3) the potential bias of the researcher; (4) the inherent problems with the methodology; (5) the specialized training needed to assess and utilize the data competently; and (6) the debatability of the appropriateness for courts to use empirical evidence in decisionmaking. . . . Statistical analysis is useful only to show facts. In evidentiary terms, statistical studies based on correlation are circumstantial evidence. They are not direct evidence. Statistical studies do not purport to state what the law is in a given situation. The law is applied to the facts as revealed by the research . . . . Where intent and motivation must be proved, the statistics have even less utility.[42]

In fact, "[o]ne difficulty with statistical evidence is that it may raise more questions than it answers."[43] What is acceptable in the social science field is not necessarily acceptable in a court of law. Concerns about reporting procedures would only magnify the problems identified in *McCleskey*, further illustrating the enormous burden placed upon the States and federal courts by the RJA.

Some have suggested that the use of statistics for discrimination claims in

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40. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 292 & n.9 (1987) (listing cases).

41. McCleskey v. Zant, 580 F. Supp. 338, 360 (N.D. Ga. 1984), *aff'd in part and rev'd in part sub nom.*, McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc), *aff'd on other grounds*, 481 U.S. 279 (1987); *see also McCleskey*, 481 U.S. at 288 n.6 (noting flaws in statistical analysis identified by the district court).

42. McCleskey v. Kemp, 753 F.2d 877, 888 (11th Cir. 1985) (en banc) (citation omitted), *aff'd on other grounds*, 481 U.S. 279 (1987).

43. *Id.* at 889.

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employment and housing contexts justifies a similar use of statistics in criminal proceedings.[44] The U.S. Supreme Court has previously considered and rejected this argument.[45] In most other types of cases where discrimination is alleged, a statistician is comparing the actions of a single decision-maker making a decision based on certain, fixed criteria. In contrast, capital decisions involve the assessment of numerous variables, which will differ in every case, and the actions of several decision makers, including juries, which may not be readily captured by statistics. The Court has noted this critical distinction:

> While employment decisions may involve a number of relevant variables, these variables are to a great extent uniform for all employees because they must all have a reasonable relationship to the employee's qualifications to perform the particular job at issue. Identifiable qualifications for a single job provide a common standard by which to assess each employee. In contrast, a capital sentencing jury may consider *any* factor relevant to the defendant's background, character, and the offense. *There is no common standard by which to evaluate all defendants who have or have not received the death penalty.*[46]

Moreover, in the employment setting, "the decision maker has an opportunity to explain the statistical disparity,"[47] but such an opportunity is usually foreclosed in the criminal justice system. It is not possible, for example, to question different juries on how their verdict was reached.[48] It is also not feasible for prosecutors to explain the decisions of their predecessors or other prosecutors.[49]

Because each capital case is a unique amalgam of factual circumstances, the capital adjudication process cannot fairly be reduced to a statistical model. The complex process of capital cases does not lend itself to easy evaluation using statistics.[50] The approach on which the RJA is based has been criticized as "ignor[ing] the realities" of capital litigation:

> The [statistical] approach . . . would take the cases with different results on what are contended to be duplicate facts, where the differences could not be otherwise explained, and conclude that the different result was based on race alone. . . . It not only ignores quantitative differences in cases: looks, age, personality, education, profession, job, clothes, demeanor, and remorse, just to name a few, but it is incapable of measuring qualitative differences of such things as aggravating and mitigating factors. *There are, in fact, no exact duplicates in capital crimes and capital defendants.*[51]

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44. *See, e.g.*, *1994 House Report*, *supra* note 26, at 8; *1989 Senate Hearings*, *supra* note 6, at 975 (statement of Sen. Kennedy); *see also* 140 CONG. REC. H2532 (daily ed. Apr. 20, 1994) (remarks of Majority Leader Gephardt).

45. *See McCleskey*, 481 U.S. at 295 n.14.

46. *Id.* (emphasis added) (citation omitted).

47. *Id.* at 296.

48. *Id.*

49. *Id.*

50. *McCleskey*, 753 F.2d at 893 (en banc) (noting "generalized statistical studies are of little use in deciding whether a particular defendant has been unconstitutionally sentenced to death").

51. *Id.* at 899 (en banc) (emphasis added).

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The outcome of each case represents the product of the assessment of numerous variables, including "the strength of the available evidence" and "[w]itness availability, credibility, and memory."[52] The California Supreme Court has recently stressed the individualized focus of capital litigation:

> Once a capital defendant is determined to be within the narrowed class of death-eligible defendants, the sentencing body must decide whether to impose a sentence of death or of life imprisonment. Of importance in this penalty selection process is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime. Thus, consideration by the sentencer of any mitigating aspect of the character and record of the individual offender and the circumstances of the particular offense is a constitutionally indispensable part of the process of inflicting the penalty of death.[53]

The U.S. Supreme Court has further noted the difficulty of relying on statistical evidence to explain the decisions of prosecutors, as distinguished from decisions of a jury commissioner or employer:

> Since decisions whether to prosecute and what to charge necessarily are individualized and involve infinite factual variations, coordination among district attorney offices across a State would be relatively meaningless. Thus, any inference from statewide statistics to a prosecutorial "policy" is of doubtful relevance.[54]

Finally, there is an element of discretion in all criminal cases which cannot be quantified. No statistical study can quantify the unique nuances in evidence and inflections in witness' voices in each case which may have influenced a final sentencing decision. No one can place a numerical value on the amount of remorse actually shown by a defendant. It is not possible to quantify other factors which are often considered in a capital case, including "[w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance,"[55] or "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."[56]

Quite simply, whether racism may have infected a *particular* case cannot be inferred from statistics from any *group* of cases. The fundamental premise of the RJA is unsound and unworkable.[57]

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52. *McCleskey*, 481 U.S. at 307 n.28.

53. People v. Bacigalupo, 862 P.2d 808, 812 (Cal. 1993) (emphasis in original) (citations and internal quotation marks omitted), *cert. denied*, 114 S. Ct. 2782 (1994).

54. *McCleskey*, 481 U.S. at 295 n.15.

55. CAL. PENAL CODE § 190.3(d) (West 1988).

56. *Id.* § 190.3(k).

57. A recent article, surveying several statistical studies, noted the complexity in quantifying criminal justice variables:

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This fundamental flaw is exacerbated by another defect of the RJA which fails to provide any statutory standard of what constitutes a statistical disparity sufficient to warrant relief under the Act. The RJA fails to provide any workable standards. Even if it could, the central problem of the inappropriate use of statistics in criminal cases would remain.

C. Constitutional Cloud Over Validity of the RJA

Several novel constitutional questions would likely be litigated if the RJA is enacted. Some serious issues are raised that the RJA violates the Eighth Amendment. In order for a jurisdiction's capital punishment system to satisfy the Eighth Amendment, discretion in the decision making process is required. Prosecutors, as well as juries, must have discretion. It is "essential to a humane and fair system of criminal justice."[58] A decision maker with discretion is one with the power to exercise leniency—a substantial benefit to a criminal defendant. Therefore, even though discretion affords substantial latitude to the decision maker, a "capital-punishment system that did not allow for discretionary acts of leniency 'would be totally alien to our notions of criminal justice.'"[59]

The RJA imposes a Hobson's choice on jurisdictions. In order to meet its burden of proof, under section 2921(e), the government either is required to show it has sought the death penalty in *all* cases which fit the statutory criteria or must submit to severe limitation in the type of evidence it is permitted to present in the defense of its own death penalty. The first alternative would directly violate the Eighth Amendment by requiring the abandonment of all discretion in the charging process. The second alternative would be so burdensome that it would place extreme pressure on a government to abandon discretion in capital charging and, as such, the RJA's second alternative indirectly violates the Eighth Amendment.

The prospect of invalidating one person's death sentence based upon another person's showing under the RJA also raises Eighth Amendment concerns that the death penalty is being "imposed under sentencing procedures that create[] a substantial risk that it would be inflicted in an arbitrary and capricious manner."[60] Assume, for example, that persons *A* and *B* have identical cases (as defined under the RJA) and are equally deserving of the death penalty. Neither

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Other critics point out that key legal variables, such as prior record and seriousness of offense, have been difficult for researchers to document and even more difficult to quantify. Other legally relevant factors, such as degree of criminal intent, frequently have been overlooked. The fundamental problem with studies of the relationship between race and the death penalty is that they fail to establish convincing causal explanations. In fact, most studies demonstrate that numerous variables influence capital sentencing. For all we know, many other influential variables may be as yet untested. Some may be unquantifiable. On the basis of the available research, one simply cannot conclude that racial discrepancies are a function of racism.

Stanley Rothman & Steven Powers, *Execution By Quota?*, PUB. INTEREST, Summer 1994, at 3, 8.

58. *McCleskey*, 481 U.S. at 313-14 n.37.

59. *Id.* at 312 (quoting Gregg v. Georgia, 428 U.S. 153, 200 n.50 (1976)).

60. Gregg v. Georgia, 428 U.S. 153, 188 (1976) (plurality opinion).

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produces the slightest evidence that racial factors influenced their death sentences. *A*, who comes from a jurisdiction where there is a "statistical disparity" under the RJA, is not executed. *B*, instead, happens to come from a jurisdiction where there is no "statistical disparity" and is executed. All other factors being the same in the case of *A* and *B* (as the RJA assumes), this circumstance fails to furnish a "meaningful basis for distinguishing the . . . cases in which [the death penalty] is imposed from the . . . cases in which it is not."[61] Under the RJA, *A* simply was fortunate to point to the statistical disparity, and *B* was not, although both *A* and *B* were equally deserving of the death penalty. *B*, knowing of *A*, might feel that the imposition of the death penalty is "cruel and unusual in the same way that being struck by lightning is cruel and unusual . . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."[62]

The House Report suggests that the RJA is premised on Congress' power to enforce the Fourteenth Amendment.[63] While Congress certainly has express authority to enact legislation pursuant to this provision, it is an open issue whether this provision may authorize the specific remedy proposed in the RJA. In question is the ability of Congress to adopt standards which interfere with the sovereign ability of the States to establish criminal justice systems and penalties.[64] Section 5 of the Fourteenth Amendment provides a means for Congress to apply federal constitutional principles to the States. At issue here is whether the RJA fulfills or embodies any federal constitutional principles, and would thus be enforceable through section 5 of the Fourteenth Amendment. If section 5 is as broad as the proponents of the RJA suggest, there is virtually no limit to the ability of the federal government to intrude into the state criminal justice system.

Under the Tenth Amendment,[65] Congress cannot convert the States into instrumentalities or agents of the national government to impose new federal regulatory standards, particularly in matters concerning a state criminal justice system, because the amendment involves a fundamental state sovereign right. Analogously, the U.S. Supreme Court recognized that this sovereign power of the States to enact substantive criminal laws is denied and frustrated when

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61. *Id.* (citation and quotation marks omitted).

62. *Id.* (citation and quotation marks omitted).

63. U.S. CONST. amend. XIV, § 5; *see 1994 House Report*, *supra* note 26, at 4.

64. Within our federal system of government, the States are reserved sovereign powers. One well-settled fundamental core attribute of this sovereignty concerns the enforcement of criminal laws. By tradition and history, the primary obligation for defining and enforcing criminal laws in our federalism form of government resides with the States. *See* Engle v. Isaac, 456 U.S. 107, 128 (1982); Palmore v. United States, 411 U.S. 389, 402 (1973); *cf.* Younger v. Harris, 401 U.S. 37 (1971).

65. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend X. At minimum, a constitutional cloud is raised by the Tenth Amendment issue. The Tenth Amendment cases have not established bright lines concerning the division of authority in our federal system. *See, e.g.*, New York v. United States, 112 S. Ct. 2408, 2420 (1992) ("The Court's jurisprudence in this area has traveled an unsteady path.").

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federal habeas claims are pending.[66] The RJA would certainly affect, if not abolish, the ability of the States to enforce the death penalty, notwithstanding that the Eighth Amendment and other federal constitutional standards have been satisfied. Under the RJA, an otherwise constitutionally valid state court sentence could be modified based on a statistical claim permitted under the Act. In this manner, the RJA presents serious questions concerning the ability of the federal government to interfere with state court criminal processes which already comport with federal constitutional standards.

These novel and complex constitutional issues would have to be resolved if the RJA is ever enacted. At minimum, the legislation, if enacted, would likely lie under a constitutional cloud pending resolution of these issues by the U.S. Supreme Court.

IV. OTHER RAMIFICATIONS OF THE RJA

A. Abolishment of Capital Punishment

For those members of Congress who oppose the death penalty and are determined to see it abolished, there are two primary courses Congress might try to prohibit the States from enforcing the death penalty. The first is direct: Pursuit of a constitutional amendment expressly banning capital punishment, an effort that would require ratification by three-fourths of the States.[67] Not only is the attainment of such a super-majority deliberately difficult under our Constitution, but the states clearly would not repeal the death penalty. Thirty-seven states have affirmatively enacted statutes to provide for the death penalty for certain heinous offenses.[68]

The second way to abolish the death penalty is less direct but no less effective: Enacting the RJA under the guise of prohibiting the imposition or implementation of death sentences in a racially discriminatory manner. In light of existing federal and state protections against race bias, and the RJA's flawed statistical premise, it is clear that the RJA has nothing to do with curbing discrimination and everything to do with abolishing the death penalty. For at least four reasons, the RJA would severely hamper the ability of the States and Federal government to enforce the death penalty where otherwise warranted.

First, protracted statistical litigation would certainly paralyze enforcement of the death penalty. Section 2921(e) of the RJA provides that "the death sentence [in any particular case] may not be carried out unless the government

66. *See generally* McCleskey v. Zant, 499 U.S. 467, 491 (1991); Teague v. Lane, 489 U.S. 288, 309 (1989) (plurality opinion); Stone v. Powell, 428 U.S. 465, 491 n.31 (1976).

67. U.S. CONST. art. V. The Fifth Amendment to the U.S. Constitution discusses capital crimes.

68. These states include: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming.

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rebuts" the statistical inference. In order to meet the flawed statistical premise of the RJA, any State would have a mammoth litigation burden to respond to the mere threshold statistical showing of a capital defendant which triggers the RJA.

Second, the statistical claims would substantially increase the cost of capital litigation on at least two levels: (a) the government response to the statistical claim in a specific case; (b) the government duty to collect and make publicly available the data which would furnish the basis for an RJA claim.

Third, enforcement of an otherwise valid death sentence would expectedly be delayed through protracted litigation on the new statistical claim. In 1989, the Powell Committee found that current capital litigation already suffers from unnecessary delay and repetitious litigation through the federal habeas corpus process.[69] The RJA would establish a new claim and opportunity for capital defendants which has nothing to do with the merits of their case, resulting in more delay and litigation. For example, in the *Robert Alton Harris* case, Harris attempted to bring statistical claims of race, age and gender discrimination which were denied under *McCleskey*, a case the RJA would overturn.[70] If the RJA had been in effect during the *Harris* case, there likely would have been more procedural delays in his case and he may have escaped execution based solely upon a court's acceptance of his unreliable statistical claims.

Fourth, the purported opportunity for the government to rebut the statistical inference is illusory. The bill language and House Report expressly disallow the government from offering a rebuttal based on evidence that "it did not intend to discriminate or that the cases in which death was imposed fit the statutory criteria for imposition of the death sentence" unless the government "can show that the death penalty was sought in all cases fitting the statutory criteria for imposition of the death penalty."[71] Ultimately, the government would need to offer its own statistical experts and the unending statistical litigation would resume.

Consequently, enactment of the RJA would essentially veto the decisions of those thirty-seven states, including California, which have chosen to adopt constitutional death penalty procedures. As can be seen, the greatest impact from enactment of the RJA would be the effective abolishment of capital punishment.[72]

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69. *See* Report and Proposal of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Judicial Conference of the United States (Aug. 23, 1989).

70. *See infra* Section IV.C.1 (discussing Harris' statistical claims).

71. H.R. 4092, 103d Cong., 2d Sess. § 2921(e) (1994). *But see supra* Section III.C (concluding that a death penalty sought in all death eligible cases would violate the Eighth Amendment).

72. Numerous members of Congress and others have also noted that the RJA would effectively abolish the death penalty. *See, e.g.*, 136 CONG. REC. S6884 (daily ed. May 24, 1990) (remarks of Sen. Graham); *id.* at S6887 (remarks of Sen. Thurmond); *id.* at S6895 (remarks of Sen. Humphrey) (referring to joint letter of 23 state attorneys general); *id.* at S6908 (remarks of Sen. Dixon); 136 CONG. REC. H9006-07 (daily ed. Oct. 5, 1990) (remarks of Rep. Douglas); *id.* (referring to letter from U.S. Attorney General); 137 CONG. REC. S8282 (daily ed. June 20, 1991) (remarks of Sen. Graham); *id.* at S8293-94 (remarks of Sen. Grassley); *id.* at S8298 (remarks of Sen. Hatch) (referring to joint letter of 25 state attorneys general); 137 CONG. REC. H8139 (daily ed. Oct. 22, 1991) (remarks of Rep. James); 140 CONG. REC. S9543 (daily ed. July 22, 1994) (remarks of Sen. Shelby); 140 CONG. REC. H2531 (daily ed. Apr. 20, 1994) (remarks of Rep. Goodlatte); 140 CONG. REC. H4619 (daily ed. June 16, 1994) (remarks of Rep. McCollum) (referring to position of 38 state attorneys general); *id.* at H4620 (remarks of Rep. Sensenbrenner); *id.* (remarks of Rep. Schiff); *id.* at H4622 (daily ed.

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B. Overturning U.S. Supreme Court Precedent

The RJA would overturn an important U.S. Supreme Court decision which rejected the use of statistics from unrelated cases to establish racial discrimination in the imposition of the death penalty.[73] In *McCleskey v. Kemp*,[74] the U.S. Supreme Court held that a defendant who contests his capital sentence on the basis of racial discrimination is required to prove that the decision makers in his *own* case acted with discriminatory *purposes*.[75] The Court rejected claims that statistical showings of racially discriminatory patterns in the application of capital punishment proves the death penalty is being administered in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution.[76]

The RJA completely overturns the *McCleskey v. Kemp* holding by specifically permitting the defendant to offer mere statistics to raise an inference that race was a factor in decisions to seek or to impose the sentence of death and by elevating that mere statistical display to a legal demonstration of a constitutionally unacceptable risk of racial prejudice influencing capital sentencing decisions.[77] In other words, statistics alone may make it unlawful to impose the death penalty, even in the absence of any prejudicial constitutional error in the trial of the particular capital case before the court. In direct contrast to the *McCleskey* decision, the House Report notes that "[i]t shall not be necessary to show discriminatory intent, motive or purpose on the part of an individual or institution."[78]

Further, by allowing an individual to claim discrimination without demonstrating intent by a particular actor or group of actors, the RJA overturns long established Fourteenth Amendment law, which is premised on the basic principle that a defendant who alleges an equal protection violation has the burden of proving "the existence of purposeful discrimination."[79] Courts have consistently held that "[a] showing of a *disproportionate impact alone is not sufficient to prove discriminatory intent* unless no other reasonable inference can be drawn."[80]

In a significant departure from this constitutional case law, the RJA effectively imposes a strict liability standard on the prosecution. The showing of an apparent statistical disparity imposes an illusory rebuttal burden on the prosecution. In the past, such a strict liability standard has been reserved for

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June 16, 1994) (remarks of Rep. McCollum) (referring to letter from Los Angeles District Attorney Gil Garcetti).

73. This point has been repeatedly made during congressional debates on the RJA. *See, e.g.*, 140 CONG. REC. H2529 (daily ed. Apr. 20, 1994) (remarks of Rep. McCollum).

74. 481 U.S. 279 (1987).

75. *Id.* at 298-99, 305-08.

76. *Id.*

77. *Id.* at 308-09.

78. *1994 House Report*, *supra* note 26, at 8.

79. Whitus v. Georgia, 385 U.S. 545, 550 (1967) (citation omitted); *see also* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265 (1977).

80. McCleskey v. Kemp, 753 F.2d 877, 892 (11th Cir. 1985) (en banc) (emphasis added) (citing *Arlington Heights*, 429 U.S. at 264-66), *aff'd on other grounds*, 481 U.S. 279 (1987).

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extreme circumstances, such as when the prosecution is held accountable for suppression or destruction of evidence regardless of good faith or bad faith or intent.[81] However, even *Brady* claims are fact specific, focusing on what transpired in the particular case and not in other unrelated cases. The RJA therefore not only overturns *McCleskey*, but also imposes a new strict liability standard which has never before been applied in criminal cases.

C. Costly and Protracted Delay: California's Instructive Experience

In at least two cases, the State of California has litigated statistical claims similar to those which would be permitted under the RJA. This experience highlights the tremendous cost and burden which would be imposed on the States if the RJA were enacted.

1. The *Robert Alton Harris* Case

The *Robert Alton Harris* case shows the broad potential application of the RJA. Harris, who was executed in April 1992, murdered two teenage boys near San Diego on July 5, 1978. Harris, who confessed at least seven times to murdering the teenagers and who was caucasian, had asserted that the California death penalty was administered in a discriminatory manner because his victims were caucasian. This statistical showing was ultimately rejected in federal court in light of U.S. Supreme Court precedent.[82] The RJA would authorize individuals such as Harris to bring similar statistical claims.[83]

2. The *Earl Lloyd Jackson* Case

A statistical claim similar to the RJA was also asserted in 1984 in the *In re Jackson* case. Jackson was convicted and sentenced to death for his involvement in the brutal beatings and murders of two elderly widows (an 81-year-old and a 90-year-old) during two separate burglaries in Long Beach in 1977. Jackson ultimately admitted being involved in the crimes and boasted to others about his role in the murders.[84]

Because the issues in the California *Jackson* case were closely related to those presented in the U.S. Supreme Court *McCleskey v. Kemp* case, then-California Attorney General John K. Van de Kamp and then-Los Angeles District Attorney Ira Reiner filed an amicus brief in the *McCleskey* case. They

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81. *See* Brady v. Maryland, 373 U.S. 83, 87-88 (1963).

82. Harris v. Pulley, 885 F.2d 1354, 1373-77 (9th Cir. 1988), *cert. denied*, 493 U.S. 1051 (1990).

83. Harris also attempted to bring statistical claims alleging age and gender discrimination, which were also rejected. *Harris*, 885 F.2d at 1375. This shows the possible future extension of the RJA if its statistical premise is adopted, as others have recognized. *See, e.g.*, *McCleskey*, 481 U.S. at 317 (noting "there is no logical reason that such a [statistical] claim [if authorized] need be limited to racial or sexual bias").

84. *See* In re Earl Lloyd Jackson, 835 P.2d 371 (Cal. 1992), *cert. denied*, 113 S.Ct. 2419 (1993); People v. Jackson, 618 P.2d 149 (Cal. 1980), *cert. denied*, 450 U.S. 1035 (1981).

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argued, among other things, the inappropriateness of using statistics to establish a prima facie case of race discrimination in the imposition of the death penalty.

In 1984, the California Supreme Court ordered that an evidentiary hearing should be held on Jackson's habeas claim that the death penalty in California was being discriminatorily imposed on the basis of the defendant's race, the victim's race and the gender of the defendant. Preparation by both sides for the court-ordered evidentiary hearing was well into its third year when the U.S. Supreme Court in *McCleskey v. Kemp* rejected such statistical claims, and the California Supreme Court vacated its earlier evidentiary hearing order. Had the order not been vacated, preparations would have continued for at least another year. Ultimately, the State taxpayers were required to pay for more than $1,000,000 in costs solely for the prosecution's preparation for the discrimination claim in the case. The costs to the taxpayers for the defense are unknown.

By ordering an evidentiary hearing into Jackson's claim, the California Supreme Court in effect found he had made a prima facie case of discrimination with a rudimentary statistical analysis of the State's homicides. Under the RJA, a defendant is not even required to make a prima facie case. All a defendant has to do is raise an "inference" that race was the basis of a death sentence; the State then bears the burden of proving that nonracial factors explain the inference. In Jackson's case, however, the prima facie showing was merely the first step for him. Jackson then had the burden of proving that it was more likely than not that the death penalty was being imposed discriminatorily.

Upon issuance of the order for an evidentiary hearing, Jackson requested a virtual mountain of statewide homicide data from the State. Much of the data had never been collected before and thousands of homicide files in California were reviewed not only by county clerks but also district attorneys to obtain this data. The accuracy of the data collected became suspect, however, when a recheck of 250 case files in Los Angeles County revealed a greater than fifty percent error rate. There is no assurance under the RJA that the data collected would be accurate. Experience with data collection shows that human error is inevitable and errors and omissions can therefore be expected to occur.

The California Attorney General's Office and the Los Angeles County District Attorney's Office created a task force to marshall the State's efforts in *Jackson*. Three statistical experts were hired. What became evident was that the same information could be treated in a number of different ways by the prosecution and Jackson's attorneys, leading to different statistical conclusions. Under the provisions of the RJA, however, the only figures likely to be attacked would be the State's since the State carries the burden of proof once an inference is made. The more errors and omissions the defendant can find in the collected data, the more the defendant can attack the statistics based on that data.

As noted, the *Jackson* evidentiary hearing never took place after the United States Supreme Court ruled in *McCleskey v. Kemp*. While a portion of the time and cost in the *Jackson* case was related to gathering the data, and might not be repeated in each case under the provisions of the RJA, an unavoidable conclusion

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from our department's experience in *In re Jackson* is that the overall cost to the public of collecting the required data and litigating RJA claims in every capital case would be astronomical and would effectively abolish capital punishment.

D. Prospectively and Inappropriately Injecting Race Consciousness into the Capital Decision Making Process and Making No Contribution to Preventing Race Bias Over Current Law Protections

Any racial bias in our criminal justice system is intolerable. Capital case decisions are supposed to be race neutral. Current federal and state law contain many protections against race bias in our criminal justice system.[85] In addition to these standards, many prosecutor offices have adopted additional procedures to protect against race bias. For example, the Los Angeles District Attorney's Office has established a general policy of redacting any information concerning the race of the defendant or victim in the capital charging process.

In stark contrast, the RJA has nothing to do with promoting racial justice; indeed, the measure would actually inject capital charging decisions with racial factors by encouraging prosecutors to achieve a statistical "balance" that is unrelated to the attainment of justice. In short, the RJA could erect a racial quota system for capital punishment.[86] Even if a defendant clearly meets the criteria for a death penalty offense, the RJA would add a new consideration based on statistics to be weighed in every capital case. Under the RJA, race would play a greater, not lesser, role in determining who does and does not receive the death penalty.[87]

E. Disregard of Existing Protections Against Race Bias

Each capital case involves numerous individual actors and a myriad of factors unique to each offense. Indeed, as a matter of federal constitutional law, a capital sentencing process is an "individualized" process that focuses on the circumstances of the offense and the offender. Because of numerous actors and factors involved no two capital cases are alike.

As discussed below, the RJA disregards existing constitutional protections against race bias. The proponents of the RJA demonstrate a fundamental mistrust of our judicial system. These aspersions are not simply limited to

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85. *See infra* Section IV.E.

86. *1991 House Hearings*, *supra* note 17, at 156 (statement of Andrew G. McBride, Associate Deputy Attorney General, U.S. Dep't of Justice) (noting the RJA "would effectively require a racial quota system for the imposition of the death penalty, not only at the federal level but also for all states").

87. Congressman Goodlatte recently made this point:

> [T]he Racial Justice Act makes the race of a defendant or the victims the most important factor in capital sentencing decisions by creating a system of statistically proportional justice where the penalty a defendant receives would be based on that defendant's race or the race of his or her victim. . . . [A] prosecutor should not be forced to consider race when deciding whether to go for a capital sentence.

140 CONG. REC. H2531 (daily ed. Apr. 20, 1994).

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enforcement of the death penalty, but really extend to the ability of our entire system of justice to determine questions of guilt and impose sentences fairly. Under the RJA, even if the defendants took full advantage of the specific procedural protections described below, they may still present a statistical claim of discrimination in their cases. Furthermore, they need not even *prove* that there was any discrimination in their case, as would be required under current law!

1. General Overview of a Capital Case

In California, suspected murderers cannot be considered for the ultimate penalty unless the prosecutor or grand jury chooses to charge the suspect with first degree murder and a "special circumstance."[88] A "special circumstance" is a particular fact about the defendant or the crime which renders the defendant eligible for the death penalty.[89] California law limits the availability of the death penalty to cases involving the most heinous murders.

The prosecutor must first determine whether a murder case should be charged as a capital crime. This initial step often entails several layers of review and consideration.[90] Of course, as the U.S. Supreme Court has recognized, "Prosecutorial decisions necessarily involve both judgmental and factual decisions that vary from case to case," but "[d]iscretion in the criminal justice system offers substantial benefits to the criminal defendant."[91] The Court has also held, however, that "the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary

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88. CAL. PENAL CODE § 190.2 (West 1988).

89. *See, e.g.*, People v. Bacigalupo, 862 P.2d 808, 810 (Cal. 1993), *cert. denied*, 114 S. Ct. 2782 (1994).

90. For example, in the Los Angeles District Attorney's Office, a Special Circumstance Penalty Evaluation Memorandum contains the following information:

> 1. Case name and number, trial deputy's name, court, next court date, defense attorney's name and office address, list of charged offenses;
> 2. A summary of the known facts surrounding the offense and an appraisal of the offense and special circumstances;
> 3. A detailed evaluation of the appropriateness of the death penalty as to the named defendant, including all known information which could be presented as to factors in aggravation or mitigation; and
> 4. The recommendation of the trial deputy's supervisor (or Head Deputy) as to whether or not the death penalty should be sought, taking into account the goals of our criminal prosecution: the protection of society, deterrence of other persons, punishment and rehabilitation. The Memorandum will usually note the trial deputy's recommendation as well.
>
> The Memorandum is reviewed by the Director responsible for the operations of the District Attorney's office in that region of the County where the case will be tried. That Director submits an additional brief memorandum indicating whether he or she agrees with the recommendation of the trial deputy and Head Deputy.
>
> The Memorandum is then received in the office of the Assistant District Attorney and scheduled for discussion by the Special Circumstances Committee, a small group of most of the office's senior administrators. Prior to the scheduled Committee meeting, the defense attorney is advised that he or she may submit material for the Committee's consideration.
>
> If the determination is made that the death penalty will not be sought in a given case, the defense attorney is advised of that fact by letter. An offer is extended to the defendant to enter into a stipulation waiving penalty phase and agreeing to a determination of life without the possibility of parole should the jury find the defendant guilty of the murder and the special circumstances to be true.

91. McCleskey v. Kemp, 481 U.S. 279, 314 n.37, 311 (1987).

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classification."[92]

Before a decision to charge is made, an appraisal of numerous factors is undertaken, including the weight and strength of particular kinds of evidence necessary to the individual case; the credibility of specific witnesses for the particular case; the quality of available forensic evidence which would be necessary for the case; and experience with capital juries in the jurisdiction, to name but a few. It is also well-accepted policy in many prosecutor offices, including the California Attorney General's Office, that defense counsel is advised and furnished an opportunity to submit pertinent mitigating information which is considered before a final decision is made.[93]

After the defendant is charged, the capital case is presented to a jury (or, if both parties agree, to a judge) and is bifurcated into two parts: (1) the guilt phase; and (2) the penalty phase. The bifurcated system guides and channels the exercise of the jury's discretion by focusing the trier of fact on relevant factors and issues and by separating the guilt determination from any sentence.[94] During the guilt phase, the jury must determine whether to convict the defendant of first degree murder and find at least one special circumstance beyond a reasonable doubt.[95] At this stage, the convicted murderer is merely eligible for the death penalty.[96]

In the event a unanimous verdict is obtained, the sentencer must determine during the penalty phase whether death or life imprisonment is an appropriate sentence.[97] During the penalty phase, the prosecution introduces statutorily limited aggravating evidence. The convicted murderers, on the other hand, have a virtually unlimited right to introduce mitigating evidence to convince the sentencer that their lives should be spared. Mitigating circumstances advance the Eighth Amendment "requirement of individualized sentencing in capital cases . . . by allowing the jury to consider all relevant mitigating evidence."[98] The jury may consider "any mitigating circumstances," not those merely enumerated in the statute.[99] For example, California law permits the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."[100]

The juries are carefully instructed on precisely what factors they should consider in imposing the penalty. The unanimous finding of a special circumstance alone does not result in a death sentence, as the trial judge instructs

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92. Wayte v. United States, 470 U.S. 598, 608 (1985) (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)).

93. *See also supra* note 90 (discussing comparable practice in the Los Angeles District Attorney's Office).

94. *See, e.g.*, Zant v. Stephens, 462 U.S. 862, 875 (1983); Gregg v. Georgia, 428 U.S. 153, 191-92, 195 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

95. CAL. PENAL CODE § 190.4 (West 1988).

96. *Id.* § 190.1.

97. *Id.* § 190.3.

98. Blystone v. Pennsylvania, 494 U.S. 299, 307 (1990); *see also Zant*, 462 U.S. at 879; Penry v. Lynaugh, 492 U.S. 302, 327-28 (1989) (noting "the jury must be able to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense").

99. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 604 (1978) (opinion of Burger, C.J.).

100. CAL. PENAL CODE § 190.3(k) (West 1988).

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the jury to determine whether the aggravating circumstances outweigh the mitigating circumstances.[101] The jury must unanimously agree on a sentence of death.[102]

After a California jury weighs this evidence and determines that death is the appropriate punishment, the verdict is independently reviewed by the trial judge.[103] In California, a convicted capital defendant has an automatic right of appeal to the California Supreme Court. This meaningful appellate review of death sentences is recognized as minimizing the risk of arbitrary and capricious sentencing determinations.[104] Although not constitutionally required, many states require proportionality review by a reviewing court, which provides "an additional safeguard against arbitrarily imposed death sentences."[105]

Of course, the convicted murderers also have access to extensive review through the federal habeas corpus process.[106] In many capital cases, such as the *Robert Alton Harris* case, federal habeas review may entail several years of litigation.

2. Additional Protections Against Race Bias

Superimposed on this process, are a series of protections against racial bias.[107] The prosecution cannot consider race in its charging decision.[108] Grand juries must be composed of members who are chosen on race-neutral grounds.[109] A California defendant may file a motion claiming discriminatory prosecution.[110] If racial prejudice in the community makes it unlikely that defendants can receive fair trials, they may seek a change of venue.[111] Jurors must be selected on race-neutral grounds, under federal and California law.[112] Prospective jurors may be questioned about potential racial prejudice.[113] The prosecution is forbidden from invoking race in arguing its case.[114] Finally, defendants may still secure relief

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101. *See, e.g., Blystone*, 494 U.S. at 304-05; Jurek v. Texas, 428 U.S. 262, 271 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); Proffitt v. Florida, 428 U.S. 242, 253 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

102. *See generally* CAL. PENAL CODE § 190.4(a) (West 1988) (discussing penalty hearing procedures).

103. *Id.* § 190.4(e).

104. *See, e.g.*, Zant v. Stephens, 462 U.S. 862, 875, 879-80 (1983); *Proffitt*, 428 U.S. at 258-59; Gregg v. Georgia, 428 U.S. 153, 195, 198 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

105. Pulley v. Harris, 465 U.S. 37, 50 (1984).

106. 28 U.S.C. § 2254 (1988).

107. *See generally* McCleskey v. Kemp, 481 U.S. 279, 309 n.30 (1987); *see also* McCleskey v. Kemp, 753 F.2d 877, 904 (11th Cir. 1985) (en banc) (Tjoflat, J., concurring), *aff'd on other grounds*, 481 U.S. 279 (1987); *1991 House Hearings*, *supra* note 17, at 169-70 (statement of Andrew G. McBride, Associate Deputy Attorney General, U.S. Dep't of Justice) (noting current safeguards against race bias); *1990 House Hearings*, *supra* note 13, at 85-88 (statement of Edward S.G. Dennis, Jr., Assistant Attorney General, Criminal Division, U.S. Dep't of Justice) (same).

108. *See, e.g.*, Wayte v. United States, 470 U.S. 598, 608 (1985).

109. *See, e.g.*, Vasquez v. Hillery, 474 U.S. 254 (1986).

110. People v. Keenan, 758 P.2d 1081, 1098 (Cal. 1988), *cert. denied*, 490 U.S. 1012 (1989); Murguia v. Municipal Court for Bakersfield Judicial Dist., 540 P.2d 44, 48-54 (Cal. 1975).

111. *See* Irwin v. Dowd, 366 U.S. 717 (1961).

112. *See* Batson v. Kentucky, 476 U.S. 79 (1986); People v. Wheeler, 583 P.2d 748 (Cal. 1978).

113. Turner v. Murray, 476 U.S. 28, 36-37 (1986); *see also* Ristaino v. Ross, 424 U.S. 589, 596 (1976).

114. Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974).

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from their convictions if they demonstrate a discriminatory intent in their cases.[115] These existing law protections ensure that prosecutors, judges, and juries act without regard for the race of the defendant or victim, except in those cases in which racial hatred is the motive for the crime.[116]

V. SECTION-BY-SECTION ANALYSIS OF THE RJA

In addition to the principle structural defects, the article highlights a number of implementation and other operational problems with the RJA, which would be the subject of more litigation and delay in capital cases.

A. Section 2921(a): In General

Section 2921(a), reproduced in Appendix A, provides that "[n]o person shall be put to death under color of State or Federal law in the execution of a sentence that was imposed based on race."

Certainly, race as a basis for imposing the death penalty is improper where reliance on that factor is invidious. However, section 2921(a) may also apply to cases where there is a legitimate consideration of racial motivation underlying a murder. Under current U.S. Supreme Court case law, racial motivation may be considered as an aggravating factor for imposing death under the U.S. Constitution. Consequently, section 2921(a) may prohibit States from constitutionally punishing persons who commit murder based on racial hatred (such as Ku Klux Klan lynchings).

In *Barclay v. Florida*, the U.S. Supreme Court reviewed a case where "the racial motive for the murder" was considered by the sentencing authority,[117] and rejected an argument that race hatred could not be considered.[118] California law, like that in other States, provides for a special circumstance where "[t]he victim was intentionally killed because of his or her race, color, nationality, or country of origin."[119] Section 2921(a) might be construed to overturn similar state sentencing provisions.

With regard to section 2921(a), the House Report notes that the RJA "does not purport to bar governmental entities from imposing death sentences."[120] In actuality, the RJA would effectively abolish the death penalty by (1) allowing for a new "quota" claim to be asserted by death row prisoners which cannot be brought under current law; (2) increasing the burden and cost of capital litigation by requiring statistical showings unrelated to the facts of the murder and the character and record of the offender; and (3) imposing unfair burdens on the

115. McCleskey v. Kemp, 481 U.S. 279, 292 (1987).

116. *See* Barclay v. Florida, 463 U.S. 939, 948 (1983).

117. *Id.*

118. *Id.* at 949 ("The United States Constitution does not prohibit a trial judge from taking into account the elements of racial hatred in this murder.").

119. CAL. PENAL CODE § 190.2(a)(16) (West 1988 & Supp. 1995).

120. *1994 House Report*, *supra* note 26, at 6.

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prosecutor to attempt to rebut statistical inferences of racial bias. The RJA would also bar relevant evidence which would otherwise be admissible in state or federal court to rebut an inference of racial discrimination.

B. Section 2921(b): Statistical Inference of Race Bias

Section 2921(b) provides for a statistical "inference that race was the basis of a particular death sentence."[121] This is the critical threshold showing which triggers a shift in the burden of proof to the government under the RJA.[122] For three reasons, this statutory trigger is inappropriate in capital cases. First, as already noted, the statistical premise of the RJA is unsound as the use of statistics from unrelated cases has no legitimate role in determining whether a criminal sentence should be imposed on a particular defendant for the charged offense.[123]

Second, this section of the RJA establishes a minimal threshold showing based simply on circumstantial evidence of disparate impact which is substantially below that required by the U.S. Constitution. This low threshold is highlighted by contrasting the constitutional standards discussed in the *McCleskey* case with those contained in the RJA.

In *McCleskey*, the U.S. Supreme Court held that to establish racial discrimination the defendant "must prove that the decisionmakers in *his* case acted with discriminatory purpose."[124] As the *McCleskey* Court noted:

> Even Professor Baldus does not contend that his statistics *prove* that race enters into any capital sentencing decisions or that race was a factor in McCleskey's particular case. . . . In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.[125]

The House Report notes that "[i]t shall not be necessary to show discriminatory intent, motive or purpose on the part of an individual or institution."[126] The RJA lowers the constitutional standard noted in *McCleskey* to circumstantial evidence

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121. *1994 House Report*, *supra* note 26, at 7.

122. *See 1994 House Report*, *supra* note 26, at 7.

123. *See supra* Section III.B. The *1994 House Report*, *supra* note 26, at 7, states that "the death penalty defendant's case will usually consist of a statistical analysis that accounts for numerous relevant and statutorily valid variables."

124. McCleskey v. Kemp, 481 U.S. 279, 292 (1987) (emphasis in original); *see also* McCleskey v. Zant, 580 F. Supp. 338, 349-50 (N.D. Ga. 1984) ("Disparate impact alone is insufficient to establish a violation of the Fourteenth Amendment unless the evidence of disparate impact is so strong that the only permissible inference is one of intentional discrimination. . . . Statistical evidence, of course, is nothing but a form of circumstantial evidence."), *aff'd in part and rev'd in part sub nom.*, McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc), *aff'd on other grounds*, 481 U.S. 279 (1987).

125. *McCleskey*, 481 U.S. at 308, 313 (emphasis in original).

126. *1994 House Report*, *supra* note 26, at 7.

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of a mere showing of a statistical disparity. To shift the burden of proof to the government under the RJA, the defendant need only present evidence that race was a statistically significant factor in decisions to seek or to impose the sentence of death.[127]

Third, the language of the RJA raises a host of issues which would be the subject of litigation and which further demonstrate the problematic nature of statistical-showings legislation like the RJA, as discussed below. This review of the legislation also shows that the RJA allows the capital defendant essentially to go "statistics shopping." For example, the RJA permits the capital defendant to decide (a) whether to base the statistical claim on the decisions of the prosecutor, jury or judge; (b) which jurisdiction the claim should be predicated on (*e.g.*, state, county, or region); and (c) what time period would be used for the claim (*e.g.*, whether all similar death penalty claims from the inception of capital punishment, or some other selective time line would be used).

1. What Is "Statistically Significant"?

It is not clear how the terms "statistically significant" are intended to be applied under the legislation.[128] Among statisticians, the term "statistically significant" refers to a process which establishes that data are "significant" by performing mathematical tests.[129] Since the term is used, in this case, in a proposed federal statute rather than in a statistical study, it is not clear what definition should apply. Capital defendants would likely argue that mathematical "disparities" which might be otherwise considered legally insignificant (such as a disparity of less than five percent) would satisfy the language in the legislation. Without any statutory definitions, this issue would be the subject of dispute and varying interpretations among federal courts around the country.

Further complicating matters, the House Report states that the statistical disparity must be shown "in cases similar to the case under consideration."[130] It is not clear how "similar" cases would be ascertained. What "apples" are being compared to what "apples" or "oranges"? For example, how does one compare

127. *1990 House Hearings*, *supra* note 13, at 99 (statement of Edward S.G. Dennis, Jr., Assistant Attorney General, Criminal Division, U.S. Dep't of Justice) (Under the RJA, "a bare statistical disparity among any of several broadly defined offender and victim classes is a sufficient showing. This places a burden on the government of attempting to divine which of the innumerable factors that affect individualized charging and sentencing decisions justify any statistical disparity.").

128. Section 2921(b) refers to a "statistically significant factor in decisions to seek or to impose the sentence of death." Section 2921(c) also refers to a showing that the death sentence is "being imposed significantly more frequently." Finally, the House Report notes a requirement that the "death penalty defendant . . . produce a sophisticated showing of significant racial disparity." *1994 House Report*, *supra* note 26, at 7. It is uncertain what specific duty this would impose on the capital defendant.

129. *McCleskey*, 580 F. Supp. at 350. These tests assess the strength of the evidence against the null hypothesis (the statement being tested in a test of significance) in terms of probability. If the term used in the RJA does refer to data subjected to mathematical tests, it should be noted that routine aggregate data supplied by "public officials" is usually not subjected to such tests. Moreover, courts have noted that the evidentiary use of statistics in courtrooms must satisfy independent legal standards, notwithstanding the acceptance of statistical conventions among social scientists. *Id.*

130. *1994 House Report*, *supra* note 26, at 7.

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the facts, defendant, and victims in the *Robert Alton Harris* case with other robbery murder capital cases, such as that of Warren McCleskey. How does one compare serial murders such as those committed by John Wayne Gacy with other capital cases? The statistical premise of the RJA would require such comparisons to be made and such comparisons may be dispositive on whether a defendant meets his or her initial burden to present an RJA claim.[131]

The House Report also notes that "Capital offenses are offenses that are eligible for the death penalty under the law of the relevant jurisdiction."[132] Under the RJA, the House Report continues, "the disparity must be 'significant' after taking into account the impact of such pertinent, non-racial variables as the statutory aggravating circumstances of the cases being compared."[133] Section 2921(d) suggests that the comparison of similar cases shall be confined to cases involving the same statutory aggravating factors. This assumes, however, that all burglary murder cases, for example, can be compared, even though there would always be factual differences in each case.[134] The use of aggravating circumstances further demonstrates the inappropriateness and complexity in developing quantitative comparisons. Some states, such as Texas, do not have a formal list of aggravating circumstances, as they are commonly known.[135] California law includes special circumstances (which make a person eligible for the death penalty) and penalty phase aggravating factors.[136]

Curiously, while the RJA attempts to equate cases using common aggravating factors, it omits any comparison based on mitigating factors, notwithstanding the central role mitigating factors serve in a capital case.[137] Even assuming *arguendo* that cases with similar aggravating factors could be compared, capital cases may be distinguishable based upon different mitigating factors. The use of mitigating factors would introduce an additional dimension of complexity.

These examples reiterate the questionable utility of relying on statistics to determine whether a particular capital defendant should receive the death penalty.

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131. As another official described this flaw:

> [The RJA] does not recognize the need to consider the effect of non-statutory aggravating factors, the effect of statutory and non-statutory mitigating factors, and the effect of other factors (such as strength of the new evidence) which influence the likelihood of capital convictions and sentences. Findings of disparities supporting an inference of "discrimination" could regularly be expected under standards that fail to require consideration of so many relevant matters.

1991 House Hearings, *supra* note 17, at 166-67 (statement of Andrew G. McBride, Associate Deputy Attorney General, U.S. Dep't of Justice).

132. *1994 House Report*, *supra* note 26, at 7.

133. *1994 House Report*, *supra* note 26, at 8.

134. While the House Report does cite to three cases concerning significant statistical disparity, this issue would likely have to be clarified in litigation. *See 1994 House Report*, *supra* note 26, at 8. None of these cases shed light on the novel statistical questions presented under the RJA, including how statutory aggravating factors would be taken into account or how similar capital cases are identified.

135. *See, e.g.*, Jurek v. Texas, 428 U.S. 262, 270 (1976) (plurality opinion).

136. CAL. PENAL CODE §§ 190.2, 190.3 (West 1988).

137. *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302, 328 (1989).

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2. Are Race Designations Accurate?

The RJA pertains to the imposition of the death penalty based on race. A viable RJA claim turns on the ability of the defendant to establish a "statistically significant" racial disparity. This supposition depends on the assumption that race designations are always accurate and are not subject to manipulation.

While it is generally assumed that race is an easily observed factor, the subjectivity of the classification and labeling process must be considered in the analysis of aggregate race data. As commonly used, race refers to large populations which share certain similar physical characteristics such as skin color. Because these physical characteristics can vary greatly within groups as well as between groups, determination of race is frequently, by necessity, subjective. In the criminal justice process, race may also be the determination of other persons such as investigators or booking officers.[138] Most commonly, self-identification of race is often used in the labeling process, but a murder victim cannot self-identify himself or herself.

A "statistical disparity" within the meaning of the RJA may therefore hinge on the race designation assigned to a defendant or victim not only in the specific case in question, but also in other unrelated cases on which an RJA claim is based. The RJA fails to take into account these subjective race designations or the serious potential to manipulate these designations. Moreover, how would "mixed" race defendants or victims be considered under the RJA?[139] For instance, would a defendant or victim who was less than fifty percent, twenty percent, or five percent of one particular race qualify for membership in that race for purposes of the RJA? Under the RJA, how far back may an individual trace his or her family lineage to establish membership in a race? Further, would an ethnic group, such as Hispanic, qualify as a "race" under the RJA? If so, how would an Anglo woman with an Hispanic last name, or an Hispanic woman with an Anglo last name, be considered? These examples demonstrate once again how the RJA would impermissibly inject race consciousness into the capital decision making process. Litigation over these issues would also divert the focus away from the facts of the crime and the character and record of the defendant.

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138. The RJA also does not specify how race designations are to be made for defendants and victims. By comparison, the U.S. Census Bureau permits self-declarations on the race of the individual. Would the RJA permit race to be made in a similar manner? The RJA makes it unclear who would make this potentially subjective determination.

139. These concerns were also noted during debate in the 103rd Congress. *See* 140 CONG. REC. H4621 (daily ed. June 16, 1994) (remarks of Minority Leader Whip Gingrich).

This issue has arisen in other contexts, including the census. For example, in recent federal hearings on census classifications, some individuals advocated "mixed" race and ethnicity classifications, contending that the four racial designations (white, black, Asian/Pacific Islander and American-Indian/Eskimo/Aleut) were inadequate. *See Speakers Voice Varied Views on Race Classification*, SACRAMENTO BEE, July 15, 1994, at B4.

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3. What Capital Decisions Are Being Considered?

The statistical claim presented under the RJA may be based on the decision of several actors in a capital case, including the prosecutor, jury and judge (many of whom may have vanished from the scene). Section 2921(b) provides that the statistical inference may be based upon "*decisions to seek or to impose* the sentence of death."[140]

The RJA would permit statistical claims to focus on a number of different decisions by several different actors, in an undefined jurisdiction over an undefined period of time, including:

- The decisions by prosecutors whether to pursue a homicide case as a capital case;
- The decisions by judges whether to let the case be tried as a capital case;
- The decisions by juries whether the defendant is guilty of a capital crime;
- The decisions by juries whether the defendant convicted of a capital crime should be sentenced to death;
- The decisions of judges whether to follow the recommendation of the jury to sentence the defendant to death.

Each statistical study of a decision making event would necessitate the comparison of all cases which reached that decision making point. For example, in order to analyze the decisions made by prosecutors whether to pursue a homicide case as a capital one, *all* homicide cases in whatever jurisdiction the defendant selects, which could arguably have been charged as a capital case, would have to be identified and made a part of the study.

Consequently, a capital defendant may choose to base the statistical claim upon the charging decisions or the jury verdicts or judge's decision not to grant a new trial, among other decisions made in the case.[141] Again, this demonstrates how the RJA would invite statistical claims to be presented and shows how easy it would be for a defendant to "shop" around to present such a claim.

4. What Is The "Jurisdiction In Question"?

The legislation, under section 2921(b), permits a statistical showing of discrimination "in the jurisdiction in question." That phrase is not defined.[142] It

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140. *1994 House Report*, *supra* note 26 (emphasis added). The House Report also refers to "the governmental subdivision where the *decision to indict and charge* the defendant was made." *Id.* at 8 (emphasis added). The 1994 House Report further suggests, without any support, that "[t]he main source of disparity appears to be prosecutorial decisions, the area where meaningful change can be achieved most readily." *Id.* at 6.

141. It is not clear whether similar cases which were plea bargained or never charged would also be included in the pool for the statistical comparison.

142. Section 2921(c) also discusses "the jurisdiction in question." The House Report refers to the "relevant jurisdiction" and notes the "evidence must be . . . specific to the jurisdiction that imposed the death sentence." *1994 House Report*, *supra* note 26, at 7. The House Report also mentions the "governmental subdivision"

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is not clear whether the proper jurisdiction would be the state which defined the offense in the penal code, the state where the trial court resided, the law enforcement jurisdiction where the offense occurred, or some other regional demarcation. Will some defendants argue that the RJA contemplates the jurisdiction to be the jurisdiction of a federal district court on habeas review? These unanswered issues will furnish further opportunities for a capital defendant to go "statistics shopping" to present the RJA claim.[143]

Other problems are introduced by this jurisdiction question. For example, if the "jurisdiction" intended under the RJA is the county, how will venue changes be treated? Assume that the defendant could not make a showing with respect to charging for the county which brought charges, but can do so for the county where the trial took place. Would the RJA permit the defendant who failed to make a statistical showing in his selected jurisdiction nevertheless attempt to do so again with another jurisdiction?

Additionally, in some jurisdictions, the pool of available data may be so small that no reliable statistical inferences may be established.

5. What Time Period Applies For Comparing Cases?

There is no guidance in the RJA on what time period would be involved in submitting the statistical claim. For example, would the claim be based on all capital decisions from the date of enactment of the death penalty in the State, as it was in the *Jackson* case? In California, this would require data from 1977 to the present. The House Report refers to "the time covered by the defendant's evidence,"[144] suggesting the defendant may choose the time period serving as the basis for the statistical claim.

Moreover, the "time period" issue highlights the dynamic nature of the statistical pool. For example, a "statistical disparity," as applied under the RJA, may not be established in years five or nine, but may be demonstrated in year eight. The dynamic aspect of the pool suggests there may be no end to litigation under the RJA and shows how the data can be "massaged" to present a statistical claim. These time period questions would furnish another opportunity for capital defendants to go "statistics shopping" in presenting an RJA claim.

6. The Accuracy of Data Supplied by Public Officials

In gathering, processing and disseminating statistical data, a certain level of human error may occur. At the state level every attempt, given the current

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making the charging decision. *Id.* at 8.

143. By analogy, in employment cases, one of the purported justifications for use of statistics in the RJA, a major threshold issue is the appropriate unit for which the statistical showing is appropriate. The employee may assert that the company discriminated based on a statistical analysis of the unit in which he or she worked, while the company may attempt to show that company-wide statistics show no discriminatory impact.

144. *1994 House Report*, *supra* note 26, at 8. For a decision of the *Jackson* case, see *supra* Section IV.C.2.

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purposes of data collection, is made to insure that the information is accurate (through training, conditional edits in computer programs and review for trend fluctuations in tabulated information). The purpose of aggregate statistical data now collected, however, is only to present a picture on which to make policy and planning decisions. Given this purpose, some error is acceptable as long as it does not distort the overall information being presented.

Considering the purpose of statistical data required by the RJA, the kind of record-keeping contemplated by the RJA would require a degree of accuracy that has never been required before and would prove prohibitively expensive to maintain. For this purpose, all available data would have to be subjected to rigorous editing prior to dissemination.

7. Summary: Opportunity for Capital Defendants to Go "Statistics Shopping"

In addition to relying on a flawed statistical premise, the RJA contains numerous undefined variables and no uniform guidelines on the how the RJA should operate. For the aforementioned reasons, the RJA provides a capital defendant with several opportunities to go "statistics shopping" to present a claim of a statistical disparity. Without greater guidance, each of these issues would certainly be the subject of litigation and would likely result in divergent standards applied in different jurisdictions around the country. Consequently, in some cases, relief under the RJA may turn on where the claim is asserted.

C. Section 2921(c): Claims Based Upon the Race of the Defendant or Victim

Section 2921(c) discusses "relevant evidence," noting that the statistically significant disparity can be established based upon the race of the defendant or the race of the victim. As already noted, the RJA would clearly permit individuals such as Robert Alton Harris to bring statistical claims based upon the race of their victim even if the race of the victim and defendant are the same.[145]

As a matter of federal policy, it is simply absurd to suggest that the decision whether Harris should receive the death penalty should be influenced by the fact that his two teenage victims were also caucasian, like Harris. The RJA would authorize such absurdities to be considered in court. This, of course, would result in more delay in the enforcement of the death penalty while such statistical claims are litigated.

D. Section 2921(d): Court Determination Concerning the Validity of Evidence Presented to Establish an Inference

Section 2921(d) requires courts to make independent determinations concerning the "validity of the evidence presented to establish an inference."

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145. *See* Harris v. Pulley, 885 F.2d 1354, 1373-77 (9th Cir. 1988), *cert. denied*, 493 U.S. 1051 (1990); *see also supra* Section IV.C.1 (discussing *Harris* case).

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There are no apparent guidelines on how courts will make this evaluation.

Interestingly, the U.S. District Court in the *McCleskey* case noted numerous flaws in the study presented in that case.[146] Presumably, these same deficiencies could be raised against any statistical claims brought under the RJA. It is likely that the question concerning the validity of the evidence would turn into a battle of experts. For this reason, the RJA may more appropriately be entitled "The Statisticians Full Employment Act."

E. Section 2921(e): Government Rebuttal Burden

Section 2921(e) provides the burden for the government to rebut the inference by a preponderance of the evidence. The legislation is direct: Unless this rebuttal showing is made "the death sentence may not be carried out."

This rebuttal obligation undermines enforcement of the death penalty in at least two respects. First, as already discussed, it is easily triggered by a minimal threshold. Consequently, it is expected that prosecutors would be required to try to rebut the statistical inference in virtually every capital case in which an RJA claim is asserted. In contrast, the Supreme Court recognized that a rebuttal burden should never be required "absent far stronger proof."[147]

Second, the rebuttal is extremely burdensome, costly to meet, and, given the extreme limitations placed on the government by the RJA, virtually impossible to establish. In fact, while the RJA purports to allow the government to rebut the statistical inference, it is extremely doubtful when the rebuttal burden could ever be established under the stringent standards contained in the bill language and accompanying House Report.

To meet this burden, section 2921(e) provides that "the government cannot rely on mere assertions that it did not intend to discriminate or that the cases in which death was imposed fit the statutory criteria for imposition of the death penalty." Further tying the hands of the government (as well as the court considering the RJA claim), the House Report states:

> The Government, however, cannot meet its burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties. Nor can the state meet its burden by showing that the defendant was properly found guilty of a crime for which the state's laws permit imposition of the death sentence. Rather, the state must demonstrate either that there is no significant pattern or, if a significant pattern of disparities is established, that permissible racially neutral criteria explain the pattern or that the case does not fit the pattern.[148]

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146. *See* McCleskey v. Zant, 580 F. Supp. 338, 360 (N.D. Ga. 1984) (noting "the data base has substantial flaws and that the petitioner has failed to establish by a preponderance of the evidence that it is essentially trustworthy"), *aff'd in part and rev'd in part sub nom.*, McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985), *aff'd on other grounds*, 481 U.S. 279 (1987).

147. *McCleskey*, 481 U.S. at 296-97 ("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?").

148. *1994 House Report*, *supra* note 26, at 9.

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Consequently, "the death sentence may not be carried out," as mandated in the RJA, unless the government can prove a negative (that race did not influence the decision to seek or impose the death penalty) through the use of more statistics or a "retrial" of all cases forming the basis of the defendant's statistics. The government may not rely upon evidence which would otherwise be relevant and material under universally accepted standards.[149] This includes evidence concerning the intentions or consideration of the prosecutors, jurors, and judges who made the decisions in the case at issue. In trying to rebut a claim of racial bias in the decision to seek the death penalty, what could be more important than the testimony of the prosecutor who sought the death penalty that, at the time of his or her decision, the races of the defendant and victim were unknown to the prosecutor and, accordingly, there could have been no intent to discriminate? Yet the RJA excludes the introduction of such evidence.

Moreover, how can the government rebut a statistical presumption if it is generally foreclosed from showing that the case fits the parameters of a death eligible case? In the *Robert Alton Harris* case, for example, Harris brought a statistical claim of race, age and gender discrimination.[150] If that statistical showing were accepted, the prosecutor arguably could not respond with the aggravated facts and circumstances of Harris' kidnapping and execution-style killing of the two boys.

The only way left for the government to attack a defendant's RJA statistics, then, is with more statistics, leading to a never-ending battle of the statisticians over figures which are incapable of ever proving whether there was discrimination in a particular case. This would effectively result in a mini-retrial of every case forming the basis of the defendant's statistics to show the presence of the race-neutral facts which caused the case decisions to be made the way they were. For this reason, it would be virtually impossible to rebut the statistical inference under the RJA.

F. Section 2922: Public Availability of the Data

Section 2922 requires the data collected for the RJA to be publicly available. It is not entirely clear what this duty may entail. It is clear that it would impose a substantial burden on the States and local officials and would significantly increase the cost of capital litigation to both the States and localities.

There are a number of jurisdictional issues in the RJA that make it unclear

149. *See* FED. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

150. *See* Harris v. Pulley, 885 F.2d 1354, 1373-77 (9th Cir. 1988), *cert denied*, 493 U.S. 1051 (1990); *see also supra* Section IV.C.1.

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who would have responsibility for providing the statistical data.[151] As noted, Section 2921(c) refers to the "jurisdiction in question." Section 2922 also indicates a much broader responsibility for "public officials." Data available at the local level would vary with each agency and the systems employed to develop information for their administrative needs. The obligations under this section would require not only State statistical programs, but also County District Attorneys, County Courts, County Probation Departments and jurisdictional law enforcement agencies to make the requisite data "publicly available."

The RJA presumes that most of the information required under the legislation is already collected and available. The House Report also suggests that States must merely "make available records they otherwise keep."[152] In California, at least, this presumption is erroneous. The statistical information which would be required under the RJA (i.e., charging information, aggravating factors, and similar-case facts) is not currently available or maintained in California data systems. Transcripts of penalty trials which did not result in the death penalty are not always prepared and court reporters do not keep their notes for very long. This reconstruction of past case history would certainly be a time consuming and costly process to develop statistics from unrelated cases which do not prove discrimination in a particular case. Further, while a very limited amount of state data currently exists in the California Department of Justice and could be made "publicly available," it is based solely on data from local agencies, and is dependent on the ability of the local systems to respond and the resources available to develop the responses.

It may not be possible to reconstruct the data for each case during the applicable retroactive period since the police and investigative reports and other information may no longer be available. For example, if required to defend against a discrimination claim under the RJA, the State of California would potentially have to acquire case information about homicides over the last eighteen years, going back to 1977 when California enacted new death penalty procedures. The total pool of cases for this time period for California could exceed 10,000. This burden is magnified by the potential number of reporting entities in California which may need to be contacted. This includes fifty-eight District Attorneys and about 800 law enforcement agencies (sheriffs, police departments, university police, special districts, etc.).

There would be substantial costs associated with providing the data,

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151. While the House Report indicates that the RJA "imposes no data collection responsibilities on the States," *1994 House Report*, *supra* note 26, at 9, it actually imposes a stringent burden in light of the real possibility of losing the presumption of correctness on findings of fact noted in section 2923(1). *See infra* Section V.G.1. For example, a capital defendant may try to argue that jury verdict decisions were publicly available but charging decisions were not, resulting in no deference to the state court finding of fact under 28 U.S.C. § 2254(d) (1988). Also, in establishing an inference of racial bias, defendants are required to take into account evidence of the statutory aggravating factors of the crimes involved *only* if the data has been compiled and publicly made available. *See also supra* Section V.D.

152. *1994 House Report*, *supra* note 26, at 9.

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whether it be provided by state or local "public officials."[153] It can be assumed that since no aggravating factor and similar case information are available, all available data would be requested so that researchers could do the statistical study required to develop valid data specific to the case.

The California experience in the *In re Earl Lloyd Jackson* case provides a tip of the iceberg example. In that case, the cost of the computer run time just to create fourteen new computer tapes from existing tapes containing very limited homicide, arrest and disposition data covering the period 1977 to 1984, and the staff time to prepare the accompanying technical manuals, required 1,200 person hours at an expense of approximately $41,500.

If Congress enacts the RJA, thereby leaving California no choice but to collect case-specific information on every capital-eligible homicide in California, an enormous new data base would be required. Just developing the computer system with the capability to start from day one with all future cases would cost approximately $225,000 initially and about $125,000 a year thereafter to maintain. This calculation is for the state level in California alone and does not include the cost of gathering the data to input into the computer.

The cost of data collection under the RJA cannot be fully estimated. If data must be collected on homicide cases going back to 1977 (when the death penalty was reinstated in California), the original case files and trial transcripts, to the extent they are still available, would have to be reviewed by persons knowledgeable in criminal law to determine those cases that were death penalty eligible. In California, all homicide cases occurring since 1977 total approximately 53,000. Those cases would then have to be reviewed from District Attorneys' original document files to establish aggravating factors and charging information. Literally millions of pieces of paper would have to be reviewed.

Virtually none of the case specific information which would be necessary for California to obtain to defend its death penalty under the RJA was gathered in the *Earl Lloyd Jackson* case. Although approximately $1,000,000 was spent to prepare for the evidentiary hearing, the overwhelming majority of the data collected was solely for the purpose of identifying the homicide cases which the defense had labeled as capital-eligible.[154]

Significantly, there is no authorization for a federal appropriation included in the bill which would assist the States and localities with the substantial costs imposed by compliance with the RJA.

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153. Even the Congressional Budget Office (CBO) notes that the statistical data required under the RJA "have not been collected and analyzed" and the "costs to compile such information would vary by state and would depend on the extent of the historical information and analysis required to support a state's case." *1994 House Report*, *supra* note 26, at 11 (letter of CBO Director Robert D. Reischauer). While anticipating increased costs and litigation resulting from the RJA, the general CBO assessment underestimates the real financial impact which would occur if the RJA is enacted. The indefinite CBO analysis fails to take into account many of the variables and issues noted in the text which would affect many States, including California. A more realistic assessment of this burden should be undertaken if Congress is serious about passing any version of the RJA.

154. Few details about those cases had been collected by the time the evidentiary hearing order was vacated. *See supra* Section IV.C.2.

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G. Section 2923: Loss of the Presumption of Correctness to State Court Findings of Fact

1. The Presumption of Correctness

Under current law, state court findings of fact are presumed correct when reviewed by a federal habeas court, unless exceptions concerning the reliability of the finding are met.[155] This allows the state court to make the finding when the evidence is "fresh" and avoids relitigating factual issues in federal court.

Section 2923 contains the aforementioned potential loss of the presumption of correctness if any of three events occurs: (a) the data is not publicly available; (b) appointed counsel and investigative services were not available which were "necessary for the adequate development of the claim;" or (c) current law standards for the presumption of correctness were not met.

Anything less than absolute state compliance with the requirements imposed under the RJA allow a federal habeas court to disregard state court findings of fact. In other words, the traditional presumption of correctness would not apply to state court findings of fact if the State failed to collect adequate records and make them publicly available or furnish sufficient funds for the defendant's presentation of a discrimination claim.

This is a harsh and inappropriate penalty to impose upon the State as any showing of any error in the record keeping obligation may result in the elimination of deference to state court findings of fact on matters potentially unrelated to the basic discrimination claim. Thus, even good faith noncompliance (resulting from technical human error) could void state court findings. For example, because the RJA does not specify or limit geographic areas for the statistical showing, incomplete compliance in one county could be used against another county which seeks to impose the death penalty in a particular case.

The consequence of losing the presumption of correctness is that two hearings may be required (in state and federal court) on a factual question, even where the reliability of the state hearing has not been questioned. This is one of the real "hidden costs" of the RJA.

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155. Federal habeas courts are statutorily required to defer to state court findings of fact unless narrow exceptions are met. Specifically, since 1966, Congress has mandated that "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State . . . were parties, evidenced by a written finding, . . . *shall be presumed to be correct.*" *See* 28 U.S.C. § 2254(d) (1988) (emphasis added); Sumner v. Mata, 449 U.S. 539, 547 n.2, 550-51 (1981) (*"Mata I"*) (discussing 1966 amendment).

This presumption of correctness always applies unless an enumerated statutory exception is established (*e.g.*, the material facts were not adequately developed in state court). *See* 28 U.S.C. § 2254(d) (listing exceptions). In the absence of such an exception, Congress has further specified that the petitioner holds the burden "to establish by convincing evidence that the factual determination by the State court was erroneous." 28 U.S.C. § 2254(d); *see also Mata I*, 449 U.S. at 550, 551. Before a federal court grants a petition for writ of habeas corpus under section 2254(d), it must provide a statement explaining why the presumption of correctness should not apply. *See Mata I*, 449 U.S. at 549, 551-52; *see also* Burden v. Zant, 498 U.S. 433, 437 (1991) (per curiam); Sumner v. Mata, 455 U.S. 591, 593 (1982) (per curiam) (*"Mata II"*).

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2. Opportunity to File in State or Federal Court

The House Report states there shall be concurrent subject matter jurisdiction in both state and federal courts and, further, suggests that RJA claims may be filed in federal non-habeas proceedings.[156] The language of section 2923, however, refers only to proceedings brought pursuant to section 2254, pertaining to federal habeas review of state prisoner claims. This jurisdictional issue would likely require clarification in litigation.

If RJA claims were limited to federal habeas corpus proceedings, the exhaustion requirement would mandate that the issue first be fairly presented in state court.[157] However, because RJA claims are allowed in non-habeas proceedings, such an exhaustion requirement may not apply. Not only would this deprive the state court from first considering the issue, but there would be no state court findings of fact which would otherwise be entitled to a presumption of correctness in federal court on habeas review.[158]

3. Relaxed Standards to Assert RJA Claim

Section 2923 provides that the petitioner's statistical showing can be made in an evidentiary hearing but need not be alleged in the petition.[159] In short, the petitioner can simply assert a conclusion, offer no suggestion as to the basis for it, then compel the district court to order an evidentiary hearing regardless of how inadequate or incomplete this showing might ultimately be. Without a requirement that an RJA claim must be asserted in a petition (as required for all federal habeas cases), the State would have no way of knowing what the basis for the allegations would be for mounting a general attack on it.

H. Section 2924

Section 2924 provides that the RJA does not otherwise affect the lawfulness of a capital sentencing scheme. In reality, the pervasive impact of the RJA cannot be overstated. If the prosecution is unable to overcome a defense statistical "inference" in, for example, one robbery-murder case in a jurisdiction, it is unclear whether all robbery-murder convictions in that jurisdiction occurring during the same time period would be invalidated. For example, if Robert Alton Harris had been successful in his race discrimination claim, it could be expected that other death row prisoners would attempt to bring similar claims. What if the prosecution were successful in rebutting an "inference" in a burglary-murder

156. *1994 House Report*, *supra* note 26, at 9. In the case of federal courts, the RJA may be asserted pursuant to any jurisdictional provisions under 28 U.S.C. §§ 1331 (federal question jurisdiction), 1343(a)(3) (jurisdiction over federal civil rights actions), 2254 (federal habeas review of state prisoner petitions), 2255 (federal habeas review of federal prisoner petitions). *See 1994 House Report*, *supra* note 26, at 9.

157. *See* 28 U.S.C. §§ 2254(b), (c) (1988).

158. *Id.* § 2254(d); *see also supra* note 155 (discussing presumption of correctness).

159. *See 1994 House Report*, *supra* note 26, at 9.

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case? Would the death sentence be enforced in all burglary-murder cases in the jurisdiction without additional RJA hearings? Even if a State is allowed or required to defend against RJA claims in every death penalty case, the proceedings could be influenced by the outcome of the other cases in the jurisdiction. Once again, this validation and invalidation of death sentences would be based on statistics and would occur without regard to the specific facts of the case and the character and record of the offender.

If individual hearings are held in every capital case, their is still a pervasive impact. In California, with 399 persons now on death row (as of December 1, 1994), there would be 399 different hearings, 399 different evidentiary presentations, and 399 different court rulings, some of which inevitably would be conflicting. The public would be confused by this ordeal and its confidence in the criminal justice system would be seriously undermined.

A. H.R. 4092, § 902: Retroactive Application of the RJA

The last section of the RJA contains a retroactive provision. This provision, if left intact, shows how far-reaching the RJA could be. The last section of the legislation states that it applies even if a similar claim was considered and rejected in court. The breadth of the language would permit any person on death row to reopen his or her case by bringing a new statistical claim under the RJA. As already noted, in California, there are currently 399 persons on death row. The retroactive provision would enable each of them to bring a new statistical claim and potentially invalidate his or her death sentence.

However, some, notably former House Judiciary Committee Chairman Jack Brooks, have indicated that this provision would be deleted.[160] This action, however, may raise other legal questions. For example, would the State be forced to defend a potential equal protection argument from current death row prisoners contending they should have the opportunity to file a statistical claim under the RJA? Even if the current retroactive provision is stricken, the statistical pool may include homicide cases going back to 1977 in California, when the death penalty was enacted.[161]

Additionally, if the retroactive provision is stricken, at what point in the criminal justice process could RJA claims be asserted? For example, would the RJA be available in cases where a charging decision has already been made but the case has not proceeded to trial, or where a jury verdict has been returned but no direct appeal has been filed?

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160. *See* 140 CONG. REC. H2607 (daily ed. Apr. 21, 1994) (statement of Rep. Brooks).

161. *See supra* Section V.F (noting tremendous burden resulting from the collection of data on cases over the last 18 years.); *see also 1990 House Hearings*, *supra* note 13, at 97 (statement of Edward S.G. Dennis, Jr., Assistant Attorney General, Criminal Division, U.S. Dep't of Justice) ("Since no jurisdiction that we know of now maintains comprehensive records of the race of victims and defendants and the reasons for various prosecutorial and jury decisions, [the retroactive provision] *would likely result in the invalidation of every capital sentence now in effect.*") (emphasis added).

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VI. CONCLUSION

For the foregoing reasons, notwithstanding its noble-sounding title, the RJA is actually an anti-death penalty bill. If enacted, the RJA would establish a legal bias and presumption against the death penalty in capital litigation on several fronts:

(1) The RJA would permit a mere statistical claim to challenge a death sentence in a way which is not permitted under U.S. Supreme Court case law. The RJA would therefore permit a new round of litigation, unrelated to the facts of the murder and the individual characteristics of the offender (in terms of his or her character and record). This new litigation would be based on circumstantial evidence of statistics which is not even capable of proving that there was racial bias in a particular case.

(2) The RJA imposes an unfair burden on the government to rebut the statistical inference and expressly precludes the government from relying on relevant evidence which is currently admissible under accepted evidentiary standards. Under the language of the RJA and accompanying House Report, the government's hands would effectively be tied and limited to rebutting the inference through more statistics and an exhaustive "retrial" of every capital case forming the basis of the defendant's statistics. Along with other aspects of the bill, this portion unfairly tilts capital litigation in favor of capital defendants.

(3) The RJA establishes relaxed procedural and evidentiary standards which encourage challenges to the death penalty. This includes the use of circumstantial evidence of an apparent statistical disparity in unrelated cases to suggest racial bias in a particular case and relaxed standards in bringing an RJA claim.

(4) The RJA would substantially increase the cost of capital litigation at both the state and local levels, by promoting protracted litigation based on statistical claims and requiring the collection of new statistical data.

(5) If the State fails to meet technical requirements under the RJA, certain state court findings of fact would not be presumed correct and would have to be relitigated in federal habeas court.

(6) The inevitably conflicting rulings coming out of the hundreds of different hearings would confuse the public and undermine its confidence in the criminal justice system.

(7) Among the many operational defects and other problems in the House-passed RJA, which are noted in this Article, are that the RJA:

- May prohibit States from constitutionally punishing persons who commit murder based on racial hatred (such as in Ku Klux Klan lynchings);
- Allows a capital defendant to go "statistics shopping" in presenting statistical claims by allowing the defendant to determine the time period covered, the jurisdiction, and the decisions (of the judge, jury or prosecutor) to be used for the RJA statistical claim;
- Fails to include a federal appropriation to assist the States and localities

with the substantial costs which would result in compliance with the RJA; and

- Contains a retroactive provision which would allow existing death row prisoners to reopen their cases by bringing a new statistical claim.

Most significantly, without protecting against race bias or guaranteeing fairness, the RJA establishes a new opportunity to challenge a death sentence, which would result in more litigation and delay than permitted under current law. Even if a defendant is otherwise eligible for the death penalty, the final determination on whether the death sentence would be enforced would turn on a statistical claim which is subject to manipulation and which is unrelated to the facts of the crime and the characteristics of the offender in terms of his or her character and record.

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APPENDIX A

H.R. 4092, Title IX—The "Racial Justice Act"[162]

TITLE IX—RACIALLY DISCRIMINATORY CAPITAL SENTENCING
SECTION 901. SHORT TITLE.

(a) PROCEDURE.-Part VI of title 28, United States Code, is amended by adding at the end thereof the following new chapter:

"CHAPTER 177-RACIALLY DISCRIMINATORY CAPITAL SENTENCING

"Sec.

"2921. Prohibition against the execution of a sentence of death imposed on the basis of race

"2922. Access to data on death eligible cases.

"2923. Enforcement of the chapter.

"2924. Construction of chapter.

§ 2921.Prohibition against the execution of a sentence of death imposed on the basis of race.

"(a) IN GENERAL.-No person shall be put to death under color of State or Federal law in the execution of a sentence that was imposed based on race.

"(b) INFERENCE OF RACE AS THE BASIS OF DEATH SENTENCE.-An inference that race was the basis of a death sentence is established if valid evidence is presented demonstrating that, at the time the death sentence was imposed, race was a statistically significant factor in decisions to seek or to impose the sentence of death in the jurisdiction in question.

"(c) RELEVANT EVIDENCE.-Evidence relevant to establish an inference that race was the basis of a death sentence may include evidence that death sentences were, at the time pertinent under subsection (b), being imposed significantly more frequently in the jurisdiction in question-

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

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

"(d) VALIDITY OF EVIDENCE PRESENTED TO ESTABLISH AN INFERENCE.-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 the inference. Such evidence must take into account, to the extent it is compiled and publicly made available, evidence of the statutory aggravating factors of the crimes involved, and shall include comparisons of similar cases involving persons of different races.

"(e) REBUTTAL.-If an inference that race was the basis of a death sentence is established under subsection (b), the death sentence may not be carried out unless the government rebuts the inference by a preponderance of the

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162. As included in the House Crime Bill adopted on April 21, 1994. *See* 140 CONG. REC. H2655-56 (daily ed. Apr. 15, 1994).

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evidence. Unless it can show that the death penalty was sought in all cases fitting the statutory criteria for imposition of the death penalty, the government cannot rely on mere assertions that it did not intend to discriminate or that the cases in which death was imposed fit the statutory criteria for imposition of the death penalty.

"§ 2922. Access to data on death eligible cases

"Data collected by public officials concerning factors relevant to the imposition of the death sentence shall be made publicly available.

"§ 2923. Enforcement of the chapter

"In any proceeding brought under section 2254, the evidence supporting a claim under this chapter may be presented in an evidentiary hearing and need not be set forth in the petition. Notwithstanding section 2254, no determination on the merits of a factual issue made by a State court pertinent to any claim under section 2921 shall be presumed to be correct unless-

"(1) the State is in compliance with section 2922;

"(2) the determination was made in a proceeding in a State court in which the person asserting the claim was afforded rights to the appointment of counsel and to the furnishing of investigative, expert and other services necessary for the adequate development of the claim; and

"(3) the determination is one which is otherwise entitled to be presumed to be correct under the criteria specified in section 2254.

"§ 2924. Construction of chapter

"Nothing contained in this chapter shall be construed to affect in one way or the other the lawfulness of any sentence of death that does not violate section 2921.".

(b) AMENDMENT TO TABLE OF CHAPTERS.-The table of chapters of part VI of title 28, United States Code, is amended by adding at the end thereof the following new item:

"177. Racially Discriminatory Capital Sentencing.....2921.".

SEC. 902. ACTIONS BEFORE ENACTMENT.

No person shall be barred from raising any claim under section 2921 of title 28, United States Code, as added by this Act, on the ground of having failed to raise or to prosecute the same or a similar claim before the enactment of the Act, nor by reason of any adjudication rendered before that enactment.

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APPENDIX B

The "Equal Justice Act"[163]

TITLE IX—EQUAL JUSTICE ACT

SEC. 901. SHORT TITLE

This Act may be cited as the "Equal Justice Act".

SEC. 902.PROHIBITION OF RACIALLY DISCRIMINATORY POLICIES CONCERNING CAPITAL PUNISHMENT OR OTHER PENALTIES.

(a) GENERAL RULE.—The penalty of death and all other penalties shall be administered by the United States and by every State without regard to the race or color of the defendant or victim. Neither the United States nor any State shall prescribe any racial quota or statistical test for the imposition or execution of the death penalty or any other penalty.

(b) DEFINITIONS.—For purposes of this Act—

(1) the action of the United States or of a State includes the action of any legislative, judicial, executive, administrative, or other agency or instrumentality of the United States or a State, or of any political subdivision of the United States or a State;

(2) the term "State" has the meaning given in section 541 of title 18, United States Code; and

(3) the term "racial quota or statistical test" includes any law, rule, presumption, goal, standard for establishing a prima facie case, or mandatory or permissive inference that—

(A) requires or authorizes the imposition or execution of the death penalty or another penalty so as to achieve a specified racial proportion relating to offenders, convicts, defendants, arrestees, or victims; or

(B) requires or authorizes the invalidation of, or bars the execution of, sentences of death or other penalties based on the failure of a jurisdiction to achieve a specified racial proportion relating to offenders, convicts, defendants, arrestees, or victims in the imposition or execution of such sentences or penalties.

SEC. 903.GENERAL SAFEGUARDS AGAINST RACIAL PREJUDICE OR BIAS IN THE TRIBUNAL.

In a criminal trial in a court of the United States, or of any State—

(1) on motion of the defense attorney or prosecutor, the risk of racial prejudice or bias shall be examined on voir dire if there is a substantial likelihood in the circumstances of the case that such prejudice or bias will affect the jury either against or in favor of the defendant;

(2) on motion of the defense attorney or prosecutor, change of venue shall be granted if an impartial jury cannot be obtained in the original venue because of racial prejudice or bias; and

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163. As Introduced During the House Crime Bill Debate on April 20, 1994. *See* 140 CONG. REC. H2529 (daily ed. Apr. 20, 1994).

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(3) neither the prosecutor nor the defense attorney shall make any appeal to racial prejudice or bias in statements before the jury.

SEC. 904. FEDERAL CAPITAL CASES.

(a) JURY INSTRUCTIONS AND CERTIFICATION.—In a prosecution for an offense against the United States in which a sentence of death is sought, and in which the capital sentencing determination is to be made by a jury, the judge shall instruct the jury that it is not to be influenced by prejudice or bias relating to the race or color of the defendant or victim in considering whether a sentence of death is justified, and that the jury is not to recommend the imposition of a sentence of death unless it has concluded that it would recommend the same sentence for such a crime regardless of the race or color of the defendant or victim. Upon the return of a recommendation of a sentence of death, the jury shall also return a certificate, signed by each juror, that the juror's individual decision was not affected by prejudice or bias relating to the race or color of the defendant or victim, and that the individual juror would have made the same recommendation regardless of the race or color of the defendant or victim.

(b) RACIALLY MOTIVATED KILLINGS.—In a prosecution for an offense against the United States for which a sentence of death is authorized, the fact that the killing of the victim was motivated by racial prejudice or bias shall be deemed an aggravating factor whose existence permits consideration of the death penalty, in addition to any other aggravating factors that may be specified by law as permitting consideration of the death penalty.

(c) KILLINGS IN VIOLATION OF CIVIL RIGHTS STATUTES.—Sections 241, 242, and 245(b) of title 18, United States Code, are each amended by striking "shall be subject to imprisonment for any term of years or for life" and inserting "shall be punished by death or imprisonment for any term of years or for life".

SEC. 905. EXTENSION OF PROTECTION OF CIVIL RIGHTS STATUTES.

(a) SECTION 241 AMENDMENTS.—Section 241 of title 18, United States Code, is amended by striking "inhabitant of" and inserting "person in".

(b) SECTION 242 AMENDMENT.—Section 242 of title 18, United States Code, is amended by striking "inhabitant of" and inserting in lieu thereof "person in", and by striking "such inhabitant" and inserting "such person".

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