
David C. Baldus
University of Iowa College of Law

George Woodworth
University of Iowa

Catherine M. Grosso
Michigan State University College of Law, grosso@law.msu.edu

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RACE AND PROPORTIONALITY SINCE
McCLESKEY v. KEMP (1987): DIFFERENT
ACTORS WITH MIXED STRATEGIES OF
DENIAL AND AVOIDANCE*

David C. Baldus**
George Woodworth***
Catherine M. Grosso****

I. INTRODUCTION

In 1987, in McCleskey v. Kemp, the U.S. Supreme Court held
that statistical proof of systemic racial disparities in the
administration of the death penalty implicates neither the Equal
Protection Clause of the Fourteenth Amendment nor the Cruel and
Unusual Punishments provision of the Eighth Amendment of the

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entitled "Pursuing Racial Fairness in the Administration of Justice: Twenty
Years After McCleskey v. Kemp," held by the NAACP Legal Defense and
Christopher, Mark Friedman, Gary Goodpaster, Dale Jones, Claudia Van Wyk,
David Zuckerman, and the participants at the Symposium provided helpful
comments and advice. Peter D'Angelo and David Franker provided valuable
research assistance and Lisa Jo Schomberg expertly prepared the figures.

** Joseph B. Tye Professor of Law, College of Law, University of Iowa. New
Jersey Supreme Court Special Master for Proportionality Review of Death
*** Professor, Department of Statistics and Actuarial Science, University of
Iowa.
**** Visiting Assistant Professor of Law, College of Law, University of
Illinois.
U.S. Constitution.\(^1\) The repercussions of \textit{McCleskey} in terms of racial equity in death sentencing have been felt at a number of levels, some of which are obvious, some of which are not. This paper reviews efforts to address racial concerns and claims since \textit{McCleskey} in courts and legislatures at the federal and state levels. We focus mainly on the judicial response of three northeastern states with a history of concern about issues of racial justice—Pennsylvania, Maryland, and New Jersey. The main theme of this paper is that \textit{McCleskey} has nearly eliminated the incentive of federal and state courts and legislatures to address meaningfully the issue of racial discrimination in the administration of the death penalty and has provided them with a political and legal framework for denying and avoiding the issue.

\textit{McCleskey} handed claimants in the federal courts a procedural victory, i.e., standing to bring race-of-victim claims.\(^2\) However, this victory was completely undermined by \textit{McCleskey}'s two substantive rulings. The equal protection holding created an impossible burden of proof that requires direct evidence of purposeful discrimination by the prosecutor or jury in the claimant's case, i.e., a smoking gun.\(^3\) The Eighth Amendment holding precluded claims based solely on evidence of a "significant risk of racial bias":

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.\(^4\)

\begin{itemize}
  \item \textbf{1.} McCleskey v. Kemp, 481 U.S. 279, 296–99, 306–13 (1987). For a broad critique of U.S. Supreme Court jurisprudence on racial justice since the 19th century (of which \textit{McCleskey} is a recent example) as a "model of judicial review as inattentive to minority interests as it was deferential to majority interests," see Donald E. Lively and Stephen Plass, \textit{Equal Protection: The Jurisprudence of Denial and Evasion}, 40 Am. U. L. Rev. 1307, 1313 (1991).
  \item \textbf{3.} The court "would demand exceptionally clear proof before it would infer the discretion has been abused. The unique nature of the decisions at issue also counsels against adopting such an inference from the disparities indicated by the Baldus study. Accordingly, we hold that the Baldus study is clearly insufficient to support an inference that any of the decision makers in McCleskey's case acted with discriminatory purpose." \textit{Id}. at 297.
  \item \textbf{4.} \textit{Id}. at 313.
\end{itemize}
In short, procedure trumps proof no matter how strong the proof. For all practical purposes, McCleskey's two substantive rulings preclude the bringing of race claims in federal courts when the evidence of discrimination is a statewide statistical study. Some federal courts have permitted evidence of county-wide proof focusing on the actions of a given prosecutor or office. Yet no relief has been granted in any of those cases. Nevertheless, Professor Anthony Amsterdam, a leading scholar and leader of the capital defense community, believes that a qualitative and quantitative approach with both a statewide and county-level focus in southern communities with a long history of racial discrimination eventually may be sufficient to sustain a challenge to the constitutionality of a state death penalty statute.

II. APPEALS TO LEGISLATIVE BODIES

Justice Powell's suggestion in McCleskey that claimants appeal for relief to the "legislative bodies" theoretically legitimated requests for federal and state legislation to support race claims that legislators formerly would have dismissed as more properly raised in a court of law. Despite Powell's suggestion, practically speaking both in Congress and the state legislatures, McCleskey bolstered the arguments of those opposing racial justice legislation in two significant ways. First, opponents could, and did, argue that any such legislation was unnecessary because race discrimination is not a problem. Indeed, they argued that the Supreme Court had determined there was no evidence of race discrimination in the administration of the death penalty, i.e. if there were a problem, the Supreme Court would have fixed it. Alternatively, opponents argued

6. Id. at 1798–1802.
9. David C. Baldus et al., Reflections on the 'Inevitability' of Racial Discrimination in Capital Sentencing and the 'Impossibility' of its Prevention,
that McCleskey recognized that to the extent race discrimination exists, it is inevitable, widespread, and ineradicable, and its only cure would be the abolition of capital punishment, a notoriously unpopular outcome.\textsuperscript{10} This claim presents race discrimination as a "necessary evil" that must be tolerated to retain the benefits of capital punishment. In the words of Senator Charles Grassley of Iowa, a vote for the Racial Justice Act is a vote to abolish capital punishment.\textsuperscript{11}

These arguments and a lack of public concern about racial discrimination in the administration of the death penalty, especially when based on the victim's race, seriously undercut support for racial justice legislation in Congress or in state legislatures.\textsuperscript{12}

In 1998, Kentucky became the only state to enact racial justice legislation.\textsuperscript{13} The Kentucky statute is limited to pretrial

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\textsuperscript{10} This perspective came across not only in Justice Powell's opinion but also in the remarks of Justice Scalia communicated in a memo to the entire Court while the case was pending. In the memo, Justice Scalia stated that the problem was not the strength of the evidence: "Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot say that all I need is more proof." Reflections, supra note 9, at 371 n.46.

\textsuperscript{11} Id. at 380 ("You cannot support the availability of capital punishment, while supporting the Racial Justice Act."). For a more recent formulation of the necessary evil argument, see John C. McAdams, \textit{Race and the Death Penalty}, in The Leviathan's Choice: Capital Punishment in the Twenty-first Century 175 (J. Michael Martinez et al. eds., 2002) (while allowing that racial discrimination is "an evil that needs correcting," \textit{Id.} at 178, argues that "an alternative policy that promises less disparity may not be preferable if it is ineffective or sacrifices too much in terms of either justice or utility." \textit{Id.} at 176).

\textsuperscript{12} The first federal measure, the Racial Justice Act, because of its breadth, encountered stiff opposition even in a Democratically controlled Congress. However, its more narrowly focused successor, the Fairness in Death Sentencing Act, was approved two times in the House of Representatives, but was finally blocked in the Senate. Reflections, supra note 9, at 427. Also, because of Supreme Court precedent, limiting Congress' powers under Section 5 of the Fourteenth Amendment, e.g., City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997), an issue now exists concerning the power of Congress to overrule McCleskey through the exercise of its powers under Section 5.

claims that the prosecutor has engaged in purposeful race discrimination in the defendant's case. Few such claims have been raised and none has been sustained. There is evidence, however, that since enactment of the law, the system has become somewhat more evenhanded in its treatment of black- and white-victim cases in Kentucky's large urban centers. For the first time, black-victim cases are advancing to penalty trials and resulting in death sentences, which means, for death sentencing purposes, that the lives of black and white victims are given more comparable value.

Although neither New Jersey nor Maryland has adopted racial justice legislation, recent legislative efforts in both states to abolish capital punishment suggest that concerns about racial disparities in the administration of their death penalty statutes may provide a small measure of support for abolition. The major concern creating the new opening for legislative reform has been the risk of


wrongful convictions that draw into question the legitimacy of the current systems of capital punishment. For most observers, compared to this overarching concern, the issue of racial disparities is quite unimportant. However, with the legitimacy of capital punishment now drawn into question, racial disparities in capital charging and sentencing may be viewed less as a necessary evil that must be tolerated to preserve the current system and more as an additional fundamental defect.

III. APPEALS TO STATE COURTS

Death row inmates also have appealed to state courts for relief under their state constitutions on grounds of racial discrimination in the administration of the death penalty. To appreciate the difficulties of this approach, it is important to understand two aspects of the McCleskey decision that reinforce state court denial and avoidance of the issue. First, if the Supreme Court in McCleskey v. Kemp was unwilling to address the complicated political and remedial issues that race claims present, how could anyone reasonably expect state courts to shoulder that burden, any more than one would have expected southern courts to address issues of school segregation before Brown v. Board of Education was decided in 1954? This reality may explain why Justice Powell failed to recommend that parties appeal to state courts for relief under state law.

Second, denial and avoidance also have been enhanced by the growing stigmatization of claims of racism. This is recognized in both the legal and social science literature, and the level of

19. See Randall Kennedy, McCleskey v. Kemp: Race, Capital Punishment and the Supreme Court, 101 Harv. L. Rev. 1388, 1418 (1988) ("The Court's lack of concern for the feelings of blacks [in McCleskey v. Kemp] may be related to its very keen concern for the sensitivities of those—mainly whites—subject to being labeled 'racist.' One of the great achievements of social reform in American history has involved the stigmatization of overt racial prejudice. But this triumph in principle has produced an unforeseen consequence in application: it is precisely the sense that racial discrimination is a terrible evil that inhibits the Justices from "finding" it in all but the clearest circumstances. Perhaps they assume that conduct so horrible must be plainly observable. Or perhaps their sense of the shamefulness of racism is so intense that they find it difficult to burden an official or agency with the moral opprobrium that the "racist" label connotes without absolutely positive proof of culpability."); Legitimacy, supra note 13, at
stigmatization associated with such claims appears to have increased since McCleskey. A judicial finding of purposeful race discrimination deeply impugns a person's character. This is particularly the case when that person happens to be a prosecutor who vehemently denies the charge. For example, in Philadelphia County, a prosecutor who in 1986 produced a training film to teach new prosecutors how to use peremptory strikes against black venire members later testified that race was never a factor in the peremptory strikes he used against black venire members in the cases he prosecuted in the 1980s.\(^2\) If racial discrimination on the part of prosecutors is largely unconscious, as most critics of the system assert,\(^2\) prosecutors' angry and vehement reactions to an allegation of invidious purposeful race discrimination should come as no surprise. Moreover, the history of race claims filed since 1986, when the Supreme Court in Batson v. Kentucky held unconstitutional peremptory venire member strikes on racial grounds,\(^2\) reveals a reluctance of state courts to find purposeful race discrimination on the part of prosecutors.\(^2\)

The experience under the Kentucky Racial Justice Act is similar.\(^2\) If a defense counsel alleges that a prosecutor's filing of notice of the state's intent to seek death is based on purposeful discrimination, this is frequently viewed as a declaration of war that may produce retaliation across the defense counsel's entire case load in that prosecutor's office. The denial and retaliatory effect is particularly strong in interracial communities where the prosecutor must stand for reelection or may someday seek election to a higher


20. See Commonwealth v. Basemore, 875 A.2d 350, 351–52 (Pa. 2005) ("The PRCA Court stated . . . the trial prosecutor in this case engaged in a pattern of discrimination. . . . This Court has carefully reviewed the trial prosecutor's explanations of his use of peremptory challenges and finds them insufficient.").


office. A recent survey of defense counsel in Kentucky clearly suggests that some of them are deterred from bringing such claims.25

Notwithstanding this resistance to claims of discrimination, capital defendants have appealed for relief from state courts under state law. With one exception, defendants have encountered a variety of strategies to deny or avoid their claims. Some courts have avoided the issue on procedural grounds, e.g., the claim was defaulted. Others go to the merits and embrace *McCleskey* as a matter of state law, thereby deeming all statistically-based claims irrelevant and insisting on smoking gun evidence in the claimant’s case as the only ground for relief.26 Other courts consider evidence of systemic

25. Legitimacy, *supra* note 13, at 1469–70. The Supreme Court also shares the tradition of pulling its punches with respect to evidence of race discrimination on the part of prosecutors and juries. A good example is *Coker v. Georgia*, 433 U.S. 584 (1977), where the issue of race discrimination in the administration of capital punishment in rape cases was not even mentioned in spite of evidence in the record. Nor was it mentioned in *Maxwell v. Bishop*, 398 U.S. 262 (1970), a case which brought to the Court a record of clear evidence of race discrimination in jury sentencing in capital rape cases across the South. The only race discrimination routinely acknowledged by public officials in this county occurred long ago on someone else’s watch. It is also instructive that the recent report of the New Jersey Death Penalty Study Commission, which recommended the abolition of New Jersey’s death penalty statute, was at pains to note that the evidence “does not support a finding of ‘invidious’ race discrimination” in the state’s death penalty system. *N.J. Report, supra* note 17, at 1.

26. See, e.g., *Evans v. State*, 914 A.2d 25, 66–67 (Md. 2006) (general statewide statistics cannot establish a violation of the Maryland Declaration of Rights; the defendant must establish specific discriminatory intent in his case); *In re Davis*, 101 P.3d 1, 57–58 (Wash. 2004) (en banc) (conclusive proof of race discrimination cannot be derived from statistical evidence describing state administration of death penalty); *Commonwealth v. Marshall*, 810 A.2d 1211, 1228 (Pa. 2002) (prosecutor training video and statistical evidence in Baldus article do not have any grounding in particular facts of defendant’s case and do not constitute new evidence warranting remand or supplemental pleading); *State v. Reeves*, 604 N.W.2d 151, 160–61 (Neb. 2000) (defendant was not entitled to relief on equal protection grounds because defendant’s statistical evidence of racial disparities cannot prove conscious racial discrimination, but sentence was vacated on other grounds); *State v. Hairston*, 988 P.2d 1170, 1191–92 (Idaho 1999) (affirming district court’s conclusion that statistics indicating disparity in application of death penalty between urban and non-urban counties do not prove discrepancy is connected to economic differences); *Underwood v. State*, 708 So. 2d 18, 37–38 (Miss. 1998) (statistical evidence of racially disproportionate application of death penalty is insufficient proof that defendant suffered discrimination); *People v. Hale*, 661 N.Y.S.2d 457, 477–78 (N.Y. Sup. Ct. 1997) (white defendant’s presented statistics do not establish racial animus in
discrimination relevant, but fault the strength of the claimant’s evidence because of omitted variables or its failure to measure up to the strength of the evidence in *McCleskey*, which ironically has become the new gold standard.\(^2\) To illustrate these responses in greater depth, we focus on the Pennsylvania and Maryland high courts, each of which has been presented with *McCleskey*-style evidence of systemic race discrimination and requests to reject *McCleskey* and consider the evidence of systemic race discrimination under the authority of its state constitution.

The single exception to this pattern of denial and avoidance is the New Jersey Supreme Court, whose response differed in two important ways. First, the court’s staff developed an empirical database that embraced all death-eligible cases prosecuted since the

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application of death penalty to him); Lee v. State, 942 S.W.2d 231, 233–34, 237 (Ark. 1997) (use of voter registration records to randomly select jury panel did not constitute systematic exclusion of African Americans from jury panel, and statistical evidence of racially discriminatory application of death penalty does not prove discriminatory intent); Bell v. State, 938 S.W.2d 35, 51–52 (Tex. Crim. App. 1996) (en banc) (studies suggesting disparities in sentencing due to race of victim and defendant are insufficient to support inference of discriminatory intent); State v. Taylor, 929 S.W.2d 209, 221 (Mo. 1996) (en banc) (finding defendant’s statistical evidence to be irrelevant because it does not show discriminatory purpose or effect in defendant’s case specifically and declining to find discrimination based on prosecutor’s refusal to exchange life without parole for guilty plea); Lane v. State, 881 P.2d 1358, 1362–63 (Nev. 1994) (statistics indicating racially disproportionate application of death penalty do not prove racially discriminatory purpose in county’s administration of death penalty or prosecutor’s seeking death penalty in present case); Jones v. State, 440 S.E.2d 161, 163 (Ga. 1994) (evidence of historical patterns in county’s imposition of death penalty is insufficient to show current discriminatory intent or support inference of discriminatory purpose); Cochran v. State, 547 So. 2d 928, 930, 932 (Fla. 1989) (holding that *McCleskey* forecloses presentation of evidence that death penalty is imposed in racially discriminatory manner, but vacating death sentence on other grounds); People v. Britz, 528 N.E.2d 703, 717–18 (Ill. 1988) (statistical study cannot definitively indicate probability of imposition of death penalty or prove intentional discrimination; hundreds of varying factors affect each case); Turner v. Commonwealth, 364 S.E.2d 483, 490 (Va. 1988) (statistical evidence of disparate impact cannot prove entire statutory scheme invalid); State v. Byrd, 512 N.E.2d 611, 619 (Ohio 1987) (statistical evidence of county-wide imposition of the death penalty does not show that improper racial considerations prompted the jury’s recommendation of death in present case).

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27. Blume, *supra* note 5, at 1800 (faulting county-level studies with relatively small samples of cases for their failure to control for hundreds of non-racial control variables, as in *McCleskey*).
inception of New Jersey’s post-Furman system. This resource enabled special masters appointed by the court to assess the risk of systemic race effects in the system. Second, the New Jersey court unanimously rejected the McCleskey burden of proof, and since then, under the authority of its state constitution, routinely addressed claims of systemic discrimination based on the statistical evidence presented in the periodic reports of its special masters.

The court denied all such claims but we believe that the court’s system of oversight had salutary effects that we explain below.

A. The Pennsylvania Supreme Court

In 2003, the Pennsylvania Supreme Court was presented with a claim of racial discrimination that was supported by a well-controlled study of racial discrimination within its jurisdiction. The court refused to consider evidence of race-of-defendant discrimination in Philadelphia County during the period 1983–93. The study documented significant black-defendant effects among 600 death-eligible cases and 384 penalty trial cases. The data on which the

30. We are aware of only one state court decision that granted relief on a racial claim. In 2003, a South Carolina trial court judge overturned a 1995 death sentence on a variety of grounds, including that the prosecutor had “used race as a factor in deciding to seek the death penalty.” National Coalition to Abolish the Death Penalty, Prosecutorial misconduct cited in 5 SC cases (Sept. 3, 2006), available at http://www.demaction.org/dia/organizations/ncadp/news.jsp?key=2984&t= (discussing State v. Kelly, 502 S.E.2d 99 (S.C. 1998)).
32. Id. at 478.
34. Id. at 1675 n.110, 1758 tbl.E1. The data revealed a 9.3 black-defendant odds multiplier, significant at the .01 level. Those data revealed no race of victim effects in prosecutorial decision making because Philadelphia prosecutors capitaly charge over 78% of all death-eligible cases. Id. A case is death eligible if the facts clearly support liability for capital murder and the presence of one or more statutory aggravating circumstances in the case. Capital prosecutions have two stages. The first is a guilt trial on the capital murder charge. The second is a
study relied had been previously proffered in state post-conviction proceedings in a 1986 case in which the Pennsylvania Supreme Court had affirmed the death sentence. In 2003, therefore, the court opted for a procedural out by ruling that the proffer was "untimely" because the evidence was not "newly discovered" within the meaning of Pennsylvania’s post-conviction review statute. Even though the study that made the evidence available to the public was not completed until 1998, the court held the evidence to be untimely because "the statistics which comprise the study were of public record and cannot be said to have been 'unknown' to appellant in 1986."

At least one case is pending in Pennsylvania that would not be subject to this procedural bar. In 2002, in *Commonwealth v. Arrington*, the Defender Association of Philadelphia proffered an updated version of the Philadelphia evidence referred to above in support of a post-trial motion to set aside a black defendant's death verdict before the court entered a judgment based on the verdict.

Arrington's death sentence was imposed at the weighing stage (stage three) of his penalty trial. At that stage, jurors have already found statutory aggravating and mitigating circumstances and they are instructed to return a death verdict if they find unanimously "at least one aggravating circumstance . . . and no mitigating circumstance or . . . one or more aggravating circumstances which outweigh any mitigating circumstances." Arrington sought relief from his death sentence on the basis of statistical evidence of black-defendant disparities in the weighing stage of 338 penalty trials conducted in Philadelphia between 1978 and 2000. His theory was that the evidence of systemic

"penalty trial" in which the sentencing authority, usually a jury, imposes a life or death sentence.

37. *Id.* at 478 (quoting *Commonwealth v. Lark*, 746 A2d 585, 588 (Pa. 2000)).
40. Memorandum of Law, *supra* note 38, at 2–3. Arrington's own penalty trial is included in these data.

**Figure 1**

**Unadjusted Black-Defendant Disparities in Death Sentences Imposed in Penalty Trial Weighing Decisions: Philadelphia (1978–2000)**\footnote{The number in parentheses above the two bars indicates the overall death sentencing rate: .22 (76/338).}

![Diagram](https://via.placeholder.com/150)

Relative Risk: 2.0 (24%/12%)

Legend: 
- † Black-Defendant Cases
- □ Non-Black-Defendant Cases

\footnote{.05 level of statistical significance of disparity.}

\footnote{See id. at 1–6.}
Figure 1 presents the unadjusted race-of-defendant disparities for the 338 cases on which Arrington based his claim.\textsuperscript{42} The shaded bar reports a 24\% death sentencing rate for 282 black defendants, while the clear bar reports a 12\% rate for fifty-six non-black defendants. The unadjusted disparity is therefore twelve percentage points, and the risk of a death sentence for the black defendants is twice as high as it is for the non-black defendants. This disparity is significant at the .05 level.\textsuperscript{43}

Arrington also presented an adjusted racial disparity comparable to the core finding in the McCleskey study, but it documented a race-of-defendant disparity rather than a race-of-victim disparity. The model controlled for twenty-nine non-racial factors, including all of the statutory aggravating and mitigating circumstances in the Pennsylvania statute, the socioeconomic status of the defendant and victim, and the time period of the prosecution. In McCleskey, a comparable model focusing on race-of-victim disparities documented that on average, the odds of a death sentence were 4.3 times higher in white-victim cases than they were in black-victim cases.\textsuperscript{44} In Arrington's Philadelphia evidence, the odds of receiving a death sentence at the weighing stage of the penalty trial were, on average, 3.8 times higher for black defendants than for similarly situated non-black defendants.\textsuperscript{45} This disparity is statistically significant at the .04 level.\textsuperscript{46}

Figure 2, which is taken from the Arrington record, is also comparable to the evidence in McCleskey.\textsuperscript{47} The figure plots each case by culpability level (measured with a "Culpability Index and Scale") along the X axis and by the estimated probability of a death sentence along the Y axis. There are four plots broken down by combinations of the defendants' and victims' respective races.\textsuperscript{48} The black-defendant cases are in the two upper plots and the non-black

\textsuperscript{42} See supra Figure 1. An unadjusted racial disparity does not take into account or control for non-racial case characteristics that may bear on defendant culpability and affect the defendant's risk of being capitaly charged and sentenced to death.

\textsuperscript{43} A statistically significant disparity at the .05 level means that the likelihood that the disparity is a fluke or chance result is less than 5\%.

\textsuperscript{44} McCleskey v. Kemp, 481 U.S. 279, 321 (1987) (Brennan, J., dissenting).

\textsuperscript{45} Memorandum of Law, supra note 38, at 4.

\textsuperscript{46} Id.

\textsuperscript{47} See infra Figure 2.

\textsuperscript{48} See Baldus et al., supra note 33, at 1696.
Defendants are in the two lower plots. What is evident here, as in the study of the Georgia system used in McCleskey, is that the race effects are strongest in cases in the mid-range of defendant culpability, i.e., cases at aggravation levels 2–3 on the "Culpability Index and Scale."

**FIGURE 2**


Defendant Culpability Index and Scale Score Estimated in a Logistic Regression Analysis

1 Baldus & Woodworth, *infra* note 54, at 211 fig.5.

"n" indicates the sample size of a subgroup of cases.
B. The Maryland Court of Appeals

The Maryland story is distinguishable from that of Pennsylvania in important ways, but the bottom line appears similar. A Maryland Court of Appeals decision in 2006 applied the McCleskey holding to effectively bar all race claims in the absence of smoking gun evidence.\(^{49}\)

In contrast to Pennsylvania, Maryland's death penalty system has long been under scrutiny for racial disparities. Although the Maryland legislature has declined to pass racial justice legislation, it has shown considerable interest in allegations of race discrimination and has held hearings on the subject.\(^{50}\) Members of the Maryland Court of Appeals have also expressed concerns about the system, in ways never seen in Pennsylvania. For example, in a recent dissenting opinion from an order denying leave to appeal a post-conviction ruling in a death penalty case, Judge Eldridge, with Chief Judge Bell concurring, expressed his concerns as follows:

The Maryland death penalty statute, by requiring the judge or jury to find the presence of one or more specified aggravating factors and to weigh them against mitigating factors, in theory is designed to impose the death sentence only on those committing the more heinous first degree murders. In light of 22 years experience under that statute, a strong argument could be made that, in practice, the statute has utterly failed to produce this result. Moreover, that argument would include the contention that there is little or no rationality underlying the actual imposition of the death penalty in Maryland, and that the penalty disproportionately falls on poor African-American males accused of murdering white victims. This raises substantial issues under Articles 24, 25, and 46 of the Maryland Declaration of Rights. Beyond that, a strong argument can be made that, in Maryland, "this unique penalty" has been "wantonly and . . . freakishly imposed." \textit{Furman v. Georgia},

\(^{49}\) See Evans v. State, 914 A.2d 25, 66–67 (Md. 2006).

408 U.S. 238, 310, 92 S.Ct. 2726, 2763, 33 L.Ed.2d 346, 390 (1972) (Stewart, J., concurring). At the very least, this Court should grant Colvin-El's application and consider the argument that the statute is being disproportionately applied.\(^\text{51}\)

However, a majority of the Maryland high court, which has considered the racial issue on several occasions\(^\text{52}\) since the reinstatement of Maryland's capital punishment system in 1978, does not share these concerns. In 2002, the court denied a motion by death row inmate Wesley Baker to reopen his state post-conviction proceeding so he could seek vacation of his death sentence on the basis of a Maryland statutory provision that bars the execution of death sentences imposed "under the influence of passion, prejudice, or any other arbitrary factor."\(^\text{53}\) Baker relied on three studies whose findings were preliminary because they had limited controls for aggravating circumstances, no controls for mitigating circumstances, and they did not include all death-eligible cases.\(^\text{54}\) Nevertheless, the studies' data showed strong white-victim and black-defendant/white-victim effects that could not arise by chance, particularly in prosecutorial charging decisions.\(^\text{55}\) The court issued no explanation for its denial of Baker's application for leave to appeal.\(^\text{56}\)

\(^{51}\) State v. Colvin-El, 753 A.2d 13, 16 (Md. 2000).

\(^{52}\) See, e.g., Baker v. State, 805 A.2d 265 (Md. 2002) (denying petition for writ of certiorari); Baker v. State, 883 A.2d 916 (Md. 2005) (denying motion to correct illegal sentence where Baker argued that death sentence was imposed in a racially and geographically biased manner); Evans v. State, 914 A.2d 25 (Md. 2006) (holding that claim that the state exercises peremptory challenges in a racially discriminatory manner was not cognizable by way of motion to correct an illegal sentence).


\(^{55}\) Michael Millemann & Gary Christopher, Preferring White Lives: The Racial Administration Of The Death Penalty in Maryland, 5 U. Md. L.J. Race,
The 2000 decision of Maryland Governor Parris Glendening to commission a McCleskey-style study (after the legislature refused to fund such a project) and to impose a moratorium on executions in the state pending the outcome of the study, is additional evidence of concern in Maryland about racial discrimination in its death sentencing system. The study was conducted by Professors Raymond Paternoster and Robert Brame, who completed it in 2003. Their sample included 1,130 death-eligible cases prosecuted between 1978 and 1999, which resulted in the imposition of seventy-six death sentences.

Figure 3 shows the Maryland adjusted statewide white-victim disparities from the Paternoster-Brame study along with the Georgia findings presented in McCleskey. The Maryland results control not only for non-racial case characteristics that bear on offender culpability but also for the county of prosecution. The white-victim disparities in the prosecutorial charging decisions shown in Part I are weaker for Maryland than they are for Georgia. Part II indicates that the same is true for the penalty trial findings. Part III also shows weaker and less stable white-victim effects for Maryland than for Georgia.


60. See infra Figure 3.
**FIGURE 3**


(The numbers in Columns B and C are adjusted odds multipliers estimated in logistic multiple regression analysis.)

<table>
<thead>
<tr>
<th>A Decision Points</th>
<th>B White-Victim Odds Multipliers</th>
<th>C White-Victim Odds Multipliers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Georgia(^1)</td>
<td>Maryland(^2)</td>
</tr>
<tr>
<td>Part I</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prosecutorial Decisions</td>
<td>3.3* (n = 708)</td>
<td>1.9* (n = 1,148)</td>
</tr>
<tr>
<td>Part II</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Penalty Trial Death Sentencing Decisions</td>
<td>3.4* (n = 253)</td>
<td>1.3 (NS) (n = 169)</td>
</tr>
<tr>
<td>Part III</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Death Sentences Imposed Among All Death-Eligible Cases</td>
<td>4.3** (n = 2,484)</td>
<td>1.9 (NS)-3.7* (n = 1,148)</td>
</tr>
</tbody>
</table>

\(^1\) Georgia Sources: Part I: Equal Justice, *infra* note 65, at 642 app.L sched.8; Part II: *Id.* at 644 app.L sched.9; Part III: *Id.* at 630 app.L sched.4, 319 tbl.52.

\(^2\) Maryland Sources: Part I: Paternoster-Brame *supra* note 50, at 79 tbl.8A; Part II: *Id.* at 82 tbl.8D; Part III: *Id.* at 83 tbl.8E (3.7 estimate), 84 tbl.8F (1.8 estimate).

"n" indicates the sample size of a subgroup of cases.

"NS" indicates that the odds multiplier is not statistically significant.

*.05 level of statistical significance of disparity.

**.01 level of statistical significance of disparity.
FIGURE 4


<table>
<thead>
<tr>
<th>Column</th>
<th>Description</th>
<th>Relative Risk</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>State Files a Notice of Its Intention to Seek a Death Sentence</td>
<td>2.0 (34%/17%)</td>
<td></td>
</tr>
<tr>
<td>B</td>
<td>State Refuses to Withdraw Before Trial the Notice of Its Intention to Seek a Death Sentence</td>
<td>1.3 (73%/56%)</td>
<td></td>
</tr>
<tr>
<td>C</td>
<td>A Capital Murder Conviction and the Case Advances to a Penalty Trial</td>
<td>1.04 (97%/93%)</td>
<td></td>
</tr>
<tr>
<td>D</td>
<td>Penalty Trial Death Sentencing Decision</td>
<td>1.4 (46%/33%)</td>
<td></td>
</tr>
<tr>
<td>E</td>
<td>Death Sentence Imposed Among All Death-Eligible Cases</td>
<td>4.1 (4.1%/1%)</td>
<td></td>
</tr>
</tbody>
</table>

Legend

- Black-Defendant/White Victim Cases
- Other Cases

1 Paternoster-Brame, supra note 50, at 86–92 tbls.9A–G. The disparities reported in Columns A, B, and E adjust for non-racial case characteristics and county of prosecution (tbls.9A, 9B & 9F). The disparities reported in Columns C and D (tbls.9D & 9E) do not control for county of prosecution. The adjusted rates in Columns A–E are reported in Table 9G. The adjusted rate for the “Other Cases” in each column is the average rate for the three other defendant-victim racial combinations reported in Table 9G.

"n" indicates the sample size of a subgroup of cases.

*.05 level of statistical significance of disparity.
However, the Maryland study documents statewide black-defendant/white-victim race effects that did not appear in the Georgia study. Figure 4 presents adjusted black-defendant/white-victim disparities. In each column, the death sentence rates for black-defendant/white-victim cases are shown in the shaded bars while the rates for all other cases are shown in the clear bars. Columns A and B document statistically significant disparities in prosecutorial charging decisions, while Column D documents a thirteen-point disparity in the penalty trial death sentencing decisions, although it is not significant. The bottom line shown in Column E is that, among all death-eligible cases, after adjustment for county of prosecution and non-racial factors, black defendants whose victims are white are 4.1 times more likely to be sentenced to death than all other similarly situated defendants.

The Paternoster-Brame study also documents significant statewide black-defendant disparities in white-victim cases. With respect to death sentencing among all death-eligible cases, the odds of a death sentence in Maryland are 60% lower for white defendants convicted of killing white victims than they are for black defendants convicted of killing white victims. Comparable results in the McCleskey research on Georgia were limited to the most aggravated cases statewide and among the rural counties.

61. Paternoster-Brame, supra note 50, at 45–51.
62. See supra Figure 4.
63. Paternoster-Brame, supra note 50.
64. Id. at 91 tbl.9F. The statistically significant -.937 regression coefficient for the “White Defendant-White Victim” coefficient compared to the black-defendant/white-victim “reference category” means that on average the odds faced by white defendants in white-victim cases are .39 (1/2.55) of the odds faced by black defendants in white-victim cases. This means that the odds faced by the white defendants are 61% (1-.39) lower than the odds faced by black defendants whose victims are white. Table 9G expresses the disparity in terms of probabilities. The adjusted risk of a death sentence is .041 in the black-defendant/white-victim cases compared to .017 in the white-defendant/white-victim cases, a 2.4 ratio of overall death sentencing rates among all death-eligible cases.
65. David C. Baldus et al., Equal Justice and the Death Penalty: A Legal and Empirical Analysis (1990) [hereinafter Equal Justice]. Among the 472 most aggravated cases statewide, the adjusted black-defendant disparity was a statistically significant 2.4 odds multiplier. Id. at 329 n.1 tbl.57. In the rural judicial circuits, the unadjusted black-defendant/white-defendant disparity was 22 percentage points (30% to 8%) significant at the .0001 level. Id. at 363 tbl.10.
In 2004, counsel for a death row prisoner proffered the Paternoster-Brame study to the Maryland Court of Appeals for its discretionary review, which it declined to exercise. The court of appeals finally reached the merits in Evans v. State, in which the Paternoster-Brame study was again proffered (a) to support a request to re-open a 1995 post-conviction proceeding to document race effects in the system statewide and in the county of conviction (Baltimore County), and (b) to support a request for discovery in Baltimore County with respect to Evans' case and the cases of similarly situated defendants on trial for murder. The court rejected both claims. First, it held that the study added nothing "new" to what earlier studies had shown. Second, on the basis of this finding, the court held that Evans' failure to present these results in post-conviction proceedings from 1990 to 2001 constituted a "deliberate withholding" of evidence. Finally, the court ruled that the study failed to provide convincing evidence of discrimination against black offenders in the system. To be sure, the study could not definitively establish purposeful race discrimination on the part of the prosecutor or the jury in Evans' case, or in any other specific case. But the study could, and does, demonstrate a substantial risk of systemic

66. See Baker v. State, 865 A.2d 563 (Md. 2005) (order denying leave to appeal). The claim was presented simultaneously to the court by way of direct appeal, but after briefing and argument on the merits, the court ducked the issue and dismissed the appeal as procedurally improper. See Baker v. State, 883 A.2d 916, 917–18 (Md. 2005).
68. Id. at 65. This is clearly wrong because the findings of none of the earlier studies were based on a database with controls for non-racial factors that were comparable to the controls for such factors in the Paternoster-Brame study.
69. Id. at 65.
70. Id. at 59. This is also wrong because the Paternoster-Brame study documents that among white-victim cases, black defendants face significantly higher risk of a death sentence than do similarly situated white defendants. The study also shows that black defendants with white victims are at a significantly higher risk of a death sentence than all other similarly situated defendants. See supra note 64, which reports findings from the Paternoster-Brame study that document the black-defendant disparity within the white-victim cases. Table 9G also documents the black-defendant/white-victim effect by contrasting the estimated death sentencing rate for "Black D – White V" cases with the estimated rate for all cases with other defendant-victim racial combinations. A significant problem in Evans was the court's failure to order a hearing on the Paternoster-Brame study in which its methodology and findings could have been scrutinized and its finding interpreted by experts. Without such a record, the court of appeals lacked the competence to conduct a proper assessment of both these issues.
discrimination in black-defendant/white-victim cases, both statewide and in Baltimore County. Nevertheless, the court adopted *McCleskey* under Maryland law and summarily rejected Evans' motion to reopen his post-conviction proceeding to pursue his race claims based on the Paternoster-Brame study and for discovery in Baltimore County.\(^71\)

The two dissenting justices believed that the Paternoster-Brame study's documentation of an unadjusted twenty-three percentage-point white-victim disparity (83%-60%) in the rate that prosecutors sought death sentences in Baltimore County was sufficient to "trigger the mandate" of *United States v. Armstrong*,\(^72\) which defines the federal standard of a right to discovery in selective prosecution cases.\(^73\)

**C. The New Jersey Supreme Court**

In contrast to the Maryland and Pennsylvania courts, the New Jersey Supreme Court proactively addressed the issue of race discrimination in the administration of the New Jersey death penalty. It did so out of the court's long-term interest in ensuring the proportionate and consistent application of the death penalty free of systemic race effects, a guarantee of article 1, section 12 of the New

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71. *Id.* at 66-67. For a thoughtful elaboration of the relevance of the Paternoster-Brame study to the Maryland Declaration of Rights, see White Lives, *supra* note 55, at 18-21. The court reiterated its support for *McCleskey* under Maryland law in *State v. Borchardt*, 914 A. 2d 1126, 1155-56 (Md. 2007) in which a death row inmate's claim based on the Paternoster-Brame study was held in "abeyance" by the trial court in post-conviction proceedings pending the outcome of other issues in the case. The court of appeals reversed the trial court's abeyance ruling and held, relying on *Evans*, that "we shall, and are able to, address [the race issue] and conclude that it has no merit." By way of dictum, the court added: "In Evans, we embraced the reasoning of McCleskey, that mere statistical studies showing apparent discrepancies in sentencing 'are an inevitable part of our criminal justice system,' largely explainable by the fact that decisions whether to prosecute and what to charge 'necessarily are individualized and involve infinite factual variations, but do not rise to the level of systemic defects. ... Borchardt's Paternoster contentions then fare no better than did Evans' contentions." *Id.* at 1157 n.19. It is also unclear how the Maryland court could conclude that the Paternoster-Brame study failed to establish "systemic defects" without an evidentiary hearing on the validity of the study. *McCleskey* merely held that evidence of systemic racial effects, which the parties conceded had been established, are insufficient to support relief in an individual case in the absence of smoking gun evidence related to the defendant's case.


Jersey Constitution. From the outset, the court viewed the state's prosecutors as crucial to the achievement of these constitutional goals. In this regard, the court's interaction with the state's prosecutors over the last twenty years fit the model of "democratic experimentalism," which applies in a variety of contexts.  

In the capital punishment context, the New Jersey Supreme Court "prescribes a general constitutional goal" and "leaves the local authorities [in this case the county prosecutors] free to adopt their own methods of achieving the goal." The court encouraged local authorities to develop institutional arrangements and policies that address the issues, and held them "accountable for achieving" the constitutional goal by subjecting "the methods they adopt and results they achieve to comparative review." The New Jersey Supreme Court's system of shared responsibility for advancing constitutional goals was unique.

In State v. Ramseur (1987), the New Jersey Supreme Court announced its constitutional goal of reliable and uniform death
sentencing. In *State v. Koedatich* (1988), the court urged prosecutors to adopt capital charging guidelines. The following year, the County Prosecutors Association and the Attorney General adopted capital charging guidelines that (a) require each county prosecutor to establish a county-level review committee to assist the prosecutor in assessing the "death eligibility" of each murder case, and (b) require a capital charge in the case if "the Prosecutor is satisfied that the State will be able to prove beyond a reasonable doubt that the aggravating factor(s) outweigh the mitigating factor(s)." It appears that over time the test for whether to charge a case capitaly evolved into an assessment of the likelihood that a jury would impose a death sentence.

In 1989, the court established a framework for its system of oversight of the entire capital charging and sentencing system. Specifically, it engaged a series of special masters whose ongoing assignment was to work in collaboration with the Administrative Office of the New Jersey Courts to (a) develop and maintain a database of all death-eligible cases processed in the system, and (b) evaluate individual death sentence cases for evidence of disproportionality. The court provided the Attorney General and the

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78. State v. Koedatich, 548 A.2d 939, 955–56 (N.J. 1988) ("Accordingly, we strongly recommend that the Attorney General, and the various County Prosecutors, in consultation with the Public Defender, adopt guidelines for use throughout the state by prosecutors in determining the selection of capital cases. With the assistance of these various participants in the criminal justice system, the state can begin to develop guidelines that not only will promote uniform prosecutorial standards but also may assist the Court in its eventual proportionality review.").
80. See David S. Baime, Report to the New Jersey Supreme Court: Systemic Proportionality Review Project 2004–2005 Term 6 (Dec. 15, 2005), http://www.judiciary.state.nj.us/pressrel/Baime2005Report12-16-05.pdf [hereinafter Baime] (explaining that the county-level review committee's assessment involves "a careful examination of the evidence to determine whether a capital prosecution would probably be successful if the death penalty were sought.").
81. To date one death sentence has been vacated solely on grounds of disproportionality. See *State v. Papasavvas*, 790 A.2d 798, 817–18 (N.J. 2002).
Office of the Public Defender access to the court's database, which enhanced the democratic nature of the process by enabling their experts to assess the validity of the periodic reports issued by the special masters and their consultants and to recommend changes in the court's system of oversight.

As of 2005, the New Jersey database included 555 death-eligible cases, 157 of which advanced to a penalty trial. Of those that advanced to penalty trial, forty-nine received death sentences after 1983. Therefore, the overall death sentencing rate among death-eligible cases was 9%. In 1992, in State v. Marshall, the court, applying New Jersey law, rejected the McCleskey requirement of direct evidence of purposeful discrimination in individual cases. It ruled that it would not countenance a system with a significant risk of systemic racial discrimination, that it would monitor the system, and that it would require modification of the system to remedy the problem or outlaw capital punishment altogether if that were the only possible remedy. To facilitate its oversight, the court embraced the McCleskey methodology as the vehicle for identifying the presence of race discrimination in a system of capital punishment. In addition, since the mid-1990s, the special master's assignment was expanded another case, the sentence was vacated in part on grounds of disproportionality. See State v. DiFrisco, 900 A.2d 820, 833 (N.J. 2006).


83. Baime, supra note 80, at 17.

84. Id. at 19 tbl.IVA. This 9% rate (48/533) includes only death sentences imposed during the first prosecution. Id. at 9. Because many judicial decisions in subsequent prosecutions reversed capital convictions and vacated death sentences, many of the cases initially carrying death sentences ultimately carried a life sentence or less. Id. As a result, the death sentencing rate among all death-eligible cases, measured by the most recent prosecution, was 4.5% (24/533). Id. at 19–20 tbl.IVB.


86. Id. at 1110.

87. Like the study presented to the court in McCleskey, the New Jersey database embraces all death-eligible cases prosecuted in the state and enables the court's special master to evaluate the exercise of discretion in capital charging at successive stages in the decision making process while controlling for a large number of non-racial variables that bear on the criminal culpability of each offender. See PR-I, supra note 28; PR-II, supra note 28.
to include periodic evaluations of the database for evidence of systemic race effects in capital charging and sentencing outcomes.\textsuperscript{88}

The New Jersey Supreme Court addressed the race issue in two ways, both direct and indirect. First, through its system of comparative proportionality review and its death penalty jurisprudence in general, the court stressed the virtues of selectivity in the use of the death penalty. This policy appears to have contributed to a sharp reduction in the rate that New Jersey prosecutors advanced death-eligible cases to penalty trials, from a rate of 52\% in the 1980s to a rate of 10\% in the period from 1999–2004.\textsuperscript{89} In addition, the court vacated a large number of death sentences, particularly among the less aggravated cases.\textsuperscript{90} As a result, the crimes of offenders with affirmed death sentences appear to have been quite aggravated.\textsuperscript{91} This strategy is consistent with a de facto application of the remedy proposed by Justice Stevens in \textit{McCleskey} to purge the system of race effects by limiting death sentences to the worst cases.\textsuperscript{92}

\footnotesize

88. PR-II, \textit{supra} note 28, at 171.
89. From 1990 to 1998, the rate was 20\%. Weisburd & Naus, \textit{supra} note 82, at 162 tbl.41B. Special Master Baime also reports that county prosecutors in New Jersey “formed committees to determine whether cases should be capitally prosecuted based upon their ‘deathworthiness,’ a careful examination of the evidence to determine whether capital prosecution would probably be successful if the death penalty were sought.” Baime, \textit{supra} note 80, at 6.
91. Legitimacy, \textit{supra} note 13, at 1462–63.
92. This remedy is based on the “liberation hypothesis” which posits that decision makers in the most highly and least aggravated cases are likely to be in the “grip of fact” and less likely to be influenced by arbitrary and irrelevant case characteristics. In contrast, decision makers in cases in the mid-range of aggravation are less likely to be in the “grip of fact,” which makes them more “liberated” and more likely to be influenced by arbitrary and irrelevant case characteristics. Equal Justice, \textit{supra} note 65, at 145.
Second, the court regularly monitored the system for race effects and heard a number of race-based claims. Although the court rejected all of those claims, it could reasonably expect that its oversight would further enhance the sensitivity of prosecutors to the racial implications of their capital charging decisions, which in turn would reduce the risk of race effects in the system.

But how successful was the court with this largely indirect approach to the prevention of race discrimination in its system? One may argue that it was successful because the New Jersey court denied all claims of systemic discrimination. However, those denials are not dispositive of the issue because the court evaluated those claims under a heavy burden of proof. Specifically, the court limited the possibility of judicial relief to situations in which the evidence of systemic discrimination was comparable to the McCleskey evidence, which ironically also became the New Jersey gold standard. The evidence of racial disparities had to be "relentlessly document[ed]" and consistent across every possible measure of offender culpability.

This heavy burden of proof reflected concerns within the court about reliance on contested statistical evidence, remedial uncertainties, and the potential political fallout from a finding of actionable race discrimination in the system. A shift in standards of this nature is consistent with the democratic experimentalism model, which contemplates "evolving judgment about the requisite degree of protection demanded by the Constitution." However, the court's

93. See PR-II, supra note 28.
94. PR-II, supra note 28, at 179. The court was not unanimous on the appropriate standard. For example, Justice Long argued that there has been a "slow but steady movement from the notion of risk to the notion of certainty in terms of the quantum of evidence necessary to prove race effect." Id. at 180. She believed that the evidence on the race-of-victim effects was "neither dispositive nor conclusive." Id. at 183 (quoting David S. Baime, Report to the New Jersey Supreme Court: Systematic Proportionality Review Project 4 (Dec. 1, 1999)). Further, she wrote that these "[e]xecutions should not be approved while we wait for the statistics to be compiled to the point of relentlessness." Id. at 184.
95. Id. at 178 (quoting State v. Loftin, 724 A.2d 129, 160 (N.J. 1999)).
96. Liebman, supra note 74, at 115. See also note 76 and accompanying text. The court also changed the standard it used to assess whether a death sentence in an individual case was comparatively excessive or disproportionate. The original understanding was that a death sentence would be affirmed as proportionate only if death sentences are "generally imposed on similar defendants who have committed similar crimes." PR-I, supra note 28, at 548. That standard was replaced with an assessment of "whether a particular death sentence is aberrational." Id. at 530. The following is the reason offered to justify
failure to sustain a race discrimination claim under this burden of proof did not answer the question of whether the racial disparities countenanced by the New Jersey court were morally acceptable.\textsuperscript{97}

Nevertheless, the empirical findings of the court's most recent special master, former Judge David Baime, and his consultants do provide a basis for assessing this issue. The data in Figure 5 document the unadjusted white-victim disparities in the New Jersey system.\textsuperscript{98} Part II indicates that there were no white-victim effects in the penalty trial sentencing decisions. In Part III Column D, which shows death sentences imposed among all death-eligible cases, there is a five-point white-victim effect that is significant at the .05 level. Since there were no white-victim effects in the penalty trial decisions, the race effects reported in Part III are strictly the product of the strong race-of-victim effects in prosecutorial decisions shown in Part I Column D, which advance capital cases to penalty trial. These disparities raise concerns about the New Jersey system's fairness, but they are not adjusted for non-racial factors.

\begin{verbatim}
the change: "Our dissenting member argues that we should insist that death sentences be 'generally imposed' in similar cases for a sentence of death to be found to be proportional. . . . Because New Jersey jurors have been sparing in their imposition of the death sentence, it will never be the case that death would be 'generally received' or 'received in a defined preponderance of cases.' Because juries impose death infrequently, we have recognized that 'death need not be normal or general to be a licit sentence.'" Id. (internal citations omitted). Given the infrequency of death sentencing in New Jersey, it appears that application of the "generally imposed" standard would have threatened many more death sentences on ground of disproportionality than the court felt comfortable vacating.

97. Although the court did not place great weight on the point, it noted that the small number of death sentences imposed in recent years (only ten between 1995 and 1999) resulted in a database that is "too small for reliable statistical analysis of race effects." PR-II, supra note 28, at 176. Although there may be some force to this argument with respect to modeling penalty trial decisions, it has no force with respect to modeling prosecutorial charging decisions.

98. See infra Figure 5. There appear to have been no substantial or significant statewide race-of-defendant disparities in the system.
\end{verbatim}

(The numbers in Columns B and C are selection rates. Rates include death sentences imposed during the first prosecution only.)

<table>
<thead>
<tr>
<th>A</th>
<th>B</th>
<th>C</th>
<th>D</th>
<th>E</th>
</tr>
</thead>
<tbody>
<tr>
<td>Decision Points</td>
<td>Race of Victim</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>White-Victim Cases</td>
<td>Black-Victim Cases</td>
<td>Difference (Col. B- Col. C)</td>
<td>Relative Risk (Col. B/Col. C)</td>
</tr>
<tr>
<td>Part I Prosecutorial Charging Decisions(^1)</td>
<td>39%</td>
<td>20%</td>
<td>19 pts. **</td>
<td>1.9 **</td>
</tr>
<tr>
<td>(n = 240)</td>
<td>(n = 223)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Part II Penalty Trial Death Sentencing Decisions(^2)</td>
<td>31%</td>
<td>34%</td>
<td>-3 pts.</td>
<td>.91</td>
</tr>
<tr>
<td>(n = 93)</td>
<td>(n = 44)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Part III Death Sentences Imposed Among All Death-Eligible Cases(^3)</td>
<td>12%</td>
<td>7%</td>
<td>5 pts. *</td>
<td>1.7*</td>
</tr>
<tr>
<td>(n = 240)</td>
<td>(n = 223)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

1 Rate that death-eligible cases advance to a penalty trial. Baime, supra note 80, at 21 tbl.VIA (the rate for Hispanic-victim cases is 23% (16/70)).
2 Id. at 17–18 tbl.IIA (the rate for Hispanic-victim cases is 25% (4/16)).
3 Id. at 19 tbl.IVA (the rate for Hispanic-victim cases is 6% (4/70)).

"n" indicates the sample size of a subgroup of cases.
*.05 level of statistical significance of disparity.
**.0001 level of statistical significance of disparity.
### FIGURE 6


(The numbers in Columns B, C, and D are adjusted odds multipliers estimated in logistic multiple regression analyses.)

<table>
<thead>
<tr>
<th>Decision Points</th>
<th>A</th>
<th>B</th>
<th>C</th>
<th>D</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Georgia 1</td>
<td>Maryland 2</td>
<td>New Jersey 3</td>
<td></td>
</tr>
<tr>
<td><strong>Part I</strong></td>
<td></td>
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<td></td>
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<tr>
<td>Prosecutorial Decisions</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Georgia</td>
<td>3.3*</td>
<td>1.9*</td>
<td>2.3**–2.4**</td>
<td></td>
</tr>
<tr>
<td>(n = 708)</td>
<td></td>
<td>(n = 1,148)</td>
<td>(n = 512/431)</td>
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</tr>
<tr>
<td><strong>Part II</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Penalty Trial Death Sentencing Decisions</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Georgia</td>
<td>3.4*</td>
<td>1.3 (NS)</td>
<td>.69 (NS)–.71 (NS)</td>
<td></td>
</tr>
<tr>
<td>(n = 253)</td>
<td></td>
<td>(n = 169)</td>
<td>(n = 153/137)</td>
<td></td>
</tr>
<tr>
<td><strong>Part III</strong></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Death Sentences Imposed Among All Death-Eligible Cases</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Georgia</td>
<td>4.3**</td>
<td>1.9 (NS)–3.7*</td>
<td>1.5 (NS)–2.2 (NS)</td>
<td></td>
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<tr>
<td>(n = 2,484)</td>
<td></td>
<td>(n = 1,148)</td>
<td>(n = 483/433)</td>
<td></td>
</tr>
</tbody>
</table>

1 Georgia Sources: Part I: Equal Justice, *supra* note 65, at 642 app.L sched.8; Part II: *Id.* at 644 app.L sched.9; Part III: *Id.* at 630 app.L sched.4, 319 tbl.52.

2 Maryland Sources: Part I: Paternoster-Brame, *supra* note 50, at 79 tbl.8A; Part II: *Id.* at 82 tbl.8D; Part III: *Id.* at 83 tbl.8E (1st estimate), 84 tbl.8F (2nd estimate).

3 New Jersey Sources: Part I: Weisburd & Naus, *supra* note 82, at 85–87 tbl.19.1, 90–91 tbl.20.1; Part II: *Id.* at 62–63 tbl.7.1, 65 tbl.8.1; Part III: *Id.* at 72 tbls.12.1 & 15.1 (all first case sample).

"n" indicates the sample size of a subgroup of cases.

"NS" indicates that an odds multiplier is not statistically significant.

*.05 level of statistical significance of disparity.

**.01 level of statistical significance of disparity.
The data in Figure 6 show the results adjusted for non-racial factors for New Jersey, Georgia, and Maryland. As in Figure 5, the adjusted analysis in Figure 6 Part II Column D shows no white-victim disparities in the jury sentencing decisions in New Jersey. The bottom line in Figure 6 shows a non-trivial effect in New Jersey, but it is still smaller than the Maryland and Georgia effects and not statistically significant.

The only statistically significant white-victim disparity in the New Jersey data is in the charging decisions, reflected in Part I Column D. Special Master Baime and his consultants discounted this finding as evidence of systemic race discrimination on the ground that the introduction of controls for the county of prosecution reduced the disparity to statistical non-significance. The Public Defender's experts took issue with this statistical conclusion. However, even with the introduction of controls for the county of prosecution, white-victim cases in New Jersey advanced to penalty trial at nearly twice the rate of the black-victim cases. For a totally clean bottom line, the New Jersey measures in Figure 6 Part III Column D would be close to 1.0 or less, as they are in Part II for the penalty trial outcomes.

More importantly, Special Master Baime assumed that the county of prosecution is a legitimate non-racial factor for which controls should be introduced, even though the county of prosecution has nothing to do with the criminal culpability of the defendants. The New Jersey Supreme Court offered no reason why the county of

99. See supra Figure 6.
101. Weisburd & Naus, supra note 82, at 158 tbl.39 (a 16-point disparity (34% for white-victim cases versus 18% for non-white-victim cases), with a relative risk of 1.9 (34%/18%), with a p. value of .02 when the cases are stratified only by county and .095 when the cases are also stratified by time by placing "cases for 2004 and 2005" in a "separate stratum"). Table 39 uses the "last case death eligible cases." Table 38 documents comparable results with the "first case death eligible cases."). Each of these analyses excludes cases in which the defendant was charged with killing a police officer, which constitutes a 4H statutory aggravating circumstance. This decision was questioned by the Public Defender's expert. Allison, supra note 100.
prosecution should be viewed as a legitimate non-racial factor for the purpose of rationalizing racial disparities in the system.\textsuperscript{102}

An analysis of charging outcomes in the New Jersey court's database before and after 1990 reveals the impact of the New Jersey experiment on the proportionality of death sentencing outcomes and the risk of race-of-victim discrimination in capital charging decisions. As noted above, the evidence is clear that New Jersey prosecutors became more selective in their use of the death penalty. Specifically, in the 1991 database (covering 1983–91), the capital charging rate was 52\% (123/237),\textsuperscript{103} while from 1990–98 the rate was 20\%, and from 1999–2004 it was 10\%.\textsuperscript{104}

In addition, after 1991, the white-victim disparities in New Jersey charging decisions declined, but not nearly at the rate of the capital charging decisions themselves. In the 1991 database (covering 1983 through 1991), the unadjusted white-victim disparity was a statistically significant twenty-four percentage points (65\% for the white-victim cases and 41\% for the black and Hispanic cases), with a ratio of 1.6 (65%/41\%).\textsuperscript{105} In the latest report of the court's special master, which embraces all cases from 1983 through 2005, the unadjusted disparity declined to a statistically significant seventeen percentage points (35\% for the white-victim cases and 18\% for the black and Hispanic-victim cases), with a ratio of 1.9 (35%/18\%).\textsuperscript{106} This evidence indicates that while prosecutor charging became more selective over time, the trend does not appear to have purged the system entirely of white-victim effects in charging decisions.\textsuperscript{107} In fact, because of the overall decline in capital prosecution rates since 1983, the relative risk of advancing to a penalty trial increased over

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\textsuperscript{102} Special Master Baime's consultants have computed unadjusted white-victim disparities within single counties but because of the small samples of cases the results have been inconclusive. Weisburd & Naus, supra note 82, at 156 tbl.37.
\textsuperscript{104} Weisburd & Naus, supra note 82, at 162 tbl.41B.
\textsuperscript{105} 1991 Special Master's Report, supra note 103, at app. tbl.18A.
\textsuperscript{106} Weisburd & Naus, supra note 82, at 95 tbl.21.2.
\textsuperscript{107} In this regard, Special Master Baime might have found it useful to estimate white-victim effect in the charging decision separately for the pre- and post-1990 cases.
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time, from 1.6 (65%/41%) in the earlier period\textsuperscript{108} to 1.9 (35%/18%) for the entire period\textsuperscript{109}

Thus, in spite of the efforts of the New Jersey court, the data indicate that race-of-victim effects persisted in the New Jersey system (even if the evidence did not meet the burden of proof established by the court). The failure of this extensive effort over seventeen years to eliminate such disparities draws into question the capacity of any state court in this country with broad statutory aggravating factors to purge its system of race effects when they exist. This nationwide reality is highlighted by the fact that New Jersey Supreme Court justices do not stand for election and enjoy tenure until age seventy,\textsuperscript{110} while state supreme court justices in most other death penalty jurisdictions must stand for election or retention at some point in their terms on the court.\textsuperscript{111}

\section*{IV. Conclusion}

\textit{McCleskey v. Kemp} revealed the Supreme Court's indifference to race discrimination in the administration of the death penalty in America. In doing so, it provided the legislative and judicial bodies, to which Justice Powell and the Supreme Court relegated the issue, with a political and legal framework for denying and avoiding the problem. This framework was particularly comfortable for these officials to accept. They clearly perceived that public care and concern about racial discrimination in the treatment of death-eligible killers, on the basis of the race of the defendant and the race of the victim, was close to nil.

Since \textit{McCleskey}, there have been a number of legislative efforts to overrule the decision and to mitigate its impact in state and federal courts. However, these legislative strategies have borne little fruit. Moreover, with one exception, litigation strategies in state and federal courts also have been unsuccessful. Theoretically, the forums with the greatest promise for reform are state supreme courts that have the power under their state constitutions to reject \textit{McCleskey}

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\bibitem{108} 1991 Special Master's Report, \textit{supra} note 103, at app. tbl.18A.
\bibitem{109} Weisburd & Naus, \textit{supra} note 82, at 95 tbl.21.2.
\bibitem{110} N.J. Const. art. XI, § 4, para. 1.
\end{thebibliography}
and provide a fair hearing for claims of racial discrimination. More than a dozen state supreme courts have considered such requests, and all but one have rejected them.

This paper has focused on how the Pennsylvania, Maryland, and New Jersey supreme courts responded to requests that they reject *McCleskey* and institute systems that correct racial disparities in death sentencing. In litigated cases, each court was presented with a well-controlled *McCleskey*-style study documenting systemic racial discrimination in the administration of the death penalty. Only the New Jersey court accepted the invitation, and it did so in an unexpected way that failed to provide relief on a single claim of discrimination.

However, the rigorous system of judicial oversight that the New Jersey court devised, which included an empirically based system of individual proportionality review—together with regular judicial admonitions to New Jersey prosecutors to limit death sentencing to the worst cases—appears to have resulted in a reasonably selective death penalty system. Before 1991, 52\% of death-eligible New Jersey cases advanced to a penalty trial, while the penalty trial rate since 1999 has been only 10\%. This development appears to have diminished, but did not entirely eliminate, the risk of systemic race-of-victim disparities in prosecutorial charging decisions.

As noted in Section C. above, during the early years of the New Jersey system (1983 to 1991) there was a twenty-four percentage-point (65\%–41\%) white-victim disparity in the rates that cases advanced to a penalty trial. In contrast, in the latest (2005) analysis by the Court’s Special Master for Proportionality Review, the comparable white-victim disparity in all death-eligible cases since 1983 declined to seventeen percentage points (35\%–18\%). However, since capital prosecution rates also declined during that period, the relative risk of advancing to a penalty trial increased from 1.6 (between 1983 and 1991) to 1.9 (between 1983 and 2005).

The New Jersey court may take some solace in a belief that it took a major step in according fairness and justice in the administration of the death penalty. This is much more than can be said of any other state supreme court that has faced issues of proportionality and racial discrimination. Nevertheless, the New Jersey record indicates that the race-of-victim disparities in capital charging persisted in spite of the system’s enhanced selectivity and
draws into question the capacity of any state court to address this issue meaningfully.

For the past twenty-five years, appeals for relief to Congress and to state courts and legislatures have mainly been ignored. Only the legislature of one state (Kentucky) and the supreme court of another (New Jersey) have addressed the issue. The Kentucky legislative remedies have had little effect. In New Jersey, the problem was ameliorated by the court’s involvement with the issue, but racial disparities in capital sentencing persisted.

Hereetofore, we have argued that courts have the capacity to purge race effects from their death penalty systems. However, the record of denial and avoidance in the United States Congress, and in our state legislatures and state courts over the last twenty years, now convinces us that in jurisdictions with clear evidence of systemic racial disparities in the administration of the death penalty, abolition of the death penalty or a drastic legislative narrowing of the breadth of death eligibility to the most highly aggravated cases coupled with close scrutiny by the state supreme court is the only way to solve the problem.