CHALLENGING THE DEATH PENALTY WITH STATISTICS: *FURMAN*, *MCCLESKEY*, AND A SINGLE COUNTY CASE STUDY

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In the forty-year history of the Supreme Court's modern death penalty jurisprudence, two cases—Furman v. Georgia *(1972) and* McCleskey v. Kemp *(1987)—stand out above all others. Both cases turned on the Court's consideration of empirical evidence, but they appear to have reached divergent—even altogether inconsistent—results. In* Furman*, the Court relied on statistical evidence that the death penalty was infrequently applied to death-eligible defendants to hold that the Georgia death penalty scheme was unconstitutional under the Eighth Amendment. In* McCleskey*, the Court, despite being presented with statistical evidence that race played a significant role in death-charging and death-sentencing in Georgia, upheld the revised Georgia scheme and McCleskey's death sentence against Equal Protection and Eighth Amendment challenges. The* McCleskey *decision called into question the use of statistical evidence to challenge the death penalty.*

In the present Article, we report on a unique empirical study of the administration of the death penalty in Alameda County, California—the largest single-county death penalty study and the only study to examine intra-county geographic disparities in death-charging and death-sentencing. The data set, drawn from 473 first-degree murder convictions for murders occurring over a twenty-three-year period, compares death-charging and

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death-sentencing in the two halves of the county. During the study period, the two halves differed significantly in racial makeup—the population of North County was over 30% African-American, and of South County approximately 5% African-American; and the two halves differed in the race of homicide victims—in North County, African-Americans were homicide victims roughly 4.5 times as often as Whites, while, in South County, Whites were homicide victims more than three times as often as African-Americans. The study reveals that there were statistically significant disparities in death-charging and death-sentencing according to the location of the murder: the Alameda County District Attorney was substantially more likely to seek death, and capital juries, drawn from a county-wide jury pool, were substantially more likely to impose death, for murders that occurred in South County. We argue that, McCleskey *notwithstanding, statistical evidence such as the "race of neighborhood" disparities found in the present study should support constitutional challenges to the death penalty under both the Equal Protection Clause and the Eighth Amendment.*

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INTRODUCTION

In the forty-year history of the Supreme Court's efforts to regulate the administration of the death penalty in the United States, two cases—*Furman v. Georgia*[1] and *McCleskey v. Kemp*[2]—stand out above all others. In both cases, the Supreme Court considered challenges to the Georgia death penalty scheme on the grounds that it created an unconstitutional risk of arbitrariness in its application and was applied to discriminate against African-Americans. Both challenges were based on empirical data: in *Furman*, simple data on death sentencing rates and unadjusted data on race-of-victim disparities; and in *McCleskey*, on a sophisticated empirical study proving the existence of substantial disparities in the administration of the death penalty according to the race of the victim, and, to an even greater extent, according to the combination of the race of the defendant and race of victim. The Supreme Court divided five to four in each case, upholding the defendant's challenge in *Furman* and rejecting the defendant's challenge in *McCleskey*.

Despite the Court's apparent message in *McCleskey*—that demonstrated statistical disparities in the administration of a jurisdiction's death penalty scheme would not render the scheme unconstitutional—in the twenty-five years since *McCleskey*, empirical studies of the death penalty have proliferated. They have found disparities in the administration of the death penalty based on race, gender, geography and other factors.[3] The present Article adds yet another empirical study to this collection, although one different from all of the studies to date. Previous studies finding geographic disparities have looked at differences in death-sentencing rates among counties in a particular state or among judicial districts in the federal courts. The present study of the death penalty in Alameda County, California—the largest study of the administration of the death penalty in a single county—examines intra-county geographic patterns in regard to the District Attorney's decision to seek death and the sentencer's decision to impose death. Examining geographic patterns in a single county, where a single District Attorney's Office makes all the death-charging decisions and where juries drawn from a single county-wide jury pool make the sentencing decisions, eliminates the possibility that any geographic disparities found, such as those found in studies of inter-county disparities,[4] are the product of different decision-makers. Our study finds statistically significant geographic disparities in the

1 408 U.S. 238 (1972).
2 481 U.S. 279 (1987).
3 *See infra* Part II.
4 *See infra* Part II.C.

administration of the death penalty in the two halves of Alameda County,[5] disparities which correlate with racial differences in the population makeup of the county and in the distribution of homicide victims. Our findings suggest avenues for constitutional challenges to the administration of the death penalty in Alameda County, challenges which might be brought based on appropriate studies, done or yet to be done, in other jurisdictions.

In Part I, we describe the holdings of *Furman* and *McCleskey* and explore the consequences of the *McCleskey* decision—which many observers thought marked the end of arbitrariness and discrimination challenges to the death penalty—for *Furman* and for statistical challenges in general to the death penalty. In Part II, we describe the numerous and varied empirical studies of the death penalty published since the *McCleskey* decision—studies which have consistently found disparities in death-charging and/or death-sentencing with respect to race, gender, and location of the crime. We review their findings in order to give context to our study and to suggest that substantial empirical evidence already exists to support the kind of constitutional challenges we discuss in Part IV. In Part III, we first describe how the California death penalty scheme—the broadest in the country—grants virtually unfettered discretion to prosecutors and juries[6] to select from among the many who are convicted of first-degree murder the few who will be sentenced to death and how the exercise of that discretion has led to disparities documented in previous California studies. Then, we describe the present study of the death penalty in Alameda County and our finding that, during the twenty-three-year period of the study, there were statistically significant disparities in death-charging and death-sentencing depending on the location of the murder. That finding takes on special significance because of the very different racial makeup of the two halves of the county, suggesting that the District Attorney and capital jurors may be engaging in "race of neighborhood" discrimination. In Part IV, we explore how findings such as ours might support Equal Protection and Eighth Amendment challenges to the administration of the death penalty in Alameda County, the same challenges rejected in *McCleskey*. Finally, in the Conclusion, we argue that, *McCleskey* notwithstanding, statistical challenges to particular

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5 During the period of the study, the county was divided in half for purposes of initiating murder prosecutions. Prosecutions for North County murders were initiated in Oakland, and prosecutions for South County murders were initiated in Hayward. However, all murder cases were tried with juries drawn on a countywide basis. The division of the county for criminal prosecution purposes corresponded with census tract lines, so that each half of the county had three Census County Divisions.

6 Although in theory the parties might waive a jury trial and allow the judge to conduct the sentencing hearing, *see* CAL. PENAL CODE § 190.4 (West 2012), in fact, that rarely occurs and did not occur in any of the cases in our study.

death penalty schemes or their application can be pursued, and must be pursued, if the promise of *Furman*, that the death penalty would not be applied in an arbitrary or discriminatory manner, is to be realized.

I. *FURMAN* AND *MCCLESKEY*

The future of statistical challenges to the death penalty requires an understanding of what the Supreme Court said about the use of empirical evidence in *Furman* and *McCleskey* and an analysis of the effect of *McCleskey* on *Furman*.

A. Furman v. Georgia

As the Chief Justice recognized in his opinion for the four dissenters, *Furman* was an empirical challenge to the death penalty under the Eighth Amendment, the centerpiece of which was a comparison of the number of cases in which the death penalty was imposed with the number of cases in which it was statutorily available.[7] Although there was conflicting data before the Court as to the exact death sentence rate at the time,[8] the Chief Justice used the figure 15–20%,[9] a figure accepted by Justice Stewart in his separate opinion.[10] Subsequently, in *Gregg v. Georgia*,[11] and *Woodson v. North Carolina*,[12] the plurality relied on the same estimate.[13] Although the five justices constituting the majority in *Furman* drew somewhat different conclusions from the evidence of a 15–20% death sentence rate, all five justices relied on the infrequency with which the death penalty was imposed to establish its unconstitutionality.[14] For Justices Brennan and Marshall, the infrequent imposition of the death penalty indicated the

7 Furman v. Georgia, 408 U.S. 238, 386 (1972) (Burger, C.J., dissenting).

8 *See id.* at 435 n.19 (Powell, J., dissenting) ("No fully reliable statistics are available on the nationwide ratio of death sentences to cases in which death was a statutorily permissible punishment.") The petitioner had argued that the death sentence rate was less than 10%, but Justice Powell cited to several individual state studies finding a death sentence rate of about 20%. *Id.* Subsequently, David Baldus and his colleagues determined that the pre-*Furman* death sentence rate in Georgia was 15%. *See* DAVID C. BALDUS, GEORGE G. WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 80 (1990).

9 408 U.S. at 386 n.11 (Burger, C.J., dissenting).

10 *Id.* at 309 & n.10 (Stewart, J., concurring).

11 428 U.S. 153 (1976) (plurality opinion).

12 428 U.S. 280 (1976).

13 *Gregg*, 428 U.S. at 182 n.26; *Woodson*, 428 U.S. at 295 n.31.

14 *See* 408 U.S. at 248 n.11 (Douglas, J., concurring); *id.* at 291–95 (Brennan, J., concurring); *id.* at 309–10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring); *id.* 354 n.124, 362–63 (Marshall, J., concurring).

rejection of the death penalty under contemporary standards.[15] On the other hand, Justices Stewart and White, whose opinions were later cited as embodying the *Furman* holding,[16] emphasized that the relative infrequency of its application created the risk that it would be arbitrarily applied. Justice Stewart found that the death sentences at issue in *Furman* were "cruel and unusual" because, of the many persons convicted of capital crimes, only "a capriciously selected random handful" were sentenced to death.[17] Justice White concluded that "the death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."[18]

In addition to statistics on the infrequent imposition of the death penalty, the Court was presented with empirical data generally tending to show that the death penalty was imposed in a racially discriminatory manner. The data suggested that the death penalty was disproportionately imposed on African-Americans, particularly for the crime of rape, where 89% of those executed were African-American.[19] Justices Douglas and Marshall argued that the racial disparities demonstrated that the broad discretion afforded prosecutors and juries permitted the death penalty to be imposed in a racially discriminatory manner.[20] In the words of Justice Douglas: "[T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination, and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments."[21] The majority of the justices found the case for racial discrimination not proved by the data,[22] and the dissenters argued further that any such claim would have to be brought under the Equal Protection Clause, rather than the Eighth

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15 *Id.* at 299–300 (Brennan, J., concurring); *id.* at 362–63 (Marshall, J., concurring).

16 *See* Maynard v. Cartwright, 486 U.S. 356, 362 (1988); *Gregg*, 428 U.S. at 188–89 (plurality opinion).

17 408 U.S. at 309–10 (Stewart, J., concurring).

18 *Id.* at 313 (White, J., concurring). Justice Brennan voiced a similar objection: "When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system." *Id.* at 293 (Brennan, J., concurring).

19 *Id.* at 364 (Marshall, J., concurring); *see also id.* at 249–57 (Douglas, J., concurring). Both of the companion cases to *Furman—Branch v. Texas* and *Jackson v. Georgia*—were challenges by African-American men sentenced to death for the rape of white women.

20 *Id.* at 249–57 (Douglas, J., concurring); *id.* at 364–66 (Marshall, J., concurring). Two decades later, Justice Stevens reiterated that *Furman* addressed these two related concerns: "The risk of arbitrary and capricious sentencing, specifically including the danger that racial prejudice would determine the fate of the defendant." Tuilaepa v. California, 512 U.S. 967, 982 (1994) (Stevens, J., concurring).

21 *Furman*, 408 U.S. at 256–57 (Douglas, J., concurring).

22 *See id.* at 310 (Stewart, J., concurring); *id.* at 389–90 n.12 (Burger, C.J., dissenting).

Amendment.[23] With regard to the possibility of succeeding on such a claim, Justice Powell's dissenting opinion foreshadowed his later opinion for the majority in *McCleskey*:

> The possibility of racial bias in the trial and sentencing process has diminished in recent years. The segregation of our society in decades past, which contributed substantially to the severity of punishment for interracial crimes, is now no longer prevalent in this country. Likewise, the day is past when juries do not represent the minority group elements of the community. The assurance of fair trials for all citizens is greater today than at any previous time in our history. Because standards of criminal justice have "evolved" in a manner favorable to the accused, discriminatory imposition of capital punishment is far less likely today than in the past.[24]

After *Furman* held the death penalty unconstitutional as then administered, thirty-five states reenacted death penalty statutes,[25] and in 1976, the Court considered Eighth Amendment challenges to five of those statutes.[26] In upholding the death penalty schemes of three of the states—Georgia, Florida, and Texas—and rejecting the schemes of North Carolina and Louisiana, the Court elaborated the Eighth Amendment requirements for a constitutional death penalty scheme. Read together, the cases held that: 1) the Eighth Amendment required that the death penalty be a proportionate punishment for the particular crime, and the death penalty was not a disproportionate punishment for intentional murder ("when a life has been taken deliberately"),[27] the crime at issue in all five cases; 2) the Eighth Amendment required that the sentencer be granted discretion to consider the circumstances of the crime and the character and record of the defendant and, consequently, mandatory death penalty statutes were unconstitutional;[28] and 3) the Eighth Amendment required that the discretion afforded to the sentencer had to be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action,"[29] and the Court found that such was the case as to the three statutes that it upheld.[30] In particular, as to Georgia's death penalty scheme, which would later be challenged in *McCleskey*, the Court found that the risk of arbitrariness

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23 *Id.* at 389–90 n.12 (Burger, C.J., dissenting); *id.* at 449 (Powell, J., dissenting).

24 *Id.* at 450 (Powell, J., dissenting).

25 Gregg v. Georgia, 428 U.S. 153, 179–80 (1976) (plurality opinion).

26 *See Gregg*, 428 U.S. 153; Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

27 *Gregg*, 428 U.S. at 187.

28 *Woodson*, 428 U.S. at 303–05.

29 *Gregg*, 428 U.S. at 189.

30 *See Gregg*, 428 U.S. at 198 (Georgia); *Proffitt*, 428 U.S. at 252–53 (Florida); *Jurek*, 428 U.S. at 276 (Texas). In each case the Court approved the statute on its face without empirical evidence of the statute's actual functioning.

was addressed by narrowing the class of murderers subject to capital punishment and providing for comparative proportionality review of the sentence by the Georgia Supreme Court.[31] In his concurring opinion in *Gregg*, Justice White, writing for himself, the Chief Justice, and Justice Rehnquist, explained how the new Georgia statute could be expected to address the *Furman* problem by narrowing the death-eligible class:

> As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate . . . it becomes reasonable to expect that juries–even given discretion not to impose the death penalty–will impose the death penalty in a substantial portion of the cases so defined. If they do, it can no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its usefulness as a sentencing device.[32]

Five years later, in *Zant v. Stephens*,[33] the Court again addressed a *Furman* ("risk of arbitrariness") challenge to the Georgia scheme. In *Zant*, the Court held that, to satisfy *Furman*, the states, by statute, had to "limit the death penalty to certain crimes"[34] and the aggravating circumstances adopted for that purpose had to "genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."[35] The Court, again without empirical evidence, found that the Georgia scheme satisfied *Furman* because the aggravating circumstances served the categorical narrowing function and because the scheme provided for "meaningful appellate review" of every death sentence.[36] Thus, on the eve of *McCleskey*, the Court had twice held that *Furman* required only genuine narrowing of the death-eligible class and meaningful appellate review and that Georgia's scheme, on its face, met those requirements.[37]

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31 *Gregg*, 428 U.S. at 196–98.

32 *Id.* at 222 (White, J., concurring).

33 462 U.S. 862 (1983).

34 *Id.* at 877 n.15.

35 *Id.* at 877.

36 *Id.* at 875, 879.

37 In *Gregg*, the petitioner argued that these elements did not in fact limit the imposition of the death penalty in any meaningful way, *Gregg*, 428 U.S. at 200–04, and commentators subsequently have made the same argument. *See, e.g.*, Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 402 (1995) ("[C]ontemporary death penalty law is remarkably undemanding. The narrowing, channeling, and individualization requirements can be simultaneously and completely satisfied by a statute that defines capital murder as any murder accompanied by some additional, objective factor or factors and that provides for a sentencing proceeding in which the sentencer is asked simply whether the defendant should live or die . . . . [T]he state can seek the death penalty against virtually any murderer."). *But see generally* Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for*

B. McCleskey v. Kemp

In 1976, when the Supreme Court approved the Georgia, Florida, and Texas death penalty schemes, the Court did so on the basis of its assumptions about how the schemes would operate because there was not yet any empirical evidence to challenge those assumptions. In the subsequent eleven years, all three schemes were challenged on the basis of new empirical evidence appearing to contradict the Court's assumptions.[38] In all three cases, the Court refused to reconsider its earlier holdings in light of the new evidence. In *Barefoot v. Estelle*,[39] the defendant challenged the Texas scheme approved in *Jurek v. Texas*.[40] Under the Texas scheme, the sentence turned on the sentencer's finding of future dangerousness,[41] and the Court, in *Jurek*, had rejected the defendant's contention that it was impossible to predict future conduct, finding instead that such predictions were commonplace in the criminal justice system.[42] In *Barefoot*, the defendant challenged the prosecution's practice of presenting psychiatrists and psychologists to make predictions of future dangerousness (often without even examining the defendants) with studies that showed that "*two out of three* predictions of long-term future violence made by psychiatrists are wrong."[43] The Court rejected the challenge because exclusion of psychiatric testimony on future dangerousness "would be asking us to disinvent the wheel"[44] and to, in effect, overrule *Jurek*.[45] In *Spaziano v. Florida*,[46] the defendant challenged the Florida scheme approved in *Proffitt v. Florida*.[47] The Florida scheme provided for judge sentencing after an advisory jury verdict, and, in *Proffitt*, the Court had upheld this aspect of the scheme because "it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment . . . ."[48] Presented with evidence that the

Furman*?*, 72 N.Y.U. L. REV. 1283 (1997) (arguing that whether these limitations are meaningful or illusory cannot be determined because the Court has never considered a challenge based on empirical evidence as to their effect).

38 *See* McCleskey v. Kemp, 481 U.S. 279 (1987); Spaziano v. Florida, 468 U.S. 447 (1984); Barefoot v. Estelle, 463 U.S. 880 (1983).

39 463 U.S. 880 (1983).

40 428 U.S. 262 (1976).

41 *Id.* at 272 (noting that a death sentence may be imposed only on finding that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society").

42 *Id.* at 274–76.

43 463 U.S. at 920 (Blackmun, J., dissenting) (citing Brief Amicus Curiae for the American Psychiatric Association at 9, 13, Barefoot v. Estelle, 463 U.S. 880 (1983) (No. 82-6080)).

44 *Id.* at 896.

45 *Id.* at 906.

46 468 U.S. 447 (1984).

47 428 U.S. 242 (1976).

48 *Id.* at 252.

scheme had not worked to protect the rights of defendants because in all eighty-three cases where a trial judge had overridden a jury verdict, it had been to impose death over a jury's recommendation of life,[49] the Court disregarded the empirical evidence and again upheld the statute.

McCleskey v. Kemp[50] was the last, and most profound, challenge to the 1976 decisions. McCleskey, a black man sentenced to death in Georgia for killing a white police officer, challenged his death sentence as unconstitutional on the basis of an extensive and sophisticated empirical study that indicated racial considerations entered into capital sentencing decisions in Georgia. The study, conducted by Professor David Baldus and his associates ("Baldus study"),[51] used a multiple regression analysis to examine the effect of the race of defendants and the race of victims in capital sentencing proceedings in Georgia. The study examined over 2000 murder cases that occurred in Georgia during the 1970s. The researchers used a number of different models that took account of numerous variables that could have explained the apparent racial disparities on nonracial grounds. The study found a very strong race-of-the-victim effect and a weaker race-of-the-defendant effect. As the Court described the study:

> Baldus subjected his data to an extensive analysis, taking account of 230 variables that could have explained the disparities on nonracial grounds. One of his models concludes that, even after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks. According to this model, black defendants were 1.1 times as likely to receive a death sentence as other defendants. Thus the Baldus study indicates that black defendants, such as McCleskey, who kill white victims, have the greatest likelihood of receiving the death penalty.[52]

From these results, McCleskey argued that the Georgia scheme, as applied, violated the Fourteenth Amendment because it denied McCleskey the equal protection of the laws and it violated the Eighth Amendment because it produced the very results condemned in *Furman*.

Although the Baldus study stands as the most complex and thorough study of its kind, in terms of the size of the sample and the number of variables considered, the district court in *McCleskey* rejected the study's methodology and findings.[53] The court of appeals assumed,

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49 468 U.S. at 475 n.14 (Stevens, J., dissenting).

50 481 U.S. 279 (1987).

51 The study, by Professors David C. Baldus, George Woodworth, and Charles A. Pulaski, Jr., was referred to by the Court, and has been referred to since, as the "Baldus study." *Id.* at 286.

52 *Id.* at 287.

53 *Id.* at 288–89.

arguendo, that the study was valid and reached the constitutional issues, as did the Supreme Court.[54] Even while accepting the validity of the Baldus study findings, Justice Powell, writing for the majority, seemed to dismiss their significance, emphasizing that the study showed only a "*risk*" that the factor of race entered into any sentencing decision[55] and referring to the racial disparities shown as "*apparent*."[56] There is good reason to believe, however, that the majority accepted the accuracy of the Baldus study findings. Three months before *McCleskey* was decided, Justice Scalia, a member of the five-justice majority, distributed to the Court a memorandum in which he wrote, "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 honestly say that all I need is more proof."[57]

Despite accepting the findings of the Baldus study, the Court rejected both of McCleskey's challenges.

1. The Equal Protection Challenge

With regard to McCleskey's challenge under the Equal Protection Clause, the majority held that McCleskey had the burden of proving "the existence of purposeful discrimination" by the decisionmakers in his case[58] and that the Baldus study was "clearly insufficient" to support an inference of such discrimination.[59] While acknowledging that statistical evidence might be used to prove discriminatory intent, the majority held that McCleskey's statewide statistics did not constitute evidence that any of the actors involved in bringing about McCleskey's conviction and sentence acted with such intent. To the extent McCleskey was contending that the state as a whole had acted with a discriminatory purpose, the majority held that he would have to prove that "the Georgia legislature enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect," and the

54 *Id.* at 291 n.7.

55 *Id.*

56 *Id.* at 312 (emphasis added). "It is true that after making these assumptions Justice Powell employs an array of rhetorical maneuvers to drain them of any potentially disturbing implications." Anthony G. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After* McCleskey, 39 COLUM. HUM. RTS. L. REV. 34, 44 n.32 (2007).

57 David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of Its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359, 371 n.46 (1994) (internal quotation marks omitted).

58 481 U.S. at 292 (quoting Whitus v. Georgia, 385 U.S. 545, 550 (1967)).

59 *Id.* at 297.

Court found no evidence to that effect.[60] With regard to the intent of prosecutors in seeking the death penalty against particular defendants, again statewide statistics could not prove a discriminatory intent on the part of any particular prosecutor.[61] Finally, each particular decision to impose a death sentence was made by a "unique" jury, so a discriminatory intent could not be inferred as to McCleskey's jury from statistics about what other juries did in other cases.[62]

However, in addition to statewide statistics, the Baldus study also included data about prosecutions in Fulton County (Atlanta), the county of McCleskey's conviction and sentence. The data indicated that at each step in the process from indictment to sentence, there was a differential treatment of the cases by the prosecution based on the race of the victim.[63] To the extent McCleskey was claiming discrimination by a single prosecutor's office, the claim could not be dismissed on the same basis as had been the claims based on statewide statistics. Instead, Justice Powell emphasized the broad discretion granted to prosecutors, suggested that even in the face of a statistical showing of racial disparities, it would be improper to require prosecutors to defend their decisions to seek death, and stated that the Court would require "exceptionally clear proof" to infer discrimination.[64] However, despite the majority's broad language, the brief holding of the Court was much narrower: the Fulton County sample was too small to create an inference of discrimination.[65]

2. The Eighth Amendment Challenge

McCleskey's Eighth Amendment challenge caused the Court more difficulty. As Justice Brennan pointed out in dissent, unlike a claim under the Equal Protection Clause, an Eighth Amendment challenge does not require proof of an intent to discriminate and, because it is directed to the risk of arbitrariness in the system as a whole, does not

60 *Id.* at 297–98.

61 *Id.* at 295 n.15.

62 *Id.* at 294–95 & n.15.

63 *Id.* at 356 n.11 (Blackmun, J., dissenting).

64 *Id.* at 296–97 (majority opinion).

65 *Id.* at 295 n.15. The Fulton County sample covered 179 cases where a defendant was convicted of murder by plea or verdict, *see* BALDUS ET AL. *supra* note 8, at 337, some portion of which not did involve defendants who were death-eligible, *id.* at 89, and nineteen of which went to penalty trial, *id.* at 337, where the decision on death was made by a jury, not the prosecutor. Whether the *McCleskey* Court would have considered a more substantial study is unclear. "The opinion's limited and tangential discussion of data for Fulton County, where McCleskey was tried and sentenced to death, leaves unclear whether capital-sentencing patterns specific to a judicial district would be equally ruled out of bounds as a basis for inference of the discriminatory animus of the official actors in that district." Amsterdam, *supra* note 56, at 45 n.36.

require proof of arbitrariness in a particular case.[66] McCleskey's argument may be summarized as follows: *Furman* held that the death penalty "may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner";[67] proof that race played a significant role in whether a defendant was sentenced to death established that the Georgia procedures produced arbitrary results; therefore the Georgia statute was unconstitutional and had to be struck down.[68] Although the logic of the argument seems compelling, given the Court's prior decisions, there were two problems.

First, the Court, in *Gregg* and in *Zant*, had twice approved the Georgia statute on its face, and, as discussed above, the Court had already demonstrated its unwillingness to reconsider death penalty schemes approved on their face in light of empirical evidence. Second, as also discussed above, by the time of the *McCleskey* case, the Court had determined that *Furman* required only that a state "genuinely narrow" the death-eligible class and provide for "meaningful appellate review" of the sentence. McCleskey never argued that his empirical evidence showed the Georgia scheme failed to meet either of these requirements.[69]

The Court rejected the Eighth Amendment claim because the "discrepancy indicated by the Baldus study is a far cry from the major systemic defects identified in Furman" and the "risk of racial bias" demonstrated by the Baldus study was not "constitutionally significant."[70] Justice Powell supported this conclusion with four arguments: 1) the Eighth Amendment requires that prosecutors and juries exercise discretion, and, consequently, "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system";[71] 2) there were adequate safeguards against racial discrimination in the Georgia scheme and in the Court's "'unceasing efforts' to eradicate racial prejudice from our criminal justice system";[72] 3) recognition of McCleskey's challenge would lead to similar challenges throughout "the

66 481 U.S. at 322–24 & n.1.

67 Godfrey v. Georgia, 446 U.S. 420, 427 (1980).

68 Transcript of Oral Argument at 7, Furman v. Georgia, 408 U.S. 238 (1972) (No. 69-5003).

69 McCleskey did not argue that the statute as it stood violated the *Furman*/*Zant* genuine narrowing requirement. Nor is it clear that the Georgia statute was insufficiently narrow. While the Georgia death sentence rate at the time of *Furman* was 15%, the post-*Furman* death sentence rate had risen to 23%. BALDUS ET AL., *supra* note 8, at 88–89. In other words, the revised Georgia statute had narrowed the death-eligible class, and the death sentence rate at the time of *McCleskey* was above the threshold 15–20% rate discussed in *Furman* and subsequent cases.

70 *McCleskey*, 481 U.S. at 313.

71 *Id.* at 312.

72 *Id.* at 309.

entire criminal justice system";[73] and 4) the matter is best left to the legislature.[74] As Justice Brennan amply demonstrated in dissent, these specific arguments, taken one by one, are not persuasive,[75] but, taken together, they may be read to express Justice Powell's more fundamental concern, that granting the relief sought by McCleskey—striking down the Georgia death penalty statute—would have led to similar results, based on similar studies, in other states and a de facto abolition of the death penalty in the United States. Justice Powell understood that abolition was the unstated goal of the dissenters,[76] and he responded: "As we have stated specifically in the context of capital punishment, the Constitution does not 'plac[e] totally unrealistic conditions on its use.'"[77]

C. *The Aftermath of* McCleskey

The Court's decision in *McCleskey* was immediately and sharply criticized for its apparent tolerance of racism in the administration of the death penalty. For example, Hugo Bedau[78] likened the decision to such notorious holdings as *Dred Scott v. Sandford*,[79] *Plessy v. Ferguson*,[80] and *Korematsu v. United States*.[81] The *Harvard Law Review* described the *McCleskey* decision as "logically unsound, morally reprehensible, and legally unsupportable."[82] And, twenty years later, Tony Amsterdam's criticism of the case was no less trenchant:

> *McCleskey* is the *Dred Scott* decision of our time. It is a declaration that African-American life has no value which white men are bound to respect. It is a decision for which our children's children will

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73 *Id.* at 314–19. "The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment." *Id.* at 319.

74 *Id.*

75 *See id.* at 320 (Brennan, J., dissenting).

76 *Id.* at 313 n.37 (majority opinion) ("Given these safeguards already inherent in the imposition and review of capital sentences, the dissent's call for greater rationality is no less than a claim that a capital-punishment system cannot be administered in accord with the Constitution.").

77 *Id.* at 319 (quoting Gregg v. Georgia, 428 U.S. 153, 199 (1976)). In fact, if, as Justice Powell assumed, similar racial disparities could be proved in most states, the result would not have been abolition of the death penalty. Instead, as was the case after *Furman*, the states would have been free to amend their statutes to eliminate such disparities, e.g., by narrowing the death-eligible class, by imposing limits on prosecutors' discretion or by permitting defendants to challenge death penalty prosecutions by proof of disparate impact.

78 *See* Hugo Bedau, *Someday* McCleskey *Will Be Death Penalty's* Dred Scott, L.A. TIMES, May 1, 1987, at 5.

79 60 U.S. (19 How.) 393 (1857).

80 163 U.S. 537 (1896).

81 323 U.S. 214 (1944).

82 *The Supreme Court, 1986 Term—Leading Cases*, 101 HARV. L. REV. 149, 158 (1987).

> reproach our generation and abhor the legal legacy we leave them. One inherent evil of the death penalty is that it extends the boundaries of permissible inhumanity so far that every lesser offense against humanity seems inoffensive by comparison, leading us to tolerate them relatively easily. *McCleskey* extends the boundaries of permissible discrimination and hypocrisy in that same measure. Accept *McCleskey*, and race discrimination in matters less momentous than life or death can be shrugged off. Accept *McCleskey*, and any hypocrisy with less than lethal consequences can be viewed as trivial in a legal system where the highest tribunal sits in a building bearing the proud motto "Equal Justice Under Law" on its west facade and ignores it.[83]

Most scholars also concluded that *McCleskey* marked the end of statistical challenges to the death penalty. For example, James Acker argued: "Justice Powell's majority opinion in [*McCleskey*] perhaps signified more than any case in recent memory the Court's unwillingness to give legal recognition to empirical research results."[84] David Baldus, George Woodworth, and Charles Pulaski, Jr. wrote: "The decision has eliminated the federal courts as a forum for the consideration of statistically based claims of racial discrimination in capital sentencing."[85] Henry Fradella called the Court's treatment of social science evidence "downright hostile"[86] and suggested that the decision rendered statistical evidence "nearly useless in future death penalty challenges based on racial discrimination."[87] Recently, Carol Steiker and Jordan Steiker reiterated that *McCleskey* marked the end of arbitrariness- or discrimination-based challenges to the death penalty.[88] On the other hand, some scholars took a more nuanced position, contending that statistics, when coupled with other forms of proof, might yet play a modest role in county-level Equal Protection challenges.[89]

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83 Amsterdam, *supra* note 56, at 47.

84 James R. Acker, *A Different Agenda: The Supreme Court, Empirical Research Evidence, and Capital Punishment Decisions, 1986-1989*, 27 LAW & SOC'Y REV. 65, 75 n.8 (1993).

85 David C. Baldus et al., *supra* note 57, at 374.

86 Henry F. Fradella, *A Content Analysis of Federal Judicial Views of the Social Science "Researcher's Black Arts,"* 35 RUTGERS L.J. 103, 109 (2003).

87 *Id.* at 111.

88 Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 168 (2008).

89 *See, e.g.*, Amsterdam, *supra* note 56, at 49–50 (arguing that statistical evidence supplemented by proof of a history of racial discrimination in the county, such as evidence that African-Americans are underrepresented as jurors, judges, prosecutors, and other officials and any direct evidence of bias on the part of the prosecution, might make out a violation); John H. Blume, Theodore Eisenberg & Sheri Lynn Johnson, *Post*-McCleskey *Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771, 1806–07 (1998) (arguing that racial discrimination claims should be litigated under the same burden-shifting approach used in employment discrimination cases).

After *McCleskey*, because it was assumed that a statistical showing of statewide racial disparities in the administration of the death penalty would not support a constitutional challenge, some litigants did turn to county-level equal protection challenges. The federal and state courts consistently rejected such challenges, however, finding that the evidence of discrimination presented was insufficient to make out a prima facie case.[90] Some courts rejected the statistical showings on the ground that they failed to consider the various non-racial variables included in the Baldus study.[91] Other courts, focusing on Justice Powell's statements about the "prosecutor's traditionally 'wide discretion'"[92] and the requirement of "exceptionally clear proof,"[93] imposed an all but impossible-to-meet burden of proof on the defendant.[94] Still other courts found that, whatever the implications of the statistics and anecdotal evidence for proof of discrimination generally by the prosecutor, the defendant did not establish a prima facie case because he produced no evidence of discrimination in *his* case and/or failed to identify a similarly situated defendant who was treated differently.[95] The Maryland Supreme Court provided perhaps the most thorough consideration of such a claim in *Evans v. State*.[96] In *Evans*, the defendant relied on a study which found statistically significant disparities by race of victim and by geography in the administration of the Maryland death penalty,[97] and, after a thorough examination of the study and the defendant's various claims, the court concluded:

> Since *McCleskey,* no court has allowed a claim of this kind. The courts accept the reasoning in *McCleskey* concerning the failure of general statistics to establish a statewide Equal Protection or Cruel

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90 The courts that bothered to discuss the evidence presented "treat[ed] these efforts to comply with *McCleskey* with varying levels of disdain." Blume et al., *supra* note 89, at 1794.

91 *See, e.g.*, People v. McPeters, 832 P.2d 146, 155–56 (Cal. 1992) (finding a county-level study showing that, although only one-third of willful homicide victims were white, all death and life-without-parole sentences involved cases with white victims, to be insufficient to warrant discovery on a racial discrimination claim because of failure to consider other factors); Lane v. State, 881 P.2d 1358, 1362–63 (Nev. 1994) (finding a county-level study tending to show death penalty sought more often against blacks than whites to be insufficient to prove discrimination because of failure to consider case-specific factors: the strengths and weaknesses of the cases, the existence of aggravating and mitigating circumstances, whether plea bargains were offered, and the character of the defendant). As Blume and his coauthors have explained, to require that a county-level study include anything like the range of variables included in Baldus's statewide study of more than 2000 cases would make a regression analysis meaningless and any results statistically insignificant. Blume et al., *supra* note 89, at 1800–01.

92 McCleskey v. Kemp, 481 U.S. 279, 296 (1987).

93 *Id.* at 297.

94 *See, e.g.*, Foster v. State, 614 So. 2d 455, 464 (Fla. 1992).

95 *See*, *e.g.*, Jones v. State, 539 S.E.2d 154, 161 (Ga. 2000); Jones v. State, 440 S.E.2d 161, 163 (Ga. 1994).

96 914 A.2d 25 (Md. 2006).

97 The study by Professor Raymond Paternoster is discussed *infra* in Part II.

> and Unusual Punishment violation and instead require a defendant to assert some specific discriminatory intent in their case.[98]

Despite the pall cast over statistically-based challenges by *McCleskey*, nothing in the decision purported to eliminate statistical challenges to state death penalty schemes—like the challenge made in *Furman* itself—based on the breadth of death-eligibility and the relative infrequency of death sentences. In fact, since the *McCleskey* decision, the Court repeatedly has reaffirmed the *Furman* principle. In *Lowenfield v. Phelps*,[99] decided a year after *McCleskey*, the Court addressed a "failure to narrow" challenge to the Louisiana death penalty scheme and, while rejecting the challenge, made clear what was implicit in *Zant*, that a capital sentencing scheme as a whole, not just each individual aggravating circumstance, must "genuinely narrow" the death-eligible class.[100] In *Penry v. Lynaugh*,[101] decided two years after *McCleskey*, the Court (quoting Justice White's explanation of the *Furman* principle in his concurring opinion in *Gregg*) stated that the required constitutional narrowing of death-eligible cases should result in the imposition of the death penalty "in a *substantial portion* of the cases so defined."[102] The statement constituted an invitation to challenge broad death penalty schemes with statistics showing that the death penalty was not being imposed in a substantial portion of death-eligible cases, i.e., statistics showing a low death sentence rate.

In the past ten years, the Supreme Court has repeatedly relied on the essential lesson of *Furman*, that, to comply with the Eighth Amendment, states must limit death eligibility. The Court has said that the death penalty may only be imposed on defendants "who commit 'a narrow category of the most serious crimes,' and whose extreme culpability makes them 'the most deserving of execution,'"[103] the "worst offenders."[104] "Confirmed by repeated, consistent rulings of this Court, [the Eighth Amendment] requires that use of the death penalty be restrained . . . . [R]esort to the penalty must be reserved for the worst of crimes and limited in its instances of application."[105] Plainly, whether a particular state's death penalty scheme is "restrained" and "limited," applies to a "narrow category of the most serious crimes," and results in

98 914 A.2d at 66.

99 484 U.S. 231 (1988).

100 *Id.* at 244.

101 492 U.S. 302 (1989).

102 *Id.* at 327 (quoting Gregg v. Georgia, 428 U.S. 153, 222 (1976) (White, J., concurring)) (emphasis added).

103 Kennedy v. Louisiana, 554 U.S. 407, 420 (2008) (quoting Roper v. Simmons, 543 U.S. 551, 568 (2005)).

104 *Roper*, 543 U.S. at 553.

105 *Kennedy*, 554 U.S. at 446–47.

a "substantial portion" of those made death-eligible being sentenced to death, is an empirical question to be answered by statistics.

II. STATISTICAL STUDIES OF DEATH-SENTENCING DISPARITIES SINCE *MCCLESKEY*

The Baldus study was not the only empirical study to find racial disparities in death-sentencing in the decade and a half following *Furman*. Samuel Gross and Robert Mauro studied racial patterns and disparities in eight states—Arkansas, Florida, Georgia, Illinois, Mississippi, North Carolina, Oklahoma, and Virginia—for the five-year period, 1976–1980.[106] Their data was obtained from the Supplementary Homicide Reports (SHRs) filed by local police agencies with the FBI,[107] and Gross and Mauro compared the SHR data with the cases of defendants sentenced to death. Focusing on the three states with the largest number of death sentences during the period—Georgia, Florida, and Illinois—and analyzing the race-of-defendant and race-of-victim data against the non-racial variables that might legitimately justify sentencing disparities, the study concluded:

> Multiple logistic regression (or "logit") analysis reveals large and statistically significant race-of-victim effects on capital sentencing in Georgia, Florida, and Illinois. After controlling for the effects of all of the other variables in our data set, we found that the killing of a white victim increased the odds of a death sentence by an estimated factor of 4 in Illinois, about 5 in Florida, and about 7 in Georgia. This method of analysis reveals some evidence that the race of the suspect had an independent effect on capital sentencing in Illinois, but no evidence of independent race-of-suspect effects in Georgia or Florida.[108]

In each of the other five states, the study found similar race-of-victim effects, although in Virginia and Arkansas, the states with the fewest

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106 SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 43–94 (1989).

107 *Id.* at 35. The SHRs included data on:

> (1) the sex, age, and race of the victim or victims; (2) the sex, age, and race of the suspected killer or killers; (3) the month and year and the place of the homicide; (4) the weapon used; (5) the commission of any separate felony accompanying the homicide; and (6) the relationship between the victim(s) and the suspected killer(s).

Id.; *see also* FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTING HANDBOOK 104–07 (2004), *available at* http://www.fbi.gov/about-us/cjis/ucr/additional-ucr-publications/ucr_handbook.pdf.

108 GROSS & MAURO, *supra* note 106, at 69.

number of death sentences, the results were not statistically significant.[109]

In early 1990, the United States General Accounting Office (GAO) issued a report reviewing and critiquing twenty-eight post-*Furman* studies concerning possible race-of-victim and/or race-of-defendant disparities in the administration of the death penalty.[110] The report found that there were significant and consistent race-of-victim disparities, i.e., that those who murdered whites were more likely to be sentenced to death than those who murdered blacks, that these disparities could not be explained by legally relevant variables and that these disparities existed at all stages of the criminal process.[111] On the other hand, the report found that, although more than half the studies found race-of-defendant disparities, overall the evidence that the race of the defendant influenced death penalty outcomes was more equivocal.[112]

Despite the cold reception given to the Baldus study in *McCleskey* and the post-*McCleskey* dismissal of discrimination cases in the lower courts, empirical studies of the death penalty in operation have proliferated in the last twenty-five years. In general, the studies have been of two kinds.[113] The majority of the researchers have followed the path taken by Gross and Mauro, comparing general homicide data, usually derived from SHRs, with similar data in death penalty cases (SHR-type studies), rather than conducting "extremely time-consuming and expensive"[114] studies based on the examination of individual murder cases to determine death-eligibility (death-eligibles studies). The SHR-type studies have been broader, but necessarily less precise, than the death-eligibles studies, which included only defendants actually charged with, and/or convicted of murder and factually death-eligible. The studies examined death-charging, death-sentencing, or both for otherwise unexplained disparities,[115] and, irrespective of differences in methodology, the studies consistently found such disparities with regard

109 *Id.* at 92.

110 U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-90-57, REPORT TO THE SENATE AND HOUSE COMMITTEES ON THE JUDICIARY: DEATH PENALTY SENTENCING (1990), *available at* http://www.gao.gov/assets/220/212180.pdf.

111 *Id.* at 5–6.

112 *Id.* at 6.

113 David Baldus, George Woodworth & Neil Alan Weiner, *Perspectives, Approaches, and Future Directions in Death Penalty Proportionality Studies*, *in* THE FUTURE OF AMERICA'S DEATH PENALTY 135, 138–42 (Charles S. Lanier et al. eds., 2009).

114 Marian R. Williams & Jefferson E. Holcomb, *Racial Disparity and Death Sentences in Ohio*, 29 J. CRIM. JUST. 207, 210 (2001).

115 While the inquiries into death-charging (by the prosecutor) and death-sentencing (by the judge or jury) are discrete, they are not independent. The sentencing discretion of the judge or jury is limited to the (often relatively small) sub-category of death-eligible cases where the prosecutor seeks death and pursues the case to a penalty trial.

to the presumably illegitimate factors[116] of race, gender, and location of the crime.[117] The findings are described below.

A. *Racial Disparities*

Since *McCleskey*, there have been numerous empirical studies focused on racial disparities in death-charging and death-sentencing, and virtually all found significant racial disparities in death-charging, death-sentencing, or both.[118]

Most of the single-state studies were SHR-type studies. The first post-*McCleskey* single-state study was Glenn Pierce and Michael Radelet's Florida study, covering over 10,000 cases.[119] They found that, taking all possibly explanatory variables into account, those suspected of

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116 By "illegitimate" factors, we mean factors other than the nature of the crime or the character and record of the accused.

117 These complex studies of disparities in death-charging or death-sentencing aimed at determining *why* the death penalty is sought or imposed should not be confused with simple studies to determine the frequency with which the death penalty is imposed in a particular jurisdiction. *See, e.g.*, Steven F. Shatz & Nina Rivkind, *supra* note 37; Steven F. Shatz, *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study*, 59 FLA. L. REV. 719 (2007). Of course, some studies encompass both sets of issues. *See, e.g.*, John J. Donohue, Capital Punishment in Connecticut, 1973–2007: A Comprehensive Evaluation from 4686 Murders to One Execution (Oct. 15, 2011) (unpublished manuscript), *available at* http://works.bepress.com/john_donohue/87 (finding a death sentence rate of 4.4% among 205 defendants convicted of homicide and death-eligible and finding disparities based on race and geography); Steven F. Shatz & Naomi R. Shatz, *Chivalry Is Not Dead: Murder, Gender, and the Death Penalty*, 27 BERKELEY J. GENDER L. & JUST. 64 (2012) (finding an initial death sentence rate of 5.5% among 1000 defendants convicted of first-degree murder and death-eligible and finding disparities based on gender).

118 Studies in three states—New Jersey, Nebraska, and Missouri—found race-of-victim disparities in charging and/or sentencing, but those disparities disappeared or became statistically insignificant when location of the crime was introduced into the analysis, i.e., statistically significant geographic disparities accounted for the observed differences in death-charging and death-sentencing. *See* DAVID S. BAIME, REPORT OF THE NEW JERSEY SUPREME COURT: SYSTEMATIC PROPORTIONALITY REVIEW PROJECT 2001–2002, at 4 (2002), *available at* http://www.judiciary.state.nj.us/pressrel/baimereport.pdf ("Although we find a consistent and strong effect of race of victim in our regression studies utilizing relevant variables defined by experienced judges and set forth in our statutes, that finding essentially disappears when county variability is introduced."); David C. Baldus, George Woodworth, Catherine M. Grosso & Aaron M. Christ, *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973–1999)*, 81 NEB. L. REV. 486, 578, 581 (2002) (little or no race disparities when taking into account defendant's culpability and location of the crime); Katherine Barnes, David Sloss & Stephen Thaman, *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 ARIZ. L. REV. 305, 354 (2009) (finding large racial disparities but concluding that all the statistically significant disparities were based on geography). *See generally* David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 41 CRIM. L. BULL., no. 2, Spring 2005, at 6 (reviewing many of the post-*McCleskey* studies).

119 *See* Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLA. L. REV. 1 (1991).

killing whites were 3.42 times as likely to receive a death sentence as those suspected of killing blacks.[120] The 1990s saw smaller studies in Missouri,[121] Arizona,[122] and Ohio[123]—all of which found racial disparities in capital cases. Radelet and Pierce followed their Florida study with similar SHR studies in California[124] and, most recently, North Carolina.[125] Their California study covered the period 1990–1999, comparing SHRs with the 263 single-victim cases where the defendant was sentenced to death.[126] They found "glaring differences in the rate of death sentences across categories of victim race/ethnicity."[127] The North Carolina study covered the period 1980–2007 and encompassed 15,281 homicides and 352 death sentences.[128] Employing logistic regression models with race and two aggravating factors (multiple victims, contemporaneous felony), Radelet and Pierce found no disparity based on race of the defendant,[129] but a significant disparity based on the race of the victim.[130]

Radelet and Pierce also studied death sentencing in Illinois, combining an SHR-type and a death-eligibles approach to 4182 cases of defendants convicted of first-degree murder during the period 1988 through 1997.[131] They coded the cases according to legally relevant factors—the presence of death-eligibility factors (principally, multiple murders or murders in the course of a felony) and aggravating factors (the defendant's record), and according to "extra-legal" factors—race, gender, and location of the murder.[132] Applying logistic regression to

120 *Id.* at 28.

121 *See* Jonathan R. Sorensen & Donald H. Wallace, *Capital Punishment in Missouri: Examining the Issue of Racial Disparity*, 13 BEHAV. SCI. & L. 61, 64–66, 78 (1995) (examining capital murders committed between 1977 and 1991 and finding both race-of-victim and race-of defendant discrimination at the pre-trial stages of a capital case (charge/conviction) and the decision to go to a penalty phase).

122 *See* Ernie Thomson, *Discrimination and the Death Penalty in Arizona*, 22 CRIM. JUST. REV. 65, 74 (1997) (examining homicides committed 1982–1991 and finding that minorities who killed whites were "heavily overrepresented" on death row).

123 *See* Marian R. Williams & Jefferson E. Holcomb, *Racial Disparity and Death Sentences in Ohio*, 29 J. CRIM. JUST. 207, 215–16 (2001) (examining homicides committed between 1981 and 1994 and finding that race of the victim, but not race of the defendant, significantly affected the likelihood of a death sentence).

124 *See* Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990–1999*, 46 SANTA CLARA L. REV. 1 (2005).

125 *See* Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina, 1980–2007*, 89 N.C. L. REV. 2119 (2011).

126 *See* Pierce & Radelet, *supra* at note 124, at 14.

127 *Id.* at 19.

128 *See* Radelet & Pierce, *supra* note 125, at 2138.

129 *Id.* at 2143–44.

130 *Id.* at 2145 (finding the odds of receiving the death penalty for killing a white victim to be three times higher than for killing a black victim).

131 Glenn L. Pierce & Michael L. Radelet, *Race, Region, and Death Sentencing in Illinois, 1988–1997*, 81 ORE. L. REV. 39, 50–51 (2002).

132 *Id.* at 50–57.

the twenty-seven factors, they concluded that race of victim was one of the five variables that achieved the highest level of statistical significance.[133] In 2004, Raymond Paternoster and his colleagues published their study of Maryland's death penalty scheme, done at the request of the Maryland governor.[134] Theirs was a death-eligibles study, examining 1311 murder cases where the murder was committed during the period 1978–1999 and where the defendant was death-eligible. Their purpose was to determine whether race or geography affected the outcome at each of four decision points in the processing of the case.[135] Applying a logistic model using 123 co-variates,[136] they found no evidence that the race of the defendant mattered at any stage.[137] However, they found that the race of the victim did matter in respect to death-charging. Controlling for case characteristics and jurisdiction, the odds of the state's attorney filing a death notice was almost twice as high in white-victim cases and the odds that the death notice would not be withdrawn once filed was almost three times as high.[138]

Two studies published in 2006 also looked at death charging. In South Carolina, Michael Songer and Isaac Unah examined prosecutors' decisions to seek death for homicides during the period 1993–1997, comparing SHR reports for cases with known defendants (2319 cases) and the 130 cases where a prosecutor filed a notice of intent to seek the death penalty.[139] Using a logistic regression model, Songer and Unah found that, while the race of the defendant had no statistically significant effect on the death-charging decision, the race of the victim did.[140] In Colorado, Stephanie Hindson, Hillary Potter, and Michael Radelet published the results of a limited study using death certificates compiled by a state agency.[141] With regard to race, Hindson et al. concluded that the probability of the death penalty being sought was 4.2 times higher for those who killed whites than for those who killed blacks.[142]

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133 *Id.* at 65.

134 Raymond Paternoster, Robert Brame, Sarah Bacon & Andrew Ditchfield, *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978–1999*, 4 MARGINS 1, 2 (2004).

135 *Id.* at 2–3.

136 *Id.* at 22–23.

137 *Id.* at 34.

138 *Id.* at 35. Race of victim has no effect at the subsequent two stages—the prosecutor's decision to move the case to a penalty trial after conviction and the sentencer's decision to impose the death penalty. *Id.* at 36.

139 Michael J. Songer & Isaac Unah, *The Effect of Race Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161, 184–85 (2006).

140 *Id.* at 195 (finding an odds multiplier of 3.10 for white victim cases).

141 Stephanie Hindson, Hillary Potter & Michael L. Radelet, *Race, Gender, Region and Death Sentencing in Colorado, 1980–99*, 77 U. COLO. L. REV. 549, 568–69 (2006).

142 *Id.* at 579.

Recently, John Donohue conducted a death-eligibles study of death-charging and death-sentencing in Connecticut for the period 1977–2007.[143] He determined that, out of the 4686 non-negligent homicides committed during the period, 205 defendants convicted of a homicide were death-eligible, and 9 of the 205 were sentenced to death and had their sentences sustained.[144] He conducted a multiple regression analysis to determine the impact on death-charging and death-sentencing decisions of legitimate factors related to death-worthiness—egregiousness of the murder, number of special aggravating factors—and of legally suspect factors—race and gender of the defendant, race of the victim and location of the crime.[145] With regard to race, the study found "Connecticut death-eligible cases that involve a minority defendant and a white victim receive a charge of capital felony and are sentenced to death at a substantially *higher* rate"[146] and that finding was statistically significant.[147]

Two multi-state reports have found pervasive racial disparities. In 2004, John Blume, Theodore Eisenberg, and Martin T. Wells analyzed data on murders and the composition of death rows from 1977 through 1999 in the thirty-one states that sentenced ten or more defendants to death row during the time period.[148] They found that black on white murders were treated more harshly than other types of murder,[149] and that, in the eight states for which they had complete data, the ratio of the percentage of death sentences for black on white murders to the percentage of death sentences for black on black murders ranged from 2.9 to 23.2.[150] Beginning in 2003, the American Bar Association Moratorium Implementation Project undertook a series of assessments in death penalty states on the administration of capital punishment.[151] The various state task forces conducting the assessments did not

143 *See generally* Donohue, *supra* note 117. In an ongoing study of the Delaware death penalty, Sheri Lynn Johnson and her coauthors report that "[b]lack defendants who kill white victims are more than six times as likely to receive the death penalty as are black defendants who kill black victims . . . [and] three times as likely to be sentenced to death as are white defendants who kill white victims . . . ." Sheri Lynn Johnson, John H. Blume, Theodore Eisenberg, Valerie P. Hans & Martin T. Wells, *The Delaware Death Penalty: An Empirical Study*, 97 IOWA L. REV. 1925, 1940 (2012).

144 Donohue, *supra* note 117, at 1.

145 *Id.* at 2. Cases were coded for "egregiousness" in two ways: according to a list of specific factors (victim suffering, victim characteristics, defendant intent/culpability, number of victims) and on a composite scale. *Id.* at 93–95.

146 *Id.* at 181.

147 *Id.* at 182–83.

148 John Blume, Theodore Eisenberg & Martin T. Wells, *Explaining Death Row's Population and Racial Composition*, 1 J. EMPIRICAL L. STUD. 165, 169 (2004).

149 *Id.* at 190–92.

150 *Id.* at 197.

151 *See Death Penalty Assessments*, AM. BAR ASS'N, http://www.americanbar.org/groups/individual_rights/projects/death_penalty_moratorium_implementation_project/death_penalty_assessments.html (last visited Mar. 9, 2013).

themselves conduct studies on racial/ethnic disparities, but instead relied on a comparison of sentencing results based on race/ethnicity of defendants and victims or on data developed earlier by the states themselves. In 2007, the ABA reported on its findings from the first eight assessments: "Every state studied appears to have significant racial disparities in its capital system, particularly those associated with the race of the victim."[152] Since that report, the ABA has conducted two additional assessments and found that race was a significant factor in death-charging and death-sentencing in Kentucky[153] and Missouri.[154]

These empirical studies of racial disparities in death-charging and death-sentencing—done in different jurisdictions, with differing methodologies, covering a variety of time periods—produced results remarkably consistent with the Baldus study findings in Georgia a quarter of a century ago: 1) there is little or no disparity based on race of the defendant alone; 2) there is a statistically significant disparity based on race of the victim(s) alone; and 3) there is an even greater disparity based on the combination of race of the defendant and race of the victim. While these numerous subsequent studies tend to confirm, if any confirmation were needed, the findings presented to the Court in

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152 *See State Death Penalty Assessments: Key Findings*, AM. BAR ASS'N, 5 (2007), http://www.abanet.org/moratorium/assessmentproject/keyfindings.doc. The eight states were: Alabama, Arizona, Florida, Georgia, Indiana, Ohio, Pennsylvania, and Tennessee.

153 *See* AM. BAR ASS'N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE KENTUCKY DEATH PENALTY ASSESSMENT REPORT xxxvi (2011), *available at* http://www.abanow.org/wordpress/wp-content/files_flutter/1323199256kydeathpenaltyreport_120711.pdf.

154 *See* AM. BAR ASS'N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE MISSOURI DEATH PENALTY ASSESSMENT REPORT, xxxvi (2012) *available at* http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/final_missouri_assessment_report.authcheckdam.pdf. Consistent with the findings of the state studies, a 2011 study found racial disparities in the administration of the death penalty by the U.S. military. *See* David C. Baldus, Catherine M. Grosso, George Woodworth & Richard Newell, *Racial Discrimination in the Administration of the Death Penalty: the Experience of the United States Armed Forces (1984–2005)*, 101 J. CRIM. L. & CRIMINOLOGY 1227, 1300–01 (2011) (finding disparities based on race of defendant, race of victim, and a combination of the two, although disparities not statistically significant because of small sample size). Recently, two relatively small single-county studies have also revealed unexplained racial disparities. Isaac Unah examined death-charging in Durham, North Carolina for the period 2003–2007, reviewing 151 cases finding that blacks who killed white victims were 43% more likely to face the death penalty than blacks who killed black victims (a finding statistically significant at the .05 level). *See* Isaac Unah, *Choosing Those Who Die: The Effect of Race, Gender, and Law in Prosecutorial Decision to Seek the Death Penalty in Durham County, North Carolina*, 15 MICH. J. RACE & L. 135, 172–73 (2009). Glen Pierce and Michael Radelet examined 191 cases where first-degree murder was charged and the defendant was convicted of a homicide offense in East Baton Rouge Parish, Louisiana during the period 1990–2008. *See* Glenn L. Pierce & Michael L. Radelet, *Death Sentencing in East Baton Rouge Parish, 1990–2008*, 71 LA. L. REV. 647, 657–58 (2011). Subjecting their data to a logistic regression analysis with race of victim and three legally relevant variables, they found that, controlling for other variables, "the odds of a death sentence are still 97% higher for those who kill whites than for those who kill blacks." *Id.* at 661, 670–71.

McCleskey, they also validate Justice Powell's assumption that upholding McCleskey's Eighth Amendment claim would not have invalidated just Georgia death sentences, but would have led to successful challenges under every other post-*Furman* statute, i.e., that *McCleskey* would have become a second *Furman*.

B. *Gender Disparities*

Although the Baldus study itself found no gender-of-defendant or gender-of-victim disparities,[155] later researchers looking at the Baldus study data concluded that victim gender was an important predictor of outcomes and that "[d]efendants who murder females are more likely to receive a death sentence than defendants who murder males."[156] Virtually every study since has found gender disparities. Most of the scholarship has focused, as did Justice Marshall in his *Furman* opinion,[157] on gender-of-defendant disparities.[158] In his latest report, Victor Streib, who has tracked the issue for many years, reports that, in terms of raw numbers, women homicide defendants receive more favorable treatment at each stage of the criminal process, so that, although women constitute 10% of those arrested for murder, they constitute only 2% of those sentenced to death at trial,[159] and only 1% of those actually executed.[160]

In their Florida study, which was focused on disparate sentencing based on race, Radelet and Pierce also noted that there existed significant gender-of-victim disparities in death sentencing.[161] They found that a defendant was 2.8 times as likely to be sentenced to death for killing a woman as for killing a man.[162] In their South Carolina

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155 Baldus et al., *supra* note 8, at 400.

156 Marian R. Williams, Stephen Demuth & Jefferson E. Holcomb, *Understanding the Influence of Victim Gender in Death Penalty Cases: The Importance of Victim Race, Sex-Related Victimization, and Jury Decision-Making*, 45 CRIMINOLOGY 865, 867 (2007), *available at* http://libres.uncg.edu/ir/asu/f/Holcomb_Jeff_2007_UNDERSTANDING%20THE%20INFLUENCE.pdf.

157 Furman v. Georgia, 408 U.S. 238, 365 (1972) (Marshall, J., concurring) ("There is . . . overwhelming evidence that the death penalty is employed against men and not women . . . . It is difficult to understand why women have received such favored treatment since the purposes allegedly served by capital punishment seemingly are equally applicable to both sexes.").

158 *See, e.g.*, Victor L. Streib, *Rare and Inconsistent: The Death Penalty for Women*, 33 FORDHAM URB. L.J. 609, 621–22 (2006).

159 Victor L. Streib, *Death Penalty for Female Offenders, January 1, 1973 Through October 31, 2010*, at 3 (2010), http://www.deathpenaltyinfo.org/documents/femaledeathrow.pdf.

160 *Id.*

161 *See* Radelet & Pierce, *supra* note 119, at 25–26.

162 *Id.* In their later Illinois study, Pierce and Radelet found convicted first-degree murderers whose victims were women were three and a half times as likely to be sentenced to death as those whose only victims were men, Pierce & Radelet, *supra* note 131, at 62, but, in their logistic

study, Songer and Unah also found death-charging decisions were influenced by gender: the odds were 2.19 times higher that female victim murders would lead to the death penalty being charged than male victim murders.[163] Hindson et al., in their Colorado study, also found significant gender-of-victim disparities in death-charging: the probability of the death penalty being sought was 1.81 times higher for those who kill females than for those who kill males.[164]

A recent substantial study focusing on gender disparities in death sentencing was that of Steven Shatz (co-author of the present Article) and Naomi Shatz in California.[165] Using data from 1299 first-degree murder convictions during the three-year period 2003–2005, they found substantial gender-of-victim disparities. In single-victim cases, factually death-eligible defendants[166] convicted of killing women were more than seven times as likely to be sentenced to death as factually death-eligible defendants who killed men.[167] While more than half that disparity can be accounted for by the extraordinarily high death sentence rate for rape-murderers—almost sixteen times the death sentence rate for all other death-eligible murderers[168]—when rape-murders were excluded, the death sentence rate in female victim cases remained more than three times the rate for male victim cases.[169] Shatz and Shatz also found gender-of-defendant disparities in the California data. Because the percentage of death-eligible women defendants in the 2003–2005 study was relatively small, they combined data from three California studies and reported that, while women constituted 5.3% of defendants convicted of first-degree murder and death-eligible, they constituted only 1.2% of those sentenced to death.[170]

Despite empirical evidence documenting gender disparities, particularly gender-of-victim disparities, in the administration of the death penalty—disparities sometimes as great as the racial disparities documented in the various race studies—the evidence has not evoked the same level of concern from the courts or from commentators. Although, as noted above, Justice Marshall raised the issue of gender

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regression model, gender of victim proved less significant than two other extra-legal factors, race of victim and sentencing county, *see id.* at 64–65.

163 Songer & Unah, *supra* note 139, at 194. It appears that they include, in female victim cases, multiple murders with at least one female victim. *Id.* at 190–91. Because multiple victim murder itself is a powerful aggravating factor, *id.* at 192, we have excluded such cases from our gender analysis.

164 Hindson, Potter & Radelet, *supra* note 141, at 580.

165 *See generally* Shatz & Shatz, *supra* note 117.

166 In California, a defendant guilty of first-degree murder is factually death-eligible if one of 32 separately enumerated special circumstances can be proved. CAL. PENAL CODE § 190.2 (West 2012); *see infra* Part III.

167 Shatz & Shatz, *supra* note 117, at 107.

168 *Id.* at 99.

169 *Id.* at 108.

170 *Id.* at 106.

disparities in *Furman*,[171] no other justice then or since has mentioned the issue. In fact, in *McCleskey*, Justice Powell, writing for the majority, went out of his way to disparage proof of gender disparities as raising a constitutional claim the Court would ever consider.[172] This lesser concern with gender disparities in the administration of the death penalty presumably reflects at least ambivalence about whether the gender of defendants or victims really is, or should be, an impermissible consideration. Gross and Mauro expressed just this ambivalence in their study, stating, on the one hand, that the sex of the victim is "legally irrelevant and perhaps even prohibited as a sentencing consideration"[173] and, on the other hand, that "we cannot reject the possibility that homicides with female victims might properly be regarded as more aggravated than those with male victims."[174]

C. *Geographic Disparities*

In their Illinois and California studies,[175] Pierce and Radelet found significant geographic disparities in the administration of the death penalty. In Illinois, they concluded "the odds of receiving a death sentence for killing a victim(s) in Cook County are on average 83.6% lower than for killing a victim(s) in the rural county region of Illinois controlling for the other twenty-six variables in the analysis."[176] In California, Pierce and Radelet compared death sentences and homicides per county and considered both the racial/ethnic demographics of the county and its population density. They concluded:

> The data . . . show geographic variations in rates of death sentencing. Excluding counties with smaller populations, death sentencing rates vary from roughly .005% of all homicides to rates five times higher. Those counties with the highest death sentencing rates also tend to have the highest proportion of non-Hispanic whites in their population and the lowest population density. When the effects of all variables are considered simultaneously, death sentencing rates are lowest in counties with the highest non-white population.[177]

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171 Furman v. Georgia, 408 U.S. 238, 365 (1972) (Marshall, J., concurring).

172 *See* McCleskey v. Kemp, 481 U.S. 279, 315–17 (1987).

173 GROSS & MAURO, *supra* note 106, at 57.

174 *Id.* In fact, some states have adopted statutes reflecting the view that violence against women should be punished more heavily than similar violence against men. *See, e.g.*, N.C. GEN. STAT. § 14-33(c)(2) (2012); S.C. CODE ANN. § 16-25-65 (2012).

175 *See generally* Pierce & Radelet, *supra* note 124 (California); Pierce & Radelet, *supra* note 131 (Illinois).

176 Pierce & Radelet, *supra* note 131, at 65.

177 Pierce & Radelet, *supra* note 124, at 38; *see also* ACLU OF N. CAL., DEATH BY GEOGRAPHY: A COUNTY BY COUNTY ANALYSIS OF THE ROAD TO EXECUTION IN CALIFORNIA 3

As we shall see, these findings regarding the patterns of inter-county disparities have particular significance in light of our study of intra-county disparities in Alameda County.

The Maryland study by Paternoster et al. found substantial and statistically significant disparities in death-charging and death-sentencing by county.[178]

> [T]he jurisdiction where the homicide occurs and where the defendant is charged matters a great deal. There are large differences in how different legal jurisdictions process their death penalty cases in Maryland. Our research clearly indicates that these differences are manifested in how state's attorneys charge death eligible cases and whether they retain a capital charge or decide to withdraw it. *Although the jurisdictional differences occur early in the process at the decisions made by local prosecutors, they are propagated to later points and go uncorrected.*[179]

In their South Carolina study, Songer and Unah also examined the effect of geography on death penalty charging.[180] They found tremendous variation in death-charging rates that, applying a regression model, could not be explained by any of the legitimate or illegitimate variables.[181] Katherine Barnes, David Sloss, and Stephen Thaman studied prosecutorial decision-making in Missouri in 1046 death-eligible cases filed during the period 1997–2001.[182] They analyzed the cases for possible racial and geographic disparities on the basis of the information available to the prosecutor at the time of the charging and plea bargaining decisions[183] and concluded that there was "significant and enduring geographic variation in the prosecution of homicides and imposition of the death penalty in Missouri."[184] Most recently, Donohue's Connecticut study found an "extremely large and highly statistically significant" disparity in death-sentencing in the Waterbury Judicial District as compared with the rest of the state.[185]

(2009) ("[W]hether someone is sentenced to death . . . depends largely on where in the state the crime occurred, not on the facts or common criteria.").

178 Paternoster et al., *supra* note 134, at 28–34.

179 *Id.* at 34. "Given the fact that a death eligible homicide has occurred, *the probability that a notification to seek death will be filed in Baltimore County is over 13 times higher than in adjacent Baltimore City, even after taking into account important case characteristics*." *Id.* at 33.

180 *See* Songer & Unah, *supra* note 139.

181 *Id.* at 203–04.

182 Barnes, Sloss & Thaman, *supra* note 117, at 309, 311.

183 *Id.* at 313. In determining whether a case was to be coded as "death-eligible," the study used a "probable cause" standard as opposed to more conservative standards used by other researchers. *Id.*

184 *Id.* at 355.

185 Donohue, *supra* note 117, at 184.

As is the case with regard to disparities based on race and gender, the empirical data suggests that geographic disparities are pervasive.[186] Unlike these other disparities, however, geographic disparities have been defended as an appropriate product of our democratic political system. Of course, interstate disparities are the natural product of our federal system, where each state can choose whether or not to have a death penalty, but intrastate disparities are defended with a similar argument, that they are a product of each county's different views of the death penalty as expressed through its elected prosecutor and its jurors. For example, Kent Scheidigger, who, as Director of the Criminal Justice Legal Foundation, has long been an outspoken supporter of the death penalty has justified the geographic disparities found in Paternoster's Maryland study in these terms:

> [S]ome counties in Maryland elect tougher-on-crime prosecutors and have tougher juries than other counties. In the tougher counties, a murder in the middle range is more likely to result in a death sentence than a similar murder in a softer county. Support for tough-on-crime measures generally and capital punishment in particular is substantially correlated with race. . . . For this reason, the tougher counties are likely to have a higher proportion of white residents and hence white crime victims.
>
> What the Paternoster group calls "geographic disparity" is, in reality, local government in action. This is exactly the way our system is *supposed* to work. We elect our trial-level prosecutors by county so that local people have local control over how the discretion of that office is exercised. If the voters of suburban Baltimore County choose to elect a prosecutor who seeks the death penalty frequently, while the voters of downtown Baltimore City elect one who seeks it rarely, that is their choice.[187]

California prosecutors offered a similar justification for the geographic disparities in California to the California Commission on the Fair Administration of Justice.[188] However, this defense of geographic disparities cannot justify geographic disparities in death-charging and death-sentencing within a single county, where the District Attorney and the jury pool are the same for all cases. As we shall see, our study

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186 Evidence of geographic disparities has also been found with regard to the federal death penalty: the vast majority of death sentences come from a relatively few districts. G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 WASH. L. REV. 425, 436–37 (2010).

187 Kent Scheidegger, *Smoke and Mirrors on Race and the Death Penalty*, 4 ENGAGE 42, 44 (2003), *available at* http://www.fed-soc.org/doclib/20080221_CrimScheidegger.pdf.

188 CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT 151 (Gerald Uelmen ed., 2008) [hereinafter CAL. COMM'N], *available at* http://www.ccfaj.org/documents/CCFAJFinal Report.pdf ("Prosecutors suggest that geographical variation in utilizing the death penalty is not a problem, because locally elected District Attorneys are responding to the demands of the electorate which they represent.").

found just such geographic disparities in death-charging and death-sentencing in Alameda County.

III. THE CALIFORNIA DEATH PENALTY SCHEME AND THE ALAMEDA COUNTY STUDY

While the Supreme Court in *Furman* and subsequent cases was insisting that death penalty schemes be narrowly crafted so that the death penalty is in fact imposed on a substantial portion of the death-eligible class, California was proceeding in the opposite direction. In Section A, we describe the California death penalty scheme, which creates the broadest death penalty in the country, giving prosecutors and jurors extraordinary discretion to choose among death-eligible defendants and thereby inviting arbitrary and discriminatory application of the death penalty. In Section B, we describe our study of Alameda County first-degree murder cases arising over a twenty-three year period,[189] and report our findings regarding geographic disparities in both death-charging and death-sentencing.

A. *The California Death Penalty Scheme*

The present California death penalty scheme was enacted through the 1978 Briggs Death Penalty Initiative six years after *Furman*.[190] According to its author, State Senator John V. Briggs, the initiative was intended to "give Californians the toughest death-penalty law in the country."[191] By "the toughest death penalty law," the proponents meant the law "which threatens to inflict that penalty on the maximum number of defendants."[192] That "toughest death penalty law" has since been expanded by voter initiatives on three occasions since 1978.[193]

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189 The study covers first-degree murder convictions in Alameda County, California for murders committed during the twenty-three-year period from November 8, 1978 to November 7, 2001. The beginning date of the study is the effective date of California's current death penalty statute. The end date reflects the fact that the data for the study was gathered during the period 2003–2005.

190 *See* OFFICE OF THE SECRETARY OF STATE OF CAL., CALIFORNIA VOTERS PAMPHLET: GENERAL ELECTION NOVEMBER 7, 1978, at 32–35, 41–46 (1978) (Initiative Statute Proposition 7), *available at* http://library.uchastings.edu/research/online-research/ballots.php.

191 *Ballot Proposition Analysis and Rundown of Key District Races*, CAL. J., Oct. 1978, Special Section, at 4–5.

192 Carlos v. Superior Court, 672 P.2d 862, 871 n.13 (Cal. 1983).

193 *See* 1995 Cal. Stat. 478, *enacted by* Proposition 196, § 2 (approved Mar. 26, 1996); 1998 Cal. Stat. 629, *enacted by* Proposition 18 (approved Mar. 7, 2000); OFFICE OF THE SECRETARY OF STATE OF CAL., CALIFORNIA BALLOT PAMPHLET: PRIMARY ELECTION JUNE 5, 1990, at 66 (1990) (Initiative Constitution Amendment and Statute Proposition 115 § 9), *available at* http://library.uchastings.edu/research/online-research/ballots.php; OFFICE OF THE SECRETARY

Because the law was enacted by initiative, the legislature has played no role in shaping the law, and, with the exception of two fairly limited holdings more than thirty years ago[194] the California Supreme Court also has taken no role in defining its coverage.[195] Currently, California is thought to have the broadest death penalty scheme in the country.[196]

The California Penal Code starts with an expansive definition of first-degree murder[197] and then enumerates thirty-three special circumstances that make a first-degree murderer death-eligible (i.e., that make the murder "capital murder").[198] This extensive list of special

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OF STATE OF CAL., CALIFORNIA BALLOT PAMPHLET: PRIMARY ELECTION MARCH 7, 2000, at 121 (2000) (Initiative Constitution Amendment and Statute Proposition 21 § 11), *available at* http://library.uchastings.edu/research/online-research/ballots.php.

194 *See* People v. Weidert, 705 P.2d 380, 383 (Cal. 1985) (applying the rule of *People v. Green*, 609 P.2d 468, 505–06 (Cal. 1980) that the felony-murder special circumstances do not apply when the felony is only "incidental" to the killing); People v. Superior Court (Engert), 647 P.2d 76, 77–78 (Cal. 1982) (holding unconstitutional the "heinous, atrocious, or cruel" special circumstance).

195 In 1983, the court in *Carlos v. Superior Court*, 672 P.2d 862 (Cal. 1983), interpreted § 190.2 to require proof of intent to kill for a special circumstances finding, but less than four years later, that interpretation was held to be erroneous and *Carlos* was overruled in *People v. Anderson*, 742 P.2d 1306 (Cal. 1987).

196 Amended Declaration of David C. Baldus, at 35, Ashmus v. Wong (N.D. Cal. Nov. 18, 2010) (No. C 93-0594 THE) [hereinafter Baldus Declaration] ("[T]he rate of death eligibility among California homicide cases is the highest in the nation by every measure. This result is a product of the number and breadth of special circumstances under California law."). In fact, the California scheme is so broad that the death sentencing rate among death-eligible cases is 66% lower than the death sentencing rate in pre-*Furman* Georgia. *Id.* at 13, 15–16; *see also* Tuilaepa v. California, 512 U.S. 967, 994 (1994) (Blackmun, J., dissenting) (noting that California's special circumstances create "an extraordinarily large death pool"); Symposium, *Report of the Governor's Council on Capital Punishment*, 80 IND. L.J. 1, 9 (2005) (citing California and Illinois as having exceptionally broad definitions of death-eligibility).

197 There are twenty-one categories of first-degree murder. CAL. PENAL CODE § 189 (West 2012).

198 *Id.* § 190.2(a). The Briggs Initiative had twenty-seven special circumstances, and six special circumstances were added by the subsequent initiatives, so those six were in effect for varying portions of the study period. The thirty-three current special circumstances may be grouped as follows:

> 2 "other murder" circumstances: the defendant was convicted of more than one murder ((a)(3)) or was previously convicted of murder ((a)(2));
>
> 8 "victim" circumstances: the defendant intentionally killed a peace officer ((a)(7)), federal law enforcement officer or agent ((a)(8)), firefighter ((a)(9)), witness ((a)(10)), prosecutor or former prosecutor ((a)(11)), judge or former judge ((a)(12)), elected official or former elected official ((a)(13)), or juror ((a)(20));
>
> 6 "manner" circumstances: the murder was committed by a destructive device, bomb or explosive planted ((a)(4)) or mailed ((a)(6)) or was intentionally committed by lying in wait ((a)(15)), by the infliction of torture ((a)(18)), by poison ((a)(19)), or by shooting from a motor vehicle ((a)(21));
>
> 4 "motive" circumstances: the defendant committed the murder for financial gain ((a)(1)), to escape arrest ((a)(5)), because of the victim's race, color, religion, national origin, or country of origin ((a)(16)), or to further the activities of a criminal street gang ((a)(22);

circumstances covers almost all forms of first-degree murder because virtually all first-degree murders are either premeditated killings or felony-murders. Most premeditated murders are capital murders under California's unique lying-in-wait special circumstance[199] that makes death-eligible a murderer who intentionally kills his victim by surprise and from a position of advantage. As for felony-murder, currently, all but one of the thirteen felonies (torture) which may be the basis for a first-degree felony-murder conviction are also special circumstances,[200] and California is one of only a handful of states where a defendant would be death-eligible for an unintentional, even wholly accidental, killing during a felony.[201]

The breadth of capital murder in California gives extraordinary discretion to prosecutors and juries to select defendants for death, and that discretion is not otherwise limited. Prosecutors have unfettered discretion in their decisions to seek the death penalty in capital murder cases.[202] After a defendant has been convicted of first-degree murder and a special circumstance has been found true at the guilt phase of a capital trial, the jury is accorded virtually unlimited discretion in its sentencing decision. The jurors are instructed to consider a list of eleven factors and told to weigh the aggravating factors against the mitigating factors in reaching their decision (although they are not told which factors are aggravating or mitigating).[203] The jurors are not required to agree on aggravating and mitigating factors, and they do not have to make findings in support of, or otherwise explain, their penalty decision.[204] And, although the California Supreme Court ostensibly will engage in individual proportionality review[205] (potentially a post hoc

12 "commission of a felony" circumstances: the murder was committed while the defendant was engaged in, or an accomplice to robbery ((a)(17)(A)), kidnapping ((a)(17)(B)), rape ((a)(17)(C)), forcible sodomy ((a)(17)(D)), child molestation ((a)(17)(E)), forcible oral copulation ((a)(17)(F)), burglary ((a)(17)(G)), arson ((a)(17)(H)), train wrecking ((a)(17)(I)), mayhem ((a)(17)(J)), rape by instrument ((a)(17)(K)), or carjacking ((a)(17)(L)); and

1 "catchall" circumstance: the murder was especially heinous, atrocious, or cruel ((a)(14)).

Id. This last circumstance was held unconstitutional on vagueness grounds. *See People v. Superior Court* (Engert), 647 P.2d at 77–78; *accord* People v. Wade, 750 P.2d 794, 804 (Cal. 1988). Consequently, the "heinous, atrocious, or cruel" circumstance was ignored for purposes of the studies discussed in this Article.

199 PENAL § 190.2(a)(15).

200 *Compare id.* § 189, *with id.* § 190.2(a)(17).

201 The other states are: Florida, Georgia, Idaho, Maryland, and Mississippi. *See* Shatz, *supra* note 117, at 761.

202 *See, e.g.*, People v. Ramirez, 139 P.3d 64, 117 (Cal. 2006); People v. Gray, 118 P.3d 496, 543 (Cal. 2005).

203 *See* PENAL § 190.3.

204 *See* People v. Solomon, 234 P.3d 501, 539 (Cal. 2010).

205 *See, e.g.*, People v. Lenart, 88 P.3d 498, 512–13 (Cal. 2004); People v. Lawley, 38 P.3d 461, 508–09 (Cal. 2002).

limitation on prosecutors' and juries' exercise of discretion), in fact, in the 524 direct appeals decided under the 1978 Death Penalty Law through 2011, the court never found a death sentence to be disproportionate.

B. *Alameda County: Seeking and Imposing the Death Penalty by Location of the Crime*

Alameda County stretches along the eastern shore of San Francisco Bay and is the seventh largest county in California by population.[206] It is a mixed urban/suburban/rural county with Oakland as its principal city. The average population of the county during the study period was 1,276,000. During the study period, there was an average of 156 homicides per year, or 12.6 homicides per 100,000 population, higher than the statewide average of 10.8 homicides per 100,000 population.[207] The District Attorney's Office was aggressive about seeking and obtaining death judgments, with the result that, during the study period, 12.8% of defendants convicted of first-degree murder and death-eligible were sentenced to death,[208] and the county ranks fourth in the number of inmates currently on California's death row.[209] During the period of

206 The population data cited here and below are taken from census reports. Because the study spans three census reports (1980, 1990, and 2000), we use an average taken from the three reports. *California: Population of Counties by Decennial Census: 1900 to 1990*, U.S. CENSUS BUREAU http://quickfacts.census.gov/qfd/states/06/06001lk.html (last visited Mar. 24, 2013); 1990 Census of Population and Housing, California, Alameda County, U.S. CENSUS BUREAU (2000), http://censtats.census.gov/cgi-bin/pl94/pl94data.pl; Census 2000 Population, Demographic, and Housing Information: General Demographic Characteristics, U.S. CENSUS BUREAU http://quickfacts.census.gov/qfd/states/06/06001lk.html (last visited Mar. 24, 2013).

207 The data on homicides in Alameda County were obtained from the California Department of Justice pursuant to a request, and the relevant tables are available from the authors. The homicide figures set forth here and below represent an average for the years 1980, 1990, and 2000.

208 In a study covering a five-year period within the timeframe of the present study, the researchers estimated the statewide death-sentence rate for comparable defendants to be 11.4%. *See* Shatz & Rivkind, *supra* note 37, at 1331–32. The 12.8% figure substantially overstates the true death sentence rate for defendants made death-eligible by statute because it does not include defendants who could have been convicted of a first-degree special circumstances murder, but were charged with, or allowed to plead to, a lesser crime. For example, murders occurring in the perpetration, or attempted perpetration, of a robbery or burglary are first-degree special circumstances murders, yet, in the present study, seventy-five defendants who committed such murders were convicted only of second-degree murder.

209 *Condemned Inmate Summary List*, CAL. DEP'T OF CORR. & REHAB., 3 (Mar. 5, 2013), http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateSummary.pdf. When Assistant District Attorney James Anderson, who had headed the office's "Death Team" for the majority of study period, retired in 2004, he had put more defendants on death row (ten) than any other prosecutor in California history. *See* GLENN CHAPMAN, *A Passionate Foe of Killers Cedes Stage After 34 Years*, OAKLAND TRIBUNE (Oct. 7, 2004). The District Attorney's Office's enthusiasm for the death penalty may not have been shared by county residents. In 2003, the Board of Supervisors voted for a moratorium on the death penalty. Donna Horowitz,

the study, the office enjoyed consistent administration by its two District Attorneys, the second of whom had been the Chief Assistant under the first.[210] During this time, the District Attorney had no written guidelines regarding when to seek the death penalty; instead, he made the decision in consultation with a committee of deputies specializing in capital cases (the "death team"), whose main concern was whether the prosecution had a "reasonable shot" at getting a death sentence.[211] When the California Commission on the Fair Administration of Justice sought to survey District Attorneys on their death-charging practices, the Alameda County District Attorney refused to participate.[212]

1. Overview of the Study[213]

In the present study, we reviewed 473 Alameda County first-degree murder conviction cases arising out of murders committed during the period from November 8, 1978 to November 7, 2001.[214] The cases were identified initially from a list of all murder prosecutions produced by the Alameda County District Attorney's Office in response to a California Public Records Act request. The District Attorney list, when checked against other partial lists of Alameda County cases appeared to omit approximately 12% of the cases, but in a random fashion. Most of the missing cases were identified and included in the study, and we estimate that the 473 cases represent more than 98% of the first-degree

Supervisors Vote OKs Moratorium on Death Penalty, ALAMEDA TIMES-STAR, Feb. 26, 2003, at 1.

210 John J. Meehan was District Attorney from 1981 to 1994, and Thomas J. Orloff succeeded him and was District Attorney from 1994 to 2009. *See History*, Office of the District Attorney Alameda County, http://www.alcoda.org/about_us/history (last visited Feb 5, 2013). Lowell Jensen was the District Attorney during the first two years of the study period, but very few of the post-Briggs Initiative murder cases went to judgment during his tenure, and the data on death charging covers the period after he left office. Although the present District Attorney is a woman, throughout the study period the District Attorney was a man, so when we refer to the District Attorney we use a male pronoun.

211 Dashka Slater, *The Death Squad*, EAST BAY EXPRESS, Sept. 25, 1992, *reprinted in* NINA RIVKIND & STEVEN F. SHATZ, CASES AND MATERIALS ON THE DEATH PENALTY 317 (3d ed. 2009).

212 CAL. COMM'N, *supra* note 188, at 152 n.129.

213 The study figures reported here differ slightly from the figures reported in 2007, *see* Shatz, *supra* note 117, because a few additional cases were discovered and added to the present study after 2007.

214 The beginning date of the study is the effective date of California's current death penalty statute. The end date reflects the fact that most of the data for the study was gathered during the period 2003–2005. We also collected data on 333 cases where a defendant was convicted of second-degree murder, but determined to limit our analysis to first-degree murder cases. In some respects, this approach is more conservative than that taken by other researchers who have included cases where the defendant was convicted of a lesser homicide but could have been prosecuted for, and convicted of, first-degree murder. *See, e.g.*, Baldus Declaration, *supra* note 196, at 2.

murder convictions for murders during the study period.[215] In 382 of the cases, we determined that the defendant was statutorily death-eligible on finding that the defendant was an adult and that a special circumstance was admitted or found true or, on the facts of the case, a special circumstance could have been found true beyond a reasonable doubt by the factfinder.[216] In response to a subsequent California Public Records Act request for a list of all cases since November 8, 1978 where death was charged, the District Attorney identified all murder prosecutions since 1982 in which the Office had notified defense counsel of an intent to seek the death penalty.[217] In the period covered by the District Attorney's response, there were 351 cases where the defendant was convicted of first-degree murder and was statutorily death-eligible, and the District Attorney initially sought death in 105 (29.9%) of those cases. Thus, because of the breadth of the California scheme, the real "narrowing work" was done by the District Attorney's use of his unfettered discretion not to seek death against 70% of the death-eligible first-degree murderers.[218]

Data on the cases was collected by examining the trial court files. In addition to case-identifying information, the data obtained included the following data relevant to the present inquiry: the nature of murder(s), as measured by any proved or provable special circumstances, the location of the murder(s), the gender of the defendant and victim(s), and the sentence imposed. Although we attempted to collect data on the race of defendants and victims, many of the case files did not contain that information, and we have insufficient information for meaningful analysis.[219] Our purpose in the study was to determine the effect of the location of the murder(s) on whether a death sentence was sought by

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215 Some cases may not have been identified, and other cases were identified but were not surveyed because the case files were missing or incomplete.

216 In making this latter determination, we applied two principles: 1) we treated as controlling a factfinder's determination that no special circumstance was proved, unless that determination was made by a jury and there was overwhelming evidence of jury nullification; and 2) where no finding was made, we determined, by reference to appellate decisions on similar facts, whether an appellate court would have upheld such a special circumstances finding had such a finding been made.

217 Because the District Attorney could not provide charging data for the first three years of the study, the "charging database" is somewhat smaller than the "sentencing database."

218 It should be emphasized that these are the figures for *initial* death charges. In a number of the cases where the District Attorney initially charged death, he exercised his discretion to drop the death charge in the course of entering a plea bargain with the defendant, *see, e.g.*, People v. Collier, No. 127184, or before, or during, the defendant's trial, *see, e.g.*, People v. Jenkins, No. 141626B. For a description of Collier's plea, see *Man Gets Life Term for Killing Peralta Officer*, CONTRA COSTA TIMES, Oct. 3, 1996, at A14.

219 We were able to identify the race of the defendant in only 74% of the cases and the race of the victim(s) in only 67% of the cases. This incomplete data reflected no race-of-defendant disparities in the application of the death penalty, but did suggest possible race-of-victim disparities—the death sentence rate in white victim cases was approximately two and a half times the death sentence rate for cases with non-white victims.

the District Attorney's Office and on whether it was obtained. As noted above,[220] the county was divided roughly in half for the purpose of initiating criminal cases, and this administrative division corresponded with census-tract divisions of the county. The average population of North County was 576,000, while the average population of South County was 700,000.[221] The two halves of the county differed dramatically in three respects. First, despite its lower population, North County had most of the homicides. The average homicide rate per 100,000 population during the study period was 22.9 for North County and 3.9 for South County.[222] Second, the racial makeup of the two halves of the county was significantly different. North County was more than 30% African-American, and South County was about 5% African-American.[223] Third, the race of homicide victims also differed significantly between the two halves of the county. In North County, African-Americans were homicide victims roughly four and a half times as often as Whites; while, in South County, Whites were homicide victims three times as often as African-Americans.[224] These differences are depicted graphically in Figures 1 and 2.

220 *See supra* note 5.

221 *See supra* note 206.

222 *See supra* note 207.

223 Despite the substantial black/white racial disparity between the two halves of the county, there is no significant disparity by economic class, at least as measured by median family income. The census data on median family income was formerly available online through the Census's American Factfinder, but is no longer available. The relevant tables may be obtained from the authors.

224 These figures are taken from the SHRs for the period 1980–2001. The SHRs for the first fourteen months of the study period were not usable because they did not give the exact location of the homicides within the county.

Figure 1
Average Population 1980–2000

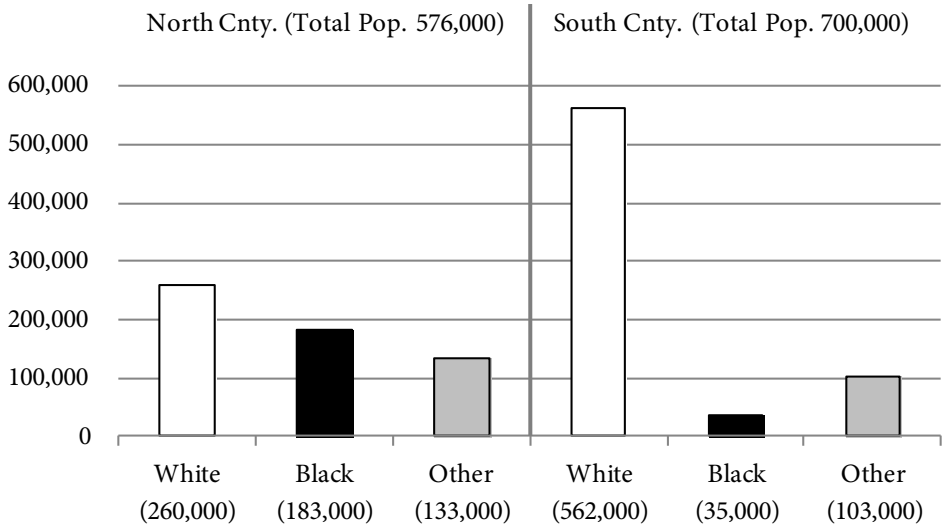
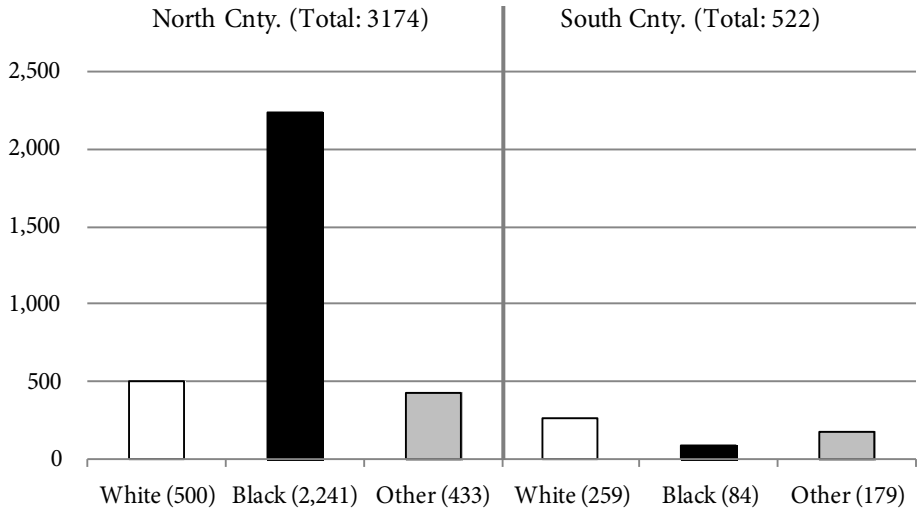


Figure 2
Total Homicide Victims 1981–2001



2. Analysis of the Data

In order to examine whether there are disparities in death-charging or death-sentencing by the location of the murder(s), we needed to control for the nature of the murder(s), the predominant factor properly affecting death sentencing.[225] For this purpose, we categorized capital murder cases according to the proved or provable special circumstances and divided the murders with the most commonly occurring special circumstances into two categories: "aggravated murders" and "ordinary murders." In the aggravated murder category, we included cases where: 1) the defendant murdered more than one person: prior murder[226] or multiple murder cases;[227] and/or 2) the defendant intentionally inflicted, or attempted to inflict, additional serious physical or psychological harm beyond the killing itself: torture,[228] rape or other sexual assault,[229] mayhem,[230] or kidnapping.[231] In the ordinary murder category, we included cases where: 1) the defendant committed a theft-related felony-murder (robbery,[232] burglary,[233] and carjacking[234]); and/or 2) the defendant committed what might be termed an "ordinary premeditated murder" (lying in wait,[235] drive-by shooting[236]) and there were no other proved or provable special circumstances. These two categories encompass fourteen special circumstances. We categorized as "miscellaneous murders" first-degree murders involving the remaining eighteen special circumstances and not falling within the aggravated murder category (e.g., murders for financial gain,[237] murders of police officers,[238] murders with a hate motive[239]). Miscellaneous murders constituted only 8.4% of the cases in the study and were omitted in our analysis of the data.[240] Our assumption that defendants in our

225 The prosecution may properly consider the defendant's record in its charging decision and the jury also may consider mitigation evidence in its sentencing decision, but other studies have established what common sense would suggest: that aggravating factors play the major role in the death sentencing decision. *See, e.g.*, Baldus, et al., *supra* note 118, at 548–49 (describing how statutory aggravators have a statistically significant effect on explaining death-sentencing outcomes, but mitigating factors do not).

226 CAL. PENAL CODE § 190.2(a)(2) (West 2012).

227 *Id.* § 190.2(a)(3).

228 *Id.* § 190.2(a)(18).

229 *Id.* § 190.2(a)(17)(C)–(F), (17)(K).

230 *Id.* § 190.2(a)(17)(J).

231 *Id.* § 190.2(a)(17)(B).

232 *Id.* § 190.2(a)(17)(A).

233 *Id.* § 190.2(a)(17)(G).

234 *Id.* § 190.2(a)(17)(L).

235 *Id.* § 190.2(a)(15).

236 *Id.* § 190.2(a)(21).

237 *Id.* § 190.2(a)(1).

238 *Id.* § 190.2(a)(7).

239 *Id.* § 190.2(a)(14).

240 The gang murder special circumstance, the most commonly occurring special

aggravated murder category are considered substantially more "death-worthy" than those in our ordinary murder category is validated by the data in the study. Although all defendants in both categories were statutorily death-eligible, defendants committing ordinary murders were 9.8 times as likely *not* to be charged with death and 5.6 times as likely *not* to be sentenced to death as defendants committing aggravated murders. Other studies in California[241] and elsewhere[242] confirm the appropriateness of our categories.

Because of the categorical nature of the variables in this study, chi-squared tests and logistic regression—appropriate statistical methods for analyzing such categorical data—were used to examine the relationships among death-charging, death-sentencing, location, categories of murder and gender of the defendants and victims.[243]

a. Death-Charging and Location

The raw data on death-charging for death-eligible defendants convicted of first-degree murder, by categories of murder and location, is set out in Table 1.

Table 1
Death-Eligible Defendants Charged with the Death Penalty

	Aggravated		**Ordinary**		**Miscellaneous**		**Total**	
North County	47/83	**56.6%**	20/181	**11.0%**	8/22	**36.4%**	75/286	**26.2%**
South County	19/24	**79.2%**	8/35	**22.9%**	3/6	**50.0%**	30/65	**46.2%**
Total	66/107	**61.7%**	28/216	**13.0%**	11/28	**39.3%**	105/351	**29.9%**

circumstance in first-degree murder cases today, was not added to section 190.2(a) until 2000, a year and a half before the end date of the study, so it had little effect on the death-charging or death-sentencing rate.

241 *See* Shatz & Shatz, *supra* note 117, at 95.

242 *See, e.g.*, David C. Baldus, *When Symbols Clash: Reflections on the Future of the Comparative Proportionality Review of Death Sentences*, 26 SETON HALL L. REV. 1582, 1601–03 (1996) (finding that, in New Jersey, the death sentence rates for multiple murder, prior murder, sexual assault and kidnapping were significantly higher than for robbery and burglary murders); Pierce & Radelet, *supra* note 131, at 61, 81–86 (finding, inter alia, that multiple murder showed the highest correlation with death sentencing and that sexual assault and kidnapping murders showed a much higher correlation with death sentencing than did robbery and burglary murders).

243 *See, e.g.*, ALAN AGRESTI, AN INTRODUCTION TO CATEGORICAL DATA ANALYSIS 34 (2d ed. 2007).

It reveals that the District Attorney sought death substantially more often for South County murders, a disparity in death-charging that cannot be explained on the theory that the murders in South County were generally more heinous. Chi-squared tests of the independence of both aggravated and ordinary murders and location reveal no significant relationship in the charging database (aggravated: *p*-value = .2116; ordinary: *p*-value = .1579). The disparity in death-charging between North County and South County is statistically significant. A chi-squared test of independence with regard to location and death charging reveals a significant relationship (*p*-value = .002). This charging disparity cannot be explained by the nature of the murders committed. Logistic regression models demonstrate that, whether the murder was aggravated or ordinary, the chance of the defendant being charged with death was roughly two and a half times greater if the murder was in South County rather than North County (odds ratio = 2.47).[244]

Since, in other studies, the gender of the defendant and/or victim has been shown to create significant disparities in death sentencing,[245] we examined whether the apparent location disparities in death charging might be influenced by gender. Conducting a chi-squared test for independence, we found a significant relationship between gender of the defendant and location (*p*-value = .0397), revealing a greater proportion of women defendants in South County than one would expect by chance, but we found no gender of defendant disparities with regard to death-charging (gender of defendant: *p*-value = .8183). We did find significant disparities based on the gender of the victim in the presence of location (odds ratio for gender of victim = 2.39). Nonetheless, logistic regression models using both location and gender of victim as independent variables demonstrate that location remains significant even when gender of victim is included (odds ratio for location = 2.47). Thus, a death-eligible defendant in a South County murder case was 2.47 times more likely to be death-charged than a defendant in a North County case, even when the victim's gender is taken into account.

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244 The pattern is evident even in the case of multiple murder, where the District Attorney charged death in a substantial majority (69.2%) of the cases, but virtually all cases where he did not charge death (nineteen out of twenty) were North County cases, and all three multiple murder cases where the District Attorney agreed to a plea for a sentence less than death were North County cases.

245 *See supra* Part II.B.

b. Death-Sentencing and Location

The raw data on death-sentencing for death-eligible defendants convicted of first-degree murder, by categories of murder and location, is set out in Table 2.

Table 2
Death-Eligible Defendants Sentenced to Death

	Aggravated		Ordinary		Miscellaneous		Total	
North County	20/86	**23.3%**	8/198	**4.0%**	2/26	**7.7%**	30/310	**9.7%**
South County	15/26	**57.7%**	4/39	**10.3%**	0/7	**0.0%**	19/72	**26.4%**
Total	35/112	**31.3%**	12/237	**5.1%**	2/33	**6.1%**	49/382	**12.8%**

The table reflects disparities even greater than the disparities in death-charging, and, again, those disparities cannot be explained on the theory that the murders in South County were more heinous. Chi-squared tests of the independence of both aggravated and ordinary murders and location reveal no significant relationship in the sentencing database (aggravated: *p*-value = .1599; ordinary: *p*-value = .1264). The location disparity is statistically significant.[246] A chi-squared test of independence with regard to location and death-sentencing reveals a significant relationship (*p*-value = .00013), i.e., there were more death sentences for South County murders than one would expect to find by chance. This sentencing disparity persists when the nature of the murder(s) is considered simultaneously. In logistic regression models with location and murder category, location continues to exert a large influence on death-sentencing (odds ratio = 3.31).

Again we examined what role gender played. Although, as with death-charging, we found no gender of defendant disparities with regard to death-sentencing, we found a relationship between the gender of the victim and a death sentence (*p*-value = .0033), i.e., a death sentence was imposed more often in female victim cases than one would

246 This disparity in sentencing outcomes is greater than the disparity in initial death charging. Whether the greater disparity is the result of the District Attorney's decision to drop the death charge in a higher percentage of North County cases or juries' rejection of the death penalty in a higher percentage of North County cases cannot be determined from the data gathered.

expect to find if there was no relationship between these two variables. Nonetheless, logistic regression models using both location and gender of victim as independent variables demonstrate that location remains significant even when gender of victim is included (odds ratio for location = 3.60). The likelihood of a death sentence in a South County case was 3.60 times greater than in a North County case, even when the victim's gender is taken into account.[247]

In both aggravated murder cases and ordinary murder cases, the District Attorney of Alameda County initially sought the death penalty significantly more often for South County murders than for North County murders. The District Attorney and capital juries combined to impose death sentences for South County murders at a rate, compared with the rate for North County murders, even more disparate than the rate at which the District Attorney sought death initially. These disparities cannot be explained by the nature of the murders, the legitimate factor that most correlates with death sentencing, nor by arguably illegitimate factors such as the gender of the defendant and victim. As we set forth in the next Part, these disparities should raise constitutional concerns.

IV. CONSTITUTIONAL CHALLENGES USING THE STUDY RESULTS

Any argument that statistically significant geographical disparities such as we found in Alameda County raise constitutional questions must contend with *McCleskey*, although whether *McCleskey* remains good law is open to question. *McCleskey* was a five to four decision, over spirited dissents, repudiated by its author four years after he wrote it.[248] It was arguably inconsistent with *Furman*, where the Court found an unconstitutional risk of arbitrariness on the basis of evidence less compelling than the Baldus study. The decision has been "the consistent

247 There is some risk that our findings, based on a data set of only first-degree murder conviction cases, might be ignoring contrary data in cases involving death-eligible defendants that did not result in first-degree murder convictions. For that reason, as noted above, *see supra* note 218, some researchers include second-degree murder cases in their data sets. While we do not have complete data on the second-degree murder cases during the study period, we do have complete data on all second-degree murder conviction cases where the defendant was death-eligible based on an ordinary robbery- or burglary-murder, the most common type of death-eligible murder. The distribution of this partial set of death-eligible second-degree murder cases is consistent with our finding that prosecutors and juries treat South County murders more severely than North County murders. Just as South County first-degree murder convictions more often result in a death sentence than do equivalent North County cases, so South County robbery- or burglary-murder cases more often result in a first-degree, rather than second-degree, murder conviction than do equivalent North County cases. Among convicted robbery- or burglary-murderers, 73% of the defendants in South County, but only 65% of the defendants in North County are convicted of first-degree murder.

248 *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 451 (1994).

subject of dispute among members of [the] Court"[249] since it was handed down.[250] Further, developments in the years since *McCleskey* have seriously undercut its precedential value. First, the central finding of the Baldus study, that victims' race has a substantial effect on death-charging and death-sentencing—a finding that was challenged in the district court and was only assumed to be true for purposes of the Supreme Court decision—has been confirmed in numerous subsequent studies. Second, in recent death penalty decisions, particularly in *Kennedy v. Louisiana*,[251] the Court has emphasized its understanding that the states' use of the death penalty must be "restrained" and "reserved for the worst of crimes."[252] In *Kennedy*, the Court twice suggested that the death penalty should be applied only in the case of intentional murders.[253] With these concerns in mind, the Court might now be receptive to empirical evidence, like that contained in the Baldus study, that race is a factor primarily in the less-aggravated cases.[254] Third, since *McCleskey*, the United States has ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[255] Because ICERD defines racial discrimination in terms of "effect," rather than just "purpose" and commits the signatories to eliminating laws which have the "effect" of continuing racial discrimination, the ratification of the treaty arguably overturns *McCleskey*'s Equal Protection holding.[256]

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249 *See* Citizens United v. Federal Election Commission, 130 S. Ct. 876, 921–22 (2010) (Roberts, C.J., concurring) (explaining that a decision which was adopted over "spirited dissents" and "has proved to be the consistent subject of dispute" has diminished precedential value).

250 *See, e.g.*, Kelly v. California, 555 U.S. 1020, 1023 (2008) (Stevens, J., statement respecting denial of certiorari); Callins v. Collins, 510 U.S. 1141, 1153–55 (1994) (Blackmun, J., dissenting from denial of certiorari).

251 554 U.S. 407 (2008).

252 *Id.* at 446–47; *see also* Roper v. Simmons, 543 U.S. 551, 568 (2005); Atkins v. Virginia, 536 U.S. 304, 319 (2002).

253 Kennedy v. Louisiana, 554 U.S. 407, 438 (2008).

254 McCleskey v. Kemp, 481 U.S. 279, 287 n.5 (1987).

255 International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, S. Treaty Doc. 95-18, 660 U.N.T.S. 195 (entered into force Jan. 4. 1969) (ratified by the United States June 24, 1994).

256 *See* Int'l Comm'n of Jurists, *Administration of the Death Penalty in the United States*, 19 HUM. RTS. Q. 165, 203 (1997) ("[T]he Race Convention's prescription of effects-based discrimination (Article 2(c) of the ICERD) extends to areas of disparate impact-discrimination not currently proscribed under United States law in the United States."); Ved P. Nanda, *Access to Justice in the United States*, 46 AM. J. COMP. L. 503, 527–28 (1998). Whether or not the treaty obligations undertaken by the United States are enforceable by a defendant is unclear, *see* Carlos Manuel Vasquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1143–46 (1992), but such standards are relevant to the Court's Eighth Amendment analysis, *see, e.g.*, *Roper*, 543 U.S. at 575 ("[A]t least from the time of the Court's decision in *Trop* [*v. Dulles*], the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'"). It might also be argued that *Bush v. Gore*, 531 U.S. 98 (2000), undercuts *McCleskey*'s Equal Protection holding. In *Bush*, the Court found an Equal Protection

Even assuming that *McCleskey* remains good law, however, *McCleskey* does not foreclose the use of a study such as ours to challenge a death charge or a death sentence on the same two grounds advanced by McCleskey: as a violation of the Equal Protection Clause and as a violation of the Eighth Amendment. In order to illustrate how the study results might support such constitutional challenges by a defendant charged with a South County murder, we consider two hypothetical defendants, one (AM) charged with an "aggravated murder" and the other (OM) charged with an "ordinary murder." The following facts for the AM and OM cases are taken from two South County cases in the study where death was charged and imposed.[257] AM stabbed to death an elderly couple in their house during the course of a burglary and robbery. Apparently he was under the influence of drugs at the time, and the robbery was for the purpose of getting money to buy drugs. AM had a juvenile record for burglary and petty theft and, while awaiting trial, AM was found with razor blades in his cell. OM responded to an ad for the sale of a motor home by the victim, arranged to meet with the victim, then killed the victim and stole the motor home. OM had suffered a felony theft conviction in another state. Below we explore the constitutional arguments that AM and/or OM might make challenging the death penalty.

A. *Equal Protection*

Both hypothetical defendants could challenge the sentence on the ground that the decision of the District Attorney to seek death significantly more often in the case of death-eligible South County murders, without regard to the nature of the crime, denied residents of North County the equal protection of the laws, in this case the benefits of the death penalty.[258] This discrimination between the two halves of the County cannot be explained on the basis that it serves either of the

violation based on the various counties' different treatment of disputed ballots in the election recount without any proof of discriminatory intent. However, the Court limited its holding to the case before it, *id.* at 109, and the lower courts have uniformly refused to apply *Bush* to criminal cases. *See, e.g.*, Coleman v. Quarterman, 456 F.3d 537, 542–43 (5th Cir. 2006); People v. Vines, 251 P.3d 943, 987 (Cal. 2011); State v. Cross, 132 P.3d 80, 101 (Wash. 2006).

257 The aggravated murder case is *People v. Pollock*, 89 P.3d 353 (Cal. 2004), and the ordinary murder case is *People v. Schmeck*, 118 P.3d 451 (Cal. 2005).

258 The defendant would have standing to make this argument even though he or she might not be a resident of North County, either because, as the Court held in *McCleskey*, the prosecutor's conduct violates the defendant's rights because it amounts to enforcing the criminal law on the basis of an "unjustifiable standard" or because the defendant has standing to assert the equal protection rights of North County residents. *McCleskey*, 481 U.S. at 291 n.8; *see also* Powers v. Ohio, 499 U.S. 400, 410–16 (1991) (holding that a white defendant has third-party standing to assert the equal protection rights of black potential jurors excused through the discriminatory use of peremptory challenges).

two principal justifications for a death penalty: general deterrence and retribution.[259] A claim that the discrimination serves general deterrence would be dubious given that North County has a far higher homicide rate than South County, so, to the extent the death penalty serves a deterrent function at all, it arguably should have been employed more often in North County rather than in South County. Similarly, a claim that the discrimination serves retribution would have to be based on the pernicious and indefensible contention that South County lives are worth more than North County lives.

The defendants' claims here would not simply be that the District Attorney's decision to offer more protection to South County residents, through the use of the death penalty, was irrational, but that, given the substantial racial disparities with respect to the residents and homicide victims between the two halves of the county, the decision amounted to "race of neighborhood" discrimination (and, perhaps, race of victim discrimination as well). In an Article written shortly after the *McCleskey* decision, Randall Kennedy elaborated the logic of such a claim:

> I conceptualize *McCleskey* as an instance of racial inequality in the provision of public goods. Whereas other cases have involved the racially unequal provision of street lights, sidewalks, and sewers, *McCleskey* involves racial inequality in the provision of a peculiar sort of public good—capital sentencing.[260]

In Kennedy's view, the African-American community suffers two harms—one material, the other symbolic—from such discrimination. The community suffers material harm because the underenforcement of the criminal law in African-American communities breeds a "spirit of lawlessness."[261] The community suffers symbolically because the implicit message is that African-Americans "are assigned a lowlier place in the polity."[262]

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259 *See* Gregg v. Georgia, 428 U.S. 153, 183 (1976).

260 Randall L. Kennedy, McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1394 (1988). As Kennedy points out, the decision to discriminate between communities in the use of the death penalty may not result from conscious consideration of race, but rather from "'the unconscious failure to extend to [blacks] the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to [whites].'" *Id.* at 1420 (quoting Paul Brest, *The Supreme Court, 1975 Term—Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7–8 (1976)). Thus, consideration of how the defendants might use this study in support of an equal protection claim should not be understood as an assertion that, in choosing to pursue the death penalty more often for South County murders, the two District Attorneys and the members of their death teams, or any of them, consciously acted from a racial motive.

261 *Id.* at 1425.

262 *Id.*; *see also* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 29 (1997) ("Deliberately withholding protection against criminality (or conduct that should be deemed criminal) is one of the most destructive forms of oppression that has been visited upon African-Americans. The specter of the wrongly convicted black defendant rushed to punishment by a racially biased process is haunting . . . [E]ven worse is racially selective underprotection. This form of

It has been clear since *Yick Wo v. Hopkins*[263] that a municipality violates the Equal Protection Clause when it discriminates in the provision of services on the basis of race. That principle applies to discrimination against distinct racial communities. For example, in *Dowdell v. City of Apopka*,[264] the Eleventh Circuit affirmed a finding of an equal protection violation and the granting of relief to plaintiffs who proved that the city had discriminated in the provision of street paving and water distribution between the African-American community and the White community. More recently, the Ninth Circuit, in *Committee Concerning Community Improvement v. City of Modesto*,[265] reversed the denial of relief to plaintiffs claiming discrimination against predominantly Latino communities in the provision of municipal services, including discrimination in law enforcement and emergency response times. The right to be treated equally in the provision of municipal services applies to protective services. The Supreme Court has said: "The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause."[266] And it is no answer that the District Attorney here has not denied the protective service of the death penalty completely to North County residents so long as it appears that he has not furnished it on an equal basis to both communities.[267]

Such a claim would not be foreclosed by *McCleskey*. McCleskey's equal protection argument was rejected because, although he established a disparate effect, he could not prove discriminatory *intent*. As noted above, to the extent that McCleskey claimed an equal protection violation based on prosecutors' charging decisions, his statewide statistics could not prove the discriminatory intent of any particular prosecutor, and his statistics with regard to the Fulton County prosecutor, who prosecuted McCleskey, constituted too small a sample to draw any conclusions.[268] The evidence in the present study suffers from neither of these defects. The study concerns a single prosecutor's office and covers a sufficient number of cases to permit the conclusion

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discrimination is worse because it has directly and adversely affected more people than have episodic misjudgments of guilt. Racially selective underprotection is also worse in the sense that society is not as well equipped to combat it. Even before the abolition of slavery, officials everywhere acknowledged, at least in principle, that government is obliged to punish for crimes only duly convicted persons, regardless of race. Much more difficult to establish has been the idea that government is obliged to protect blacks from crime on the same terms as it protects whites.").

263 118 U.S. 356 (1886).

264 698 F.2d 1181 (11th Cir. 1983).

265 583 F.3d 690 (9th Cir. 2009).

266 DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 197 n.3 (1989).

267 Elliot-Park v. Manglona, 592 F.3d 1003, 1007 (9th Cir. 2010) ("[D]iminished police services, like the seat at the back of the bus, don't satisfy the government's obligation to provide services on a non-discriminatory basis.").

268 McCleskey v. Kemp, 481 U.S. 279, 295 n.15 (1987).

that the Alameda District Attorney has deliberately chosen to employ the death penalty substantially more often in the case of South County murders than in the case of North County murders.[269]

The procedural model for making such an equal protection claim in a criminal case should be that set out in *Batson v. Kentucky*[270] and its progeny[271] involving equal protection challenges to a prosecutor's discriminatory use of peremptory challenges.[272] Under *Batson*, once the defendant has presented a prima facie case raising an inference of discrimination, the burden shifts to the prosecutor to offer a neutral, non-discriminatory explanation for the challenges in question, although the burden of proving purposeful discrimination remains on the defendant.[273] In *McCleskey*, Justice Powell, distinguishing *Batson*, hinted that a selective enforcement challenge such as McCleskey's might never be viable because of the "impropriety" of requiring prosecutors to defend their decisions to seek death, "often years after they were made."[274] It is not clear whether Justice Powell's objection to requiring prosecutors to explain their death-charging decisions was theoretical—it would constitute too great an interference with their broad charging discretion, or practical—it would be too difficult for a prosecutor to recall or reconstruct his/her reasons for seeking, or not seeking, death years after the fact. With regard to the theoretical concern, requiring the Alameda District Attorney to explain his death- charging decisions no more interferes with his exercise of discretion than requiring a prosecutor to explain her peremptory strikes interferes with her discretion to select a jury. In fact, given the broad range of factors that might legitimately influence the District Attorney's charging decisions—including institutional factors such as enforcement priorities and office resources in addition to case-specific factors such as the nature of the murder, the defendant's record, the strength of the case, the impact on the victim's family—a court is much less likely to question the District Attorney's explanations for charging decisions than to question a prosecutor's necessarily case-specific use of peremptory challenges. District attorneys do not seem to share this theoretical concern. When the issue of making district attorneys' death charging decisions more transparent was raised before the California Commission on the Fair

269 The present study is based on roughly two and half times as many murder convictions and death-eligible cases as the Fulton County portion of the Baldus study.

270 476 U.S. 79 (1986).

271 *See, e.g.*, Snyder v. Louisiana, 552 U.S. 472 (2008); Miller-El v. Dretke, 545 U.S. 231 (2005).

272 In *United States v. Armstrong*, 517 U.S. 456 (1996), a selective prosecution case, although the Supreme Court distinguished *Batson* in terms of the showing required to establish a prima facie case, the Court seemed to assume that the *Batson* three-step procedure applied to selective prosecution claims. *Id.* at 467–68.

273 Purkett v. Elem, 514 U.S. 765, 768 (1995).

274 McCleskey v. Kemp, 481 U.S. 279, 296–97 (1987).

Administration of Justice, the Commission—which included district attorneys—unanimously recommended: "That all District Attorney Offices in California formulate and disseminate a written Office Policy describing how decisions to seek the death penalty are made, who participates and what criteria are applied."[275]

As to the practical concern, Justice Powell's attempt to distinguish *Batson* is not altogether persuasive, especially in light of later cases. While it is true that a selective prosecution challenge may require the District Attorney to explain past charging decisions in addition to his decision in the case at hand, the same may be true of *Batson* challenges, which need not be based solely on conduct of the prosecutor in the particular case,[276] and may require testimony in post-conviction proceedings years after the challenges were made.[277] If anything, given the gravity of the decision whether to seek the death penalty against a given defendant and how infrequently a death charge is filed (an average of a little more than five times a year in the study), the District Attorney's task in reconstructing those decisions should be far easier than the prosecutors' task in reconstructing the immediate, "seat-of-the-pants instincts"[278] that dictate peremptory challenges.

With regard to the substance of the equal protection claim, the defendants would have to show that the District Attorney's policy "had a discriminatory effect and that it was motivated by a discriminatory purpose."[279] Exactly what a defendant would have to show to make out a prima facie case is not altogether clear. The Supreme Court has stated: "The requirements for a selective-prosecution claim draw on 'ordinary equal protection standards.'"[280] At the same time, the Court has emphasized the broad discretion enjoyed by prosecutors, the reluctance of the courts to review this "special province" of the executive and the presumption of regularity accorded to prosecutors' charging decisions, all of which require the defendant to present "clear evidence" of discrimination.[281] At a minimum, the defendants would have to prove a disparate effect with their statistical evidence and also identify similarly situated defendants who were treated differently.[282]

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275 CAL. COMM'N, *supra* note 188, at 155.

276 *See, e.g.*, Reed v. Quarterman, 555 F.3d 364, 382 (5th Cir. 2009) (considering evidence that the prosecutor's office had a history of discrimination and that one of the prosecutors in the present case had been found to have discriminated in a prior case); Hightower v. Terry, 459 F.3d 1067, 1077–78 (11th Cir. 2006) (Wilson, J., dissenting) (considering evidence of particular prosecutor's past discriminatory conduct).

277 *See, e.g.*, Miller-El v. Dretke, 545 U.S. 231, 283 (2005).

278 Batson v. Kentucky, 476 U.S. 79, 138 (1986) (Rehnquist, J., dissenting).

279 Wayte v. United States, 470 U.S. 598, 608 (1985).

280 United States v. Armstrong, 517 U.S. 456, 465 (1996) (quoting *Wayte*, 470 U.S. at 608).

281 *Id.* at 464–65.

282 United States v. Bass, 536 U.S. 862, 862 (2002) (per curiam).

The principal evidence supporting the claim is the statistically significant disparity in death-charging between North and South County, a disparity that cannot be explained by the nature of the murders committed in each location. That "race of neighborhood" may explain the disparities is supported by the finding of Pierce and Radelet in their California study (noted above) that inter-county disparities in the use of the death penalty are correlated with race: death-sentencing rates were lowest in the counties with the highest non-white population.[283] In addition to the statistical evidence, AM's evidence would be that, as egregious as multiple murder might be, the District Attorney did not charge death in all multiple murder cases, and 95% of the cases where he did not charge death, and all of the cases where he charged death but accepted a plea for less than death, were North County cases.[284] Among the North County multiple murder cases where the District Attorney did not charge death, or agreed to a plea dropping the death charge, were the following cases: 1) defendant killed her elderly mother and another older woman, a client of the defendant's, in order to loot their bank accounts and, in the course of killing the second woman, set fire to the woman's house;[285] 2) defendant, a prior felon, engaged in a string of armed robberies during which he killed three victims;[286] 3) defendant tortured and then killed the two victims in the course of a burglary, robbery, and kidnapping;[287] 4) defendant, in the course of a robbery, killed two victims, the second, to eliminate a witness to the crimes.[288] Whether or not there is an explanation for the District Attorney's "leniency" toward these North County defendants, it seems an unlikely explanation that their crimes were less egregious than AM's.

OM can make out an even stronger prima facie case. With regard to ordinary first-degree death-eligible murders, like that committed by OM, the District Attorney charged death in only 13% of the cases, and again, where death was charged, he agreed to pleas for less than death only in North County cases.[289] Among the North County ordinary murder cases where the District Attorney did not charge death were the following: 1) defendant robbed and killed a wheelchair-bound cerebral palsy victim and set fire to his apartment;[290] 2) defendants, guilty of a robbery-murder, were also guilty of attempting to murder a second

283 Pierce & Radelet, *supra* note 124, at 38.

284 *See supra* Part III.B.

285 *See* People v. Loyd, No. 127214 (Alameda Cnty. Super. Ct.).

286 *See* People v. Ringo, No. 141626A (Alameda Cnty. Super. Ct.).

287 *See* People v. Johnson, No. 131017 (Alameda Cnty. Super. Ct.); *see also* Henry K. Lee, *Arrest in Double Slaying Suspect Held After Chase*, S.F. CHRON., Jan. 7, 1997, at A14.

288 *See* People v. Sanders, No. 92279 (Alameda Cnty. Super. Ct.).

289 *See supra* Part III.B.

290 *See* People v. Pinkston, No. 84479A (Alameda Cnty. Super. Ct.).

person during the crime;[291] 3) defendant and his cohorts committed four armed robberies of businesses, during one of which defendant shot and killed a clerk;[292] 4) defendant was on parole when he committed the robbery-murder of a cab driver.[293] Again, whatever explanation there might be for treating OM differently from these North County defendants who committed ordinary murders and from all the thirty-six North County defendants who committed aggravated murders and were not charged with death, it would not seem to be because his crime was more egregious.

Statistical evidence coupled with evidence that North County defendants who committed murders as egregious, or more egregious, than those committed by the defendants were not charged with death should be sufficient to establish a prima facie case.[294] In theory, the District Attorney would have three potential responses to this prima facie case. First, he might dispute the implication of the statistical showing by proving that his charging decisions can be explained by a (neutral) factor other than location of the crime. For example, the disparities might have resulted from the District Attorney's decision not to seek the death penalty in the case of gang murders, and the heavy concentration of such murders in Oakland (North County).[295] Such an explanation may be plausible because, across the state, the death penalty is rarely employed in the case of gang killings,[296] but it is doubtful that the explanation is race-neutral since in Alameda County, as elsewhere, most gang killings occur in minority communities. Second, he might admit charging death more often for South County murders, but he might offer a (neutral) justification for the policy. In this regard, the District Attorney might argue—as the California District Attorneys argued to justify inter-county disparities[297]—that he was simply responding to greater demand for use of the death penalty in South

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291 *See* People v. Ahmed, No. 109424 (Alameda Cnty. Super. Ct.); People v. Powell, No. 83178A (Alameda Super. Ct.).

292 *See* People v. Molsone, No. 76827A (Alameda Cnty. Super. Ct.).

293 *See* People v. Slaughter, No. 80264 (Alameda Cnty. Super. Ct.).

294 The prima facie case might be supported by anecdotal evidence of race discrimination by the District Attorney's Office, for example evidence that the office engaged in racial discrimination in jury selection. *See* Thaai Walker, *Surprise Allegation Revives Old Case: Ex-Prosecutor Says He, Judge Colluded to Keep Jews off Jury in Killing*, SAN JOSE MERCURY NEWS, Mar. 19, 2005, at 1B (reporting on the declaration under oath of a former Alameda County prosecutor that prosecutors routinely used peremptory challenges against black women and Jews).

295 *See* Michael Dorgan, *Drug War Casualty Rate Rising, Oakland Murders Tied to Crackdown*, SAN JOSE MERCURY NEWS, Oct. 27, 1986, at 1B; Lance Williams, *Cocaine Gang Leaders Given Big Prison Terms, Bluitt, Lieutenants Will Be Put Away for 3-Year Murder Spree to Protect Drug Territory*, S.F. EXAMINER, Apr. 29, 1993, at A4.

296 Shatz & Shatz, *supra* note 117, at 98 (finding a death sentence rate of 0.3% in single-victim first-degree murders committed for the benefit of street gangs).

297 *See* CAL COMM'N, *supra* note 188, at 151.

County, as opposed to North County.[298] This argument would be inconsistent with the District Attorneys' enthusiastic pursuit of death sentences in the absence of substantial public support for the death penalty in Alameda County,[299] and it is implausible since the District Attorney's death review committee is not diverse and does not seek input from the community, or even consult with the victim's family prior to filing a death charge.[300] Third, he might try to prove that the decision to charge death was based on some factor unique to the defendants' cases (other than the nature of the murders) and unrelated to the general policy to seek death more aggressively for South County murders: perhaps the community reaction to, or the impact on the victim's families of, the particular murders. Of course, the Alameda District Attorney has never been called upon to explain his charging decisions, so one can only speculate as to what explanation might be offered, but, given the statistical showing and the numerous comparably egregious North County cases where death was not charged, a court should require an explanation and give the defendants the opportunity to carry their burden by proving the explanation to be false.[301]

B. *Eighth Amendment*

As long as *McCleskey* remains good law, a statistical showing of disparities in the application of the death penalty—whether the disparities shown are by race, gender, geography, or all three, and whether proved on a statewide or county-level basis—will not prove an Eighth Amendment violation. To establish an Eighth Amendment violation, the defendants would have to prove what Furman proved, that the death penalty was imposed so infrequently in those cases "for which

298 There may well be more support for the death penalty in South County than in North County based on the very different racial makeup of the two halves of the county and the fact that African-Americans have always been far less in favor of the death penalty than Whites. *See* Michael Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, 39 CRIME & JUST. 273, 289 (2010) (reporting that there has been a thirty-point racial gap in support for capital punishment since at least 1974).

299 The District Attorney has simply ignored the Board of Supervisors' 2003 call for a moratorium on use of the death penalty. *See supra* note 209.

300 Letter from ACLU of N. Cal. to the Cal. Comm'n on the Fair Admin. of Justice, Re: Charging Practices of CA DA's in Death Penalty Cases, Survey Responses, at 6–7 (Feb. 15, 2008), *available at* http://ccfaj.org/documents/reports/dp/expert/ACLUDAChargingPracticesLetter.pdf.

301 In support of the Court's decision in *McCleskey*, Justice Powell emphasized that there was a "legitimate and unchallenged explanation" for the prosecutor's decision to charge death, that McCleskey was death-eligible under the Georgia statute. McCleskey v. Kemp, 481 U.S. 279, 296–97 (1987). That McCleskey was death-eligible is no answer at all to a claim that he was treated differently from other death-eligible defendants because of racial considerations.

death is the authorized penalty"[302] as to create an unconstitutional risk of arbitrariness and an unconstitutional likelihood that its imposition was without penal justification. They would have to show that the California statute, or its application, failed to genuinely narrow the death-eligible class and thus failed to result in the death penalty being imposed on a "substantial portion" of the death-eligible class.

There are two versions of this claim, both of which would be supported by the study's findings. The broader claim that both defendants could make would be based on statewide statistics on the imposition of the death penalty at the time of the charges against them. There is ample evidence that California's death penalty scheme fails to narrow. David Baldus, in a study completed in 2010, found the scheme so broad that the death-sentencing rate among death-eligible cases was 69% lower than the death-sentencing rate in pre-*Furman* Georgia.[303] An earlier study based on cases decided on appeal during a five-year period within the period of the present study found that approximately 84% of those convicted of first-degree murder were death-eligible, and approximately 11.4% of death-eligible defendants convicted of first-degree murder were sentenced to death,[304] a death sentence rate well below that in Georgia at the time of *Furman*.[305] A death penalty scheme where prosecutors and jurors enjoy virtually unfettered discretion in their selection decision and where better than five out of six first-degree murderers is made death-eligible is not "genuinely narrow," and a scheme where death is imposed on fewer than one in eight death-eligible defendants is not a scheme where death is being imposed on a "substantial portion" of the class.[306] The findings of our study with regard to death sentence rate confirm the statewide statistics. Although

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302 Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring).

303 Baldus Declaration, *supra* note 196, at 25–26.

304 Shatz & Rivkind, *supra* note 37, at 1332. The different death sentence rates reported in the several California studies reflect the difference in the case samples studied—all cases, only appellate cases, only Alameda County cases; whether the study covered only defendants convicted of first-degree murder or included those convicted of lesser homicides; and the version(s) of the death penalty in effect for the cases studied. Nevertheless, regardless of the methodology, the studies all found that the death sentence rate in California is, and always has been, substantially below the 15–20% pre-*Furman* death sentence rate.

305 Although the California statute is the broadest in the country, that does not necessarily mean California has the lowest death sentence rate. As noted above, Donohue's study, *supra* note 116, using cases of defendants convicted of first- or second-degree murder, found a 4.4% death sentence rate in Connecticut. A new study by Justin Marceau, Wanda Foglia, and Sam Kamin, also using cases of defendants convicted of first- or second-degree murder, has found a death sentence rate of less than 1% in Colorado. Joint Declaration and Report of Justin Marceau, Wanda Foglia, and Sam Kamin, Colorado v. Montour (Douglas Cnty. Dist. Ct. Sept. 7, 2012) (No. 02CR782).

306 The 11.4% death sentence rate is the rate from the late 1980s. More recently, death sentences in California have declined, so that among death-eligible first-degree murderers sentenced during the period 2003–2005, the death sentence rate was 5.5%. Shatz & Shatz, *supra* note 117, at 93–94.

the Alameda County death sentence rate among defendants convicted of first-degree murder and death-eligible was 12.8%, higher than the statewide rate, that is not inconsistent with the lower state rate because, during the period of the study, Alameda was a high death county.[307]

In a properly narrowed California scheme—one where the majority of first-degree murderers were not made death-eligible and the death sentence rate exceeded 15–20%—AM almost certainly would still be death-eligible. The data on death sentencing during the period of the study demonstrate that the multiple murderer is considered by prosecutors and jurors to be the most deserving of death.[308] By contrast, OM almost certainly would not be death-eligible under a narrowed scheme. Making death-eligible ordinary theft-related felony-murders, such as that committed by OM, in itself would defeat narrowing because the majority of first-degree murders are theft-related felony-murders.[309] However, the fact that AM and OM are differently situated with regard to a hypothetical narrowed statute should not mean that they are differently situated with regard to their challenge to the present statute. Just as the Court in *Furman* held the Georgia statute unconstitutional without considering the arbitrariness of any given sentence, so the courts would have to hold the California statute unconstitutional in all its applications.

OM, but probably not AM, could also make a narrower Eighth Amendment claim based on the infrequent imposition of the death penalty for the kind of murder he committed.[310] In *Furman*, the Court was addressing the Georgia scheme as a whole, but the same principle—that when too few are selected from too large a death-eligible class, there is an unconstitutional risk of arbitrariness—might be applied to any particular form of murder made death-eligible. The Court recognized as much in *Gregg* when the plurality cited with approval the Georgia Supreme Court's understanding that the Eighth Amendment does not permit the imposition of the death penalty "when juries generally do not impose the death sentence in a certain kind of murder case."[311] In Alameda County during the study period juries did not generally

307 *See* Pierce & Radelet, *supra* note 124, at 27.

308 Shatz, *supra* note 117, at 739–44. This finding is consistent with findings in other states. *See* Baldus, *supra* note 242 at 1601–03 (New Jersey); Pierce & Radelet, *supra* note 131, at 61 (Illinois).

309 Shatz, *supra* note 117, at 738.

310 Statewide, during the 1980s, approximately 27% of defendants convicted of first-degree murder who murdered more than one victim were sentenced to death. *Id.* at 741. The comparable figure for Alameda County during the period of the study is 34%. *Id.* at 740. Today, with the overall decline in death sentencing in California during the last decade, even a defendant convicted of first-degree murder with multiple victims would have an Eighth Amendment claim based on the 2003–2005 study showing a death sentence rate for multiple murderers of 16.4%. (Unpublished data in the possession of the author.)

311 Gregg v. Georgia, 428 U.S. 153, 205–06 (1976).

impose the death penalty on convicted first-degree murderers for "ordinary murders," such as that committed by OM. The death sentence rate for such defendants was 5.1%. If we were to focus only on defendants convicted of murder during a robbery or burglary, but were to include all such defendants convicted of murder (rather than just those convicted of first-degree murder), the death sentence rate was 4.5%.[312]

The defendants arguably could prove an Eighth Amendment violation with nothing more than statistical evidence demonstrating the infrequent use of the death penalty in California or for defendants committing particular kinds of murders. However, just as Furman's Eighth Amendment case was supported by statistical evidence of racial discrimination, the proof of disparities in the imposition of the death penalty documented in this study and earlier studies would add substantial support to the defendants' Eighth Amendment claims. The harm to be feared from overbroad death penalty statutes is that the selection of the few who are sentenced to death from the many who are death-eligible will be done on an arbitrary or, worse, discriminatory basis. In *Furman*, the Justices in the majority presumed that the infrequent use of the death penalty—in 15–20% of the cases where it was legally available—would necessarily produce arbitrary results, but that presumption also was validated to some degree by background evidence of racial discrimination in death-sentencing, particularly for the crime of rape.[313]

Similarly, with regard to the California death penalty scheme, broad death-eligibility and a low death-sentence rate create a presumption that death sentences will be imposed in an arbitrary or discriminatory fashion, and that presumption has been validated by statistical evidence of various sentencing disparities. Prior studies have documented disparities based on race of victim,[314] gender of defendant and victim,[315] and geography.[316] The present study finds disparities based on location of the murder as well as gender of the victim. The studies confirm that the California statute is overbroad because its infrequent application has produced the very harms identified in *Furman*. In sum, while proof of irrational disparities in the administration of the death penalty may not, under *McCleskey*, prove a constitutional violation, such proof strongly supports the claim that the

312 Shatz, *supra* note 117, at 745. Calculating the death sentence rate using second-degree murder cases as well as first-degree murder cases may give a more accurate picture since it captures those cases in which the District Attorney initially charged, or allowed the defendant to plead to, a lesser crime than the defendant committed.

313 *See supra* Part I.A.

314 Pierce & Radelet, *supra* note 124, at 19.

315 Shatz & Shatz, *supra* note 117, at 105–10.

316 Pierce & Radelet, *supra* note 124, at 38–39.

California scheme is constitutionally flawed in its failure to meet the Court's narrowing requirements.

CONCLUSION

The core finding of the Supreme Court in *Furman*—reiterated by the majority in *McCleskey*—is that, when the death penalty is imposed infrequently, i.e., where many are made death-eligible, but few are sentenced to death, the result is inevitably arbitrary and, consequently, unconstitutional.[317] That has been the situation in California since the enactment of the 1978 Death Penalty Law—the death-eligible pool is larger than in pre-*Furman* Georgia, and the death sentence rate has never approached the pre-*Furman* Georgia rate found unconstitutional in *Furman*. The size of the death-eligible pool in California during this period is such as to give prosecutors, and then jurors, extraordinary discretion in choosing defendants for death, producing the very arbitrary and discriminatory results prevalent prior to *Furman*. Although California may be an extreme case, it is not unique in having an overbroad death penalty scheme. As noted above,[318] studies in other states also have documented death-sentence rates among death-eligible defendants well below the 15–20% rate at the time of *Furman*, and the wealth of studies finding significant disparities in the administration of the death penalty suggest that most states' schemes might be challenged as overbroad.

The choice of the Alameda County District Attorney and Alameda County capital case jurors to favor South County residents with the protection of the death penalty is a product of the virtually unfettered discretion created by an overbroad statute. Given the very different racial demographics of the two halves of the county and the racially skewed distribution of homicide victims, and viewed in light of the overwhelming empirical evidence of race effects in death-charging and death-sentencing throughout the country,[319] an obvious explanation is that racial considerations, conscious or unconscious, underlie those choices. Although our study of a single county is unique in its size and its focus, there is no reason that similar studies could not be done in other "high death counties."[320] Given the racial disparities identified in the numerous statewide studies and in smaller county studies, it would

317 *See* Furman v. Georgia, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring); *id.* at 313 (White, J., concurring); *see also* McCleskey v. Kemp, 481 U.S. 279, 301 (1987).

318 *See supra* Part II.

319 *See supra* Part II.A.

320 *See* Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 231–34 (2012) (listing the most "active" death penalty counties from 2004 to 2009).

hardly be surprising if larger studies in high death counties found a race of neighborhood effect.

The Supreme Court has stated, as a constitutional principle, that the death penalty must be imposed "fairly, and with reasonable consistency, or not at all."[321] Twenty-five years worth of statistical studies since *McCleskey* have demonstrated that, in jurisdiction after jurisdiction, the death penalty is not being imposed "with reasonable consistency." The time is ripe for the Court to take another look at statistics.

321 Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).