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STATE RESPONSES TO THE SPECTER OF RACIAL DISCRIMINATION IN CAPITAL PROCEEDINGS: THE KENTUCKY RACIAL JUSTICE ACT AND THE NEW JERSEY SUPREME COURT'S PROPORTIONALITY REVIEW PROJECT

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INTRODUCTION

Since April 22, 1987, when the United States Supreme Court handed down *McCleskey v. Kemp*,¹ the death penalty in America has operated in a twilight of simultaneous acknowledgement and denial of racial discrimination in the ultimate punishment. In *McCleskey*, the Supreme Court admitted the existence of racial disparity in capital sentencing,² but declined to recognize it as a constitutional violation.³ In the three decades since the Court

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¹ 481 U.S. 279 (1987).

² This note distinguishes between *disparity*, a statistical phenomenon, and *discrimination*, a human behavioral phenomenon. Furthermore, this note assumes that disparity correlated with a victim's race and disparity correlated with a defendant's race equally constitute racial disparity.

³ *McCleskey*, 481 U.S. at 312 (admitting that "[t]he Baldus study indicates a discrepancy that appears to correlate with race" but asserting that "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system"). But this is not to say that the Court admitted to any complicity in racial

decided the 1972 landmark case *Furman v. Georgia*,⁴ which struck down then-existing state death penalty statutes as unconstitutionally arbitrary and capricious, social scientists and legal scholars have produced a significant body of research showing death sentences to be correlated with the race of both murder victims (the highest rates being found in white-victim cases) and murder defendants (the highest rates being found in black-defendant cases).⁵ Public opinion polls suggest that a considerable portion of the public accepts race-of-defendant disparity in capital proceedings as a fact.⁶

Nevertheless, almost every court—federal and state—to hear a statistically-based claim of racial discrimination in capital proceedings since 1987 has rejected it under cover of *McCleskey*.⁷

discrimination. *See id.* at 309-10 (cataloguing the Court's "unceasing efforts to eradicate racial prejudice from our criminal justice system") (internal quotation marks omitted).

⁴ 408 U.S. 238 (1972). *See* discussion *infra* Part I.A.

⁵ *See, e.g.*, U.S. GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990) (analyzing twenty-eight studies involving cases from 1972 to 1988), reprinted in 136 CONG. REC. S6873, 6889 (1990); David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1738 (1998) [hereinafter *Overview*] (noting that "the problem of arbitrariness and discrimination in the administration of the death penalty is a matter of continuing concern and is not confined to southern jurisdictions").

⁶ In a March 2001 Gallup poll, 50 percent of respondents agreed that a black person is more likely than a white person to receive the death penalty for the same crime. Gallup Poll Release 3/2/01, available at <http://deathpenaltyinfo.org/article.php?scid=23&did=210#pew20030724>. A 1991 Gallup poll found that 73 percent of blacks and 41 percent of whites agreed that blacks are more likely to receive the death penalty than whites in similar cases. *See* WENDY KAMINER, IT'S ALL THE RAGE 103 (1995).

⁷ *See, e.g.*, *Bell v. Ozmint*, 332 F.3d 229, 237 (4th Cir. 2003); *U.S. v. Webster*, 162 F.3d 308, 334 (5th Cir. 1998); *Griffin v. Dugger*, 874 F.2d 1397, 1401 (11th Cir. 1989); *State v. Stevens*, 78 S.W.3d 817, 852 (Tenn. 2002); *Brooks v. State*, 990 S.W.2d 278, 289 (Tx. Crim. App. 1999); *Watkins v. Com.*, 385 S.E.2d 50, 57 (Va. 1989). In *United States v. Bass*, 266 F.3d 532 (6th Cir. 2001) a divided panel of the Sixth Circuit upheld the district court's dismissal of a death notice after the government refused to provide discovery for a capital defendant's selective prosecution claim. The Court of Appeals concluded that

RACE AND THE DEATH PENALTY

361

These courts have been unwilling to accept the proposition at the heart of such statistically-based claims: that racial disparity, in the absence of race-neutral explanations for it, constitutes sufficient proof of unconstitutional discrimination. Moreover, attempts in Congress to respond to *McCleskey* by passing a Racial Justice Act, which would have provided a federal statutory vehicle for challenging racial disparity, have repeatedly failed.⁸ Nevertheless, since 1987 there have been a few isolated efforts by state governing institutions to respond to racial disparity in capital proceedings.⁹

This note will examine two such institutional responses: the Kentucky Racial Justice Act¹⁰ and the New Jersey Supreme Court's Proportionality Review Project.¹¹ This note focuses on Kentucky and New Jersey because of their distinctions among death penalty jurisdictions: Kentucky is the only state with a Racial Justice Act on the books, and New Jersey is home to the court that has conducted the most thorough proportionality reviews of death

McCleskey did not pose any bar at that preliminary stage. *Id.* at 540. The Supreme Court reversed in a unanimous, *per curiam* opinion. *U.S. v. Bass*, 536 U.S. 862 (2002).

⁸ Don Edwards & John Conyers, *The Racial Justice Act—A Simple Matter of Justice*, 20 DAYTON L. REV. 699, 700-1 (1995) (discussing failed attempts to pass a Racial Justice Act in Congress between 1988 and 1994).

⁹ *See, e.g.*, *State v. Marshall*, 613 A.2d 1059, 1108-10 (N.J. 1992) (discussed *infra* Part III.C.); the Kentucky Racial Justice Act, KY. REV. STAT. ANN. § 532.300(1) (Michie 2004) (discussed *infra* Part II.B); N.Y. Crim. Proc. § 470.30(3)(a) (McKinney 1995) (requiring the Court of Appeals to consider “whether the imposition of the verdict or sentence [of death] was based upon the race of the defendant or a victim of the crime for which defendant was convicted”); *Foster v. State*, 614 So.2d 455 (Fla. 1992) (4-3 decision) (dissenting opinion of Barkett, C.J., rejecting *McCleskey* as inconsistent with the Florida constitution).

¹⁰ KY. REV. STAT. ANN. § 532.300(1) (Michie 2004).

¹¹ *See State v. Ramseur*, 524 A.2d 188 (N.J. 1987) (upholding the constitutionality of the 1982 New Jersey death penalty statute and expressing the court's commitment to performing thorough examinations of the imposition of the death penalty under the rubric of proportionality review). In July 1988 the court appointed Prof. David Baldus as Special Master to assist it in developing a system of proportionality review. *State v. Marshall*, 613 A.2d 1059, 1063 (N.J. 1992).

sentences, including an intensive effort to ensure that racial disparity does not infect capital proceedings.¹² Part I discusses *McCleskey* and the U.S. Supreme Court's death penalty decisions that prepared the ground for it. Part II discusses a legislative response to *McCleskey*, the Kentucky Racial Justice Act. Part III, on the other hand, discusses a judicial response to *McCleskey*, the New Jersey Supreme Court's Proportionality Review Project. Finally, Part IV analyzes the effectiveness of each state's institutional response to racial disparity in capital proceedings, considers the two responses through the lens of relative institutional competence, and recommends some measures to help counteract this disparity.

This note proceeds from two basic premises. The first is that racial disparity based on the race of murder victims is just as problematic, morally and legally, as racial disparity based on the race of murder defendants.¹³ The second is that racial disparity in

¹² David Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1440 (2004) (noting that, "with the exception of Kentucky, no remedial legislation has been adopted" to address racial disparity in capital proceedings); Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only the "Appearance of Justice"?*, 87 J. CRIM. L. & CRIMINOLOGY 130, 161 n.109 (1996) (commenting on the New Jersey court's "noteworthy" and "exceptional" commitment to proportionality review); Barry Latzer, *The Failure of Comparative Proportionality Review of Capital Cases (With Lessons from New Jersey)*, 64 ALB. L. REV. 1161, 1164 (2001) (noting that "the New Jersey court committed itself to the most quantitative proportionality review in the United States").

¹³ See *McCleskey v. Kemp*, 481 U.S. 279, 291 n.8 (1987) (noting that *McCleskey* had standing to raise an equal protection claim based on the race-of-victim disparity, since a state would violate the Equal Protection Clause by enforcing its criminal laws on "an unjustifiable standard such as race, religion, or other arbitrary classification" (internal quotation marks omitted). See also Baldus & Woodworth, *supra* note 12, at 1452-53 (arguing that race-of-defendant and race-of-victim discrimination are morally indistinguishable and identifying the immoral elements of race-of-victim discrimination). The immoral elements of race-of-victim discrimination include:

- a) its undervaluation of black lives, (b) its distortion of the decision-making process on the basis of race, (c) the fact that race is a but for

RACE AND THE DEATH PENALTY

363

capital proceedings is the product of racial discrimination—although not necessarily *conscious* racial discrimination—by various actors in the system, including prosecutors, judges, and jurors.¹⁴ Significant support for this premise is found in studies of capital cases¹⁵ and in studies of white Americans' attitudes about the death penalty.¹⁶ Researchers have identified racial prejudice as the strongest predictor of death penalty support among white Americans, ahead of such factors as income, education, and

cause of many death sentences and executions, (d) the unfairness it visits upon black communities, and (e) the unseemly message it sends that the overriding objective of capital punishment in America is the protection of white people.

Id.

¹⁴ For a discussion of unconscious racism and an argument favoring its recognition in equal protection analysis, see Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

¹⁵ See, e.g., U.S. GENERAL ACCOUNTING OFFICE, *supra* note 5; Baldus et al., *supra* note 5; William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563, 599 (1980) (finding a high risk of powerful white-victim bias in Florida, Texas, and Georgia); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 108 (1984) (finding “a remarkably stable and consistent” pattern of racial discrimination in the imposition of the death penalty in Arkansas, Florida, Georgia, Illinois, Mississippi, North Carolina, Oklahoma, and Virginia); Gennaro F. Vito & Thomas J. Keil, *Capital Sentencing in Kentucky: An Analysis of the Factors Influencing Decision-Making in the Post-Gregg Period*, 79 CRIM. L. & CRIMINOLOGY 483 (1988) (finding that Kentucky prosecutors were more likely to seek death in white-victim cases); Leigh J. Bienen et. al, *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27, 63 n.129 (1988) [hereinafter *Reimposition*] (finding pronounced race-of-victim and race-of-defendant disparities unexplained by non-racial variables).

¹⁶ See, e.g., Steven E. Barkan & Steven F. Cohn, *Racial Prejudice and Support for the Death Penalty by Whites*, 31 J. RES. CRIME & DELINQ. 202 (1994) (reporting results of statistically-controlled studies that “[w]hite support for the death penalty is . . . associated with antipathy to Blacks and with racial stereotyping”); Joe Soss et al., *Why Do White Americans Support the Death Penalty?*, 65 J. POL. 397, 416 (2003) (reporting results of statistically-controlled studies that “[w]hite support for the death penalty in the United States has strong ties to anti-black prejudice”).

political party affiliation.¹⁷ If one accepts that disparity manifests discrimination, it reasonably follows that racial disparity, unexplained by non-racial factors, violates the Constitution.¹⁸ Yet one need not recognize a causal connection between discrimination and disparity to believe that racial disparity in capital proceedings constitutes a serious social problem that must be remedied. The mere appearance of racial discrimination in the ultimate punishment, in a nation with a long history of racial subjugation, is at the very least unseemly, if not downright corrosive of our justice system.¹⁹

The specter of racial discrimination haunts the death penalty system in America, yet officials in most jurisdictions have attempted to ignore it.²⁰ The efforts of the Kentucky legislature and

¹⁷ Soss et al., *supra* note 16, at 412.

¹⁸ Among the many arguments for recognizing racial disparity in capital proceedings as a basis for finding a constitutional violation, see, e.g., John H. Blume et al., *Post-McCleskey Racial Discrimination in Capital Cases*, 83 CORNELL L. REV. 1771 (1998) (proposing a burden-shifting scheme that would allow a defendant to make out an equal protection violation if prosecutors fail to rebut the defendant's *prima facie* case, statistically based or otherwise); Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 WM. & MARY L.REV. 2083 (2004) (arguing that unconscious racial bias infects capital proceedings and that such bias skews the process of deciding who deserves the death penalty, making the resultant death penalty cruel and unusual punishment). On the other hand, Justice Antonin Scalia appears to believe that racial bias in capital proceedings does not necessarily present a constitutional problem. Justice Scalia, who voted to uphold McCleskey's death sentence, wrote a memorandum to his fellow justices that included this remarkable admission: "Since it is my view that 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." See Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 519, 528 (1995) (citing the full text of the memorandum).

¹⁹ See Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 481 (1995) ("Courts lose respect when they refuse to acknowledge and remedy racial discrimination which is apparent to everyone else.").

²⁰ Kentucky's Racial Justice Act is the nation's only statute allowing a

RACE AND THE DEATH PENALTY

365

the New Jersey Supreme Court to confront this specter illustrate the difficulties in defining, isolating, and remedying problems where race and crime intersect. Although neither state institution has achieved unequivocal success or produced unambiguous lessons, the experiences of each are nonetheless instructive. They are also cause for some hope that the future of the death penalty will be more equitable than the past.

I. TALISMAN: *MCCLESKEY V. KEMP*

In 1987 the U.S. Supreme Court decided *McCleskey v. Kemp*, considered at the time to be the last broad-based attack on the constitutionality of the death penalty.²¹ Warren McCleskey's claims were crafted to take advantage of the death penalty jurisprudence developed by the Supreme Court during the preceding fifteen years—the first fifteen years of the modern death penalty era, which dates from the Court's invalidation of all capital statutes in *Furman v. Georgia* in 1972.²² In *Furman* the Court evinced concern about arbitrariness in capital sentencing²³ and race- and class-based discrimination.²⁴ McCleskey's legal team put

defendant to challenge the prosecutor's decision to seek death. See Baldus & Woodworth, *supra* note 12. The New Jersey Supreme Court is, arguably, the only state high court to take a rigorous approach to screening out racially discriminatory death sentences. See Bienen, *supra* note 12.

²¹ *McCleskey v. Kemp*, 481 U.S. 279 (1987); DAVID COLE, NO EQUAL JUSTICE 134 (1999).

²² See *McCleskey*, 481 U.S. at 291, 301; see also Anderson Bynam, *Eighth and Fourteenth Amendments—The Death Penalty Survives: McCleskey v. Kemp*, 107 S.Ct. 1756 (1987), 78 CRIM. L. & CRIMINOLOGY 1080, 1080-81 (1988) (stating that, in *Furman*, “the Supreme Court attempted to clarify the requirements for death penalty statutes in order to satisfy the mandates of the Eighth and Fourteenth Amendments,” and asserting that *McCleskey* “drifted away from” the goal of “a high degree of rationality consistency in capital sentencing,” which the Court had espoused since *Furman*).

²³ The *Furman* Court held that arbitrariness violates the Eighth Amendment's prohibition of cruel and unusual punishments. *Furman v. Georgia*, 408 U.S. 238, 239-40, 256, 305-6 (1972). The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

²⁴ Race- and class-based discrimination violates the Fourteenth

these concerns to the test with the first rigorous and comprehensive statistical study of how a state death penalty system operates.²⁵ McCleskey was thus able to point to data supporting his argument that the system that had put him on death row was both arbitrary and discriminatory, and therefore unconstitutional.²⁶ The Supreme Court, while accepting the validity of his data, did not accept his argument.²⁷

A. Background: Furman and Gregg

In 1972 the Court decided *Furman v. Georgia*,²⁸ which effectively invalidated all existing death penalty statutes. In *Furman* the Court issued a *per curiam* opinion supported by five separate concurrences; the common ground of the concurrences was the conclusion that in failing to guide judges and juries properly in their sentencing decisions, the Georgia and Texas capital punishment statutes under consideration produced death sentences that were so arbitrary and capricious as to be “cruel and unusual” under the Eighth Amendment.²⁹ Justice Douglas’s concurrence openly acknowledged that racial minorities and the poor had always suffered most from this arbitrary scheme of

Amendment’s equal protection guarantee. *See, e.g.*, *Strauder v. West Virginia*, 100 U.S. 303, 307 (1879). The relevant portion of the Fourteenth Amendment provides, “nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV. *See also* Bright, *supra* note 19, at 433-34.

²⁵ *See* Bynam, *supra* note 22, at 1106, 1110 (1988) (stating that in *McCleskey* “the Court was presented with unparalleled statistical evidence that the death penalty in Georgia was being applied in a racially influenced manner,” and that “[t]he only way to get better results than those provided by the Baldus study would be to ask the discretionary actors within the capital sentencing infrastructure whether they had discriminated in a particular case”).

²⁶ *McCleskey*, 481 U.S. at 286-88.

²⁷ *Id.*

²⁸ 408 U.S. 238 (1972). The case was consolidated with *Jackson v. Georgia and Branch v. Texas*.

²⁹ *Id.* at 249-52 (Douglas, J., concurring). The Eighth Amendment provides, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S. CONST. amend. XVIII.

RACE AND THE DEATH PENALTY

367

punishment.³⁰

Within six months of the *Furman* decision, states began enacting new death penalty statutes intended to address the deficiencies identified by Justice Douglas's opinion and the four other opinions in support of the judgment.³¹ In 1976 the Court considered the first challenges to these statutes.³² In *Gregg v. Georgia*,³³ *Proffitt v. Florida*,³⁴ and *Jurek v. Texas*³⁵ (collectively known as *Gregg*), the Court upheld death penalty statutes that provided judges and juries with sentencing guidelines by which to make the life-or-death decision.³⁶ In addition to sentencing guidelines, *Gregg* also approved—but did not enshrine as constitutionally required—three procedural reforms featured in the new Georgia statute.³⁷ The first was bifurcation of the trial, providing for separate deliberations on guilt and punishment.³⁸ The

³⁰ *Id.* at 355-56. (quotation from J. Douglas). See also Bright, *supra* note 19, at 433-34 (stating that the *Furman* decision was “due to arbitrariness and discrimination against racial minorities and the poor”).

³¹ DEATH PENALTY INFORMATION CENTER, HISTORY OF THE DEATH PENALTY, PART I, at <http://www.deathpenaltyinfo.org/article.php?scid=15&did=410#ConstitutionalityoftheDeathPenaltyinAmerica> (last visited Jan. 15, 2005) (stating that, after the *Furman* decision, advocates of capital punishment began proposing new statutes that they believed would end arbitrariness in capital sentencing, and that Florida rewrote its death penalty statute only five months after *Furman*).

³² *Id.*

³³ 428 U.S. 153 (1976).

³⁴ 428 U.S. 242 (1976).

³⁵ 428 U.S. 262 (1976).

³⁶ DEATH PENALTY INFORMATION CENTER, *supra* note 31. In deciding on the sentence, the judge or jury was to consider any of ten statutory aggravating circumstances supported by the evidence, as well as “any mitigating or aggravating circumstances otherwise authorized by law.” *Gregg*, 428 U.S. at 164. The statutory aggravating factors included that “the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions,” that the offense “was committed while the offender was engaged in the commission of another capital felony,” and that “the offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.” *Id.* at 165 n.9.

³⁷ DEATH PENALTY INFORMATION CENTER, *supra* note 31.

³⁸ *Gregg*, 428 U.S. at 163-64. The Georgia statute provided that after a

second was automatic appellate review of convictions and sentences.³⁹ The third reform was proportionality review, by which state appellate courts could compare sentences in capital cases and determine whether a given sentence was disproportionately harsh in light of the crime and the defendant.⁴⁰

B. Warren McCleskey's Powerful Case

Warren McCleskey was convicted and sentenced to death in a Georgia state court for armed robbery and the murder of a white police officer.⁴¹ McCleskey challenged his sentence, grounding his arguments in the Eighth and Fourteenth Amendments to the U.S. Constitution.⁴² First, he claimed that Georgia violated the Equal Protection Clause of the Fourteenth Amendment by administering the death penalty in a racially discriminatory manner.⁴³ McCleskey argued that race affected the application of the Georgia statute in two ways. First, defendants convicted of murdering whites were more likely to be sentenced to death than defendants convicted of murdering blacks.⁴⁴ Second, black defendants were more likely to

verdict or plea of guilty, a sentencing hearing would be held at which the judge or jury would "hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas." *Id.*

³⁹ *Id.* at 166-67.

⁴⁰ *Id.* at 167. Since *Gregg*, state high courts have differed as to what proportionality review entails, and how much judicial effort it deserves. See Bienen, *supra* note 12, at 132 (noting that proportionality review "can implicate broad principles of federal and state constitutional law and trigger the implementation of an empirical examination of the state's entire capital case processing system, raising issues of racial and economic disparity and questioning the charging practices and autonomy of local prosecutors. Or, it can result in no more than a conclusory sentence tacked on to the end of a state high court's affirmance of a death sentence.").

⁴¹ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

⁴² *Id.* at 286.

⁴³ *Id.* at 291-92.

⁴⁴ *Id.* at 291.

RACE AND THE DEATH PENALTY

369

be sentenced to death than white defendants.⁴⁵ McCleskey presented a wealth of statistical evidence from a study of more than 2,000 Georgia capital cases tried in the 1970s.⁴⁶ The study, conducted by a team of researchers led by Professor David Baldus of the University of Iowa College of Law, produced some remarkable findings.⁴⁷ It revealed that prosecutors sought the death penalty in 70 percent of cases involving black defendants and white victims, but just 19 percent of cases involving white defendants and black victims.⁴⁸ Defendants received death sentences in 22 percent of cases involving black defendants and white victims, but just 3 percent of cases involving white defendants and black victims.⁴⁹ After subjecting the data to an extensive analysis that accounted for 230 variables that could have provided non-racial explanations for these disparities,⁵⁰ Baldus concluded that Georgia defendants who killed whites were 4.3 times more likely to receive a death sentence than defendants who killed blacks.⁵¹ This was the most sophisticated and powerful evidentiary showing a capital defendant had ever made.⁵²

McCleskey also argued that because of the significant demonstrated risk that race, an arbitrary factor, played a role in capital sentencing, the Georgia system violated the Cruel and Unusual Punishments Clause of the Eighth Amendment.⁵³ This

⁴⁵ *Id.* The Court noted that McCleskey had standing to raise an equal protection claim based on the race-of-victim disparity, since a state would violate the Equal Protection Clause by enforcing its criminal laws on “an unjustifiable standard such as race, religion, or other arbitrary classification” *Id.* at 291 n.8 (internal quotation marks omitted).

⁴⁶ *Id.* at 286-87.

⁴⁷ *Id.* at 287.

⁴⁸ *Id.*

⁴⁹ *Id.* at 286.

⁵⁰ For example, one variable was whether or not the defendant was the prime mover behind the homicide; another was whether or not the defendant had a prior record of conviction for murder, armed robbery, rape, or kidnapping with bodily injury. *Id.* at 355, n.9 & 10.

⁵¹ *Id.* at 287.

⁵² See Bynam, *supra* note 22, at 1106.

⁵³ McCleskey v. Kemp, 481 U.S. 279, 299 (1987).

argument followed directly in *Furman*'s footsteps.⁵⁴

By a one-vote margin the Court rejected McCleskey's claims.⁵⁵ Justice Powell, writing for the Court, began his analysis by affirming the rule that a defendant who alleges an equal protection violation has the burden of proving the existence of purposeful discrimination.⁵⁶ Justice Powell concluded that McCleskey's equal protection claim must fail because he had not shown that any authorities had acted with the requisite intent to discriminate in his particular case.⁵⁷ In addition, Justice Powell pointed out that McCleskey had failed to show that the Georgia legislature maintained its system of capital punishment because of, not in spite of, the system's racially discriminatory effect.⁵⁸ As for McCleskey's Eighth Amendment claim, Justice Powell stated that because the sentence was imposed under procedures that focused the sentencer's discretion on the particular crime and the particular defendant, the Court would presume that McCleskey's death sentence was not "wantonly and freakishly" imposed in violation of *Furman*.⁵⁹ Finally, Justice Powell concluded that the degree of risk of racial discrimination against McCleskey was acceptable under the Eighth Amendment because discrimination was a by-product of discretion, which plays a fundamental and valuable role in the criminal justice system.⁶⁰

At the end of the *McCleskey* opinion, Justice Powell lifted the veil on the policy concerns behind the Court's decision. He noted that if the Court crafted a rule under which racial disparity

⁵⁴ See 481 U.S. at 322 ("Since *Furman v. Georgia*, the Court has been concerned with the *risk* of the imposition of an arbitrary sentence, rather than the proven fact of one.") (Brennan, J., dissenting) (internal citation omitted).

⁵⁵ 481 U.S. at 291-92, 308.

⁵⁶ *Id.* at 292.

⁵⁷ *Id.* at 297.

⁵⁸ *Id.* at 298.

⁵⁹ *Id.* at 308.

⁶⁰ *Id.* at 313. The Court cited *Gregg v. Georgia* in support of the proposition that, under a statute providing guided discretion, the existence of discretion at each stage of the criminal justice system does not violate the Constitution. *McCleskey*, 481 U.S. at 307 (citing *Gregg v. Georgia*, 428 U.S. 153, 199 (1976)). See also cases cited *supra* note 33 and note 34 and accompanying text.

RACE AND THE DEATH PENALTY

371

invalidates capital sentencing decisions, it would face claims that racial disparity should invalidate punishments in much of the rest of the criminal law.⁶¹ Justice Powell also asserted that legislatures are better equipped than courts to interpret and respond to large-scale studies such as the one McCleskey presented.⁶² In short, the Court contended that “McCleskey’s wide-ranging arguments that basically challenge the validity of capital punishment in our multiracial society” called for a response beyond the Court’s institutional competence.⁶³

C. A Failed Attempt to Respond: The Federal Racial Justice Act

The first legislative attempt to respond to *McCleskey* came from Congress in the spring of 1988. Led by Representative John Conyers (D-Mich.) and Senator Edward Kennedy (D-Mass.), several members began work on legislation to address the racial disparities highlighted by the case.⁶⁴ The ill-fated Racial Justice Act sought to remedy racial discrimination in capital sentencing through the exercise of Congress’s enforcement power under Section Five of the Fourteenth Amendment.⁶⁵ The Act’s sponsors responded to the *McCleskey* Court’s holding that only intentional discriminatory actions are remediable by expressly allowing statistical evidence of disparate impact to raise an inference of

⁶¹ 481 U.S. at 314-15. Justice Powell contended that “[a]pparent disparities in sentencing are an inevitable part of our criminal justice system.” *Id.* at 312.

⁶² *Id.* at 314-19.

⁶³ *Id.* at 319. Justice Powell asserted that legislatures “are better qualified to weigh and ‘evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts’” *Id.* (quoting *Gregg*, 428 U.S. at 186). See *infra* Part IV.B for a comparison of the legislative and judicial responses to racial disparities in capital proceedings.

⁶⁴ Paul Schoeman, Note, Easing the Fear of Too Much Justice: A Compromise Proposal to Revise the Racial Justice Act, 30 HARV. C.R.-C.L. L. REV. 543, 551 (1995). See also Edwards and Conyers, *supra* note 8, at 700 & n.39.

⁶⁵ H.R. REP. NO. 103-458 (1994). Section Five of the Fourteenth Amendment reads: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”

unlawful racial discrimination.⁶⁶ The sponsors noted that the U.S. Supreme Court had already recognized the validity of such showings in the contexts of jury venires, jury selection, voting rights, and employment.⁶⁷ Although the U.S. House of Representatives passed versions of the Racial Justice Act in 1990 and 1994, the legislation never cleared the House-Senate conference process and never became law.⁶⁸

II. LEGISLATIVE RESPONSE: THE KENTUCKY RACIAL JUSTICE ACT

In the modern death penalty era, Kentucky has been a relatively quiet death penalty jurisdiction. Since 1976 the Bluegrass state has executed only two persons, both of whom were white.⁶⁹ Its death row currently houses thirty-five inmates, of

⁶⁶ *Id.*

⁶⁷ *Id.* See *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that showing of racial disparity in peremptory strikes of venire members established prima facie case of discrimination, which, unrebutted, established violation of equal protection); *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (Stevens, J., concurring in the judgment) (stating that voting structure's significant adverse impact on minority group, unsupported by neutral justification, could make structure unconstitutional); *Castaneda v. Partida*, 430 U.S. 482 (1977) (holding that showing of racial or ethnic disparity in grand jury venires established prima facie case of discrimination, which, unrebutted, established violation of equal protection); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (holding that, under Civil Rights Act of 1964, showing pattern of practice of racially differential treatment, unless rebutted, constitutes violation of Act); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (holding that complaint alleging that new voting district that removed 99 percent of black voters from city constitutes due process and equal protection violation sufficiently stated cause of action).

⁶⁸ See *Edwards & Conyers*, *supra* note 8, at 700-1; *Schoeman*, *supra* note 64, at 553. Opponents of the Act expressed the view that it was unnecessary and that if passed it would make carrying out death sentences impossible. See, e.g., 136 CONG. REC. S. 6885 (daily ed. 1990) (statement of Sen. Graham) ("This act would effectively end the ability of States to constitutionally apply the death penalty.").

⁶⁹ NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., *DEATH ROW U.S.A.* (Fall 2004), available at http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Fall_2004.pdf [hereinafter *Death Row U.S.A.*]. In number of executions, Kentucky ranks 26th (tied with Montana and Oregon) among the 33

RACE AND THE DEATH PENALTY

373

whom seven are black and one is Latino.⁷⁰ Thus, Kentucky's death row is 20 percent black, while the state's black population is 7.3 percent.⁷¹

Despite its low rate of executions in the modern death penalty era, Kentucky has a disturbing history of racial violence.⁷² The Ku Klux Klan was a powerful force in Kentucky for decades following its inception in 1868, terrorizing blacks, Union Army veterans, and Freedmen's Bureau agents.⁷³ Between 1860 and 1939, Kentucky had 353 lynchings, 258 of which targeted blacks.⁷⁴ This figure includes eighty-five lynchings of blacks on suspicion of rape or attempted rape.⁷⁵ Even when official trials took place during this period, mobs outside courtrooms frequently demanded that courts impose the death penalty when blacks were accused of rape or murder.⁷⁶ Throughout the period from 1860 to 1960, blacks were consistently executed at rates disproportionate to their presence in

jurisdictions that have put inmates to death since 1976. *Id.*

⁷⁰ KENTUCKY DEPARTMENT OF CORRECTIONS, PROFILES OF KENTUCKY DEATH ROW INMATES, at <http://www.corrections.ky.gov/inmateinfo/deathrow.htm> (last visited Jan. 15, 2005).

⁷¹ *Id.*; U. S. CENSUS BUREAU, KENTUCKY QUICKFACTS, at <http://quickfacts.census.gov/qfd/states/21000.html> (last visited Jan. 15, 2005). This comparison is not intended as evidence of disparity in death penalty proceedings, since the relevant population for that determination would be persons accused of committing aggravated murder. This comparison is made simply to provide a snapshot of the racial makeup of death row and the state as a whole.

⁷² See Defendant's Motion to Bar the Commonwealth from Subjecting Him to a Sentence of Death Sought on the Basis of Race, Commonwealth of Kentucky v. Nathaniel Wood (Barren Circuit Court 2003, No. 01-CR-00059, on file with the Journal of Law and Policy) [hereinafter Wood motion] (discussing Kentucky's history of slavery, segregation, and racial violence); Gerald Neal, Not Soft on Crime, But Strong on Justice: The Kentucky Racial Justice Act: a Symbol, a Statement of Legal Principle, and a Commitment to Systemic Fundamental Fairness (unpublished manuscript, on file with the Journal of Law and Policy) (noting that "[t]he end of the Civil War ushered in a prolonged period of racial violence in Kentucky").

⁷³ Wood motion, *supra* note 72, at 14.

⁷⁴ *Id.* at 18; Neal, *supra* note 72, at 3.

⁷⁵ Neal, *supra* note 72, at 3.

⁷⁶ Wood motion, *supra* note 72, at 22.

the Kentucky population.⁷⁷ Perhaps Kentucky's most significant distinction as a death penalty state is that it was the last to carry out a public execution, the 1936 hanging of Rainey Bethea, a young African-American man, before a festive crowd of 20,000 spectators in Owensboro.⁷⁸

A. The Context for Kentucky General Assembly Action

In 1992 the Kentucky General Assembly passed a bill calling for a study to determine whether racial bias played any role in death sentencing in the state.⁷⁹ To that end, the state commissioned two University of Louisville professors, Thomas J. Keil of the Sociology Department and Gennaro F. Vito of the School of Justice Administration, to study the prosecution of all homicides in Kentucky from 1976 to 1991.⁸⁰

Professors Keil and Vito had already studied the effect of race on Kentucky capital proceedings, using data from December 1976 to October 1986, and published their results in 1988.⁸¹ In that study Keil and Vito reported that, by simple numerical comparison, a higher percentage of blacks accused of killing whites (44.7 percent) went before a "death-qualified jury"⁸² than blacks accused

⁷⁷ *Id.* at 25. Of 164 persons executed between 1911 and 2000, 52 percent were black. Neal, *supra* note 72, at 3.

⁷⁸ Wood motion, *supra* note 72, at 21.

⁷⁹ Neal, *supra* note 72, at 9.

⁸⁰ *Racial Justice Act Becomes Law: Not Soft on Crime, But Strong on Justice*, THE ADVOCATE, July 1998, at 5, available at <http://dpa.ky.gov/library/advocate/july98/Racial.html> [hereinafter *Racial Justice Act Becomes Law*].

⁸¹ Thomas J. Keil & Gennaro F. Vito, *Capital Sentencing in Kentucky: An Analysis of the Factors Influencing Decision-Making in the Post-Gregg Period*, 79 CRIM. L. & CRIMINOLOGY 483 (1988).

⁸² A death-qualified jury is one composed of jurors who have said that they could fairly consider the death penalty as a sentence and that they would not automatically vote for or against death if they find the defendant guilty of capital murder. See *Morgan v. Illinois*, 504 U.S. 719 (1992); *Wainwright v. Witt*, 469 U.S. 412 (1985); *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Because a death-qualified jury is a necessary condition for a capital trial, and because district attorneys have a great deal of discretion in seeking a death sentence as long as at

RACE AND THE DEATH PENALTY

375

of killing other blacks (12.9 percent) or whites accused of killing blacks (0 percent).⁸³ Among black defendants tried for a capital offense, 63.6 percent were accused of killing whites.⁸⁴ Furthermore, among those blacks who actually received death sentences, 87.5 percent had been convicted of killing whites.⁸⁵ After subjecting this data to statistical analysis that controlled for non-racial factors that may have led to death sentences,⁸⁶ Professors Keil and Vito still found that prosecutors were more likely to seek the death penalty for blacks accused of killing whites than in other homicide cases.⁸⁷ However, the study did not reveal a statistically significant correlation between black defendant-white victim cases and death sentences, suggesting that capital jurors' racial considerations were negligible.⁸⁸ Thus, it appeared that prosecutorial discretion to seek the death penalty accounted for the heightened risk that blacks accused of killing whites would end up on death row.⁸⁹

When Professors Keil and Vito released their state-commissioned report in 1993, their findings were largely consistent with those in their 1988 study and with some of the Baldus team's findings in *McCleskey*.⁹⁰ By simple numerical comparison, black defendant-white victim cases were more likely to be prosecuted capitally than cases with any other defendant-victim racial combination.⁹¹ At trial, a Kentucky defendant was

least one statutory aggravating factor is present, in Keil and Vito's study a death-qualified jury serves as a statistical proxy for the Commonwealth's Attorney's decision to seek death. *See* Keil & Vito, *supra* note 81, at 500.

⁸³ Keil & Vito, *supra* note 81, at 499.

⁸⁴ *Id.* at 498.

⁸⁵ *Id.*

⁸⁶ Non-racial factors included, for example, the sex of the victim and whether the defendant had a prior conviction for a violent offense. *Id.*

⁸⁷ *Id.* at 502.

⁸⁸ *Id.* at 501.

⁸⁹ Keil & Vito, *supra* note 81, at 502.

⁹⁰ Thomas J. Keil & Gennaro F. Vito, *Race and the Death Penalty in Kentucky Murder Trials, 1976-1991: A Study of Racial Bias as a Factor in Capital Sentencing*, 20 AM. J. OF CRIM. JUSTICE 17, 26-30 (1995) (reporting and discussing 1992-93 state-commissioned findings).

⁹¹ *Id.* at 26. Prosecutors sought death in 33 percent of black defendant-

more likely to receive a death sentence if convicted of killing a white person than a black person, and a black defendant convicted of killing a white person was the most likely of all to receive a death sentence.⁹² Unlike the 1988 study, the 1993 study indicated that the defendant-victim racial combination did affect jurors' sentencing decisions.⁹³ Keil and Vito found that the black defendant-white victim combination was a significant factor in both the likelihood of capital prosecution and the likelihood of death sentence, even after statistical analysis accounting for factors such as multiple-victim crime, defendant's prior criminal record, and personal relationship between defendant and victim.⁹⁴ Keil and Vito concluded that, although the exact source of discrimination was impossible to pinpoint,⁹⁵ "the impact of race upon prosecutorial deliberations cannot be justified by the presence of other, legitimate factors."⁹⁶ The researchers further concluded that juries "considered the killing of a White by a Black more deserving of capital punishment" than other racial combinations.⁹⁷

After failed attempts in the 1994 and 1996 legislative sessions, Senator Gerald Neal, then the Kentucky Senate's only African-American member, introduced the Kentucky Racial Justice Act in the 1998 session.⁹⁸ The Commonwealth's Attorneys opposed the KRJA and backed attempts to dilute it with floor amendments.⁹⁹ After two hours of vigorous debate, the legislation passed the Senate by a vote of 22 to 12.¹⁰⁰ Four days later another African-

white victim cases, in 20 percent of white defendant-white victim cases, 17 percent of white defendant-black victim cases, and 14 percent of black defendant-black victim cases. *Id.* at 25.

⁹² *Id.* at 30.

⁹³ *Id.* at 27. Professors Keil and Vito do not address this discrepancy in their journal article reporting on the 1993 study. *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 30.

⁹⁶ *Id.* at 26.

⁹⁷ *Id.* at 27.

⁹⁸ Neal, *supra* note 72, at 10.

⁹⁹ *Id.* at 9, 20. One Senate opponent of the KRJA characterized the vote as "a vote on whether we're soft on crime." *Id.* at 10. Sen. Neal countered, "I'm not soft on crime, I'm strong on justice." *Id.*

¹⁰⁰ *Racial Justice Act Becomes Law*, *supra* note 80.

RACE AND THE DEATH PENALTY

377

American legislator, Representative Jesse Crenshaw, introduced an identical bill in the House.¹⁰¹ During floor debate, Rep. Crenshaw introduced a letter from a retired African-American state judge and former prosecutor, who described the KRJA as “the least we can do to help erase the perception of minorities that they do not get a fair deal before the courts.”¹⁰² Again after vigorous debate, and after three amendments were defeated, the House passed the bill 70 to 23.¹⁰³ Three days later Governor Paul Patton, a Democrat, signed the nation’s first racial justice act into law.¹⁰⁴

B. The Provisions of the Kentucky Racial Justice Act

Unlike the proposed federal act, which would have aimed Congress’s enforcement power at a tainted sentence after its imposition, the Kentucky Racial Justice Act (KRJA) focuses on the period before trial, during which a Commonwealth’s Attorney (Kentucky parlance for district attorney) decides whether or not to seek the death penalty in a given murder case.¹⁰⁵ A Kentucky capital defendant who suspects that his race or the race of the victim provided the basis for the prosecution’s decision to seek death may allege a violation of the KRJA at a pretrial conference.¹⁰⁶ If the defendant so alleges, the court must schedule a hearing on the claim.¹⁰⁷ If the defendant makes a *prima facie* showing of a racial basis and the prosecution fails to rebut it, the court must order that a death sentence cannot be sought in that case.¹⁰⁸ Thus while the federal Racial Justice Act would have attempted to counteract racial discrimination by prosecutors, juries,

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ KENTUCKY LEGISLATURE, LEGISLATIVE RECORD ONLINE, at <http://www.lrc.state.ky.us/recarch/98rs/SB171.htm> (last visited Jan. 15, 2005).

¹⁰⁵ KY. REV. STAT. ANN. § 532.300 (Michie 2004).

¹⁰⁶ 9 LESLIE ABRAMSON, KENTUCKY PRACTICE SERIES, CRIMINAL PRACTICE AND PROCEDURE § 31.31 (West 2004).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

or both, the KRJA is aimed solely at checking racial discrimination by prosecutors.¹⁰⁹

The Kentucky Racial Justice Act proclaims, “No person shall be subject to or given a sentence of death that was sought on the basis of race.”¹¹⁰ The statute provides that a defendant *may* establish that race was “the basis” of a decision to seek death “if the court finds that race was a significant factor in decisions to seek the sentence of death in the Commonwealth at the time the death sentence was sought.”¹¹¹ Thus, on the face of the statute, statewide practice, rather than county practice, appears to be the benchmark.¹¹² The statute expressly recognizes that statistical evidence is relevant to this “significant factor” determination—in stark contrast to the distrust of statistics embodied in *McCleskey* and its progeny.¹¹³ Following the proposed federal act’s lead, the KRJA accounts for both race-of-defendant discrimination and race-of-victim discrimination.¹¹⁴ A defendant may show that death was sought “significantly more frequently” for persons of one race than persons of another race (race-of-defendant discrimination)¹¹⁵ or that death was sought “significantly more frequently” as punishment for capital offenses against persons of one race as compared to another race (race-of-victim discrimination).¹¹⁶

Lest the KRJA seem like a defendant’s dream, however, the final two subsections erect a high evidentiary wall for the defendant to surmount.¹¹⁷ The defendant must “state with particularity how the evidence supports a claim that racial considerations played a significant part in the decision to seek a

¹⁰⁹ H.R. REP. NO. 103-458 (1994); KY. REV. STAT. ANN. § 532.300 (Michie 2004).

¹¹⁰ KY. REV. STAT. ANN. § 532.300(1) (Michie 2004).

¹¹¹ *Id.* § 532.300(2).

¹¹² *But see* text accompanying notes 118-19 and 163-64.

¹¹³ *Id.* § 532.300(3); see *McCleskey*, 481 U.S. at 312, for Justice Powell’s comment that “[a]pparent disparities in sentencing are an inevitable part of our criminal justice system.”

¹¹⁴ *Id.*

¹¹⁵ KY. REV. STAT. ANN. § 532.300(3)(a) (Michie 2004).

¹¹⁶ *Id.* § 532.300(3)(b).

¹¹⁷ *See id.* §§ 532.300(4), (5).

RACE AND THE DEATH PENALTY

379

death sentence in his or her case.”¹¹⁸ This provision appears to conflict with the provision permitting prosecutorial decisions “in the Commonwealth”—presumably meaning statewide—to serve as the benchmark for determining whether or not race was the basis for the death notice in a particular defendant’s case.¹¹⁹ In addition, the defendant has the burden of proving by clear and convincing evidence that race was the basis of the decision to seek death in his case, and the prosecution may offer evidence in rebuttal.¹²⁰

C. Effects of the Kentucky Racial Justice Act

Seven years after the KRJA’s passage, its effects remain murky. Attempts to measure the Act’s effect on defendants are complicated by the fact that its provisions are designed to operate before trial.¹²¹ If a defense lawyer uses the KRJA to stave off a Commonwealth’s Attorney’s death notice, the issue is almost certain not to reach the appellate court, especially if the lawyer does so through informal negotiation rather than a formal motion.¹²² Presumably a failed KRJA motion would be more likely than a successful one to create an issue on appeal, but Kentucky appellate courts have yet to address the KRJA in a published opinion.¹²³

Still, there are other indirect ways to try to assess the KRJA’s impact. In particular, it is worthwhile to examine the Kentucky Supreme Court’s treatment of claims of racial discrimination in capital proceedings, however such claims were couched, before

¹¹⁸ *Id.* § 532.300(4).

¹¹⁹ *Id.* § 532.300(2); *see* discussion accompanying notes 163-64.

¹²⁰ *Id.* § 532.300(5).

¹²¹ KY. REV. STAT. ANN § 532.300 (Michie 2004).

¹²² 9 LESLIE ABRAMSON, KENTUCKY PRACTICE SERIES, CRIMINAL PRACTICE AND PROCEDURE § 31.32 (West 2004) The Commonwealth must give defense counsel “adequate notice” that it will seek the death penalty. *Id.* (citing *Perdue v. Com.*, 916 S.W.2d 148 (Ky.1995)).

¹²³ Online searches of WestLaw and LexisNexis produced no Kentucky cases containing the term “Kentucky Racial Justice Act” or its statutory section number as of Jan. 15, 2005.

and after the Act's passage in 1998.¹²⁴ Although the KRJA is intended for use in trial courts, it is reasonable to postulate that the state's highest court has taken the Act into account in its jurisprudence.¹²⁵

In the 1987 case of *Stanford v. Commonwealth*, a black 17-year-old was tried as an adult, convicted, and sentenced to death for the rape and murder of a white woman.¹²⁶ The Kentucky Supreme Court rejected Kevin Stanford's claim that the statute providing for referral of juvenile cases to adult criminal court had been applied in an unconstitutional manner by over-representing blacks in such transfers.¹²⁷ The court acknowledged the "disturbing statistic" that during the period from 1975 to 1979, 68 percent of the juveniles transferred to adult court were black, even though blacks made up only 30 percent of juvenile cases.¹²⁸ Nevertheless, it noted that Stanford's statistical showing indicated that black juveniles had committed more than half of all the homicides and robberies and nearly half the assaults and rapes.¹²⁹ More important to the court, however, was the fact that the statistics did not indicate how many of the adult court transfers involved repeat offenders (like Stanford), for whom previous state attempts at rehabilitation had proved unsuccessful.¹³⁰ Implicit in the court's mention of repeat offenders is the idea that recidivism is a non-racial factor that presumably would correlate strongly with transfer to adult court. The court finished its paragraph on the

¹²⁴ See discussion *infra* Part II.B.

¹²⁵ This examination is meant to assess three alternative hypotheses: 1) that the Kentucky Supreme Court understood the KRJA as a signal from the legislative branch to give greater credence to racial discrimination claims in death cases; 2) that the court understood the KRJA to mean that such claims are to be handled pre-trial, thus justifying a less rigorous approach on appeal; or 3) that the court has ignored the Act.

¹²⁶ 734 S.W.2d 781 (Ky. 1987). This decision was handed down on April 30, 1987, just eight days after *McCleskey*; the Kentucky court makes no mention of the landmark case.

¹²⁷ *Id.* at 791.

¹²⁸ *Id.*

¹²⁹ *Id.* The court did not explain how these facts justify the 68 percent transfer figure.

¹³⁰ *Id.*

RACE AND THE DEATH PENALTY

381

discrimination claim resoundingly: “We are not at all persuaded by Stanford’s statistics and find no evidence whatsoever to convince us that Stanford or any other juvenile was directly or indirectly the victim of racial discrimination.”¹³¹

Seven years later and four years before the passage of the KRJA, the Kentucky Supreme Court considered *Bussell v. Commonwealth*.¹³² Charles Bussell, a black defendant convicted and sentenced to death by an all-white jury for the murder of a white woman, claimed that the death penalty in Kentucky operated in an arbitrary, discriminatory, and freakish manner.¹³³ Bussell relied on the Keil and Vito study commissioned by the General Assembly to support his structural challenge to the application of the death penalty statute.¹³⁴ Citing *McCleskey* and a Kentucky case that followed in 1990, the court rejected his claim.¹³⁵ In its brief explanation, the court stated that the Keil and Vito study “indicates it is difficult, if not impossible, to control any perceived racial bias through judicial review.”¹³⁶ The court stated that it must avoid “any kind of actual or perceived institutional racism that would contribute” to death sentences, but concluded that, “[i]n [Bussell’s]

¹³¹ *Id.* In June 2003 Gov. Paul Patton commuted Kevin Stanford’s death sentence to life imprisonment, citing the “injustice” of sentencing a juvenile offender to death. Henry Weinstein, *Death Sentence Commuted for Ky. Man Who Killed at 17*, THE LOS ANGELES TIMES, June 22, 2003, at 36.

¹³² 882 S.W.2d 111 (Ky. 1994).

¹³³ *Id.* at 115.

¹³⁴ *Id.* For a discussion of this study, see *infra* Part II.A.

¹³⁵ *Bussell*, 882 S.W.2d at 115.

The United States Supreme Court in *McCleskey v. Kemp* . . . rejected a similar type of challenge to the application of the death penalty statute in Georgia. *Sanders v. Commonwealth*, Ky., 801 S.W.2d 665 (1990), held that the argument that the death penalty in Kentucky operates in an arbitrary, discriminatory and freakish manner has been repeatedly presented, considered and dismissed.

Id.

¹³⁶ *Id.* Although the court did not elaborate on this statement, it could be alluding to Keil and Vito’s comments that “the exact source of discrimination is difficult to pinpoint” and “[d]iscrimination did occur somewhere in this process but it is often subtle and difficult to discern.” Keil & Vito, *supra* note 90, at 30, 31.

case, there [was] no logical connection between the crime, the imposition of the death penalty and racial bias.”¹³⁷ In its two-paragraph proportionality review,¹³⁸ the court concluded, without citation or further explanation, that “[t]he sentence was not fixed because he was black or because the victim was white [but rather] . . . because he was found guilty as charged.”¹³⁹

As the *Stanford* and *Bussell* decisions illustrate, the court was plainly resistant to statistically-based claims of racial discrimination in capital cases before the KRJA’s passage.¹⁴⁰ Even with the Act on the books, the court appears to have been no more receptive to such claims. In the 2003 case of *Wheeler v. Commonwealth*,¹⁴¹ which involved a black defendant and two black victims, the court took just four sentences to dispatch the claim that the Kentucky death penalty was discriminatory, arbitrary, and disproportionate.¹⁴² The court pointed out that “[t]his Court and the United States Supreme Court have repeatedly rejected the statistical analysis presented by Wheeler as insufficient to invalidate a specific finding by a jury.”¹⁴³

¹³⁷ *Id.*

¹³⁸ *Bussell*, 882 S.W.2d at 116. Kentucky law provides for automatic proportionality review, in which the state Supreme Court determines “[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.” KY. REV. STAT. ANN. § 532.075(3)(c) (Michie 2002). The universe of cases for comparison is “all felony offenses in which the death penalty was imposed after Jan. 1, 1970.” KY. REV. STAT. ANN. § 532.075(6)(a) (Michie 2004).

¹³⁹ *Bussell*, 882 S.W.2d at 116. This conclusory statement, which ignores the broad discretion prosecutors and juries exercise in capital proceedings, recalls Justice Powell’s dismissive remark in *McCleskey* that “a legitimate and unchallenged explanation for the [penalty] decision is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty.” 481 U.S. at 297.

¹⁴⁰ See Neal, *supra* note 72, at 22.

¹⁴¹ 121 S.W.3d 173 (Ky. 2003).

¹⁴² *Id.* at 186-87.

¹⁴³ *Id.* The court did not cite any U.S. Supreme Court precedents, but it did cite two of its own decisions in support of its rejection of Wheeler’s claim that the death penalty is arbitrary and discriminatory. See *Woodall v. Commonwealth*, 63 S.W.3d 104, 133 (2001) (rejecting white defendant’s claim that the death penalty is arbitrary and discriminatory with two citationless

RACE AND THE DEATH PENALTY

383

Because no Kentucky Supreme Court opinion contains any mention of the KRJA,¹⁴⁴ it is impossible to know if the court has understood the Act to mean that racial discrimination claims are to be handled before trial (and, therefore, if a defendant's case appears on its docket, the capital prosecution against him must have passed KRJA muster), or if the court has simply ignored the Act. Given the court's treatment of post-1998 claims of racial discrimination in capital proceedings, it is safe to infer that the court has not taken the KRJA as a signal from the legislative branch to give greater credence to racial discrimination claims in capital cases.

While capital defendants have made no discernible headway in the Kentucky Supreme Court with claims of disparity, public defenders in the state have reported some instances of success in using the KRJA before trial.¹⁴⁵ In September 2002 the Kentucky Department of Public Advocacy surveyed the state's public defenders, asking about their experiences using the KRJA and their views on its effects.¹⁴⁶ Of the sixty-four public defenders who returned the survey, only four reported having had a case that involved the KRJA.¹⁴⁷ In one such case, with a white victim, the Jefferson County Assistant Commonwealth's Attorney initially declined to make a plea offer, citing an unspecified policy.¹⁴⁸

sentences: "Woodall claims that the death penalty in Kentucky is unconstitutionally arbitrary and insidiously discriminatory. This Court has previously rejected similar arguments as stated above."); *Bowling v. Commonwealth*, 873 S.W.2d 175 (Ky. 1993) (finding death sentence for white defendant who killed two people and wounded infant proportionate). These citations can only be taken to refer to procedural proportionality review, since proportionality is the only issue *Wheeler*, *Woodall*, and *Bowling* all have in common. *See* KY. REV. STAT. ANN. § 532.075(3)(c) (Michie 2004) (requiring state supreme court to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant"). Thus the court appears not to distinguish between its review of constitutional claims and its proportionality review.

¹⁴⁴ *See supra* note 123.

¹⁴⁵ Neal, *supra* note 72, at 12-13.

¹⁴⁶ *Id.* at 12.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 13.

Defense counsel prepared to argue that the defendant did not receive an offer because the victim was white and moved to discover the policy of the Commonwealth's Attorney's office concerning plea bargaining in capital cases.¹⁴⁹ Defense counsel subpoenaed the county Commonwealth's Attorney and the Assistant Commonwealth's Attorney on the case.¹⁵⁰ Although the court quashed all subpoenas and denied the defense motion on the Commonwealth's plea bargain policy, prosecutors eventually offered the defendant life imprisonment with parole eligibility.¹⁵¹ Two other public defenders reported similar scenarios, in which they responded to the Commonwealth's death notices with motions, citing the KRJA, to discover the prosecutors' charging history in potentially capital cases.¹⁵² In both cases, prosecutors subsequently made non-capital plea offers, which the defendants accepted.¹⁵³

When asked in the survey to comment on the symbolic meaning of the KRJA, most public defenders' comments were positive, ranging from unbridled enthusiasm¹⁵⁴ to guarded optimism.¹⁵⁵ However, when asked what effect they thought the KRJA actually had on race discrimination in Kentucky, public defenders' comments were more negative than positive.¹⁵⁶ One called the Act "nice to have . . . as a back up."¹⁵⁷ Another remarked that the KRJA "recognizes that bias is at least possible and is not

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Neal, *supra* note 72, at 13.

¹⁵² *Id.*

¹⁵³ *Id.* In both of these cases the Commonwealth's Attorneys complied with the discovery requests—in one case, the Commonwealth's Attorney did so before the court ruled on the motion. *Id.*

¹⁵⁴ *Id.* "The people of Kentucky, in adopting the Racial Justice Act through their elected representatives, have announced their complete rejection of the death penalty as a tool of discrimination." *Id.* at 17.

¹⁵⁵ *Id.* "[T]he symbolism that Kentucky will not look the other way when the death penalty is to be applied in a racially discriminatory manner is 97 percent of the value of the bill." *Id.* at 17.

¹⁵⁶ See Neal, *supra* note 72, at 14.

¹⁵⁷ *Id.* at 14.

RACE AND THE DEATH PENALTY

385

the result of defense counsel's ingenuity."¹⁵⁸ Many others discerned a prosecutorial tilt toward, rather than away from, capital charging; as one defender put it, "the prosecutor [issues death] notices in each and every case where there is arguably an aggravator."¹⁵⁹ Some public defenders' interpretations of prosecutors' actions were, perhaps not surprisingly, cynical: "Prosecutors will still find excuses to treat African American defendants differently."¹⁶⁰ But at least one public defender noted a different interpretation of an increase in death notices, one that had been articulated by a Commonwealth's Attorney in deciding to seek death for three African-American defendants accused of killing another African-American: "Not to seek death would devalue the worth of the life of the victim because of his race."¹⁶¹

On the subject of why the KRJA has not been used more, public defenders' views varied. Some chalked it up to a simple lack of awareness of the Act.¹⁶² Others pointed out the practical difficulties involved, for example, "[i]n most counties, there are only a handful of eligible cases, far too few to draw any conclusions—particularly given the lack of racial diversity in those counties."¹⁶³ This comment suggests that, despite the KRJA's statement that decisions to seek death "in the Commonwealth" are relevant to a particular defendant's claim of a racial basis for capital prosecution, public defenders understand county-level statistics to be the benchmark.¹⁶⁴ Another common theme was discomfort at broaching the subject of racism: "In a clear majority of counties, formally raising a Racial Justice Act motion would have dire consequences on the success of the defense attorney in

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 14-15.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 15.

¹⁶² *Id.* at 18-19.

¹⁶³ *Id.*

¹⁶⁴ *Id.*; telephone interview with David Barron, Assistant Public Advocate, Frankfort, Kentucky, Oct. 31, 2004 (stating that public defenders view the relevant statistical sample for a KRJA challenge to be prior prosecutions in the county). See also KY. REV. STAT. ANN. §532.300(2), discussion of this provision in Part II.B *infra*.

that individual case and perhaps scores of other cases while the prosecutor cools down from being called a racist in the local paper.”¹⁶⁵

The prevailing view among Kentucky prosecutors and judges is that the KRJA has not had much impact on capital proceedings.¹⁶⁶ Joseph Bouvier, a 22-year veteran of the Commonwealth’s Attorney’s office in Fayette County, the state’s second-most populous county, said that Kentucky prosecutors expected a “flood of motions” after the KRJA passed but that the flood never came.¹⁶⁷ Philip Patton, a state circuit court judge who served for eight years as Commonwealth’s Attorney in rural Barren County said he was unaware of the KRJA actually barring a death sentence in any case.¹⁶⁸ Neither Mr. Bouvier nor Judge Patton believed that the KRJA had any appreciable effect on prosecutors’ charging decisions.¹⁶⁹ Bouvier said he did not think that any Commonwealth’s Attorneys had attempted to change the racial make-up of their capital prosecutions, since they would then be discriminating in a different direction, and creating bigger problems for themselves.¹⁷⁰ Bouvier opined that defense attorneys’ attempts to raise racial challenges to the death penalty have ebbed

¹⁶⁵ Neal, *supra* note 72, at 17-19.

¹⁶⁶ Telephone interview with Phillip R. Patton, Circuit Court Judge, 43rd Judicial Circuit, Barren County, Kentucky (Nov. 26, 2003); Telephone interview with Joseph T. Bouvier, Assistant Commonwealth’s Attorney, Fayette County, Kentucky (Dec. 2, 2003).

¹⁶⁷ Bouvier interview, *supra* note 166.

¹⁶⁸ Patton interview, *supra* note 166.

¹⁶⁹ *Id.*; Bouvier interview, *supra* note 166; Patton interview, *supra* note 166. In order to pursue a death sentence, a Kentucky prosecutor must file a notice of intention to seek the death penalty, in effect an addendum to the indictment. Telephone interview with David Harshaw, Assistant Public Advocate, Oldham County, Kentucky (Jan. 14, 2005). This “death notice” must identify the statutory aggravating factor(s) the prosecution intends to prove at trial. *Id.* See also KY. REV. STAT. ANN. § 532.025(2) (Michie 2004). Even if not seeking death, a prosecutor must file a notice of aggravation, also identifying the statutory aggravating factor to be proved, in order to seek an “aggravated sentence” of life imprisonment without parole or life imprisonment without parole for twenty-five years. Harshaw interview, *supra*.

¹⁷⁰ Bouvier interview, *supra* note 166.

RACE AND THE DEATH PENALTY

387

and been replaced by attempts to raise awareness of the possibility of executing the innocent.¹⁷¹

A look at death-sentencing outcomes, however, suggests that prosecutorial behavior has changed somewhat since the passage of the KRJA and that the perceived tilt toward seeking death may be real.¹⁷² In the five years before the KRJA, an average of 2.6 death sentences were imposed per year; in the five years after the Act's passage, the figure was 2.8.¹⁷³ There were twelve initial capital prosecutions (as opposed to re-trials after a judge vacated an initial sentence) in the five years after the Act's passage, up from nine in the five years before passage.¹⁷⁴ Strikingly, the only two death sentences imposed in Lexington in the five years following the KRJA's enactment involved white defendants with black victims, and the only two death sentences in Louisville in this period involved black-on-black murders.¹⁷⁵

III. JUDICIAL RESPONSE: THE NEW JERSEY SUPREME COURT'S PROPORTIONALITY REVIEW PROJECT

Like Kentucky, New Jersey has seen relatively little death penalty activity in the modern era. The Garden State has executed no one since 1963, when Ralph Hudson, a white man, was put to death in the electric chair for murder.¹⁷⁶ New Jersey currently has fifteen death row inmates, of whom seven are black and eight are

¹⁷¹ Bouvier interview, *supra* note 166.

¹⁷² See Baldus & Woodworth, *supra* note 12, at 1471-72.

¹⁷³ *Id.* at 1471.

¹⁷⁴ *Id.* at 1472.

¹⁷⁵ *Id.* Louisville, in Jefferson County, and Lexington, in Fayette County, are Kentucky's two largest cities. KENTUCKY DEPT. OF TOURISM, KENTUCKY FACTS, at http://travel.ky.gov/facts_populations.aspx (last visited Jan. 17, 2005). Jefferson and Fayette Counties also have the highest percentages of African-American residents in the state: 18.9 percent and 13.5 percent, respectively. U.S. CENSUS BUREAU, KENTUCKY QUICKFACTS: JEFFERSON COUNTY, at <http://quickfacts.census.gov/qfd/states/21/21111.html> (last visited Jan. 17, 2005); U.S. CENSUS BUREAU, KENTUCKY QUICKFACTS: FAYETTE COUNTY, at <http://quickfacts.census.gov/qfd/states/21/21067.html> (last visited Jan. 17, 2005).

¹⁷⁶ See *Reimposition*, *supra* note 15.

white.¹⁷⁷ The death row population is thus 46.6 percent black, while the state's black population is 13.6 percent.¹⁷⁸

Historically, New Jersey law imposed more severe punishments on blacks and Native Americans than on whites, even providing summary proceedings for the execution of slaves between 1714 and 1768.¹⁷⁹ After 1768 slaves could still be put to death for manslaughter, stealing a sum above five pounds, and any other felony or burglary.¹⁸⁰ In 1835 the state legislature, at the request of the governor, passed a law prohibiting public executions for blacks and whites alike.¹⁸¹ Since the beginning of the twentieth century the death penalty has played a relatively minor role in New Jersey criminal justice.¹⁸² In the period from 1900 to 1960, the highest number of death sentences imposed in a single year was sixteen, in 1930.¹⁸³ In six of the years between 1900 and 1940, New Jersey courts imposed fewer than two death sentences, and in only four of the years between 1930 and 1960 were more than five death sentences imposed in a single year.¹⁸⁴

In the modern death penalty era, the New Jersey Supreme Court, rather than the legislature, has acted most directly to confront racial disparity in the state's death penalty system, and the court has done so chiefly in the context of proportionality review.¹⁸⁵ The state's criminal code provides for proportionality

¹⁷⁷ See *Death Row U.S.A.*, *supra* note 69.

¹⁷⁸ *Id.*; U.S. CENSUS BUREAU, NEW JERSEY QUICKFACTS, at <http://quickfacts.census.gov/qfd/states/34000.html> (last visited Jan. 17, 2005). As with the Kentucky data, this comparison is not intended as evidence of disparity in death penalty proceedings, but simply as a snapshot of the racial makeup of death row and the state as a whole.

¹⁷⁹ *Reimposition*, *supra* note 15, at 48-49.

¹⁸⁰ *Id.* Although a gradual emancipation act was passed in 1804 (making New Jersey the last northern state to outlaw slavery), complete abolition was not effected until 1846. Eric Avedissian, *Cape May's Role in History: Pathway to Freedom*, at <http://capemay.com/capemayarchives/slavery.html> (last visited Jan. 17, 2005).

¹⁸¹ *Reimposition*, *supra* note 15, at 53-54.

¹⁸² *Id.* at 57-61.

¹⁸³ *Id.* at 60-61.

¹⁸⁴ *Id.* at 60.

¹⁸⁵ See Bienen, *supra* note 12, at 207-8 (noting that "[i]n spite of or perhaps

RACE AND THE DEATH PENALTY

389

review of a death sentence “upon the request of the defendant” to “determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.”¹⁸⁶

Since the U.S. Supreme Court gave its imprimatur to Georgia’s capital punishment statute in *Gregg*, two strains of proportionality review have emerged in state high courts. One is *substantive* proportionality review, which looks to whether the punishment of death is excessive for a particular offense.¹⁸⁷ The other is *procedural* proportionality review, which examines whether a particular defendant’s death sentence is excessive when compared to factually similar cases.¹⁸⁸ The New Jersey Supreme Court has interpreted this second aspect of proportionality review as “a means through which to monitor the imposition of death sentences and thereby to prevent any impermissible discrimination in imposing the death penalty.”¹⁸⁹

because of the principled commitment of the New Jersey Supreme Court and its Proportionality Review Project, the court was sharply criticized by state legislators, the press, and the New Jersey Attorney General on capital punishment issues”). In January 2003 the New Jersey General Assembly (the larger house of the bicameral legislature) passed a death penalty study bill by a vote of 70-8. Emilie Lounsbury, *A Tide of Doubt Is Rising About the Death Penalty*, PHILADELPHIA INQUIRER, July 20, 2003. The study was to include an examination of whether selection and sentencing of defendants in New Jersey capital trials is arbitrary, unfair or discriminatory in any way. *Id.* After a compromise move to delete any mention of the study leading to a moratorium on the death penalty, the state senate passed the study bill 34-0. William Young, *Thumbs Down to Death Penalty Study: Governor Calls It Redundant*, N.J. LAWYER, Jan. 19, 2004, at 4. In January 2004 Governor James McGreevey, a Democrat, vetoed the bill, emphasizing his support for the death penalty and saying that there had already been enough studies. *Id.*

¹⁸⁶ N.J. STAT. ANN. §2C:11-3e. (West 2003).

¹⁸⁷ *State v. Marshall*, 613 A.2d 1059, 1067 (N.J. 1992).

¹⁸⁸ *Id.* Substantive proportionality review is guided by the Cruel and Unusual Punishments Clause of the Eighth Amendment and any analogous state constitutional provisions. Henceforth, the term “proportionality review” in this note will refer only to procedural proportionality review.

¹⁸⁹ *State v. Ramseur*, 524 A.2d 188, 292 (N.J. 1987).

A. The Genesis of Proportionality Review in New Jersey

The history of proportionality review in New Jersey begins with the U.S. Supreme Court's decision in *Furman*,¹⁹⁰ which prompted the New Jersey Supreme Court to declare the state's death penalty law unconstitutional in 1972.¹⁹¹ After a decade of debate and deliberation, the legislature enacted a new death penalty statute that included mandatory proportionality review.¹⁹² New Jersey, along with twenty-five other states, carefully copied the Georgia statute upheld in *Gregg*.¹⁹³ Like the Georgia law, the 1982 New Jersey statute called for an automatic state supreme court determination as to proportionality for every capital sentence.¹⁹⁴ After the U.S. Supreme Court's 1984 decision in *Pulley v. Harris*¹⁹⁵ that, *Gregg* notwithstanding, the Eighth Amendment did not require procedural proportionality review, the New Jersey legislature amended the statute to require such review only when the defendant requests it.¹⁹⁶ The amendment had no appreciable impact, however, as the New Jersey Supreme Court continued to conduct procedural proportionality review on the assumption that almost all capital defendants would request it.¹⁹⁷ The New Jersey Supreme Court finally issued an opinion upholding the constitutionality of the death penalty statute in 1987,¹⁹⁸ but it invalidated twenty-seven death sentences before affirming one

¹⁹⁰ See *supra* text accompanying notes 28-30.

¹⁹¹ Latzer, *supra* note 12, at 1196.

¹⁹² *Id.*; 1982 N.J. Laws 555, 558 (providing that convictions resulting in death sentences may be appealed to the New Jersey Supreme Court, which shall "determine whether the sentence is disproportionate to the penalty imposed").

¹⁹³ Latzer, *supra* note 12, at 1196. See also N.J. STAT. ANN. § 2C:11-3(e) (West 2004).

¹⁹⁴ Latzer, *supra* note 12, at 1196-97.

¹⁹⁵ 465 U.S. 37 (1984).

¹⁹⁶ Latzer, *supra* note 12, at 1197; 1985 N.J. Laws 1935, 1940 (stating that the court, *once the defendant has requested a review*, shall examine "whether the sentence is disproportionate to the penalty imposed in similar cases").

¹⁹⁷ Latzer, *supra* note 12, at 1197; *State v. Ramseur*, 524 A.2d 188 (N.J. 1987).

¹⁹⁸ See *Ramseur*, 524 A.2d at 202 (finding that the death penalty statute did not violate the state or the federal constitutions).

RACE AND THE DEATH PENALTY

391

under the “new” law in 1991.¹⁹⁹

In upholding the death penalty statute, the court emphasized that the proportionality review process was to be “an important procedural mechanism to safeguard against the arbitrary and capricious imposition of the death penalty.”²⁰⁰ The court established at the outset that its system of proportionality review would not simply rely on traditional legal review, but would also seek the participation of criminal justice experts and perhaps even experts from disciplines outside the law.²⁰¹ The court acknowledged that the death penalty statute provided little guidance in crafting a proportionality review system, providing simply that “the Supreme Court shall . . . determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.”²⁰²

Looking forward, the court identified some proportionality review problems with which it would have to grapple.²⁰³ The first was determining the universe of cases within which the proportionality comparison would be made: should the focus be countywide or statewide, and should the universe include only actual death-sentenced cases or all cases in which the state could have sought death?²⁰⁴ The court recognized that this last question raised the issue of whether to consider possible misuse of prosecutorial discretion in seeking death.²⁰⁵

The court faced another challenge in determining how to select

¹⁹⁹ Latzer, *supra* note 12, at 1197. In eighteen successive decisions between 1987 and 1990, the court vacated or reduced a death sentence or reversed a capital murder conviction on the basis of legal error. Baldus & Woodworth, *supra* note 12, at 1462 n.195.

²⁰⁰ *Ramseur*, 524 A.2d at 294. See also David Weisburd, *Good for What Purpose? Social Science, Race, and Proportionality Review in New Jersey*, in SOCIAL SCIENCE, SOCIAL POLICY, AND THE LAW 258 (Patricia Ewick et al., eds., 1999).

²⁰¹ *Ramseur*, 524 A.2d at 293.

²⁰² *Ramseur*, 524 A.2d at 292 (quoting N.J. STAT. ANN. § 2C:11-3(e) (West 2004)).

²⁰³ *Ramseur*, 524 A.2d at 293.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

similar cases.²⁰⁶ It identified “sexual mutilation,” “torture,” and “multiple victims” as possible categories for comparison but worried that categories such as “domestic,” “execution style,” and “depravity of mind” might be too broad or ambiguous to allow any real comparison.²⁰⁷ Displaying its openness, the court wrote, “[w]e anticipate and welcome suggestions regarding which criminological, sociological, and statistical models are appropriate for analyzing the similarity of crimes and sentencing.”²⁰⁸

The court also recognized that, even after identifying similar cases, it would face the problem of determining the defendants’ “relevant underlying characteristics.”²⁰⁹ The court stated that the statutory aggravating and mitigating factors would provide a starting point.²¹⁰ However, the court also noted that “other factors

²⁰⁶ *Id.* (quoting N.J. STAT. ANN. § 2C:11-3(e) (West 2004)).

²⁰⁷ 524 A.2d at 293.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ N.J. STAT. ANN. § 2C:11-3 (c)(4) (West 2004). The aggravating factors that may be found by the jury or the court are:

- (a) The defendant has been convicted, at any time, of another murder. For purposes of this section, a conviction shall be deemed final when sentence is imposed and may be used as an aggravating factor regardless of whether it is on appeal; (b) In the commission of the murder, the defendant purposely or knowingly created a grave risk of death to another person in addition to the victim; (c) The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim; (d) The defendant committed the murder as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value; (e) The defendant procured the commission of the murder by payment or promise of payment of anything of pecuniary value; (f) The murder was committed for the purpose of escaping detection, apprehension, trial, punishment or confinement for another offense committed by the defendant or another; (g) The murder was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit murder, robbery, sexual assault, arson, burglary, kidnapping, carjacking or the crime of contempt in violation of N.J.S. 2C:29-9b.; (h) The defendant murdered a public servant, as defined in N.J.S. 2C:27-1, while the victim was engaged in the performance of his official duties, or because of the victim’s status as a public servant; (i) The defendant: (i) as a leader of a

RACE AND THE DEATH PENALTY

393

such as race, sex, and socioeconomic status . . . the relationship between the defendant and victim, whether defendant pleaded guilty or not guilty, and the race and sex of the victim” were possibly appropriate factors to consider.²¹¹ Finally, the court candidly acknowledged the paradox inherent in the proportionality review process: although the “paramount theme” of the criminal justice system is that the punishment should fit the crime, not the criminal, the U.S. Supreme Court has categorically rejected “blind uniformity” in the sentencing of capital defendants.²¹²

B. A Statistical Study of New Jersey Capital Cases

One year later, the New Jersey Supreme Court made good on its promise to seek outside assistance: in July 1988 the court appointed David Baldus, who had led the *McCleskey* study, as Special Master to assist with the creation of a system of proportionality review.²¹³ Baldus spent three years collecting data and developing the methodology he would recommend in his final report.²¹⁴ One year into the project, the state Attorney General

narcotics trafficking network as defined in N.J.S. 2C:35-3 and in furtherance of a conspiracy enumerated in N.J.S. 2C:35-3, committed, commanded or by threat or promise solicited the commission of the murder or (ii) committed the murder at the direction of a leader of a narcotics trafficking network as defined in N.J.S. 2C:35-3 in furtherance of a conspiracy enumerated in N.J.S. 2C:35-3; (j) The homicidal act that the defendant committed or procured was in violation of paragraph (1) of subsection a. of N.J.S. 2C:17-2 [causing “an explosion, flood, avalanche, collapse of a building, release or abandonment of poison gas, radioactive material or any other harmful or destructive substance”]; (k) The victim was less than 14 years old; or (l) The murder was committed during the commission of, or an attempt to commit, or flight after committing or attempting to commit, terrorism pursuant to section 2 of P.L. 2002, c. 26 (C. 2C:38-2).

N.J.STAT. ANN. 2C:11-3(c)(4) (2004).

²¹¹ *Ramseur*, 524 A.2d at 294.

²¹² *Id.* See *Woodson v. North Carolina*, 428 U.S. 280 (1976) (holding mandatory death sentence for conviction of first-degree murder unconstitutional under the Eighth Amendment).

²¹³ *State v. Marshall*, 613 A2d 1059, 1063 (N.J. 1992).

²¹⁴ *Id.*

applied to the Court for a preliminary determination of the appropriate universe of cases to be used in proportionality review.²¹⁵ The Attorney General argued that, in keeping with a majority of other jurisdictions' proportionality review systems,²¹⁶ the only appropriate universe would be one composed exclusively of cases in which a death sentence had been imposed.²¹⁷ Baldus, on the other hand, recommended that the universe also include homicide cases that he determined to be clearly death-eligible but in which prosecutors had chosen not to seek the death penalty.²¹⁸ Because proportionality review is essentially an exercise in comparing similar cases, deciding which cases are sufficiently similar to include in a universe becomes crucially important.²¹⁹ The court declined to define the appropriate universe at that point, averring that its eventual decision would be better informed by awaiting Baldus's final report and the arguments of interested parties (chiefly the Attorney General and the state Office of the Public Defender).²²⁰

²¹⁵ *In re the Proportionality Review Project*, 585 A.2d 358, 358-59 (N.J. 1990).

²¹⁶ *Id.* at 359.

²¹⁷ *Id.* As of July 1990, there had been 33 death sentences in 117 death-penalty trials. *Id.*

²¹⁸ *Id.*

²¹⁹ See Dale Jones, *The Office of the Public Defender, Race and Proportionality Review in New Jersey: The View from the Back of the Bus*, 26 SETON HALL L. REV. 1469, 1471 (1996). A small universe of cases with highly similar facts would make defense claims of disproportion difficult, since it would be hard for a defendant to distinguish himself from his death-sentenced peers in such a universe. A larger universe that included cases not prosecuted capitally would make defense claims of disproportion easier, since it would be possible to point to defendants who also committed murders of roughly equal aggravation but who did not face the death penalty. Considering the same issue a few years before, a justice of the Nebraska Supreme Court offered an analogy in support of a broad universe of cases: "If one wants to determine whether individuals are being discriminated against in public transportation, one does not merely look at those who are required to sit in the back of the bus and conclude that since everybody in the back of the bus looks alike, there is no discrimination." *State v. Palmer*, 399 N.W.2d 706, 752 (Neb. 1986) (Krivosha, C.J., concurring in part and dissenting in part).

²²⁰ *Proportionality Review Project*, 585 A.2d at 360.

RACE AND THE DEATH PENALTY

395

In his final report, Baldus provided the court with a database comprising 246 cases and more than 400 factors that detailed the social and criminal backgrounds of the offenders and their victims, the contexts of their crimes, and the procedural and legal issues that Baldus deemed relevant to capital cases.²²¹ He provided the court with three distinct statistical methods for assessing the offenders' culpability, or blameworthiness, a major factor in determining the proportionality of their sentences.²²² Baldus also reported that he found race effects in the course of developing his statistical models: both the race-of-defendant and race-of-victim variables showed statistically significant correlations with death sentences.²²³ It appeared that black defendants were at a greater

²²¹ Weisburd, *supra* note 200, at 263.

²²² State v. Marshall, 613 A.2d 1059, 1077-78 (N.J. 1992).

²²³ Weisburd, *supra* note 200, at 264-65. The Court had not actually requested an analysis of arbitrariness and discrimination in the state's capital charging and sentencing system.

²²⁴ *Id.* at 265-66.

²²⁵ *Id.* (quoting Baldus, Final Report at 102).

²²⁶ *Id.* at 266 (quoting Baldus, Final Report at 103).

²²⁷ *Id.* at 268.

²²⁸ 613 A.2d 1059. The New Jersey Supreme Court had already affirmed Marshall's conviction and death sentence on direct appeal in State v. Marshall, 586 A.2d 85 (1991) ("*Marshall I*"). The Court reserved the proportionality review issue, and it was briefed and argued separately. 613 A.2d at 1062-63. In this note, "*Marshall*" refers to the proportionality review appeal, which the Court refers to as "*Marshall II*."

²²⁹ *Id.*

risk of receiving death sentences than similarly situated white and Hispanic defendants.²²⁴ The data suggested that, “on average, after controlling for the aggravation level of the cases, black defendants may have a 19 percentage point higher risk . . . of receiving a death sentence than do other defendants.”²²⁵ Furthermore, the data suggested that “on average, cases with a white victim may have a 14 percentage point or higher risk of advancing to a penalty trial [i.e., being prosecuted as a capital murder case and producing a conviction] than do other cases.”²²⁶ Baldus cautioned, however, that these findings were strictly preliminary because discrimination was not the primary target of his analysis.²²⁷

C. The First Use of Proportionality Review

In *State v. Marshall*,²²⁸ a case involving a white insurance agent who hired a hit man to kill his wife (who was also white), the court had its first opportunity to apply Baldus’s newly-gathered data.²²⁹ But even before the court could draft an opinion, the state legislature stepped into the universe-of-cases debate on the Attorney General’s side.²³⁰ Following oral argument in *Marshall*, the legislature amended the Capital Punishment Act to provide that “proportionality review . . . shall be limited to a comparison of similar cases in which a sentence of death has been imposed.”²³¹ The Attorney General then filed a memorandum suggesting that this amendment be applied to *Marshall*’s proportionality review

²³⁰ 613 A.2d at 1063.

²³¹ *Id.*; N.J. STAT. ANN. § 2C:11-3(e) (West 2004).

²³² 613 A.2d at 1063.

²³³ N.J. STAT. ANN. § 2C:11-3(e) (West 2004).

²³⁴ 613 A.2d at 1063, 1131. *See* U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed”); art. I, § 10, cl. 1 (“No State shall . . . pass any . . . ex post facto law”); N.J. CONST. art. IV, § 7 par. 3 (“The Legislature shall not pass any . . . ex post facto law”).

RACE AND THE DEATH PENALTY

397

appeal.²³² The court noted that applying the amendment—which was to “take effect immediately”²³³—to pending appeals would implicate the federal Constitution’s ex post facto clause and the analogous clause of the New Jersey Constitution.²³⁴ Citing the long pendency of Marshall’s appeal (and displaying its independence), the court decided to apply pre-amendment law and decide for itself what universe of cases to use.²³⁵ After assessing the strengths and weaknesses of the competing approaches, the court decided that Baldus’s better served its need “to assess disproportionality in terms of the crime and the defendant.”²³⁶

Among defendant Robert Marshall’s claims was a structural challenge to the state’s death penalty scheme—reminiscent of Warren McCleskey’s—based on the Special Master’s finding of a correlation between race and death sentences.²³⁷ Marshall pointed out that at the midrange culpability level (neither the most aggravated murders nor the least aggravated) there was a 64 percent higher risk that a black defendant would be sentenced to death than a defendant of any other race.²³⁸ Furthermore, at this midrange level white-victim cases were 1.4 times more likely to

²³⁵ *Id.* at 1064. In addition to the Special Master’s report, the Court had before it a competing report, commissioned by the Attorney General and produced by statistician Herbert I. Weisberg. *Id.* at 1086. Dr. Weisberg proposed a more modest role for statistical analysis of past decisions, recommending that the universe of cases be limited to those capital trials in which a judge or jury had found at least one statutory aggravating factor, and limiting the independent variables to just the statutory aggravating factors (leaving out mitigating factors and extra-legal factors such as race). *Id.* This approach would shrink the universe of cases and make it impossible to assess what role the race of the defendant or victim played, if any. *Id.*

²³⁶ *Id.* at 1088 (internal quotation marks omitted).

²³⁷ *Id.* at 1110. The New Jersey court found standing for Marshall to complain of race-influenced death sentencing: “Defendant surely has a right to raise a structural challenge to the constitutional fairness of the New Jersey Capital Punishment Act. A death-penalty statute that systematically discriminates on the basis of race of the victim or race of the defendant menaces the institutions and foundation of a free democratic State.” *Id.* at 1109 (internal quotation marks omitted). Similarly, the *McCleskey* Court found McCleskey had standing to raise an Equal Protection claim based on the race-of-victim disparity, since a state would violate the Equal Protection clause by enforcing its criminal laws on an unjustifiable standard such as race. *See supra* note 45.

²³⁸ *Id.*

advance to a penalty trial than other cases.²³⁹ Noting that race effects are undetectable at the highest and lowest culpability levels, Marshall asserted that when juries are faced with real choices, that is, when crimes are neither so horrendous that the death penalty seems clearly appropriate to jurors, nor so borderline that the death penalty seems clearly excessive, race stands out as a predictive factor.²⁴⁰

When the New Jersey Supreme Court finally decided *Marshall*, it repudiated the *McCleskey* Court's assertion that racial disparities are inevitable in the American criminal justice system, proclaiming that "New Jersey's history and traditions would never countenance racial disparity in capital sentencing."²⁴¹ The court did not, however, accept Special Master Baldus's evidence of racial disparity in sentencing as conclusive.²⁴² Although the court found "disturbing" the Special Master's "suggestion" that there may be a discrepancy in capital sentencing rates based on race, it did not find evidence of "constitutionally-significant race-based disparities in sentencing."²⁴³ The court contrasted the evidence of racial disparity in *McCleskey*, which issued from a "more extensive set of relationships between the statistical variables," with the evidence in the Special Master's report, which presented only "the rate at which black defendants are sentenced to death and the rate at which cases with white victims proceed to a penalty trial."²⁴⁴ The *Marshall* data did not show the death-sentencing rate for race-of-victim and race-of-defendant combinations, as the *McCleskey* data had done.²⁴⁵ Furthermore, the court pointed out that, despite apparent race-of-defendant disparities at the midrange culpability level, the same data showed no race-of-victim disparities in the penalty trial decisions.²⁴⁶

Finally, the court emphasized Baldus's observation that the

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Marshall*, 613 A.2d at 1108-9. See quotation from Justice Powell, *supra* note 61.

²⁴² *Id.* at 1108. See *supra* text accompanying notes 223-26.

²⁴³ *Marshall*, 613 A.2d at 1108.

²⁴⁴ *Id.* at 1110.

²⁴⁵ *State v. Bey*, 645 A.2d 685, 712 (N.J. 1994).

²⁴⁶ *Marshall*, 613 A.2d at 1111.

RACE AND THE DEATH PENALTY

399

race-of-victim effect observed in cases advancing to penalty trial is less statistically stable (and therefore more questionable) than the race-of-defendant effect in death sentences.²⁴⁷ In short, the fact that Baldus had not constructed his statistical analysis specifically to test for race effects, combined with the small universe of cases he employed, led the court to refrain from stating definitively that New Jersey's death penalty statute had a racially discriminatory effect.²⁴⁸ Comparing the case before it with Justice Brennan's characterization of *McCleskey*, the court found that it did not yet confront a record in which "the statistical evidence relentlessly documents the risk that [the defendant's] sentence was influenced by racial considerations."²⁴⁹

D. Post-Marshall Proportionality Review Cases

In the next three proportionality appeals it heard in 1994 and 1995—*State v. Bey*,²⁵⁰ *State v. Martini*,²⁵¹ and *State v. DiFrisco*²⁵²—the court continued to express concern about findings that indicated some degree of racial disparity. In *Bey* the defendant was a black man sentenced to death for the sexual assault and murder of a black woman.²⁵³ Like Marshall, Bey raised a structural challenge to the New Jersey capital system on the ground that race operated as an impermissible factor in prosecutors' charging decisions and juries' sentencing decisions.²⁵⁴

The Association of Criminal Defense Lawyers of New Jersey and the New Jersey State Conference of NAACP Branches, as *amici curae* supporting Bey's position, attempted to ameliorate the statistical deficiencies the Court had found in Marshall's claim.²⁵⁵ They evaluated the interaction between race-of-defendant and

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 1111-12 (quoting *McCleskey*, 481 U.S. at 328 (Brennan, J., dissenting)).

²⁵⁰ 645 A.2d 685 (N.J. 1994).

²⁵¹ 651 A.2d 949 (N.J. 1994).

²⁵² 662 A.2d 442 (N.J. 1995).

²⁵³ 645 A.2d 685.

²⁵⁴ *Bey*, 645 A.2d at 689, 715.

²⁵⁵ *Id.* at 713.

race-of-victim combinations and assessed the influence of non-statutory factors such as socio-economic status.²⁵⁶ In an attempt to include enough cases for a statistically reliable comparison, the *amici* expanded Bey's culpability level to embrace twenty-three cases.²⁵⁷ They then pointed out that in the expanded culpability level, 80 percent of black defendants (eight of ten) but only 15 percent of non-black defendants (two of thirteen) received death sentences,²⁵⁸ and defendants who killed whites were more likely to receive death sentences than defendants who killed non-whites.²⁵⁹

The court rejected Bey's claim, finding that the statistics did not support it.²⁶⁰ The court objected to the expansion of Bey's culpability level because it failed to "achieve the underlying purpose of creating culpability levels consisting of similar cases."²⁶¹ The fundamental problem, the court observed, was that the New Jersey case universe still contained too few cases to make analysis reliable.²⁶² The court acknowledged that it was "vexing" to wait for more data, but stated that "[t]he inescapable fact is that we lack enough cases to conclude with any degree of statistical reliability whether race is working impermissibly in death sentencing."²⁶³

The defendants in *Martini* and *DiFrisco* (both white) raised the same claim as Bey.²⁶⁴ The court rejected *Martini's* claim by referring to its holding in *Bey*,²⁶⁵ and it rejected *DiFrisco's* claim by referring to its holdings in *Martini*, *Bey*, and *Marshall*.²⁶⁶ Eight years after its inception, the proportionality review project had yet to provide relief to a single death-sentenced defendant in New

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 715.

²⁶⁰ *Bey*, 645 A.2d at 711-12.

²⁶¹ *Id.* at 714.

²⁶² *Id.* at 714.

²⁶³ *Id.* at 712.

²⁶⁴ J. Randy Sawyer, Comment, *The Last Line of Defense: A Comparative Analysis of United States Supreme Court and New Jersey Supreme Court Approaches to Racial Bias in the Imposition of the Death Penalty*, 7 SETON HALL CONST. L.J. 663, 704 n.225 (1997).

²⁶⁵ *Martini*, 651 A.2d at 987.

²⁶⁶ *DiFrisco*, 662 A.2d at 473.

RACE AND THE DEATH PENALTY

401

Jersey.

E. The New Jersey Supreme Court Reconsiders Proportionality Review

David Baldus's tenure as Special Master ended with the proportionality appeal in *Bey*, and the state Administrative Office of the Courts (AOC) then took responsibility for producing ongoing analyses for proportionality review.²⁶⁷ In January 1996 the AOC released updated data, including thirty-two new cases, in preparation for proportionality review in *State v. Harris*.²⁶⁸ David Weisburd, a statistics expert retained by the AOC to analyze this data, reported that a black-defendant race effect had achieved statistical significance as a predictor of death sentences in penalty trials.²⁶⁹ Thus, the race effect that could have been dismissed as a mere statistical artifact in Baldus's study now had stronger legs to stand on.²⁷⁰ Although striking, this development did not turn the tide in the argument between the Public Defender and the Attorney General about racial disparity.²⁷¹ Instead, each side argued its own interpretation with renewed vigor.²⁷² The Public Defender claimed that the AOC report "provided relentless and conclusive evidence of prejudice" in death sentencing, while the Attorney General challenged the statistical models' ability to "measure what they purport to measure."²⁷³

In 1996 there were two deaths that altered the course of proportionality review.²⁷⁴ The first was that of Chief Justice Robert N. Wilentz, under whose leadership the court undertook the proportionality review project.²⁷⁵ Republican Governor Christine Todd Whitman appointed Attorney General Deborah Poritz to

²⁶⁷ Weisburd, *supra* note 200, at 277.

²⁶⁸ 662 A.2d 333 (N.J. 1995).

²⁶⁹ Jones, *supra* note 219, at 1475.

²⁷⁰ See discussion *infra* Part III.C.

²⁷¹ See Weisburd, *supra* note 200, at 277.

²⁷² *Id.*

²⁷³ *Id.* at 280.

²⁷⁴ See Bienen, *supra* note 12, at 186; Sawyer, *supra* note 264, at 704.

²⁷⁵ See Bienen, *supra* note 12, at 136.

replace Wilentz as Chief Justice.²⁷⁶ The proportionality review project would henceforth operate under the supervision of someone who, at least in her institutional role, was one of its chief critics.²⁷⁷ The second death was that of Joseph Harris, the defendant in *State v. Harris*, who suffered a stroke on the eve of his hearing.²⁷⁸ The case was dismissed as moot, and the battle over the AOC report was postponed.²⁷⁹

The battle was joined in the proportionality appeal of *State v. Loftin*,²⁸⁰ which concerned a black defendant convicted of killing a white man in the course of robbing him. The court appointed a new Special Master, retired Appellate Division Judge Richard S. Cohen, to review the significance of the AOC's data for Loftin's case.²⁸¹ Cohen, assisted by Princeton University statistician John Tukey, reported to the court in January 1997.²⁸² Cohen and Tukey had created three new statistical models, each including the race of the defendant as a variable in a set of no more than ten variables, the rest of which were statutory aggravating or mitigating factors.²⁸³ Cohen reported that "the statistical evidence does not prove the defendant's assertions of racial bias in penalty-trial verdicts, [but] neither does it prove that the system operates without bias."²⁸⁴

Just as the state had retained an expert to counter Special Master Baldus in past appeals, the defense in *Loftin* retained an

²⁷⁶ *Id.* at 209 n.284.

²⁷⁷ See discussion *infra* Part III.C.

²⁷⁸ Sawyer, *supra* note 264, at 704.

²⁷⁹ *Id.*

²⁸⁰ 724 A.2d 129 (N.J. 1999).

²⁸¹ See Sawyer, *supra* note 264, at 705.

²⁸² *State v. Loftin*, 724 A.2d 129, 154 (1999). See also Weisburd, *supra* note 200, at 280.

²⁸³ *Id.*

²⁸⁴ 724 A.2d at 154 (quoting Richard S. Cohen, *Report to the Supreme Court of New Jersey* (Jan. 27, 1997)). In its February 1999 *Loftin* decision, the court reviewed the raw data on capital sentencing and noted that prosecutors sought death sentences against 36 percent (73/203) of the black defendants and 47 percent (74/159) of the non-black defendants, while juries imposed death sentences on 38 percent (28/73) of the black defendants and 30 percent (22/74) of the non-black defendants. *Id.* at 155.

RACE AND THE DEATH PENALTY

403

expert to counter Special Master Cohen.²⁸⁵ Defense statistician Paul Allison offered alternative statistical models that added a white-victim variable to the three Cohen-Tukey models, with the result that two of these models showed a statistically significant race effect.²⁸⁶ But the court, evincing considerably more skepticism about statistical analysis than it had in previous cases, dismissed Allison's findings as "infected by [Baldus's] suspect culpability ratings and the small size of the database."²⁸⁷ In contrast, the court noted with approval Cohen's determination that none of the results drawn from the AOC data could be considered statistically significant, including the "apparent racial disparity in penalty-phase verdicts."²⁸⁸ Harkening to the standard that the *Marshall* court had plucked from Justice Brennan's *McCleskey* dissent, the court concluded that "the record in this case convinces us that defendant has not 'relentlessly document[ed] the risk' of racial disparity in the imposition of the death penalty."²⁸⁹

Along with its rejection of Loftin's appeal, the court appointed yet another Special Master to "examine the proportionality review methodology used by the Court since *Marshall* . . . and to test the assumptions on which the current system is based."²⁹⁰ Again the court appointed an Appellate Division judge, this time Judge David Baime, to be the new Special Master.²⁹¹

In his initial report of April 1999, Baime recommended retaining the "clearly death-eligible" universe of cases for proportionality review, ignoring the legislature's 1992 amendment, just as the court had done.²⁹² Baime also recommended the appointment of a retired judge as standing Special Master to supervise the proportionality review process.²⁹³ In keeping with the court's desire to streamline the system, Baime recommended

²⁸⁵ *Id.* at 158.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 156.

²⁸⁹ *Id.* at 160.

²⁹⁰ *Id.* at 135.

²⁹¹ *In re* Proportionality Review Project, 735 A.2d 528, 532 (N.J. 1999).

²⁹² *Id.* at 534.

²⁹³ *Id.*

consolidating proportionality review with direct appeals.²⁹⁴ The court accepted these recommendations.²⁹⁵

Most significantly, Baime recommended abandoning the complex statistical analysis that Baldus had championed, citing the instability of the statistical models and the small projected increase in the case database.²⁹⁶ The court acknowledged these shortcomings: “[T]here are too many independent variables (degree of victimization, extent of premeditation, nature of offense) in relationship to the relatively few dependent variables (death verdicts) to reach a reliable conclusion about the effect of the independent variables.”²⁹⁷ While the court agreed to abandon the analysis Baldus had instituted, it recognized that “[s]tatistical modeling certainly will be needed to examine systemic disproportionality.”²⁹⁸ The court directed the Special Master to work with his consultants, Professors David Weisburd and Joseph Naus, to create a more reliable model.²⁹⁹

In December 1999, Baime issued the second part of his report.³⁰⁰ Whereas his initial report’s recommendations were aimed at *individual* proportionality review (the effort to ensure that individual death sentences are not disproportionately harsh in the universe of similar cases), Baime’s second report focused on *systemic* proportionality review (the effort to ensure that death sentences statewide do not fall disproportionately on ethnic and racial minorities.)³⁰¹ He recommended a process specifically for monitoring the presence of racial discrimination in the administration of the death penalty, a process that would combine three statistical techniques in an effort to isolate race effects.³⁰²

²⁹⁴ 735 A.2d 528 at 543.

²⁹⁵ *Id.* at 548.

²⁹⁶ *Id.* at 534-35.

²⁹⁷ *Id.* at 541.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *In re* Proportionality Review Project (II), 757 A.2d 168, 169 (N.J. 2000).

³⁰¹ *Id.*

³⁰² *Id.* at 172-73. These techniques are bivariate analysis, which looks at just two variables, race and sentence; multiple regression analysis, which isolates the individual effects of many independent variables on the sentence;

RACE AND THE DEATH PENALTY

405

Baime asserted that creating a statistically stable, reliable model to test for race would be easier than creating such a model for individual proportionality.³⁰³ This was because he and his consultants would need to include in their model only those variables that were related to a particular outcome (for example, conviction or death sentence) and to race; they would not have to include the wide variety of variables relevant to the culpability of each offender.³⁰⁴ The court concluded that the variables must include non-statutory factors, and approved Baime's plan to survey judges with experience in capital cases to select the non-statutory factors most relevant to death-sentencing decisions.³⁰⁵ In an effort to make racial coding more reflective of reality, the court also accepted the Special Master's recommendation to code both defendants and victims as white, black, Latino, Asian, and other, abandoning Baldus's system of coding defendants as black or non-black and victims as white or non-white.³⁰⁶

Finally, the court reiterated the standard for establishing disproportionality: a defendant must "relentlessly document the risk of racial disparity in the imposition of the death penalty."³⁰⁷ The court also held that, to meet this standard, a defendant would have to show "converging outcomes produced by the application of a variety of techniques," specifically, the three techniques Baime proposed.³⁰⁸ Considering the variation in results that different statistical analyses had produced in previous cases and the susceptibility of these results to differing interpretations, the court set the bar quite high.³⁰⁹

and case-sorting analysis, which looks at which combination of aggravating and mitigating factors were involved in cases in the universe, then identifies which combinations showed strong racial disparities. *Id.* at 172-77.

³⁰³ *Id.* at 173-74.

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 175.

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 178.

³⁰⁸ *Id.*

³⁰⁹ The Court's opinion was written by Chief Justice Poritz, who appears to have accepted the importance of the proportionality review project. ("The importance of understanding whether racial discrimination infects our system of capital punishment requires that we make this effort.") *In re* Proportionality Review Project (II), 757 A.2d 168, 172 (N.J. 2000). However, Chief Justice

In accepting the Special Master's Report, the court simultaneously decided three proportionality review cases.³¹⁰ Citing Baime's finding that there was no consistent statistical evidence of race-of-victim or race-of-defendant effects, the court concluded, "[W]e cannot find that race has operated as an impermissible factor in the imposition of the death penalty."³¹¹ Thus the court affirmed all three sentences.³¹²

In 2001 Baime delivered his *Report to the Supreme Court Systemic Proportionality Review Project*.³¹³ In it, he stated, "[W]e discern no sound basis from the statistical evidence to conclude that the race or ethnicity of the defendant is a factor in determining which cases advance to a penalty trial and which defendants are ultimately sentenced to death."³¹⁴ Baime noted that all three analytical techniques produced convergent results, which bolstered his and his consultants' confidence in the result.³¹⁵ As for the race of the victim, Baime allowed that the results were "more equivocal."³¹⁶ Although he found no appreciable difference in sentencing rates between defendants who killed whites and defendants who killed minorities, he did find "unsettling" evidence that cases involving white victims were more likely to advance to penalty trials (i.e., to be pursued by prosecutors as capital cases and to produce convictions) than cases involving black victims.³¹⁷ Baime attributed this finding to county variance—the fact that a

Poritz also appears to have brought some skepticism about statistical analysis with her from the Attorney General's office ("We have learned that statistical modeling for [sorting out the relationship between discretion and the race of defendants or victims] is largely untested and that its usefulness is uncertain.") *Id.*

³¹⁰ *State v. Harris*, 757 A.2d 221 (N.J. 2000); *State v. Feaster*, 757 A.2d 266 (N.J. 2000); *State v. Morton*, 757 A.2d 184 (N.J. 2000).

³¹¹ 757 A.2d 168 at 179.

³¹² *State v. Harris*, 757 A.2d 221, 244 (N.J. 2000); *State v. Feaster*, 757 A.2d 266, 284 (N.J. 2000); *State v. Morton*, 757 A.2d 184, 203 (N.J. 2000).

³¹³ D. Baime, *Report to the Supreme Court Systemic Proportionality Review Project*, at <http://www.judiciary.state.nj.us/baime/baimereport.pdf> (last visited July 28, 2004) [hereinafter *Baime Report*].

³¹⁴ *Id.* at 4.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.* at 4-5.

RACE AND THE DEATH PENALTY

407

disproportionately large number of minority-victim cases are tried in counties with the lowest overall rates of cases progressing to the penalty phase of the trial.³¹⁸ When county variance is accounted for, Baime concluded, “the evidence does not suggest that the race of the victim plays an important role in determining which death-eligible cases advance to the penalty phase.”³¹⁹

F. Effects of the Proportionality Review Project

Between 1987 and 2001, the New Jersey Supreme Court rendered a dozen proportionality review decisions in which it found every death sentence proportionate, both individually and systemically.³²⁰ During this period, the rate at which New Jersey juries imposed death sentences dropped significantly, to an average of about two per year.³²¹ While many factors may be presumed to account for the drop, some criminal defense lawyers in New Jersey believe that the difficulty in making a death sentence “stick” has discouraged some prosecutors from seeking it.³²² Not surprisingly, the Proportionality Review Project has inspired polarized

³¹⁸ *Id.* at 5.

³¹⁹ *Baime Report*, *supra* note 313, at 5-6.

³²⁰ Latzer, *supra* note 12, at 1199. There has been no systemic proportionality review of a death sentence in the New Jersey Supreme Court since 2001. However, in 2002, the court found the death sentence of Peter Papasavvas, a white man, disproportionate. *State v. Papasavvas*, 790 A.2d 798, 800 (2002). The court’s decision was based on *individual* proportionality review (also known as procedural proportionality review), which concerns whether a sentence is unduly harsh compared with the sentences imposed in similar crimes, not systemic proportionality review, which concerns (among other things) whether statewide racial disparity in capital proceedings exists. *Id.*; *see also* text accompanying notes 187-89.

³²¹ *See In re Proportionality Review Project (II)*, 757 A.2d 168, 176 (noting that in the five years before 2000, jurors had sentenced only ten defendants to death).

³²² E-mail message from Karl Keys, Assistant Deputy Public Defender, Paterson, N.J., to Alex Lesman (Oct. 21, 2003) (on file with the Journal of Law and Policy). This view accords with that of scholars David Baldus and George Woodworth, who assert that “the most important feature of New Jersey’s proportionality review system is its feedback mechanism with the prosecutorial community, which, over time, appears to have developed a fairly conservative approach to capital charging.” Baldus & Woodworth, *supra* note 12, at 1461-62.

reactions, including the strongly negative reactions of some New Jersey governors, attorneys general, and legislators.³²³ Moreover, some scholars have lambasted the project³²⁴ while others have defended it.³²⁵ Regardless of how one views the undertaking, however, it seems fairly clear that the heyday of systemic proportionality review in New Jersey is over. With former Attorney General Deborah Poritz at the helm, the court has begun to scale back Baldus's elaborate statistical models, which more often showed race effects than the models Baime substituted.³²⁶ In addition, Baime's 2001 Special Master's report, identifying county variance as the source of what little racial disparity he found, shifted the focus of systemic proportionality from the potential racial prejudice (conscious or unconscious) of prosecutors and juries to the more practical issue of how prosecutorial resources are used.³²⁷

³²³ See Bienen, *supra* note 12, at 207-208.

³²⁴ See, e.g., Latzer, *supra* note 12, at 1162 (contending that "comparative proportionality review is constitutionally unwarranted, methodologically unsound, and theoretically incoherent, and, therefore, should be abolished").

³²⁵ See, e.g., Evan J. Mandery, *In Defense of Specific Proportionality Review*, 65 ALB. L.REV. 883, 925 (2002) (asserting that "New Jersey experience shows . . . that specific proportionality review is workable and useful").

³²⁶ Cf. *supra* text accompanying notes 223-26 and *supra* text accompanying notes 313-319.

³²⁷ See *Baime Report*, *supra* note 313, at 5. The report revealed that the three urban counties with the highest number of death-eligible cases (Camden, Essex, and Union) had the lowest rate of advancement to death penalty trials (21 percent). See Joseph R. McCarthy, Note, *Implications of County Variance in New Jersey Capital Murder Cases: Arbitrary Decision-Making by County Prosecutors*, 19 N.Y.L. SCH. J. HUM. RTS. 969, 980 (2003). Although county variance may be driven in part by racial prejudice, the number of murders a county must deal with and the high cost of prosecuting a capital case are undeniably important factors in a district attorney's decision-making. Whether county variance constitutes an arbitrary geographical disparity, and therefore violates equal protection, is open to argument, and could be the next front on which death penalty opponents attack the state's capital punishment scheme. See *id.* at 983-84 (suggesting that significant geographic variance in rates at which prosecutors seek death could run afoul of the Constitution's equal protection and cruel and unusual punishments provisions). In the summer of 2004 the New Jersey Attorney General's office began reviewing and updating its 15-year-old Guidelines for the Designation for Capital Prosecutions, with the participation of county prosecutors, in an effort to promote greater uniformity in seeking the

RACE AND THE DEATH PENALTY

409

IV. ANALYSIS

Neither the Kentucky Racial Justice Act nor the New Jersey Supreme Court's Proportionality Review Project could be deemed an unqualified success by its proponents. Indeed, there exists no body of case law illustrating that either state action has provided relief to any capital defendants.³²⁸ Nor is there a body of research to show that racial disparity in capital proceedings has been eliminated in either state.³²⁹ Yet there have been changes in the ways in which Kentucky and New Jersey administer their respective death penalty systems in recent years, and these changes are at least arguably attributable to these states' responses to the specter of racial discrimination.

A. Evaluating the Impact of the Kentucky and New Jersey Responses

A few tentative findings emerge from examining the Kentucky Racial Justice Act and its repercussions. One is that the Act has provided defense lawyers a weapon to fend off capital trials for their clients in some cases; however a variety of factors—including tiny populations of racial minorities in many counties, Commonwealth's Attorneys' willingness to accept non-capital pleas, and defense lawyers' reluctance to antagonize prosecutors—have severely limited the use of this weapon. Another conclusion is that the Act has caused Kentucky prosecutors, at least in large counties with significant minority populations, to seek the death penalty in more black-victim cases, increasing the total of capital prosecutions statewide. A third conclusion is that the Kentucky Supreme Court, which has yet to consider a case raising a KRJA claim, has not been moved by the Act's passage to treat

death penalty. Mary P. Gallagher, "*White-Victim Effect*" *Impels AG to Review Death Penalty Guidelines*, N.J. LAW JOURNAL, July 12, 2004, at 7. The Attorney General's office undertook this review and update instead of implementing a central review system for all capital prosecution decisions, a step which Special Master Baime urged in his 2004 proportionality review report. *Id.*

³²⁸ See *supra* note 123, text accompanying note 320.

³²⁹ Recent official, statewide statistics are available for New Jersey, but not Kentucky. See note 344 and text accompanying note 317.

statistically-based claims of racial discrimination any more seriously than it did before 1998. Finally, despite these shortcomings, the KRJA at least serves as an official endorsement of racial equality in capital proceedings and a reminder that prosecutorial discrimination—even unconscious discrimination—can be challenged under a state statute.³³⁰

A Kentucky capital defendant faces an extremely difficult challenge in attempting to prove by clear and convincing evidence that race was the basis of the decision to seek death in his particular case. A defendant's first major obstacle is the fact that the KRJA outlaws only those death sentences sought "on *the* basis of race."³³¹ A finding that race was *the* basis of the decision can only occur if the court finds that "race was a *significant* factor" in the decision to seek death.³³² These strictures seem impossible to justify on principle, since it is fundamental to equal protection doctrine that race is an arbitrary factor that should play no part in sentencing decisions.³³³ A constitutionally impermissible factor, if found to have been considered, should not have to be "significant" to allow the defendant relief; its mere presence should constitute an equal protection violation.

Another hurdle is the KRJA's requirement that the defendant "state *with particularity* how the evidence supports a claim that racial considerations played a significant part in the decision to seek a death sentence."³³⁴ While the particularity requirement could signify nothing more than the need to logically connect the evidence to the claim, it easily lends itself to the prosecution argument that, for the claim to succeed, a particular

³³⁰ See note 340 and accompanying text.

³³¹ KY. REV. STAT. ANN. § 532.300(1) (Michie 2004) (emphasis added). Use of the words "the basis" indicates that race must at least be the predominant basis for seeking death, if not the sole basis, for the KRJA's protections to apply.

³³² KY. REV. STAT. ANN § 532.300(2) (Michie 2004) (emphasis added).

³³³ The *McCleskey* Court itself acknowledged this point: "It would violate the Equal Protection Clause for a State to base enforcement of its criminal laws on 'an unjustifiable standard such as race, religion, or other arbitrary classification'." *McCleskey*, 481 U.S. at 291 n.8 (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

³³⁴ KY. REV. STAT. ANN § 532.300(4) (Michie 2004) (emphasis added).

RACE AND THE DEATH PENALTY

411

Commonwealth's Attorney must be shown to have had specific intent to discriminate against the defendant himself.³³⁵ If this argument were to prevail, then the KRJA would represent absolutely no improvement over *McCleskey*.³³⁶

Even under *Batson v. Kentucky*'s relatively defendant-friendly burden-shifting scheme for challenging racial discrimination in jury selection,³³⁷ defendants' low success rate indicates just how difficult claims of prosecutorial discrimination are to win.³³⁸ One public defender's comment in the KRJA survey—that “formally raising a Racial Justice Act motion would have dire consequences on the success of the defense attorney in that individual case and perhaps scores of other cases while the prosecutor cools down from being called a racist in the local paper”³³⁹—may help explain why both *Batson* and the KRJA are troublesome weapons for the defense. Interpersonal relationships among judges, prosecutors, and defense lawyers are important, especially in small-town courthouses. To raise a claim that brands a prosecutor as a racist could be strategically quite harmful at the trial level, even if the issue ought to be preserved for appeal.³⁴⁰ The foregoing

³³⁵ Specific intent is essentially what the *McCleskey* Court required: “[T]o prevail under the Equal Protection Clause, *McCleskey* must prove that the decision makers in *his* case acted with discriminatory purpose.” *McCleskey*, 481 U.S. at 292.

³³⁶ See discussion of *McCleskey* *infra* Part I.B.

³³⁷ See discussion of *Batson*, *supra* note 67.

³³⁸ See, e.g., *United States v. Clemmons*, 892 F.2d 1153, 1159-63 (3d Cir. 1989) (Higginbotham, J., concurring) (citing cases and articles demonstrating judges' dereliction in enforcing the constitutional prohibition against racially based peremptory strikes). See also Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L.REV. 1807, 1830-31 (1993) (asserting that the level of review *Batson* imposes is not as rigorous as strict scrutiny, and that *Batson*'s race-neutral explanation requirement allows a prosecutor to hide his or her discrimination behind race-neutral explanations).

³³⁹ Neal, *supra* note 72, at 17-19.

³⁴⁰ An accusation of racism has a unique sting. An ironic byproduct of the progress against overt racism in American society is that almost no one will admit to being racist to any degree, whether intentionally or unintentionally, because racism is now so roundly condemned. See Lawrence, *supra* note 14, at 321, 322-23 (arguing that the “illness of racism infects almost everyone” and explaining that “[w]hen an individual experiences conflict between racist ideas

considerations lead to the conclusion that absent a stark record of unexplained racial disparities in a given county, it is difficult to imagine a KRJA challenge leading a trial judge to bar the death penalty.

It may be, as the anecdotal evidence from Kentucky public defenders suggests, that the primary use of the Act will be as leverage in pre-trial negotiations with Commonwealth's Attorneys. Still, the amount of leverage the Act provides depends on the plausibility of a claim of significant racial disparity. A Commonwealth's Attorney whose capital case demographics show racial balance is not likely to feel the pinch; neither is one who seeks death in every arguably aggravated murder. The KRJA certainly retains some symbolic value, although different parties disagree on how much value: a veteran prosecutor sees the Act as a sort of anti-death penalty fad,³⁴¹ while its sponsor and some public defenders trumpet it as an important symbol of an ethos of equality in Kentucky.³⁴²

In New Jersey, the supreme court has shown every sign of taking proportionality review, particularly systemic proportionality review for racial discrimination, quite seriously.³⁴³ But the court has yet to declare that the statistics presented to it actually prove racially disproportionate sentencing, even when supplied with statistical models that could have provided a defensible basis for such a conclusion.³⁴⁴ With the state's capital sentencing rate slowing, the time for the court to invalidate a death sentence on the

and the societal ethic that condemns those ideas, the mind excludes his racism from consciousness”).

³⁴¹ Bouvier interview, *supra* note 166.

³⁴² Neal, *supra* note 72, at 15-16.

³⁴³ See Bienen, *supra* note 12, at 147 (noting that “only the New Jersey Supreme Court has taken an unequivocal position that proportionality review and the systematic analysis of capital case processing is mandated by the state constitution.”); *State v. Ramseur*, 524 A.2d 188, 330 (N.J. 1987) (stating that the court “must ensure that discriminatory factors are not shifting the balance between life and death”); *State v. Marshall*, 613 A.2d 1059, 1112 (N.J. 1992) (stating that “[w]hether in the exercise of statutory proportionality review or our constitutional duty to assure the equal protection and due process of law, we cannot escape the responsibility to review any effects of race in capital sentencing”).

³⁴⁴ See discussion *infra* Part III.E.

RACE AND THE DEATH PENALTY

413

grounds of systemic disproportionality may have come and gone.³⁴⁵ As the court remarked in 2000, “[i]t is ironic indeed that the result of juror reluctance to impose the death penalty is a database too small for reliable statistical analysis of race effects.”³⁴⁶ Looking beyond juror reluctance, however, the situation may not appear so ironic. Professors David Baldus and George Woodworth contend that “[a] compelling argument can be made that [the Proportionality Review Project] has enjoyed a reasonable measure of success in limiting death sentencing to highly aggravated cases.”³⁴⁷ Because highly aggravated cases show no appreciable racial discrimination in charging or sentencing,³⁴⁸ the Proportionality Review Project could be said to have achieved the goal of eradicating discrimination in a roundabout way. Finally, like the Kentucky Racial Justice Act, the New Jersey Supreme Court’s proportionality review project carries symbolic weight. The court’s many references to New Jersey’s non-discriminatory values, beginning with the repudiation of *McCleskey* in *Marshall*, bespeak an awareness of symbolism.³⁴⁹ For some actors in the criminal justice system, proportionality review symbolizes obstructionism, but for others, it symbolizes a principled commitment to fairness.³⁵⁰

It is interesting to note that both New Jersey’s and Kentucky’s actions appear to have affected prosecutors’ charging decisions—although in opposite directions. In the wake of the KRJA’s passage, Kentucky prosecutors have increased their death notices in black-victim cases, perhaps in order to neutralize charges of race-of-victim discrimination.³⁵¹ In New Jersey, meanwhile,

³⁴⁵ Baime’s proportionality reports are now annual, and subsequent reports have confirmed his 2001 conclusion that New Jersey’s death penalty system is not infected by racial prejudice, although defendants accused of killing whites are more likely to proceed to a capital trial than those who kill blacks. *Action in Trenton*, THE STAR-LEDGER (Newark, N.J.), May 28, 2004, at 41.

³⁴⁶ *In re* Proportionality Review Project (II), 757 A.2d 168, 176 (N.J. 2000).

³⁴⁷ Baldus & Woodworth, *supra* note 12, at 1463.

³⁴⁸ See discussion *infra* Part III.C.

³⁴⁹ See discussion *infra* Part III.C.

³⁵⁰ See Bienen, *supra* note 12, at 207-9.

³⁵¹ See *supra* text accompanying notes 116, 161, 170.

prosecutors have retreated somewhat from seeking the death penalty, perhaps realizing that any death sentence they attain will be painstakingly and exhaustively reviewed by the state's high court, whatever the defendant's race.³⁵²

B. Comparing the Legislative and Judicial Responses

Comparison of the Kentucky legislation and the New Jersey jurisprudence presents obvious challenges, particularly the impossibility of holding constant the differences in history, demographics, and penal laws between the two states. Yet certain fruitful comparisons can be made.

First, it is instructive to note that Kentucky's provision seeks to counteract, or even prevent, racial discrimination at the front end of the trial process, while New Jersey's seeks to remedy racial discrimination, if found, after the trial process has run its course. The implication is clear: in the Kentucky scheme, the Commonwealth's Attorney is implicated as the crucial actor in producing racial disparity, whereas in the New Jersey project both the jury and the district attorney are implicated as possible sources of such disparity. It is also significant that Kentucky's response to the specter of racial discrimination came from the elected representatives of its citizens, while New Jersey's came from appointed members of its judiciary.³⁵³ This difference raises the

³⁵² See, e.g., Jim O'Neil, *Death Row Inmate Gets Life in Waitress's '93 Slaying*, THE STAR-LEDGER (Newark, N.J.), June 11, 2004, at 35 (reporting that Middlesex County prosecutors would not seek death for John Chew, a white man whose original death sentence was vacated by the New Jersey Supreme Court, and quoting the assistant prosecutor as saying, "[c]apital prosecutions require a huge investment in time, money and resources and it has become obvious to me that the New Jersey Supreme Court will not allow a death sentence to be imposed upon John Chew"). Adding a new hurdle for prosecutors, in February 2004 the New Jersey Supreme Court held in *State v. Fortin*, 843 A.2d 974 (N.J. 2004), that prosecutors planning to seek the death penalty must first present evidence tending to prove a statutory aggravating factor to a grand jury as part of the indictment practice. 843 A.2d at 1027-28.

³⁵³ Supreme Court Justices are appointed by the Governor and confirmed by the State Senate for initial terms of seven years. NEW JERSEY JUDICIARY, SUPREME COURT OF NEW Jersey, at <http://www.judiciary.state.nj.us/supreme/>

RACE AND THE DEATH PENALTY

415

issue of relative institutional competence: are legislatures or courts better able to address the problem of racial disparity in capital proceedings and the racial discrimination (conscious or unconscious) that presumably underlies it?

At first blush the answer might seem to depend on whether we conceive of discrimination in capital punishment as a political issue or a legal one. But disentangling political issues, appropriate for the legislative and executive branches, from legal issues, appropriate for the judicial branch, is not easy. As Alexis de Tocqueville famously observed more than 150 years ago, “[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”³⁵⁴ Still, one clarification is helpful: the central issue presented by disparities in the death penalty is not crime control, for neither the desirability nor the constitutionality of the death penalty *per se* are necessarily at stake. Rather, the central issue is the protection of rights, namely the right to be free of cruel and unusual punishments and the right to the equal protection of the laws. Thus the question becomes, is a particular branch of government best suited to protect these rights?

A useful way of approaching this question is presented by political scholar John J. Dinan.³⁵⁵ He identifies three regimes of rights protection in U.S. history, each arising from the socio-political and economic developments of its time, and each achieving some degree of success under certain circumstances.³⁵⁶ Dinan calls the first regime republicanism, which arose in the late eighteenth and early nineteenth centuries, and which understood representative assemblies to be the most capable of securing rights.³⁵⁷ He asserts that on the whole these assemblies achieved a commendable level of rights protection but fell short when the rights at issue conflicted with representatives’ self-interest or when representatives got caught up in the “momentary passions” of the

(last visited Jan. 17, 2005). On reappointment, they are granted tenure until they reach the mandatory retirement/judicial retirement age of 70. *Id.*

³⁵⁴ Quoted in LAURA LANGER, JUDICIAL REVIEW IN STATE SUPREME COURTS: A COMPARATIVE STUDY, 1 (2002).

³⁵⁵ JOHN J. DINAN, KEEPING THE PEOPLE’S LIBERTIES: LEGISLATORS, CITIZENS, AND JUDGES AS GUARDIANS OF RIGHTS (1998).

³⁵⁶ *Id.* at 167.

³⁵⁷ *Id.* at 168.

day.³⁵⁸ The second regime was populism, which emerged at the beginning of the twentieth century, and which maintained that rights were best protected through direct democratic institutions, such as state constitutional conventions.³⁵⁹ The third was judicialism, which arose in the middle of the twentieth century, and which presumed that judges were best qualified to protect the people's rights.³⁶⁰

Dinan contends that judicialist institutions have performed better than representative institutions in securing rights during periods of social and political ferment, when they have been better insulated from transitory passions.³⁶¹ He also points out that none of these regimes have been totally dominant; non-dominant institutions have continued to act on rights issues throughout each regime, with varying degrees of assertiveness.³⁶²

The present period is one of judicialist regime dominance.³⁶³ In the past few decades the United States has experienced a renaissance of state supreme courts' power and influence.³⁶⁴ Given these conditions, it is not surprising that the New Jersey Supreme Court arrogated to itself the responsibility for rights protection in capital proceedings. After all, the U.S. Supreme Court, in *Gregg*, gave its imprimatur to state supreme court proportionality review (although it later decided such review is not constitutionally required).³⁶⁵ To apply Dinan's conception, capital crimes presumably arouse such popular passions that representative assemblies cannot be trusted to protect defendants' rights as effectively as judicial institutions. This presumption appears to underlie the *Furman* decision, the U.S. Supreme Court's entry into

³⁵⁸ *Id.* at 169.

³⁵⁹ *Id.* at 168.

³⁶⁰ *Id.*

³⁶¹ *Id.* at 169.

³⁶² *Id.* at 167-71.

³⁶³ *Id.* at 168.

³⁶⁴ See LANGER, *supra* note 354, at 2. See also William J. Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L.REV. 535, 548-50 (1986).

³⁶⁵ See discussion of *Gregg* *supra* Part I.A. and *Pulley* *supra* Part III.A.

RACE AND THE DEATH PENALTY

417

death penalty regulation.³⁶⁶

New Jersey's experience with proportionality review highlights another factor affecting judicial action, not just in rights protection, but in every area of the law: social consensus. Courts function within a system of checks and balances, and, as institutions, they have always been responsive to majoritarian interests.³⁶⁷ One way of understanding the Proportionality Review Project—which the New Jersey Supreme Court created on its own initiative, poured significant resources into, struggled with, and eventually downsized without finding a single death sentence disproportionate—is as a manifestation of the conflict between the court's belief in judicialism and its sensitivity to popular concerns.³⁶⁸

The Kentucky Racial Justice Act, on the other hand, represents a rare effort by an institution of a non-dominant regime to protect the rights of a marginal, even despised, group—defendants accused of aggravated murder. The Act's backers were able to achieve what had not been achieved in the U.S. Congress or in any other state. The KRJA's passage is all the more extraordinary in light of Kentucky's history of racial discrimination and racial violence, and the continuing popular approval of the death penalty there and across the country.³⁶⁹ Yet the KRJA's very terms, as we have seen,

³⁶⁶ The *Furman* Court effectively invalidated the work of forty state legislatures and commuted the sentences of 629 men on death row when it ruled that no death sentences could be carried out under existing capital punishment statutes. DEATH PENALTY INFORMATION CENTER, HISTORY OF THE DEATH PENALTY, PART I, at <http://www.deathpenaltyinfo.org/article.php?scid=15&did=410#ConstitutionalityoftheDeathPenaltyinAmerica> (last visited Jan. 15, 2005).

³⁶⁷ See DONALD E. LIVELY, JUDICIAL REVIEW AND THE CONSENT OF THE GOVERNED: ACTIVIST WAYS AND POPULAR ENDS 125 (1990).

³⁶⁸ See Baldus & Woodworth, *supra* note 12, at 1461 (observing that “[a]lthough the New Jersey court is highly respected, it has been criticized for its high standards in the review of death cases” and “[i]n response, the court adopted conservative substantive standards to guide its reviews”).

³⁶⁹ In a 1999 University of Louisville poll, 59.2 percent of Kentucky respondents supported the death penalty. In a 2002 University of Kentucky poll, 32 percent of Kentuckians opposed legislation to raise the age of death-eligibility from 16 to 18. DEATH PENALTY INFORMATION CENTER, SUMMARIES OF RECENT POLL FINDINGS, at <http://www.deathpenaltyinfo.org/article.php?scid=23&did=210#Kentucky> (last visited Jan. 28, 2005).

resign it to extremely limited practical effect.³⁷⁰ The Act was crafted to address the problem laid bare in *McCleskey* by providing Kentucky's capital defendants with a weapon for challenging the decision to seek death penalty in their cases. But in order to get the Act through the legislature, its backers, probably mindful of the federal Racial Justice Act's demise, created a weapon that is difficult to wield.³⁷¹

In the course of the legislative process, KRJA supporters also antagonized prosecutors, some of the executive branch's most visible and powerful members, by implying that prosecutorial discretion is sometimes tainted by racism.³⁷² As noted above, the desire of prosecutors, defense attorneys and judges alike to get along and "save face" plays a major role in what defense claims are raised and how they are adjudicated.³⁷³ In light of this interpersonal dynamic—and considering that Kentucky is composed mostly of rural counties with very little racial diversity—it is not surprising that use of the KRJA has been sparing.³⁷⁴ Thus the KRJA, although a symbolic victory for rights protection, has been of limited use both to defendants and to those who would look to Kentucky as a laboratory for legislatively-enacted tools for ensuring racial equality in capital proceedings.

C. A Proposal for Adjudicating Claims of Racial Discrimination in Capital Proceedings

In the eighteen years since *McCleskey* was handed down,

³⁷⁰ See *supra* text accompanying notes 331-36.

³⁷¹ In fact, Sen. Gerald Neal's intention in sponsoring the KRJA may have been simply to hold prosecutors to a higher standard, not give defense lawyers a usable litigation weapon, as his comments shortly after the Act's passage suggest: "I would be amazed if anyone successfully avoids the death penalty under this legislation [. . .] prosecutors are going to be so careful as they decide whether to seek death, that they'll build such a tight case for it, that no judge will rule against them." John Cheves, *If Death Penalty Has Taint of Race, Can Law Remove It?*, THE LEXINGTON HERALD-LEADER, Feb. 15, 1998, at A1.

³⁷² See discussion *infra* Part II.C.

³⁷³ See *id.*

³⁷⁴ See Patton interview, *supra* note 166 (noting that most Kentucky counties have almost entirely White residents); KENTUCKY QUICKFACTS, *supra* note 71.

RACE AND THE DEATH PENALTY

419

scholars have produced a sea of articles and books about the decision, the vast majority finding significant fault with the Court's opinion.³⁷⁵ Among the many scholarly proposals for dealing with the challenge the *McCleskey* Court avoided—that of crafting a framework for deciding whether claims that racial disparities in capital proceedings represent constitutional violations in individual cases—perhaps the most straightforward and powerful proposal is simply to treat these claims like equal protection claims in other areas of the law.³⁷⁶

Under established Supreme Court equal protection doctrine, a party claiming discrimination must show racially discriminatory intent or purpose behind the decision at issue to make out a violation of the Equal Protection Clause³⁷⁷ But that party need not prove discriminatory intent by direct evidence.³⁷⁸ Rather, as the Court stated in *Village of Arlington Heights v. Metropolitan Division Corporation*, “invidious discriminatory purpose may often be inferred from the totality of the relevant facts.”³⁷⁹ Judicial

³⁷⁵ See, e.g., Bynam, *supra* note 22; Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988); SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 159-211 (1989); Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L.REV. 509, 510 (1994); Bright, *supra* note 19, at 480. Even Justice Powell, the author of the *McCleskey* opinion, came to wish that he could change his vote in the case. David Von Drehle, *Retired Justice Changes Stand on Death Penalty*, WASH. POST, June 10, 1994, at A1.

³⁷⁶ See, e.g., Blume et al., *supra* note 18, at 1778-80 (noting that “*McCleskey* purports to be rooted in and consistent with standard equal protection analysis” and asserting that “no reason exists to believe that prosecutorial decisions to seek the death penalty are exempt from the dictates of the Equal Protection Clause”).

³⁷⁷ See *Washington v. Davis*, 426 U.S. 229, 241 (1976).

³⁷⁸ See, e.g., *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977). In *Arlington Heights*, a real estate developer that had purchased land to build racially-integrated low-income housing sued after local authorities refused to rezone the land from single-family to multi-family. *Id.* at 254. The developer claimed that the village's action was racially discriminatory and violated the Equal Protection Clause of the Fourteenth Amendment. *Id.*

³⁷⁹ *Id.* at 266; see also *Washington v. Davis*, 426 U.S. at 242 (stating that “an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily upon one race than another”).

analysis therefore “demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.”³⁸⁰

Thus if courts take equal protection doctrine seriously in the criminal context, they should apply an equivalent burden-shifting scheme to claims of racial discrimination in capital proceedings.³⁸¹ For example, if a capital defendant can show by rigorous statistical analysis that the district attorney who prosecuted him has a racially disparate record of seeking death, the court should recognize that the defendant has fulfilled the first two *Arlington Heights* factors, showing “the impact of the official action” and “[t]he historical background of the decision.”³⁸² If the defendant can show that the district attorney assigned more staff members to, devoted more funds to, or otherwise prioritized the prosecution of a white-victim or black-defendant case, the court should recognize that the defendant has shown “[d]epartures from the normal procedural

³⁸⁰ *Arlington Heights*, 429 U.S. at 266. The *Arlington Heights* Court listed several factors to consider in testing for discriminatory intent: “the impact of the official action,” “[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes,” “[d]epartures from the normal procedural sequence,” “substantive departures . . . particularly if the factors usually considered important by the decision maker strongly favor a decision contrary to the one reached,” and “contemporary statements by members of the decision-making body.” *Id.* at 267-68. The Court made clear that this list is not exhaustive. *Id.* at 268. If factors such as these are convincing, a court may find that the party claiming discrimination has made out a prima facie case of discriminatory intent. See *Washington v. Davis*, 426 U.S. at 241; *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972). The burden then shifts to the other party to rebut the presumption of unconstitutional action by showing that race-neutral criteria or procedures produced the racially disparate effect. *Washington v. Davis*, 426 U.S. at 241. Burden-shifting schemes make a great deal of sense in the context of racial discrimination claims, since discriminatory actors can always be expected to deny invidious intent (whether or not they are even conscious of having such intent). See Evan Tsen Lee & Ashutosh Bhagwat, *The McCleskey Puzzle: Remediating Prosecutorial Discrimination Against Black Victims in Capital Sentencing*, 1998 SUP. CT. REV. 145, 154 (1998) (citing Charles Lawrence’s thesis that decision-making influenced by racial factors often occurs unconsciously and arguing that “the government actor’s conscious mental state should be irrelevant to the constitutional analysis”).

³⁸¹ See Blume et al., *supra* note 18, at 1778-80.

³⁸² See *Arlington Heights*, *supra* notes 378, 380.

RACE AND THE DEATH PENALTY

421

sequence.”³⁸³ Finally, if the defendant can show that the district attorney decided to seek death in white-victim or black-defendant cases while eschewing capital charges in black-victim or white-defendant cases with essentially the same aggravating and mitigating factors, the court should recognize that the defendant has shown “substantive departures.”³⁸⁴

These factors, taken together, should establish a prima facie case, which the prosecution should be required to rebut with evidence that conclusively demonstrates race-neutral factors and explanations for the racially disparate effects the defendant showed. Failure to rebut the prima facie case should result in a finding of racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.³⁸⁵

This proposal focuses on the district attorney (or the Commonwealth’s Attorney, as the case may be) for two important reasons. First, unlike jurors, district attorneys are repeat actors in the system, so their decisions can be tracked over time. Second, a showing of what the particular district attorney in a defendant’s county has done over time has substantially more probative force than a statewide showing, as in *McCleskey*.³⁸⁶ Finally, it should be noted that this proposal would not restrict relief to those defendants who could show racial discrimination in their own cases. If, in a given case, a court finds that race has operated as a factor in capital proceedings in that county, then the system that the defendant faces operates unconstitutionally, and the defendant should not

³⁸³ *See id.*

³⁸⁴ *See id.*

³⁸⁵ This proposal essentially tracks the burden-shifting scheme the Court has applied in the contexts mentioned *infra* Part I.C: grand jury venires, peremptory strikes of jurors, voting rights, and employment. See *supra* note 67. Even in the *McCleskey* opinion, the Court cited with approval *Bazemore v. Friday*, 478 U.S. 385 (1986) for the proposition that it “has accepted statistics in the form of multiple-regression analysis to prove statutory violations under Title VII of the Civil Rights Act of 1964.” *Id.* at 400-1. Justice Blackmun, in his *McCleskey* dissent, advocated a similar burden-shifting scheme. 481 U.S. at 351-61. In its broad outlines, the proposal sketched out above also differs little from the Kentucky Racial Justice Act. But the KRJA, while establishing a burden-shifting scheme and allowing statistical proof, is hamstrung by highly restrictive language, as discussed *infra* Part IV.A.

³⁸⁶ *See Blume et al., supra* note 18, at 1794.

have to prove that the decisions in his own case were discriminatory.³⁸⁷

CONCLUSION

The Kentucky Racial Justice Act and the New Jersey Supreme Court's Proportionality Review Project came about essentially as experiments in addressing conditions some perceived to be unjust. In neither state was there broad agreement that racial disparity in capital proceedings was a significant problem that required remediation. Yet in each state, key government decision makers, unlike their counterparts in the vast majority of death penalty states, responded to racial disparity with official action. These official responses were shaped by the unique legal-political cultures of the two states, but both were motivated to some degree by the desire to conform state practice to the ideal inscribed on many American courthouses: Equal Justice Under Law. These official responses have also been curtailed by the same legal-political cultures, in which a significant portion of voters and politicians support the death penalty for the perpetrators of the most heinous crimes.³⁸⁸

³⁸⁷ The foregoing proposal does not necessarily preclude state supreme court proportionality review. Indeed, state supreme courts could still undertake rigorous systemic proportionality reviews, in the spirit of New Jersey's proportionality review project. Courts could vacate any death sentence that contributes to a clear, disproportionate statewide pattern unexplained by nonracial factors, as the federal Racial Justice Act would have provided. Racial Justice Act, H.R. 4017, 103d Cong. § 2921(d)-(e) (1994). This review could serve as a second safeguard, monitoring the capital punishment system with a statewide perspective difficult to attain at the county level. The difficulties of such review, however, have been made manifest by the New Jersey experience. Conducting a truly rigorous review is expensive; it slows down the appellate process significantly; it annoys and alienates death penalty supporters in the executive and legislative branches; and it does not guarantee that any clear conclusions will emerge, which risks undermining public confidence in the court's decision to undertake the project in the first place. If a burden-shifting scheme were put in place and conscientiously applied, both to pre-trial motions and claims on appeal, statewide systemic proportionality review should not be necessary.

³⁸⁸ See *supra* note 369. DEATH PENALTY INFORMATION CENTER, SUMMARIES OF RECENT POLL FINDINGS, at <http://www.deathpenaltyinfo.org/>

RACE AND THE DEATH PENALTY

423

The death penalty functions as a powerful symbol in American public life.³⁸⁹ It simplifies complex social issues, unites many people in the belief that something is being done about an important problem, and reassures anxious communities.³⁹⁰ More disturbingly, among white Americans, support for the death penalty strongly correlates with anti-black prejudice.³⁹¹ Of course this does not mean that all whites who support the death penalty consciously do so because of racial animus. But the nation's painful experience with slavery, state sanctioned racial bias, racially motivated violence, and extrajudicial executions makes the link between anti-black prejudice and death penalty support—at least on an unconscious level—difficult to dismiss. Given this context, any state institutional response to the specter of racial discrimination in capital proceedings, whether legislative, judicial, executive, or a combination of the three, must be made with the understanding that it is only one limited step down a long and arduous road. A decent respect for reality requires us to

article.php?scid=23&did=210#NewJersey (last visited January 28, 2005) (showing death penalty support in New Jersey at 63 percent in 1999).

³⁸⁹ David Baldus, *When Symbols Clash: Reflections on the Future of the Comparative Proportionality Review of Death Sentences*, 26 SETON HALL L. REV. 1582 (1996).

³⁹⁰ *Id.*

³⁹¹ See Barkan & Cohn, *supra* note 16, at 205-6 (finding that White support for the death penalty was associated with antipathy to Blacks and with racial stereotyping), Soss et al. *supra* note 16, at 414 (finding that racial prejudice had the largest influence of any factor in the analysis). The 1994 study by Barkan & Cohn was based on data in the 1990 General Social Survey, a random sample of the U.S. adult population conducted almost annually since 1972. Barkan & Cohn, *supra* note 16, at 203. Barkan & Cohn's anti-black prejudice variable was constructed by selecting several survey questions the researchers thought indicative of prejudice, such as the degree to which respondents favored or opposed "living in a neighborhood where half your neighbors were Blacks" and "having a close relative or family member marry a Black person." *Id.* The 2003 study by Soss et al. was based on data from the 1992 American National Election Study. In addition, there are many measures of racially differential beliefs about the death penalty; for example, in a recent poll, 58 percent of African-Americans, but only 35 percent of white Americans, agreed that the death penalty "is applied . . . unfairly in this country today." UNITED STATES DEP'T. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2004, Table 2.52, *Attitudes Toward Fairness of the Application of the Death Penalty*, available at <http://www.albany.edu/sourcebook/pdf/t252.pdf>.

acknowledge that significant progress against racial disparity in the imposition of the death penalty will be achieved only after a candid public assessment of the death penalty as public policy, as well as a concerted effort against the “illness of racism”³⁹² in American society as a whole.

³⁹² Lawrence, *supra* note 14, at 321.