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PREFERRING WHITE LIVES: THE RACIAL ADMINISTRATION OF THE DEATH PENALTY IN MARYLAND

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I. THE HISTORICAL INFLUENCE OF RACE IN THE ADMINISTRATION OF THE DEATH PENALTY

The Maryland General Assembly enacted the current Death Penalty Law in 1978.¹ However, Maryland's experience with the death penalty dates back to early colonial times.² In Colonial Maryland, a variety of crimes were punishable by death,³ including grand larceny, then defined as theft of property worth "over twelve pence."⁴ This continued the English practices of the day.⁵ By 1810, Maryland's General Assembly had limited the death penalty to the "crimes of first-degree murder, rape, arson, and treason."⁶ Extrajudicial executions, however, were common. From the late nineteenth century through the mid-twentieth century, at least twenty-nine Marylanders—nearly all of them African-American—were lynched.⁷

By the time data on the legal administration of the death penalty was available, it became apparent that the selection of who lived and died was heavily skewed by race. Between 1923 and 1962, the State executed 79 men, of whom "62 were Negro and 17 were white."⁸ Twenty-one of the Negroes were executed for rape, 41 for

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1. 1978 Md. Laws 6.

2. COMMITTEE ON CAPITAL PUNISHMENT, REPORT OF THE COMMITTEE ON CAPITAL PUNISHMENT TO THE LEGISLATIVE COUNCIL OF MARYLAND 5 (1962) [hereinafter REPORT OF THE COMMITTEE ON CAPITAL PUNISHMENT].

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 6.

7. Avis Thomas-Lester, *Descendants Share the Legacy of Lynching: Linked by Grief, Relatives Meet at Capitol*, WASH. POST, July 7, 2005, at T08.

8. REPORT OF THE COMMITTEE ON CAPITAL PUNISHMENT, *supra* note 2, at 8; WILLIAM J. BOWERS, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982*, at 446-48 (1984).

murder.⁹ These experiences prompted a 1962 legislative committee on capital punishment to comment, in understated fashion, that “the Negro has had a greater chance of execution upon *sentence* of death than . . . the white offender”¹⁰ By a 5-2 vote, the Capital Punishment Committee of the Legislative Council concluded that capital punishment ought to be abolished.¹¹ It recommended a phased-in approach: “that the Legislature accept the principle of abolition as a goal and adopt a plan for the gradual removal of capital punishment in our State.”¹²

By 1972, the United States Supreme Court had reached a similar conclusion to that of the Capital Punishment Committee under the United States Constitution. In *Furman v. Georgia*,¹³ the Supreme Court held the death penalty unconstitutional, in major part, because it discriminated in its administration against racial minorities and the poor.¹⁴ In 1976, after many states had re-enacted death penalty statutes they contended would eliminate discrimination based on race (as well as other factors), the Supreme Court reconsidered the issue and upheld the constitutionality of the death penalty. In *Gregg v. Georgia*,¹⁵ the Supreme Court based its conclusion on a prediction, stating that “the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority

9. *Id.* During the mid-twentieth century, Maryland’s governors made substantial use of the commutation power in capital cases. During 1936-1961, of 102 prisoners sentenced to death, “57 were executed, 34 were commuted to life, 9 received a new trial, [and] 2 committed suicide” *Id.* at 10-11.

10. REPORT OF THE COMMITTEE ON CAPITAL PUNISHMENT, *supra* note 2, at 35 (emphasis added). The Committee found that unmarried offenders, as compared to married offenders, also had a greater chance of being executed for comparable crimes. *Id.*

11. *Id.* at 38.

12. *Id.*

13. 408 U.S. 238 (1972).

14. Justice Marshall reviewed the extensive history of race discrimination in the administration of the death penalty, concluding that “Negroes [have been] executed far more often than whites in proportion to their percentage of the population.” 408 U.S. at 364 (Marshall, J., concurring). Justice Stewart said that “if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.” *Id.* at 310 (Stewart, J., concurring). Justice Douglas contended that the discretion of decisionmakers in capital cases often resulted in discrimination “against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority,” and preferences for “those who by social position may be in a more protected position.” *Id.* at 255 (Douglas, J., concurring).

15. 428 U.S. 153 (1976).

is given adequate information and guidance.”¹⁶ Unfortunately, this prediction has not proven to be accurate.

II. THE CONTEMPORARY INFLUENCE OF RACE IN THE ADMINISTRATION OF THE DEATH PENALTY

As of October 13, 2004, there were seven men on death row in Maryland.¹⁷ All seven, of which five were black, had been convicted of killing whites.¹⁸ These profiles suggest that race, especially the race of the victim, still plays a significant and unacceptable role in the administration of the ultimate punishment in Maryland. A 2003 statewide survey confirms this theory. Prior to analyzing this study, we review the concerns that led to it.

In 1992, Governor William Donald Schaefer convened a commission to review certain aspects of Maryland’s death penalty law, including whether it was being fairly imposed. The *Report of the Governor’s Commission on the Death Penalty*, issued in November, 1993, was the first comprehensive collection of data on the operation of Maryland’s death penalty.¹⁹ The Commission had conducted regional hearings to consider the views and experiences of Maryland’s citizens and experts. A number of those who provided information to the Commission complained “that the present system discriminates against minorities and the poor.”²⁰ These concerns prompted the Commission to examine the available sentencing data. Although the data were incomplete, they indicated there had been disparities in the race of the defendants and victims in the frequency with which the death penalty had been sought and imposed.²¹ As a result, the

16. *Id.* at 195.

17. Julie Bykowitz & Jennifer McMenamin, *Death Penalty Review Possible: Judge Sets Execution Date then Issues Stay for Black Man: Defense Plans Racial Bias Appeal: UM Study to Be Used to Contest Md. Capital Punishment Law*, BALT. SUN, Oct. 22, 2004, at 1B.

18. *Id.*; see also Lawrence Hurley, *Prince George’s County Prosecutors to Seek Death Warrant in Convicted Murderer’s Case*, DAILY RECORD, Oct. 13, 2004.

19. GOVERNOR’S COMMISSION ON THE DEATH PENALTY, REPORT OF THE GOVERNOR’S COMMISSION ON THE DEATH PENALTY: AN ANALYSIS OF CAPITAL PUNISHMENT IN MARYLAND, 1978-1993 (1993) [hereinafter GOVERNOR’S COMMISSION REPORT].

20. *Id.* at 79.

21. *Id.* at 102-05 & app. B.

Commission observed that “racial disparities in [the death penalty’s] implementation remain a matter of legitimate concern.”²²

In 1996, Governor Parris Glendening appointed a Task Force on the Fair Imposition of Capital Punishment in Maryland to undertake “further inquiry...to determine the causes of racial disparities in the administration of the death penalty in Maryland.”²³ However, the Task Force was given no budget and had only five months to complete its inquiry. Nevertheless, it concluded “that the high percentage of African-American prisoners under sentence of death and...the low percentage of prisoners under sentence of death whose victims were African-American remains a cause for concern,” and “the potential for race to constitute a factor in the administration of justice exists.”²⁴

During the 2000 General Assembly session, Governor Glendening committed \$225,000 to fund an empirical study to collect all of the data necessary to determine whether race operates as a factor in Maryland capital sentencing.²⁵ Dr. Raymond Paternoster, a Professor with the University of Maryland Department of Criminology and Criminal Justice, was assigned the task of conducting the study. In May of 2002, Governor Glendening imposed a moratorium on executions in the State pending the release of the Paternoster Study.²⁶ He acted out of continuing concern that the death penalty was being administered in an arbitrary and discriminatory manner. That concern arose from an interim study on the issue entitled: *Race of Victim and Race of Defendant Disparities in the Administration of Maryland’s Capital Charging and Sentencing System (1978-1999): Preliminary Finding*.²⁷ Professors David C. Baldus and George Woodworth of the

22. *Id.* at 201. The Commission lacked the resources to conduct the sophisticated statistical analysis needed to reveal whether factors other than race accounted for the disparities. The Commission also found that “[c]apital prosecutions under Maryland’s 1978 death penalty statute are distributed among the State’s twenty-four charging jurisdictions in numerically uneven fashion.” *Id.* at 198. Noting that “a death sentence should be proportionate to the gravity of the murder committed and not dependent on its geographical location,” the Commission favored the adoption of measures that would achieve “a more uniform enforcement of the death penalty.” *Id.* at 200-01.

23. Maryland Exec. Order No. 01.01.1996.16 (1996).

24. REPORT OF THE TASK FORCE ON THE FAIR IMPOSITION OF CAPITAL PUNISHMENT IN MARYLAND 39, 41 (1996).

25. Sarah Koenig, *Doubts on Halt to Death Penalty: 1-Year Moratorium in Senate Bill Falls Short, Professor Says*, BALT. SUN, Apr. 5, 2001, at 1B.

26. Francis X. Clines, *Death Penalty is Suspended in Maryland*, N.Y. TIMES, May 10, 2002, at A20.

27. David C. Baldus & George Woodworth, *Race of Victim and Race of Defendant Disparities in the Administration of Maryland’s Capital Charging and Sentencing System*

University of Iowa had prepared this interim study documenting the effects of race based on data gathered by the Governor's Commission on the Death Penalty and the Maryland Office of the Public Defender.²⁸ The interim study found that it was more likely that the cases of Maryland defendants accused of killing white victims would advance to penalty proceedings.²⁹ This was "principally a product of prosecutorial decisions that advance cases to a penalty trial."³⁰ The interim study also indicated that it was more likely yet that the defendants in the white-victim cases would be sentenced to death.³¹ The black defendant/white victim combination was the most toxic of all; this combination was much more likely to produce a death sentence than any other.³²

In 2003, Dr. Paternoster published the results of the largest empirical study of capital cases in state history.³³ Paternoster's study encompassed all first- and second-degree murder convictions from 1978-1999 and a number of additional cases in which defendants were charged with, but not convicted of, first or second degree murder.³⁴ An understanding of the study requires a basic knowledge of the extensive process of capital cases in Maryland, which includes all of the typical criminal procedures along with the added layer of death penalty procedures.

The process begins with a notice from the prosecutor that the State intends to seek the death penalty.³⁵ There are no statewide standards that govern or even inform the prosecutorial decision. The only practical requirement is that there must be adequate evidence, in the prosecutor's view, that the homicide was "aggravated" in one of the ways prescribed by the statute,³⁶ otherwise, prosecutorial

(1976-1996): Preliminary Finding (Feb. 14, 2001) (unpublished manuscript, on file with University of Maryland Law Journal of Race, Religion, Gender and Class).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. Raymond Paternoster et al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978-1999*, 4 MARGINS 1, 1 (2004) [hereinafter PATERNOSTER ARTICLE]. The study was commissioned by the Governor of Maryland. It was comprehensive. Dr. Paternoster and his associates reviewed extensive data, including prisoner files, presentence investigations, prosecution files, and reports prepared by trial judges in capital cases pursuant to Md. Rule 4-343, among other data.

34. *Id.* at 15-16.

35. MD. CODE ANN., CRIM. LAW § 2-202(a) (LexisNexis 2002). The death notice must be filed "at least 30 days before trial."

36. *Id.*

discretion is unlimited. This gives the Death Penalty Law, with the ultimate punishment that it allows, the quality of a local ordinance. Some prosecutors seek death penalties regularly, others rarely and some, not at all.³⁷ For example, of the 76 death sentences handed down in Maryland since 1978, 34 (45 percent) were imposed in Baltimore County, a jurisdiction in which the prosecutor regularly seeks the death penalty despite only 12 percent of the State's death-eligible cases occurring in Baltimore County.³⁸ Eight of the 12 prisoners on death row as of January, 2004 were convicted in Baltimore County.³⁹ By comparison, 44 percent of the State's death eligible cases occur in Baltimore City, yet Baltimore City only hands down 13 percent of the state's death sentences.⁴⁰

There are also procedural differences in the guilt/innocence trials of non-capital and capital trials. For example, jury selection is more exhaustive in death penalty cases (the defendant is given 20 peremptory challenges and the State is given 10 for each defendant).⁴¹ However, most of the special procedures in a death penalty case are part of the sentencing proceeding. For example, a defendant has the right to have a jury impose the sentence, even if the guilt/innocence phase was before a judge or the defendant pled guilty.⁴² In addition, in a capital trial, the decision-maker must consider whether the defendant is death-eligible, e.g., because the defendant killed with his own hands (is a first degree principal), and if so, he must then consider and weigh aggravating against mitigating evidence before deciding whether to impose one of three sentences: death, life without parole, or life with parole.⁴³ The rules make a broad array of evidence admissible.⁴⁴

Following the presentation of evidence and arguments, the decision-maker uses a sentencing form, pursuant to Maryland Rule 4-343, as guidance in making a decision and/or to record its decision.

37. PATERNOSTER ARTICLE, *supra* note 33, at 56 fig. 5.

38. *See Id.* at 24, 28.

39. *Id.* at 1-2.

40. *Id.* at 28.

41. MD. R. 4-313(2). A defendant facing the possibility of life without parole also receives twenty peremptory challenges.

42. MD. CODE ANN., CRIM. LAW §2-303(c) (LexisNexis Supp. 2005).

43. MD. CODE ANN., CRIM. LAW §2-303 (LexisNexis Supp. 2005).

44. The rules leave broad discretion for evidence in capital sentencing. Specifically admissible are mitigating or aggravating circumstances, prior criminal convictions or lack thereof, the presentence investigation report, and "any other evidence the court finds to have probative value and relevance to sentencing, if the defendant has a fair opportunity to rebut any statement." MD. CODE ANN., CRIM. LAW §2-303(e)(1)(v) (LexisNexis Supp. 2005).

The form records decisions about whether the defendant was an eligible first-degree principal, whether the defendant was exempt from the death penalty because of mental retardation, which aggravating circumstances and mitigating circumstances were established, and what the sentence will be.⁴⁵ The jury then sentences the defendant, and the judge cannot override their decision. If the jury cannot decide unanimously, the sentence cannot be death.⁴⁶ At the end of the proceeding, the trial judge must complete a report about the case.⁴⁷

The Paternoster Study identified 1,311 death eligible cases from a pool of approximately 6,000 homicides.⁴⁸ In 353 of those cases, prosecutors filed death notices.⁴⁹ Prosecutors later withdrew 140 of these notifications.⁵⁰ Of the remaining 213 cases, 180 reached the penalty phase, and in 76 of these cases, the defendant was sentenced to death.⁵¹ The Paternoster Study concluded that a person charged with a death eligible crime has roughly a one-in-six (16 percent) chance of being a defendant in a capital proceeding,⁵² and one-in-seventeen (5.8 percent) chance of receiving a death sentence.⁵³ However, these risks are not distributed equally amongst criminal defendants as race is a factor throughout the process.

The victims were white in only 44 percent of Maryland's death eligible cases.⁵⁴ Yet, in 66% of the cases in which prosecutors gave death notifications, the victims were white, and in 80% of the cases in which the death penalty was imposed, the victims were white.⁵⁵ Moreover, prosecutors filed death notices over twice (2.5 times) as often when a white person was killed as when a black person was

45. For a complete overview of the form, see GOVERNOR'S COMMISSION REPORT, *supra* note 19, at 35-44.

46. MD. CODE ANN., CRIM. LAW § 2-303(j)(2) (LexisNexis Supp. 2005).

47. MD. R. 4-343(k).

48. PATERNOSTER ARTICLE, *supra* note 33, at 18-19. The study defined "death eligible" as when (1) "[t]he state's attorney filed a notice of an intention to seek a death sentence, even if that notice was later withdrawn unilaterally or in exchange for a plea" or when a panel of experienced criminal law attorneys determined (2) "[t]he facts of the case clearly established that a first-degree murder was committed, the defendant was the principal in the first degree (or met the principle in the second-degree exception), the defendant was eligible by age at the time of the offense, the defendant was not mentally retarded at the time of the offense, and the murder included at least one statutory aggravating circumstance." *Id.* at 18.

49. *Id.* at 20; MD. CODE ANN., CRIM. LAW §2-202(a) (LexisNexis 2002).

50. PATERNOSTER ARTICLE, *supra* note 33, at 20.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 25.

55. *Id.*

killed (42% versus 17%).⁵⁶ Worse, it was more than five times more likely that a death sentence would be imposed when the victim was white.⁵⁷ Death sentences were imposed in 12% of the death eligible cases when a white person was killed, as compared to 2% of the cases when a person of color was killed.⁵⁸

After their initial analysis of the data, Dr. Paternoster and his associates took a series of statistically accepted steps to determine whether the outcomes in these cases could be explained by factors other than race. They identified 123 “covariates”—factors that might have played a role in the sentencing outcomes.⁵⁹ In addition to these covariates were “county factors,” which accounted for disparities that were the results of different prosecutorial policies in the 23 political subdivisions in Maryland.⁶⁰ For example, prosecutors in Baltimore County, which is a predominantly white jurisdiction, regularly seek the death penalty, while prosecutors in Baltimore City, which is disproportionately black, rarely do so.⁶¹

After using multi-variable logistic regression models, Dr. Paternoster and his associates looked at the disparities when factoring in the race of the victim and defendant. Dr. Paternoster found that the race of the victim continues to play a statistically disproportionate role, although the extent of the disparities was reduced. In sum, there was a 1.7 greater chance that a person who allegedly killed a white victim

56. *Id.* at 26-27.

57. *Id.* at 26.

58. RAYMOND PATERNOSTER ET AL., AN EMPIRICAL ANALYSIS OF MARYLAND’S DEATH SENTENCING SYSTEM WITH RESPECT TO THE INFLUENCE OF RACE AND LEGAL JURISDICTION 22 & tbl.2 (2003), available at <http://www.newsdesk.umd.edu/pdf/finalrep.pdf> [hereinafter PATERNOSTER STUDY]; see also RAYMOND PATERNOSTER ET AL., AN EMPIRICAL ANALYSIS OF MARYLAND’S DEATH SENTENCING SYSTEM WITH RESPECT TO THE INFLUENCE OF RACE AND LEGAL JURISDICTION: EXECUTIVE SUMMARY 17 & fig.4 (2003), available at <http://www.newsdesk.umd.edu/pdf/exec.pdf>.

59. PATERNOSTER ARTICLE, *supra* note 33, at 58 tbl.1.

60. *Id.*

61. PATERNOSTER ARTICLE, *supra* note 33, at 28: Baltimore County homicides comprise only .12 of all death eligible homicides in the state but .28 of the death notifications, .39 of all notifications that “stick”, .42 of all penalty trials, and .45 of all death sentences. Baltimore County, therefore, which only contributed 12% to the total number death eligible homicides in the state from 1978-1999, was responsible for almost one-half of the total number of death sentences that were imposed.

Id. Translating these data, after adjusting the statistics by discounting for other factors, “the probability that a notification to seek death will be filed in Baltimore County is over 13 times higher than in adjacent Baltimore City, . . . five times greater than . . . in Montgomery County, and three times greater than . . . in Anne Arundel County. *Id.* at 33.

would receive a death notice as compared to a person who allegedly killed a black victim.⁶² Thus, a person who kills a white victim is more than three times as likely to get the death sentence than a person who kills a non-white victim.⁶³ When race of the defendant was factored in, the disparities grew in even more significant respects. Black defendants who kill white victims are more than twice as likely to receive death notifications as black offenders who kill black victims.⁶⁴ Black defendants who kill white victims are 2.5 times more likely to be sentenced to death than whites who kill whites, and they are 3.6 times more likely to be sentenced to death than blacks who kill blacks.⁶⁵

The statistical bottom line is this: after controlling for all other variables, including different jurisdictional practices, it was more than twice as likely that a defendant would be sentenced to death when the victim was white than when the victim was black.⁶⁶ In black defendant/white victim cases, it was 1.8 times more likely that prosecutors would give death notifications, and 2.6 times more likely that a death sentence would be imposed.⁶⁷

Three years before the Paternoster Study was released, two judges of the Maryland Court of Appeals, including its Chief Judge, concluded that there is a “strong argument” that “there is little or no rationality underlying the actual imposition of the death penalty in Maryland, and that the penalty disproportionately falls on poor African-American males accused of murdering white victims.”⁶⁸ This was based on over two decades of judicial experiences with the death penalty.

The judges added that, although in theory the Maryland Death Penalty Law is supposed to apply to “the more heinous first degree murders,” there is “a strong argument...that, in practice, the statute has

62. *Id.* at 37.

63. *Id.* at 37-38.

64. *Id.* at 39.

65. *Id.* at 39-40.

66. *Id.* at 39.

67. *Id.* at 92 tbl.9G. The Paternoster Study is consistent with many others throughout the country. See John H. Blume et al., *Post-McCleskey Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771, 1774 (1998) (“There is no question that both the historical and the current imposition of the death penalty in this country are racially discriminatory. Nearly every study, including the federal government’s General Accounting Office review of twenty-eight studies, has come to this conclusion.”).

68. *Colvin-El v. State*, 359 Md. 49, 55, 753 A.2d 13, 16 (2000) (Eldridge, J., joined by Bell, C.J., dissenting).

utterly failed to produce this result,” but rather “that, in Maryland, “this unique penalty” has been “wantonly and . . . freakishly imposed.”⁶⁹ As described above, the Paternoster Study confirmed the accuracy of these judicial comments.

III. RACE-BASED ARGUMENTS UNDER THE UNITED STATES CONSTITUTION

A. *The Supreme Court's Decision in McCleskey v. Kemp*

In *McCleskey v. Kemp*,⁷⁰ a deeply divided Supreme Court held that a statewide statistical study indicating that race played a factor in death penalty determinations was insufficient evidence to establish that McCleskey's death sentence had been unconstitutionally imposed under the Eighth and Fourteenth Amendments to the United States Constitution.⁷¹ Justice Powell, joined by four Justices, delivered the opinion of the Court, one that he would later come to regret.⁷² The four remaining justices dissented in three separate opinions.

McCleskey was convicted of murder and sentenced to death after his involvement in an armed robbery during which a police officer was killed.⁷³ In a subsequent federal *habeas corpus* proceeding, McCleskey offered a statistical study, which demonstrated race-based disparities in Georgia's administration of the death penalty, in support of his equal protection and cruel and unusual punishment arguments.⁷⁴ The Majority of the Court said that the study did not contain particularized evidence that the “decisionmakers in [his] case acted with discriminatory purpose.”⁷⁵ Justice Powell acknowledged that the Court had “accepted statistics as proof of intent to discriminate in certain limited contexts.”⁷⁶ He gave two examples, jury venire-selection and Title VII cases:

69. *Id.* (quoting *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring)).

70. 481 U.S. 279 (1987).

71. *Id.*

72. See *infra* Part III(A)(2). See also Linda Greenhouse, *Lewis Powell, Crucial Centrist Justice, Dies at 90*, N.Y. TIMES, Aug. 26, 1988, at A1.

73. *McCleskey*, 481 U.S. at 283-85.

74. *Id.* at 286.

75. *Id.* at 297.

76. *Id.* at 293.

First, this Court has accepted statistical disparities as proof of an equal protection violation in the selection of the jury venire in a particular district. Although statistical proof normally must present a “stark” pattern to be accepted as the sole proof of discriminatory intent under the Constitution, “because of the nature of the jury-selection task,...we have permitted a finding of constitutional violation even when the statistical pattern does not approach [such] extremes.” Second, this Court has accepted statistics in the form of multiple-regression analysis to prove statutory violations under Title VII of the Civil Rights Act of 1964.⁷⁷

Justice Powell distinguished these two examples, reasoning that venire-selection and Title VII cases involve discrete decisions and contain contexts in which the facts are more limited and there are fewer variables involved in the decisions.⁷⁸ Moreover, in these cases, “the decisionmaker has an opportunity to explain the statistical disparity.”⁷⁹ By comparison, the study in *McCleskey* implicated decisions of prosecutors, judges and juries statewide, making it difficult for the state actors in *McCleskey*’s case to respond to it. Justice Powell said, for example, that “[r]equiring a prosecutor [in a single jurisdiction] to rebut a study that analyzes the past conduct of scores of prosecutors is quite different from requiring a prosecutor to rebut a contemporaneous challenge to his own acts.”⁸⁰

This reasoning becomes more attenuated, however, as the geographical scope of the race discrimination claim shrinks, and as it focuses on the actions of a more limited number of key actors, and especially on the decisions of prosecutors. Such a race-based death penalty claim approximates a race-based jury selection claim—“the selection of the jury venire in a particular district”⁸¹—which Justice Powell acknowledged can be proved with statistics because it involves discrete decisions, a limited context, and fewer variables. We return to this point in Part IV(B), in which we argue that Maryland’s courts

77. *Id.* at 293-94 (quoting *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 & n.13 (1977) and citing *Bazemore v. Friday*, 478 U.S. 385, 400-01 (1986) (Brennan, J., concurring in part)) (footnotes omitted).

78. *Id.* at 294-95.

79. *Id.* at 296.

80. *Id.* at 296 n.17 (citing *Batson v. Kentucky*, 476 U.S. 79 (1986)).

81. *Id.* at 293.

should apply the constitutional rules governing race-based jury selection claims to the findings of the Paternoster Study.

In rejecting McCleskey's Eighth Amendment "cruel and unusual punishment" argument, Justice Powell described a variety of post-*Furman* procedural protections that states, including Georgia, had developed to protect capital defendants from arbitrary decisions.⁸² His ultimate conclusion, however, was based on a judgment—that the study's evidence of race discrimination did not pose an "unacceptable risk of racial prejudice influencing capital sentencing decisions."⁸³ In other words, Justice Powell held that the study "does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process."⁸⁴ Rather, in Powell's view, at best, the study "indicate[d] a discrepancy that appears to correlate with race."⁸⁵

Dissenting, Justice Brennan criticized the Majority for upholding a system where "lawyers must tell their clients that race casts a large shadow on the capital sentencing process."⁸⁶ Justice Brennan argued that it was irrelevant that McCleskey could not *prove* that race was a factor in his sentence because the constitutional violation was the "risk of the imposition of an arbitrary sentence, rather than the proven fact of one."⁸⁷ Justice Brennan disagreed with the Court's analysis, stating that "[d]efendants challenging their death sentences [] never have had to prove that impermissible considerations have actually infected sentencing decisions."⁸⁸ Justice Brennan argued that the proper Eighth Amendment test is to determine whether there is a "pattern of arbitrary and capricious sentencing."⁸⁹

Justice Blackmun also dissented, with the biting comment that the majority gave "a new meaning to our recognition that death is different" by applying a "*lesser* standard of scrutiny under the Equal Protection Clause."⁹⁰ He said that "concerns" that race had played a role in McCleskey's death sentence "are central not only to the principles underlying the Eighth Amendment, but also to the principles

82. *Id.* at 303-04.

83. *Id.* at 309.

84. *Id.* at 313.

85. *Id.* at 312.

86. *Id.* at 321-22 (Brennan, J. dissenting).

87. *Id.* at 322 (Brennan, J. dissenting) (citing *Furman v. Georgia*, 408 U.S. 238 (1972)).

88. *Id.* at 324 (Brennan, J. dissenting).

89. *Id.* at 323 (Brennan, J. dissenting) (quoting *Gregg v. Georgia*, 428 U.S. 153, 195 n.46 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)).

90. *Id.* at 347-48 (Blackmun, J. dissenting).

underlying the Fourteenth Amendment.”⁹¹ He criticized the majority for “treat[ing] the case as if it is limited to challenges to the actions of two specific decisionmaking bodies—the petit jury and the state legislature.”⁹² He argued that “[t]his self-imposed restriction enables the Court to distinguish this case from the venire-selection cases and cases under Title VII of the Civil Rights Act of 1964 in which it long has accepted statistical evidence and has provided an easily applicable framework for review.”⁹³ Justice Blackmun noted that:

A significant aspect of [McCleskey’s] claim is that racial factors impermissibly affected numerous steps in the Georgia capital sentencing scheme between his indictment and the jury’s vote to sentence him to death. The primary decisionmaker at each of the intervening steps of the process is the prosecutor, the quintessential state actor in a criminal proceeding.⁹⁴

Justice Blackmun “concentrate[d] on the decisions within the prosecutor’s office through which the State decided to seek the death penalty and, in particular, the point at which the State proceeded to the penalty phase after conviction,” a step, in his belief, at which “the evidence of the effect of the racial factors was especially strong.”⁹⁵ The Paternoster Study came to the same conclusion.⁹⁶

Justice Blackmun stated that the majority “nowhere explains why this limitation on prosecutorial discretion does not require the same analysis that we apply in other cases involving equal protection challenges to the exercise of prosecutorial discretion.”⁹⁷ He cited *Batson v. Kentucky*,⁹⁸ in which the Court invalidated the use of race-based peremptory challenges to venire jurors, in support of his argument that statistical proof of race discrimination can establish the proponent’s prima facie case.⁹⁹ He concluded that McCleskey had made a “prima facie case of purposeful discrimination by showing that

91. *Id.* at 346 (Blackmun, J. dissenting).

92. *Id.* at 350 (Blackmun, J. dissenting).

93. *Id.* (Blackmun, J. dissenting).

94. *Id.*

95. *Id.* at 351.

96. PATERNOSTER ARTICLE, *supra* note 33, at 48.

97. *McCleskey*, 481 U.S. at 351 n.3 (Blackmun, J. dissenting).

98. 476 U.S. 79 (1986).

99. *Id.* at 94.

the totality of the relevant facts gives rise to an inference of discriminatory purpose” and, thus, the State had the burden to “rebut that case.”¹⁰⁰

Although many courts have read *McCleskey* broadly in rejecting federal constitutional challenges to death sentences based on race discrimination,¹⁰¹ there are reasons to give it a more limited effect.¹⁰² As indicated above, the basis for the majority opinion erodes when the race-based challenge is more limited, both by jurisdiction and actor. Indeed, in a decision after *McCleskey*, the Supreme Court held that courts should “draw on ‘ordinary equal protection standards’” to resolve a claim that a prosecutorial decision is based on race, i.e., a “selective-prosecution claim.”¹⁰³ These standards envision giving significant weight to racial effect in demonstrating a racial purpose.

B. The Reaction to *McCleskey*

The criticism of *McCleskey* has been severe and enduring. Commentators have called it “logically unsound, morally reprehensible, and legally unsupportable,”¹⁰⁴ “grievously flawed,”¹⁰⁵ and “morally inconsistent with the essential principles of

100. *McCleskey*, 481 U.S. at 351-52 (Blackmun, J. dissenting) (quoting *Batson*, 476 U.S. at 94) (footnote omitted).

101. See, e.g., *Coleman v. Mitchell*, 268 F.3d 417, 441 (6th Cir. 2001) (“The Supreme Court in *McCleskey* established a demanding evidentiary standard for finding prosecutorial abuse of discretion in seeking the death penalty”); *Sexton v. French*, 163 F.3d 874, 888 (4th Cir. 1998) (holding that *McCleskey* “set forth very exacting standards for entitlement to constitutional relief based on statistical evidence of race-of-defendant and race-of-victim effects”); *United States v. Webster*, 162 F.3d 308, 334 (5th Cir. 1998) (denying defendant’s discovery request because his statistical evidence did not meet the standard in *McCleskey* “which may allow finding a constitutional violation (or *prima facie* finding thereof) in very limited circumstances if the data presents a ‘stark’ enough picture”); *Davis v. Greer*, 13 F.3d 1134, 1144 (7th Cir. 1994) (holding that the defendant’s statistical studies failed to establish “any constitutional violation and certainly does not provide the exceptionally clear proof of discrimination required by *McCleskey*”); *Harris v. Pulley*, 885 F.2d 1354 (9th Cir. 1989) (upholding California’s capital sentencing scheme despite a statistical study demonstrating racial discrimination); *Fuller v. Georgia State Bd. of Pardons & Paroles*, 851 F.2d 1307 (11th Cir. 1988) (denying defendant’s challenge to a decision by the Georgia Parole Board based on a statistical study).

102. See, e.g., Blume et al., *supra* note 67.

103. *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985)).

104. *The Supreme Court, 1986 Term: Leading Cases*, 101 HARV. L. REV. 119, 158 (1987).

105. Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1389 (1988).

retributivism,”¹⁰⁶ and have argued that it “deprives [the Court] of any credibility as a vehicle for achieving racial justice in our society.”¹⁰⁷

State judges have been critical as well.¹⁰⁸ A unanimous Supreme Court of New Jersey, in *State v. Marshall*,¹⁰⁹ reviewing a claim of racial discrimination under its death penalty law, sharply rejected the state’s suggestion that the Court follow *McCleskey*’s lead. The New Jersey Court said:

New Jersey’s history and traditions would never countenance racial disparity in capital sentencing. As a people, we are uniquely committed to the elimination of racial discrimination. All of our institutions reflect that commitment. We were among the first of the states that enacted a civil rights law. “[Racial] discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State” Our decisional law has always reflected the “strength of the State’s policy” in this area. To countenance racial

106. Thom Bassett, *Risking Cruelty: McCleskey v. Kemp, Retributivism, and Ungrounded Moral Judgment*, 52 SYRACUSE L. REV. 1, 47 (2002).

107. DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 337 (Richard A. Epstein et al. eds., 1992). See, e.g., SAMUEL R. GROSS & ROBERT MAURO, *DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* 159-211 (1989); Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 480 (1995) (referring to *McCleskey* as a “badge of shame upon American’s [sic] system of justice”); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1016 (1988); Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509, 510 (1994); Blume et al., *supra* note 67.

108. Maryland has yet to address the issue of statewide statistical studies as applied to the constitutional application of the death penalty under the Declaration of Rights. *McCleskey* has only been cited in three published Maryland cases, and none of them adopt any part of *McCleskey* as a binding interpretation of the Declaration of Rights. See *Oken v. State*, 378 Md. 179, 191-94, 229 n.20, 835 A.2d 1105, 1112-14, 1134 n.20 (2003) (*McCleskey* is cited a number of times within two quotations, one taken from Justice Scalia’s opinion in *Walton v. Arizona*, 497 U.S. 639, 657-65 (1990), and the other a quotation from *Penry v. Lynaugh*, 492 U.S. 302, 327-28 (1989). None of the quotes pertain to the issues discussed in this article.); *Collins v. State*, 318 Md. 269, 300, 568 A.2d 1, 16 (1990) (*McCleskey* cited along with a number of other cases for the general proposition that defendant’s case was not “aberrant, arbitrary, capricious or freakish” where defendant did not introduce a statewide study or make an equal protection and unrelated to a separate cruel and unusual challenge); *White v. State*, 125 Md. App. 684, 708 n.6, 726 A.2d 858, 869-70 n.6 (1999) (not actually citing *McCleskey*, but instead citing a memorandum that Justice Scalia wrote to Justice Marshall regarding *McCleskey* where he “acknowledged the existence of unconscious racism”).

109. 130 N.J. 109, 613 A.2d 1059 (1992).

discrimination in capital sentencing would mock that tradition and our own constitutional guarantee of equal protection of the laws under New Jersey Constitution Article I, paragraph 1.

As a Court, we have repeatedly emphasized our special commitment to equality in the administration of justice. As we have stated, to exclude from jury service qualified groups “not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.” The imposition of capital-death sentences based solely on the race of the defendant or the victim would be equally at war with the basic concepts of a democratic society and a representative government.¹¹⁰

The New Jersey Court criticized the *McCleskey* majority for “seem[ing] resigned to accept” racial disparities in capital sentencing, and responded to *McCleskey*’s concern that real review of racially influenced death penalties would prove impractical by saying:

This Court cannot refuse to confront those terrible realities. We have committed ourselves to determining whether racial and ethnic bias exist in our judicial system and to “recommend ways of eliminating it wherever it is found.” Hence, were we to believe that the race of the victim and race of the defendant played a significant part in capital-sentencing decisions in New Jersey, we would seek corrective measures, and if that failed we could not, consistent with our State’s policy, tolerate discrimination that threatened the foundation of our system of law.¹¹¹

110. *Marshall*, 130 N.J. at 207-08, 613 A.2d at 1108-09 (citations omitted). The evidence of discrimination presented in *Marshall* was relatively weak, at least in relation to what was presented in the Paternoster Report. “[T]he only statistics presented by the Master were the rate at which black defendants are sentenced to death and the rate at which cases with white victims proceed to penalty trial.” *Id.* at 210, 613 A.2d at 1110. No regression analysis was undertaken adjusting for the case and geographic variables.

111. *Id.* at 209, 613 A.2d at 1110 (citations omitted).

Three dissenting members of Florida's Supreme Court, led by its Chief Justice, expressed similar concerns in *Foster v. State*.¹¹² They said that *McCleskey* was simply inconsistent with the commitment of the state and the Court to racial fairness, which requires that claims of race discrimination in the administration of the death penalty, as a matter of Florida constitutional law, should be judged by a standard that gives substantial weight to "discriminatory impact."¹¹³ The Chief Justice said:

Discrimination, whether conscious or unconscious, cannot be permitted in Florida courts. As important as it is to ensure a jury selection process free from racial discrimination, it is infinitely more important to ensure that the State is not imposing the ultimate penalty of death in a racially discriminatory manner. The U.S. Supreme Court may eventually recognize that the burden imposed by *McCleskey* is as insurmountable as that presented by *Swain*.¹¹⁴ In the meantime, defendants such as Foster have no chance of proving that application of the death penalty in a particular jurisdiction is racially discriminatory, no matter how convincing their evidence.¹¹⁵

Remarkably, even *McCleskey*'s author, Justice Lewis Powell, eventually came to view his vote in *McCleskey* as a mistake, saying, after he retired, that he regretted that decision.¹¹⁶

IV. RACE DISCRIMINATION CLAIMS BASED ON THE PATERNOSTER STUDY AND SIMILAR EVIDENCE OF JURISDICTIONAL DISCRIMINATION UNDER THE MARYLAND DECLARATION OF RIGHTS

We believe that it is the potential combination of evidence that raises serious race discrimination issues, i.e., the evidence in the

112. 614 So. 2d 455, 465 (Fla. 1992) (Barkett, C.J., dissenting).

113. *Id.* at 467 (Barkett, C.J., dissenting).

114. *Swain v. Alabama*, 380 U.S. 202 (1965).

115. *Foster*, 614 So. 2d. at 466 (Barkett, C.J., dissenting).

116. See David Von Drehle, *Retired Justice Changes Stand On Death Penalty*, WASH. POST, June 10, 1994, at A1 ("John C. Jeffries Jr., author of 'Justice Lewis F. Powell Jr.: A Biography,' writes that he asked during a 1991 interview if Powell would change any of his votes if he could. 'Yes,' Powell answered, '*McCleskey v. Kemp*.'").

statewide Paternoster Study combined with similar evidence in the jurisdiction in which a constitutional challenge is presented. We begin with an analysis of the independent role of the provisions of Maryland's Declaration of Rights.

A. The Relevance of Maryland's Declaration of Rights, and the State's History and Experiences with Capital Punishment

In his dissenting opinion in *Colvin-El v. State*,¹¹⁷ Judge Eldridge, joined by Chief Judge Bell, pointed out the provisions of the Maryland Declaration of Rights that are implicated by the arbitrary and racially discriminatory administration of Maryland's death penalty. These include the implicit "equal protection component of Article 24,"¹¹⁸ and the prohibitions of "cruel and unusual pains and penalties" and "cruel or unusual punishment" contained, respectively, in Articles 16 and 25.¹¹⁹

There are competing views about the weight that Maryland's courts should give to the Supreme Court's decision in *McCleskey* in applying these provisions to a claim based on the Paternoster Study and similar evidence of local discrimination. One view argues that Maryland's courts should interpret state constitutional provisions "*in pari materia*" with (in the same manner as) the analogous federal provisions.¹²⁰ This lockstep approach has virtues, including consistency and predictability. However, sometimes there are good reasons for state courts to break ranks with the Court when they are interpreting their own constitutions, and Maryland's appellate courts

117. 359 Md. 49, 55, 753 A.2d 13, 16 (2000).

118. Article 24 provides: "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." In construing it to include a guarantee of equal treatment, the Maryland Court of Appeals has said: "concept of equal treatment" is "embodied in the due process requirement of Article 24 of the Declaration of Rights." *Attorney General of Maryland v. Waldron*, 289 Md. 683, 704, 426 A.2d 929, 940-41 (1981) (citing *Bd. of Supervisors of Elections v. Goodsell*, 284 Md. 279, 293 n.7, 396 A.2d 1033, 1040 n.7 (1979); *Governor v. Exxon Corp.*, 279 Md. 410, 438 n.8, 370 A.2d 1102, 1118 n.8 (1977) *aff'd*, 437 U.S. 117 (1978); *Bruce v. Dir., Dep't of Chesapeake Bay Affairs*, 261 Md. 585, 600, 276 A.2d 200, 208 (1971)).

119. *Colvin-El*, 359 Md. 49, 54-55, 753 A.2d 13, 16. Judge Eldridge explained that "[t]he Maryland Constitution contains two 'cruel and unusual punishment' prohibitions. One, directed at the General Assembly, is in Article 16 of the Declaration of Rights. The other, directed at 'the Courts of Law,' is contained in Article 25 of the Declaration of Rights." *Id.* at 54, n.2, 753 A. 2d 13, 16 n.2.

120. *Pickett v. Sears, Roebuck & Co.*, 365 Md. 67, 77, 775 A.2d 1218, 1224 (2001).

have recognized this. The Maryland Court of Appeals has said that the federal and state constitutions “are independent of each other so that a violation of one is not necessarily a violation of the other.”¹²¹ For example, the state and federal due process provisions “are independent, capable of divergent effect, [and] the two are so intertwined that they, in essence, form a double helix, each complementing the other.”¹²² As a result of the willingness of many state courts to give independent meaning to state constitutions, “[t]he present function of state constitutions is as a second line of defense for those rights protected by the federal Constitution and as an independent source of supplemental rights unrecognized by federal law.”¹²³

When a state court interprets its constitution to protect a right that the Court has not recognized, or has recognized but has not adequately protected, it plays an important role in our Federalism.¹²⁴ This is not a new idea, but rather is part of the original conception of the separation of powers.¹²⁵ It also is consistent with the differing texts and histories of state constitutional provisions, and the differing experiences and values of the states. And, as the Court has recognized, there is no area in which states have stronger “Federalism” interests than in the administration of criminal justice, including capital punishment laws.¹²⁶ Thus, if a Court decision is wrong, as we

121. *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 640, 458 A.2d 758, 781 (1983) (citing *Attorney General v. Waldron*, 289 Md. 683, 704-05, 426 A.2d 929 (1981); *Pitsenberger v. Pitsenberger*, 287 Md. 20, 27, 410 A.2d 1052 (1980); *Governor v. Exxon Corp.*, 279 Md. 410, 423, 372 A.2d 237 (1977), *aff'd*, 437 U.S. 117 (1978)).

122. *Waldron*, 289 Md. at 705, 426 A.2d at 941 (1981).

123. *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1367 (1982).

124. See generally *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 85 (1980) (States have an interest in “promoting more expansive rights of free speech and petition than conferred by the Federal Constitution.”); *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (“Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court’s refusal to decide cases where there is an adequate and independent state ground. . . . ‘It is fundamental that state courts be left free and unfettered by [the Supreme Court] in interpreting their state constitutions.’”) (quoting *Minnesota v. Nat’l Tea Co.*, 309 U.S. 551, 557 (1940)).

125. See, e.g., A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 935 (1976); Hans A. Linde, *Book Review*, 52 OR. L. REV. 325 (1973); *United States v. Miller*, 425 U.S. 435, 454 (1976) (Brennan, J., dissenting) (commenting on, and encouraging “emerging trend among high state courts of relying upon state constitutional protections of individual liberties . . .”).

126. See, e.g., James R. Acker & Elizabeth R. Walsh, *Challenging the Death Penalty Under State Constitutions*, 42 VAND. L. REV. 1299, 1301 (1989) (“Death penalty laws increasingly have been challenged under state constitutions, on a variety of grounds, in the

believe *McCleskey* is, a state court has every reason to reject it in interpreting its own constitution.

Moreover, the basic federal constitutional principles underlying the death penalty are open-ended. This is true of constitutional principles generally, but especially so in the Court's death penalty jurisprudence. This not only allows, but requires, state judges to exercise independent "judgment"—"reasoned judgment" in the words of Justice O'Connor—in applying the principles. Thus, in interpreting the Maryland Declaration of Rights' provisions, state courts can *accept* the federal constitutional principles that govern the federal equal protection and "cruel and unusual punishments" clauses, but *apply* them in ways that are true to Maryland's "moral consensus"¹²⁷ about the death penalty.

The "death is different"¹²⁸ principle, for example, requires that decisions in capital cases be more "reliable" than in non-capital cases, but leaves judges with substantial discretion to determine how much more reliability is required and how to attain that greater degree of required reliability. Similarly, the administration of the death penalty must be consistent with "evolving standards of decency."¹²⁹ In giving content to that principle, state judges should look to the standards of decency within their borders.

McCleskey rests in part on a judgment that the "risk of racial prejudice influencing capital sentencing decisions" is *not* "unacceptable."¹³⁰ In Maryland, however, there are strong objective indicators that this risk *is* unacceptable. Specifically, Maryland's highest court has been vigilant in preventing and redressing race discrimination, even when to do so it had to go beyond, or anticipate,

several states that retain capital punishment."); Joseph T. Walsh, *The Evolving Role of State Constitutional Law in Death Penalty Adjudication*, 59 N.Y.U. ANN. SURV. AM. L. 341, 341 (2003) (this concept of "'new federalism' is but a corollary of the well established premise of federal constitutional law that federal courts, including the U.S. Supreme Court, will defer to interpretation of state law as expounded by the highest court of a particular state."); *id.* at 348 (arguing that the "increased restrictions on the use of federal *habeas corpus*" will "actually increase[] the effectiveness of state court review").

127. In upholding the constitutionality of the death penalty in 1976, the Supreme Court, in *Gregg v. Georgia*, 428 U.S. 153 (1976), deferred, in part, to "[c]onsiderations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction . . ." *Id.* at 186-87.

128. See *Gregg*, 428 U.S. at 188 (the Supreme Court has recognized in the past that "the penalty of death is different in kind from any other punishment imposed under our system of criminal justice.") (citing *Furman v. Georgia*, 408 U.S. 238 (1972)).

129. See *Roper v. Simmons*, 125 S. Ct. 1183, 1190 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)).

130. *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987).

rulings of the United States Supreme Court. For example, prior to *Batson v. Kentucky*,¹³¹ the Maryland Court of Appeals observed that a prosecutor's use of peremptory challenges to exclude minority jurors would be unconstitutional.¹³² The Court of Appeals has also required, in cases involving interracial crimes, that trial courts conduct voir dire that seeks to expose racial bias, even though the Supreme Court has not imposed this requirement.¹³³ And, the Court of Appeals has reversed trials in which parties have made racial appeals to jurors.¹³⁴

Generally, Maryland has worked hard to prevent non-racial arbitrariness in the administration of capital punishment. For example, Maryland has given capital defendants the right to have a jury determine the essential facts in the sentencing proceeding,¹³⁵ and left the final sentencing decision to the jury (unless the capital defendant waives this right).¹³⁶ In 1987, eighteen years before the Supreme Court's decision in *Roper v. Simmons*,¹³⁷ the General Assembly prohibited the execution of those who were younger than eighteen when they committed their crimes.¹³⁸ In 1989, the legislature prohibited the execution of the mentally retarded;¹³⁹ this development came thirteen years before the Supreme Court finally ended the practice.¹⁴⁰ As a result of these and other procedural requirements, only three people have been executed in Maryland since 1978.¹⁴¹ It is wholly inconsistent with this tradition to allow race to play such a prominent role in the capital process.

B. The Significance of the Paternoster Study and Similar Evidence of Local Discrimination Under the Maryland Declaration of Rights

The Maryland Declaration of Rights has no express equality provision; however the "concept of equal treatment" is "embodied in

131. 476 U.S. 79 (1986).

132. *Lawrence v. State*, 295 Md. 557, 570, 457 A.2d 1127, 1133 (1983); *Evans v. State*, 304 Md. 487, 526-28, 499 A.2d 1261, 1281-82 (1985), *cert. denied*, 478 U.S. 1010 (1986).

133. *Bowie v. State*, 324 Md. 1, 595 A.2d 448 (1991).

134. *Tierco Maryland, Inc. v. Williams*, 381 Md. 378, 849 A.2d 504 (2004).

135. In *Ring v. Arizona*, 536 U.S. 584 (2002), the Supreme Court held this to be a federal constitutional right.

136. MD. CODE ANN., CRIM. LAW §2-303 (LexisNexis Supp. 2005).

137. 125 S. Ct. 1183 (2005).

138. 1987 Md. Laws 2907.

139. 1989 Md. Laws 3957.

140. *Atkins v. Virginia*, 536 U.S. 304 (2002).

141. David Nitkin, *Curran's Views Raise Concern over Conflict: Attorney General's Call to Abolish Death Penalty Draws Rebukes from Some*, BALT. SUN, June 16, 2004, at 6A.

the due process requirement of Article 24 of the Declaration of Rights.”¹⁴² Since Maryland has no express equal protection provision, the Court of Appeals has held that Maryland’s equal treatment rule is “independent” and “capable of divergent effect” from the federal provision.¹⁴³

The rejection of *McCleskey* would not leave Maryland’s courts without established standards to evaluate the findings of the Paternoster Study and similar local findings. Indeed, as we suggested previously (see Part III(A)), there are compelling reasons to use the constitutional rules governing race-based jury selection claims to evaluate the findings of the Paternoster Study. In sum, in those cases in which capital defendants raise a race claim within a single jurisdiction, and focus on the actions of a more limited number of key actors (especially on the decisions of prosecutors), race-based death penalty claims approximate race-based jury selection claims, in which both Maryland’s Court of Appeals and the Supreme Court have given substantial weight to racial effect.

In *Gilchrist v. State*,¹⁴⁴ the Maryland Court of Appeals considered a challenge to the racially discriminatory use of peremptory challenges based on the equal protection clause of the Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights. The Court set forth the procedure that a trial court should use to resolve such claims:

First, the complaining party has the burden of making a *prima facie* showing that the other party has

142. Attorney General of Maryland v. Waldron, 289 Md. 683, 704, 426 A.2d 929, 940-41 (1981) (citing Bd. of Supervisors of Elections v. Goodsell, 284 Md. 279, 293 n.7, 396 A.2d 1033, 1040 (1979)). In *Waldron*, the Court considered whether a state law prohibiting retired judges from practicing law for compensation violated, *inter alia*, the state version of equal protection embodied in Article 24 of the Maryland Declaration of Rights. The Court found that the proper analysis of the issue did not fit within the Supreme Court’s two-tiered Equal Protection approach. Therefore, it resolved the issue (holding unconstitutional the law) by identifying and applying a third, intermediate level of scrutiny which has no counterpart in federal equal protection analysis. *Id.* at 710-28, 426 A.2d at 944-54. See also Governor v. Exxon Corp., 279 Md. 410, 438 n.8, 370 A.2d 1102, 1118 n.8 (1977) *aff’d*, 437 U.S. 117 (1978); Bruce v. Dir., Dep’t of Chesapeake Bay Affairs, 261 Md. 585, 600, 276 A.2d 200, 208 (1971).

143. *Waldron*, 289 Md. at 705, 426 A.2d at 941. See also Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 458 A.2d 758 (1983) (evaluating the validity of the state education funding scheme against the Equal Protection Clause and Article 24 of the Declaration of Rights separately).

144. 340 Md. 606, 667 A.2d 876 (1995).

exercised its peremptory challenges on an impermissibly discriminatory basis, such as race or gender. Moreover, “[w]hether the requisite *prima facie* showing has been made is the trial judge’s call....”

Second, once the trial court has determined that the party complaining about the use of the peremptory challenges has established a *prima facie* case, the burden shifts to the party exercising the peremptory challenges to rebut the *prima facie* case by offering race-neutral explanations for challenging the excluded jurors....It is insufficient...for the party making the peremptory challenges to “merely deny[] that he had a discriminatory motive or...merely affirm[] his good faith.”

Finally, the trial court must “determine[] whether the opponent of the strike has carried his burden of proving purposeful discrimination.” This includes allowing the complaining party an opportunity to demonstrate that the reasons given for the peremptory challenges are pretextual or have a discriminatory impact. It is at this stage “that the persuasiveness of the justification becomes relevant....”¹⁴⁵

These familiar principles are well-suited to evaluate a race discrimination claim based on the Paternoster Study and similar evidence of local discrimination. Indeed, in his dissent in *McCleskey*, Justice Blackmun noted that this approach ““progressively...sharpen[s] the inquiry into the elusive factual question of intentional discrimination.””¹⁴⁶ A defendant would present a *prima facie* case of discrimination, Justice Blackmun concluded, “by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.”¹⁴⁷ Whether that inference exists would depend on a three part risk-based model of proof.¹⁴⁸

The first prong of the three part risk-based model of proof—basically a standing issue—was plainly satisfied in *McCleskey*, Justice

145. *Id.* at 625-26, 667 A.2d at 885-86 (citations omitted).

146. *McCleskey v. Kemp*, 481 U.S. 279, 351-52 n.4 (1987) (Blackmun, J., dissenting) (quoting *Texas Dep’t of Comty. Affairs v. Burdine*, 450 U.S. 248, 255 n.8 (1981)).

147. *Id.* at 351-52 (Blackmun, J., dissenting) (quoting *Batson v. Kentucky*, 476 U.S. 79, 94 (1986)).

148. *Id.* at 352-53.

Blackmun suggested, because McCleskey was black and the victim was white, and the data demonstrated disparate treatment of such defendants.¹⁴⁹ The third prong, that “the allegedly discriminatory procedure [was] susceptible to abuse or [was] not racially neutral,” was also satisfied, Justice Blackmun believed, since the data demonstrated that the discrimination occurred at the prosecutorial selection stage.¹⁵⁰ However, with regards to the second prong—proof of “a substantial likelihood that his death sentence is due to racial factors,”—Justice Blackmun took note of the thoroughness of the evidence presented, including proof of systemic and substantial disparities by race of victim, all subjected to multiple regression analysis confirming race to be the cause of the disparities.¹⁵¹ Based on this evidence, he concluded that the “showing is of sufficient magnitude that, absent evidence to the contrary, one must conclude that racial factors entered into the decision-making process that yielded McCleskey’s death sentence.”¹⁵² The burden thereupon should shift, Justice Blackmun said, to the prosecution, to “demonstrate that legitimate racially neutral criteria and procedures yielded this racially skewed result.”¹⁵³ Should the prosecution fail in that burden, the defendant would have “demonstrated a clear pattern of differential treatment according to race that is ‘unexplainable on grounds other than race.’”¹⁵⁴

In her dissent in *Foster v. State*,¹⁵⁵ Chief Judge Barkett of the Florida Supreme Court took the same approach:

I suggest the following standard: A party asserting racial discrimination in the State’s decision to seek the death penalty should make a timely objection and demonstrate on the record that the discrimination exists and that there is a strong likelihood it has influenced the State to seek the death penalty. Such discrimination conceivably could be based on the race of the victim or on the race of the defendant. Once the trial court

149. *Id.* at 353.

150. *Id.* at 352-53, 357-58.

151. *Id.* at 353.

152. *Id.* at 359.

153. *Id.*

154. *Id.* at 360-61 (quoting *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)).

155. 614 So. 2d 455, 465 (Fla. 1992) (Barkett, C.J., dissenting).

determines that the initial burden has been met by the defendant, the burden then shifts to the State to show that the practices in question are not racially motivated. If the trial court determines that the State does not meet that burden, the State then is prohibited from seeking the death penalty in that case.¹⁵⁶

“The question remaining . . . is at what point does that disparity become constitutionally unacceptable.”¹⁵⁷ In the context of Title VII, the disparity is cognizable if it is “substantial enough to raise an inference of causation. That is, a plaintiff’s statistical evidence must reflect a disparity so great that it cannot be accounted for by chance.”¹⁵⁸ This is a rule that courts have applied in some constitutional race discrimination cases.¹⁵⁹ It is the rule that Maryland’s courts should apply in making sure that race does not significantly contribute to death penalty decisions.¹⁶⁰

There are two other relevant provisions of Maryland’s Declaration of Rights: Articles 16 and 25. Article 16 governs legislation, and prohibits “cruel and unusual pains and penalties.”¹⁶¹ Article 25 applies to judicial punishments, and prohibits “cruel or unusual punishment.”¹⁶² The constitutional assumption underlying today’s death penalty laws is that they are not cruel and unusual, and therefore do not violate provisions like those in Articles 16 and 25, because they eliminate “the arbitrariness and capriciousness condemned by *Furman*.”¹⁶³ In *Calhoun v. State*,¹⁶⁴ the Maryland Court of Appeals upheld the constitutionality of Maryland’s death

156. *Id.* at 468 (Barkett, C.J., dissenting).

157. *McCleskey*, 481 U.S. at 354 (Blackmun, J., dissenting).

158. *EEOC v. Joint Apprenticeship Comm.*, 186 F.3d 110, 117 (2nd Cir. 1999).

159. *See, e.g., Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (holding that even a flawed regression analysis could be admissible to statistically show racial discrimination).

160. In *United States v. Bass*, 266 F.3d 532 (6th Cir. 2001), the United States Court of Appeals for the Sixth Circuit held that a statistical study showing racial disparities at the charging stage of the federal capital process is sufficient to justify discovery before a death notice is filed.

161. MD. DECL. OF RTS. art. 16.

162. MD. DECL. OF RTS. art. 25. The Eighth Amendment to the United States Constitution also prohibits “cruel and unusual punishments.” U.S. CONST. amend. VIII. The Supreme Court has held that Eighth Amendment applies “with special force” to the death penalty because that penalty is so “severe.” *Roper v. Simmons*, 125 S. Ct. 1183, 1194 (2005) (citing *Thompson v. Oklahoma*, 487 U.S. 815, 856 (1988) (O’Connor, J., concurring in judgment)).

163. *Gregg v. Georgia*, 428 U.S. 153, 198 (1976).

164. 297 Md. 563, 468 A.2d 45 (1983).

penalty statute based, in part, on a variant of this assumption: that prosecutors would not exercise their discretion in “irrational, inconsistent, or discriminatory” ways.¹⁶⁵ However, the 26 year history of Maryland’s post-*Gregg* death penalty law demonstrates that it simply has not eliminated racial “arbitrariness and capriciousness.” During this period, more than 1300 death eligible murders have been prosecuted; more than 350 death penalty notices have been filed; at least 80 death sentences have been imposed; and eight men are now under sentence of death, all but one for murdering white victims. In a society that regularly pledges its commitment to equal justice, this is unacceptable.

165. *Id.* at 605, 468A.2d at 64.