

# SMOKE AND MIRRORS ON RACE AND THE DEATH PENALTY

By KENT SCHEIDEGGER\*

## Introduction

Claims that the death penalty is enforced in a manner that discriminates on the basis of race have long been prominent in the capital punishment debate. In its 1972 decision in *Furman v. Georgia*,<sup>1</sup> the Supreme Court relied on the Eighth Amendment's Cruel and Unusual Punishment Clause to throw out the capital punishment laws then in existence, but the Equal Protection Clause lay just beneath the surface of the opinions.<sup>2</sup> Congress and 38 state legislatures rewrote their laws to put more structure into the sentencing decision so as to reduce the possibility of racial bias.<sup>3</sup>

In January 2003, a study of capital punishment in Maryland was widely reported as confirming the claim that race remains a large factor. "Large Racial Disparity Found By Study of Md. Death Penalty," said the headline in the *Washington Post*.<sup>4</sup> A hard look at the numbers tells a different story. First, however, a review of the background is in order.

## The *McCleskey* Case

The most widely known study of race and capital punishment is the one involved in a Supreme Court case, *McCleskey v. Kemp*.<sup>5</sup> The NAACP Legal Defense and Education Fund, Inc. (LDF) asked a group of researchers headed by Dr. David Baldus to undertake a study for the specific purpose of using the results to challenge Georgia's capital punishment system.<sup>6</sup> The LDF also arranged funding for the study. One result of this study was undisputed. "What is most striking about these results is the total absence of any race-of-defendant effect."<sup>7</sup> The reforms after *Furman v. Georgia* had successfully eliminated discrimination against black defendants as a substantial factor in capital sentencing. This was consistent with a variety of studies done in other states.<sup>8</sup>

With their primary argument disproved by their own study, *McCleskey*'s defenders proceeded to a federal *habeas corpus* hearing on a different theory. The Baldus group claimed to have found a "race-of-victim" effect. That is, after controlling for other factors, murders of black victims are somewhat less likely to result in a death sentence than murders of white victims.<sup>9</sup> Based on a mechanical "culpability index," Dr. Baldus identified a class of clearly aggravated cases where the death penalty was consistently imposed, a class of clearly mitigated cases where it was almost never imposed, and a mid-range where it was sometimes imposed,<sup>10</sup> exactly the way a discretionary system should work. It was only within the mid-range that the race of the victim was claimed to be a factor. After an extensive hearing with experts on both sides, the federal District Court found numerous problems with Dr. Baldus's data and methods. Most important, though, was a finding that the model claiming to show a

race-of-victim effect had failed to account for the legitimate factor of the strength of the prosecution's case for guilt. When a different model that accounted for that factor was used, the race-of-victim effect disappeared.<sup>11</sup>

Despite this finding, and contrary to normal appellate practice, the Court of Appeals and the Supreme Court assumed on appeal that Dr. Baldus had actually proven his case.<sup>12</sup> Ever since, the Supreme Court's opinion in *McCleskey* has been cited for "facts" which it merely assumed, and which the trial court had found were false.<sup>13</sup> The Court held that even if the statistics were valid, "McCleskey cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did not receive the death penalty."<sup>14</sup>

This holding points out what is so very odd about this race-of-victim bias claim. The benchmark of our society for what kind of case "deserves" the death penalty is established in those cases where race is not a factor, i.e., in those cases where the murderer, the victim, and the decision-makers are all the same race. Traditionally, at least in the Southeast, that would be the case where they are all white. A race-of-defendant bias would mean that there are black defendants on death row who would have been sentenced to life if their cases had been measured by the benchmark. That is a valid ground for attacking the death penalty, as was done successfully in *Furman*. However, a race-of-victim effect means that every murderer on death row would still be there if the bias were eliminated and every case judged by the race-neutral benchmark, but a few more murderers would be there as well. The unjust verdicts which result from a system biased against black victims are the cases that should result in a death sentence according to the race-neutral criteria, but which result in life sentences instead. *McCleskey*'s sentence was correct when measured against the race-neutral benchmark, and he was justly executed for gunning down a police officer in the performance of his duty. The unjust sentences, if Dr. Baldus is correct, are in the similar cases where equally culpable murderers get off with life.

## Post-*McCleskey* Studies

The *McCleskey* decision shut down Baldus-type studies as tools of federal litigation. Similar studies since then have been done in a few states where state courts chose not to follow *McCleskey* on independent state grounds, where legislative or executive branches commissioned them, or where there were done independently of government.

The California Attorney General commissioned the RAND Corporation to study that state's system in preparation for *McCleskey*-type litigation which was subsequently

dismissed. Using a different methodology, Klein and Rolph found no evidence of racial discrimination based on either the race of the victim or the race of the defendant.<sup>15</sup>

In New Jersey, the Supreme Court appointed a succession of special masters, the first one being Dr. Baldus, to study the death penalty in that state. The 2001 report of Judge David Baime reports that the statistical evidence supports neither the thesis of race-of-defendant bias nor that of race-of-victim bias in determining the likelihood that a defendant will be sentenced to death.<sup>16</sup> Statewide data do show that proportionately more white-victim cases advance to the penalty phase. However, this is not actually caused by race of the victim, but rather by different prosecutorial practices in counties with different populations. Prosecutors in the more urban counties, with proportionately more black residents and hence more black-victim cases, take fewer potentially capital cases to a penalty trial. Conversely, prosecutors in the less urban counties, which generally have higher percentage white populations, seek relatively more death sentences. “New Jersey is a small and densely populated state. It is, nevertheless, a heterogenous one. It is thus not remarkable that the counties do not march in lock-step in the manner in which death-eligible cases are prosecuted.”<sup>17</sup>

The Nebraska Legislature commissioned a study, which was headed by Dr. Baldus and George Woodworth, the lead researchers of the *McCleskey* study. This study found no significant evidence of sentencing disparity based on race of the defendant, race of the victim, or socioeconomic status.<sup>18</sup> The study did find differences among counties, particularly between urban and rural. The Baldus group uses the term “geographic disparity”<sup>19</sup> to describe the same phenomenon that Judge Baime calls not marching in lock-step. However, the Baldus group found that the trial judges, who did the sentencing in Nebraska at this time, effectively corrected for the difference.<sup>20</sup>

In January 2000, the United States Justice Department released raw data on the ethnic breakdown of persons for whom the death penalty was sought at various stages of federal prosecutions and on those finally sentenced to death.<sup>21</sup> Federal prosecution of violent crime has been targeted specifically at drug-trafficking organized crime for many years. From 1988 to 1994, the only federal death penalty in force was the Drug Kingpin Act.<sup>22</sup> No one should be surprised that the organizations smuggling drugs from Latin America are largely Hispanic or that the drug-fueled, violent gangs of the inner city are largely black. So there should have been no surprise that the federal death row has a very large percentage of black and Hispanic murderers, as this report showed it does. The shock and dismay that accompanied the release of this report<sup>23</sup> was entirely unwarranted. The data gathering process continued and, sure enough, the proportion of minorities for whom the death penalty is sought or obtained reflects the pool of potentially capital cases which are appropriate for federal prosecution.<sup>24</sup>

A study by a legislative commission in Virginia produced results similar to the New Jersey and Nebraska studies. “The findings clearly indicate that race plays no role in the decisions made by local prosecutors to seek the death penalty in capital-eligible cases.”<sup>25</sup> However, urban prosecutors do seek it less often than rural ones.<sup>26</sup> In interviews with the urban prosecutors, the reason most often given for seeking the death penalty less often was the reluctance of urban juries to impose it.<sup>27</sup>

### The Maryland Study

With the background of these other studies in mind, analysis of the Paternoster study in Maryland<sup>28</sup> is straightforward. Prior to the year 2000, there had been four studies of the death penalty in Maryland, but none of them had information on the aggravating and mitigating circumstances of the individual cases. Thus, they lacked the essential information to make a judgment about the administration of the death penalty in Maryland.<sup>29</sup> In 2000, Governor Glendenning funded a study to gather that information.

The study began with a database of approximately 6,000 cases where the defendant was convicted of first- or second-degree murder between 1978 and 1999.<sup>30</sup> That is about 40% less than the approximately 10,000 cases of murder and voluntary manslaughter in that period,<sup>31</sup> so presumably the remainder were voluntary manslaughter, unsolved cases, or cases where a perpetrator was identified but evidence was insufficient to convict.

One of the essential requirements of a valid post-*Furman* death penalty statute is that it first narrow the category of defendants for whom the death penalty can even be considered.<sup>32</sup> Maryland law does this by requiring that the murder meet all of the following criteria: (1) the murder was first degree; (2) the defendant was a principal in the first degree (i.e., the actual killer, rather than just an accomplice); (3) the defendant was at least 18; (4) the defendant was not retarded; and (5) at least one of a list of ten aggravating circumstances is true.<sup>33</sup> The most common aggravating circumstance is murder in the course of a rape, robbery, or certain other felonies. The Paternoster group determined that 1,311 out of 5,978 murder convictions were “death eligible.”<sup>34</sup> Before any decision-maker exercises any discretion, Maryland law whittles the class of murderers eligible for the death penalty to a mere 22% of the total. Maryland’s criteria therefore easily meet the constitutional requirement of a meaningful narrowing of the eligible class.

Prosecutor discretion in seeking the death penalty and continuing the case to a penalty hearing further reduced the number of hearings to 14% of the original 1,311. Juries actually imposed death sentences in about 42% of the cases where they were asked, or about 6% of the originally eligible cases. The key question is what part, if any, racial discrimination plays in these two discretionary steps: the decision of

the prosecutor to ask the jury for the death penalty, and the decision of the jury, when asked, to actually impose it. A further subdivision is whether the race of the defendant or the race of the victim makes a difference.

The study also asks about so-called “geographic disparity,” at one point even equating such “disparity” with “arbitrariness.”<sup>35</sup> The study appears to simply assume throughout that variation by county is a problem on the same order as racial discrimination. In other words, contrary to Judge Baime’s report in New Jersey,<sup>36</sup> the Paternoster report appears to assume that Maryland’s counties *should* “march in lock-step.” This assumption colors the entire report.

The report then tabulates numbers of cases by race and by county without adjusting for case characteristics.<sup>37</sup> However, the meat of the study lies in the adjusted race data, and the combined effects of race and county. First, there is the result, that by all rights, *should* have been the headline story. After adjusting for relevant case characteristics, so as to compare apples to apples, there is no difference between the death sentence rates of black and white offenders, beyond the inevitable level of statistical “noise” inherent in such studies. “In sum, *we have found no evidence that the race of the defendant matters in the processing of capital cases in the state.*”<sup>38</sup>

Although this result is consistent with the other studies discussed above, it is completely contrary to the popular conception of the death penalty in America. For any American institution to eliminate the primary racial effect of concern to the point that it is lost in the statistical grass is an accomplishment to be celebrated with fireworks and champagne. Instead, this finding was barely noticed.

On the race-of-victim effect, the picture is murky. There are various ways to analyze the data. Some ways show a significant race of victim effect while others do not.<sup>39</sup> Different regression models can be constructed by choosing which variables to include. Paternoster reports that “considered *alone* the race of the victim matters, those who kill white victims are at a substantially increased risk of being sentenced to death . . . .”<sup>40</sup> But considering race alone is wrong. A different model considering race and jurisdiction together yields a very different result:

“When the prosecuting jurisdiction is added to the model, the effect for the victim’s race diminishes substantially, and is no longer statistically significant. This would suggest that jurisdiction and race of victim are confounded. There are state’s attorneys in Maryland who more frequently pursue the death penalty than others. It also happens that there are more white victim homicides committed in those jurisdictions where there is a more frequent pursuit of the death penalty.”<sup>41</sup>

What this means, in English, is that some counties

in Maryland elect tougher-on-crime prosecutors and have tougher juries than other counties. In the tougher counties, a murder in the middle range is more likely to result in a death sentence than a similar murder in a softer county. Support for tough-on-crime measures generally and capital punishment in particular is substantially correlated with race. One poll earlier this year found whites in favor of capital punishment (68-27) and blacks opposed (40-56).<sup>42</sup> For this reason, the tougher counties are likely to have a higher proportion of white residents and hence white crime victims.

What the Paternoster group calls “geographic disparity” is, in reality, local government in action. This is exactly the way our system is *supposed* to work. We elect our trial-level prosecutors by county so that local people have local control over how the discretion of that office is exercised. If the voters of suburban Baltimore County choose to elect a prosecutor who seeks the death penalty frequently, while the voters of downtown Baltimore City elect one who seeks it rarely, that is their choice.

Prosecutors also make judgments about the kinds of cases in which the juries of their area will impose the death penalty. This form of local control, the jury of the vicinage, is one of our cherished rights going back to the common law. Parliament’s violation of this right was one of the reasons for the American Revolution.<sup>43</sup> The right is guaranteed, albeit in modified form appropriate for the federal courts, in the Sixth Amendment.

Why, one might ask, is there so much hyperventilating about “geographic disparity”? Apparently, it is because all the other discrimination arguments against capital punishment have failed. The post-*Furman* reforms have been a resounding success in smashing the form of discrimination of greatest concern: the race of the defendant. In study after study, race-of-victim bias is either non-existent or disappears when legitimate variables are accounted for. What is left is to create a brand new requirement of statewide uniformity, flatly contrary to the American tradition of local control, and then declare our judicial system a failure for violating this *ex post facto* requirement. It is an elaborate sleight of hand.

### The Real Problem

Debunking the racial discrimination claim does not mean that everything is just fine in Maryland, or any other state. The Paternoster study does indicate a very real problem. The people of Baltimore City and Prince George’s County are receiving an inferior quality of justice. A murderer who kills a resident of one of those counties is more likely to get off with a life sentence under circumstances where the death penalty is warranted.

Failure to use the death penalty where it is warranted can have fatal consequences for innocent people.

Although the deterrence debate has not yet been conclusively resolved, a mounting body of scholarship confirms what common sense has always told us: a death penalty that is actually enforced saves innocent lives.<sup>44</sup>

We can make a rough calculation with the Paternoster study's unadjusted geographic data<sup>45</sup> to get an idea of the magnitude of the problem. Baltimore City had a fraction of 0.435 of the state's 1311 death-eligible homicides, or 570. At the statewide average rate of death sentences, that would yield 33, instead of the 10 that Baltimore City actually produced. The Emory study estimates that each execution saves 18 innocent lives through deterrence.<sup>46</sup> If the additional 23 death sentences had been imposed and carried out,<sup>47</sup> over 400 murders could have been deterred.

That is a staggering toll of death caused by insufficient use and execution of the death penalty. Even if this rough calculation is off by a factor of four, that would still be over 100 people murdered who could have been saved.

To properly protect the people in Baltimore City and other jurisdictions like it, we must restore public confidence in and support of capital punishment, so that prosecutors can seek it in appropriate cases, and juries will impose it. The first step toward that end is to debunk the myth that capital punishment is imposed discriminatorily. The numbers are there in the opponents' own studies, once we cut through the spin and look at the facts.

\* Kent Scheidegger is the Legal Director of the Criminal Justice Legal Foundation. He is the Chairman-Elect of the Federalist Society's Criminal Law and Procedure Practice Group.

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## Footnotes

<sup>1</sup> 408 U. S. 238.

<sup>2</sup> See *Graham v. Collins*, 506 U. S. 461, 479-484 (1993) (Thomas, J., concurring).

<sup>3</sup> See *Gregg v. Georgia*, 428 U. S. 153, 179-180 (1976); U. S. Dept. of Justice, U. S. Bureau of Justice Statistics, Capital Punishment 2001, Tables 1 & 2 (2002).

<sup>4</sup> Susan Levine & Lori Montgomery, Large Racial Disparity Found By Study of Md. Death Penalty, *Washington Post*, Jan. 8, 2003, p. A1.

<sup>5</sup> 481 U. S. 279 (1987).

<sup>6</sup> See D. Baldus, G. Woodworth & C. Pulaski, Equal Justice and the Death Penalty 44 (1990).

<sup>7</sup> *Id.*, at 150.

<sup>8</sup> See *id.*, at 254.

<sup>9</sup> The alarmist claim that the Baldus study shows that killers of white victims are "four times as likely" to receive a death sentence as killers of black victims is literally a textbook example of how to lie with statistics. See Barnett, How Numbers Can Trick You, 97 *Technology R.* 38, 42-43 (1994).

<sup>10</sup> See Baldus, *supra* note 6, at 91, Figure 5.

<sup>11</sup> *McCleskey v. Zant*, 580 F. Supp. 338, 368 (ND Ga. 1984).

<sup>12</sup> *McCleskey v. Kemp*, 481 U. S. 279, 291, n. 7 (1987).

<sup>13</sup> See, e.g., *Callins v. Collins*, 510 U. S. 1141, 1153-1154 (1994) (Blackmun, J., dissenting).

<sup>14</sup> 481 U. S., at 307.

<sup>15</sup> Klein & Rolph, Relationship of Offender and Victim Race to Death Penalty Sentences in California, 32 *Jurimetrics J.* 33, 44 (1991).

<sup>16</sup> D. Baime, Report to the Supreme Court Systemic Proportionality Review Project: 2000-2001 Term 61 (2001), <http://www.judiciary.state.nj.us/baime/baimereport.pdf>.

<sup>17</sup> *Id.*, at 62.

<sup>18</sup> D. Baldus, G. Woodworth, G. Young, & A. Christ, The Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973-1999): A Legal and Empirical Analysis, Executive Summary 14-22 (2001).

<sup>19</sup> *Id.*, at 18.

<sup>20</sup> *Id.*, at 21.

<sup>21</sup> U. S. Dept. of Justice, The Federal Death Penalty System: A Statistical Survey (1988-2000) (2000).

<sup>22</sup> *Id.*, at 1.

<sup>23</sup> See, e.g., Bonner & Lacey, Pervasive Disparities Found in the Federal Death Penalty, *N. Y. Times*, Sept. 12, 2000, at A6.

<sup>24</sup> U. S. Dept. of Justice, The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review 4 (2001).

<sup>25</sup> Joint Legislative Audit and Review Commission, Review of Virginia's System of Capital Punishment, iii (2002), <http://jlarc.state.va.us/reports/rpt274.pdf>

<sup>26</sup> *Ibid.*

<sup>27</sup> *Id.*, at 31.

<sup>28</sup> R. Paternoster, et al., An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction (2003) (cited below as "Paternoster"). The study is on the University of Maryland Web site as <http://www.urhome.umd.edu/newsdesk/pdf/exec.pdf> (Executive Summary) and <http://www.urhome.umd.edu/newsdesk/pdf/finalrep.pdf> (Final Report). Page cites below are to the Executive Summary unless otherwise noted.

<sup>29</sup> *Id.*, at 4.

<sup>30</sup> *Id.*, at 7.

<sup>31</sup> U. S. Bureau of Justice Statistics, Data Online, query run July 28, 2003; <http://bjsdata.ojp.usdoj.gov/dataonline/Search/Homicide/State/StatebyState.cfm>. The FBI collects data on a category it calls "murder and nonnegligent manslaughter."

<sup>32</sup> See *Tuilaepa v. California*, 512 U. S. 967, 972 (1994).

<sup>33</sup> Paternoster, *supra* note 28, at 5-7.

<sup>34</sup> *Id.*, at 9.

<sup>35</sup> *Id.*, at 1.

<sup>36</sup> See *supra* note 17 and accompanying text.

<sup>37</sup> Paternoster, *supra* note 28, at 13-23.

<sup>38</sup> *Id.*, at 26 (emphasis in original).

<sup>39</sup> See *id.*, at 27-28 (logistical regression shows significant race-of-victim effect, according to generally accepted statistical criterion, while stepwise regression does not).

<sup>40</sup> *Id.*, at 32 (emphasis added).

<sup>41</sup> *Ibid.*

<sup>42</sup> Sussman, No Blanket Commutation, Poll: Most Oppose Clearing Death Row (Jan. 24, 2003), [http://abcnews.go.com/sections/us/DailyNews/commutation\\_poll030124.html](http://abcnews.go.com/sections/us/DailyNews/commutation_poll030124.html).

<sup>43</sup> Declaration of Independence (1776) ("For transporting us beyond Seas to be tried for pretended Offences").

<sup>44</sup> See Dezhbakhsh, Rubin, and Shephard, Does Capital Punishment Have a Deterrent Effect?, 33 *American Law and Economics Report* 344 (2003); Mocan, Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment, *Journal of Law and Economics* (forthcoming Oct. 2003), <http://econ.cudenver.edu/mocan/papers/GettingOffDeathRow.pdf>; Cloninger & Marchesini, "Execution and Deterrence: A Quasi-Controlled Group Experiment," 33 *Applied Economics* 569, 576 (2001); California District Attorneys' Association, Prosecutors' Perspective on California's Death Penalty 44-46 (2003), <http://www.cdaa.org/WhitePapers/DPPaper.pdf>

<sup>45</sup> See Paternoster, *supra* note 28, Report Figure 5. The adjustments for case characteristics, see *id.*, Report Figure 10F, are significant but not needed for the order-of-magnitude calculations being made here.

<sup>46</sup> See Dezhbakhsh, et al., *supra* note 44.

<sup>47</sup> Actually carrying them out is another problem and the subject of another paper. The primary reason death sentences are not carried out in Maryland has been changes in the rules after the trial.