

## EQUAL PROTECTION UNDER THE CARCERAL STATE

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**ABSTRACT**—*McCleskey v. Kemp*, the case that upheld the death penalty despite undeniable evidence of its racially disparate impact, is indelibly marked by Justice William Brennan’s phrase, “a fear of too much justice.” The popular interpretation of this phrase is that the Supreme Court harbored what I call a “disparity-claim fear,” dreading a future docket of racial discrimination claims and erecting an impossibly high bar for proving an equal protection violation. A related interpretation is that the majority had a “color-consciousness fear” of remedying discrimination through race-remedial policies. In contrast to these conventional views, I argue that the primary anxiety exhibited by the *McCleskey* majority was a “leniency fear” of death penalty abolition. Opinion author Justice Lewis Powell made clear his view that execution was the appropriate punishment for McCleskey’s crime and expressed worry that McCleskey’s victory would open the door to challenges of criminal sentences more generally. Understanding that the Court’s primary political sensitivity was to state penal authority, not racial hierarchy, complicates the progressive sentiment that *McCleskey*’s call-to-action is securing equality of punishment. Derrick Bell’s “interest convergence” theory predicts that even conservatives with an aversion to robust equal protection law will accept racial-disparity evidence when in the service of crime-control values. Indeed, Justice Powell may have been more sanguine about McCleskey’s discrimination claim had mandatory capital punishment been an option. Accordingly, I caution that, outside of the death penalty context, courts and lawmakers can address perceived punishment disparities through “level-up” remedies, such as mandatory minimum sentences or abolishing diversion (which is said to favor white defendants). There are numerous examples of convergence between antidiscrimination and prosecutorial interests, including mandatory sentencing guidelines, aggressive domestic violence policing and prosecution, and the movement to abolish Stand-Your-Ground laws.

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INTRODUCTION

Every year, professors of criminal, constitutional, and antidiscrimination law introduce students to the case that established the popular claim, “The death penalty is racist.” Every year, students are surprised to find out that the racial picture of the death penalty that emerges from that case, *McCleskey v. Kemp*,<sup>1</sup> is more vexing and complex than they had anticipated. In popular consciousness, capital punishment is racist because African-American defendants are the primary recipients of its barbaric practices, and this is certainly part of the story. The brutal history of state-imposed and tolerated application of the death penalty to Southern Blacks, regardless of guilt and through the most sadistic means like beatings and lynching, will forever be a conspicuous stain on the fabric of the United States. However, *McCleskey* involved a different formulation of the racially discriminatory application of the death penalty. The famous “Baldus study” introduced by the defendant’s attorneys found that black defendants in Georgia were generally *less* likely to receive death sentences than white defendants, and that the racial discrimination related to the race of the

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<sup>1</sup> 481 U.S. 279 (1987).

victim.<sup>2</sup> Prosecutors, and to a lesser extent jurors, displayed a tendency to undervalue black life and overvalue white life by condemning to death only those murderers who dared to deny that white lives matter.<sup>3</sup>

Every five to ten years, legal scholars dust off their copies of *McCleskey*, or download fresh ones, and re-engage with the intricacies of the majority and dissenting opinions for anniversary symposia. *McCleskey v. Kemp* has been such an ubiquitous ground for legal postulating, posturing, and prophesizing that one writer for a twenty-fifth anniversary symposium in 2012 remarked that “little more can be said” about the case.<sup>4</sup> The case is indeed singular. It singularly preserved the ultimate punishment, a “peculiar institution” and outlier in barbarity in the world.<sup>5</sup> It singularly foreclosed racial disparity arguments in criminal sentences in general, a fact particularly salient today given that the criminal system is a, if not *the*, primary site of racial injustice in America.<sup>6</sup> The case is also a singularly stunning piece of legal literature. Justice William Brennan’s dissent’s devastating critique of capital punishment is a goldmine of philosophical, historical, and legal insight. It is here that we find the evocative characterization of the majority’s position as “a fear of too much justice”—the focus of this Symposium.<sup>7</sup>

Throughout the years, legal scholars have offered various accounts of the fear of justice that underlay the *McCleskey* majority’s preservation of the death penalty. One of the most common critiques of the majority opinion centers on author Justice Lewis Powell’s treatment of the equal protection doctrine and the impossibly high burden for circumstantial proof of Georgia state actors’ discriminatory intent. The fact that Powell required “smoking gun” proof of discriminatory animus undergirds the common scholarly sentiment that the primary fear in the majority opinion is that of racial discrimination claims.<sup>8</sup> I will call this the “disparity-claim fear.” A related

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<sup>2</sup> See *infra* notes 39–52 and accompanying text.

<sup>3</sup> See David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 707–09 (1983).

<sup>4</sup> G. Ben Cohen, *McCleskey’s Omission: The Racial Geography of Retribution*, 10 OHIO ST. J. CRIM. L. 65 (2012).

<sup>5</sup> See DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA’S DEATH PENALTY IN AN AGE OF ABOLITION* (2010). After *McCleskey*, the Supreme Court entertained challenges related to the characteristics of the defendant, method of execution, and procedures used for determining a death sentence, but did not entertain challenges to the death penalty as a whole or revisit the racial issue based on new statistical evidence. See *infra* note 261.

<sup>6</sup> Carol S. Steiker, *The Marshall Hypothesis Revisited*, 52 HOW. L.J. 525, 547 (2009).

<sup>7</sup> *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

<sup>8</sup> See Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 443 (1988); Jeffrey Fagan & Mukul Bakhshi, *New Frameworks for Racial Equality in the Criminal Law*, 39 COLUM. HUM. RTS. L. REV. 1, 3 (2007); Christopher J. Schmidt, *Analyzing the Text of the Equal Protection Clause: Why the Definition of “Equal” Requires a Disproportionate Impact Analysis When Laws Unequally Affect*

argument is that the majority harbored a colorblindness-driven apprehension of race-conscious remedies, such as requiring prosecutors to account for the racial distribution of their pursuit of capital punishment.<sup>9</sup> I will call this the “color-consciousness fear.”

My contribution concentrates on a related yet separate remedial fear that is so obvious as to seem banal: the fear of abolishing the death penalty—and the concurrent fear that *McCleskey*’s success would pave the way for defendants to challenge non-capital sentences, undermining U.S. criminal authority generally.<sup>10</sup> The Court refused to accept the disparity evidence in this case, not primarily because it had an unremitting and immovable aversion to claims of racial disproportion. Rather, having previously taken mandatory capital punishment off the table and being unwilling to engage in color-conscious social engineering, the only real remedy left was abolition, something Justice Powell was, at that time, unwilling to endorse. And indeed, he feared that if disparity claims presaged leniency in this case, they could very well do so across the board. I will call this the “leniency fear.”

Understanding the centrality of carceral sentiments in *McCleskey* is particularly important in this age of mass incarceration. The salience of *McCleskey* endures precisely because it forms the basis for various social justice-based and legally progressive political strategies.<sup>11</sup> The focus on the *McCleskey* Court’s disparity-claim fear prefigures a common progressive sensibility that legal success, if not justice itself, occurs whenever decisionmakers accept and remedy identity-based disparities. If, however, we understand that the Court’s primary political sensitivity was to the possibility of a broad assault on the penal authority of the state, it counsels a more cautious approach to asserting disparity claims and evidence. Viewing the “fear of too much justice” as a fear of leniency indicates that legal decisionmakers are often more sanguine about discrimination claims when

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*Racial Minorities*, 12 CORNELL J.L. & PUB. POL’Y 85, 140 (2002); Paul Schoeman, *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); *The Supreme Court, 1986 Term—Leading Cases*, 101 HARV. L. REV. 119, 158 (1987).

<sup>9</sup> See Ian F. Haney López, *Is the “Post” in Post-Racial the “Blind” in Colorblind?*, 32 CARDOZO L. REV. 807, 815 (2011); Tanya Kateri Hernandez, *“Multiracial” Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97, 141 (1998); Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988); R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1120 (2001).

<sup>10</sup> Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509, 510 (1994).

<sup>11</sup> *McCleskey* is thus symbolically representative of judicial blindness toward evidence of racial discrimination, against which critical race scholars, activists, and lawyers must struggle. In turn, the central goal of many equality scholars becomes achieving equality of punishment, not necessarily less punishment, in any given area. See, e.g., sources cited *supra* note 8; *infra* notes 238–250 and accompanying text.

they can address them through greater penal severity and without color-conscious social engineering. Accordingly, one should be vigilant of what Professor Derrick Bell famously termed “interest convergence,” the phenomenon of racial justice remedies succeeding when they reflect the agendas of empowered lawmakers and constituencies.<sup>12</sup>

The rest of this Essay proceeds in three parts. The first Part sets the stage for an analysis of *McCleskey* by examining the jurisprudential setting in which the Petitioner, death row inmate Warren McCleskey, and his NAACP Legal Defense Fund (LDF) attorneys asserted their disparity claims. It was a setting involving rejection *and* requirement of discretion, where both optional and mandatory capital punishment had been ruled unconstitutional. Part II is an intricate exegesis of the *McCleskey* majority opinion. After considering the explanations that the Court’s opinion reflects an overarching aversion to racial disparity claims and color-conscious policies, I make the case that the majority’s primary “fear of justice” was the fear of tempering penal authority. In Part III, I caution that, outside of the capital context, lawmakers can address racial disparities by “leveling-up” punishment. They can, for example, address disproportional leniency toward those who offend against black victims by mandating high minimum sentences. Indeed, the feminist experience with domestic violence criminalization underscores how easily progressive formal-equality projects transform into simple law-and-order policies.

## I. SETTING THE JURISPRUDENTIAL STAGE: CERTAINTY VERSUS LENIENCY

### A. *The Janus Face of Death Penalty Discretion*

Much of the younger generation does not realize that the American death penalty was at one time unconstitutional. In 1972, Georgia, the state upon which the seeds of death penalty jurisprudence have largely been sown, faced a challenge in the Supreme Court by three black defendants.<sup>13</sup> Two of the defendants were sentenced to death for rape, while Furman, an occasional psychotic with “convulsive disorder,” was condemned for murder.<sup>14</sup> The resulting Supreme Court decision in *Furman v. Georgia* was a tapestry of

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<sup>12</sup> DERRICK A. BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 165–79 (2004); Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

<sup>13</sup> *Furman v. Georgia*, 408 U.S. 238 (1972). I begin my history with *Furman*, although death penalty controversies and the NAACP’s LDF strategies began far before. See Arthur J. Goldberg, *Memorandum to the Conference Re: Capital Punishment, October Term, 1963*, 27 S. TEX. L. REV. 493 (1986) (arguing in a 1963 memo that capital punishment violates the Eighth Amendment).

<sup>14</sup> *Furman*, 408 U.S. at 252–53.

judicial opinions: Two Justices, Justice Brennan and Justice Thurgood Marshall, argued that capital punishment per se violated the Eighth Amendment's prohibition against cruel and unusual punishment;<sup>15</sup> three Justices, Justice William Douglas, Justice Potter Stewart, and Justice Byron White, reserved on the question of the general constitutionality of the death penalty, but rejected Georgia's scheme that left capital punishment to the unfettered discretion of the jury as "wanton[] and . . . freakish[]"<sup>16</sup> and "pregnant with discrimination,"<sup>17</sup> the remaining four Justices dissented,<sup>18</sup> with Justice Warren Burger opining that the majority usurped legislatures' power to determine criminal sentences.<sup>19</sup> Of note here, Justice Powell, the *McCleskey* majority opinion's future author, dissented separately to emphasize his disagreement with Justices Brennan and Marshall that capital punishment's "evolutionary process ha[d] come suddenly to an end."<sup>20</sup> Powell painted a picture of an America besieged by crime, noting the "brutish and revolting murders [that] continue to occur with disquieting frequency[,] . . . the several senseless assassinations[,] [and] the too numerous shocking multiple murders that have stained this country's recent history."<sup>21</sup> Compare this with fellow dissenter Justice Harry Blackmun, who averred to Burger's restraint-oriented sentiments but emphasized his own "distaste, antipathy, and, indeed, abhorrence, for the death penalty."<sup>22</sup>

The execution-free moment in Supreme Court jurisprudence proved short-lived. Just four years later, in three 1976 companion cases—*Gregg v. Georgia*,<sup>23</sup> *Proffitt v. Florida*,<sup>24</sup> and *Jurek v. Texas*<sup>25</sup>—a majority of Justices, including Powell, declared that the states' revised statutory schemes, which provided guided discretion to the jury, cured the death penalty's constitutional infirmity.<sup>26</sup> Justices Brennan and Marshall, now the lone voices of abolition, reiterated their *Furman* sentiments.<sup>27</sup> Although many states moved to guided discretion exemplified by *Gregg*, *Proffitt*, and *Jurek*,

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<sup>15</sup> *Id.* at 305 (Brennan, J., concurring); *id.* at 358–59 (Marshall, J., concurring).

<sup>16</sup> *Id.* at 310 (Stewart, J., concurring).

<sup>17</sup> *Id.* at 257 (Douglas, J., concurring).

<sup>18</sup> *Id.* at 375–479 (Burger, Blackmun, Powell & Rehnquist, JJ., dissenting separately).

<sup>19</sup> *Id.* at 383–84 (Burger, J., dissenting).

<sup>20</sup> *Id.* at 430–31 (Powell, J., dissenting).

<sup>21</sup> *Id.* at 444–45 (Powell, J., dissenting). *See also id.* at 459 (Powell, J., dissenting) (describing rape as "sordid, heinous[,] . . . demeaning, humiliating, and often physically or psychologically traumatic").

<sup>22</sup> *Id.* at 405 (Blackmun, J., dissenting).

<sup>23</sup> 428 U.S. 153 (1976).

<sup>24</sup> 428 U.S. 242 (1976).

<sup>25</sup> 428 U.S. 262 (1976).

<sup>26</sup> *See Gregg*, 428 U.S. at 196–98.

<sup>27</sup> *See id.* at 227 (1976) (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting).

a few states responded to *Furman*'s prohibition of unfettered discretion through level-up measures mandating capital punishment for certain crimes. This produced another set of 1976 companion cases, *Roberts v. Louisiana*<sup>28</sup> and *Woodson v. North Carolina*,<sup>29</sup> reviewing the constitutionality of mandatory capital punishment. The revival of mandatory executions moved Powell toward a measure of mercy, and he joined in striking the schemes down.

Justice Powell's turn toward temperance might seem curious in light of his *Furman* dissent's anticrime sentences and impassioned defense of legislative prerogative. Nevertheless, he had also expressed a special fondness for "case by case" analysis and jury discretion.<sup>30</sup> Such sentiments animated the *Woodson* plurality's main reasoning that because a death sentence is so exceptional, it requires jurors to assess the "character and record of the individual offender."<sup>31</sup> The plurality's second rationale was somewhat confounding given this unwavering trust in juries to prudently manage the magnitudinous death decision. It asserted that mandatory systems were untenable because juries could not be trusted to make lawful decisions about first-degree murder liability, leading to widespread and arbitrary nullification.<sup>32</sup> *Woodson*'s reasoning betrays a sensibility on the part of the plurality that mandatory executions, a vestige of antiquated premodern punishment, are simply inconsistent with "contemporary community values" regarding the administration of justice.<sup>33</sup> By contrast, discretionary execution comports with contemporary rectitude when imagined to be imposed by a thoughtful, presumptively nonracist, and thoroughly modern jury.<sup>34</sup> Read with *Furman* and *Gregg*, the *Roberts/Woodson* holdings made for tricky legal terrain to navigate. The Court both forbade and mandated discretion.<sup>35</sup>

It was between this rock and hard place that the administration of capital punishment persisted, now under guided discretion systems where juries were to weigh statutory aggravating factors ranging from concrete (committing an enumerated felony) to vague ("heinousness") against

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<sup>28</sup> 428 U.S. 325 (1976).

<sup>29</sup> 428 U.S. 280 (1976).

<sup>30</sup> See *Furman v. Georgia*, 408 U.S. 238, 430, 440 (1972) (Powell, J., dissenting).

<sup>31</sup> *Woodson*, 428 U.S. at 304.

<sup>32</sup> *Id.* at 302–03.

<sup>33</sup> *Id.* at 295 (quoting *Witherspoon v. Illinois*, 391 U.S. 510 (1968)).

<sup>34</sup> *Id.* at 295–296.

<sup>35</sup> See generally Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 382 (1995) (discussing this tension); Stephen P. Garvey, "As the Gentle Rain from Heaven": Mercy in Capital Sentencing, 81 CORNELL L. REV. 989, 990 (1996) (noting the complexity of the role of mercy in Eighth Amendment jurisprudence).

mitigating evidence presented by the defendant.<sup>36</sup> To be sure, the Court struggled with exactly how to reconcile *Furman*'s prohibition of arbitrariness and *Roberts/Woodson*'s principle that death penalty decisions must be personalized, a principle that reached its pinnacle in the 1978 decision, *Lockett v. Ohio*, where the Court quite surprisingly required states to allow *unlimited* mitigating evidence.<sup>37</sup> Professors Jordan Steiker and Carol Steiker survey the terrain, concluding: "[t]he tension between *Gregg*'s seeming insistence on channeling [jury discretion] and *Woodson*'s seeming insistence on uncircumscribed consideration of mitigating evidence constitutes the central dilemma in post-*Furman* capital punishment law."<sup>38</sup>

### B. *McCleskey and the Baldus Study*

*McCleskey v. Kemp* posed the most serious constitutional challenge to capital punishment writ large since *Furman*. Ruminating on that challenge's failure, a death penalty critic might lament the providence of timing that designated Warren McCleskey the face of abolition.<sup>39</sup> McCleskey had murdered a police officer, a fact that would garner little sympathy from swing justices, particularly Justice Powell whose law-and-order sentiments were on full display in *Furman*.<sup>40</sup> Justice Powell, in fact, confirmed this disposition in a memo to his clerks after the *McCleskey* oral argument, remarking, "[t]he opponents of capital punishment hardly could have picked a weaker case for this argument. Petitioner planned the armed robbery, was the trigger man, he shot an officer twice, and had a substantial record of other serious felonies. He identified no mitigating circumstances."<sup>41</sup>

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<sup>36</sup> See *Zant v. Stephens*, 462 U.S. 862, 866 (1983) (discussing aggravating factors); Steiker & Steiker, *supra* note 35 at 374, 382.

<sup>37</sup> 438 U.S. 586, 604–05 (1978) (striking down limits on what capital sentencers could consider as a mitigating factor). One might wonder whether the holding related to the fact that Lockett was a woman. *See id.* at 590. The Court's treatment of aggravating factors fared little better, allowing the jury unfettered discretion once it narrowed the pool by finding an aggravator. *Zant*, 462 U.S. at 416 (upholding death sentence where capital jury relied on both valid and invalid aggravating factors). *See also* *Walton v. Arizona*, 497 U.S. 639, 652–55 (1990) (holding that the "especially heinous, cruel, or depraved" aggravating factor was not unconstitutionally vague because judges could interpret it narrowly).

<sup>38</sup> Steiker & Steiker, *supra* note 35, at 382.

<sup>39</sup> See Dennis D. Dorin, *Far Right of the Mainstream: Racism, Rights, and Remedies from the Perspective of Justice Antonin Scalia's McCleskey Memorandum*, 45 MERCER L. REV. 1035, 1043 (1994) (calling McCleskey a "seemingly sociopathic armed robber [who] had killed a police officer"). In 2008, when I was a colleague of David Baldus at the University of Iowa, he remarked to me in passing that he believed the case would have been decided differently had McCleskey not been a cop killer.

<sup>40</sup> *See supra* note 21 and accompanying text.

<sup>41</sup> Memorandum from Lewis F. Powell, Jr., Assoc. Justice, Supreme Court of the U.S., to Leslie & Ronald 3 (Nov. 1, 1986) [hereinafter Powell Memo to Leslie & Ronald] (located in Justice Powell's *McCleskey v. Kemp Case File* on file with Washington & Lee University School of Law Library at 111–



Nevertheless, *McCleskey* involved a black-on-white killing, and in *Furman*, several Justices, including Powell, invited litigants with compelling evidence of racial discrimination to present claims under the Equal Protection Clause.<sup>42</sup> A 1983 study by law professors David Baldus and Charles Pulaski and statistician George Woodworth would serve as a basis for the LDF lawyers' acceptance of that invitation.<sup>43</sup> The study, among other things, tested the efficacy of a particular safeguard touted in *Gregg*, the requirement that the Georgia Supreme Court determine whether a death sentence is "excessive or disproportionate to the penalties imposed in similar cases," called "proportionality" or "comparative sentencing" review.<sup>44</sup> The researchers obtained the case files for all the murder convictions in Georgia from 1973 to 1978 to determine whether the Georgia Supreme Court had been correct to rule all the death sentences proportionate.<sup>45</sup> The good news for Georgia was that its system was not completely unpredictable, as increased aggravation did correlate with increased probability of a death sentence.<sup>46</sup> However, a significant portion of death sentences (13–22%) were "presumptively excessive" in that a substantial majority of similar cases did not result in death.<sup>47</sup>

The study also revealed a disparity that would forever mark the death penalty as racist. The white race of a victim was highly predictive of death, even when controlling for aggravation level.<sup>48</sup> Prosecutors required fewer aggravating factors to send white-victim cases to juries, and juries required fewer factors to sentence those killers to death. The authors concluded, "our data strongly suggests that Georgia is operating a dual system, based upon the race of the victim, for processing homicide cases."<sup>49</sup> Baldus and colleagues conducted a follow-up study,<sup>50</sup> and by the time the two studies (collectively called "the Baldus study") appeared in the *McCleskey* litigation, they included data from over 2000 cases with analyses of over 400 individual

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15), <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1168&context=casefiles> [https://perma.cc/8G5R-FK56].

<sup>42</sup> *Furman v. Georgia*, 408 U.S. 238, 449 (1972) (Powell, J., dissenting).

<sup>43</sup> See Baldus et al., *supra* note 3.

<sup>44</sup> See *Gregg v. Georgia*, 428 U.S. 153, 205–06 (1976).

<sup>45</sup> Baldus et al., *supra* note 3, at 679, 711.

<sup>46</sup> *Id.* at 702.

<sup>47</sup> *Id.* at 704–06. Between only 50% and 30% were "presumptively evenhanded." *Id.* "Presumptively evenhanded" death sentences were those where 80% or more of similar cases resulted in death. *Id.* at 698.

<sup>48</sup> *Id.* at 709–10.

<sup>49</sup> *Id.*

<sup>50</sup> See DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990) (describing the methodology and results of their second "Charging and Sentencing Study" of death sentences in Georgia).

factors that contributed to capital decisions.<sup>51</sup> The Baldus study found not only “stark” racial differences in death penalty distribution—the death penalty was assessed in 1% of black-victim cases, 11% of white-victim cases, and 22% of white-victim cases with black killers—but also that white victimhood was more predictive of death than some aggravating factors, including a prior record of murder.<sup>52</sup>

It is now prosaic to say that the Baldus study was “groundbreaking,” but it is difficult to overstate the precision and comprehensiveness of the evidence as compared to statistical proof in past cases.<sup>53</sup> Considering the character of the empirical work, along with the testimony in the record from a famed statistician that the study was “far and away the most complete and thorough analysis of sentencing” ever conducted,<sup>54</sup> it is shocking that the Georgia federal district judge found the Baldus study so lacking in validity that it could “demonstrate nothing.”<sup>55</sup> While a refutation of district court Judge J. Owen Forrester’s analysis is beyond the scope of this Essay, the district court decision reminds us that faith can always triumph over fact. Just as the extremely religious characterize evolution as a “theory” that lacks exacting proof while simultaneously eschewing the need for evidence of creation, those with colorblind faith that criminal punishment is fair demand undeniable, ironclad, and, indeed, unobtainable proof of discrimination, while offering none that the system is just.<sup>56</sup>

The Eleventh Circuit declined to test statistical wits with Baldus and company and instead presumed that the study was valid. Like the district court, the court of appeals was unimpressed, but its skepticism related to the study’s findings. The Baldus study revealed that the whiteness of the victim alone increased the defendant’s chance of being sentenced to death from 5% to 11%, more than doubling the risk of death. The appeals court wrote off this increase as “not sufficient,” incorrectly characterizing it as showing a *six percent* difference, rather than a *six point* difference, and noting that “[i]n any discretionary system, some imprecision must be tolerated.”<sup>57</sup> In fact, the appeals court saw the Baldus study as vindication that the system was

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<sup>51</sup> Samuel R. Gross, *David Baldus and the Legacy of McCleskey v. Kemp*, 97 IOWA L. REV. 1905, 1911–12 (2012).

<sup>52</sup> *McCleskey v. Kemp*, 481 U.S. 279, 286–87, 326–28 (1987).

<sup>53</sup> Gross, *supra* note 51, at 1911.

<sup>54</sup> See *McCleskey v. Kemp*, 753 F.2d 877, 908 & n.1 (11th Cir. 1985) (Johnson, J., dissenting).

<sup>55</sup> *McCleskey v. Zant*, 580 F. Supp. 338, 379 (N.D. Ga. 1984).

<sup>56</sup> See *McCleskey*, 481 U.S. at 360 (Blackmun, J. dissenting) (stating that “[t]he State did not test its hypothesis to determine if white-victim and black-victim cases at the same level of aggravating circumstances were similarly treated”).

<sup>57</sup> *McCleskey*, 753 F.2d at 897.

“operating in a rational manner,” despite the little glitch that a victim’s white race increased the defendant’s death probability, not by 6%, but by 120%.<sup>58</sup>

The Supreme Court similarly assumed the statistical validity of the Baldus study but did not endorse it as proof of discrimination.<sup>59</sup> By the time the case reached the High Court, the defense had amassed unassailable evidence of the study’s comprehensiveness and legitimacy.<sup>60</sup> Leading U.S. criminologists described it as “among the best empirical studies on criminal sentencing ever conducted.”<sup>61</sup> At least one Justice joining the majority, however, did not doubt the validity of the study as proof of discrimination. In 1993, the private papers of Thurgood Marshall became public, and among them was a bombshell that David Baldus later remarked “had taken his breath away.”<sup>62</sup> In a 1987 memo to the Conference, junior Justice Antonin Scalia stated:

I plan to join Lewis’s [Powell’s] opinion in this case, with two reservations. I disagree with the argument that the inferences that can be drawn from the Baldus study are weakened by the fact that each jury and each trial is unique, or by the large number of variables at issue. And I do not share the view, implicit in the opinion, that an effect of racial factors upon sentencing, if it could only be shown by sufficiently strong statistical evidence, would require reversal. 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. I expect to write separately to make these points, but not until I see the dissent.<sup>63</sup>

Perhaps Powell’s reluctance to endorse the study stemmed from the belief that the “Court should not be the forum for an extensive review of statistical techniques.”<sup>64</sup> Alternatively, he may have sought to allow the

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<sup>58</sup> See *id.* at 896–97.

<sup>59</sup> *McCleskey*, 481 U.S. at 291 n.7, 292–99.

<sup>60</sup> Gross, *supra* note 51, at 1914.

<sup>61</sup> Brief for Dr. Franklin M. Fisher, Dr. Richard O. Lempert, Dr. Peter W. Sperlich, Dr. Marvin E. Wolfgang, Professor Hans Zeisel & Professor Franklin E. Zimring as Amici Curiae Supporting Petitioner at 3, *McCleskey*, 481 U.S. 279 (1987) (No. 84-6811).

<sup>62</sup> Dorin, *supra* note 39, at 1039.

<sup>63</sup> Memorandum from Antonin Scalia, Assoc. Justice, Supreme Court of the U.S., to the Conference, *McCleskey v. Kemp* (Jan. 6, 1987) (located in Justice Powell’s *McCleskey v. Kemp Case File* on file with Washington & Lee University School of Law Library at 148), <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1168&context=casefiles> [https://perma.cc/8G5R-FK56].

<sup>64</sup> Bench Memorandum from Leslie to Lewis F. Powell, Jr., Assoc. Justice, Supreme Court of the U.S., 8 (Oct. 1, 1986) (located in Justice Powell’s *McCleskey v. Kemp Case File* on file with Washington & Lee University School of Law Library at 36–59), <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1168&context=casefiles> [https://perma.cc/8G5R-FK56]. Powell underlines this sentence and writes “I agree!” in the margin. *Id.*

majority to maintain the pretense of not really knowing whether there was discrimination, as opposed to admitting, as Scalia did, that they knew Georgia discriminated but just did not care.<sup>65</sup> I suspect, however, that Justice Powell eschewed extended exploration of the statistics because he just could not fathom how general race-of-victim disparities invalidated the specific sentence given to McCleskey, a convicted cop killer. In an early memo to his clerk, Powell ruminated:

At the outset, it is not at all clear to me that Baldus is even relevant to this case. McCleskey confessed to participating in a planned and armed robbery. . . . At the sentencing hearing, the jury found two statutory aggravating circumstances: the murder was committed in the course of another capital felony; and the victim had been a police officer engaged in the performance of his duties. McCleskey offered no mitigating evidence. In these circumstances, it is not easy to believe that general statistics only could be relevant to whether McCleskey was guilty of a capital offense for which death is a proper punishment under Georgia law.<sup>66</sup>

The Justice emphasized the lens of legitimacy through which he viewed capital punishment and the jaundiced eye he cast toward any wholesale assault on the institution: “This case presents, as we know, an attack on capital punishment itself. . . . It will not be easy for me to accept this view.”<sup>67</sup>

## II. A FEAR OF TOO MUCH LENIENCY

Before I proceed to dissect the *McCleskey* majority opinion and reconfigure it in a manner that supports my thesis, as law professors are wont to do, a serious caveat on methodology is warranted. It is often an exercise in aspiration, speculation, and even futility to seek to divine the motivations of individual Supreme Court Justices. I certainly do not mean to psychologize or biograph Justice Powell, the latter having been done with care by John C. Jeffries.<sup>68</sup> Nor do I engage in a court-watcher’s analytic of larger Supreme Court trends, transformations, or partisanship.<sup>69</sup> My goal and

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<sup>65</sup> I thank Carol Steiker for this point.

<sup>66</sup> Memorandum from Lewis F. Powell, Jr., Assoc. Justice, Supreme Court of the U.S. to Leslie 2–3 (Sept. 16, 1986) [hereinafter Powell Memo to Leslie] (located in Justice Powell’s *McCleskey v. Kemp Case File* on file with Washington & Lee University School of Law Library at 28–33), <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1168&context=casefiles> [<https://perma.cc/8G5R-FK56>].

<sup>67</sup> *Id.* at 6.

<sup>68</sup> See JOHN C. JEFFRIES, JR., *JUSTICE LEWIS F. POWELL, JR.* (1994).

<sup>69</sup> See, e.g., ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* (2014); JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* (2007); LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* (1985). For a recent empirical look at the politics of the courts, although not the Supreme Court in particular, see Dan M. Kahan et. al., “*Ideology*” or “*Situation Sense*”? *An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349, 351 (2016).

method is far more modest: to divine the meaning of the opinion from an inspection of the opinion itself, other relevant decisions, and statements of the Justices, particularly Justice Powell. Of course, there is a fine line between analysis and psychoanalysis, and case history must attend to the concerns of historiography, but I hope not to wade into those murky waters. Instead, the following is an effort to put *McCleskey*'s jurisprudential pieces together in a new, but not novel, way, adhering to the norms of case interpretation in legal scholarship.

#### A. *The Disparity-Claim Fear*

Justice Powell's relatively terse and dispassionate opinion commences with the admonition that an equal protection violation requires proof of "discriminatory purpose," not general impact.<sup>70</sup> Significantly, however, Powell immediately qualified that intent can be established through statistical evidence of disparity.<sup>71</sup> He further opined that a "stark" pattern of disparity can constitute the "sole proof of discriminatory intent" and that in certain cases the Court will find a violation "even when the statistical pattern does not approach . . . extremes."<sup>72</sup> This language reads as promising for the Petitioner, yet by the end of the equal protection section, the opinion has erected the onerous requirement of "exceptionally clear proof" of discrimination.<sup>73</sup> Powell opines that under such a standard, "the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in *McCleskey*'s case acted with discriminatory purpose."<sup>74</sup>

Perhaps the exacting standard of proof reflects Justice Powell's desire to short circuit discriminatory pattern and practice jurisprudence and entrench *Washington v. Davis*'s bright line between discriminatory intent and impact.<sup>75</sup> In this view, Powell's overarching fear was one of too much racial justice, the type secured through the disparate impact analysis.<sup>76</sup> However, a newfound distaste for discriminatory pattern evidence would have been a stunning reversal for a jurist who, just the year before, authored *Batson v. Kentucky*, the most important antidiscrimination case to date.<sup>77</sup> *Batson* was, at that time, quite singular in its forthright embrace of pattern

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<sup>70</sup> *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987).

<sup>71</sup> *Id.* at 293.

<sup>72</sup> *Id.* at 293–94.

<sup>73</sup> *Id.* at 297.

<sup>74</sup> *Id.*

<sup>75</sup> 426 U.S. 229, 240 (1976).

<sup>76</sup> See *McCleskey*, 481 U.S. at 316; see also *supra* note 8 and accompanying text.

<sup>77</sup> 476 U.S. 79 (1986).

evidence to prove discriminatory intent.<sup>78</sup> In *Batson*, Justice Powell took up the issue of racially biased peremptory strikes.<sup>79</sup> Criminal attorneys had long enjoyed a privilege of absolute discretion in striking a certain number of jurors, without regard to “cause” and without explanation, and, to many, discretionary peremptory strikes represented a bedrock principle of fair procedure.<sup>80</sup>

*Batson* asserted that the prosecutor in his case engaged in racial discrimination by excluding African-Americans from the jury. In assessing *Batson*’s argument, Powell articulated the famous standard for proving discriminatory purpose through circumstantial evidence:

[A defendant] may make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. Once the defendant makes the requisite showing, the burden shifts to the State to explain adequately the racial exclusion. The State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties. Rather, the State must demonstrate that “permissible racially neutral selection criteria and procedures have produced the monochromatic result.”<sup>81</sup>

Far from requiring smoking-gun proof, *Batson* specified that a prima facie case of petit jury selection discrimination could be established simply by a prosecutor’s “pattern” of excluding African-Americans from the jury.<sup>82</sup> This history does not readily support the thesis that Powell had an overwhelming fear of racial disparity evidence.<sup>83</sup>

In *McCleskey*, Justice Powell did not in fact withdraw support for the admission of pattern evidence in jury selection cases, or in housing, voting, and employment discrimination cases.<sup>84</sup> Instead, he took pains to distinguish

<sup>78</sup> See James J. Tomkovicz, *Twenty-Five Years of Batson: An Introduction to Equal Protection Regulation of Peremptory Jury Challenges*, 97 IOWA L. REV. 1393, 1403 (2012) (calling *Batson*’s lowering of threshold for proof of petit jury selection discrimination a “dramatic, revolutionary step”). The case proved less revolutionary in practice, as judges routinely accept prosecutors’ weak explanations for their strikes. See *infra* note 95.

<sup>79</sup> *Batson*, 476 U.S. at 82.

<sup>80</sup> See *id.* at 133 (Burger, C.J., dissenting) (“[T]he peremptory challenge that is part of the fabric of our jury system should not be casually cast aside . . .”).

<sup>81</sup> *Id.* at 93–94 (internal citations omitted).

<sup>82</sup> *Id.* at 96–97.

<sup>83</sup> Powell’s *McCleskey* case file papers reveal that he was particularly attuned to differentiating between civil discrimination cases and discrimination claims in *criminal* cases. His remarks on the draft opinion from his clerk, states, “I am inclined to rely in the text of our opinion only—or primarily—on criminal cases that have placed the burden of proving this discrimination on the particular defendant.” Powell Memo to Leslie & Ronald, *supra* note 41.

<sup>84</sup> *McCleskey v. Kemp*, 481 U.S. 279, 293–94 (1987).

*McCleskey* based on the “[t]he *unique* nature of the decisions at issue in this case.”<sup>85</sup> This invited a blistering rejoinder from Justice Blackmun in dissent:

The Court today seems to give a new meaning to our recognition that death is different. Rather than requiring a correspondingly greater degree of scrutiny of the capital sentencing determination, the Court relies on the very fact that this is a case involving capital punishment to apply a *lesser* standard of scrutiny under the Equal Protection Clause.<sup>86</sup>

Justice Powell offered weak analytical support for distinguishing capital process from the jury selection process. To be sure, the doctrinal history of the two processes reveals the death penalty a far likelier candidate for equal protection regulation than peremptory strikes. In capital jurisprudence, the courts had long problematized decisionmakers’ discretion and set forth parameters to channel it. By contrast, peremptory challenges’ entire point is to provide prosecutors and defense attorneys an alternative to for-cause strikes and allow them a measure of unfettered jury-empaneling discretion. Given that *Batson* had established the necessity and propriety of requiring prosecutors to articulate race-neutral reasons for peremptorily striking a juror, why did Powell consider it wholly inappropriate to require capital prosecutors to articulate race-neutral reasons for seeking a defendant’s death?

Powell could fairly object to any implication that courts could second-guess capital jury decisionmaking or require jurors to articulate post-verdict race-neutral explanations for their death sentences, relying on the longstanding precept that jury secrecy is sacrosanct. However, while courts may be precluded from probing jurors’ minds for evidence of discrimination, *Batson* makes clear that *prosecutors* enjoy no such immunity.<sup>87</sup> Faced with the reality that prosecutorial decisionmaking is not sacrosanct, the *McCleskey* opinion, remarkably, hinges its distinction between prosecutors seeking strikes and seeking deaths on the gossamer thread of time, referring solely to “the impropriety of our requiring prosecutors to defend their decisions to seek death penalties, often years after they were made.”<sup>88</sup> But this distinction is unexplained and inexplicable. *Batson* challenges can also occur years after conviction—case in point, 2016’s *Foster v. Chatman*, where the Supreme Court upheld a *Batson* challenge to a jury in a 1986 murder trial that occurred just four months after *Batson* was decided.<sup>89</sup>

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<sup>85</sup> *Id.* at 297 (emphasis added).

<sup>86</sup> *Id.* at 347–48 (Blackmun, J., dissenting) (internal citations and quotation marks omitted).

<sup>87</sup> *See id.* at 348–49 (Blackmun, J., dissenting).

<sup>88</sup> *Id.* at 296 (majority opinion) (internal citations and quotation marks omitted).

<sup>89</sup> 136 S. Ct. 1737, 1755 (2016).

The Court also opined that death penalty decisions involve more variables than jury selection, employment, housing, and voting decisions.<sup>90</sup> Even if this conclusory assumption were correct, it would not refute that Baldus and his colleagues *actually addressed* the multiple variable phenomenon—hundreds of them—in a manner that far exceeded the breadth and depth of the proof found sufficient in past discrimination cases.<sup>91</sup> Indeed, the *Batson* prima facie case is established simply by asserting that a prosecutor created a white jury through striking black jurors, without *any* empirical evidence attesting to whether or how much the factor of race, among the infinite reasons, predicted prosecutorial strikes. Yet, evidence of Georgia prosecutors’ virtual non-prosecution of black victim cases *combined with* exacting statistical evidence that race played a role in their decisions was “clearly insufficient.”<sup>92</sup>

Why did Justice Powell try so hard to shut down McCleskey’s disparity challenge, when it was he who created the very *Batson* framework?<sup>93</sup> The answer lies in the respective challenges’ relationship to state criminal authority. Powell understood that *Batson* called for “case-by-case” resolutions of disputes through re-empaneling juries or, in the extreme case, retrial.<sup>94</sup> Such a blip on prosecutors’ paths toward securing convictions was a small price to pay for vindicating racial equality.<sup>95</sup> By contrast, *McCleskey* presented institutional stakes of a wholly different magnitude. As Justice John Paul Stevens noted, Powell feared that a favorable ruling “would sound the death knell for capital punishment in Georgia.”<sup>96</sup> Powell’s earliest case memo queried whether acceptance of the Baldus study would require that no black defendant be sentenced to death when their victim was white.<sup>97</sup>

Justice Blackmun, in fact, worked through the application of the *Batson* framework to McCleskey’s case in his dissent. However, his conclusion could only serve to confirm Powell’s anxieties over abolition. Blackmun

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<sup>90</sup> *McCleskey*, 481 U.S. at 295.

<sup>91</sup> See *supra* notes 48–52 and accompanying text.

<sup>92</sup> *McCleskey*, 481 U.S. at 297.

<sup>93</sup> See *supra* notes 77–81 and accompanying text.

<sup>94</sup> Powell Memo to Leslie & Ronald, *supra* note 41, at 2–3.

<sup>95</sup> *Batson* did not prevent racialized mass incarceration and its application to defense attorneys may have rendered it marginally more punitive than protective. See *Georgia v. McCollum*, 505 U.S. 42, 48–50 (1992) (applying the *Batson* framework to defendants’ peremptory strikes); Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina’s Remarkable Appellate Batson Record*, 94 N.C. L. REV. 1957, 1963–64 (2016) (examining thirty years of *Batson* litigation in North Carolina and concluding that *Batson* has proven “toothless” at preventing discriminatory jury strikes, which is especially disturbing “in light of the dubious reasons North Carolina prosecutors routinely give for their peremptory challenges of minority jurors”).

<sup>96</sup> *McCleskey*, 481 U.S. at 367 (Stevens, J., dissenting).

<sup>97</sup> See Powell Memo to Leslie & Ronald, *supra* note 41, at 3–4.



opined that whenever a black defendant convicted of killing a white victim brought a challenge, the state had to articulate a compelling “countervailing theory” of the racial disparity. Given the “magnitude” of the Baldus study, prosecutors would generally be unable to make an adequate case that their decisions were free of racial bias.<sup>98</sup> This implied that every defendant in a white victim case would have a successful *Batson*-like challenge until Georgia modified its system.<sup>99</sup> Indeed, during oral argument, LDF attorney Jack Boger drew a straight line to *Furman*’s moratorium, stating that “like *Furman*,” Georgia’s system “is not operating evenhandedly . . . [and] need[s] [to] be struck.”<sup>100</sup> In the end, Powell’s carve-out for capital punishment in discrimination jurisprudence stemmed from his belief that equal protection liberality in capital punishment, unlike in jury selection, would be too great an assault on carceral authority for the state to bear.<sup>101</sup>

### B. *The Color-Consciousness Fear*

A separate but related explanation for the Court’s dismissal of McCleskey’s equal protection claim emphasizes, not the Court’s resistance to evidence of disparity, but the Justices’ concern that accepting such evidence would require the Court to compel prosecutors to engage in a color-conscious calibration of their capital decisions. Although, as discussed above, some of the dissenters imagined that Georgia’s capital punishment system could, after a *Furman*-like chrysalis phase, emerge metamorphosed, the question of how to reign in discriminatory victim-valuation while preserving individualized decisionmaking remained intractable. One might reason that the racial disparity issue militated in favor of mandatory capital punishment in select cases, but that had been foreclosed by *Roberts/Woodson*.<sup>102</sup> However, this constitutionally required discretion, crafted in the name of civilized modernity, was also an avenue for retrograde racist sentiments to enter into the capital process.

During oral argument, the Justices struggled with this new rock-and-hard-place between desirable individuation and unacceptable discrimination.

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<sup>98</sup> *McCleskey*, 481 U.S. at 359, 361 (Blackmun, J., dissenting).

<sup>99</sup> Blackmun suggested Stevens-like narrowing and also suggested that prosecutor guidelines might save the system. *Id.* at 365.

<sup>100</sup> Oral Argument at 15:22, *McCleskey*, 481 U.S. 279 (1987) (No. 84-6811), <https://www.oyez.org/cases/1986/84-6811> [<https://perma.cc/H7TE-294W>].

<sup>101</sup> James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006*, 107 COLUM. L. REV. 1, 85–86 (2007) (suggesting this as a “less charitabl[e]” view).

<sup>102</sup> See *supra* notes 30–35 and accompanying text.

Justice Powell only spoke to emphasize McCleskey's "serious offense,"<sup>103</sup> but other Justices were preoccupied with this "tension:"

O'Connor: So this Court's cases that have, since *Furman*, opened up to allow more discretion, were wrongly decided, and we should move back toward less discretion?

Boger: Not necessarily. They were based on the hope . . . they were based on the strong presumption . . . that [states] could carry out those statutes without racial discrimination. . . .

. . . .

Scalia: [W]hat procedure could have been inserted that would have solved that problem, other than the one that Justice O'Connor has suggested, that is, going back to a rigid system where a certain crime, felony murder, produces the death penalty?<sup>104</sup>

Various commentators offered suggestions for a system that would reduce Georgia's disparities while preserving discretionary capital punishment,<sup>105</sup> the most enduring of which can be found in Justice Stevens's dissent. Noting that the Baldus study found little racial disparity in the highly aggravated murder category, which did not include McCleskey's "mid-level" murder, Justice Stevens suggested limiting death eligibility to those extreme cases.<sup>106</sup> Today, attorney Boger ruminates on whether he should have emphasized Stevens' remedy.<sup>107</sup> However, the features of this system that would remedy discrimination—the rare-but-guaranteed nature of execution—also render it unacceptable to both abolitionists and death

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<sup>103</sup> Justice Powell asked, "So this defendant was found guilty of shooting a police officer while he was in the process of committing a robbery[?]" Attorney Boger responded in part, "It's no doubt, Justice Powell, that's a serious offense," to which Powell replied, "Right." Oral Argument at 21:45, *supra* note 100.

<sup>104</sup> Oral Argument at 26:25, *supra* note 100 (first ellipsis in original).

<sup>105</sup> These range from narrowing to "super due process." See, e.g., Steiker & Steiker, *supra* note 35, at 414–26.

<sup>106</sup> *McCleskey*, 481 U.S. at 367. I hasten to add that in recent years, the idea of drastically narrowing the pool of death-eligible murderers while simultaneously making death virtually mandatory for that class has gained a measure of support from the many who believe that the system "worked" in the Dzhokhar Tsarnaev (Boston bomber) and Dylann Roof (racist church killer) cases. See Richard A. Serrano, *Death Sentence for Dzhokhar Tsarnaev Brings Relief to Many in Boston*, L.A. TIMES (May 15, 2015), <http://www.latimes.com/nation/la-na-boston-tsarnaev-sentence-20150512-story.html> [<https://perma.cc/2DGL-ZQE5>]; Malcolm Graham, Viewpoint, *Sparing Dylann Roof the Death Penalty Says White Lives Matter More*, CHARLOTTE OBSERVER (Aug. 30, 2016), <http://www.charlotteobserver.com/opinion/op-ed/article98836492.html> [<https://perma.cc/P28C-YY8D>]. The brother of one of Roof's victims reasoned that sparing Dylann Roof the death penalty says "[w]hite lives matter more and that white victims matter more." *Id.*

<sup>107</sup> Discussion with Jack Boger, Wade Edwards Distinguished Professor of Law, University of North Carolina (Nov. 20, 2017).

penalty supporters. Justices Brennan and Marshall did not endorse Stevens's suggestion that capital punishment could be made racially palatable by changing its "for whites only" character and guaranteeing black families murderer-execution benefits in highly aggravated cases.<sup>108</sup> Conversely, Justice Powell regarded the *McCleskey* litigation as an unwarranted "challenge to the validity of the [capital statutes] that repeatedly have been approved by this Court and scores of other courts."<sup>109</sup> Powell found it difficult "to think of many cases with aggravating circumstances worse than those in this case."<sup>110</sup>

Moreover, Powell was uncertain that even Stevens's plan would survive the *McCleskey* standard, noting that a "borderline area would continue to exist" and that "the discrepancy between borderline cases would be difficult to explain."<sup>111</sup> To be sure, race can influence the very interpretation of aggravation and mitigation, from the malign tendency to view aggravators like "heinousness" through a racial lens to a more benign acceptance of the leniency sentiments of black victims' families.<sup>112</sup> As such, nondiscrimination in capital punishment might require what law professor Randall Kennedy has characterized as "affirmative action" for execution. He observed, "it is not self-evident why—if race can and should be taken into account in redressing racial injustice in employment, housing, voting, and education—race cannot also be taken into account in reforming capital sentencing."<sup>113</sup>

Suffice it to say, the notion of affirmative action for death did not flourish in the Supreme Court. One may reason that the Court was swinging toward rigid colorblindness, a sentiment reflected in 1997's *Adarand Constructors, Inc. v. Peña*, which applied the "strict scrutiny" test formerly reserved for invidious discrimination to race-conscious remedial programs in employment.<sup>114</sup> However, Justice Powell, who retired before *Adarand*,

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<sup>108</sup> *McCleskey*, 481 U.S. at 367 (Stevens, J., dissenting).

<sup>109</sup> Powell Memo to Leslie, *supra* note 66, at 3–4.

<sup>110</sup> Justice Powell's Handwritten Oral Argument Notes (Oct. 15, 1986) (located in Justice Powell's *McCleskey v. Kemp Case File* on file with Washington & Lee University School of Law Library at 88), <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1168&context=casefiles> [<https://perma.cc/8G5R-FK56>].

<sup>111</sup> *McCleskey*, 481 U.S. at 318 n.45 (majority opinion).

<sup>112</sup> For studies on African-Americans' tendency toward mercy regarding capital punishment, see Theodore Eisenberg, *Death Sentence Rates and County Demographics: An Empirical Study*, 90 CORNELL L. REV. 347, 370 (2005) (empirical study suggesting that "minority community skepticism about the justness of the death penalty" contributes to disparity); Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26, 46–47 (2000) (citing studies and concluding that "black juror[s] [are] more likely to have found the defendant likable as a person" regardless of other characteristics).

<sup>113</sup> Kennedy, *supra* note 9, at 1438.

<sup>114</sup> 515 U.S. 200, 227 (1995).

was not unalterably set against color-conscious reasoning. Powell had authored the famous affirmative action case, *Regents of University of California v. Bakke*, which struck down race-based quotas but approved racial preferences in higher education.<sup>115</sup> Instead, as Professor Kennedy's article notes, Powell's anti-affirmative action sentiments appeared unique to the capital punishment context, reflecting a squeamishness toward racially distributing death. Thus, although Powell may not have been completely sanguine about affirmative action in general, the *McCleskey* majority's reluctance to racially calibrate execution also reflected *abolitionist* sentiments that death is, in fact, different.<sup>116</sup>

Professor Kennedy argues that abolitionist first principles largely "determined the response of those outraged by racial patterns in capital sentencing."<sup>117</sup> To an abolitionist, the idea of applying barbaric and uncivilized capital punishment based on the racial makeup of a case is particularly repugnant, even if to remedy systemic disparities. In 2010, several prominent abolitionist lawyers and scholars authored a law review article criticizing South Carolina's racist capital punishment system.<sup>118</sup> In it, they discussed several cases that involved "direct evidence of racial discrimination," including a prosecutor's outrageous reference to a black defendant as "King-Kong."<sup>119</sup> The article recounts a "particularly instructive" case in which a death penalty prosecutor admitted:

I felt like the black community would be upset though if we did not seek the death penalty because there were two black victims in this case. . . . I felt like if we did not seek the death penalty, that the community, the black community would be upset because we are seeking the death penalty in the (Andre) Rosemond case for the murder of two white people.<sup>120</sup>

The prosecutor's reasoning, although imprecise and incomplete, seems like the type of race-conscious distributional analysis that vindicates the importance of black lives.<sup>121</sup> Unsurprisingly, the state supreme court reversed

<sup>115</sup> 438 U.S. 265 (1978) (plurality opinion). An alumnus of Harvard Law School, Powell appended to his opinion Harvard College's admissions policy, which stated that "the race of an applicant may tip the balance in his favor." *Id.* at 316.

<sup>116</sup> Kennedy, *supra* note 9, at 1393.

<sup>117</sup> *Id.*

<sup>118</sup> See John H. Blume et al., *When Lightning Strikes Back: South Carolina's Return to the Unconstitutional, Standardless Capital Sentencing Regime of the Pre-Furman Era*, 4 CHARLESTON L. REV. 479, 515–16 (2010).

<sup>119</sup> *Id.* at 514.

<sup>120</sup> *Id.* at 515–16 (2010) (citation omitted).

<sup>121</sup> See, e.g., Douglas O. Linder, *Juror Empathy and Race*, 63 TENN. L. REV. 887, 910 (1996) (exhorting prosecutors to "understand the importance of reminding jurors . . . that the lives of black victims are as valuable as lives of white victims" and suggesting that prosecutors "use closing arguments

the case on equal protection grounds—a life-preserving result viewed positively by the article’s abolitionist authors. However, the South Carolina postconviction court did not reverse on abolitionist or even “death is different” grounds, but strictly on an *Adarand*-like colorblindness theory:

[I]f the victims in this case had been white, and the deputy prosecutor had stated that the white community would have been upset if the State had not sought death, then clearly it would be an unconstitutional race-based decision to seek death, and a new trial would have been required. *It is no different* when the deputy prosecutor states that the concerns of the black community were discussed and considered in the State’s decision to seek death.<sup>122</sup>

Professor Kennedy’s analysis that abolitionist sentiments are woven into the very fabric of the race and death penalty discussion reveals that the racial disparity argument was born in interest convergence. Had McCleskey prevailed, it would have been by means of a merger of antidiscrimination ideals and larger “institutional” critiques of capital punishment, both race-based (the institution is inherently racist) and nonracial (the institution is philosophically immoral). Surely, Justice Brennan would have signed on to a death penalty moratorium based on the system’s “devaluation” of black victims, even though Brennan would regard as anathema Professor Kennedy’s characterization of capital punishment as “a useful and highly valued public good” to be distributed equally.<sup>123</sup> Brennan’s dissent assiduously avoids characterizing leniency as a harm to black victims, concentrating instead on the mutually constitutive history of slavery, racial oppression, and state-sponsored execution that renders the punishment inherently racist, even if meted out equitably.<sup>124</sup> This stands in stark contrast to liberal scholars who critique capital punishment for denying black victims’ families “the sense of closure and ‘justice’ that the death penalty affords.”<sup>125</sup>

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to tell the stories of black victims in such a way as to emphasize points of commonality with white jurors”).

<sup>122</sup> Sheri Lynn Johnson, *Litigating for Racial Fairness After McCleskey v. Kemp*, 39 COLUM. HUM. RTS. L. REV. 178, 179–80 (2007) (emphasis added) (citation omitted).

<sup>123</sup> Kennedy, apparently without irony, compares execution to electricity: “abolition as a remedy for race-of-the-victim disparities is equivalent to reducing to darkness a town in which street lights have been provided on a racially unequal basis.” Kennedy, *supra* note 9, at 1440.

<sup>124</sup> See *McCleskey*, 481 U.S. at 328–31 (Brennan, J., dissenting); see also Charles J. Ogletree, Jr., *Black Man’s Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 33 (2002) (arguing that Kennedy’s analysis relies on the “fallacy” that the remedy to racial discrimination is “executing more people” and asserting that “[w]e could approach the problem instead by ceasing to over-value white life so much—that is, we could decrease the rate at which we execute black killers of whites such that it matches the rate at which we execute black killers of blacks” (emphasis omitted)).

<sup>125</sup> Evan Tsen Lee & Ashutosh Bhagwat, *The McCleskey Puzzle: Remediating Prosecutorial Discrimination Against Black Victims in Capital Sentencing*, 1998 SUP. CT. REV. 145 (1998); see also

Professor Kennedy himself acknowledged the dangers of racially distributing death. In addition to the potential that it “might actually lead to the execution of more black defendants,”<sup>126</sup> there is the danger “that race-conscious reform would simply degenerate into an expedient tokenism designed to save capital punishment[,] . . . that defendants might be sentenced to death primarily to create ‘good’ statistics.”<sup>127</sup> The Justices clearly harbored an aversion to racially “tinker[ing] with the machinery of death.”<sup>128</sup> Justices Marshall and O’Connor asked Boger how discrimination against victims constitutes discrimination against defendants. He answered:

[I]f I have two defendants at my right hand, and two at my left, and the two at my right have murdered whites in Georgia, and two at my left have murdered blacks, surely my defendants on the right hand would have standing if Georgia had a statute that made killing a white person a [more] serious crime.<sup>129</sup>

O’Connor responded, “It’s such a curious case, because what’s the remedy? Is it to execute more people?”<sup>130</sup>

### C. *The Leniency Fear*

The majority opinion itself indicates less a concern that reformed capital systems would involve affirmative action than trepidation that McCleskey’s success would prevent capital punishment (and other serious sentences) from surviving in any form. This fear appears as Justice Powell’s can-of-worms argument: “McCleskey’s claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties.”<sup>131</sup> Throughout the process of preparing the majority opinion, Powell made clear his belief that the “petitioner’s challenge is no less than to our entire criminal justice system.”<sup>132</sup>

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Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 473 (1998) (failure to impose death causes “emotional harm” to “the family and friends of the undervalued black victim”).

<sup>126</sup> Kennedy, *supra* note 9, at 1392.

<sup>127</sup> *Id.* at 1439.

<sup>128</sup> *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

<sup>129</sup> Oral Argument at 14:32, *supra* note 100.

<sup>130</sup> *Id.*

<sup>131</sup> *McCleskey v. Kemp*, 481 U.S. 279, 314–15.

<sup>132</sup> Memorandum from Lewis F. Powell, Jr., Assoc. Justice, Supreme Court of the U.S., to Leslie & Ronald 6 (Nov. 3, 1986) [hereinafter Powell Memo to Leslie & Ronald] (located in Justice Powell’s *McCleskey v. Kemp Case File* on file with Washington & Lee University School of Law Library at 116–124), <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1168&context=casefiles> [https://perma.cc/8G5R-FK56]; see also Memorandum from Lewis F. Powell, Jr., Assoc. Justice,

Justice Brennan critiqued Powell's fear of "open[ing] the door to widespread challenges to all aspects of criminal sentencing," stating, "Taken on its face, such a statement seems to suggest a fear of too much justice."<sup>133</sup> Brennan further argued that *any* disproportionate death sentencing, even of those with "blond hair," "would be repugnant to deeply rooted conceptions of fairness."<sup>134</sup> To Justice Powell, however, Brennan's argument was little more than an admission of "the scope of his dissent," namely, "a system of 'statistical jurisprudence' unprecedented in civilized history."<sup>135</sup> Brennan unquestionably viewed the Court's role as a bulwark against governmental overreach:

[T]he methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged. Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life.<sup>136</sup>

Given Brennan's impassioned plea, it is somewhat surprising his dissent goes on to accommodate Powell's fear by suggesting that the Court could limit *McCleskey*'s impact to "qualitatively different" death penalty cases.<sup>137</sup> To be sure, a holding favorable to *McCleskey* could have specified that only death sentences merited heightened equal protection review. However, such a result would, again, be unsatisfactory to Justice Powell, who was convinced of the continued propriety, if not desirability, of capital punishment.<sup>138</sup> The Baldus study may have moved Justice Blackmun, who

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Supreme Court of the U.S., to Leslie 3 (Oct. 14, 1986) (located in Justice Powell's *McCleskey v. Kemp Case File* on file with Washington & Lee University School of Law Library at 78–80), <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1168&context=casefiles> [<https://perma.cc/8G5R-FK56>] (underlining the statement, "[b]ecause of the limitless application of a challenge like that posed by *McCleskey*," and writing, "Yes" in the margin).

<sup>133</sup> *McCleskey*, 481 U.S. at 339 (Brennan, J., dissenting).

<sup>134</sup> *Id.*

<sup>135</sup> Justice Powell's Handwritten Notes on First Draft of Justice Brennan's Dissent 19 (circulated Jan. 30 1987) [hereinafter Powell's Notes on Brennan's Dissent] (located in Justice Powell's *McCleskey v. Kemp Case File* on file with Washington & Lee University School of Law Library at 270–94), <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1168&context=casefiles> [<https://perma.cc/8G5R-FK56>] (writing in the margin of the first draft of Brennan's dissent, in response to the "fear of too much justice" passage).

<sup>136</sup> *McCleskey*, 481 U.S. at 343 (Brennan, J., dissenting) (internal citations and quotation marks omitted); *see also id.* at 365 (Blackmun, J., dissenting) ("If a grant of relief to him were to lead to a closer examination of the effects of racial considerations throughout the criminal justice system, the system, and hence society, might benefit.").

<sup>137</sup> *Id.* at 339–42 (Brennan, J., dissenting).

<sup>138</sup> *See supra* note 109 and accompanying text.

had long “abhorred” the death penalty, to switch sides, but Powell’s commitment to the punishment remained steadfast.<sup>139</sup> Powell regarded execution as the *presumptively* rational, intuitive, and warranted punishment for murderers like Warren McCleskey, of whom he stated, “[i]ndeed, on the facts of this case, it is unlikely that any jury—in a state where capital punishment is authorized—could have given him any other sentence.”<sup>140</sup>

This presumption in favor of capital punishment for murder explains why Powell’s opinion equates discretion with leniency, despite that *McCleskey* was not about mandating execution or limiting mitigating factors, but abolition.<sup>141</sup> Compared to mandatory capital punishment, preserving sentencing discretion is lenient, but compared to abolition, preserving the discretion to impose death is *severe*. Powell’s myopic view of discretion stemmed from his innate sense that the prosecutor’s and jury’s natural inclination is to impose death for aggravated murder. When for racial or other reasons they do not, it is an act of mercy that defendants should appreciate.<sup>142</sup> Powell adhered to this view, despite the Baldus study showing an inverse phenomenon of racialized “excessiveness.”<sup>143</sup> Prosecutors and jurors generally refrained from imposing death in mid-level cases like McCleskey’s and did so only when white victimhood impelled them to be uncharacteristically severe.<sup>144</sup> Indeed, “among those 17 defendants who had been charged with homicides of Fulton County police officers between 1973 and 1980, only one defendant other than [McCleskey] had even received a penalty trial. In that case, where the victim was black, a life sentence was imposed.”<sup>145</sup>

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<sup>139</sup> See *supra* notes 21–22 and accompanying text.

<sup>140</sup> Memorandum from Lewis F. Powell, Jr., Assoc. Justice, Supreme Court of the U.S., to Leslie 4 (Nov. 1, 1986) (located in Justice Powell’s *McCleskey v. Kemp Case File* on file with Washington & Lee University School of Law Library at 125–31), <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1168&context=casefiles> [https://perma.cc/8G5R-FK56].

<sup>141</sup> *McCleskey*, 481 U.S. at 311 (majority opinion) (“Discretion in the criminal justice system offers substantial benefits to the criminal defendant.”).

<sup>142</sup> See *id.*

<sup>143</sup> Baldus et al., *supra* note 3, at 698.

<sup>144</sup> *Id.*

<sup>145</sup> Brief for Petitioner at 16, *McCleskey*, 481 U.S. 279 (1987) (No. 84-6811), 1986 WL 727359, at \*16. In 1994, a retired Justice Powell confessed to his biographer John Jeffries that *McCleskey* was the one decision he regretted and he had come to embrace abolition. JEFFRIES, *supra* note 68, at 442. However, Powell’s change of heart appears less an eleventh-hour realization of the racist nature of capital punishment than a conclusion that recent litigation had rendered the punishment too random and infrequent to serve any penological purpose. According to Jeffries, the Justice had received a “bitter education” from reviewing capital cases, with their corresponding “endless waiting, merry-go-round litigation, last-minute stays, and midnight executions [that] offended Powell’s sense of dignity and his conception of the majesty of the law.” *Id.* at 452.



Powell also found Brennan's "death is different" argument unpersuasive because he simply did not believe *McCleskey's* disparity claim could be so confined. Reacting to Brennan's eloquent draft dissent, Powell remarked, "Great jury speech, but no answer other than to abolish capital punishment, and this would leave much of [Brennan's] argument applicable to felony sentences generally—for example life sentences for murder and rape."<sup>146</sup> In the *McCleskey* opinion, Powell points to *Solem v. Helm*—a holding he authored declaring a petty offender's mandatory life sentence under a three-strikes regime unconstitutionally disproportionate in violation of the Eighth Amendment—as opening the door to *McCleskey*-style arbitrariness claims in noncapital cases.<sup>147</sup> Those familiar with the Court's subsequent noncapital proportionality jurisprudence might find this idea somewhat laughable, given how impotent the Court has rendered the Eighth Amendment in checking outrageous carceral sentences. However, these confines of the Eighth Amendment may not have been evident to Powell at the time, as a memo to his law clerks confirms: "If *McCleskey* were to prevail, not only would other minorities seek to avoid capital punishment on the basis of statistics; blacks and other minorities would attempt to extend *McCleskey* to rape, life sentences, and possibly other crimes and penalties, relying on the Eighth Amendment."<sup>148</sup>

Indeed, Powell was on to something in predicting a jurisprudence-of-death creep. The last decade has seen an unprecedented application of Eighth Amendment principles in nondeath cases. After the 2005 *Roper v. Simmons* case, which ruled capital punishment cruel and unusual as applied to minors,<sup>149</sup> the Court applied the case's principles outside of the capital context, banning life without the possibility of parole (LWOP) for minors who had committed nonmurder crimes in 2010,<sup>150</sup> prohibiting mandatory LWOP for any minor in 2012,<sup>151</sup> and declaring the ban retroactive in 2016.<sup>152</sup> *Simmons* undoubtedly brought about a significant transformation in noncapital juvenile sentencing. Had the *McCleskey* Court adopted an antidiscrimination rule for capital punishment, it would only have been a

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<sup>146</sup> Powell's Notes on Brennan's Dissent, *supra* note 135, at 25.

<sup>147</sup> *McCleskey*, 481 U.S. at 315 (citing *Solem v. Helm*, 463 U.S. 277 (1983)).

<sup>148</sup> Powell Memo to Leslie & Ronald, *supra* note 132, at 7.

<sup>149</sup> 543 U.S. 551 (2005).

<sup>150</sup> *Graham v. Florida*, 560 U.S. 48 (2010).

<sup>151</sup> *Miller v. Alabama*, 567 U.S. 460 (2012).

<sup>152</sup> *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). This line of cases has raised hope in two directions. First, that proportionality might yet have its moment in the sun, and second, that the Eighth Amendment will put limits on juvenile sentences more generally. The Court has since changed, and may change again, foreclosing either avenue.

short matter of time before defendants began challenging their racially discriminatory LWOP sentences.<sup>153</sup>

Finally, Powell feared not just the potential for disparity challenges to flood the courts, but that judicial recognition of bias in the administration of criminal justice would undermine the presumption of legitimacy that maintained the state criminal apparatus. Although not quite as obvious in *McCleskey*, this fear was front and center in Powell's *Furman* dissent. In *Furman*, Justice Powell wrote specifically to respond to Brennan's and Marshall's concurrences. Marshall's concurrence famously invokes the notion of a reasonably informed citizenry, stating that "a violation of the Eighth Amendment is totally dependent on the predictable subjective, emotional reactions of informed citizens."<sup>154</sup> Marshall concluded that armed with all the information about capital punishment, including its disparate application to the disempowered, "the average citizen would, in my opinion, find it shocking to his conscience and sense of justice."<sup>155</sup> Powell's response to this contention displays far more alacrity than does the entirety of his *McCleskey* opinion:

Certainly the claim is justified that this criminal sanction falls more heavily on the relatively impoverished and underprivileged elements of society. The "have-nots" in every society always have been subject to greater pressure to commit crimes and to fewer constraints than their more affluent fellow citizens. This is, indeed, a tragic byproduct of social and economic deprivation, but it is not an argument of constitutional proportions under the Eighth or Fourteenth Amendment. . . . The root causes of the higher incidence of criminal penalties on "minorities and the poor" will not be cured by abolishing the system of penalties. Nor, indeed, could any society have a viable system of criminal justice if sanctions were abolished or ameliorated because most of those who commit crimes happen to be underprivileged. The basic problem results not from the penalties imposed for criminal conduct but from social and economic factors that have plagued humanity since the beginning of recorded history . . . .<sup>156</sup>

While not as extreme as Scalia's belief that bias is "ineradicable" and unproblematic, Powell firmly rejected that criminal authority could be sacrificed in the quest to ameliorate social inequalities, "tragic" though they were. Powell's certainty that remedying disparity threatened the continued survival of state punishment led him to pursue some surreal argumentative

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<sup>153</sup> See *McCleskey v. Kemp*, 481 U.S. 279, 315 n.38 (1987) (citing studies demonstrating a racial disparity in length of criminal sentences).

<sup>154</sup> *Furman v. Georgia*, 408 U.S. 238, 362 (1972) (Marshall, J., concurring).

<sup>155</sup> *Id.* at 369.

<sup>156</sup> *Id.* at 447 (Powell, J., dissenting).

strategies. Powell considered devoting a portion of the majority opinion to describing ubiquitous discrimination against many types of minorities to make the point that crime commission (and therefore punishment) is inevitably disparate. He wrote to his clerks,

The history of blacks' mistreatment in the deep South will be emphasized by the dissents. But apart from slavery (abolished a century and a third ago), racial prejudice has existed, and may still exist, against Orientals in parts of the West Coast. . . . [and] Chicanos, Spanish Americans and Indians also may claim discrimination.<sup>157</sup>

By the time this contention appeared in a footnote in the final opinion, it was less a catalogue of entrenched inequality than a caution that the social-constructivist nature of race and ethnicity allowed any given defendant to claim minority status and thus discrimination. Nevertheless, Powell initially endorsed the remarkable argument that widespread historical and current racial discrimination, which caused social dysfunction among minorities, was a ground to *reject* McCleskey's equal protection challenge.

Throughout the *McCleskey* proceedings, Powell adhered to his faith that endemic inequality is "unrelated" to the operation of positive criminal law, such that regardless of social circumstances, individual defendants are fully culpable.<sup>158</sup> His insistence on "case-by-case" analysis sought to protect the fragile illusion that criminal law punishes internally bad individuals.<sup>159</sup> Marshall's "reasonably informed citizenry" standard, like the "rotten social background" defense or philosophical objections to the operation of "constitutive" luck in criminal law, stabbed at the heart of the shared presumption, or self-induced delusion, that there is true criminality untainted by the stain of inequality.<sup>160</sup> Powell imagined that the criminal justice house-

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<sup>157</sup> Powell Memo to Leslie & Ronald, *supra* note 132, at 6; *cf. McCleskey*, 481 U.S. at 315–17 & n.39 (noting the fluidity of race, listing multiple types of minority identities, and asserting that Whites can even claim minority status to support the caution that McCleskey's "claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups").

<sup>158</sup> *Furman*, 408 U.S. at 447–48 (Powell, J., dissenting).

<sup>159</sup> See *supra* note 94 and accompanying text.

<sup>160</sup> This objection arises in the debate over "moral luck," that is, whether attributions of immorality or personal responsibility can be based on luck factors. The constitutive luck objection asserts that because individuals' endemic and environmental conditions characters are a matter of chance, punishing them for criminal choices assesses culpability based on luck factors. See Jamal Greene, *Beyond Lawrence: Metaprivacy and Punishment*, 115 YALE L.J. 1862, 1909 (2006); Gruber, *Distributive Theory*, *infra* note 218, at 28–29; Bernard Williams, *Moral Luck*, in MORAL LUCK 35 (Daniel Statman ed., 1993). *McCleskey* played out not during the post-World War II era of rehabilitation and treatment, but at the height of Reagan's retributivist war on crime and drugs.

of-cards could easily fold under the pressure of Marshall's structural objection, presaging a massive overhaul of the machinery of incarceration.<sup>161</sup>

But this fear was proved unwarranted. In recent years, as evidence has amassed of the inherently racially biased nature of criminal punishment, even the most liberal lawmakers have found themselves in a state of perpetual cognitive dissonance, with Justice Marshall on one shoulder and Justice Powell on the other. Like Marshall, they recognize that criminal prosecution and punishment is about far more than individual culpability—it is about power, race, socioeconomic status, and other inequalities. At the same time, like Powell, they struggle with how or whether this structural objection should affect the prosecution and punishment of guilty individual offenders, particularly violent criminals and rapists.<sup>162</sup>

### III. EQUALITY VERSUS JUSTICE IN THE CARCERAL STATE

The above analysis characterizes *McCleskey* as a case concerned more with preserving penal authority than foreclosing equal protection analysis. However, it in no way dislodges *McCleskey* from its rightful place of infamy alongside *Dred Scott*, *Plessy*, and *Korematsu*.<sup>163</sup> Justice Powell's veneration of capital punishment in the face of its brutally racist past—not to mention his willingness to use ubiquitous discrimination as an argument *against* equal protection relief—demonstrates his ignorance of the racial significance of the penalty within American history, especially Southern history. Moreover, Powell's belief that the administration of criminal punishment must be totally siloed from arguments about endemic inequalities is the very ideology that rendered criminal law the preferred response to social problems, including race- and gender-based violence, even as the system morphed into the primary site of racial injustice, imprisoning more black men than the number in bondage under slavery.<sup>164</sup>

Powell's tolerance of racial discrimination was thus institutionally determined. He accepted disparity claims about institutions like voting and housing, but such claims were unacceptable when they challenged capital punishment. Unlike Scalia, who contested the Court's role in remedying any

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<sup>161</sup> See *supra* note 156 and accompanying text.

<sup>162</sup> See James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21 (2012).

<sup>163</sup> Anthony G. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After McCleskey*, 39 COLUM. HUM. RTS. L. REV. 34, 47 (2007); Scott E. Sundby, *The Loss of Constitutional Faith: McCleskey v. Kemp and the Dark Side of Procedure*, 10 OHIO ST. J. CRIM. L. 5, 5 (2012).

<sup>164</sup> Max Ehrenfreund, *There's a Disturbing Truth to John Legend's Oscar Statement About Prisons and Slavery*, WASH. POST (Feb. 23, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/02/23/theres-a-disturbing-truth-to-john-legends-oscar-statement-about-prisons-and-slavery> [<https://perma.cc/MA44-GF3A>].

institutional racial disparities, Powell's overarching interest was preserving the death penalty, and he was willing to turn a blind eye to the fact that this institution was born in and infused with discrimination. Justice Powell's unconditional embrace of the death penalty is racially fraught, but in a different manner than Scalia's tolerance of "ineradicable" racism.<sup>165</sup> One might analogize the difference between Scalia's and Powell's views to the difference between fast and slow violence. Fast violence occurs when racist police officers kill unarmed black civilians, and slow violence occurs when the cumulative conditions of racialized inequality and disenfranchisement leave an island vulnerable to a hurricane.<sup>166</sup> Similarly, fast racism is tiki-torch bearing white supremacists,<sup>167</sup> and slow racism is "the white moderate, who is more devoted to 'order' than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice."<sup>168</sup> I hesitate to use "racist" to describe either Scalia's or Powell's views and recognize a distinction between white-supremacists and equal protection-averse jurists, so I will term Powell's law-and-order concerns "slow racialist" and Scalia's anti-antidiscrimination stance "fast racialist."

I emphasize Powell's slow-racialist sentiments as an admonition to race scholars that lawmakers and state actors' acceptance or rejection of racial disparity evidence is a function of more than just fast-racialist denial of *all* antidiscrimination claims. Powell would have been more sanguine about McCleskey's anti-discrimination interests if they converged with his slow-racialist interest in sustaining capital punishment. This Part accordingly sounds a caution that victim-based disparity claims, that is, arguments and evidence that the criminal system treats those who offend against minority victims with undue leniency, often converge with larger interests in bolstering the American penal state. A poignant example is domestic violence reform, where feminists' interest in fair treatment of female victims converged with prosecutors' interest in punishing batterers, resulting in punitive policies that actually devalued and materially harmed women.

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<sup>165</sup> Justice Scalia, in fact, believed there should not be limits on "relevant aggravating evidence" in capital sentencing. See *Payne v. Tennessee*, 501 U.S. 808, 833 (1991) (Scalia, J., concurring).

<sup>166</sup> See generally ROB NIXON, *SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR* (2011) (discussing the causes and implications of slow violence). See also Aya Gruber, *A Provocative Defense*, 103 CALIF. L. REV. 273, 326–30 (2015) (commenting on fast and slow violence); Levi Gahman & Gabrielle Thongs, *In the Caribbean, Colonialism and Inequality Mean Hurricanes Hit Harder*, PBS NEWSHOUR (Sept. 24, 2017, 10:45 AM), <https://www.pbs.org/newshour/world/caribbean-colonialism-inequality-mean-hurricanes-hit-harder> [<https://perma.cc/ZSN2-Y6UB>] (explaining why poverty and social inequality increased the devastation of the Caribbean hurricanes).

<sup>167</sup> See Matt Stevens, *White Nationalists Reappear in Charlottesville in Torch-Lit Protest*, N.Y. TIMES (Oct. 8, 2017), <https://www.nytimes.com/2017/10/08/us/richard-spencer-charlottesville.html> [<https://perma.cc/W7NU-FWVT>].

<sup>168</sup> MARTIN LUTHER KING, JR., *Letter from Birmingham Jail*, in *WHY WE CAN'T WAIT* 85, 96 (1963).

Lawmakers' and other state actors' receptivity to disparity claims vary by their interests, and the criminal arena is one in which punitive interests are ascendant. To the extent that the American penal state is constitutively racist, formal equality efforts to treat minority victims fairly by leveling up punishment can end up undermining larger substantive racial equality in society.

*A. When Antidiscrimination and Pro-Punishment Interests Converge*

Interest convergence theory predicts that even the fast-racialist, anti-equal-protection camp will occasionally accept racial disparity evidence when in the service of preserving some other value. Recall that abolitionist lawyers deployed the Baldus study within the context of a death-penalty jurisprudence in which mandatory execution was off the table. In this setting, they could predict that the Court's acceptance of McCleskey's claims would result in a death penalty moratorium, possibly indefinitely, or, in the worst case, preservation of the institution with a substantial narrowing of death eligibility, *à la* Stevens. LDF lawyers would have faced a much trickier strategic choice had mandatory execution remained viable. If the abolitionist lawyers thought that the Court would accept their equal protection claims but remedy them through mandating or even re-distributing death, they may have simply refrained from pursuing disparity arguments. To be sure, in cases like *Graham v. Collins*, conservative Justices trot out the racial disparity claim to justify limits on mitigating evidence and, in turn, increase the probability of death sentences.<sup>169</sup>

Now, a person such as Professor Kennedy, who is preoccupied with formal equality between white and black victims in capital cases and harbors no preference between level-up and level-down remedies, might balk at such LDF restraint. To some, eliminating whatever individual disparity they encounter through whatever means is an end in itself—and the end of the story. However, many racial justice scholars acknowledge that a given disparity is just one among multiple hierarchies that operate within the criminal system's complex matrix of power. Justices Marshall and Brennan knew that securing fleeting equality gains through racially balancing the distribution of death came at the cost of preserving a historically and symbolically racist institution that imbues blackness with criminality.

Importantly, racial justice scholars who criticize noncapital sentencing disparities should bear in mind that there is largely no upper limit on imprisonment—mandatory penalties are permissible, and legislators can easily create new crimes. Right-wing lawmakers, for example, routinely

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<sup>169</sup> See 506 U.S. 461, 478–89 (1993) (Thomas, J., concurring).

justified three-strikes and mandatory-minimum laws on the ground that they treat all eligible offenders equally.<sup>170</sup> If such fast-racialist actors occasionally “switch sides,” moderates with law-and-order sensibilities will positively line up to support disparity claims that coincide with increased prosecution. Mass incarceration is not just the product of racists who relish African-American imprisonment, pearl-clutching city dwellers feeling besieged, or even those with a colorblind faith that “all lives matter.”<sup>171</sup> Equality-minded moderates and liberals have fully participated in the penal experiment of late-modern America. They too harbor a “punitive impulse” stemming “from a sustained national eidos that has for decades accepted criminal law as a legitimate, if not the preferred, response to harms.”<sup>172</sup> Like Justice Powell, even progressives draw a bright line between their philosophical aversion to “tragic” social inequality and their “embrace [of] punitivity for whatever they consider true harm.”<sup>173</sup>

Examples of interest convergence in the criminal law arena, where lawmakers remedy disparities by leveling up criminal punishment, are legion. From federal sentencing guidelines to mandatory domestic violence prosecutions, powerful state actors advance equality claims as part of a web of “fairness” rationales for tough punishment. Indeed, activists and lawmakers often frame victim-based discrepancies in the distribution of punishment as unfair *leniency*,<sup>174</sup> à la Justice Powell, instead of unusual *severity* brought on by preferred victimhood, as the Baldus study actually demonstrated.<sup>175</sup> The leniency framing itself suggests a level-up solution, which is an ever-present possibility in noncapital sentencing. In the 1980s, conservatives *and* liberals came together to decry the arbitrariness of and

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<sup>170</sup> See, e.g., The Repeat Criminal Offender/Three Strikes Fair Sentencing Act of 2006, at 1 (filed Jan. 20, 2006), [http://caag.state.ca.us/initiatives/pdf/sa2006rf0005\\_amdt\\_1\\_s.pdf](http://caag.state.ca.us/initiatives/pdf/sa2006rf0005_amdt_1_s.pdf) [<https://perma.cc/YF29-QYND>] (providing “a complete, proportionate or consistent statutory structure for appropriately and fairly sentencing repeat offenders” in California).

<sup>171</sup> Ian Olasov, *How Did “All Lives Matter” Come to Oppose “Black Lives Matter”?* *A Philosopher of Language Weighs In.*, SLATE: LEXICON VALLEY (July 18, 2016, 11:11 AM), [http://www.slate.com/blogs/lexicon\\_valley/2016/07/18/all\\_lives\\_matter\\_versus\\_black\\_lives\\_matter\\_how\\_does\\_the\\_philosophy\\_of\\_language.html](http://www.slate.com/blogs/lexicon_valley/2016/07/18/all_lives_matter_versus_black_lives_matter_how_does_the_philosophy_of_language.html) [<https://perma.cc/2HBJ-PXDR>].

<sup>172</sup> Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 *FORDHAM L. REV.* 3211, 3223 (2015) [hereinafter Gruber, *When Theory Met Practice*].

<sup>173</sup> *Id.*

<sup>174</sup> See Aya Gruber, *Murder, Minority Victims, and Mercy*, 85 *U. COLO. L. REV.* 129, 143–55 (2014) (discussing activists’ common framing of the provocation doctrine as discriminatory leniency toward those men who offend against women and their calls for abolishing or narrowing the defense, and citing cases and articles).

<sup>175</sup> See *supra* notes 43–50 and accompanying text.

disparities in criminal sentencing,<sup>176</sup> and receptive lawmakers quickly settled on rigid, mandatory federal sentencing guidelines.<sup>177</sup> Not surprisingly, the regime was a “one-way upward ratchet” of harsh sentences, exposing lawmakers’ *imaginaire* that the prototypical defendant in any given crime is always the most reprehensible, clearly guilty version of a thief, robber, killer, etc.<sup>178</sup> Moreover, through its codification of “common sense,” or politically expedient, notions of which crimes are “worse”—for example dealing crack is worse than dealing cocaine—the guidelines created *greater* racial disparity.<sup>179</sup>

### B. Feminism, Gender Disparity Claims, and Police Power

It is in the space where feminism meets criminal law that we see antidiscrimination and prosecutorial interests converge most profoundly. During the juris-generative “second wave” of feminism, roughly the 1970s through 1990s, feminists embarked on a reformist campaign to raise awareness of the unfair leniency afforded to men who offend against women.<sup>180</sup> This campaign proceeded parallel to other second-wave feminist agitation on workplace discrimination, reproductive rights, and wage equality. However, feminist efforts for noncriminal law reform encountered difficulty in translating proposals into positive law, were besieged by opposition, and riddled with setbacks.<sup>181</sup> Women are literally “pregnant with

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<sup>176</sup> See MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENTS IN AMERICA 164 (1995); Honorable Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569, 573 (2005).

<sup>177</sup> See Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1944 (1988) (noting the “general consensus . . . among judges, lawyers, criminal justice experts, and scholars that sentencing guidelines were needed”); see also Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 31–32 (1988) (observing that the guidelines are not a product of political compromise but of the institutional struggle to implement a consensus idea that sentences should be uniform).

<sup>178</sup> Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 246 (2005).

<sup>179</sup> See *id.* at 256. In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court struck down mandatory federal sentencing guidelines as violative of the Sixth Amendment jury guarantee. Recently, there has been a debate over whether *Booker* has revived racial disparities. See generally Sonja Starr, *Did Booker Increase Disparity? Why the Evidence is Unpersuasive*, 25 FED. SENT’G REP. 323 (2013) (critiquing a recent Sentencing Commission’s report finding that *Booker* has increased racial disparity as unsupported by the evidence).

<sup>180</sup> See Suzanne A. Kim, *Marital Naming/Naming Marriage: Language and Status in Family Law*, 85 IND. L.J. 893, 950 (2010) (describing the “second wave” of feminism as “stretching from the 1960s until the 1990s”).

<sup>181</sup> See generally Katie R. Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275 (2012) (describing onerous hurdles confronted by discrimination plaintiffs).



discrimination,” and yet attacks on women’s reproductive freedom and health persist with vigor.<sup>182</sup> A democratically aligned government under President Barack Obama could do no more than produce feckless legislation on wage equality.<sup>183</sup> The idea of the state imposing mandatory pay equality or gender-based quotas (or any identity-based quotas) on private businesses, as under some European laws, feels utterly un-American.<sup>184</sup>

Feminist reformers’ efforts to cabin the discretion of powerful male actors met an altogether different fate in the criminal law realm. Reformers advanced a straightforward discriminatory leniency contention, which was not necessarily historically accurate,<sup>185</sup> that police, prosecutors, judges, and jurors had a longstanding practice of tolerating violence against women—regarding it as a private matter, an insoluble problem not worthy of government intervention, or worse, legitimate chastisement.<sup>186</sup> This

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<sup>182</sup> See Michele Goodwin & Meigan Thompson, *In the Shadow of the Court: Strategic Federalism and Reproductive Rights*, 18 GEO. J. GENDER & L. 333, 335 (2017) (“Copiously documented evidence details the harsh impacts produced by laws targeting women’s reproductive healthcare rights, including serious hurdles to access abortion rights, criminalizing certain conduct during pregnancy, and even restricting pregnant women’s medical autonomy at the end of life. Lawmakers refer to the latter as ‘pregnancy exclusion laws,’ because that type of legislation functions to literally exclude pregnant women from autonomous decision-making at the end of life.”).

<sup>183</sup> See Martha Chamallas, Ledbetter, *Gender Equity and Institutional Context*, 70 OHIO ST. L.J. 1037, 1049 (2009) (describing the Lilly Ledbetter Fair Pay Act as “a very modest piece of legislation and will not alone bring pay equity back from the dead”).

<sup>184</sup> See Véronique Magnier & Darren Rosenblum, *Quotas and the Transatlantic Divergence of Corporate Governance*, 34 NW. J. INT’L L. & BUS. 249 (2014) (contrasting European gender-based quotas with American shareholder primacy). Today, even uber-liberal Silicon Valley companies cannot bring themselves to mandate representational and pay equality, touting the need for discretion to hire and promote “tech stars.” See Ellen Huet, *Inside Silicon Valley’s Struggles to Hire More Women and Minorities*, BLOOMBERG (Mar. 20, 2017), <https://www.bloomberg.com/diversity-inclusion/blog/inside-silicon-valleys-struggles-hire-women-minorities> [<https://perma.cc/RE6H-7PWC>].

<sup>185</sup> Legal historian Carolyn B. Ramsey, engaged in a review of domestic violence law and policy in the late-nineteenth and early-twentieth centuries and discovered:

Police responded to calls for help, and courts routinely forced violent men to pay fines or spend time in jail for wife beating. Legal materials and newspaper reports on such cases reveal widespread condemnation of male violence against women and the repudiation of husbands’ claims to a right to use corporal punishment on disobedient wives. The failure of state efforts to prevent recidivism and the escalation of intimate-partner violence was likely attributable to the general disorganization of early police departments and the reluctance of abused women to prosecute their husbands, rather than to widespread misogyny.

Carolyn B. Ramsey, *The Exit Myth: Family Law, Gender Roles, and Changing Attitudes Toward Female Victims of Domestic Violence*, 20 MICH. J. GENDER & L. 1, 7 (2013) (footnotes omitted).

<sup>186</sup> For articles on second-wave feminist domestic violence activism and legal reforms, see BETH E. RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA’S PRISON NATION* (2012); Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009 (2000); Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1 (2009) [hereinafter Goodmark, *Autonomy Feminism*]; Leigh Goodmark, *Should Domestic Violence Be*

argument about unfair leniency toward woman-abusers converged with other phenomena, including intensified criminal law governance, the powerful victims' rights movement, and conservative lawmakers' concern that disordered homes represented a threat to "family values."<sup>187</sup> In the mid-1980s, the issue of domestic violence reached a new pinnacle in public discussion and popular consciousness. President Reagan's Surgeon General C. Everett Koop declared domestic violence a public health emergency, testifying in front of the Senate that a quarter of American women, "that's 15 million women," experience domestic violence.<sup>188</sup>

The Surgeon General did not himself endorse an aggressive program of criminalization, and the report appended to his testimony reads like a progressive wish list.<sup>189</sup> The number one recommendation for reducing assaults and homicides was "a complete and universal federal ban on the sale, manufacture, importation, and possession of handguns," and others included "full employment," "an aggressive policy to reduce racial discrimination and sexism," and, pertinently, "abolishing capital punishment by the state because all are models and sanctions of violence."<sup>190</sup> As for domestic violence, the report endorsed programs to address "[r]elationships between power, control, gender stereotypes, sex roles and violence; [and] [n]onviolent resolution of interpersonal conflicts."<sup>191</sup> Suffice it to say, the Reagan Administration did not adopt these socialistic strategies, pursuing instead its preferred carceral strategy, with Koop's statistics serving to galvanize the public against lax responses to wife abuse.

By the time of Koop's testimony, President Reagan had already commissioned a domestic violence task force helmed by prominent

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*Decriminalized?*, 40 HARV. J. L. & GENDER 53 (2017) [hereinafter Goodmark, *Should DV Be Decriminalized?*]; Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL'Y 13, 38 (2011); Claire Houston, *How Feminist Theory Became (Criminal) Law: Tracing the Path to Mandatory Criminal Intervention in Domestic Violence Cases*, 21 MICH. J. GENDER & L. 217, 240, 253 (2014); Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2 (2006); Deborah M. Weissman, *Law, Social Movements, and the Political Economy of Domestic Violence*, 20 DUKE J. GENDER L. & POL'Y 221, 223–24 (2013).

<sup>187</sup> MARIE GOTTSALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* ch. 4 (2006); Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741 (2007) [hereinafter Gruber, *Feminist War*]; Suk, *supra* note 186.

<sup>188</sup> *Domestic Violence and Public Health: Hearing Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Comm. on Labor and Human Resources*, 99th Cong. 2 (1985) (statement of Surgeon General C. Everett Koop), <https://www.ncjrs.gov/pdffiles1/Digitization/102525NCJRS.pdf> [<https://perma.cc/NR49-3GJT>].

<sup>189</sup> *Id.* at 5–48.

<sup>190</sup> *Id.* at 7.

<sup>191</sup> *Id.* at 41.

conservatives.<sup>192</sup> The task force was then-Missouri Attorney General John Ashcroft's entrée into federal governing. The resulting 1984 report of the task force, unlike the Surgeon General's report, called for a de-contextualized law and order approach to family violence: "*The legal response to family violence must be guided primarily by the nature of the abusive act, not the relationship between the victim and the abuser.*"<sup>193</sup> The get-tough approach stemmed not from a concern for women's equality and independence, but from a desire to "strengthen family values."<sup>194</sup> Later, U.S. Attorney General Ashcroft explained that reform had been necessary to "transform" masochistic victims into *good mothers*.<sup>195</sup> Ashcroft recalled a conversation with a former victim: "She said, quote, 'I finally realized the truth, that I was hurting not only myself, but I was hurting my children even more. I was teaching them by example that they deserved to be abused and that violence was acceptable.'"<sup>196</sup>

Also in 1984, sociologist Lawrence Sherman and coauthor Richard Berk published the famous "Minneapolis Domestic Violence Experiment," finding that arresting men for misdemeanor domestic violence produced a greater deterrent effect than a mere warning or temporary separation.<sup>197</sup> Sherman had collected and analyzed domestic violence arrest data in Minneapolis and Milwaukee, from which he produced several published studies in the 1980s and 1990s.<sup>198</sup> The Minneapolis study was his first and

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<sup>192</sup> WILLIAM L. HART ET AL., ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE: FINAL REPORT (Sept. 1984) [hereinafter FINAL REPORT].

<sup>193</sup> *Id.* at 4.

<sup>194</sup> *Id.* at 119.

<sup>195</sup> Attorney General John Ashcroft, Prepared Remarks at the Annual Symposium on Domestic Violence (October 29, 2002), <https://www.justice.gov/archive/ovw/docs/agremarks.htm> [<https://perma.cc/Q3W2-ED7V>].

<sup>196</sup> *Id.*

<sup>197</sup> Lawrence W. Sherman & Richard A. Berk, *The Minneapolis Domestic Violence Experiment*, POLICE FOUND. REP. (Apr. 1984), <https://www.policefoundation.org/publication/the-minneapolis-domestic-violence-experiment> [<https://perma.cc/567R-FZB6>].

<sup>198</sup> See LAWRENCE W. SHERMAN, POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS (1992); Richard A. Berk & Lawrence W. Sherman, *Police Responses to Family Violence Incidents: An Analysis of an Experimental Design with Incomplete Randomization*, 83 J. AM. STAT. ASS'N 70 (1988); Janell D. Schmidt & Lawrence W. Sherman, *Does Arrest Deter Domestic Violence?*, 36 AM. BEHAV. SCIENTIST 601 (1993); Lawrence W. Sherman & Douglas A. Smith, *Crime, Punishment, and Stake in Conformity: Legal and Informal Control of Domestic Violence*, 57 AM. SOC. REV. 680 (1992); Lawrence W. Sherman et al., *From Initial Deterrence to Long-Term Escalation: Short-Custody Arrest for Poverty Ghetto Domestic Violence*, 29 CRIMINOLOGY 821 (1991); Lawrence W. Sherman, *The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 1, 23–24 (1992); Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984); Lawrence W. Sherman et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137 (1992).

least comprehensive study, examining recidivism in a six-month time frame, but its pro-arrest conclusion proved to have an outsized influence. Professor Stephen Schulhofer notes, “[b]y 1989, only five years after the study results were released, 84% of urban police agencies reported having mandatory or preferred arrest policies for domestic violence cases.”<sup>199</sup> He further observes that “the rapid and uncritical acceptance of the Minneapolis findings was premature” and later and better studies demonstrated that, over time, “arrest often seems to have an ‘escalation effect,’ aggravating the subsequent violence.”<sup>200</sup>

In response to criticism that he had publicized the powerful study before replication,<sup>201</sup> Dr. Sherman authored a 1989 paper asking, “When should researchers refrain from publicizing results and thus possibly influencing legal policy?”<sup>202</sup> The article concludes that researchers bear no responsibility for policy changes but encourages policymakers to be better empiricists.<sup>203</sup> The paper touts early publicity to “focus attention and funding on further research,” reasoning that “[s]hould further studies reach different conclusions, publicity about them can influence policies to change yet again.”<sup>204</sup> This evolutionary prediction proved naively optimistic, as even Sherman’s own follow-up studies undermining the Minneapolis study and his calls to abandon mandatory arrest did little to mitigate the study’s influence.<sup>205</sup> Today, lawmakers have little to no appetite for reversing their hastily adopted pro-arrest policies.<sup>206</sup>

In 2015, Sherman and a colleague published yet another Minnesota domestic violence study, this time a twenty-three-year follow-up of his 1988 Milwaukee study of 1,125 victims whose assaulters had been arrested or

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<sup>199</sup> Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2162 (1995).

<sup>200</sup> *Id.* at 2162–63.

<sup>201</sup> See generally Richard Lempert, *Humility Is a Virtue: On the Publicization of Policy-Relevant Research*, 23 LAW & SOC’Y REV. 145 (1989) (criticizing the publicization of the results of the Minneapolis Domestic Violence Experience as premature).

<sup>202</sup> Lawrence W. Sherman & Ellen G. Cohn, *The Impact of Research on Legal Policy: The Minneapolis Domestic Violence Experiment*, 23 LAW & SOC’Y REV. 117, 117 (1989).

<sup>203</sup> *Id.* at 142.

<sup>204</sup> *Id.*

<sup>205</sup> See *supra* note 198 (citing studies).

<sup>206</sup> See Jane K. Stoeber, *Parental Abduction and the State Intervention Paradox*, 92 WASH. L. REV. 861, 868–69 (2017) (critiquing the aggressive policing and prosecution DV policies that began in the 1990s and persist today and noting that “[i]n recent decades, the state has largely taken a more protective and often punitive posture”); see also Justine A. Dunlap, *Soft Misogyny: The Subtle Perversion of Domestic Violence “Reform”*, 46 SETON HALL L. REV. 775, 793–800 (2016) (cataloguing and critiquing mandatory arrest and prosecution policies).

warned.<sup>207</sup> In reestablishing contact with study participants, Dr. Sherman was surprised to find that many had passed away, but not from intimate partner homicide. A full analysis of the data yielded astounding results: “Victims were 64% more likely to have died of all causes if their partners were arrested and jailed than if warned and allowed to remain at home. Among the 791 African-American victims, arrest increased mortality by 98%.”<sup>208</sup> Further, “murder of the victims caused only three of all 91 deaths; heart disease and other internal morbidity caused most victim deaths.”<sup>209</sup> Sherman hypothesized, “There must be something about witnessing a partner’s arrest that triggers a physiological response leading to higher rates of death . . . .”<sup>210</sup> In racially and socioeconomically segregated Milwaukee, he reasoned, black women did not have resources to cope with arrest-induced stress.<sup>211</sup>

Today, Sherman laments the mandatory policies his 1984 study heralded: “Imagine if doctors were required by law to use surgery, and not allowed to test chemotherapy as an alternative.”<sup>212</sup> But for many lawmakers and antiviolence activists, once the 1984 study confirmed that arrest is best, the research–policy evolution simply ended. There is a sad irony in the End Domestic Abuse Wisconsin organization’s summary dismissal of Sherman’s 2015 study: “Twenty-five-year-old data cannot be used to conclude that domestic violence arrests are dangerous to victims.”<sup>213</sup> The organization confoundingly adds, “Thankfully for victims of domestic violence, we don’t live in the 1980s anymore.”<sup>214</sup>

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<sup>207</sup> Lawrence W. Sherman & Heather M. Harris, *Increased Death Rates of Domestic Violence Victims from Arresting vs. Warning Suspects in the Milwaukee Domestic Violence Experiment (MilDVE)*, 11 J. EXPERIMENTAL CRIMINOLOGY 1 (2015) <https://link.springer.com/content/pdf/10.1007%2Fs11292-014-9203-x.pdf> [<https://perma.cc/ETF5-LYF3>].

<sup>208</sup> *Id.* at 1.

<sup>209</sup> *Id.*

<sup>210</sup> Belinda Luscombe, *When Not to Arrest an Abuser in a Domestic Violence Case*, TIME MAG. (Mar. 5, 2014), <http://time.com/12682/when-not-to-arrest-an-abuser-in-a-domestic-violence-case> [<https://perma.cc/H394-NTYN>] (quoting Sherman).

<sup>211</sup> Sherman & Harris, *supra* note 207, at 17–18. The 2015 Sherman study found that mandatory arrest policies, intended to remedy a perceived gender disparity, may have created a more disturbing racial one. *Id.* at 17. Indeed, the “face” of domestic violence in the 1980s and 90s was a white face—a young, beautiful, blonde mother subject to horrific abuse and doubly victimized by state nonintervention. But that face spurred tough prosecution initiatives that disproportionately affected poor communities of color. See Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER L. 1, 37 (1998); Gruber, *Feminist War*, *supra* note 187, at 805; Cheryl I. Harris, *Myths of Race and Gender in the Trials of O.J. Simpson and Susan Smith—Spectacles of Our Time*, 35 WASHBURN L.J. 225 (1996).

<sup>212</sup> Lawrence Sherman, *University of Cambridge – Domestic Violence and Arrests*, ACADEMIC MINUTE (May 1, 2014, 12:44 PM), <https://academicminute.org/2014/05/lawrence-sherman-university-of-cambridge-domestic-violence-and-arrests> [<https://perma.cc/2YJV-P2LT>].

<sup>213</sup> Luscombe, *supra* note 210.

<sup>214</sup> *Id.*

Outrage over the disparate leniency afforded to abusers became more mainstream throughout the 1980s and 1990s, and by the millennium many states had adopted not just pro-arrest policies, but also specialized courts, no-drop prosecution, and exceptional civil protection order procedures.<sup>215</sup> In 2003, President George W. Bush, in synchronicity with feminist reformers, praised level-up solutions to domestic violence leniency, telling domestic violence prosecutors in his signature vernacular, “If you treat something as a serious crime, then there must be serious consequences; otherwise it’s not very serious.”<sup>216</sup> Much like mandatory capital punishment would leave no room for victims’ families with objections to execution, mandatory domestic violence policies gave no quarter to victims who sought leniency for their intimate partners. Prosecutors often ignored, or worse, mistreated victims who resisted the prosecution and incarceration of their intimates.<sup>217</sup> Elsewhere, conservatives argued that “victims’ rights” and victims’ presumptively punitive interests should trump prosecutorial discretion and defendant protections,<sup>218</sup> but in domestic violence, as the 1984 task force insisted, “[t]he prosecutor and the judge, not the victim, determine whether the case is prosecuted or dismissed.”<sup>219</sup> Feminist reformers went along with this program upon the belief that victims’ desires for leniency were

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<sup>215</sup> See generally Gruber, *Feminist War*, *supra* note 187, at 747. For arrest statistics, see Schulhofer, *supra* note 199, Schmidt & Sherman, *supra* note 198, and SHERMAN, *supra* note 198. See also Goodmark, *Should DV Be Decriminalized?*, *supra* note 186, at 62 n.36 (noting that “between 1997 and 2003, states passed 700 new statutory provisions responding to domestic violence”). For protection order statistics, see generally Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 811–1094 (1993) (surveying civil protection order statutes in all fifty states, D.C., and Puerto Rico); Michelle R. Waul, *Civil Protection Orders: An Opportunity for Intervention with Domestic Violence Victims*, 6 GEO. PUB. POL’Y REV. 51, 53–56 (2000) (explaining the process of obtaining a civil protection order and discussing its effectiveness in preventing domestic violence); Betsy Tsai, Note, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285 (2000).

<sup>216</sup> President George W. Bush, Remarks on Domestic Violence Prevention (Oct. 8, 2003), <https://www.gpo.gov/fdsys/pkg/WCPD-2003-10-13/pdf/WCPD-2003-10-13-Pg1341.pdf> [<https://perma.cc/W4XV-NFK7>].

<sup>217</sup> Goodmark, *Autonomy Feminism*, *supra* note 186, at 37–38. See generally Gruber, *Feminist War*, *supra* note 187, at 773. See BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, POLICE RESPONSE TO DOMESTIC VIOLENCE, 2006–2015, at 1 (May 2017), <https://www.bjs.gov/content/pub/pdf/prdv0615.pdf> [<https://perma.cc/3P32-JJ32>] (finding that victims only signed complaints in about half (48%) of domestic violence incidents reported to police); see also Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1302 (2016) (finding only 22% of African-American respondents said that they trusted courts).

<sup>218</sup> MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME 167 (2002); Gruber, *Feminist War*, *supra* note 187, at 757. Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1 (2010) [hereinafter Gruber, *Distributive Theory*].

<sup>219</sup> FINAL REPORT, *supra* note 192, at 30.

inauthentic products of “coercive control” that contributed to underenforcement.<sup>220</sup>

Today, domestic violence systems routinely involve mandatory policing and prosecution, special courts, compulsory protection orders, immigration consequences, and de facto divorce.<sup>221</sup> Beyond the trauma of arrest and prosecution, victims also stand to lose a source of income, a co-parenting asset, their public housing, the person they love, their own freedom if arrested as a mutual aggressor, parental rights if the police observe neglect, and presence in the United States if they are undocumented.<sup>222</sup> With so much to lose and no ability to hit pause on the prosecutorial machine, abused women face a true dilemma in engaging the police or even medical services.<sup>223</sup> The class of domestic violence defendants, which increasingly has included women, faces the costs of arrest, prosecution, incarceration, and collateral consequences—including ineligibility for public housing, government benefits, and employment.<sup>224</sup> The domestic violence system contributes significantly to a mass misdemeanor phenomenon that Professor Alexandra Natapoff derisively describes as a revolving-door style of prosecution that is indifferent to guilt or innocence and which devastates

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<sup>220</sup> See Gruber, *Feminist War*, *supra* note 187, at 815; Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973 (1995).

<sup>221</sup> For more information on these reform principles, see sources cited *supra* note 186. See also Goodmark, *Should DV Be Decriminalized?*, *supra* note 186, at 83; Suk, *supra* note 186, at 7, 17–20; Deborah M. Weissman, *Countering Neoliberalism and Aligning Solidarities: Rethinking Domestic Violence Advocacy*, 45 SW. L. REV. 915, 922–34 (2016).

<sup>222</sup> Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 804–05 (2001); Goodmark, *Should DV Be Decriminalized?*, *supra* note 186, at 71–73; Gruber, *Feminist War*, *supra* note 187, at 804–06; Beth Richie, *Battered Black Women: A Challenge for the Black Community*, 16 BLACK SCHOLAR 40, 40 (1985); see also Dee L. R. Graham & P. Gail Allen, *Victim Interviews and Surveys*, in FACTORS RELATED TO DOMESTIC VIOLENCE COURT DISPOSITIONS IN A LARGE URBAN AREA: THE ROLE OF VICTIM/WITNESS RELUCTANCE AND OTHER VARIABLES, FINAL REPORT 114 (Joanne Belknap & Dee L. R. Graham eds., 2000), <https://www.ncjrs.gov/pdffiles1/nij/grants/184232.pdf> [<https://perma.cc/MX5E-QVH6>] (discussing reasons for victim reluctance to prosecute, including fear of the legal system, love, desire to keep family intact, and fear of reprisal).

<sup>223</sup> See Meghan A. Novisky & Robert L. Peralta, *When Women Tell: Intimate Partner Violence and the Factors Related to Police Notification*, 21 VIOLENCE AGAINST WOMEN 65 (2012), <https://www.ncbi.nlm.nih.gov/pubmed/25540249> [<https://perma.cc/DQ8K-UEPD>].

<sup>224</sup> See Carol Bohmer et al., *Domestic Violence Law Reforms: Reactions from the Trenches*, 29 J. SOC. & SOC. WELFARE 71, 78 (2002) (reporting on Ohio study that found a 142% rise in male arrests and 428% rise in female arrests); Goodmark, *Should DV Be Decriminalized?*, *supra* note 186, at 83–85; Gruber, *Feminist War*, *supra* note 187, at 832; see also David Hirschel et al., *Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions?*, 98 J. CRIM. L. & CRIMINOLOGY 255, 256, 259–61 (2007) (showing mandatory arrest statutes correlated with increased dual arrest); cf. Dennis M. Cullinane et al., *Offender-Victim Body Mass Ratio and the Decision to Arrest in Cases of Intimate Partner Violence*, 49 MED. SCI. & L. 200, 201 (2009).

already-marginalized populations.<sup>225</sup> An objective of mass misdemeanors, as Professor Issa Kohler-Hausmann discovered through meticulous ethnographic research, is to mark individuals, scarlet-letter-style, to facilitate the penal state's management of large numbers at low cost.<sup>226</sup>

Indeed, domestic violence law reform has served to mark, but not necessarily deter, abusers. In 2010, criminologists Joel Garner and Christopher Maxwell released a meta-data analysis of the 135 English-language studies on domestic violence criminal law.<sup>227</sup> They found that, contrary to the “common wisdom” that prosecutions and convictions are rare, the majority of domestic violence arrests (three-fifths) produced prosecutions, and a third resulted in convictions.<sup>228</sup> Of the thirty-two studies involving quantitative analyses of criminal sanctions and repeat offending, a preponderance reported that sanctions had no effect on or increased the risk of offending.<sup>229</sup> However, in light of problems with “the quality of the research methods” of the studies, the authors performed a secondary analysis of the available archived data, comprising 11,518 domestic violence cases.<sup>230</sup> The authors ran a total of 370 tests on the data sets to determine the relationship between sanctions and re-offense, and the “findings were not what [they] expected.”<sup>231</sup> They had anticipated variation in results but instead found “striking” consistency: “Only four of the 370 tests show a reduction in repeat offending and those findings come from one study. Fifty-eight tests show criminal sanctions are associated with increased amounts of repeat offending. The predominant finding is that 308 of the tests show no effect, one way or the other.”<sup>232</sup>

I have undoubtedly painted a dystopian picture of the system built on feminists' victim-based disparity arguments.<sup>233</sup> Others may assert different

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<sup>225</sup> Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012). Between 2006 and 2015, an average of 23% (95,207 of 413,945) of domestic violence simple assaults reported to police resulted in arrests. See REAVES, *supra* note 217, at 6.

<sup>226</sup> See Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014) (arguing that misdemeanor enforcement has largely moved from an adjudicative model of criminal justice to a managerial model, where people are “managed” through repeated engagement with law enforcement).

<sup>227</sup> JOEL H. GARNER & CHRISTOPHER D. MAXWELL, THE CRIME CONTROL EFFECTS OF CRIMINAL SANCTIONS FOR INTIMATE PARTNER VIOLENCE: FINAL REPORT SUBMITTED TO THE NATIONAL INSTITUTE OF JUSTICE (Sept. 30, 2010), <https://www.ncjrs.gov/pdffiles1/nij/grants/236959.pdf> [<https://perma.cc/3WM9-2LBP>].

<sup>228</sup> *Id.* at 15–16.

<sup>229</sup> *Id.* at 66.

<sup>230</sup> *Id.* at 66, 71.

<sup>231</sup> *Id.* at 94.

<sup>232</sup> *Id.*

<sup>233</sup> Several articles discussed above present critical views of domestic violence criminal reform, including Gruber, *Feminist War*, *supra* note 187; Goodmark, *Should DV Be Decriminalized?*, *supra* note



cost-benefit analyses, tout different studies, and have a more sanguine attitude toward prosecution's liberatory potential.<sup>234</sup> My goal in telling the domestic violence story is to demonstrate that feminist disparity arguments and evidence, by design or institutional predisposition, inexorably produced greater punishment. Whether such carcerality was worth it to secure equality by some standard and whether punishment is a distributable good that uniquely measures the worth of minorities and women are different questions. I have previously answered both with a resounding "no,"<sup>235</sup> but my larger point here is that critical race empiricists who produce disparity evidence—especially of victim-based disparities—must attend to more than whether policymakers will accept it. They must grapple with *why* those powerful actors would accept it and, in the end, whether such acceptance is a case of "be careful what you wish for."

### C. A Caution About Victim-Based Racial Disparity

The aforementioned caution may appear less pressing in the racial rather than the gender context, given that white women have long been the iconic face of American victimhood. By contrast, police, prosecutors, and the public at large are strongly resistant to viewing presumptively criminal black men as victims. A significant number of white Americans regard victims like Trayvon Martin and Michael Brown as "thugs" and then express utter outrage at the "racist" suggestion that they believe black lives matter

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186; Goodmark, *Autonomy Feminism*, *supra* note 186; Suk, *supra* note 186; and Coker, *supra* note 222. See also Holly Maguigan, *Wading into Professor Schneider's "Murky Middle Ground" Between Acceptance and Rejection of Criminal Justice Responses to Domestic Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 427 (2002) (critiquing aggressive policing and prosecution policies on race, gender, and class grounds.).

<sup>234</sup> See, e.g., Jonathan Lippman, *Ensuring Victim Safety and Abuser Accountability: Reforms and Revisions in New York Courts' Response to Domestic Violence*, 76 ALB. L. REV. 1417, 1424–27 (2013) (applauding New York's adoption of mandatory arrest policies and aggressive prosecution of domestic abusers); Corinne L. McCann, *What Can States Do to Maintain Victims' Security, Deter Aggressor's Repeated Abuse, and Motivate Police Departments to Pursue Criminals in the Domestic Violence Context?*, 30 SETON HALL LEGIS. J. 509 (2006) (arguing that states should do more to encourage police officers to comply with mandatory arrest statutes); Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1739 (calling certain women critics of domestic violence criminalization "pseudofeminists"); Elie A. Maalouf, Note, *Tougher Measures: How the New Massachusetts Strangulation Law Demonstrates the Need for Stricter Penalties and "No-Drop" Prosecution Policies in Domestic Violence Disputes*, 50 SUFFOLK U. L. REV. 295 (2017) (arguing in favor of Massachusetts adopting no-drop domestic violence prosecution policies).

<sup>235</sup> See Gruber, *Distributive Theory*, *supra* note 218 (critiquing American criminal law's treatment of punishment as a distributable good); Aya Gruber, *Murder, Minority Victims, and Mercy*, 85 COLO. L. REV. 129 (2014) (contrasting progressives' level-down proposals to remedy racial disparities in capital punishment context with their level-up proposals to remedy perceived gender bias in homicide law); Gruber, *When Theory Met Practice*, *supra* note 172 (critiquing the tendency of left-leaning activists to selectively embrace criminalization).

less than white lives.<sup>236</sup> Nevertheless, racial justice seekers should remain skeptical when powerful actors tout widespread black crime victimhood as a basis for greater policing or tougher prosecution. Unlike with domestic abuse, where the *inter*-gendered nature of the crime places the burden of carceral reform primarily on men (and tangentially on the women in their lives), most violent crimes are *intra*-racial.<sup>237</sup> This means, as Professor Kennedy pointed out in the capital context, that “valuing” minority victims through intensifying criminal policing and punishment has the grave potential to increase incarceration of minorities overall.<sup>238</sup>

Of course, state actors theoretically could pursue a Koop-public health route over an Ashcroft-punitive route. Critiquing leniency toward those who offend against African-Americans could produce positive developments, such as de-escalation training and proper criminal and civil accountability for murderous police officers.<sup>239</sup> Nevertheless, this is not a Koop moment, and emphasizing minority victimhood risks greater police and prosecutorial presence in the very neighborhoods where they have sown the most mischief. Right now, the federal government has offered a part-political, part-

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<sup>236</sup> See Jonathan Capehart, *Pictures Put Trayvon Martin on Trial*, WASH. POST (May 28, 2013), <https://www.washingtonpost.com/blogs/post-partisan/wp/2013/05/28/pictures-put-trayvon-martin-on-trial> [<https://perma.cc/7VUB-84WB>] (blasting defense attorney for releasing “unsavory” images intended to portray Martin as a “thug”); Jon Swaine, *Lawyer Urged Prosecutor After Ferguson Shooting: ‘Do the Right Thing’ for Police*, GUARDIAN (Sept. 22, 2017), <https://www.theguardian.com/us-news/2017/sep/22/ferguson-michael-brown-shooting-prosecutor-email> [<https://perma.cc/5QSM-JTDX>] (observing that during the prosecution’s investigation of the Michael Brown shooting, a senior investigator sent an email to the prosecutor describing Brown as a “thug” and stating that all the evidence supported the officer’s side of the story); Daniel Victor, *Why ‘All Lives Matter’ Is Such a Perilous Phrase*, N.Y. TIMES (July 15, 2016), <https://www.nytimes.com/2016/07/16/us/all-lives-matter-black-lives-matter.html> [<https://perma.cc/4S6B-MB26>] (describing the controversy surrounding the usage of the “all lives matter” phrase).

<sup>237</sup> See ALEXIA COOPER & ERICA L. SMITH, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008, NCJ 236018, 13 (Nov. 2011), <http://bjs.ojp.usdoj.gov/content/pub/pdf/htus8008.pdf> [<https://perma.cc/6ZM9-P7LJ>] (finding that between 1980 and 2008, 84% of white victims were killed by Whites and 9% of black victims were killed by Blacks).

<sup>238</sup> See *supra* notes 126–127 and accompanying text.

<sup>239</sup> See, e.g., Nick Wing, *Cops in this City Haven’t Killed Anyone Since 2015. Here’s One Reason Why.*, HUFFINGTON POST (May 18, 2017, 5:45 AM), [https://www.huffingtonpost.com/entry/salt-lake-city-police-de-escalation\\_us\\_591c9070e4b03b485cae1129](https://www.huffingtonpost.com/entry/salt-lake-city-police-de-escalation_us_591c9070e4b03b485cae1129) [<https://perma.cc/C3W8-27DQ>] (discussing de-escalation training of police in Salt Lake City, Utah). However, policing reformist sentiments might also converge with commercial interests. The widespread solution to excessive force has been to employ body cameras, at millions of dollars of costs to local and state governments and millions of dollars of private profits, with little if no benefit. Amanda Ripley & Timothy Williams, *Body Cameras Have Little Effect on Police Behavior, Study Says*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/police-body-camera-study.html> [<https://perma.cc/L2UB-YDTM>] (despite the fact that the “federal government has given police departments more than \$40 million to invest in body cameras, and state and local authorities have spent many millions more,” body cameras have shown little effect on police conduct).

hysterical response to the “epidemic” of “black-on-black” violence in Chicago—in President Donald Trump’s words, American “carnage,” for which he has threatened to “send[] in [the] Fed[s]” to address the problem.<sup>240</sup> Invoking racial imagery of Obama’s “hometown,” Trump lamented that “nobody talks about” the black murder victims.<sup>241</sup> During the 2016 campaign, Trump tweeted about Chicago Bull’s star Dwyane Wade’s cousin’s tragic killing: “Dwayne [sic] Wade’s cousin was just shot and killed walking her baby in Chicago. Just what I have been saying. African-Americans will VOTE TRUMP!”<sup>242</sup> Community activists on the ground in Chicago urged economic, educational, and social interventions, as well as gun control.<sup>243</sup> In response, Trump’s press secretary Sarah Sanders doubled down on racialized criminality sentiments, stating, “it’s a crime problem . . . [and] crime is probably driven by morality more than anything else.”<sup>244</sup> But even to a nonracist, a carceral solution might look promising. One African-American journalist counseled the Chicago black community to make a “tough choice[],” explaining that “[m]andatory sentencing is a touchy subject for many African-Americans who fear, justifiably so, that there would be a disproportionate negative impact on blacks. But don’t the repeat offenders

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<sup>240</sup> Philip Bump, *America’s Big Issue is ‘Black Africans’ Killing Each Other, Sebastian Gorka Says*, WASH. POST (Oct. 24, 2017), <https://www.washingtonpost.com/news/politics/wp/2017/10/24/americas-big-issue-is-black-africans-killing-each-other-sebastian-gorka-says> [https://perma.cc/65V4-SDMN] (criticizing a statistical graph retweeted by Trump); Jeremy Gorner, *As Feds Help Chicago on Guns, Trump Aide Says City’s Crime More About ‘Morality,’* CHI. TRIB. (June 30, 2017), <http://www.chicagotribune.com/news/local/breaking/ct-federal-agents-gun-crimes-trump-20170630-story.html> [https://perma.cc/9U3H-PSKQ]; Timothy McLaughlin & Doina Chiacu, *Trump Says He Is Sending Federal Help to Fight Chicago Crime*, REUTERS (June 30, 2017), <https://www.reuters.com/article/us-usa-trump-chicago/trump-says-he-is-sending-federal-help-to-fight-chicago-crime-idUSKBN19L1JB> [https://perma.cc/8W5Z-NANN].

<sup>241</sup> Rick Pearson & Monique Garcia, *Trump Cites Chicago Gun Violence in Speech*, CHI. TRIB. (July 22, 2016, 7:22 AM), <http://www.chicagotribune.com/news/local/politics/ct-donald-trump-chicago-violence-speech-met-0722-20160721-story.html> [https://perma.cc/LAA6-N6VT] (covering Trump’s speech criticizing Obama’s policies and Chicago’s gun violence).

<sup>242</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 27, 2016, 9:26 AM), <https://twitter.com/realdonaldtrump/status/769571710924263424> [https://perma.cc/25SA-VUHW].

<sup>243</sup> See Adam Gabbatt, *‘It Won’t Stop the Murders’: Why Chicago’s Activists Oppose Trump’s ‘Gun Strike Force’*, GUARDIAN (July 10, 2017, 7:11 AM), <https://www.theguardian.com/cities/2017/jul/10/chicago-trump-gun-violence-activists> [https://perma.cc/2FZ9-J387] (observing grassroots opposition to Trump’s stance on Chicago’s gun violence); Jonathan Parks-Ramage, *These People Dedicate Their Lives to Ending Gun Violence in Chicago*, VICE (Aug. 15, 2017, 12:30 PM), [https://impact.vice.com/en\\_us/article/zmmnyx/these-people-dedicate-their-lives-to-ending-gun-violence-in-chicago](https://impact.vice.com/en_us/article/zmmnyx/these-people-dedicate-their-lives-to-ending-gun-violence-in-chicago) [https://perma.cc/EM5D-5ZZT] (discussing grassroots approaches to combating Chicago’s gun violence).

<sup>244</sup> See Lincoln Anthony Blades, *Trump’s Obsession with Chicago, Explained*, TEEN VOGUE (July 6, 2017, 10:27 AM), <https://www.teenvogue.com/story/trumps-obsession-with-chicago-explained> [https://perma.cc/G9UA-BGQH].

responsible for this astounding murder rate of African-Americans cause as much harm?”<sup>245</sup>

Elsewhere, racial justice theorists struggle with the self-defense doctrine, and particularly stand-your-ground (SYG) laws, which have become a symbol of racial injustice since George Zimmerman, citizen watchman and “wannabe” cop, was acquitted for stalking and shooting unarmed black teen Trayvon Martin in Florida, an SYG state.<sup>246</sup> The primary feature of stand your ground is to eliminate the “duty to retreat” from self-defense law and permit a threatened person to use force even if he can safely retreat.<sup>247</sup> A majority of states, through legislation or common law, adopted SYG. In 2015, a group of sociologists examined cases from 2005–2013 identified as SYG cases by the *Tampa Tribune*. Like the Baldus study, they found that killers of white victims were more likely to be convicted for a variety of legal reasons.<sup>248</sup> The subsequent headlines proclaimed, “‘Stand Your Ground’ Laws Are Racist, New Study Reveals.”<sup>249</sup> The authors, comparing Florida self-defense law to the “three-fifths compromise,” suggested a law reform project of “repeal[ing] biased laws that perpetuate institutionalized racism.”<sup>250</sup>

After the Zimmerman case, critics frequently asserted that SYG primarily benefits Whites who kill Blacks. The 2015 study, however, found only a pro-white-victim bias among the self-defense cases analyzed.

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<sup>245</sup> Dahleen Glanton, *With 500 Homicides in Chicago, Time for African-Americans to Get Tough on Crime*, CHI. TRIB. (Sept. 7, 2016, 2:35 PM), <http://www.chicagotribune.com/news/columnists/ct-violence-african-americans-glanton-20160907-column.html> [<https://perma.cc/SKL2-57V8>].

<sup>246</sup> See, e.g., FLA. STAT. ANN. § 776.012(1) (West 2014) (Florida self-defense law containing SYG). For a discussion of the Zimmerman case, see generally Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013) (using the Trayvon Martin shooting to examine implicit biases in cases involving self-defense claims) and Aya Gruber, *Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground*, 68 U. MIAMI L. REV. 961 (2014) [hereinafter Gruber, *Race to Incarcerate*] (observing that concerns over Florida state actors’ racially based application of the law have virtually evaporated in the face of arguments that SYG is inherently poor criminal policy).

<sup>247</sup> See generally Aya Gruber, *The Duty to Retreat in Self-Defense Law and Violence against Women*, in OXFORD HANDBOOKS ONLINE (July 2017), <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935352.001.0001/oxfordhb-9780199935352-e-5> [<https://perma.cc/ZLB9-T9LP>] [hereinafter Gruber, *Duty to Retreat*] (discussing the relationship between the duty to retreat in self-defense law and violence against women).

<sup>248</sup> See Nicole Ackermann et al., *Race, Law, and Health: Examination of ‘Stand Your Ground’ and Defendant Convictions in Florida*, 142 SOC. SCI. & MED. 194 (2015). The study controlled for five other variables, including who was the initial aggressor and whether the defendant could have retreated, both of which were more predictive than victim race.

<sup>249</sup> Erin Meisenzahl-Peace, *‘Stand Your Ground’ Laws Are Racist, New Study Reveals*, VICE (Dec. 1, 2015, 4:15 PM), [https://broadly.vice.com/en\\_us/article/nz8pek/stand-your-ground-laws-are-racist-new-study-reveals](https://broadly.vice.com/en_us/article/nz8pek/stand-your-ground-laws-are-racist-new-study-reveals) [<https://perma.cc/LSE2-993P>].

<sup>250</sup> Ackermann et al., *supra* note 248, at 7.

Moreover, it did not examine whether Florida self-defense outcomes became more disparate after adoption of SYG or whether Florida outcomes were more disparate than those in non-SYG jurisdictions. A few studies of this nature exist, and they attest that *all* self-defense case outcomes exhibit race disparities, but SYG makes these disparities not so much worse as *different*.<sup>251</sup> In 2012, researcher Jon Roman released a study that compared justification rates for cases with attributes of the Trayvon Martin case (male strangers involved in a one-on-one conflict with a gun) in non-SYG and SYG jurisdictions. The effects were complex. The justification rates of black-on-black killings remained constant. SYG increased the justification rates of white-on-black killings (from 41.14% to 44.71%) and black-on-white killings (from 7.69% versus 11.10%), rendering black-on-white killings *more* justified than black-on-black killings (11.10% versus 9.94%). However, SYG most profoundly impacted justification rates for white-on-white killings, which nearly doubled from 12.95% to 23.58%.<sup>252</sup> The most salient racial effect of SYG was to *reduce* the privilege afforded to white victims, which primarily inures to the benefit of white killers.

The 2015 SYG study simply confirmed what Baldus found and Powell feared: Wherever there is discretion in the criminal system, whether it is a prosecutor's decision to seek capital punishment or a jury's decision that a defendant acted in self-defense, white victimhood predicts severity. In self-defense law, decisionmakers resist viewing a white victim as an attacker. However, emphasizing this victim-based disparity as proof positive that Florida self-defense law is racist poses risks that were not faced by the LDF lawyers in *McCleskey*. In theory, the self-defense disparity could be addressed through a level-down remedy, for example, encouraging prosecutors and jurors to more readily regard white victims as threatening and their attackers as justified (and given Roman's evidence, the SYG doctrine might precisely do this). However, the "stand your ground is racist" argument necessarily prefigures a level-up remedy, where SYG is eliminated so that defendants who claim self-defense against black and white victims alike are more likely to be convicted. Now, eliminating SYG may be

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<sup>251</sup> See, e.g., JOHN K. ROMAN, URBAN INSTITUTE, RACE, JUSTIFIABLE HOMICIDE, AND STAND YOUR GROUND LAWS: ANALYSIS OF FBI SUPPLEMENTARY HOMICIDE REPORT DATA 9 (July 2013), <http://www.urban.org/UploadedPDF/412873-stand-your-ground.pdf> [https://perma.cc/Q5Y2-NSWG] (comparing SYG and non-SYG cases with and without attributes that match the Martin case). I discuss this study at length in Gruber, *Race to Incarcerate*, *supra* note 246, at 1007. See also Chandler B. McClellan & Erdal Tekin, *Stand Your Ground Laws, Homicides, and Injuries* 7 (NBER Working Paper Series, Working Paper No. 18187, 2012), <http://www.nber.org/papers/w18187> [https://perma.cc/DD56-UN7V] (finding that "between 28 and 33 additional white males are killed each month as a result of these laws" but "no evidence . . . [of] an increase in homicides among blacks").

<sup>252</sup> ROMAN, *supra* note 251.

warranted for independent symbolic reasons. The doctrine arguably has an institutionally racist, three-fifths-style character, given its history of protecting the “true man” from “savages” and its current residence in the racially fraught gun-loving right wing.<sup>253</sup> But, eliminating the defense for symbolic reasons comes at the cost of potentially increasing convictions of black defendants.

The interests that converged as the Florida stand-your-ground saga played out are illuminating. Many race critics called for repeal, which would make it easier for Florida prosecutors to convict defendants.<sup>254</sup> That position garnered support from gun-control-oriented Democratic legislators and crime-control-oriented prosecutors. This included the prosecutor in Zimmerman’s case, Angela Corey, an infamous death penalty proponent abhorred by abolitionists, social justice advocates, and race critics alike.<sup>255</sup> Also critiquing the state of SYG law and policy were feminist and racial justice supporters of Marissa Alexander, a black woman convicted for shooting at her estranged abusive husband and his children. She too had been prosecuted by Corey and attempted unsuccessfully to assert an SYG defense. Alexander and those in her camp, in diametric opposition to Trayvon Martin supporters and Florida Democrats, supported the level-down position of making the Florida SYG law broader and easier to invoke by all defendants, including minority and female defendants.

Alexander supporters faulted Corey for pursuing charges against Alexander at all and criticized the judge for denying her immunity from prosecution under the SYG law’s unusual pretrial immunity provision.<sup>256</sup> Alexander called for significant legal reforms, including creating a presumption in favor of immunity, extending SYG protections to so-called

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<sup>253</sup> See Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237, 244–45 (2008) (examining historical portrayals of the “true man” in self-defense law); see also Gruber, *Duty to Retreat*, *supra* note 247, at 12 (discussing laws that forbade “savage” Indians and Blacks from possessing firearms); David B. Kopel, *The Self-Defense Cases: How the United States Supreme Court Confronted A Hanging Judge in the Nineteenth Century and Taught Some Lessons for Jurisprudence in the Twenty-First*, 27 AM. J. CRIM. L. 293 (2000) (examining turn-of-the-century Supreme Court “Self-Defense Cases” and concluding that support for no-retreat rules was a response to harsh murder sentences imposed in federal Indian territory cases).

<sup>254</sup> See Gruber, *Duty to Retreat*, *supra* note 247, at 13 (discussing the view that SYG is reserved “for White defendants only”); Tamara Rice Lave, *Shoot to Kill: A Critical Look at Stand Your Ground Laws*, 67 U. MIAMI L. REV. 827, 850–55 (2013) (arguing that SYG fosters racism and should be eliminated). See also Gruber, *When Theory Met Practice*, *supra* note 172, at 3217.

<sup>255</sup> See Jessica Pishko, *Is Angela Corey the Cruellest Prosecutor in America?*, NATION (Aug. 16, 2016), <https://www.thenation.com/article/is-angela-corey-the-cruellest-prosecutor-in-america/> [<https://perma.cc/8CXG-49JY>] (discussing several of Corey’s draconian and cruel prosecutorial decisions).

<sup>256</sup> See *Bretherick v. State*, 170 So. 3d 766, 768 (Fla. 2015) (discussing Florida’s pretrial immunity process).

warning shots, and reducing penalties for firearm offenses.<sup>257</sup> Alexander's efforts won support from state Republicans and the National Rifle Association (NRA), as well as from public defenders.<sup>258</sup> Alexander's position won the day, with laws expanding SYG and reducing sentences for certain firearms offenses—a rare victory for public defenders. However, this level-down solution to perceived disparity was largely due to the overwhelming influence of the NRA in the state, and marginalized criminal defendants elsewhere rarely enjoy such powerful backing.

Preferences for white victimhood can exist whenever defenses and sentencing regimes give prosecutors and jurors a measure of discretion. Thus, like Justice Stevens's "for whites only" critique of capital punishment, one could advance an argument against the entire self-defense doctrine, asserting that it is better to have no self-defense than a self-defense stamped "for those who kill blacks only."<sup>259</sup> If we adopt the program of eliminating any discretionary doctrine that results in more leniency toward those who offend against Blacks than those who offend against Whites, no defense is safe. For victimless crimes, one has grounds to worry about the fate of alternative sanctions, like diversion, that tend to disproportionately favor white defendants. Notwithstanding the NRA's love affair with self-defense, law-and-order sentiments still rule, and decarceral principles and programs are perpetually on shaky ground. I thus harbor my own can-of-worms fear, not that disparity claims will crash the system as Powell prophesized, but that they will lead to level-up solutions that render minority defendants vulnerable to increased policing, prosecution, and incarceration.

#### CONCLUSION

Researchers' and advocates' choices matter, and they should be made with awareness of their potential impact. Legal reform does not ebb and flow with the best evidence, as Dr. Sherman once hoped. Empirical study and law reform expend serious political, academic, and financial capital. Carceral reforms that ride in on a wave of bipartisan support for disparately treated minority victims may prove difficult or impossible to reverse. Accordingly, before the wheels are set in motion, one must determine the extent to which disparity claims have the potential to "lie[] about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need."<sup>260</sup> Take stock in the beginning or end up like Justice Powell who, in his retirement, observed the death penalty become more irrational

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<sup>257</sup> See Gruber, *Duty to Retreat*, *supra* note 247, at 7, 13–16.

<sup>258</sup> *Id.*

<sup>259</sup> *McCleskey v. Kemp*, 481 U.S. 279, 366 (1987) (Stevens, J., dissenting).

<sup>260</sup> *Korematsu v. United States*, 323 U.S. 214, 246 (1944).

and unjustifiable, and realized that it was he who had brought the  
“evolutionary process . . . suddenly to an end.”<sup>261</sup>

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<sup>261</sup> *Furman v. Georgia*, 408 U.S. 238, 430–31 (1972) (Powell, J., dissenting); *see also* Steiker, *supra* note 6 (observing that *McCleskey* effectively foreclosed future challenges to racial discrimination in the imposition of the death penalty).



