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Keynote Address

MCCLESKEY V. KEMP: FIELD NOTES FROM 1977–1991

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ABSTRACT—The litigation campaign that led to *McCleskey v. Kemp* did not begin as an anti-death-penalty effort. It grew in soil long washed in the blood of African-Americans, lynched or executed following rude semblances of trials and hasty appeals, which had prompted the NAACP from its very founding to demand "simple justice" in individual criminal cases. When the Warren Court signaled, in the early 1960s, that it might be open to reflection on broader patterns of racial discrimination in capital sentencing, the NAACP Legal Defense & Educational Fund, Inc. (LDF) began to gather empirical evidence and craft appropriate constitutional responses. As that effort built, other deficiencies in state capital states became apparent, and LDF eventually asserted a broader constitutional critique of state capital structures and processes. By 1967, LDF and its allies had developed a nationwide "moratorium" campaign that challenged death sentencing statutes in virtually every state.

Though the campaign appeared poised for partial success in 1969, changes in Court personnel and shifts in the nation's mood dashed LDF's initial hopes. Yet unexpectedly, in 1972, five Justices ruled in *Furman v. Georgia* that all death sentences and all capital statutes nationwide would fall under the Eighth Amendment's prohibition against cruel and unusual punishments. Each of the nine *Furman* Justices wrote separately, without a single governing rationale beyond their expressed uneasiness that the death penalty was being imposed infrequently, capriciously, and in an arbitrary manner. Thirty-five states promptly enacted new and revised capital statutes. Four years later, a majority of the Court held that three of those new state statutes met Eighth and Fourteenth Amendment standards. The 1976 Court majority expressed confidence that the states' newly revised procedures should work to curb the arbitrariness and capriciousness that had earlier troubled the *Furman* majority.

The *McCleskey* case emerged from subsequent review of post-*Furman* sentencing patterns in the State of Georgia. A brilliant and exhaustive study by Professor David Baldus and his colleagues demonstrated that the Court's assumptions in 1976 were wrong; strong racial disparities in capital

sentencing continued to persist statewide in Georgia—especially in cases in which the victims of homicide were white. The Supreme Court eventually heard and decided this case, ruling five to four against Warren McCleskey's claims in 1987. Justice Lewis Powell's opinion purported to accept in theory, but appears grievously to have misunderstood or disregarded in fact, McCleskey's powerful and unrebutted evidence of racial discrimination. Justice Powell's decision likewise appears to have contorted the Court's prior Eighth and Fourteenth Amendment jurisprudence, erecting all-but-insuperable future barriers against statistical proof of racial discrimination anywhere within the criminal justice system.

This Symposium reflects on the handiwork of the Court in *McCleskey* and its subsequent impact. As one member of the legal team who brought the case, my contribution is to speculate on how and why the Court might have acquiesced in the face of such troubling patterns in capital sentencing, despite the Justices' clear condemnation of racial discrimination in principle and their occasional intervention to curb particularly egregious acts of racial injustice. This Essay ends by encouraging social scientists and legal scholars to continue to uncover and oppose patterns of racial discrimination that remain widespread in the administration of criminal justice.

AUTHOR—Wade Edwards Distinguished Professor of Law, Emeritus, University of North Carolina at Chapel Hill. My thanks to Professor Destiny Peery and student members of the *Northwestern University Law Review* for conceiving and hosting this outstanding Symposium, "'A Fear of Too Much Justice'? Equal Protection and the Social Sciences 30 Years After *McCleskey v. Kemp*," and for expanding their invitation beyond the roster of distinguished empiricists and legal scholars to include a practitioner-relic from an earlier time. I am also grateful to my life partner, Jennifer Boger, for many suggestions and edits to this Essay, and for her perpetual good cheer and support during my years of capital defense litigation.

In the 1980s, I was part of a legal team that represented Warren McCleskey, a death-sentenced inmate forever linked with the Supreme Court decision that is the object of this thirtieth anniversary Symposium. Warren was an African-American, born into poverty and family dysfunction in Marietta, Georgia.[1] He was convicted and sentenced to death

[1] JEFFREY L. KIRCHMEIER, IMPRISONED BY THE PAST: WARREN MCCLESKEY AND THE AMERICAN DEATH PENALTY 11–13 (2015). McCleskey never knew his natural father. His mother Willie Mae

in Fulton County, Georgia, in 1978 for the murder of an Atlanta police officer, Frank Schlatt, during an armed robbery of the Dixie Furniture Store.[2] Warren was ultimately executed in Georgia's electric chair on September 25, 1991.[3]

Although the *McCleskey* case occupied much of my professional life for over a decade, my reflections—on the Court's treatment of David Baldus's sophisticated empirical evidence, Justice Lewis Powell's much-criticized constitutional rationales, the decision's subsequent reach—inevitably begin with historical forces at work long before April 22, 1987 when *McCleskey v. Kemp* was announced. Professor Reva Siegel sounds an historical theme in her opening Essay.[4] I am drawn to conclude in a related vein.

For *McCleskey* certainly did not begin with me, nor with Warren McCleskey, nor with the Baldus study, nor with the Rehnquist Court's 1985 Term. It began, in my view, no later than the dawn of the twentieth century, when the NAACP, formed in 1909 under the leadership of W.E.B. Du Bois and his colleagues, committed its energies to organize, to lobby, and, eventually, to move into state and federal courts to combat the relentless regime of racial subordination and oppression that was Jim Crow.[5]

While the principal legal objectives of the NAACP and its legal arm, which eventually incorporated separately as the NAACP Legal Defense & Educational Fund, Inc. (LDF), were to enlarge and expand *affirmative* rights for law-abiding African-American people—voting, equal educational opportunities, workplace fairness, and residential opportunities[6]—the

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McCleskey raised six children in the "Skid Row" section of Marietta, where violence and random death were a daily threat. For a time, he was placed with an aunt who often beat him. When Warren was eight years old, his mother married a physically abusive man, John Henry Brooks, who drank and often beat his wife and stepchildren. The family ran an illegal gambling casino in their ramshackle home, where Warren and his brothers and sisters were obliged to serve alcohol to the rowdy patrons. *Id.*

[2] *McCleskey v. Kemp*, 481 U.S. 279, 283, 285 (1987); *see also* KIRCHMEIER, *supra* note 1, at 15–17.

[3] Peter Applebome, *Georgia Inmate is Executed After 'Chaotic' Legal Move*, N.Y. TIMES (Sept. 26, 1991), http://www.nytimes.com/1991/09/26/us/georgia-inmate-is-executed-after-chaotic-legal-move.html [https://perma.cc/ZMX4-GKA9].

[4] Reva B. Siegel, *Blind Justice: Why the Supreme Court Refused to Accept Statistical Evidence of Discriminatory Purpose in McCleskey—And Some Pathways for Change*, 112 NW. U. L. REV. 1269 (2018).

[5] *See generally* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 96–101 (2004); DAVID LEVERING LEWIS, W.E.B. DU BOIS: BIOGRAPHY OF A RACE, 1869–1919, at 386–407 (1993); PATRICIA SULLIVAN, LIFT EVERY VOICE: THE NAACP AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT 1–16 (2009).

[6] The NAACP "pledged itself to work for the abolition of all forced segregation, equal education for Negro and white children, the complete enfranchisement of the Negro, and the enforcement of the

organization repeatedly found itself compelled to deploy its scarce resources *defensively* as well, to protect men and women of color suspected of crimes against blatant acts by white prosecutors and judges, and often by white mobs,[7] who bypassed or shortcut or distorted ordinary criminal processes to deny "simple justice" to African-American communities.[8]

NAACP lawyers were especially drawn into Southern courtrooms to defend capitally charged black men in egregious cases that did reach state courts for trial—*Moore v. Dempsey*[9] and *Powell v. Alabama*,[10] among a score of others—contesting such travesties as police interrogation conducted from the barrel of a shotgun or a noose around the suspect's neck, or jury selection processes in which all the black names mysteriously disappeared from jury lists.[11] The LDF's celebrated team of mid-twentieth-century legal counsel—Thurgood Marshall, Constance Baker Motley, Robert Carter, and Jack Greenberg—each did service in hostile Southern courthouses where their clients' lives, and their own safety as counsel, hung precariously in balance.[12]

Fourteenth and Fifteenth Amendments." JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF AMERICAN NEGROES 439 (1947).

[7] John Hope Franklin reported that "[i]n the last sixteen years of the nineteenth century there had been more than 2,500 lynchings, the great majority of which were of Negroes." *Id.* at 431. While there was some hope that the new twentieth century might bring a change, instead, the years from 1900 until the beginning of World War I witnessed more than 1,100 additional lynchings. *Id.* at 432. In response, the NAACP joined with those like Ida B. Wells-Barnett to lobby Congress for federal anti-lynching statutes, a campaign repeatedly thwarted by the power of Southern members of the United States Senate. *See, e.g.*, KIRCHMEIER, *supra* note 1, at 119–29; SULLIVAN, *supra* note 5, at 105–10, 194–97; Thomas C. Holt, *The Lonely Warrior: Ida B. Wells-Barnett and the Struggle for Black Leadership*, *in* BLACK LEADERS OF THE TWENTIETH CENTURY 39, 42–43, 53–54, 59–60 (John Hope Franklin & August Meier eds., 1982).

[8] FRANKLIN, *supra* note 6, at 439–40, 478–79; KLUGER, *supra* note 5, at 100–01; SULLIVAN, *supra* note 5, at 18–19.

[9] 261 U.S. 86 (1923).

[10] 287 U.S. 45 (1932).

[11] KLUGER, *supra* note 5, at 112–15 (describing the background facts and trial of *Moore v. Dempsey*, a case where black defendants argued that their due process rights were infringed by an all-white jury pressured by roving white mob members). *See generally* DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (rev. ed. 2007) (recounting the role of the NAACP in the protracted and contentious, off-and-on representation of the nine defendants in the Scottsboro cases); *see also* Brown v. Mississippi, 297 U.S. 278, 281–82 (1936) (recounting how black defendants' confessions were obtained after they had been repeatedly whipped, beaten, and one, hung from a tree by a rope); RANDALL KENNEDY, RACE, CRIME, AND THE LAW 312–16 (1997) (recounting the cases of the "Martinsville Seven," black defendants all death-sentenced for the alleged rape of a white woman, in which black lawyers unsuccessfully pressed claims of a pattern of racial discrimination, with the LDF offering legal assistance on appeal).

[12] *See, e.g.*, MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, at 50–66 (1994); GILBERT KING, DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA (2012) (recounting the cases of four black men in a Florida community falsely accused of rape who were successfully defended by

There came a time when a more comprehensive opportunity to redress these criminal justice grievances presented itself. The moment was June of 1963. Nine years earlier, in 1954, Chief Justice Earl Warren had announced *Brown v. Board of Education*, marking a profound break with eighty years of judicial betrayal of protections promised under the Thirteenth, Fourteenth, and Fifteenth Amendments.[13] By the early 1960s, the Warren Court had also undertaken a "criminal law revolution," extending one by one, to state criminal defendants, most of the Bill of Rights protections originally applicable only against federal actors.[14]

It was during this springtime for civil rights and civil liberties claims that a newly appointed Justice, Arthur Goldberg, and his young law clerk, Alan Dershowitz, came forward in 1963 with an internal memorandum, circulated to other Justices, proposing that the Court should take up the question "[w]hether, and under what circumstances, the imposition of the death penalty is proscribed by the Eighth and Fourteenth Amendments to the United States Constitution."[15] After cataloguing arguments as to why all capital punishment might violate the Cruel and Unusual Punishment Clause, Goldberg's memo focused on its use against those convicted of "sexual crimes which do not endanger life (*e.g.*, rape),"[16] noting "the well-recognized disparity in the imposition of the death penalty for sexual crimes committed by whites and nonwhites," and citing statistics illustrating that between 1937 and 1951, 233 of the 259 defendants executed for rape in the United States were African-American.[17] He urged the Court to order briefing and argument on all these issues.[18]

Goldberg found, to his dismay, that a majority of the Justices were not eager to expand their docket to embrace this new cause. Indeed, Chief Justice Warren, *Brown*'s author, cautioned Goldberg prudentially that if he

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Marshall and Jack Greenberg despite rampant injustice, Ku Klux Klan violence, and personal danger to counsel); JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 93–102 (1994) (same); *id.* at 256–59 (recounting unsuccessful last-minute attempts to save a black defendant from electrocution in Georgia, despite powerful evidence that he could not have committed the crime).

[13] 347 U.S. 483 (1954). *See generally* JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION*: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY xii–xviii (2001); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 139–47 (3d ed. 1974).

[14] *See* Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1 (1995); A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249 (1968).

[15] Arthur J. Goldberg, *Memorandum to the Conference Re: Capital Punishment, October Term, 1963*, 27 S. TEX. L. REV. 493, 493 (1986); *see also* KIRCHMEIER, *supra* note 1, at 76–78.

[16] Goldberg, *supra* note 15, at 504.

[17] *Id.* at 505 n.18.

[18] *Id.* at 493, 499; *see also* MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 28–30 (1973).

did press the death penalty issue further, he should omit the issue of racial injustice.[19] This theme of "racial avoidance" by the Court is one we shall see again.[20]

Only partially deterred, Justice Goldberg, joined by Justices William O. Douglas and William Brennan, published a rare dissent in June of 1963 from the Court's decision to deny certiorari in a "routine" rape case, *Rudolph v. Alabama*.[21] Justice Goldberg's dissent posed the questions whether, in light of the international and American trend against the imposition of death for rape, Arkansas's continued use of the penalty violated the Eighth Amendment's "evolving standards of decency."[22] It read like an engraved invitation to resourceful counsel to build a trial record against rape as punishment and return to the Court, where the three dissenting Justices had already signaled their predisposition to entertain the claims favorably.[23]

Nowhere was this invitation weighed more seriously than in the offices of the LDF. Despite a docket already overflowing with cases on school desegregation, college integration, and civil rights demonstrations, Jack Greenberg, Thurgood Marshall's chosen successor as Director/Counsel of the LDF, charged several LDF staffers, including Michael Meltsner, Leroy Clark, and Frank Heffron, to begin exploring this

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[19] EVAN J. MANDERY, A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA 27–28 (2013).

[20] *See id.* at 25–28. Mandery notes that Chief Justice Warren was keenly aware of the hostile political responses to *Brown* and widespread Southern defiance of its mandate for school integration, and suggests that Warren thought it would be imprudent for the Court to take on the death penalty, especially focusing on its racially discriminatory features during that period. "Ruling the death penalty unconstitutional would mean stepping in on behalf of black rapists and murderers. This would be more than the public could take." *Id.* at 26; *see also* EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT 88 (1998) (citing a secondhand account by Justice Douglas of Chief Justice Warren's rationale); David C. Baldus, George Woodworth & Catherine M. Grosso, *Race and Proportionality Since* McCleskey v. Kemp *(1987): Different Actors with Mixed Strategies of Denial and Avoidance*, 39 COLUM. HUM. RTS. L. REV. 143 (2007) (naming and exploring this "denial and avoidance" strategy by the Supreme Court of the United States, the United States Congress, and state legislatures and supreme courts); Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, 82 U. CHI. L. REV. 243 (2015) (exploring the repeated occasions on which the Supreme Court has avoided addressing evidence of racial discrimination).

[21] 375 U.S. 889 (1963) (Goldberg, Douglas, & Brennan, JJ., dissenting from denial of certiorari).

[22] *Id.* at 890 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

[23] Professor Jeffrey Kirchmeier has observed that "the questions in the dissent sent out a message to capital defense attorneys across the country that at least some of the justices were open to constitutional arguments about the death penalty. . . . Justice Goldberg . . . hoped it would inspire lawyers to concentrate on bringing more challenges to the nation's death penalty." KIRCHMEIER, *supra* note 1, at 78.

possible new campaign.[24] LDF was initially drawn toward this struggle not with the aim of abolishing capital punishment for its own sake, but because of its visibly racial misuse, a pattern Greenberg and LDF knew well.[25] The story of the subsequent LDF-led campaign is a familiar one, oft retold, but I briefly recount it to underscore certain features that have significance for what ultimately transpired in *McCleskey*.

Two crucial personnel decisions helped shape all that followed. The first was the recruitment into the effort of a young law professor, Anthony G. Amsterdam, among the very most brilliant, innovative, and selfless legal academics of the past half-century. Amsterdam, a summa cum laude graduate of the University of Pennsylvania Law School and a rare non-Harvard clerk for Justice Felix Frankfurter in 1962, had already gained near legendary status for his encyclopedic knowledge of federal law, his astonishing ability to spin out ingenious legal theories, his twenty-hour work days, and his unstinting devotion to civil liberties causes.[26] Another Penn recruit was Professor Marvin Wolfgang, one of the most eminent and seasoned criminologists in the nation, who agreed to carry out an empirical study to probe the rape claim.[27]

Together, Wolfgang, Amsterdam, and their LDF colleagues began to plan what was, for that day, a sophisticated empirical study of the imposition of capital sentences for the crime of rape. They decided to draw a scientific sample from the 3,000 capital rape cases that had been prosecuted in eleven Southern states between 1945 and 1965. They were keenly aware that simply demonstrating raw disparities between the number of black and white rape defendants on the one hand, and the number of black and white death sentences on the other, would not suffice to sustain a constitutional challenge, since prosecutors would surely contend that factors other than race itself actually explained the apparent racial disparities. Wolfgang therefore designed a questionnaire to gather data on twenty-nine important aspects of each case.[28] In the summer of 1965, amid the regional violence and tumult of that bloody civil rights era, Wolfgang sent forth young data collectors to county courthouses in eleven

[24] MELTSNER, *supra* note 18, at 30–31. *See generally* GREENBERG, *supra* note 12, at 440–42; TUSHNET, *supra* note 12, at 50–56.

[25] MELTSNER, *supra* note 18, at 35–36.

[26] *Id.* at 79–86; BURTON H. WOLFE, PILEUP ON DEATH ROW 230–32 (1973).

[27] Marvin E. Wolfgang & Marc Riedel, *Racial Discrimination, Rape, and the Death Penalty*, *in* THE DEATH PENALTY IN AMERICA 194, 194–97 (Hugo Adam Bedau ed., 3d ed. 1982).

[28] *Id.* at 198–200; *see also* MELTSNER, *supra* note 18, at 75–78.

Southern states, charging them to search laboriously, file by file, for the necessary data on every sampled case.[29]

Meanwhile, through a gradual process, LDF lawyers arrived at a series of ethical decisions that would shape the whole future of their representation in *McCleskey* and beyond. They could not know, for sure, in which particular case or cases Wolfgang's evidence might eventually be presented. Unlike many civil "test cases," in which counsel can select especially sympathetic plaintiffs to present their issues in the most favorable factual light, criminal cases frequently involve defendants charged with serious misdeeds who do not arouse sympathy of any kind. In these defense cases, moreover, trial and appellate courts are often disposed summarily to deny new constitutional claims and reluctant to entertain sophisticated social science evidence, especially in post-conviction proceedings filed long after the original criminal trials are over. In short, LDF lawyers would be hard-pressed to wait for just the right case in which to assert their constitutional claims. Instead, LDF eventually concluded that it needed to share whatever formal allegations of racial discrimination it could fashion with every single lawyer representing every single African-American rape defendant, standing ready to go forward to a hearing whenever invited to do so by any interested judge. Such were the circumstances under which Warren McCleskey's case would eventually become the vehicle for considering racial discrimination in Georgia's post-1972 capital statutes.[30]

While racial disparities in capital sentencing were plainly what drew LDF into the rape-and-death-penalty struggle, moreover, LDF deemed it professionally unethical not to assert, on behalf of each such client, any other constitutional claims, whether racially based or not, that might save his or her life.[31] Some fraction of those claims would be individual to each particular client's case—how a defendant had been apprehended and questioned by police, whether evidence had been obtained illegally, or whether selection of the jury had violated constitutional norms.

Yet by 1965, under Amsterdam's guidance, LDF had begun to draw upon and expand ideas for a series of potentially broadly shared claims

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[29] MELTSNER, *supra* note 18, at 86–87.

[30] *See* Eric Muller, *The Legal Defense Fund's Capital Punishment Campaign: The Distorting Influence of Death*, 4 YALE L. & POL'Y REV. 158, 177 (1985) (noting that "[t]he possibility of choosing an appealing litigant was a luxury which the planners of the capital punishment campaign could not enjoy," and describing LDF's capital clients as among "the most violent, ugly, and hated dropouts from American society").

[31] GREENBERG, *supra* note 12, at 442 ("For reasons related to our professional responsibility to our clients, . . . [w]e found that we couldn't ethically limit ourselves to claims of racism if defendants had other good arguments . . . .").

based on common procedural choices that most states had made about how to try capital cases. Among the most important were three later known as the "bifurcation" claim, the "sentencing guidelines" or "guided discretion" claim, and the "death qualification" claim.

Most states required capital juries to resolve in a single proceeding both a defendant's guilt and, if convicted, his or her sentence as well. Yet under this so-called "single verdict" approach, evidence that might weigh powerfully against imposition of a death sentence, such as a childhood marred by abuse and violence, might point toward a defendant's possible guilt. The American Law Institute had recommended the reform of this system in 1959.[32] Amsterdam framed that recommendation as a Due Process Clause challenge, arguing that states should not force defendants into a Hobson's choice between presenting evidence that might save their lives or not presenting it in an effort to minimize the likelihood of their conviction. Instead, states should be required to structure bifurcated proceedings. In the first phase, juries would hear evidence and deliberate on guilt or innocence, with a second, separate sentencing phase to follow only if the defendant were convicted of capital murder.[33]

Amsterdam's examination of sentencing guidelines resulted in a similar new challenge. In most states, before juries deliberated on a defendant's guilt or innocence, trial judges routinely instructed the jurors in detail on law pertinent to each element of the crime and how they should weigh available evidence. Yet in marked contrast, judges allowed jurors to deliberate without any guidance at all on whether to impose a life or death sentence. This lack of any uniform "guided discretion" on the crucial issue of punishment, Amsterdam argued, also failed to meet due process standards.[34]

The third broad claim looked neither to the structure of the proceedings nor to the guidance given jurors but to how those jurors were selected at the outset of the trial. In most states, prosecutors were allowed, during their pretrial voir dire examination of prospective jurors, automatically to exclude "for cause" all jurors who expressed any hesitation to impose a death sentence. Amsterdam posited that the wholesale removal of such jurors biased the jury's deliberations at the *guilt* phase of the proceedings, by excusing jurors who could fairly decide the guilt–innocence issue (and who could indeed be shown to be less biased in favor of the State on various issues),[35] and again at the *penalty* phase, by

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[32] LAZARUS, *supra* note 20, at 91.

[33] MELTSNER, *supra* note 18, at 68–69.

[34] *Id.* at 69–70.

[35] *Id.* at 67–68.

excluding those who might vote for death in an especially egregious case but whose initial reluctance to do so represented an important part of the overall "conscience of the community" that should contribute to the jury's recommendation on an appropriate sentence.[36]

Lawyers at LDF agreed that each of these potentially lifesaving claims belonged in each capital rape case. Yet these claims seemed equally applicable to defendants at risk of a death sentence for murder, arson, or other felonies as well. Could LDF refuse to share its new theories with black clients facing execution for these other capital crimes? Indeed, could they restrict their potentially lifesaving theories only to African-American defendants?

LDF's answer to each of these questions was "no."[37] While LDF's initial campaign had not aimed at abolition of death penalty statutes generally, through a process of ethical and strategic deduction, it eventually arrived at a principled approach that seemed to point toward the end, or at least the radical restructuring, of all state capital sentencing regimes. Moreover, LDF lawyers reasoned that since many of these issues might be employed by lawyers for white clients, it would be prudent as well as principled to become involved in all potential cases that might reach the Supreme Court.[38]

Some tactical advantages supported such a decision. If LDF did manage to build a nationwide network of capital defense attorneys to defend every client under sentence of death, each of whom raised these new constitutional claims in state and federal post-conviction proceedings, proffering identical evidence and seeking final resolution by the Supreme Court, LDF foresaw that a "pileup on death row" might emerge. Such a de facto "moratorium" could elevate the public visibility of death penalty issues in every case. It might also put significant pressure on conscientious

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[36] The challenge to this practice eventually led to the Supreme Court's important decision in *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

[37] *See* Muller, *supra* note 30, at 167–69 (suggesting that the original LDF race-focused goals of the campaign expanded as "the force of abolitionist logic . . . pushed the campaign far beyond its original scope"); *see also* MANDERY, *supra* note 19, at 49 (quoting LDF's deputy director, James Nabrit, III, who explained that "[o]ur legal arguments created a lifeboat for people. Everybody was in the lifeboat, so LDF had an obligation to help them all"); MELTSNER, *supra* note 18, at 108 (quoting Amsterdam, who remarked that "[w]e could no more let men die that we had the power to save than we could have passed by a dying accident victim sprawled bloody and writhing on the road without stopping to render such aid as we could").

[38] GREENBERG, *supra* note 12, at 443 (observing that "[t]hese arguments against capital punishment could be made in the cases of whites as well as blacks. We knew that if we wanted to persuade the Supreme Court to make law, we needed to control every case possible . . . or some lawyer . . . who was perhaps not very competent might produce decisions that would tie our hands"); LAZARUS, *supra* note 20, at 96.

judges, forcing them to decide claims in the awareness that their decisions might affect the fates of not one or two defendants, but many hundreds.[39]

Yet this commitment to share potentially lifesaving constitutional claims with all capital inmates obviously came at a price. It took away key tools that experienced civil law reformers often employ to their advantage: to select a case with sympathetic clients and "favorable facts" and to file the case if possible before a favorably disposed judge. By contrast, LDF's capital campaign would cede to any willing state or federal judge the opportunity to weigh complex empirical evidence and assess novel constitutional claims on behalf of any inmate who had pled LDF's claims.

In 1967, Amsterdam and LDF lawyers embarked on this never-before-attempted effort to provide post-conviction assistance to every capital defendant, prompted in part by an announcement of Florida's new governor, Claude Kirk, Jr., that he intended to begin executions for all of Florida's nineteen inmates within a few weeks.[40] Amsterdam, LDF staffer Jack Himmelstein, and others worked with legal allies in Florida and then California to obtain stays of execution in all pending capital cases.[41] To do so, they prepared and circulated widely a "last aid" kit of papers: model constitutional claims and motions that would offer to provide evidence in support of each claim, ideally to be placed in the cases of every capitally sentenced defendant in America.[42] LDF also held regional and statewide conferences to instruct willing volunteer attorneys in how to present such claims, and LDF agreed to stand, like a guarantor on a bank loan, as a backup source of help and counsel for any attorney called into court for a full post-conviction hearing on any of the claims. In effect, LDF's original objective to challenge the racially disproportionate death sentencing of African-Americans for the crime of interracial rape became a nationwide campaign directed at the modern death penalty itself.[43]

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[39] MANDERY, *supra* note 19, at 65; MELTSNER, *supra* note 18, at 106–07; WOLFE, *supra* note 26, at 244–45.

[40] WOLFE, *supra* note 26, at 230–38.

[41] GREENBERG, *supra* note 12, at 443–46; WOLFE, *supra* note 26, at 229–43.

[42] MANDERY, *supra* note 19, at 52; MELTSNER, *supra* note 18, at 107–10; WOLFE, *supra* note 26, at 244–46.

[43] MELTSNER, *supra* note 18, at 112–15. LDF was joined in this campaign at the national level by the ACLU, which, after internal debate, decided to take a public position against capital punishment and press its arguments, less in the courts than in legislative arenas and public forums. *See* KIRCHMEIER, *supra* note 1, at 80–81 (noting that some later mused that, had the money and energy directed into the litigation effort overseen by LDF been channeled instead into lobbying for legislative repeal, in an era when public opposition to the death penalty had grown large, capital punishment might have ended via this legislative route); *see also* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 250–51 (2002) (same); Muller, *supra* note 30, at 175–80 (faulting LDF's failure fully to consider the risky public relations dimensions of its capital representations). Despite the national-level division of labors

The next six years were fraught with legal and judicial drama. In the years from 1965 to 1971, some aspects of the campaign went according to plan, while others skewed wildly in unexpected directions. The moratorium strategy succeeded beyond expectations: despite a flow of new capital convictions and death sentences in some forty-one states, the last execution carried out in any American jurisdiction occurred in Colorado in 1967.[44] Virtually every other death-sentenced inmate was protected by pleadings filed in some state or federal court that asserted one or more of the LDF issues.[45] Many counsel persuaded local judges, moreover, that they should hold those issues in abeyance pending the Supreme Court's ultimate disposition in "some other case." Scores of state and federal judges, hard-pressed for time, proved frequently quite willing to let these difficult habeas cases sink toward the bottom of their busy dockets.[46] The pileup of death-sentenced inmates awaiting execution gradually grew to 435 by 1967 and to over 620 by 1972.[47]

Meanwhile, of great significance for the Supreme Court's ultimate treatment of racial discrimination claims in capital cases, Professor Wolfgang's study results began to come in. The data revealed that black defendants in his survey were indeed nearly seven times more likely to receive a death sentence than white defendants (13% vs. 2%), a rate that rose to eighteen times as many death sentences when the defendant was black and the victim was white (36% vs. 2%).[48] Significantly, these wide racial disparities did not diminish when Wolfgang carried out multiple

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between LDF and the ACLU, some of the most vigorous statewide efforts involved state ACLU branches in Georgia, Florida, California, and elsewhere. WOLFE, *supra* note 26, at 230–42.

[44] KIRCHMEIER, *supra* note 1, at 81–82; *see also* Hugo Adam Bedau, *Background and Developments*, *in* THE DEATH PENALTY IN AMERICA, *supra* note 27, at 24, 25 tbl.1-3 (titled "Prisoners Executed Under Civil Authority in the United States, 1930–1980").

[45] WOLFE, *supra* note 26, at 309–10.

[46] LAZARUS, *supra* note 20, at 92.

[47] KIRCHMEIER, *supra* note 1, at 81–82; Hugo Adam Bedau, *The Laws, the Crimes, and the Executions*, *in* THE DEATH PENALTY IN AMERICA, *supra* note 27, at 63 tbl.2-3-4 (titled "Prisoners on Death Row by Year, Race, and Sex, 1968–80" and reporting that 642 inmates were awaiting execution at the close of the year 1971).

[48] Wolfgang & Riedel, *supra* note 27, at 200–01. David Baldus later summarized the study's design as follows:

> Wolfgang's data set included information on a wide variety of legitimate case characteristics. Indeed, in terms of the number of legitimate background variables for which data were available, his was the most sophisticated empirical investigation of sentencing yet conducted at that time. The data allowed Wolfgang to control one at a time for over two dozen variables (such as prior record, contemporaneous robbery, weapon, and victims' age). . . . Wolfgang found that adjusting for none of these legitimate background variables reduced the strong race effects initially observed.

DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 250–51 (1990).

regression analyses to test whether race-neutral factors or others among the twenty-nine variables in each case might actually be driving the differences.[49]

An Arkansas federal district judge eventually agreed to hear these racial claims. Amsterdam and LDF counsel presented Dr. Wolfgang and his data on behalf of death-sentenced inmate William Maxwell.[50] Following the hearing, first the district court[51] and then the United States Court of Appeals for the Eighth Circuit, in an opinion authored by then-Circuit Judge Harry Blackmun,[52] rejected Maxwell's racial claim for several reasons. First, despite the statistical significance of Wolfgang's overall racial patterns, Maxwell's case had arisen, by chance, in an Arkansas county that was not part of Wolfgang's sample, so there was no direct evidence comparing what prosecutors and juries in Maxwell's own county had done in other rape cases.[53] Second, Blackmun noted that Wolfgang had not collected data on additional factors about each crime that might conceivably have affected the sentencing outcomes.[54] Finally, Wolfgang's sample of death-sentenced Arkansas cases similar to Maxwell's included only fifty-five cases, too few to reach scientifically reliable answers.[55] Blackmun famously concluded: "We are not certain that, for Maxwell, statistics will ever be his redemption."[56]

LDF subsequently filed a comprehensive petition for certiorari with the Supreme Court, its ultimate target all along, raising Maxwell's racial claim as well as LDF's claims about the absence of a bifurcated proceeding, the lack of any sentencing guidance for the jury, and a jury

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[49] Wolfgang & Riedel, *supra* note 27, at 201–04; *see also id.* at 204 (noting that "[w]hether or not a contemporaneous offense has been committed, if the defendant is black and the victim is white, the defendant is about eighteen times more likely to receive the death penalty than when the defendant is in any other racial combination of defendant and victim"). The researchers added:

> Over two dozen possibly aggravating nonracial variable that might have accounted for the higher proportion of blacks than whites sentenced to death upon conviction of rape have been analyzed. Not one of these nonracial factors has withstood the tests of statistical significance. . . . This is a striking conclusion. . . . All the nonracial factors in each of the states analyzed "wash out," that is, they have no bearing on the imposition of the death penalty in disproportionate numbers upon blacks. The only variable of statistical significance that remains is race.

Id.; *see also* Marvin E. Wolfgang, *Blacks and the Law*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 119 (1973) (further describing his study).

[50] GREENBERG, *supra* note 12, at 444–45 (describing testimony in the district court hearing).

[51] Maxwell v. Bishop, 257 F. Supp. 710 (E.D. Ark. 1966).

[52] Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968); MELTSNER, *supra* note 18, at 103–05; WOLFE, *supra* note 26, at 284–86.

[53] *Maxwell*, 398 F.2d at 146.

[54] *Id.* at 147.

[55] MELTSNER, *supra* note 18, at 94–102.

[56] *Maxwell*, 398 F.2d at 148.

selection process that excluded jurors hesitant about the death penalty. Strikingly, the Court agreed to grant review and hear all these issues *except* Maxwell's racial claim, a claim the liberal Warren Court went out of its way *not* to entertain, despite the presentation in the case of the full Wolfgang study, tested in trial litigation.[57]

After *Maxwell v. Bishop* was argued in March of 1969,[58] an initial internal vote showed the Justices ready, by an eight-to-one margin, to strike down Maxwell's sentence on one of the broad due process grounds.[59] Yet the apparent consensus was a shaky one, since some Justices apparently preferred the bifurcation issue, while others found the guided-sentencing-discretion issue more compelling. When Justice Douglas tried to draft an opinion that embraced both issues, he failed to attract five votes for his efforts.[60]

In the meantime, the Court's membership was about to undergo seismic change. Chief Justice Earl Warren had announced in the spring of 1968 that he would step down at the end of the following Term. Moreover, Abe Fortas—who had succeeded Arthur Goldberg and whom President Johnson hoped to name the new Chief Justice as Warren's replacement—first found his nomination to become Chief Justice stalled in the Senate in the fall of 1968 and then found himself accused of financial misconduct the following spring, prompting his resignation from the Court on May 14, 1969.[61]

These events took place in the immediate aftermath of a tumultuous presidential election in which the country had chosen former Republican Vice President Richard Nixon over the Democratic Vice President Hubert Humphrey. Nixon had campaigned vigorously in 1968 on a "law and order" platform,[62] and he soon fulfilled that promise by replacing Chief Justice Warren with the far more conservative Warren Burger, who had earlier, as a judge on the United States Court of Appeals for the District of Columbia Circuit, clashed with more liberal judges over criminal law

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[57] MELTSNER, *supra* note 18, at 148.

[58] *See id.* at 158–67 (providing a summary of the arguments by Anthony G. Amsterdam and Albert W. Harris, Jr. in *Maxwell*).

[59] LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE 63, 339 n.71 (1992); MANDERY, *supra* note 19, at 83.

[60] KIRCHMEIER, *supra* note 1, at 84; MANDERY, *supra* note 19, at 83–84, 89.

[61] LAZARUS, *supra* note 20, at 100; MELTSNER, *supra* note 18, at 186.

[62] *See* Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 3, 14–16 (2013) (discussing Nixon's 1968 strategy emphasizing the need for public safety as a rationale for his law and order promises).

issues.[63] President Nixon then replaced liberal Abe Fortas with Harry Blackmun, the very Eighth Circuit judge who had rejected Maxwell's claims.[64]

Suddenly, neither of the due process issues in Maxwell's case commanded a majority. The Court instead ordered reargument for May 4, 1970, and eventually reversed Maxwell's death sentence on a narrower, death-qualification ground, making no new constitutional law.[65] The Court then took two death cases, *McGautha v. California*[66] and *Crampton v. Ohio*,[67] which had been litigated by non-LDF attorneys, to consider the due process issues unresolved in *Maxwell* itself. In 1971, Justice John Harlan, writing for six Justices in *McGautha*, declared that the Due Process Clause did not constitutionally compel states to accept LDF's long-pursued guided-discretion approach. His coolly analytic decision asked instead whether any comprehensive standards for classifying the death-worthiness of each case could ever be developed.[68] He likewise found no constitutional obligation for states to conduct bifurcated proceedings.[69] It appeared the breakthrough moment for LDF's constitutional campaign had come and gone.

Indeed, the 1970s appeared to have ushered in an autumnal chill for every aspect of the LDF campaign.[70] Not only had core liberal members of the reform-minded Warren Court been replaced by a cohort of more conservative Justices, but the country itself had moved in a notably more conservative direction. The widespread optimism of the early Kennedy years had largely vanished after the assassinations of John Kennedy, Martin Luther King, Jr., and Robert Kennedy, the urban riots of the mid-to-late

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[63] LAZARUS, *supra* note 20, at 102.

[64] *Id.*

[65] Maxwell v. Bishop, 398 U.S. 262 (1970) (per curiam); KIRCHMEIER, *supra* note 1, at 84; *see* MANDERY, *supra* note 19, at 95–96; MELTSNER, *supra* note 18, at 199–211; WOLFE, *supra* note 26, at 303–04.

[66] 402 U.S. 183 (1971).

[67] *Id.* (stating that the Court heard *Crampton* together with *McGautha*).

[68] *Id.* at 204 ("To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."); *see* MANDERY, *supra* note 19, at 107–11; MELTSNER, *supra* note 18, at 240–42.

[69] *McGautha*, 402 U.S. at 210 ("To say that the two-stage jury trial . . . is probably the fairest, as some commentators and courts have suggested, and with which we might well agree were the matter before us in a legislative or rulemaking context, is a far cry from a constitutional determination that this method of handling the problem is compelled by the Fourteenth Amendment." (citation omitted)). The Court's treatment here has been brilliantly analyzed by Professor Robert Weisberg. Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305.

[70] MANDERY, *supra* note 19, at 111–14.

1960s, and the relentless war in Vietnam.[71] Crime, including homicide, had begun to climb, and popular support for the death penalty had increased.[72] President Nixon and his Attorney General John Mitchell repeatedly asserted that federal judges and the Supreme Court should engage in "strict construction" of the Constitution and nothing beyond.[73] Before the end of 1972, President Nixon would remake the Supreme Court with his third and fourth nominations, replacing the retiring Justices Black and Harlan with Lewis Powell and William Rehnquist, both of them strongly skeptical about any judicial role in restricting the latitude of state criminal proceedings.[74]

Yet, to the surprise of many, despite these adverse changes in both Court personnel and the public mood, in 1972, in four capital cases that included *Furman v. Georgia*,[75] the Supreme Court finally gave LDF and Amsterdam the broad victory they had sought for eight years—vacating not just the death sentences of the four defendants before the Court, but every death sentence, and every death penalty statute, in every American jurisdiction.[76] Although LDF's Due Process Clause challenges had been rejected in *McGautha* a term earlier, the Court invited new argument on the question whether the "imposition and carrying out of the death penalty in (these cases) constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?"[77]

LDF's Director/Counsel Jack Greenberg and Anthony Amsterdam presented the arguments for the defendants. Greenberg, who represented the defendants in the two rape cases, made passing use of the Wolfgang evidence of racial bias to emphasize that death for rape was a penalty used primarily in the South against black defendants and was therefore "unusual" under the Eighth Amendment.[78] Amsterdam embroidered an elaborate Eighth Amendment theme, pressing the idea that while the Constitutional text expressly recognized, and thus implicitly approved,

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[71] *See* THEODORE H. WHITE, THE MAKING OF THE PRESIDENT 1968 (1969).

[72] KIRCHMEIER, *supra* note 1, at 92–93.

[73] *See* Brad Snyder, *How the Conservatives Canonized* Brown v. Board of Education, 52 RUTGERS L. REV. 383, 419, 430 (2000).

[74] KIRCHMEIER, *supra* note 1, at 86; LAZARUS, *supra* note 20, at 104–05.

[75] 408 U.S. 238, 239 (1972). The other three cases were *Aikens v. California*, *Branch v. Texas*, and *Jackson v. Georgia*. The Court heard *Furman* together with *Branch* and *Jackson*, while hearing *Aikens* separately. *See* Aikens v. California, 406 U.S. 813 (1972). All four cases involved African-American defendants convicted for crimes against white victims. Aikens and Furman had been convicted of murder, Branch and Jackson, of rape. MELTSNER, *supra* note 18, at 246.

[76] KIRCHMEIER, *supra* note 1, at 89. A total of 589 prisoners were spared execution by the Court's decision.

[77] *Furman*, 408 U.S. at 239.

[78] MELTSNER, *supra* note 18, at 268, 275–77.

governmental use of the death penalty, capital punishment had since become an atavism, a relic of an earlier age, a penalty no longer supported or regularly applied.[79] His intertwined theme, enlarging on the first, was that those death sentences still being imposed were being meted out in a handful of arbitrary, capriciously chosen cases that made its imposition "freakish" and "unusual," violating core Eighth Amendment principles.[80] Justice Byron White later remarked to a colleague after Amsterdam's argument in *Furman* that he had "never seen a better oral advocate."[81]

The Court proved deeply divided; although it struck down the death penalties in every case before it, the Court split five to four, with each of the nine Justices writing separately to produce the longest set of opinions in one case in the Court's history.[82] The five opinions of the majority Justices varied in rationale. Justices Douglas, Potter Stewart, and Thurgood Marshall all acknowledged in passing that racial minorities and the poor bore the heaviest burden of death sentencing,[83] but most of the Justices chose not to reflect at all on the penalty's racial effects. Two key short decisions authored by Justices White and Stewart relied principally on the penalty's freakishness and unusualness. The death penalty, Justice White added, was used so seldom that it no longer served either of its chief penological justifications—neither deterrence nor retribution.[84] Notably for our later discussion of *McCleskey*, Justice Lewis Powell, new to the Court in 1972, wrote by far the longest and most passionate dissent in *Furman*; it ran to more than fifty printed pages. Powell devoted several pages to parrying claims that racial disparities infected capital sentencing in 1972, attributing such evidence either to past practices now largely abandoned or to the ostensible fact that "[t]he '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."[85]

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[79] *See* Brief for Petitioner at 6–7, *Aikens*, 406 U.S. 813 (No. 68-5027), 1971 WL 134168, at *15–18.

[80] *Id.* at 49–55; MELTSNER, *supra* note 18, at 269–70; WOLFE, *supra* note 26, at 378.

[81] LAZARUS, *supra* note 20, at 114.

[82] BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 220 (1979) (observing that "[t]he nine separate opinions totaled 50,000 words, 243 pages—the longest decision in the Court's history").

[83] Furman v. Georgia, 408 U.S. 238, 249–52, 256 (1972) (Douglas, J., concurring); *id.* at 310 (Stewart, J., concurring); *id.* at 364–66 (Marshall, J., concurring).

[84] *Id.* at 310–14 (White, J., concurring).

[85] *Id.* at 414, 447–50 (Powell, J., dissenting). Woodward and Armstrong report that Justice Powell acknowledged that "[b]lacks probably had been discriminated against and more often given death sentences, just as they had been discriminated against in every other way. But these were things of the past." WOODWARD & ARMSTRONG, *supra* note 82, at 214. Powell apparently assumed such injustices were unlikely to persist, because of the increased presence of black jurors on capital juries and the

Death row inmates and lawyers at LDF could celebrate their remarkable victory only for a short time,[86] since a broad public backlash against *Furman* was powerful and immediate. Amsterdam had assured the Justices that capital punishment was a leftover relic of an earlier day. Yet fierce public outcry against the decision and prompt reenactment of capital statutes by thirty-five state legislatures appeared to show that the penalty remained important to many citizens and their representatives.[87] The Court and the abolitionist forces came in for broad criticism, not only from state and local executive and legislative leaders, but eventually from President Gerald Ford's Solicitor General, Robert Bork, who weighed in aggressively in support of states defending against death penalty challenges.[88]

State attorneys general and legislators, however determined they may have been to reenact capital statutes, nonetheless poured over the language and logic of *Furman*. In consequence, virtually every state adopted one or more of the procedural reforms that had been pressed by LDF through the late 1960s. Roughly half chose both to bifurcate all death cases and to legislate a roster of "aggravating" and "mitigating" factors that could guide the discretion of their capital juries.[89]

A second wave of constitutional challenges to these new statutes was inevitable, and the battle was joined in cases from five states: Georgia, Florida, Texas, Louisiana, and North Carolina. While LDF's constitutional attacks came from several directions, its chief contentions reiterated its claim in *Furman* that capital punishment inevitably violated the Eighth Amendment. In the alternative, LDF argued that even if the evenhanded application of the penalty was theoretically possible, these new state procedures were not actually working to curb arbitrariness in practice;

Warren Court's expansion of other criminal procedural protections—protections that could be deployed to rectify individual instances of discrimination without the need to strike all death sentences. *Id.*

Indeed, while rejecting the petitioner's argument to invalidate all capital sentences under the Eighth Amendment, Powell's opinion ironically invoked the Wolfgang study to suggest a possible equal protection avenue, suggesting that "*Maxwell* does point the way to a means of raising the equal protection challenge that is more consonant with precedent and the Constitution's mandates than the several courses pursued by today's concurring opinions." *Furman*, 408 U.S. at 450 (Powell, J., dissenting). Time was to test, of course, whether Justice Powell, when faced with a far more thoroughgoing statistical showing of discrimination than Wolfgang's, would actually apply an Equal Protection Clause analysis to redress proven discrimination in capital sentencing.

[86] MANDERY, *supra* note 19, at 239–41 (recounting Amsterdam's immense personal sense of relief when learning that his many clients had been spared from death, and likewise, the LDF capital punishment staff's late-night celebration, elatedly chanting out, one by one, the names of their clients).

[87] LAZARUS, *supra* note 20, at 111.

[88] *Id.* at 114; *see* EPSTEIN & KOBYLKA, *supra* note 59, at 97–98; MANDERY, *supra* note 19, at 247–58.

[89] WILLIAM J. BOWERS, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864–1982, at 194–95 (1974); LAZARUS, *supra* note 20, at 111–12.

instead, they merely papered it over with high-sounding but ineffective procedures that still allowed unchecked discretion.[90]

The Supreme Court's eventual decisions in these five cases in 1976 represented a major defeat for LDF and its allies. The decisions indeed set the constitutional foundation for all capital sentencing litigation that has followed. In a set of three-Justice plurality opinions coauthored by Justices Stewart, Powell, and John Paul Stevens in *Gregg v. Georgia*,[91] *Proffitt v. Florida*,[92] and *Jurek v. Texas*,[93] and a second set authored by Justice White for himself, Chief Justice Burger, and Justice Rehnquist, the Court first decided that the Eighth Amendment did not forbid use of the death penalty under all circumstances.[94] It then carefully examined the specific procedures each state had put in place since 1973 and concluded that each appeared to satisfy the core constitutional concerns that had prompted the Court's decision in *Furman* four years earlier.[95]

In the years following its 1976 decisions, the Court decided, favorably to capital defendants, a number of additional cases that gradually circumscribed state sentencing authority along two dimensions. First, the Court repeatedly took steps to limit the kinds of crimes for which death could be imposed and the defendants who could be charged capitally.[96] Second, it refined and augmented the requisite procedural requirements necessary to assure "super due process" in capital sentencing.[97] Pertinent to

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[90] EPSTEIN & KOBYLKA, *supra* note 59, at 102–03; KIRCHMEIER, *supra* note 1, at 97. Amsterdam's "intense moral and emotional commitment" apparently did not play nearly so well during the 1976 oral arguments as they had in *Furman*. When the Court tested his argument by wondering whether the commandant at Buchenwald, or an airline terrorist, or the perpetrator of a hydrogen explosion in New York City might be executed, Amsterdam repeatedly replied in the negative. Several Justices found his inflexibility on this point "self-righteous." WOODWARD & ARMSTRONG, *supra* note 82, at 433–34. One Justice reportedly commented in exasperation, "Now I know what it's like to hear Jesus Christ." LAZARUS, *supra* note 20, at 114.

[91] 428 U.S. 153 (1976).

[92] 428 U.S. 242 (1976).

[93] 428 U.S. 262 (1976).

[94] *Gregg*, 428 U.S. at 176–87.

[95] *Id.* at 187–206; *Proffitt*, 428 U.S. at 247–60; *Jurek*, 428 U.S. at 268–77. The Court did decide, however, to strike the capital statutes of the states of North Carolina and Louisiana, which had proposed to eliminate arbitrariness by automatically imposing death sentences on all defendants convicted of any capital crime. *See* Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

[96] DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 270–71 (2010) (noting the Court's series of post-*Gregg* decisions that eventually forbade the death penalty for rapists, robbers, the insane, the mentally infirm, and juvenile offenders).

[97] *Id.* at 263–67 (noting that, in addition to narrowing the categories of defendants constitutionally eligible for death, the Court engaged in the "juridification" of certain additional capital sentencing procedures between 1976 and the mid-1980s, in such decisions as: *Gardner v. Florida*, 430 U.S. 349 (1977) (forbidding a Florida judge to impose a death sentence based on evidence contained in a pre-

our later consideration of *McCleskey*, one of the Court's first post-1976 decisions came in 1977 in *Coker v. Georgia*,[98] where the Court finally took up the issue of the death penalty as punishment for rape. Rape was, of course, the very crime, and death, the very punishment, that had originally impelled LDF's death penalty campaign. Yet strikingly, neither Justice White's opinion for four Justices, nor any of the concurring or dissenting opinions in *Coker*, ever mentioned race, the Wolfgang evidence, or the nation's broader history of discrimination in rape cases at all. Instead, White rested his decision upon the principle that death was constitutionally disproportionate under the Eighth Amendment for a crime that did not extinguish life.[99] Once again, the Court chose not to confront the systematic racial disparities, even in rape cases where wide and persistent racial disparities had long been the punishment's most distinguishing feature.

Amsterdam responded to the constitutional defeat in the 1976 cases with a self-enforced period of contemplation of the various decisions rendered by the Court. He returned to the fray within a few weeks, armed with a new packet of more than one-hundred legal-sized pages. Each page designated some possible claim he found lurking in the interstices of the Court's decisions in *Gregg*, *Proffitt*, *Jurek*, *Woodson*, and *Roberts.* For each possible new claim, Amsterdam recited constitutional authority, drawn from language in the 1976 cases or from earlier decisions of the Court that could fortify the argument, then assessed the strength of the claim, offered tactical considerations, and added a summary description of all evidence needed to substantiate the claim. Affectionately known by LDF staffers as "the ridiculous memo," this one-hundred-plus-page document guided much of LDF's capital work for the coming decade.[100] Prominent among the new claims remained LDF's lodestar: challenges to capital sentencing regimes for arbitrariness and racial discrimination in practice.

My own connections with LDF began in the summer of 1976, when I volunteered to work with a seasoned partner in my New York law firm to represent Jerry Jurek—Texas's "named defendant" in the 1976 case—as

sentencing report that the defendant had no state right to confront and rebut); *Green v. Georgia*, 442 U.S. 95 (1979) (insisting that a capital defendant must be allowed to proffer mitigating evidence in a capital sentencing proceeding, even if otherwise violative of a state hearsay rule); *Godfrey v. Georgia*, 446 U.S. 420 (1980) (striking a Georgia aggravating circumstance as too vague and amorphous); and *Ford v. Wainwright*, 477 U.S. 399 (1986) (faulting Florida's procedures for determining whether a condemned inmate was insane and, therefore, ineligible to be executed), before the Court began to turn away from these ameliorative procedural requirements in the following decade)).

[98] 433 U.S. 584 (1977).

[99] *Id.* at 597–600.

[100] MANDERY, *supra* note 19, at 426–27.

his case moved into state and federal post-conviction proceedings. Eighteen months later, in January of 1978, I joined LDF full time as its most junior capital punishment attorney, overseen by Jack Greenberg, three more senior LDF attorneys, and Anthony Amsterdam, who became a mentor for the subsequent twelve years.

LDF concentrated some of its energies in 1977 and 1978 on knitting together a revived national network of volunteer counsel for every death-sentenced inmate and litigating other post-*Gregg* issues. Yet the question whether capital statutes were discriminatory and arbitrary never left LDF's agenda. Various eminent social scientists had already begun analyzing homicide data from the FBI's Uniform Crime Reports files to see whether racial factors appeared to be playing an impermissible role in post-*Furman* capital sentencing.[101] And in 1979, David Baldus, a law professor at the University of Iowa and a coauthor of a highly respected text on the use of statistics in proving discrimination,[102] began a National Institute of Justice-funded, before-and-after study of 156 pre-*Furman* death cases and 594 post-*Furman* cases in Georgia, modeling two decision points: prosecutorial decisions on whether to move murder convictions to a sentencing phase, and jury decisions on whether to impose a life or a death sentence. This Procedural Reform Study, as Baldus named it, was by far the most ambitious post-*Furman* study to that point.[103]

Meanwhile, Jack Greenberg, LDF's Director/Counsel, had gone searching for a generous funder who might provide major support for a state-of-the-art empirical study of post-*Furman* capital sentencing. Once he obtained the then-huge $250,000 commitment from the Edna McConnell Clark Foundation, LDF turned to the selection of an appropriate expert.[104] I was only minimally involved in the decision to choose David Baldus, but I recall early meetings between Baldus, Greenberg, Amsterdam, and other

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[101] *See, e.g.*, SAMUEL R. GROSS & ROBERT MAURO, DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 35–105 (1989); William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post*-Furman *Capital Statutes*, 26 CRIME & DELINQ. 590–91 (1980); Gary Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783, 789 (1981); Michael L. Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918 (1981); Marc Riedel, *Discrimination in the Imposition of the Death Penalty: A Comparison of the Characteristics of Offenders Sentenced Pre*-Furman *and Post*-Furman, 49 TEMP. L. Q. 261, 282–85 (1976); Hans Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456, 458–59 (1981).

[102] DAVID C. BALDUS & JAMES W. L. COLE, STATISTICAL PROOF OF DISCRIMINATION (1980).

[103] *See* BALDUS ET AL., *supra* note 48, at 42–44 (1990).

[104] David Baldus et al., McCleskey v. Kemp *(1987): Denial, Avoidance, and the Legitimization of Racial Discrimination in the Administration of the Death Penalty*, *in* DEATH PENALTY STORIES 229, 246 (John H. Blume & Jordan M. Steiker eds., 2009); *see also* LAZARUS, *supra* note 20, at 167.

LDF staffers (for I had volunteered to serve as LDF's social science liaison—one of the best poorly-thought-out decisions I ever made) and I soon became immersed in the ongoing effort.

LDF's agreement with Baldus was simple and straightforward: he would conduct a major study of capital sentencing in some Southern state, using Clark Foundation funds to meet the expenses of the research. If Baldus found no discrimination, he would be free to publish his findings wherever he chose. If he did chance to find discrimination however, he would share his findings and agree to testify for LDF in some capital proceeding.[105] Baldus was honest and forthright from the outset: he candidly stated that he did not believe he would find substantial discrimination by race. He surmised that between the various criminal procedure reforms approved by the Supreme Court and the ongoing civil rights progress being made in the South, capital charging and sentencing decisions had probably become evenhanded. Lawyers at LDF were pleased with Baldus's initial stance; it seemed far wiser to solicit data and analysis from a conscientious social scientist initially skeptical of the racial hypothesis than to retain someone predisposed from the outset to credit it.

The design of the study was crucially important to all parties. LDF had long suspected that any continuing discrimination might well manifest itself not at the penalty phase, where Baldus's Procedural Reform Study had focused, but at earlier stages of capital prosecutions: a prosecutor's choice to charge a homicide as murder rather than some lesser offense; a prosecutor's refusal to accept a plea of guilty in exchange for a commitment not to press for a death sentence; or a jury's choice to convict for murder rather than for a lesser included offense. Baldus was quite willing to obtain evidence on decisions made at each of these stages.[106] He was also eager to expand his already large roster of variables to include every possible factor bearing on a prosecutorial or jury decision that could be suggested by any cooperative prosecutor, judge, or defense attorney, including variables designed to capture the "strength of the evidence" in each case.[107] Baldus and his colleagues ultimately designed a revised and much-expanded questionnaire for the study with over 400 variables.[108] They then drew a stratified sample of 1,066 cases from all 2,484 Georgia cases, within the 1973–1979 period, in which a defendant had been arrested,

[105] BALDUS ET AL., *supra* note 48, at 44, 310.

[106] *Id.* at 45.

[107] *Id.* at 45–46.

[108] *Id.* at 512–48 (setting forth the Charging and Sentencing Study questionnaire).

charged with homicide, and later convicted either of murder or of voluntary manslaughter.[109]

Georgia was chosen as the state for further inquiry for several principal reasons. By far the most important was the unique access Georgia afforded to necessary data. Unlike most other states, where collecting data required extended field trips to scores of county courthouses, Georgia had already done most of the collection work itself, for Georgia operated a system under which its Board of Pardons and Paroles already gathered the criminal files on every prisoner incarcerated anywhere within the system. The board's offices in Atlanta therefore contained a treasure trove of data, including actual police reports, witness statements taken by police or prosecutors, and prosecutors' notes, in addition to formal documents such as indictments, judgments, and the like.[110] A trained group of law students, overseen by an experienced graduate data collector, gathered the data for Baldus in the summer of 1981, working principally from Pardon & Parole Board files.[111]

Beyond his rich intellectual gifts, four interrelated characteristics shaped David Baldus's work: scrupulous honesty; a deep knowledge of statistical and methodological alternatives; a readiness to test, reexamine, and vary all of his methods and assumptions; and an indefatigable commitment to take every step necessary to assure the integrity of his own work. Throughout the litigation, Baldus repeatedly showed himself willing to question his overall design, accept any reasonable coding or modeling suggestions, and retest all alternative hypotheses that might explain his tentative conclusions.[112]

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[109] *Id.* at 45, 67 n.10 (describing the sampling methods and choices).

[110] *Id.* at 310.

[111] *Id.* at 46. During the oral argument before the Supreme Court, Justice White attempted to make an issue of qualifications of the data gatherers, noting they were merely "law students, as opposed to law graduates." LAZARUS, *supra* note 20, at 202–03. In fact, the data project overseer, Edward Gates, was a law graduate and experienced empiricist who had earlier collected data for Baldus's Procedural Reform Study and still earlier, for cancer research at Yale. He and Professor Baldus had personally selected the law student coders through a competitive process and then trained them on scene at the Georgia Board of Pardons and Paroles. Gates remained throughout the summer, offering both personal oversight and a written protocol designed to instruct the coders on any matters of ambiguity. Gates regularly double-checked their work by instructing the coders who had completed a file to switch files randomly with another coder, to recode, and then compare the coding of each coder so as to assure uniformity. *See* BALDUS ET AL., *supra* note 48, at 452.

[112] *See* Samuel R. Gross, *David Baldus and the Legacy of* McCleskey v. Kemp, 97 IOWA L. REV. 1905, 1924 (2012) (noting that "Baldus's achievement in *McCleskey* is as much as anything a testament to his character—that of a tireless, selfless, passionate, inquisitive scientist"); *id.* at 1911 (contrasting Baldus's exemplary research approach—"Why not find out everything about every case?"—with that of other fine researchers); *see also* BALDUS ET AL., *supra* note 48, at 323 (describing Baldus's willingness, during the federal hearing, to accept a predictive, death-sentencing model proposed by the federal judge

The Georgia coding went forward in Atlanta during the summer of 1981; Baldus and Woodward carried out their data entry, cleaning, and initial analysis over the winter and spring of 1982.[113] In the meantime, LDF was advising lawyers throughout the State of Georgia to be sure to plead Eighth and Fourteenth Amendment discrimination and arbitrariness claims in all of their capital cases and to request evidentiary hearings to demonstrate these disparities.[114]

Late in May of 1982, Professor Baldus telephoned me to share big news: his still-preliminary first data analyses revealed, to his surprise, that racial factors were indeed still playing an important role in Georgia's capital sentencing system. Most salient were the race-of-victim disparities he found. While African-American defendants had received death sentences in 22% of cases in which their murder victims had been white, only 8% of white defendant/white victim cases led to death sentences, and only 1% of black defendant/black victim cases. Multiple regression analyses performed using different combinations of possibly relevant alternative factors and varied statistical techniques failed to shake these racially disparate outcomes.[115]

At that time, I was serving as LDF's liaison to Georgia's capital defense attorneys, working directly with the state's active ACLU branch and other Georgia nonprofit legal organizations.[116] Following LDF's long-standing policies, I let each of them know about Baldus's research results. One Atlanta attorney, Robert Stroup, called to say that he was then representing an inmate whose federal habeas petition had just been denied by a federal district judge. Without hesitation, we prepared a motion to reopen the case under Federal Rule 60(b)(2), alleging that Baldus's recent findings constituted "newly available evidence." The federal district judge, J. Owen Forrester agreed to grant our motion and direct a hearing. The inmate's name was Warren McCleskey.[117]

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and then reanalyze his Georgia data employing the judge's model—an experiment that yielded racial disparities in Georgia cases equal to, and even somewhat greater than, those reported using Baldus's own models).

[113] BALDUS ET AL., *supra* note 48, at 310.

[114] Baldus et al., *supra* note 104, at 247.

[115] BALDUS ET AL., *supra* note 48, at 310.

[116] In addition to an active state ACLU branch, led by attorney George Kendall and death penalty coordinator, Patsy Morris, who charted the progress of every capital case, Georgia was blessed with the presence of the Southern Prisoners' Defense Committee (later renamed the Southern Center for Human Rights), led by Steve Bright, the Team Defense Project, led by Millard Farmer, the Southern Regional Office of the ACLU, and a network of fine and dedicated public defenders and private volunteer counsel.

[117] LAZARUS, *supra* note 20, at 184–85; Baldus et al., *supra* note 104, at 247–48.

The Court allowed just over a year for the parties to exchange documents and carry out depositions of Baldus and the State's expert witnesses. In August of 1983, Judge Forrester heard the matter over a period of eight days. Our challenge was how best to present Professor Baldus's sophisticated study, which by then had been expanded to include dozens of overlapping analyses (cross-tabulations, ordinary least squares regressions, logistical regressions, stepwise regressions, and qualitative comparisons using vignettes) carried out in a huge variety of ways (from parsimonious eight- or nine-factor models to a 230-variable model, with dozens of alternatives in between). The choice was not among which models to employ and defend, since virtually all models, even the huge 230-variable model, showed race-of-victim effects that achieved statistical significance at a .01 level or greater.[118] The challenge was to emphasize why this uniformity of racial findings across all of Baldus's multiplicity of alternative analyses was such a great strength of his study, without somehow allowing our description of the various technical alternatives to create overload or confusion.[119]

At the hearing, once I had presented Professors Baldus and George Woodworth, my co-counsel Timothy Ford, an Amsterdam protégé and longtime LDF cooperating attorney, presented Professor Richard Berk of the University of California at Santa Barbara, who had previously conducted a review of modern criminal sentencing research for the National Academy of Sciences, to assess Baldus's work. Berk testified to the outstanding quality and reliability of the Baldus studies and rendered an unqualifiedly positive assessment: "[T]his is far and away the most complete and thorough analysis of sentencing that's been done. I mean there's nothing even close."[120]

The State took an extremely defensive posture throughout the hearing. It offered no alternative data analysis at all. Instead, it made three basic

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[118] BALDUS ET AL., *supra* note 48, at 317–18 tbl.51.

[119] Baldus thoroughly described this statistical presentation in his subsequent book. *Id.* at 311–39.

[120] *See* McCleskey v. Kemp, 753 F.2d 877, 907 (11th Cir. 1985) (en banc) (Johnson, J., concurring in part and dissenting in part) (quoting Richard Berk's assessment). Professor Welsh White likewise described the Baldus study as "the most exhaustive study of racial discrimination in capital sentencing that has ever been conducted." WELSH S. WHITE, THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT 128 (1987). In 1990, the United States General Accounting Office published an analysis of twenty-eight studies and acknowledged a pattern of racial disparities in capital charging and sentencing by race. U.S. GEN. ACCOUNTING OFFICE, GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5–6 (1990) ("To summarize, the synthesis supports a strong race of victim influence. The race of offender influence is not as clear cut and varies across a number of dimensions. Although there are limitations to the studies' methodologies, they are of sufficient quality to support the synthesis findings.").

arguments in avoidance: first, that Baldus's data was so dirty and unreliable that no results could be relied on; second, that black-victim cases as a whole were different, and usually less aggravated, than white-victim cases; and third, that, in any event, every capital case was so unique, and the relevant considerations so vast in number, that no meaningful comparisons were possible. LDF's response to the first objection noted that Baldus had drawn his data directly from Georgia police and prosecutors' working files. These Georgia officials had plainly considered their own files sufficiently reliable to use them as a basis for making their life or death charging and sentencing decisions. Addressing the State's hypothesis that Georgia's black-victim homicides were, on the whole, less aggravated than white-victim cases, Baldus responded that the State's observation missed the point. The key question was whether black-victim cases and white-victim cases *at similar levels of aggravation* were being treated similarly. The data showed they were not.[121]

Finally, the State's assertion that each capital case was unique and incomparable could not begin to account for Baldus's finding that the overall pattern of charging and sentencing in Georgia otherwise conformed to the statute's intended design: leaving race aside, prosecutors and juries regularly imposed death as punishment in more aggravated cases and life in less aggravated cases. Moreover, the State could point to no specific factors, which, if added to the mix, would work to explain, extinguish, or even significantly diminish the clear racial disparities that marked the system's performance.[122]

Judge Forrester had been appointed to the federal bench by President Ronald Reagan after a professional career as strike force prosecutor for the U.S. Drug Enforcement Agency. He proved throughout the hearing to be an honest, decent, and conscientious judge. Yet the power of Baldus's complex statistical case appeared to elude him. Though this Georgia Tech graduate possessed an intuitive understanding of people and human nature, he seemed lost once Baldus's testimony moved beyond cross-tabular results—where every tested factor is visible and every case is included in some cell—to the more rarified mathematical world of regression analysis.[123]

Six months after the hearing, Judge Forrester entered an order denying relief to Warren McCleskey on his Eighth and Fourteenth Amendment

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[121] BALDUS ET AL., *supra* note 48, at 463–64.

[122] Baldus et al., *supra* note 104, at 254 n.64.

[123] *See* GROSS & MAURO, *supra* note 101, at 136–38, 153 n.21 (critiquing the district court's opinion and examining some of its methodological misunderstandings).

racial discrimination claims.[124] Forrester's opinion faulted nearly every aspect of Baldus's study: the data sources on which Baldus had relied; his data collection and cleaning methods; some apparent inconsistences between the earlier Procedural Reform Study and the Charging and Sentencing Study; his treatment of variables coded as "unknown" in cases where no definitive clarity about their presence appeared in the record; the absence of data on factors in some of the cases; his use of a thirty-nine-variable model; his ostensibly low R-squared statistics; and the multicollinearity of some of his larger models.[125] The Court nonetheless granted Warren McCleskey a new trial because of a misrepresentation by a key witness against McCleskey, which, Judge Forrester found, may well have affected the jury's judgment on the witness's credibility, and thus, of McCleskey's guilt.[126]

We appealed the decision, expecting to present argument to a three-judge panel of the Eleventh Circuit after briefs had been filed. Yet the Eleventh Circuit decided to forgo customary three-judge consideration and proceed directly to en banc review by all twelve of the Circuit's judges.[127] The oral argument on June 12, 1984 veered between questions about the statistical evidence and issues of constitutional theory. At one point, however, Judge Robert Vance of Alabama made an observation about the potential reach of any ruling for McCleskey: "You say there is racial discrimination in capital sentencing. Candidly, I think there's likely to be discrimination in *every* kind of criminal case. Just what are we supposed to do?" I responded that the Supreme Court had held that "death is different,"

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[124] McCleskey v. Zant, 580 F. Supp. 338, 345 (N.D. Ga. 1984).

[125] *Id.* at 354–64; *see* BALDUS ET AL., *supra* note 48, at 340–41, 366 n.84. Baldus later provided an extensive, methodological critique of the district court's conclusions. *See id.* at 450–78. Professor Gross notes with irony that Judge Forrester (1) first demanded that McCleskey's analysis must take into account all relevant factors, (2) then observed that only the method of multiple regression analysis was capable of doing so, and yet, (3) held that since multivariate analysis does not, by definition, offer proof of an individual state actor's state of mind on the issue of intent to discriminate *in a particular case*, statistical analysis provided no evidence of value to McCleskey's claims of discriminatory treatment. GROSS & MAURO, *supra* note 101, at 137.

[126] *McCleskey*, 580 F. Supp. at 380–84. McCleskey was able to establish at his federal hearing that the State had failed fully to disclose to McCleskey's jury during trial an offer of assistance with pending federal charges made by the chief police investigator to a key witness against McCleskey. That nondisclosure violated the well-known *Giglio* rule, requiring disclosure of any incentive the state has offered a witness in custody—such as release from custody or a plea reduced charges—in exchange for trial testimony against a defendant. Giglio v. United States, 405 U.S. 150 (1972). *See generally* BALDUS ET AL., *supra* note 48, at 342, 367 n.86.

[127] McCleskey v. Kemp, 753 F.2d 877, 881 (11th Cir. 1985) (en banc) (noting that "[t]his case was taken *en banc* principally to consider the argument arising in numerous capital cases that statistical proof shows the Georgia capital sentencing law is being administered in an unconstitutionally discriminatory and arbitrary and capricious matter").

requiring greater assurance in capital cases against discrimination or arbitrariness than in other criminal cases. Judge Vance pressed the point: "What if the racial disparities in armed robbery cases, for example, prove to be very high?" Former divinity student that I was, I responded that the court should "gird up its loins" and enter an order banning such discriminatory sentencing. Judge Vance did not seem satisfied.

Yet the Eleventh Circuit never had to wrestle with the scope of a favorable decision, for it decided instead to deny all relief to McCleskey on a nine-to-three vote.[128] The majority opinion took an unusual course. While Rule 52 of the Federal Rules of Civil Procedure normally provides that the factual findings of a district court are to be assumed correct on appeal unless "clearly erroneous,"[129] the Circuit chose, without substantial comment, to discount Judge Forrester's extensive findings about the infirmities of the Baldus study, and instead, "review this finding of fact by assuming the validity of the study," and "rest [its] holding on the decision that the study, even if valid, not only supports the district judge's decision . . . but compels it."[130]

Judge Paul Roney's opinion then clarified just why the court thought the Baldus study "compelled" a rejection of McCleskey's Eighth and Fourteenth Amendment claims. In the Eleventh Circuit's view, when racial discrimination was alleged in a capital sentencing system, both the Cruel and Unusual Punishment Clause and the Equal Protection Clause demanded much more than mere proof of a disparate racial impact:

> We . . . hold that proof of a disparate impact alone is insufficient to invalidate a capital sentencing system, unless that disparate impact is so great that it compels a conclusion that the system is unprincipled, irrational, arbitrary and capricious such that purposeful discrimination—*i.e.*, race is intentionally being used as a factor in sentencing—can be presumed to permeate the system.[131]

The Court added that statistical evidence has, at best, a marginal role in demonstrating intent or purpose under such a standard. Even if, as Baldus's evidence showed, the influence of race was "more likely than not," in a range of cases such as McCleskey's—and Baldus had shown that it was likely that only twenty of every thirty-four Georgia defendants sentenced to death for the murder of a white victim would have received

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[128] Six judges joined Judge Roney's opinion for seven members of the court. Judges Gerald Tjoflat and Vance each concurred separately. *Id.* at 878.

[129] FED. R. CIV. P. 52.

[130] *McCleskey*, 753 F.2d at 895.

[131] *Id.* at 892.

their capital sentence had their victim been black—this more-likely-than-not evidence would still not suffice to make out an Eighth Amendment violation.[132] Moving past this virtually insurmountable Eighth Amendment standard of proof, the Court declared that neither McCleskey nor any future defendant could overturn his death sentence on equal protection grounds without proof of racial animus by a specific actor in his own case, or a statistical showing of impact "so strong that the only permissible inference is one of intentional discrimination."[133] In effect, the court of appeals told McCleskey, Baldus, and LDF: "Go away. Not only is relief denied; this Court will never seriously entertain another statistical case challenging the racial justice of our capital sentencing system." Adding injury to the insult, the court of appeals also reversed Judge Forrester's *Giglio* findings, concluding that the State's failure to disclose a detective's promise to "speak a word" to federal authorities about pending charges against the State's key witness, in exchange for his testimony against McCleskey, did not amount to a sufficient enough promise to justify a new trial.[134]

Our petition to the Supreme Court was served on May 28, 1985.[135] The Court chose to hold it for over a year, without decision, pending the outcome of another LDF capital case being considered by the Court.[136] When that case was announced on May 5, 1986, the Court automatically lifted the "hold" on *McCleskey*, and we knew a decision on *McCleskey*'s petition would be announced shortly thereafter. It came on a sunny summer morning in July—a short order granting review.[137]

Candidly, I was surprised when the Court agreed to hear the case. Let me share the full extent of my naiveté. The Court carefully guards its overall docket. It declines to hear most petitions filed seeking review, no matter how strong the claims. These denials leave the lower court decisions in place, but they do not commit the Court one way or the other on the merits. Yet once review is granted, the Court must normally address and

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[132] *Id.* at 897–98.

[133] *Id.* at 893 (quoting Adams v. Wainwright, 709 F.2d 1443, 1449 (11th Cir. 1983) and citing Smith v. Balkcom, 671 F.2d 858, 859 (5th Cir. 1982)).

[134] Judge Roney reasoned that the State's representations to the jailhouse witness who testified against McCleskey fell short of a full promise of release from custody, and therefore "offered such a marginal benefit . . . that it is doubtful it would motivate a reluctant witness, or that disclosure of the statement [to the jury] would have had any effect on his credibility." *Id.* at 884. Alternatively, completely dismissing the findings of Judge Forrester, he concluded that any *Giglio* violation was a harmless error. *Id.* at 884–85.

[135] GROSS & MAURO, *supra* note 101, at 159.

[136] LAZARUS, *supra* note 20, at 187–88 ("[T]he Justices had held *McCleskey* for another of the LDF's death penalty challenges, *Lockhardt* [sic] *v. McCree*, a variation on the Court's 1968 ruling in *Witherspoon v. Illinois*."); *see also* GROSS & MAURO, *supra* note 101, at 159.

[137] McCleskey v. Kemp, 478 U.S. 1019 (1986).

resolve those merits. And to do so in *McCleskey*'s case, in my view, put the Court in a difficult spot.

First, I had become thoroughly convinced of the facts: the Baldus study seemed extraordinarily robust and sound, not simply because of Baldus's expertise, his careful research design, and his evident care, but because he had so transparently and thoroughly tested his methods and his findings against every proposed alternative analysis and counterhypothesis, and because none of those tests had reduced the impact or significance of the racial disparities he found. The outcomes in all of his alternative quantitative and qualitative analyses triangulated consistently.

Moreover, after two full years in which to consult with experts of every stripe, the State of Georgia's principal response had remained little more than a "rope-a-dope" defense; Georgia could point to no omitted variable that would reduce the impact of race, no alternative model, however far-fetched, that might justify Georgia's racially skewed sentencing patterns. Instead, all Georgia could do was recite its know-nothing mantra: "Analysis of any capital sentencing patterns is impossible."[138]

Turning from facts to law, it seemed that in dismissing Baldus's findings, the Eleventh Circuit majority had grossly distorted both the Supreme Court's prior Eighth Amendment and Equal Protection Clause jurisprudence. The Court in 1972 in *Furman* had struck all the nation's capital statutes because of apparent patterns of arbitrariness and capriciousness. Thereafter, in 1976 and often since, the Court had reaffirmed that, constitutionally, "death was different."[139] Even though the Court chose in *Gregg* to presume that Georgia's new statutes would work to cure the ills of *Furman*, it promised exceptionally close scrutiny of future capital decisions under the new and higher Eighth Amendment standards in order to guard against any further risk of arbitrariness—a higher scrutiny, when death was the penalty imposed, than in any other criminal justice setting.[140]

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[138] *See* Petitioner's Reply Brief at 1, *McCleskey*, 481 U.S. 279 (No. 84-6811), 1986 WL 727363, at *1–2 ("The State of Georgia stakes its case largely on two propositions: first that capital cases are so unique that any statistical analysis of capital sentencing patterns is impossible as a matter of law . . . .").

[139] *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 188 (1976) ("While *Furman* did not hold that the infliction of the death penalty *per se* violates the Constitution's ban on cruel and unusual punishments, it did recognize that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice.").

[140] *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion of Stewart, Powell, & Stevens, JJ.) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."); *see also* Gardner v. Florida, 430 U.S. 349, 357–58 (1977) (noting that

Moreover, the Court based its key assumption in *Gregg*—that Georgia's new procedures would suffice to cure the deficiencies condemned in *Furman*—solely on the absence of any "facts to the contrary."[141] Yet the Baldus study, in *McCleskey v. Kemp*, *was* evidence to the contrary. How could the High Court, I asked myself, square its own Eighth Amendment jurisprudence with Baldus's damning new study?

Moreover, while the Court's Equal Protection Clause jurisprudence had, since *Washington v. Davis*[142] in 1976, demanded proof of intent to discriminate, Justice Powell, writing for the Court a year later in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[143] had clearly acknowledged that the invidious intent of a public body was often difficult to show directly. Consequently, Powell clarified, judges should undertake "a sensitive inquiry into such circumstantial and direct evidence . . . as may be available."[144] Justice Stevens had earlier made just

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"five Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in the country. . . . It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion"); Lockett v. Ohio, 438 U.S. 586, 605 (1978) (declaring that "[w]hen the choice is between life and death," state exclusion of potentially mitigating evidence is a "risk [that] is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments").

[141] *Gregg*, 428 U.S. at 225. Justice White's opinion for himself, Chief Justice Burger, and Justice Rehnquist in *Gregg*, concurring in the judgment, expressly founded their approval of Georgia's post-*Furman* system upon a series of factual assumptions about the system's likely operation in practice. Looking first at Georgia's new roster of statutory aggravating and mitigating factors, Justice White wrote:

> The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on the basis of factors too intangible to write into a statute, *and I cannot accept the naked assertion that the effort is bound to fail*.

Id. at 222 (emphasis added).

Turning to the newly designated role of the Georgia judicial branch, which was charged to oversee sentences and "decid[e] whether *in fact* the death penalty was being administered for any given class of crime in a discriminatory, standardless, or rare fashion," he observed:

> *[I]f the Georgia Supreme Court properly performs the task assigned to it* under the Georgia statutes, death sentences imposed for discriminatory reasons or wantonly or freakishly for any given category of crime will be set aside. *Petitioner has wholly failed to establish, and has not even attempted to establish*, that the Georgia Supreme Court has failed properly to perform its task . . . .

Id. at 223–24 (emphasis added).

Looking finally at the role of Georgia prosecutors, Justice White observed:

> Petitioner's argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies is *unsupported by any fa*cts. . . . This is untenable. *Absent facts to the contrary, it cannot be assumed* that prosecutors will be motivated in their charging decisions by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts.

Id. at 225 (emphasis added).

[142] 426 U.S. 229 (1976).

[143] 429 U.S. 252 (1977).

[144] *Id.* at 266.

this point in his concurring opinion in *Washington v. Davis*: "[G]overnmental action . . . is frequently the product of compromise, of collective decisionmaking, and of mixed motivation. . . . It [would be] unrealistic . . . to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker."[145]

David Baldus' evidence, it seemed to me, clearly met *Arlington Heights*'s standards: it offered just such a "clear pattern" of collective governmental decisionmaking in Georgia, and his relentless multivariate analysis was designed carefully to investigate all possible "grounds other than race," that would have explained the racial disparities, all in a criminal justice system that was, as Justice Stevens aptly put it, "the product of compromise, of collective decisionmaking, and of mixed motivation."[146] In Baldus's data, race never disappeared; no other explanations were ever found.

While the Supreme Court had tinkered with its equal protection standards in the decade since *Washington v. Davis* and *Arlington Heights*, the Court had recently shown practical flexibility in specifying what proof would be required to show discrimination. Only months before certiorari was granted in *McCleskey*, Justice Powell, in *Batson v. Kentucky*,[147] had expressly reframed the proof necessary to challenge a prosecutor who was alleged to be exercising peremptory jury challenges to remove jurors on a racial basis. Writing for seven members of the Court, Justice Powell drew from Title VII cases a method that (1) required a defendant first to present prima facie evidence of discrimination—often nothing more than the prosecutor's unexplained exclusion of a number of prospective black jurors—before (2) shifting the burden to the prosecutor to explain, on nonracial grounds, her choices. If the prosecutor could do so, the final burden would then (3) shift back to the challenging defendant to show, if possible, that any ostensible explanation by the prosecutor was pretextual.[148]

Such a paradigm seemed remarkably pertinent to the capital sentencing context, except that Baldus's evidence had examined, not a handful of decisions by a single prosecutor, but rather thousands of decisions, looking at hundreds of factors in each decision over a seven-year period, a much more powerful prima facie showing than could ever emerge

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[145] *Davis*, 426 U.S. at 253 (Stevens, J., concurring). Justice Stevens added that it would likewise be unrealistic "to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process." *Id.*

[146] *Id.*

[147] 476 U.S. 79 (1986).

[148] *Id.* at 93–98.

in a jury selection context, where there were often no more than a few state decisions to examine. Moreover, nothing seemed a clearer failure of the *Batson* paradigm than the State of Georgia's failure in McCleskey's case to offer any plausible explanation for the prima facie racial disparities that Baldus had demonstrated.

Finally, I reasoned that the Court would surely not falter merely because of McCleskey's statistics-heavy factual case. The Court had regularly entertained and relied upon statistical proof of discrimination in other circumstances, such as the exclusion of nonwhite citizens from criminal grand or petit jury pools.[149] Both in the Title VII employment area[150] and the Title VIII housing area,[151] moreover, statistical proof of disparate impact had been deemed sufficient to make out a violation. Indeed, in another case decided in the very spring of *McCleskey*'s grant of certiorari, *Bazemore v. Friday*,[152] the Court had relied almost exclusively on a multivariate regression analysis in condemning a $395 average racial disparity between the pay of similarly qualified white and black North Carolina Agricultural Extension Agents.[153] Those salary decisions had been made, in part, by some 100 different local governmental boards, acting across each of North Carolina's 100 counties over a period of years.[154] How like prosecutorial or jury decisions, I thought: multiple decisionmakers, each with a changing membership, acting across scores of counties to make a series of decisions, over time, with racially disparate outcomes.

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[149] *See, e.g.*, Castaneda v. Partida, 430 U.S. 482, 495–96 (1977) ("The disparity proved by the 1970 census statistics showed that the population of the county was 79.1% Mexican-American, but that, over an 11-year period, only 39% of the persons summoned for grand jury service were Mexican-American. . . . The mathematical disparities that have been accepted by this Court as adequate for a prima facie case have all been within the range presented here."); Turner v. Fouche, 396 U.S. 346, 359 (1970) (using statistical analysis to compare the percentage of black jurors in relation to the overall population); Whitus v. Georgia, 385 U.S. 545, 552 (1967) (accepting statistical disparity between the percentage of black individuals on the grand jury and petit jury venires as proof of purposeful discrimination).

[150] *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 430–32 (1971) (using census data to compare the education levels of white and black employees in determining whether a company's policy of requiring a high school diploma had racial purpose or invidious intent).

[151] *See, e.g.*, Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977) (affirming that discrimination in housing can be established by statistical evidence of discriminatory effect); United States v. City of Black Jack, Mo., 508 F.2d 1179, 1184–85 (8th Cir. 1974) (examining whether a housing complex designed to meet the needs of families earning between $5,000 and $10,000 per year was discriminatory by comparing the relative percentages of the black and white populations earning that amount). The Supreme Court has recently reaffirmed that proof of disparate impact can suffice to establish a violation of Title VIII of the Fair Housing Act. Tex. Dept. of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015).

[152] 478 U.S. 385 (1986) (per curiam).

[153] *Id.* at 399 (Brennan, J., joined by all other members of the Court, concurring in part).

[154] *Id.* at 389–90.

To be sure, *Bazemore* had been a Title VII employment discrimination case decided per curiam, yet it was not the difference between the statutory and constitutional standards of proof that seemed most pertinent to me, but the Court's confidence in the capacity of the statistical methods to uncover racial discrimination.[155] Moreover, $395 pay differentials, while indefensible, paled in comparison, I thought, to differences between life imprisonment and death in an electric chair.

In sum, as I weighed the options, the Court's decision to deny certiorari in *McCleskey* would let the Court "duck" and leave the core issues unresolved at the highest level.

A grant of review, on the other hand, would leave the Court with few options but to confront Baldus's powerful evidence and, I reasoned, to uphold McCleskey's claim. This confession of folly did not extend to my LDF colleagues, nor to Tony Amsterdam, nor to Julius Chambers, who in 1984 had replaced Jack Greenberg as LDF's Director/Counsel. It revealed instead my personal habit of untethered hope, which sustained me through twelve years of full-time capital practice.

What *didn't* I know or fully appreciate, on the morning of July 7th, with certiorari finally granted in *McCleskey v. Kemp*? Looking backwards—with the benefit of what we learned during the subsequent litigation and from the thoughtful scholarship that has followed—I see that I did not fully appreciate at least seven factors, seven sources of fierce judicial headwinds that would assault our constitutional vessel.

(1) First, I had sensed, but did not fully understand, just how nettled the Court had become with LDF's relentless constitutional attacks, and to some extent, with the whole style and content of Amsterdam's campaign. The Court in 1972 had implicitly accepted LDF's contention in *Furman*

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[155] As Justice Brennan noted for the Court:

> The Court of Appeals erred in stating that petitioner's regression analyses were "unacceptable as evidence of discrimination," because they did not include "all measurable variables thought to have an effect on salary level." The court's view of the evidentiary value of the regression analyses was plainly incorrect. While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors "must be considered unacceptable as evidence of discrimination." Normally, failure to include variables will affect the analysis' probativeness, not its admissibility.
>
> Importantly, it is clear that a regression analysis that includes less than "all measurable variables" may serve to prove a plaintiff's case. A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence. Whether, in fact, such a regression analysis does carry the plaintiffs' ultimate burden will depend in a given case on the factual context of each case in light of all the evidence presented by both the plaintiff and the defendant. However, as long as the court may fairly conclude, in light of all the evidence, that it is more likely than not that impermissible discrimination exists, the plaintiff is entitled to prevail.

Id. at 400–01 (citations omitted).

that the American death penalty was on its deathbed, shriveling away, its continued use "cruel" and "unusual" because of its capricious infrequency. Yet after the Court struck down all capital statutes, thirty-five new state statutes soon sprang up in their wake, proof positive that LDF had either overstated its case or underestimated the opposition, but, in either event, had disappointed a Court which had expected an end to the penalty.[156]

Moreover, although most of the post-*Furman* statutes paid implicit tribute to LDF's due process critiques by adopting the remedies it had advocated throughout the 1960s—new bifurcated guilt and penalty trials, new statutory guidance for sentencing juries on how to weigh aggravating and mitigating factors, and new limitations on those eligible for death—still, this medicine once taken, LDF would not relent. Back it came to the Court in the mid-1970s, insisting the very remedies for which it had pled so earnestly in principle throughout the 1960s were actually insufficient in practice to avoid future arbitrariness and discrimination.

The Court's 1976 decisions had strongly rebuffed LDF's second wave of attacks, declaring, after close examination, that the sentencing regimes crafted by Georgia, Florida, and Texas were conceived in good faith, were likely to succeed in practice in avoiding system-wide arbitrariness and discrimination, and thus were constitutional.

Then, back came LDF in *McCleske*y, in this third wave, now informing the Justices that all their presumptions in *Gregg* had been unfounded, their handiwork infirm: in sum, that they had collectively failed capital punishment's biggest constitutional test. Some Justices, at least, testy at such allegations, had grown weary with the endless rounds of censure and fault-finding.[157]

(2) I also did not fully realize how profoundly unhappy the Court had become with what it viewed as an onslaught of empirical evidence and statistical proof in capital cases. Just the Term before, in another LDF-backed case before the Court, *Lockhart v. McCree*,[158] the Court had reversed an en banc victory for death-sentenced inmates rendered by a five-to-four majority of the United States Court of Appeals for the Eighth Circuit.[159] The defendants in *Lockhart* had amassed a host of well-designed

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[156] Woodward and Armstrong reported Justice Stewart's reaction: "When the states began passing new death penalty laws right after the 1972 *Furman* decision, Stewart realized that he had miscalculated. 'Professor [Anthony] Amsterdam promised us that if we decided his way this would be the last death case,' Stewart told his clerks after *Furman*." WOODWARD & ARMSTRONG, *supra* note 82, at 432–33.

[157] *See, e.g.*, LAZARUS, *supra* note 20, at 189, 197.

[158] 476 U.S. 162 (1986).

[159] Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985) (en banc).

and convergent studies to demonstrate that the exclusion of jurors opposed to the death penalty at the *guilt* phase of a capital trial biased the guilt–innocence deliberations in the State's favor.[160] The studies and the experts who testified about them during a weeklong hearing had persuaded a sophisticated and exacting federal trial judge, and later, the Eighth Circuit, sitting en banc, that the bias was real.[161]

When the case arrived at the Supreme Court, however, Chief Justice Burger reportedly declared during the Court's weekly conference: "Think of the consequences," adding that he, for one, was "not going to be 'bossed around' by social scientists."[162] Justice Blackmun added that the whole claim was "typical Tony Amsterdam."[163] Justice Rehnquist eventually wrote for six Justices, expressing barely concealed contempt for the evidence.[164] He worked his way through each scientific study, finding flaws everywhere, then turned on a dime and—in a move to be later imitated by Justice Powell in *McCleskey*—declared that the Court would

> assume for purposes of this opinion that the studies are both methodologically valid and adequate to establish that "death qualification" in fact produces juries somewhat more "conviction-prone" than "non-death-qualified" juries. We hold, nonetheless, that the Constitution does not prohibit the States from "death qualifying" juries in capital cases.[165]

In effect, Justice Rehnquist held that even if (or more precisely, even though) the empirical evidence showed that the State was systematically

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[160] *Id.* at 232–35.

[161] Chief Judge Donald Lay's opinion for the Eighth Circuit majority concluded:

> In upholding the district court's finding based upon the evidentiary record we must note: (1) the record here is exhaustive; it is difficult to perceive how any petitioner could make a record and an objection to death-qualified juries, as constituting an improper jury for the determination of guilt-innocence, more complete than that presented here; and (2) there are no studies which contradict the studies submitted; in other words, all of the documented studies support the district court's findings.

Id. at 238.

[162] LAZARUS, *supra* note 20, at 189.

[163] *Id.*

[164] Lockhart v. McCree 476 U.S. 162 (1986).

[165] *Id.* at 173. Legal counsel for the American Psychological Association, which filed an amicus curiae brief in *Lockhart* supporting the findings and conclusions of the lower federal courts, later observed with dismay

> Courts will cite psychological research when they believe it will enhance the elegance of their opinions but data are readily discarded when more traditional and legally acceptable bases for decision making are available. . . . [I]t is now clear that even the most unassailable and methodologically perfect evidence would not have convinced the majority.

Donald N. Bersoff, *Social Science Data and the Supreme Court:* Lockhart *as a Case in Point*, 42 AM. PSYCHOLOGIST 52, 57 (1987); *see also* ROSEMARY J. ERICKSON & RITA J. SIMON, THE USE OF SOCIAL SCIENCE DATA IN SUPREME COURT DECISIONS 17–18 (1998) (noting a fierce critique of *Lockhart* by Professor J. Alexander Tanford).

biasing capital juries in the State's favor in the determination of guilt or innocence, the bias did not violate the Sixth Amendment and would be tolerated. So much for empirical evidence and precise evenhandedness in capital cases.

(3) A third adverse factor that had clearly gained force throughout the Burger Court years was federalism, the growing disinclination to second-guess the capital/criminal justice choices of state legislatures and courts.[166] Federalism and respect for state legislative choices were, of course, integral to the design of the American constitutional system, and it had taken nearly ninety years after the adoption of the Fourteenth Amendment for the Supreme Court to begin to apply, with some rigor, its own notion of minimum Due Process Clause standards in state criminal cases. Yet the Warren Court's "criminal justice revolution"[167] had prompted a strong countermotion. The Nixon, Ford, and Reagan Administrations, and the Burger and Rehnquist Courts whose composition they shaped, set out strongly to restore earlier Supreme Court deference to state criminal policies. By 1986, a majority of the Justices were determined not to go further, and indeed, were troubled that they had gone far too far already.[168]

(4) The Court had also begun to reach the limits of its patience with the federal writ of habeas corpus, the principal procedure employed by capital defendants to assert new federal constitutional principles in attacking their convictions and death sentences. Prior to the mid-1960s, federal and state habeas corpus filings were relatively infrequent.[169] Once a trial and direct appeal to the state's highest court had been completed, most capital inmates' legal recourse ceased for lack of assigned counsel and lack of perceived residual claims. In the early 1960s, however, the Warren Court had opened the federal courts to a much wider variety of challenges

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[166] See WOODWARD & ARMSTRONG, *supra* note 82, at 221–22 (noting Rehnquist's "ideological commitment to keep the federal courts out of certain types of cases. He argued that state legislatures, state governments, and state courts should be given the benefit of the doubt when it came to defining the individual rights of their citizens," and that the Due Process Clause of the Fourteenth Amendment "was misapplied when used to give rights to prisoners, women or other groups").

[167] See discussion and authorities cited *supra* at note 14.

[168] *See*, *e.g.*, JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT 172 (1995). *See generally* DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT (1992).

[169] *See* David L. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 321 (1973) (noting that the number of federal habeas petitions filed nationally rose from a modest 560 in 1950 to 871 in 1960, and then very sharply to 9,063 by 1970); *see also* MELTSNER, *supra* note 18, at 94 (observing that when the Supreme Court announced three decisions in 1963, expanding federal habeas availability, "the impact on death-row inmates was enormous").

to state criminal proceedings.[170] LDF's moratorium strategists seized on this opportunity to conscript the federal habeas writ into use, on newly framed issues, for virtually all capitally sentenced inmates.[171]

The normally mild-mannered Justice Powell was especially hostile toward these consequences. Invited to the Eleventh Circuit Judicial Conference in 1983, Powell sharply condemned the delays from habeas review in capital cases and lamented that they "undermine[] public confidence in our system of justice and the will and ability of the courts to administer it."[172]

(5) Another factor that I underestimated was the difficulty the Court had in grasping what injustice might flow from racial disparities based on the race of the *victim*. While many judges felt some intuitive sympathy for claimants mistreated or devalued because of their own race, the race of one's victim, by contrast, seemed at first blush a fortuity.[173] It was not.

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[170] *See* Fay v. Noia, 372 U.S. 391 (1963) (examining whether a state prisoner was deprived of his constitutional rights because he had been convicted based on a coerced confession); Townsend v. Sain, 372 U.S. 293 (1963) (same).

[171] MELTSNER, *supra* note 18, at 106–09.

[172] Remarks of Lewis F. Powell, Jr., Assoc. Justice, Supreme Court of the U.S., at the Eleventh Circuit Judicial Conference, Savannah, Georgia 8 (May 8–10, 1983). Justice Powell continued his sharp criticism of the Great Writ, especially in capital cases. *See* Lewis F. Powell, Jr., *Commentary: Capital Punishment*, 102 HARV. L. REV. 1035 (1989). Chief Justice Rehnquist was also dismissive of the writ and the delays necessarily inherent in federal habeas corpus review. LAZARUS, *supra* note 20, at 134. Dean Simon reported that even as a law clerk to Justice Robert Jackson in the 1952 Term, "Rehnquist had written a memorandum advocating that the Court narrow habeas corpus remedies, expressing impatience with the many habeas petitions from death row inmates received by the Court." SIMON, *supra* note 168, at 201. Later appointee Sandra Day O'Connor shared this view, adding from the perspective of a former state appellate judge that federal habeas review "produced a 'strange' and 'imperfect' duplication of judicial effort ultimately demeaning to state courts." LAZARUS, *supra* note 20, at 150 (quoting Sandra Day O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 801 (1981)).

[173] Indeed, the internal files of Justice Powell include a memorandum he wrote to the conference apparently presented on the day the Court considered whether to grant review of McCleskey's case, declaring: "I will vote to deny cert. on this issue," for four principal reasons: first, because "[n]o study can take all of these individual circumstances into account, precisely because they are fact-specific as to each defendant"; second, because "the aggravating and mitigating factors in each case differ in ways that are real but difficult to calibrate"; third, because the Baldus study did not find race-of-defendant effects, but only race-of-victim effects; and finally, "the study tends to show that the system operates rationally as a general matter . . . [a] pattern [that] suggests precisely the kind of careful balancing of individual factors that the Court required in *Gregg*." Memorandum from Justice Lewis F. Powell, Jr., Assoc. Justice, Supreme Court of the U.S., to the Conference 3 (June 27, 1986) (located in Justice Powell's *McCleskey v. Kemp Case File* on file with the Washington & Lee University School of Law Library at 19–22), http://law.wlu.edu/deptimages/powell%20archives/McCleskeyKempBasic.pdf [https://perma.cc/S4LZ-WQE9].

Justice White also circulated a rare, pre-argument memorandum in *McCleskey* to some, though not all, of the Justices. *See* Memorandum from Byron White, Assoc. Justice, Supreme Court of the U.S., to Lewis F. Powell, Jr., Assoc. Justice, Supreme Court of the U.S. (Oct. 15, 1986) (located in Justice Powell's *McCleskey v. Kemp Case File* on file with the Washington & Lee University School of Law

From the time of slavery and the post-Civil War "Black Codes," states had regularly imposed more severe punishments to protect white lives, especially in interracial crimes.[174] Black lives, slave or free, scarcely mattered in early nineteenth century criminal law, as Chief Justice Roger Taney so memorably observed in *Dred Scott v. Sandford*.[175] Indeed, the Civil Rights Act of 1866 and the Fourteenth Amendment's Equal Protection Clause were deliberately framed to counter the reemergence in the post-Civil War South of new Black Codes under which African-American citizens formally received different, and lesser, protection under criminal laws.[176]

Even after Southern laws were revised to appear facially neutral, however, the cultural power of racial subordination constantly manifested

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Library at 88–99), http://law.wlu.edu/deptimages/powell%20archives/McCleskeyKempBasic.pdf [https://perma.cc/S4LZ-WQE9]. Justice White dismissed the significance of the Baldus study, in part, because "it does not appear to me that there is a serious argument that the Georgia system discriminates against black defendants," *id.* at 1, and "[t]his leaves the question whether the Georgia system would be stricken down *in toto* because in some percentage of the cases, the race of the victim is determinative. I doubt that it should." *Id.* at 4; *see also* LAZARUS, *supra* note 20, at 202. *See generally* David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1444, 1450–53 (2004) (suggesting that race-of-victim discrimination presents a distinct and subtler moral question than does race-of-defendant discrimination).

[174] The State of Georgia, for example, compiled a comprehensive code of its accumulated state slavery laws in 1860. Professor Don Fehrenbacher summarized its criminal disparities in sentencing:

> Part Four, the penal code, included a separate code for slaves and free Negroes. One article of this unit listed the crimes for which, when committed by blacks, capital punishment was mandatory or discretionary. For instance, conviction of raping a white woman, which meant a prison sentence of two to twenty years for a white offender, carried a mandatory death penalty for Negro offenders. Even attempted rape of a white woman by a black man could be punished with death, at the discretion of the court. On the other hand, rape of a slave or free Negro by a white man was punishable "by fine and imprisonment, at the discretion of the court."

DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 31 (1978). *See generally* FRANKLIN, *supra* note 6, 186–89 (describing pre-Civil War Black Codes).

[175] 60 U.S. 393, 407 (1857) (confessing that, during the first 250 years of our colonial and national experience, black persons, slave or free, were "regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect"). *See generally* LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790–1860, at 93–97 (1961) (describing the multiple challenges faced by free Blacks in Northern criminal courts, including a rule in four Midwestern states and California that forbade Blacks to testify in any case in which a white person was a party, which was applied in California, even if the black citizen was the complaining witness in a criminal case against a white defendant).

[176] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 244–47, 256–59 (1988) (observing that Civil Rights Act supporters in the 39th Congress, "rejected the entire idea of laws differentiating between black and white in access to the courts and penalties for crimes. The shadow of the Black Codes hung over these debates, and [Congressman Lyman] Trumbull began his discussion of the Civil Rights Bill with a reference to recent laws of Mississippi and South Carolina, declaring his intention 'to destroy all these discriminations'"); *see also* GROSS & MAURO, *supra* note 101, at 119–120.

itself. Gunnar Myrdal's magisterial study, *An American Dilemma*, reported in 1944 that interracial crimes, especially those involving a white victim, continued to arouse especially punitive criminal responses across the South throughout the 1920s and 1930s.[177] Two early social-scientific studies in North Carolina in the 1940s tracked precisely these patterns,[178] the same basic defendant/victim patterns that Marvin Wolfgang, and later David Baldus, were to report decades later.[179] Yet several of the Justices were hard-pressed during the *McCleskey* oral argument to understand why this seeming racial fortuity should lead to relief for someone whose victim happened to be white; they missed the key point that, had McCleskey's victim been black, as Baldus's data showed, a life sentence would have been more likely than not, even given the troubling facts of McCleskey's crime.[180]

(6) Related to this last point, I only later realized, was the extent of the challenge involved in trying to arouse the Court's sense of injustice over racial disparities *in the criminal context*. Many people are troubled by a narrative of a nonwhite person who, because of his race, has been denied a job, a place in a school, a home they could afford, or an opportunity to vote which they *deserved*, or had *earned*. Yet the persuasive burden is significantly greater when one who has willfully violated laws or social norms seeks to use constitutional objections to avoid society's lawfully prescribed sanction. That most other killers of police officers in Fulton County had received life sentences did little, in the eyes of the Court's

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[177] 2 GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 551–53 (2003).

[178] *See* Guy B. Johnson, *The Negro and Crime*, 217 ANNALS AM. ACAD. POL. & SOC. SCI. 93 (1941) (finding disparate death sentencing rates between 1930 and 1940 among 330 cases in five North Carolina counties—32% when Blacks murdered Whites, 13% when Whites murdered Whites, 4% when Blacks murdered Blacks, and a 0% when Whites murdered Blacks); Harold Garfinkel, *Research Note on Inter- and Intra-Racial Homicides*, 27 SOC. FORCES 369, 369–70, 374 (1949) (finding comparably disparate rates among 821 cases in ten North Carolina counties between 1930 and 1940—37%, 11%, 4%, and 0%, respectively).

[179] Professor Baldus has noted that these earlier results "are strikingly comparable" to his pre-*Furman* findings in Georgia, revealing both race-of-defendant and race-of-victim disparities. BALDUS ET AL., *supra* note 48, at 249–50

[180] Professor Baldus testified that seventeen police officers had been murdered in Fulton County (Atlanta), where Officer Schlatt had been murdered, during the years of his study. Six of those seventeen had, like McCleskey's case, involved the murder of officers during investigations of contemporary felonies. None of the seventeen defendants eventually charged, apart from McCleskey, received a capital sentence. *Id.* at 334–35. He also estimated that in what he termed the "midrange of cases" measured by their "level of aggravation," "where McCleskey's case [wa]s located," black defendants whose victims were white received death sentences between 34% and 43% of the time, while defendants whose victims were black received death sentences only 14%–23% of the time. *Id.* at 320–21. Thus, a death sentence was roughly twice as likely, or more, in white-victim cases.

majority, to mitigate the seriousness of McCleskey's own crime or to undermine the acceptability of his punishment.[181]

(7) Lastly and most important of all, I confess to being naïve, despite the pattern of history in this area, about the extent to which the Court might be willing to divert its eyes from, minimize, trivialize, or even acquiesce in proven patterns of racial discrimination that manifest themselves at a systemic or societal level. I was chiefly worried that the Court might not understand the study, that it might find itself lost in the details. Yet surely, I thought, if they confronted honestly what Baldus had found, knowing the stakes were life and death, they would be compelled to stay the State's hand.

I should have known better.

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There have been many fine analyses of Justice Powell's curious opinion for the Court in *McCleskey v. Kemp*.[182] I will not review them. Let me share only my personal response. Justice Lewis Powell did what I thought no Justice could do: purport to accept Baldus's data, apply Eighth Amendment and Equal Protection standards, and yet conclude that McCleskey had failed to show a violation of his constitutional rights.

He did this in several ways: like Justice Rehnquist in *Lockhart*, he accepted as proven those parts of Baldus's findings that were congenial to

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[181] Justice Powell put the proposition baldly in his opinion for the Court,

> [McCleskey] does not deny that he committed a murder in the course of a planned robbery, a crime for which this Court has determined that the death penalty constitutionally may be imposed. . . . [A]bsent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, McCleskey cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty.

McCleskey v. Kemp, 481 U.S. 306–07 (1987).

[182] *See*, *e.g.*, ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 194–216 (2009); GROSS & MAURO, *supra* note 101, at 159–211; KENNEDY, *supra* note 11, at 332–44, 388; Evan Tsen Lee & Ashutosh Bhagwat, *The McCleskey Puzzle: Remedying Prosecutorial Discrimination Against Black Victims in Capital Sentencing*, 1998 SUP. CT. REV. 145; *see also* James R. Acker, *A Different Agenda: The Supreme Court, Empirical Research Evidence, and Capital Punishment Decisions, 1986–1989*, 27 LAW & SOC'Y REV. 65 (1993); Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1844–47 (2012); Aziz Z. Huq, *Judging Discriminatory Intent*, 103 CORNELL L. REV. (forthcoming 2018) (manuscript at 48–49), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3033169 [https://perma.cc/G7JY-AYE7]; James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006*, 107 COLUM. L. REV. 1, 82–86 (2007) (observing after a review of the majority opinion that "Justice Powell's analysis supports the opposite of the conclusion he reaches"); Scott E. Sundby, *The Loss of Constitutional Faith:* McCleskey v. Kemp *and the Dark Side of Procedure*, 10 OHIO ST. J. CRIM. L. 5 (2012).

his own themes and expressed radical skepticism or purposeful misunderstanding of the rest.[183]

Beyond his dismissal of the facts and their significance in Georgia, his opinion distorted the legal standards so fiercely that, as other Symposium participants have observed, *McCleskey* effectively closed the book, not only on further racial challenges in capital sentencing but, far more broadly, on empirical racial challenges in other kinds of criminal cases.[184] By holding that a defendant must show direct proof of discrimination in his own case, Powell decreed, by circumlocution, that the federal courts should no longer entertain statistical cases demonstrating even strong patterns of discrimination, but only cases involving smoking gun confessions or individualized evidence of racial misconduct or malice. "Put down your data sets," Justice Powell effectively instructed LDF, David Baldus, and all future claimants, and "step against the wall."[185]

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[183] Although Justice Powell declared that the Court will "assume the study is valid statistically without reviewing the factual findings of the District Court," *McCleskey*, 481 U.S. at 291 n.7, he later spoke dismissively of Baldus's statistics as "show[ing] only a likelihood that a particular factor entered into some decisions," *id.* at 308, adding later, that "[a]t most, the Baldus study indicates a discrepancy that appears to correlate with race," quickly assuring the reader that "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system," *id.* at 312, and "a far cry from the major systemic defects identified in *Furman*." *Id.* at 313 (quoting Pulley v. Harris, 465 U.S. 37, 54 (1984)).

In a notable incongruity, even while dismissing the study's overwhelming evidence of widespread racial disparities, Justice Powell was pleased to lift up the study's non-racial conclusions, noting with evident satisfaction that

> [t]he Baldus study in fact confirms that the Georgia system results in a reasonable level of proportionality among the class of murderers eligible for the death penalty. . . . [T]he system sorts out cases where the sentence of death is highly likely and highly unlikely, leaving a midrange of cases where the imposition of the death penalty in any particular case is less predictable.

Id. at 313 n.36.

[184] *See* KIRCHMEIER, *supra* note 1, at 163 (observing that "[t]he standard the Court created in the *McCleskey* decision not only preserved the death penalty . . . [but] also made it very difficult for capital defendants to bring race-based constitutional claims in the future"); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 119–20 (2011) (identifying *McCleskey* as one of three modern Supreme Court decisions that make claims of discriminatory policing and prosecution almost impossible to succeed, since the demand that statistics prove some individual prosecutor, judge, or jury acted with discriminatory intent is virtually impossible, allowing "[t]he system as a whole [to] discriminate massively [since] . . . no single decision-maker is responsible for more than a small fraction of the discrimination, [and thus] the law holds no one accountable for it").

[185] Professor Amsterdam has identified "the error that lies at the heart of" *McCleskey* as the Court's "supposi[tion] that conscious racial bigotry on the part of public officials is the sole significant form of government-supported racial inequality in this country today":

> That error is both the source and the teaching of *McCleskey*. *McCleskey* assumes and declares that we need to worry about a denial of the Equal Protection of the Laws only in the short-lived situation where some individual decisionmaker, temporarily invested with the powers of government, is prompted by overt racial prejudice to act discriminatorily, and that we need not be concerned about any denial of Equal Protection in those long-continuing, culturally impacted situations where hundreds upon hundreds of publicly empowered actors—police, prosecutors, jurors, and judges—with no need for collusion and usually with no awareness of their own racial

As to the Court's Eighth Amendment concern for the "risk" of arbitrariness demonstrated by statistical patterns of discrimination, the Court made clear that no risk, no matter how high, would violate the Constitution unless it went beyond a risk to become a virtual certainty.[186] No longer a realm in which "death is different," requiring higher standards than in other cases, the Eighth Amendment rule in death sentences shriveled into Justice Powell's straitened Fourteenth Amendment demand for proof of racial intention or purpose, by an individual actor in the defendant's own case.

Justice Powell professed that his opinion was dictated by the need to allow states to design their own criminal justice procedures and, especially, to allow discretion in capital sentencing.[187] Yet as Justice John Paul Stevens and many subsequent analysts have observed, there were a number of plausible alternatives that might have struck down Georgia's post-*Furman* sentencing system while allowing a revised, more strictly tailored capital system to go forward.[188]

One unsparing reading of Justice Powell's contorted decision is that he and the Court majority, in truth, silently concurred in views expressed in private by their newest colleague, Justice Antonin Scalia, in an unpublished memorandum circulated to the Court on January 6, 1987 after Scalia had

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> biases, march in lockstep to produce a pattern of color-coded results that reflect the powerful prejudices of an entire population.

Anthony G. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After* McCleskey, 39 COLUM. HUM. RTS. L. REV. 34, 55–56 (2007).

[186] *McCleskey*, 481 U.S. at 299–313. In one telling phrase, Justice Powell wrote that "[w]here the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious." *Id.* at 313. Yet the racial disparities reported by Baldus and his colleagues, far from "unexplained," remain among the most thoroughly "explained," tested, examined and reexamined findings ever presented to any American court in a criminal proceeding.

[187] Justice Powell concluded his discussion of the statistical evidence with a stunning non sequitur: since Georgia had put into place procedures to prevent discrimination (and since Georgia also valued the exercise of prosecutorial discretion and the use of jury trials) the significant racial disparities reported by the Baldus study made no constitutional difference:

> In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.

Id. Or, as Gross and Mauro titled their concluding chapter: "It's Not Broken Because It Can't Be Fixed." GROSS & MAURO, *supra* note 101, at 212.

[188] *McCleskey*, 481 U.S. at 366–67 (Stevens, J., dissenting) (citing Baldus's study, which showed that "[i]f Georgia were to narrow the class of death-eligible defendants" to embrace only those "extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender," the "danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated").

read an early draft of Powell's opinion.[189] Let me quote the short memo, in its entirety:

> I plan to join Lewis'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 the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof. I expect to write separately to make these points, but not until I see the dissent.
>
> Sincerely, Nino.[190]

Justice Scalia's memorandum appears to reveal both that he understood the explanatory power of multiple regression analysis and that he accepted Baldus's principal findings. Yet racial discrimination, in his view, while "real," was "acknowledged in the [prior] decisions of [the Court], and ineradicable." Justice Scalia evidently decided never to publish these thoughts, yet Powell's otherwise irrational and self-contradictory opinion, behind its verbal screens, can, in my view, best be understood not so much as a refusal to acquiesce in another LDF empirical assault, or as a vindication of federalism, or as an impatience with habeas corpus review, or as a misunderstanding of the functioning of race-of-victim discrimination, or even as an indifference to an "unfairness" claim asserted by a justly tried and convicted defendant—all the adverse factors facing Warren McCleskey that I underestimated in 1986.

Instead, *McCleskey* seems to me best understood as an act of Grand Racial Avoidance: a turning away from the reality of widespread racial discrimination in Georgia's capital sentencing system and an acquiescence to Scalia's cynical perspective. From this perspective, systemic racial bias is, candidly, not confined to the past. It remains real and present in the post-*Furman* capital universe. We the Court have acquiesced in it before, and

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[189] This unpublished memorandum, originally reported by Professor 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 (1994), is now available online in Washington & Lee's collected archives of Justice Powell. *See* Memorandum from Antonin Scalia, Assoc. Justice, Supreme Court of the U.S., to the Conference (Jan. 6, 1987) [hereinafter Scalia Memorandum] (located in Justice Powell's *McCleskey v. Kemp Case File* on file with the Washington & Lee University School of Law Library at 147), http://law.wlu.edu/deptimages/powell%20archives/McCleskeyKempBasic.pdf [https://perma.cc/S4LZ-WQE9].

[190] Scalia Memorandum, *supra* note 189.

we will do so now. And if offered similar evidence in the future, we will do so again.[191]

* * *

What is the value of any lawsuit, or the fifteen-year campaign behind it, that ultimately makes such very bad law? What lessons can law students, or seasoned social science researchers, learn from this story, especially those who may passionately want to make a positive difference in this nation's future? Allow me three short observations to close this great conference.

First, as Symposium participant Reva Siegel has observed, campaigns to change law, to establish justice, often must be waged well beyond the law courts.[192] Even when advocates elect to bring controversial social justice claims forward in courtrooms, they must assess not only the immediate likelihood of litigation success, but the social attention their courtroom efforts may (though by no means always will) attract to the important issues they present. A well-constructed litigation campaign has the potential to shape public understanding, even though it fails in a purely legal setting, *if* it is carried out with the greatest candor, rigor, and transparency. In his eloquent 2011 tribute to David Baldus, Professor Samuel Gross made just this point about David Baldus's work:

> The main reason that race [remains] a powerful issue in debates about the death penalty is that everyone who cares *knows* that race plays a major role in determining who gets sentenced to death. And the single most important reason that "everybody knows" this is what happened in *McCleskey*. Even on the Supreme Court that sent Warren McCleskey to his death, even among the Justices who most strongly support the death penalty, nobody has tried to deny that racial "sympathies and antipathies" decide who lives and who dies. No

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[191] Long-time death penalty litigator Stephen Bright has vividly described this pattern:

> Instead of acknowledging the risk of racial discrimination and attempting to identify and eliminate it, both federal and state courts frequently dodge the inquiry. They deny the existence of racial discrimination that is apparent to everyone; employ legal fictions that have no relation to the reality of race relations in America today; set legal standards or burdens of proof that are impossible to meet; or provide wholly inadequate remedies for discrimination that is undeniable. All this may be done while the courts are issuing sweeping pronouncements decrying the evil of racial discrimination and proclaiming their "unceasing efforts" to cure it.

Stephen B. Bright, *Discrimination, Death, and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, *in* FROM LYNCH MOBS TO THE KILLING STATE 211, 214 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006).

[192] Siegel, *supra* note 4, at 1289–91.

> Justice said otherwise in *McCleskey* and none have denied it since. That may be the enduring legacy of *McCleskey*."[193]

A second and related point: sometimes the weight even of powerful arguments and a completely thorough demonstration of their truth will not suffice, alone, to change deeply embedded patterns of belief, of understanding, and of priorities. "The race issue" did not persuade Justice Powell or his *McCleskey* majority to strike the Georgia statutes. Yet once Northwestern's outstanding Center on Wrongful Convictions began in 1999 its tireless work to document cases in which states had convicted and sentenced those who were actually innocent,[194] a raft of former death penalty supporters and previously confident public officials fell into stunned silence, speechless before evidence that the innocent have been convicted, death sentenced, and perhaps, executed. I salute this exceptionally powerful work carried out by Northwestern and others who have commenced this search to rescue the truly innocent.[195] It has become, along with racial discrimination, a second heavy "weight" that must be borne by all who would attempt to justify America's continued use of the death penalty.[196]

Finally, it is notable, as others have mentioned, how some truths gain their power not on first encounter, but only over time. At least six Justices—including the very three, Stewart, Powell, and Stevens, whose joint opinions were the centerpiece of the *Gregg*/*Proffitt*/*Jurek* decision—have since, in one fashion or another, renounced capital punishment altogether.[197] Justice Powell's change of mind and heart is well known. In

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[193] Gross, *supra* note 112, at 1922–23.

[194] *See Center on Wrongful Convictions*, BLUHM LEGAL CLINIC, http://www.law.northwestern.edu/legalclinic/wrongfulconvictions [https://perma.cc/W8YY-9YWG].

[195] *See* INNOCENCE PROJECT, www.innocenceproject.org [https://perma.cc/94TK-8UWA]. The National Coalition to Abolish the Death Penalty reports that as of October 2015, 156 individuals had been exonerated, found innocent, and released from the nation's death rows. *Exonerations of Innocent Men and Women,* NAT'L COALITION TO ABOLISH THE DEATH PENALTY (Oct. 2015), http://www.ncadp.org/pages/innocence [http://www.ncadp.org/pages/innocence]. *See generally* Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROC. NAT'L ACAD. SCI. 7230 (2014).

[196] Professor Kirchmeier observes:

> [A]fter McCleskey's case clarified that the courts would not strike down capital punishment and would not eliminate the risk of racial disparities, efforts to educate the public on problems with the death penalty began to pay off. Support for the death penalty continued to be strong, but the support fell below the level of the 1980s and 1990s. . . . Out of the moratorium movement, and out of education about the death penalty, and out of discoveries of innocent people on death row, significantly more people now oppose the death penalty than they did prior to the post-*McCleskey* moratorium movement.

KIRCHMEIER, *supra* note 1, at 293.

[197] The Justices who have foresworn the death penalty include Brennan and Marshall, who renounced the punishment absolutely in *Furman*, as well as Powell, Blackmun, and Stevens. Justice

1990, less than a year after he retired from the Court and lobbied Congress to curtail prisoners' access to habeas corpus procedures, Justice Powell told his biographer that the one vote he regretted in his sixteen-year career of Supreme Court service was the one he cast in *McCleskey v. Kemp*. Asked if he meant that he had come to accept the statistical case, he responded: "No, I would vote the other way in any capital case."[198]

Justice Harry Blackmun, who upheld William Maxwell's death sentence as an Eighth Circuit judge, wrote a powerful dissent in the *McCleskey* case, and later declared in 1994, in a routine capital certiorari denial in *Callins v. Collins*,[199] that "[f]rom this day forward, I no longer shall tinker with the machinery of death,"[200] explaining that he had come to see and regret the manifold infirmities of capital punishment in daily operation. He thus embraced the tradition of Justices Brennan and

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Stevens speculated that Justice Stewart, "had he remained on the Court, surely would have voted with the four dissenters" in *McCleskey*. John Paul Stevens, *On the Death Sentence*, N.Y. REV. OF BOOKS, Dec. 23, 2010, http://www.nybooks.com/articles/2010/12/23/death-sentence [https://perma.cc/R4K8-KRNB]. Justice Stephen Breyer has recently posed the question of the continued constitutionality of the death penalty in a dissent in *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting) joined by Justice Ruth Bader Ginsburg. Justice Ginsburg has also told law students that she would be in favor of returning to the Court's position in *Furman*, and Justice O'Connor has publicly expressed that she harbors "serious questions" about whether the death penalty has been fairly administered. *O'Connor Questions Death Penalty*, N.Y. TIMES, July 4, 2001, at A9; *see also* Gross, *supra* note 112, at 1918–20 (citing to interviews and opinions from Justices Powell, Blackmun, and Stevens questioning the constitutionality of the death penalty). *See generally* KIRCHMEIER, *supra* note 1, at 228–32 (discussing Justices Blackmun, Powell, and O'Connor's beliefs regarding the administration of the death penalty).

[198] JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 451 (1994). Justice Powell's statement is curious. If his regret reflected a developing conclusion that the death penalty cannot be fairly administered, it is odd to center that regret in *McCleskey*, rather than in *Furman* or especially his joint opinions in *Gregg*/*Proffitt*/*Jurek*, where his participation as one of the triumvirate of Stewart, Powell, and Stevens solidified the constitutionality of the entire modern death penalty regime.

It is possible that Justice Powell's regret about his role in *McCleskey* reflects his discomfort as the author of an opinion repeatedly described as a modern *Dred Scott v. Sandford*, *Plessy v. Ferguson*, or *Korematsu v. United States*. *See*, *e.g.*, Amsterdam, *supra* note 185, at 47 (observing that "*McCleskey* is the *Dred Scott* decision of our time. . . . It is a decision for which our children's children will reproach our generation and abhor the legal legacy we leave them"); John H. Blume & Sheri Lynn Johnson, *Unholy Parallels Between* McCleskey v. Kemp *and* Plessy v. Ferguson: *Why* McCleskey *(Still) Matters*, 10 OHIO ST. J. CRIM. L. 37, 63 (2012) (discussing the parallels between *McCleskey* and *Plessy* and stating that "*McCleskey*, like *Plessy*, was 'wrong the day it was decided'"); Bright, *supra* note 191, at 236 (viewing McCleskey as "more consistent with the Court's decisions in . . . *Dred Scott v. Sandford*[] and *Plessy v. Ferguson* than its more recent decisions recognizing racial discrimination in other areas of life"); Bryan Stevenson, *Keynote Address by Mr. Bryan Stevenson*, 53 DEPAUL L. REV. 1699, 1707 (2004) (comparing *McCleskey* to *Plessy* and *Korematsu*); Sundby, *supra* note 182, at 5 (grouping *McCleskey* with *Dred Scott*, *Korematsu*, and *Plessy*).

[199] 510 U.S. 1141, 1143 (Blackmun, J., dissenting from denial of certiorari).

[200] *Id.* at 1145.

Marshall, both of whom had, since *Furman*, voted against death in every capital case that came before them.[201]

Northwestern's gift to the Supreme Court, Class of '47 graduate John Paul Stevens—who wrote a short, perceptive dissent in *McCleskey*[202]—also eventually joined Justice Blackmun in renouncing capital punishment. In 2008, in *Baze v. Rees*,[203] a case that upheld the constitutionality of Kentucky's protocol for lethal injection, Justice Stevens carefully examined all of the principal penological justifications for the death penalty, one by one, and found all to be presently diminished or insignificant.[204] He weighed four serious problems with administration of the death penalty; third among the four was its frequently discriminatory pattern, a pattern, he noted, that had been uncovered in *McCleskey*.[205] Though Justice Stevens concurred with reluctance in *Baze* for reasons of stare decisis,[206] later, in his retirement, in a thoughtful 2014 book, he urged a change to the text of the Eighth Amendment to bring a clear, constitutional end to capital punishment.[207]

Most recently, in a 2016 dissent to the denial of certiorari in *Glossip v. Gross*,[208] reminiscent of Justice Goldberg's dissent fifty-three years earlier in *Rudolph v. Alabama*,[209] Justice Stephen Breyer, with whom Justice Ruth Bader Ginsburg joined, wrote that he would have invited "full briefing on [the] . . . basic question: whether the death penalty violates the Constitution."[210] Justice Breyer mused that the current death penalty may well be unconstitutional for at least four reasons, naming its arbitrary application, based on race-of-victim disparities, among the four.[211]

There is no formal procedure for recalculating the votes of Justices who change their minds. Yet this extraordinary accumulation of expressed regret by Justices who have lived with the death penalty's fitful

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[201] *See*, *e.g.*, Gregg v. Georgia, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting).

[202] McCleskey v. Kemp, 481 U.S. 279, 366 (1987) (Stevens & Blackmun, JJ., dissenting).

[203] 553 U.S. 35 (2008).

[204] *Id.* at 75 (Stevens, J., concurring).

[205] *Id.* at 83–86.

[206] *Id.* at 86.

[207] JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION 123 (2014) (suggesting that the Eighth Amendment be modified to read: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and usual punishments *such as the death penalty* inflicted") (emphasis added).

[208] 135 S. Ct. 2726, 2754–55 (2015) (Breyer, J., dissenting).

[209] 375 U.S. 889, 889 (1963).

[210] *Glossip*, 135 S. Ct. at 2755 (Breyer, J., dissenting).

[211] *Id.* at 2756.

administration has added to the necessary burden of those who would continue to defend the death penalty.

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Why should social scientists, in this time of real uncertainty about the Court's future (indeed the country's future), bother with presenting social science to courts, especially on issues of system-wide racial disparities? How can they do so, aware of the Court's repeated failure to confront, fully and honestly, the continued legacies of slavery and Jim Crow, the stubborn and self-reinforcing social stratifications that make the future so challenging for millions of people of color and for the poor and marginalized?

The answer I give predictably comes from my own perspective as a former death penalty lawyer. I learned long ago, working closely with clients—all still full of humanity and all of whom faced death—that they and we had no practical option but to struggle on with whatever tools were at hand. Dedicated lawyers and great social scientists can wield very important tools. I applaud the candor of Symposium participant Paul Butler[212] and others who question the wisdom and effectiveness of participating in a legal system so historically skewed toward preserving the structural subordination of millions of African-American individuals and communities, and other people of color, who find their lives circumscribed by residential and educational segregation, restricted public services, often punitive criminal justice practices, and deliberately restricted avenues for political participation.

In part, how to respond to such circumstances is a matter of temperament and personal disposition. We benefit from and sorely need prophetic voices like those of Derrick Bell[213] and Paul Butler,[214] or W.E.B.

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[212] Paul Butler, *Equal Protection and White Supremacy*, 112 NW. U. L. REV. 1457 (2018).

[213] *See*, *e.g.*, DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 10–14 (1992) (expressing the view that "[b]lack people will never gain full equality in this country," and that even "short-lived victories" will "slide into irrelevance as racial patterns adapt in ways that maintain white dominance" (emphasis omitted)); DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 51–74 (1987).

[214] Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1436–38, 1471–78 (2016) (contrasting the respective roles of "traditional civil rights organizations" such as LDF that "focus on liberal reform" with the "broader scale transformation," working toward a Third Reconstruction that needs to be undertaken by the Movement for Black Lives and other more radically transformative groups).

Du Bois of an earlier era[215]—who speak out of a profound skepticism that our present system will ever work to cure its own ills. Yet I join with those who observe that we benefit as well from reformers like LDF's leadership—Thurgood Marshall, Jack Greenberg, Julius Chambers, Elaine Jones, Ted Shaw, John Payton, and Sherrilyn Ifill—who work tirelessly within the system, using what tools circumstances present, to press for incremental change toward justice. And whatever the likelihood of immediate change through law, we need committed social scientists in the tradition of David Baldus, who will explore with imagination, rigor, and transparent integrity, the multiple forces that create and maintain racial discrimination, sharing their research findings even in an era where the cry of "fake news" greets every unwelcome fact.

Warren McCleskey's execution took place in a small, one-story cinder block building in the far rear of the sprawling rural grounds of the Georgia Diagnostic and Classification Center in Jackson, Georgia.[216] It was long

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[215] *See*, *e.g.*, W. E. Burghardt Du Bois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 328–29 (1935) (questioning the plausibility and desirability of legal efforts by the NAACP and others to press for integrated public education, and examining the illusion that civil rights litigation can ever lead to permanent equality for African-Americans: "I am no fool; and I know that race prejudice in the United States today is such that most Negroes cannot receive proper education in white institutions").

[216] McCleskey's execution was delayed for over four years after the Supreme Court's 1987 decision because of defense counsel's serendipitous discovery—from an attorney friend of McCleskey's, Robert Stroup—of a twenty-one-page document, a statement made by the jailhouse informant, Offie Evans, who had provided damning testimony against McCleskey at his trial. KIRCHMEIER, *supra* note 1, at 35. The document clearly fell within the category of documents repeatedly requested from the State, without any success, by McCleskey's trial and appellate counsel—before trial, during trial, on appeal, and in state habeas corpus proceedings—and it strongly confirmed defense counsel's earlier suspicions of a secret relationship between the key witness Evans and the State.

Once discovered in late 1987, the document led to an Atlanta jailor, Ulysses Worthy, who testified before Judge Owen Forrester, during a successive federal habeas hearing, that someone, likely the chief police investigator on the McCleskey case, Atlanta Detective Sidney Dorsey, had secretly instructed jailor Worthy to move Evans, who had served as a prior informant for Dorsey in other cases, to the jail cell next to McCleskey, and had instructed the informant Evans to "gather[] incriminating information" on McCleskey. McCleskey v. Zant, 499 U.S. 467, 475 (1991).

Faced with this unrebutted evidence that the State had violated McCleskey's Sixth Amendment rights against surreptitious state questioning under *Massiah v. United States*, 377 U.S. 201 (1964) and McCleskey's right to receipt of this relevant witness statement from the State, and then used this informant against McCleskey at trial, Judge Forrester, for the second time, reversed McCleskey's capital conviction and directed a new trial. McCleskey v. Kemp, No. C87-1517A (N.D. Ga. Dec. 23, 1987), at 63–97.

The Eleventh Circuit, however, reversed the District Court decision, *McCleskey*, 890 F.2d 342 (11th Cir. 1989), and the Supreme Court affirmed, in an opinion by Justice Anthony Kennedy. *McCleskey*, 499 U.S. 467. Both appellate courts faulted not the State, but defense counsel, for initially raising such a claim (albeit without benefit of the evidence deliberately withheld by the State) and thereafter "abus[ing] . . . the writ" of habeas corpus by abandoning the claim, during its earlier federal habeas appeals, after they had been unable to obtain evidence in support thereof. *Id.* at 497–503. Justice

after midnight on a rain-swept night. Three rows of witnesses sat in plastic chairs on the far side of the execution chamber into which Warren was led. After being strapped into Georgia's electric chair, thick wires attached to his temples and legs, he was permitted some final words before his death. Self-composed and dignified despite the barbaric setting, Warren began to speak into a microphone, thanking those who had supported him, expressing his regret to the family of Atlanta police officer Frank Schlatt, and confessing the impact of his religious conversion and faith.[217]

Suddenly, without any explanation, Warren's microphone went silent, he was led out of the execution chamber, and all came to a halt. We later learned that a temporary stay of execution had been entered by a federal court. Some thirty-four minutes later, prison authorities determined that the stay had been lifted, and Warren was re-strapped into the electric chair. Though he began again to share his final thoughts, the microphone was not turned back on.[218] Those of us on the far side of the thick glass partition realized we would hear nothing of Warren's last words in the moments

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Marshall, in a bitter dissent joined by Justices Blackmun and Stevens, showed how Justice Kennedy's opinion rested upon a novel reinterpretation that radically tightened the "abuse of the writ" standard, thereby jettisoning several decades of controlling federal law on the issue, to McCleskey's fatal disadvantage. *Id.* at 506–23 (Marshall, J., dissenting). Marshall added that Justice Kennedy's opinion had then applied its new standard in a way Marshall described as "hollow[]" and "dangerous[]". *Id.* at 526.

> The majority's invocation of "the orderly administration of justice" rings hollow when the majority itself tosses aside established precedents without explanation, disregards the will of Congress, fashions rules that defy the reasonable expectations of the persons who must conform their conduct to the law's dictates, and applies those rules in a way that rewards state misconduct and deceit. Whatever "abuse of the writ" today's decision is designed to avert pales in comparison with the majority's own abuse of the norms that inform the proper judicial function.

Id. at 529 (citation omitted).

Detective Dorsey, who arranged the secret interrogation of McCleskey, was later elected Sheriff of DeKalb County in metropolitan Atlanta. Sheriff Dorsey lost reelection after one term and immediately directed several of his senior officers to assassinate his successful opponent, apparently to cover up widespread corruption and abuse by his office. Ironically, for his role in this brazen murder, Detective Dorsey was himself sentenced to life imprisonment. *See Ex-Sheriff Gets Life in Death of Successor*, N.Y. TIMES (Aug. 16, 2002), http://www.nytimes.com/2002/08/16/us/ex-sheriff-gets-life-in-death-of-successor.html [https://perma.cc/DE4X-9M3F]; *see also* KIRCHMEIER, *supra* note 1, at 305–06 (describing the circumstances surrounding Dorsey's conviction for ordering the murder of the candidate who defeated him in the sheriff's election).

[217] KIRCHMEIER, *supra* note 1, at 189. McCleskey's statement included the following:

> First of all I would like to say to the Schlatt family that I am deeply sorry and repentant for the suffering, hurt and pain that you have endured over the years. I wish there was something I could do or say that would give comfort to your lives and bring peace to it. I pray that you would find in your heart to forgive me for the participation in the crime that caused the loss of your loved one. . . . I am deeply sorry for the lives that have been altered the way they have because of my ignorance and stupidity. . . . This is not the end, but the beginning I hoped for—to be in the presence of my Lord.

Id.

[218] Applebome, *supra* note 3.

before his death, and Warren was apparently unaware of the silence beyond the death chamber.[219]

Forgive me if I close with a metaphor. Those who have participated in this Symposium as speakers, researchers, scholars, teachers, and students, possess a special capacity: to turn that microphone on again, to speak out on racial injustices that still plague the criminal justice system. The State of Georgia exercised its own brute power to put Warren McCleskey to death in the post-midnight September darkness. Yet empirical evidence and constitutional arguments have their own uncanny counter-power to survive, regather strength, and shine light into darkness, defying adverse judicial decisions and our present, woeful consequences.

Whether those labors yield prophecies that go unheeded, or reforms one day accomplished, I salute those who continue their ongoing empirical research, or statutory and constitutional analyses—in sum, who continue to set their shoulders against the burden of America's 400-year legacy of racial injustice and subordination.

[219] KIRCHMEIER, *supra* note 1, at 189.