

Winter 1988

## Eighth and Fourteenth Amendments--The Death Penalty Survives

Anderson E. Bynam

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>



Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

---

### Recommended Citation

Anderson E. Bynam, Eighth and Fourteenth Amendments--The Death Penalty Survives, 78 J. Crim. L. & Criminology 1080 (1987-1988)

This Supreme Court Review is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

## EIGHTH AND FOURTEENTH AMENDMENTS—THE DEATH PENALTY SURVIVES

**McCleskey v. Kemp, 107 S. Ct. 1756 (1987).**

### I. INTRODUCTION

Since the landmark decision of *Furman v. Georgia*<sup>1</sup> the Supreme Court has attempted to clarify the requirements for death penalty statutes in order to satisfy the mandates of the eighth and fourteenth amendments to the United States Constitution. The Court has both narrowed the spectrum of death-eligible defendants<sup>2</sup> and given approval to procedures designed to ensure consistency in capital sentencing.<sup>3</sup>

The severe nature of the death penalty has prompted the Court to require a high degree of rationality and consistency in capital sentencing.<sup>4</sup> This pattern of jurisprudence is consistent with the evolving standards of decency in contemporary society. In *McCleskey v. Kemp*,<sup>5</sup> however, the Court drifted away from this goal by holding that Georgia's capital sentencing system was constitutional despite evidence that it had applied the death penalty in a racially discriminatory manner.<sup>6</sup>

This Note examines the application of Georgia's capital sentencing system by analyzing the facts, lower decisions, and Supreme Court opinions in *McCleskey v. Kemp*. In reviewing the errors in the majority's opinion, this Note argues that the Court misinterpreted prior decisions with regard to capital punishment. This Note also argues that the Court inappropriately relied on various policies to justify its reasoning. Finally, this Note concludes that the Court un-

---

<sup>1</sup> 408 U.S. 238 (1972)(holding that all of the discretionary death penalty statutes then in effect violated the eighth amendment's prohibition against "cruel and unusual punishments," which was made applicable to the states by the due process clause of the fourteenth amendment).

<sup>2</sup> See *Coker v. Georgia*, 433 U.S. 584 (1977); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

<sup>3</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976).

<sup>4</sup> *California v. Ramos*, 463 U.S. 992, 998-99 (1983).

<sup>5</sup> 107 S. Ct. 1756 (1987).

<sup>6</sup> *Id.* at 1765.

determined important state concerns in maintaining the death penalty.

## II. FACTS OF *MCCLESKEY V. KEMP*

A young black male, Warren McCleskey, "was convicted of two counts of armed robbery and one count of murder in the Superior Court of Fulton County, Georgia, on October 12, 1978."<sup>7</sup> The evidence at trial showed that McCleskey and three accomplices planned and completed the robbery of a furniture store.<sup>8</sup> During the robbery, a white police officer, responding to a silent alarm, entered the store.<sup>9</sup> As the police officer was walking down the center aisle of the store, he was struck and killed by two shots.<sup>10</sup>

Several weeks after the robbery, McCleskey was arrested for an unrelated offense.<sup>11</sup> After his arrest, McCleskey confessed to the furniture store robbery, but he denied the shooting of the police officer. At trial for the events connected with the robbery, the State introduced evidence that at least one of the bullets that struck the officer was fired from a gun that matched the description of a gun McCleskey had carried during the robbery.<sup>12</sup> Furthermore, witnesses testified that they had heard McCleskey admit to the shooting.<sup>13</sup> A petit jury convicted McCleskey of murder.<sup>14</sup>

At the penalty hearing,<sup>15</sup> the court instructed that the "jury could not consider imposing the death penalty unless it found beyond a reasonable doubt that the murder was accompanied by one of the statutory aggravating circumstances," which are circumstances which add to the enormity or injurious consequences of the crime.<sup>16</sup> The jury found two aggravating circumstances,<sup>17</sup> and Mc-

---

<sup>7</sup> *Id.* at 1761-62.

<sup>8</sup> *Id.* at 1762.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> The relevant Georgia statute provides that a person commits murder "when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being." GA. CODE ANN. § 16-5-1(a) (1984).

<sup>15</sup> Georgia law provides that when a jury convicts a defendant of murder, "the court shall resume the trial and conduct a presentence hearing before the jury." GA. CODE ANN. § 17-10-2(c) (1982).

<sup>16</sup> *McCleskey*, 107 S. Ct. at 1762. A jury cannot sentence a defendant to death for murder unless it finds beyond a reasonable doubt that one of the following aggravating circumstances existed:

- (1) The offense . . . was committed by a person with a prior record of conviction for a capital felony;
- (2) The offense . . . was committed while the offender was engaged in the commis-

Cleskey offered no mitigating evidence.<sup>18</sup> The jury recommended that McCleskey be sentenced to death for the murder conviction and to two consecutive life sentences for the armed robbery convictions.<sup>19</sup> The trial court judge accepted the jury's capital punishment recommendation and imposed the death penalty.<sup>20</sup>

On appeal, the Supreme Court of Georgia affirmed the murder and armed robbery convictions and the sentences.<sup>21</sup> After the United States Supreme Court denied McCleskey's petition for a writ of certiorari,<sup>22</sup> the Superior Court of Fulton County denied McCleskey's motion for a new trial.<sup>23</sup> Subsequently, the Superior Court of Butts County denied McCleskey's petition for a writ of habeas corpus.<sup>24</sup> The Supreme Court of Georgia denied McCleskey's application for a certificate of probable cause to appeal the Butts County Superior Court's denial of his petition. The United States

---

sion of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree;

(3) The offender, by his act of murder . . . knowingly created a risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense . . . for himself or another, for purpose of receiving money or any other thing of monetary value;

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor, or former district attorney or solicitor was committed during or because of the exercise of his official duties;

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(8) The offense . . . was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties;

(9) The offense . . . was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

GA. CODE ANN. § 17-10-30(b) (1982).

<sup>17</sup> The two aggravating circumstances the jury found are discussed in GA. CODE ANN. §§ 17-10-30(b)(2) and 17-10-30(b)(8) (1982). *See supra* note 16.

<sup>18</sup> *McCleskey*, 107 S. Ct. at 1763.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* The Georgia Code provides that "[w]here a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death." GA. CODE ANN. § 17-10-31 (1982).

<sup>21</sup> *McCleskey v. State*, 245 Ga. 108, 263 S.E.2d 146 (1980).

<sup>22</sup> *McCleskey v. Georgia*, 449 U.S. 891 (1980).

<sup>23</sup> *McCleskey v. Kemp*, 107 S. Ct. at 1763.

<sup>24</sup> *McCleskey v. Zant*, No. 4909 (Ga. Super. April 8, 1981)(order denying petition for writ of habeas corpus). Presumably, McCleskey was being jailed in Butts County, allowing him to seek his writ of habeas corpus in Butts County.

Supreme Court again denied certiorari.<sup>25</sup>

McCleskey filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Georgia.<sup>26</sup> McCleskey's petition included a claim that "the Georgia capital sentencing process . . . [had been] administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments to the United States Constitution."<sup>27</sup> In support of his claim, McCleskey presented statistical research, namely, the Baldus study,<sup>28</sup> "that purport[ed] to show a disparity in the imposition of the death penalty in Georgia based on [both] the race of the murder victim, and to a lesser extent, the race of the defendant."<sup>29</sup>

The district court conducted an evidentiary hearing to consider McCleskey's petition. Although it found no merit in McCleskey's eighth amendment claim,<sup>30</sup> it carefully analyzed the Baldus study. The court held that the Baldus study failed to contribute anything of value to McCleskey's claims and dismissed his petition.<sup>31</sup>

The United States Court of Appeals for the Eleventh Circuit, sitting en banc, heard McCleskey's appeal of the district court's decision.<sup>32</sup> The Eleventh Circuit assumed the validity of the Baldus study and addressed the substantive issues presented by McCleskey's eighth and fourteenth amendment claims.<sup>33</sup> The appeals court believed the proffered statistics to be "insufficient to demonstrate discriminatory intent or unconstitutional discrimination in the Fourteenth Amendment context, [and] insufficient to show irrationality, arbitrariness and capriciousness under any kind of Eighth Amendment analysis."<sup>34</sup> The Eleventh Circuit affirmed the district court's dismissal of McCleskey's claims despite confirming the validity of the Baldus study.<sup>35</sup> The United States Supreme Court granted certiorari to consider whether McCleskey's capital sentence was unconstitutional under the eighth and fourteenth amendments.<sup>36</sup>

---

<sup>25</sup> McCleskey v. Zant, 454 U.S. 1093 (1981).

<sup>26</sup> McCleskey v. Kemp, 107 S. Ct. at 1763.

<sup>27</sup> *Id.*

<sup>28</sup> Baldus, Pulaski & Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & C. 661 (1983) [hereinafter Baldus].

<sup>29</sup> McCleskey, 107 S. Ct. at 1763.

<sup>30</sup> See Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979) (holding that Florida's death penalty statute did not violate defendant's constitutional rights).

<sup>31</sup> McCleskey v. Zant, 580 F. Supp. 338, 379 (N.D. Ga. 1984).

<sup>32</sup> McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985).

<sup>33</sup> *Id.* at 895.

<sup>34</sup> *Id.* at 891.

<sup>35</sup> *Id.*

<sup>36</sup> McCleskey v. Kemp, 106 S. Ct. 3331 (1986).

## III. THE SUPREME COURT OPINIONS

## A. THE MAJORITY OPINION

A sharply divided Court<sup>37</sup> affirmed the decision of the Eleventh Circuit and held that the administration of Georgia's capital punishment system did not violate the eighth and fourteenth amendments.<sup>38</sup> Justice Powell began his opinion by setting the boundaries of McCleskey's fourteenth amendment claim in which he asserted "race ha[d] infected the administration of Georgia's statute in two ways: persons who murder whites are more likely to be sentenced to death than persons who murder blacks, and black murderers are more likely to be sentenced to death than white murderers."<sup>39</sup> Justice Powell noted that McCleskey's claim of discrimination extended throughout the Georgia capital sentencing process—from jury to prosecutor to the state legislature that had enacted the statute.<sup>40</sup> Justice Powell then stated that the Court would join the string of lower courts which had considered this issue<sup>41</sup> and denied McCleskey relief.<sup>42</sup>

Justice Powell began his analysis with the proposition that a defendant who alleges an equal protection violation has a two-fold burden. First, he must prove "the existence of purposeful discrimination,"<sup>43</sup> and second, he must prove that the purposeful discrimination "had a discriminatory effect" on him.<sup>44</sup> Justice Powell noted that McCleskey relied solely on the Baldus study to compel an inference that his sentence rested on purposeful discrimination.<sup>45</sup> The majority concluded that if the Baldus study was "sufficient proof of discrimination, without regard to the facts of a particular case, such a claim would extend to all capital cases in Georgia, at least where

---

<sup>37</sup> Justice Powell wrote the majority opinion and was joined by Chief Justice Rehnquist and Justices White, O'Connor, and Scalia. Justice Brennan filed a dissent which Justice Marshall joined. Justices Blackmun and Stevens joined all but Part I of Justice Brennan's dissent. Justice Blackmun filed a separate dissent which Justices Marshall and Stevens joined and, in all but Part IV-B of which, Justice Brennan joined. Justice Stevens filed a separate dissent and was joined by Justice Blackmun.

<sup>38</sup> *McCleskey*, 107 S. Ct. at 1765-66.

<sup>39</sup> *Id.* at 1766.

<sup>40</sup> *Id.*

<sup>41</sup> See, e.g., *Shaw v. Martin*, 733 F.2d 304 (4th Cir.), *cert. denied*, 469 U.S. 873 (1984); *Adams v. Wainwright*, 709 F.2d 1443 (11th Cir. 1983)(*per curiam*), *cert. denied*, 464 U.S. 1063 (1984); *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979).

<sup>42</sup> *McCleskey*, 107 S. Ct. at 1766.

<sup>43</sup> *Id.* (quoting *Whitus v. Georgia*, 385 U.S. 545, 550 (1967)).

<sup>44</sup> *Id.* (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985)).

<sup>45</sup> *Id.* at 1766-67.

the victim was white and the defendant was black.”<sup>46</sup>

Justice Powell then discussed the Court’s use of statistics to demonstrate proof of intent to discriminate in limited contexts.<sup>47</sup> Justice Powell observed that the two areas in which statistical evidence had been used to prove an equal protection violation were in the selection of the jury venire and in the showing of statutory violations under Title VII.<sup>48</sup> Justice Powell asserted that the capital sentencing decision and the relationship of statistics to that decision were fundamentally different from the corresponding elements in the venire-selection<sup>49</sup> or Title VII cases.<sup>50</sup> He reasoned that “[i]n [venire-selection and Title VII] cases, the statistics related to fewer entities, and fewer variables were relevant to the challenged decisions” than in a capital sentencing case.<sup>51</sup> The majority noted that each capital punishment decision was made “by a petit jury selected from a properly constituted venire.”<sup>52</sup> Justice Powell stated further that each jury is unique in composition and that the Constitution mandated each jury to rest its decision on several factors that vary with each individual defendant and case. “Thus, the application of an inference drawn from the general statistics to a specific decision in a trial . . . [would not] be comparable to the application of an inference drawn from general statistics to a specific venire-selection or Title VII case.”<sup>53</sup>

Justice Powell discussed another difference between a capital punishment case and the venire-selection and Title VII cases. In the two latter contexts, Justice Powell reasoned that the factfinders have a chance to justify the statistical disparity because these decision-makers can be questioned about their motivation in decision-making.<sup>54</sup> In *McCleskey*, however, Justice Powell determined that the state had no similar opportunity, because jurors cannot be called “‘to testify to the motives and influences that led to their verdict.’”<sup>55</sup> Justice Powell also asserted that similar policy considerations prevented an inquisition into a prosecutor’s decision to seek the death penalty.<sup>56</sup> The majority stated that absent strong proof to

---

<sup>46</sup> *Id.* at 1767.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Bazemore v. Friday*, 106 S. Ct. 3000 (1986).

<sup>50</sup> *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977).

<sup>51</sup> *McCleskey*, 107 S. Ct. at 1768.

<sup>52</sup> *Id.* at 1767.

<sup>53</sup> *Id.* at 1767-68.

<sup>54</sup> *Id.* at 1768.

<sup>55</sup> *Id.* (quoting *Chicago, B. & Q.R. Co. v. Babcock*, 204 U.S. 585, 593 (1907)).

<sup>56</sup> *Id.*

the contrary, "it [was] unnecessary to seek such a rebuttal, because a legitimate and unchallenged explanation for the decision was apparent from the record: [the defendant] committed an act for which the United States Constitution and Georgia law permit imposition of the death penalty."<sup>57</sup>

Justice Powell next declared that McCleskey's statistical evidence challenged decisions at the core of Georgia's criminal justice system.<sup>58</sup> He asserted that implementation of these laws required crucial discretionary judgments and that exceptionally clear evidence would be demanded to show that discretion had been abused.<sup>59</sup> The majority stated that the "unique nature of the decisions at issue in this case counsel[ed] against adopting such an inference from the disparities indicated by the Baldus study."<sup>60</sup> The majority thus held that the Baldus study was inadequate to compel an inference that racial prejudice affected the sentence imposed against McCleskey.<sup>61</sup>

Justice Powell then considered McCleskey's contention that the state as a whole violated the equal protection clause by adopting the capital punishment statute despite its alleged discriminatory application.<sup>62</sup> The Court dismissed this argument, asserting that "[f]or this claim to prevail, McCleskey would have to prove that the Georgia legislature enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect."<sup>63</sup> Justice Powell stated that the Court's decision in *Gregg v. Georgia*<sup>64</sup> demonstrated that the Georgia capital sentencing system could operate in a fair and neutral manner, especially in the absence of any evidence "that the Georgia legislature enacted the capital punishment statute to further a racially discriminatory purpose."<sup>65</sup> Justice Powell further reasoned that "McCleskey [had not] demonstrated that the legislature maintained its capital punishment statute because of the racially disproportionate impact."<sup>66</sup> The Court refused to infer a discriminatory purpose from the statute because of its determination that the legislature had legitimate reasons to adopt and main-

---

<sup>57</sup> *Id.* at 1769.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* (emphasis in original).

<sup>64</sup> 428 U.S. 153 (1976).

<sup>65</sup> *McCleskey*, 107 S. Ct. at 1769-70.

<sup>66</sup> *Id.* at 1770.



tain capital punishment.<sup>67</sup>

The Court next addressed the petitioner's claim that Georgia's capital sentencing system was cruel and unusual punishment prohibited by the eighth amendment. Justice Powell began by analyzing the precedents which set restrictions on capital punishment.<sup>68</sup> The majority also acknowledged the constitutionality of capital punishment.<sup>69</sup> The Court then discussed how the death penalty must be based on contemporary standards of decency<sup>70</sup> indicated by two sources: decisions of state legislatures<sup>71</sup> and decisions of juries.<sup>72</sup>

The Court was guided by *Furman v. Georgia*<sup>73</sup> and *Gregg v. Georgia*<sup>74</sup> in its eighth amendment analysis of Georgia's death penalty statute. In *Furman*, the statute at issue provided no basis "for determining in any particular case whether the death penalty imposed was proportionate to the crime."<sup>75</sup> *Gregg* addressed the issue left open in *Furman*—whether the death penalty for murder was violative of the eighth and fourteenth amendments under all circumstances.<sup>76</sup> The *Gregg* Court noted the long history of acceptance of the death penalty in both the United States and England.<sup>77</sup> In the aftermath of *Furman*, thirty-five states re-enacted the death penalty.<sup>78</sup> The Court in *Gregg* concluded that the decision of a jury to institute the death penalty was consistent with the intent of the Georgia legislature.<sup>79</sup>

The *Gregg* Court upheld the constitutionality of particular pro-

---

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

<sup>68</sup> *Id.* The Court's early eighth amendment cases examined the methods of execution to determine "'whether they were too cruel to pass constitutional muster.'" *Id.* (quoting *Gregg*, 428 U.S. at 170). See, e.g., *In re Kemmler*, 136 U.S. 436 (1890)(electrocution); *Wilkerson v. Utah*, 99 U.S. 130 (1879)(public shooting). The Court has also acknowledged that "punishment for crime should be graduated and proportioned to the offense." *Weems v. United States*, 217 U.S. 349, 378 (1910).

<sup>69</sup> *Trop v. Dulles*, 356 U.S. 86, 99 (1958).

<sup>70</sup> *McCleskey*, 107 S. Ct. at 1771.

<sup>71</sup> *Gregg*, 428 U.S. at 175.

<sup>72</sup> *Id.* See also *Enmund v. Florida*, 458 U.S. 782 (1982)(felony murder); *Coker v. Georgia*, 433 U.S. 584 (1977)(rape).

<sup>73</sup> 408 U.S. 238 (1972).

<sup>74</sup> 428 U.S. 153 (1976).

<sup>75</sup> *Furman*, 408 U.S. at 313.

<sup>76</sup> *Gregg*, 428 U.S. at 168.

<sup>77</sup> *Id.* at 179.

<sup>78</sup> *McCleskey*, 107 S. Ct. at 1771. Thirty-seven states now have capital punishment statutes that have been enacted since the Court decided *Furman*. *Id.* at n.23 (citing NAACP LEGAL DEFENSE & EDUCATIONAL FUND, DEATH ROW, U.S.A. 1 (Oct. 1, 1986)). Federal law authorizes capital punishment in cases of aircraft piracy if a death results. *Id.* (citing 49 U.S.C. § 1472 (i)(1)(b) (1974)).

<sup>79</sup> *Gregg*, 428 U.S. at 182.

cedures embodied in the Georgia punishment statute.<sup>80</sup> The majority explained that *Furman* required that in a situation in which discretion is given to a sentencing body considering the death penalty, that discretion must be limited to minimize the risk of "arbitrary and capricious action."<sup>81</sup> The new Georgia capital punishment system met the concerns raised in *Furman* with the following safeguards: the bifurcation of guilt and sentencing proceedings,<sup>82</sup> the narrowing of the class of murders subject to the death penalty,<sup>83</sup> allowing the defendant to introduce any relevant mitigating evidence,<sup>84</sup> and the requirement of an inquiry into the circumstances of the offense along with the propensities of the particular offender.<sup>85</sup> Thus, Justice Powell reasoned in *McCleskey* that although discretion still existed in the Georgia capital sentencing system, this discretion was effectively limited by objective criteria that avoided discriminatory application.<sup>86</sup> The majority asserted that the system's provision for an automatic appeal of a death sentence to the Georgia Supreme Court, aided by a detailed questionnaire,<sup>87</sup> added protection for a defendant because a determination was made as to whether the sentence was imposed under prejudice.<sup>88</sup> Furthermore, the Court concluded that the appeals process also required adequate evidence of whether statutory aggravating circumstances existed and whether the sentence was disproportionate to sentences imposed in similar murder cases.<sup>89</sup>

The Court observed that further restrictions on capital sentencing decisions had been imposed in cases since *Gregg*.<sup>90</sup> These cases required the invalidation of a mandatory sentencing system,<sup>91</sup> the "narrow[ing of] the class of murderers subject to capital punishment,"<sup>92</sup> and the provision of specific guidelines to the sentencer.<sup>93</sup> Justice Powell also noted that sentencers were required to consider any mitigating factors or characteristics of the offense or the

---

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 189.

<sup>85</sup> *Id.*

<sup>86</sup> *McCleskey*, 107 S. Ct. at 1772.

<sup>87</sup> *Id.* The trial judge answers a questionnaire about the trial, including questions as to "the quality of the defendant's representation [and] whether race played a role in the trial."

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Woodson v. North Carolina*, 428 U.S. 280 (1976).

<sup>92</sup> *Gregg*, 428 U.S. at 153.

<sup>93</sup> *Proffitt v. Florida*, 428 U.S. 242, 253 (1976).

defendant.<sup>94</sup>

Justice Powell then discussed *Godfrey v. Georgia*,<sup>95</sup> in which the Court evaluated the application of Georgia's capital sentencing statute in particular cases.<sup>96</sup> According to Justice Powell, the Court in *Godfrey* held that Georgia's interpretation of the statute had "vitiated the role of the aggravating circumstance in guiding the jury's sentencing discretion."<sup>97</sup>

Justice Powell described how objective community standards had demonstrated a consensus that the death penalty was disproportionately applied to certain classes of cases.<sup>98</sup> He also summarized the constitutional spectrum of discretion a jury has in imposing the death penalty.<sup>99</sup> First, a required threshold of rational criteria must be found before the death penalty may be imposed.<sup>100</sup> Second, states cannot limit the sentencer's consideration of any relevant mitigating factor.<sup>101</sup> Justice Powell then asserted that McCleskey's argument was not one of disproportionality in the traditional sense and that his sentence was proportionate to the crime of murder.<sup>102</sup>

Justice Powell rejected the contention that McCleskey's case differed from other cases in which defendants had received the death penalty.<sup>103</sup> On appeal, the Georgia Supreme Court had found that the sentence in McCleskey's case was not disproportionate to other cases of capital punishment in Georgia.<sup>104</sup> The majority agreed with this analysis. When sentencing discretion has been adequately controlled, Justice White argued in *Pulley v. Harris*, such a proportionality review was not even required.<sup>105</sup>

Justice Powell reasoned that McCleskey could not prove a violation of the eighth amendment by showing that similar defendants

---

<sup>94</sup> *McCleskey*, 107 S. Ct. at 1773 (citing *Lockett v. Ohio*, 438 U.S. 588, 604 (1978)(plurality opinion)).

<sup>95</sup> 446 U.S. 420 (1980).

<sup>96</sup> *McCleskey*, 107 S. Ct. at 1773.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* See also *Ford v. Wainwright*, 106 S. Ct. 2595 (1986); *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977).

<sup>99</sup> *McCleskey*, 107 S. Ct. at 1774.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* (citing *Pulley v. Harris*, 465 U.S. 37 (1984)). McCleskey did "not deny that he committed a murder in the course of a planned robbery, a crime for which the Court has determined that the death penalty constitutionally may be imposed." *Id.* (citing *Gregg*, 428 U.S. at 187). McCleskey's argument was that his sentence was disproportionate to sentences in other murder cases. *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *McCleskey v. State*, 245 Ga. 108, 263 S.E. 2d 146 (1980).

<sup>105</sup> *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984).

did not receive the death penalty.<sup>106</sup> The majority stated that no precedent suggested that providing an individual defendant leniency is violative of the Constitution.<sup>107</sup> Justice Powell argued that because McCleskey's sentence was given within Georgia sentencing procedures that channel discretion with consideration of the individual circumstances of the crime and the defendant, the Court could presume McCleskey's sentence was not imposed "wantonly and freakishly"<sup>108</sup> and therefore violative of the eighth amendment.<sup>109</sup>

Justice Powell then addressed McCleskey's challenge "that the Georgia capital punishment system . . . [was] arbitrary and capricious in application, and [was] therefore . . . excessive, because racial considerations may influence capital sentencing decisions in Georgia."<sup>110</sup> First, Justice Powell examined the possible interpretations of the Baldus study.<sup>111</sup> The majority observed that Professor Baldus did not contend that his study proved race entered into *all* capital sentencing decisions, but only that there existed *some* likelihood that the race factor entered into *some* capital sentencing decisions.<sup>112</sup> Justice Powell acknowledged a risk that racial prejudice could influence a jury's decision along with other forms of prejudice.<sup>113</sup> He believed the proper question was whether this risk was so great that it was constitutionally impermissible.<sup>114</sup> Although McCleskey argued that the Baldus study demonstrated the requisite likelihood of racial prejudice, the majority declined to follow this view.<sup>115</sup>

Justice Powell asserted that the Court, in recognizing the risk that racial considerations may enter the criminal justice process, has made continuous efforts to remove racial prejudice from the criminal justice system.<sup>116</sup> Justice Powell stated that the right to trial by jury was both a cornerstone of the whole criminal justice system<sup>117</sup> and was one of the fundamental protections against racial prejudice.<sup>118</sup> More specifically, the Court argued that a capital sentenc-

---

<sup>106</sup> *McCleskey*, 107 S. Ct. at 1774.

<sup>107</sup> *Id.*

<sup>108</sup> *Gregg*, 428 U.S. at 207.

<sup>109</sup> *McCleskey*, 107 S. Ct. at 1775.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 1776.

<sup>118</sup> *Id.*

ing jury had the ability to give an impartial expression of the community's beliefs on the ultimate question—the death penalty.<sup>119</sup>

Justice Powell next noted that each individual juror contributed a wide variety of experiences to the jury's collective deliberations, some of which were impossible to ascertain.<sup>120</sup> Thus, he observed that some jury decisions were difficult to explain.<sup>121</sup> Justice Powell argued that this inherent lack of predictability did not warrant destruction of the system.<sup>122</sup> Rather, he reasoned that "the jury's function was to make . . . the uniquely human judgments that . . . [add] 'equity and flexibility to our criminal justice system.'"<sup>123</sup>

Justice Powell reasoned that McCleskey's argument that the Constitution condemned the discretionary characteristics of the Georgia capital sentencing system was "antithetical to the fundamental role of discretion in our criminal justice system."<sup>124</sup> Justice Powell asserted that discretion gave the criminal defendant substantial benefits, including not returning a conviction or imposing a lesser sentence.<sup>125</sup> The majority further stated that although decisions against a defendant's interest are reversible, "discretionary exercises of leniency are final and unreviewable."<sup>126</sup> He then noted similar benefits that were derived from prosecutorial discretion.<sup>127</sup> Justice Powell stated that a capital punishment system that did not allow for discretionary acts of leniency would be untenable.<sup>128</sup>

Justice Powell believed that "at most the Baldus study indicat[ed] a discrepancy . . . correlat[ing] with race."<sup>129</sup> Justice Powell reasoned that although seeming disparities were an inevitable part of our criminal justice system, the discrepancy indicated by the Baldus study was not similar to the major systemic defects noted in *Furman*.<sup>130</sup> Justice Powell next asserted that there existed no perfect procedure for deciding in which cases the death penalty should be imposed.<sup>131</sup> Justice Powell reasserted that even with these imperfections, if the process has been adequately insulated with safeguards to ensure fairness, the discretionary elements would not be

---

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

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 1777.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* (quoting H. KLAVER AND H. ZEISEL, *THE AMERICAN JURY* 498 (1966)).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

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

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 1777-78.

<sup>131</sup> *Id.* at 1778.

removed simply because some results were unexplained.<sup>132</sup> Justice Powell stated that when considered along with the safeguards that exist to reduce racial prejudice in the process, the fundamental value of a jury trial, and the benefits of discretion to the criminal defendant, the Baldus study had not shown "a constitutionally significant risk of racial bias affecting the Georgia capital-sentencing process."<sup>133</sup>

Justice Powell concluded his opinion by addressing two final concerns. First, he reasoned that McCleskey's claim would throw "principles that underlie our entire criminal justice system" into serious question.<sup>134</sup> Justice Powell feared that if McCleskey's claim—"that racial bias has impermissibly tainted the capital sentencing decision"—was honored, similar claims would be asserted concerning other types of punishment.<sup>135</sup> Furthermore, Justice Powell posited that McCleskey's claim could be extended to other claims based on other unexplained discrepancies, such as membership in other racial groups or gender.<sup>136</sup> The majority contended that statistical disparities that correlate with race or sex could be applied to a variety of actors in the criminal justice system.<sup>137</sup> Justice Powell stated that "[t]he Constitution [did] not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment."<sup>138</sup>

Second, Justice Powell believed that McCleskey's arguments were more appropriate for legislative consideration.<sup>139</sup> He stated that it was neither the duty nor the right of the Court to determine the appropriate punishments for crimes.<sup>140</sup> The majority observed that legislatures are better suited to analyze the usefulness of statistical studies in terms of their particular localities.<sup>141</sup> Justice Powell explained that "the duty of the courts was to determine, on a case-by-case basis, whether the laws were applied consistently with the Constitution."<sup>142</sup> Justice Powell agreed with the district court and the court of appeals that in this case the law of Georgia was properly

---

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 1779.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 1780.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 1781.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

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

applied.<sup>143</sup>

#### B. JUSTICE BRENNAN'S DISSENT

Justice Brennan began by reasserting his opinion "that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments."<sup>144</sup> Justice Brennan then stated that even if he did not hold that position, *McCleskey* had demonstrated the irrationality in capital sentencing that has long been condemned in the Court's eighth amendment jurisprudence.<sup>145</sup> Justice Brennan contended that the majority's reasoning for discounting the evidence presented in the Baldus study could not justify ignoring the force of the study.<sup>146</sup>

Justice Brennan first emphasized his belief that the Court's assertion that the defendant could not prove the influence of racial prejudice on the sentencing decision in his case or in any other individual case was not probative in considering the eighth amendment claim which he raised.<sup>147</sup> Justice Brennan believed the proper concern was with the risk of the imposition of an arbitrary sentence, rather than with proof of an arbitrary sentence in a specific case.<sup>148</sup> Justice Brennan stated that "this emphasis on risk acknowledge[d] the difficulty of . . . determining the jury's motivation in a . . . [particular] case, . . . [while it also showed] that [the] concern for arbitrariness focuses on the rationality of the system as a whole."<sup>149</sup> Justice Brennan next analyzed how risk had been the relevant consideration in cases in which death sentences were struck down as a result of ambiguous definitions of heinous crimes or in which mandatory death sentences were imposed.<sup>150</sup> Justice Brennan reasoned that the Court has required a defendant to establish that the system under which a sentence was rendered posed a significant risk that impermissible considerations infected the process.<sup>151</sup> Justice Brennan noted that *McCleskey* presented, for the first time, empirical evidence, rather than mere speculation, to show that the system

---

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* (Brennan, J., dissenting); See *supra* note 37 for alignment of justices.

<sup>145</sup> *Id.* at 1782 (Brennan, J., dissenting).

<sup>146</sup> *Id.* at 1783 (Brennan, J., dissenting).

<sup>147</sup> *Id.* (Brennan, J., dissenting).

<sup>148</sup> *Id.* (Brennan, J., dissenting).

<sup>149</sup> *Id.* (Brennan, J., dissenting).

<sup>150</sup> *Id.* (Brennan, J., dissenting).

<sup>151</sup> *Id.* at 1783-84 (Brennan, J., dissenting) (citing *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980)).

actually operated in an unconstitutional manner.<sup>152</sup>

Justice Brennan next provided a detailed analysis of the Baldus study.<sup>153</sup> He followed this analysis with a discussion of the forcefulness and accuracy of the multiple-regression analysis, especially the one used in the Baldus study.<sup>154</sup> Justice Brennan then stated that in determining what risk would be acceptable, courts must take into consideration the complete finality of the death sentence.<sup>155</sup> Justice Brennan reasoned that because courts will not convict a defendant "if the chance of error is simply less likely than not," courts "should not be willing to take a person's life if the chance that his death sentence was irrationally imposed is *more* likely than not."<sup>156</sup> Justice Brennan concluded that racially prejudiced sentencing, because it is irrational, should be condemned in eighth amendment jurisprudence.<sup>157</sup>

Justice Brennan proposed that the Baldus study must be considered in conjunction with the history of the racially biased criminal justice process in Georgia.<sup>158</sup> Justice Brennan noted that since colonial times, the criminal law in Georgia differentiated between whites and blacks.<sup>159</sup> Justice Brennan then observed that the Court "had

<sup>152</sup> See *Roberts v. Louisiana*, 428 U.S. 325, 334-35 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976).

<sup>153</sup> *McCleskey*, 107 S. Ct. at 1784 (Brennan, J., dissenting).

<sup>154</sup> *Id.* at 1785-86 (Brennan, J., dissenting). According to Justice Brennan, the Court in *Bazemore v. Friday*, 106 S. Ct. 3000 (1986), held that:

a multiple-regression analysis need not include every conceivable variable to establish a party's case, as long as it includes those variables that account for the major factors that are likely to influence decisions. In [*McCleskey*], Professor Baldus in fact conducted additional regression analyses in response to criticisms and suggestions by the District Court, all of which . . . confirmed the study's original conclusions.

*McCleskey*, 107 S. Ct. at 1785 (Brennan, J., dissenting).

<sup>155</sup> *McCleskey*, 107 S. Ct. at 1786 (Brennan, J., dissenting). "The Baldus study indicated that, after taking into consideration 230 nonracial factors that could legitimately influence a sentencer, the jury more likely than not would have spared McCleskey's life had his victim been black." *Id.* at 1784 (Brennan, J., dissenting). The study separates:

(1) cases in which the jury exercises virtually no discretion because the strength or weakness of the aggravating factors usually suggests that only one outcome is appropriate; and (2) cases reflecting an "intermediate" level of aggravation, in which the jury has considerable discretion in choosing a sentence. McCleskey's case falls into the intermediate range; in such cases, death is imposed in 34% of the white victim . . . [cases] and in 14% of the black victim . . . [cases], a difference of 139% in the rate of imposition of the death penalty. *Id.* at 1786 (Brennan, J., dissenting).

<sup>156</sup> *Id.* at 1786 (Brennan, J., dissenting) (emphasis added).

<sup>157</sup> *Id.* (Brennan, J., dissenting).

<sup>158</sup> *Id.* (Brennan, J., dissenting).

<sup>159</sup> *Id.* (Brennan, J., dissenting). For many years, the criminal law in Georgia "expressly differentiated between crimes committed by and against blacks and whites, distinctions whose lineage traced back to the time of slavery. During the colonial period, black slaves who killed whites in Georgia, regardless of whether in self-defense or in defense of another, were automatically executed." *Id.* (Brennan, J., dissenting) (citing A.



invalidated portions of the Georgia capital sentencing system 3 times over the past 15 years.”<sup>160</sup> Justice Brennan observed that at least one justice in each of these decisions discussed the spectre of racial prejudice.<sup>161</sup> Justice Brennan next explained that his historical view was not meant to force the state to make amends “for past transgressions, . . . but that it would be unrealistic to ignore the influence of history in assessing the implications of McCleskey’s evidence.”<sup>162</sup> Justice Brennan found that the majority’s acknowledgement of continued efforts to eradicate racial prejudice did not show the elimination of the problem, but, rather, its persistence.<sup>163</sup>

Justice Brennan stated that “[t]he discretion prosecutors and jurors in the Georgia capital-sentencing system created opportunities” for racial prejudice to infect the system.<sup>164</sup> Justice Brennan noted that no guidelines existed in Georgia governing “prosecutorial decisions to seek the death penalty,” nor were jurors provided with a “list of aggravating or mitigating factors” or with instructions as to how to apply them.<sup>165</sup> Thus, Justice Brennan concluded that “[t]he Georgia capital sentencing system . . . provide[d] considerable opportunity for racial considerations, however subtle and unconscious, to influence charging and sentencing decisions.”<sup>166</sup>

Justice Brennan next asserted that the majority misinterpreted existing eighth amendment precedents.<sup>167</sup> He stated that McCleskey’s evidence was an exercise in “moral judgment, not a mechanical statistical analysis.”<sup>168</sup> Justice Brennan reiterated that the death penalty required a high degree of rationality due to its irrevocable nature.<sup>169</sup> The dissent reasoned that “[a] capital sentencing system

---

HIGGINBOTHAM, IN THE MATTER OF COLOR: RACE IN THE AMERICAN LEGAL PROCESS 256 (1978)).

<sup>160</sup> *Id.* at 1787 (Brennan, J., dissenting).

<sup>161</sup> *Id.* (Brennan, J., dissenting).

<sup>162</sup> *Id.* at 1788 (Brennan, J., dissenting). See *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Coker v. Georgia*, 433 U.S. 584 (1977); *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>163</sup> *McCleskey*, 107 S. Ct. at 1787 (Brennan, J., dissenting). The cases reflect a variety of situations in which racial considerations influence criminal proceedings. See, e.g., *Batson v. Kentucky*, 106 S. Ct. 1712 (1986) (peremptory challenges); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (selection of the grand jury); *Wayte v. United States*, 470 U.S. 598 (1985) (in the exercise of prosecutorial discretion); *Whitus v. Georgia*, 385 U.S. 545 (1967) (selection of the petit jury).

<sup>164</sup> *McCleskey*, 107 S. Ct. at 1788 (Brennan, J., dissenting).

<sup>165</sup> *Id.* (Brennan, J., dissenting).

<sup>166</sup> *Id.* at 1789 (Brennan, J., dissenting).

<sup>167</sup> *Id.* (Brennan, J., dissenting).

<sup>168</sup> *Id.* (Brennan, J., dissenting).

<sup>169</sup> *Id.* (Brennan, J., dissenting).

in which race more likely than not play[ed] a role" did not meet the constitutional standard of rationality.<sup>170</sup>

Justice Brennan next analyzed the four reasons cited by the majority for not accepting McCleskey's evidence: "the desirability of discretion, . . . the existence of statutory safeguards against abuse of that discretion, the potential consequences for broader challenges to criminal sentencing, and an understanding of the contours of the judicial role."<sup>171</sup> Justice Brennan stated that although these concerns required careful deliberation, "they do not justify rejecting evidence as convincing as McCleskey . . . presented."<sup>172</sup>

Justice Brennan asserted that reliance on race is antithetical to the very reasons for granting sentencing discretion.<sup>173</sup> "Discretion is a means, not an ends." Thus, a "[f]ailure to conduct . . . an individualized . . . inquiry 'treats all . . . [defendants] not as unique individualized human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty.'"<sup>174</sup> Justice Brennan asserted that "decisions influenced by race rest, in part, on a categorical assessment of the worth of human beings according to color" that disregards the individual qualities of the defendant.<sup>175</sup> He posited that an increased willingness to impose the death sentence on black defendants or a diminished willingness to impose the death penalty in crimes in which blacks are victims reflected a devaluation of the lives of blacks.<sup>176</sup> Justice Brennan next reasoned that if a higher risk that race plays a role is required before action is taken, the goals of discretion will be undermined.<sup>177</sup>

Justice Brennan acknowledged that a presumption existed "that actors in the criminal justice system exercise their discretion in responsible fashion, [so courts] do not automatically infer that sentencing patterns that do not comport with ideal rationality [are improper]."<sup>178</sup> Justice Brennan asserted that such a presumption, however, is rebuttable.<sup>179</sup> He concluded that the majority had im-

---

<sup>170</sup> *Id.* (Brennan, J., dissenting).

<sup>171</sup> *Id.* at 1789-90 (Brennan, J., dissenting).

<sup>172</sup> *Id.* at 1790 (Brennan, J., dissenting).

<sup>173</sup> *Id.* (Brennan, J., dissenting).

<sup>174</sup> *Id.* (Brennan, J., dissenting) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).

<sup>175</sup> *Id.* (Brennan, J., dissenting).

<sup>176</sup> *Id.* (Brennan, J., dissenting).

<sup>177</sup> *Id.* (Brennan, J., dissenting). Justice Blackmun stated that discretion is granted to treat each defendant as an individual. This goal is undermined when defendants are treated as indistinguishable members of a class of criminals.

<sup>178</sup> *Id.* (Brennan, J., dissenting).

<sup>179</sup> *Id.* (Brennan, J., dissenting).

posed a crippling burden of proof on defendants in order to rebut this presumption and present the need for individualized sentencing decisions. Justice Brennan stated that the majority had rejected the most sophisticated capital sentencing analysis ever done and one which demonstrated that race was a likely factor in sentencing decisions.<sup>180</sup> Thus, Justice Brennan reasoned that a rebuttable presumption had been turned into a conclusive one.<sup>181</sup>

Justice Brennan next considered the Court's assertion that McCleskey's evidence was insufficient in light of the safeguards designed to reduce bias in the system which was upheld in *Gregg*.<sup>182</sup> Although the *Gregg* Court did not grant permanent approval to the Georgia sentencing system, it assumed that the safeguards were adequate in the absence of evidence to the contrary.<sup>183</sup> Justice Brennan asserted that the empirical nature of the Baldus study prevented the Court from relying on the statutory safeguards to reject McCleskey's evidence.<sup>184</sup> Justice Brennan posited that the Baldus study showed that the effectiveness of these safeguards cited by the majority was the very subject at issue.<sup>185</sup>

Justice Brennan next attacked the majority's fear that acceptance of McCleskey's evidence would lead to widespread challenges throughout the criminal justice 'system'.<sup>186</sup> He proposed that the prospect that more widespread sentencing abuse in the criminal justice system than McCleskey had shown may have occurred was discouraging but that it did not justify complete abandonment of the Court's judicial role.<sup>187</sup> Justice Brennan acknowledged that any humanly administrated penalty system would exhibit some imperfection, but the Court, in rejecting McCleskey's evidence, failed to consider the qualitatively different nature of the death penalty, the repugnance of racial discrimination, and the unprecedented acuity

---

<sup>180</sup> *Id.* at 1790-91 (Brennan, J., dissenting).

<sup>181</sup> *Id.* at 1791 (Brennan, J., dissenting). See *Batson v. Kentucky*, 106 S. Ct. 1712 (1986). In *Batson*, the Court showed that the presumption that peremptory challenges were exercised in a neutral manner was rebuttable.

<sup>182</sup> *McCleskey*, 107 S. Ct. at 1791 (Brennan, J., dissenting). Justice Brennan relied on *Gregg v. Georgia*, 428 U.S. 153, 226 (1976), in which "the Court rejected a facial challenge to the Georgia capital sentencing statute, describing such a challenge as based 'simply an assertion of lack of faith' that the system could operate in a fair manner." *McCleskey*, 107 S. Ct. at 1791 (Brennan, J., dissenting) (quoting *Gregg*, 428 U.S. at 226 (White, J., concurring)).

<sup>183</sup> *McCleskey*, 107 S. Ct. at 1791 (Brennan, J., dissenting).

<sup>184</sup> *Id.* (Brennan, J., dissenting).

<sup>185</sup> *Id.* (Brennan, J., dissenting).

<sup>186</sup> *Id.* (Brennan, J., dissenting).

<sup>187</sup> *Id.* (Brennan, J., dissenting).

and strength of the Baldus study.<sup>188</sup>

Justice Brennan reiterated the qualitative difference between the death penalty and other forms of punishment.<sup>189</sup> He analyzed the different interests of the state and the defendant in the death penalty context, stating that "[t]he marginal benefits accruing to the state from obtaining the death penalty rather than life imprisonment are considerably less than the marginal difference to the defendant between death and life in prison."<sup>190</sup> As a result of this unique punishment, Justice Brennan reasoned that "the degree of arbitrariness that may be adequate to render the death penalty 'cruel and unusual' punishment may not be adequate to invalidate lesser penalties."<sup>191</sup> Thus, Justice Brennan determined that the majority's fear of the complete destruction of our legal system was without a sound base.<sup>192</sup>

Justice Brennan next addressed the majority's fear that the acceptance of McCleskey's claim would render all sentencing invalid "because . . . a correlation might be demonstrated between sentencing outcomes and other personal characteristics."<sup>193</sup> Justice Brennan believed that such a worry was inconsequential to a determination of whether punishment was "cruel and unusual."<sup>194</sup> Justice Brennan stated that "we have expressed a moral commitment" that race would not be a basis for distributing burdens and benefits.<sup>195</sup> Thus, Justice Brennan was disturbed by the possibility that the "decision to impose the death penalty could be influenced by race . . . and evidence that race may play even a modest role in . . . [the imposition of] a death sentence should be enough to characterize that sentence as 'cruel and unusual.'"<sup>196</sup>

Justice Brennan next stated that an irrelevant factor, such as hair color, at least theoretically, could be associated with sentencing results, but the evaluation of such evidence must be informed by both history and experience.<sup>197</sup> Justice Brennan rejected the Court's fear of the expansive ramifications based upon a holding in favor of McCleskey because of the outstanding quality of the Baldus study, an action which he believed would establish a "stringent stan-

---

<sup>188</sup> *Id.* at 1792 (Brennan, J., dissenting).

<sup>189</sup> *Id.* (Brennan, J., dissenting).

<sup>190</sup> *Id.* (Brennan, J., dissenting).

<sup>191</sup> *Id.* (Brennan, J., dissenting).

<sup>192</sup> *Id.* (Brennan, J., dissenting).

<sup>193</sup> *Id.* (Brennan, J., dissenting).

<sup>194</sup> *Id.* (Brennan, J., dissenting).

<sup>195</sup> *Id.* (Brennan, J., dissenting).

<sup>196</sup> *Id.* (Brennan, J., dissenting)(emphasis in original).

<sup>197</sup> *Id.* at 1792-93 (Brennan, J., dissenting).

dard for statistical evidence.”<sup>198</sup> Justice Brennan concluded that despite the Court’s acceptance of the validity of *McCleskey*’s evidence, it was willing to let the death sentence stand because of a baseless fear that the Court could not successfully establish standards for lesser crimes.<sup>199</sup>

Justice Brennan finally considered the majority’s worry that the Court was usurping the legislatures’ role in constructing and controlling capital punishment.<sup>200</sup> After acknowledging the importance of a sparing use of constitutional intervention,<sup>201</sup> Justice Brennan stated that capital punishment is the most powerful act a state can perform and, therefore, deserves close scrutiny.<sup>202</sup> Justice Brennan posited that this objective must be upheld even when considering those individuals “society finds most . . . opprobrious.”<sup>203</sup> Justice Brennan asserted that the courts’ duty was to protect such individuals in order to prevent the majoritarian view from trampling over constitutional protections and to fulfill the goal of the effective separation of powers.<sup>204</sup>

Justice Brennan concluded his dissent in *McCleskey* by discussing the historical efforts of the Court to eradicate racial prejudice from society.<sup>205</sup> He declared that the rejection of *McCleskey*’s evidence sent a disturbing message to a society that had formally repudiated racism.<sup>206</sup>

### C. JUSTICE BLACKMUN’S DISSENT

Justice Blackmun wrote a separate dissent to address *McCleskey*’s fourteenth amendment claim.<sup>207</sup> Justice Blackmun first remarked “that racial discrimination is fundamentally at odds with our constitutional guarantee of equal protection.”<sup>208</sup> Justice Blackmun next noted that the legislative history of the fourteenth amendment revealed that discriminatory enforcement of a state’s criminal laws was a matter of concern for the drafters of the amendment.<sup>209</sup>

---

<sup>198</sup> *Id.* at 1793 (Brennan, J., dissenting).

<sup>199</sup> *Id.* (Brennan, J., dissenting).

<sup>200</sup> *Id.* (Brennan, J., dissenting).

<sup>201</sup> *Id.* (Brennan, J., dissenting).

<sup>202</sup> *Id.* (Brennan, J., dissenting).

<sup>203</sup> *Id.* (Brennan, J., dissenting).

<sup>204</sup> *Id.* at 1794 (Brennan, J., dissenting). See Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 25 (1936).

<sup>205</sup> *McCleskey*, 107 S. Ct. at 1794. (Brennan, J., dissenting).

<sup>206</sup> *Id.* (Brennan, J., dissenting).

<sup>207</sup> *Id.* at 1794-95 (Blackmun, J., dissenting); see *supra* note 37.

<sup>208</sup> *McCleskey*, 107 S. Ct. at 1795 (Blackmun, J., dissenting).

<sup>209</sup> *Id.* (Blackmun, J., dissenting).

Justice Blackmun also emphasized the qualitatively different nature of the death penalty and other forms of punishment.<sup>210</sup> He was disturbed that instead of applying a more stringent standard for scrutiny of capital punishment, the Court had applied "a *lesser* standard of scrutiny under the Equal Protection Clause."<sup>211</sup>

Justice Blackmun believed the majority's assertion—that because McCleskey was convicted of murder, his fourteenth amendment claim was weakened—was inconsistent with the Court's precedents.<sup>212</sup> Justice Blackmun noted that the invalidation of a criminal conviction on constitutional grounds does not necessarily preclude retrial and resentencing by the state.<sup>213</sup> Thus, Justice Blackmun argued that invalidation would be applicable with the *per se* reversal rule in cases involving racial discrimination.<sup>214</sup> Therefore, a conviction does not suggest that discrimination did not impermissibly enter the capital sentencing process.<sup>215</sup>

Justice Blackmun proposed that the majority's "reliance on legitimate interests underlying the Georgia legislature's enactment of its capital punishment statute was inappropriate."<sup>216</sup> He stated that such considerations were relevant if the case involved a facial challenge to a statute but were irrelevant in a consideration of how the statute had been applied.<sup>217</sup>

Justice Blackmun stated that "[i]n analyzing an equal protection claim, a court must first determine the nature of the claim and the responsibilities of the state actors involved to determine what showing is required for the establishment of a *prima facie* case."<sup>218</sup> He asserted that "[t]he Court treat[ed] the case as if it [were] limited to challenges to the actions of two specific decision-making bodies—the petit jury and the state legislature," a restriction which allowed the Court to distinguish McCleskey's case from other cases in which statistical evidence provided a framework for review.<sup>219</sup> Justice Blackmun contended that McCleskey's case did fit into this framework. He also focused on the decisions that were made by the pros-

---

<sup>210</sup> *Id.* at 1796 (Blackmun, J., dissenting).

<sup>211</sup> *Id.* (Blackmun, J., dissenting) (emphasis in original).

<sup>212</sup> *Id.* (Blackmun, J., dissenting). See, e.g., *Rose v. Mitchell*, 443 U.S. 545, 559 (1978); *Whitus v. Georgia*, 385 U.S. 545, 549-50 (1967).

<sup>213</sup> *McCleskey*, 107 S. Ct. at 1796 (Blackmun, J., dissenting).

<sup>214</sup> *Id.* (Blackmun, J., dissenting).

<sup>215</sup> *Id.* at 1796-97 (Blackmun, J., dissenting).

<sup>216</sup> *Id.* at 1797 (Blackmun, J., dissenting).

<sup>217</sup> *Id.* (Blackmun, J., dissenting).

<sup>218</sup> *Id.* (Blackmun, J., dissenting).

<sup>219</sup> *Id.* (Blackmun, J., dissenting).

ecutor, who is the primary actor in a state criminal proceeding.<sup>220</sup> Justice Blackmun stated that this post-conviction decision-making period was a juncture in the proceeding in which the evidence of racial factors was especially strong.<sup>221</sup> Justice Blackmun noted that "a criminal defendant alleging an equal protection violation must prove the existence of purposeful discrimination."<sup>222</sup> Justice Blackmun believed that once a defendant established a *prima facie* case, the burden shifted to the prosecution to rebut that case.<sup>223</sup>

Justice Blackmun next argued that McCleskey met the three-prong test for establishing a *prima facie* case set out in *Casteneda v. Partida*:<sup>224</sup> the defendant must show that he was a member of a distinct group singled out for differential treatment; he must show "a substantial degree of differential treatment"; and he must show that "the allegedly discriminatory procedure is susceptible to abuse or is not racially neutral."<sup>225</sup>

Justice Blackmun asserted that McCleskey easily met the requirements of the first prong of the test because "[t]he Baldus study demonstrated that black persons are a distinct group that are singled out for differential treatment in the Georgia capital sentencing system."<sup>226</sup> Justice Blackmun noted not only that cases involving a white victim, regardless of the race of the offender, lead to more death penalties, but also that black defendants were more likely than white defendants to receive the death penalty.<sup>227</sup>

Under the second prong of the test, Justice Blackmun addressed the question of when the risk of race-based differential treatment becomes constitutionally unacceptable.<sup>228</sup> Justice Blackmun emphasized that the Baldus study showed systematic disparities in the infliction of the death penalty based on the race of the victim and the defendant, even after allowing for the presence of other factors that may affect capital punishment decisions.<sup>229</sup> Jus-

---

<sup>220</sup> *Id.* at 1798 (Blackmun, J., dissenting).

<sup>221</sup> *Id.* (Blackmun, J., dissenting). Justice Blackmun refers to evidence indicating prosecutors disproportionately seek the penalty phase for black defendants. Transcript of Federal Habeas Corpus Hearing 894-926.

<sup>222</sup> *McCleskey*, 107 S. Ct. at 1798 (Blackmun, J., dissenting) (citing *Washington v. Davis*, 426 U.S. 229, 239-40 (1976); *Whitus v. Georgia*, 385 U.S. 545, 550 (1967)).

<sup>223</sup> *McCleskey*, 107 S. Ct. at 1798 (Blackmun, J., dissenting).

<sup>224</sup> 430 U.S. 482, 494 (1977). This test was also discussed in *Batson v. Kentucky*, 106 S. Ct. 1712 (1986).

<sup>225</sup> *McCleskey*, 107 S. Ct. at 1798-99 (Blackmun, J., dissenting).

<sup>226</sup> *Id.* at 1799 (Blackmun, J., dissenting).

<sup>227</sup> *Id.* (Blackmun, J., dissenting).

<sup>228</sup> *Id.* (Blackmun, J., dissenting).

<sup>229</sup> *Id.* at 1799-800 (Blackmun, J., dissenting). McCleskey established that because he was charged with killing a white person, he was 4.3 times as likely to be sentenced to

tice Blackmun declared that:

[t]he most persuasive evidence of the constitutionally significant effect of racial factors in the Georgia capital-sentencing system was McCleskey's proof that the race of the victim was more important in explaining the imposition of a death sentence than the factor of whether the defendant was a "prime mover" in the homicide.<sup>230</sup>

Similarly, the race-of-the-victim factor is nearly as crucial as the statutory aggravating circumstance, whether the defendant had a prior record of a conviction for a capital crime.<sup>231</sup>

Justice Blackmun next examined the evidence in McCleskey's case, focusing on the prosecutor's decision to seek the death penalty. He argued "that McCleskey established that the race of the victim is an especially significant factor at the point where the defendant has been convicted of murder . . . ."<sup>232</sup> At this point in the process, "the prosecutor must choose whether to proceed to the penalty phase of the trial and create the possibility that a death sentence may be imposed or to accept the imposition of a sentence of life imprisonment."<sup>233</sup> Justice Blackmun found the evidence presented by the defendant to be statistically significant to show that racial factors had an adverse effect.<sup>234</sup>

Justice Blackmun posited that McCleskey had fulfilled the third and final prong of the *Casteneda* test by showing the susceptibility to abuse of the process by which the state decided both to seek a death penalty in his case and pursue that sentence throughout the prosecution.<sup>235</sup> Justice Blackmun observed that the assistant district attorneys were given no guidelines as to how to proceed at any particular stage of the prosecution.<sup>236</sup> Justice Blackmun also observed the absence of guidelines to suggest when to "seek an indictment for murder as opposed to a lesser charges," when to accept a plea bargain, and when to seek the death penalty.<sup>237</sup> Justice Blackmun stressed that all of these decisions were left to the complete

---

death as he would have been had he been charged with killing a black person. *Id.* at 1800 (Blackmun, J., dissenting). See Baldus, *supra* note 28, at 707-09.

<sup>230</sup> *Id.* at 1800 (Blackmun, J., dissenting).

<sup>231</sup> *Id.* (Blackmun, J., dissenting).

<sup>232</sup> *Id.* (Blackmun, J., dissenting).

<sup>233</sup> *Id.* (Blackmun, J., dissenting). "The state-wide statistics indicated that black defendant/white victim cases advanced to the penalty trial at nearly five times the rate of the black defendant/black victim cases (70% v. 15%), and over three times the rate of white defendant/black victim cases (70% v. 19%)." *Id.* (Blackmun, J., dissenting). See Baldus, *supra* note 28, at 707-09.

<sup>234</sup> *McCleskey*, 107 S. Ct. at 1801 (Blackmun, J., dissenting).

<sup>235</sup> *Id.* (Blackmun, J., dissenting).

<sup>236</sup> *Id.* (Blackmun, J., dissenting).

<sup>237</sup> *Id.* (Blackmun, J., dissenting).



discretion of the assistant district attorneys, who, in turn, informed the district attorney of their decisions.<sup>238</sup>

Justice Blackmun declared that this evidence demonstrated that at every stage the assistant district attorney exercised a great deal of discretion.<sup>239</sup> He observed that the sole effort to obtain consistency in the decision to seek the death penalty consisted of the district attorney's periodic pulling of files to check on the progress of cases.<sup>240</sup> The assistant district attorneys were not required to report why they decided whether to seek the death penalty.<sup>241</sup> Justice Blackmun discussed several factors that the district attorney thought relevant to the decision to seek the death penalty<sup>242</sup> and also noted that the death penalty was not sought in every case in which statutory aggravating circumstances existed.<sup>243</sup> Justice Blackmun observed that the district attorney testified "that his office still operated in the same manner as it did when he took office in 1964, except that it . . . [no longer] sought the death penalty in . . . rape cases."<sup>244</sup>

Justice Blackmun reasserted the effect of the history of racial discrimination in Georgia.<sup>245</sup> The evidence from the Baldus study, considered in conjunction with the evidence presented by Justice Brennan, was sufficient to show "an inference of discriminatory purpose."<sup>246</sup> Thus, without evidence to the contrary, Justice Blackmun presumed that racial factors entered into the decisionmaking process, and the burden, therefore, shifted to the state to show that racially neutral criteria and procedures yielded the seemingly racially influenced result.<sup>247</sup>

Justice Blackmun considered the state's proposition "that if the Baldus thesis was correct then the aggravation level in black-victim cases where a life sentence was imposed would be higher than in white-victim cases."<sup>248</sup> Justice Blackmun disputed this theory because "[t]he State did not test its hypothesis to determine if white-

---

<sup>238</sup> *Id.* (Blackmun, J., dissenting).

<sup>239</sup> *Id.* (Blackmun, J., dissenting).

<sup>240</sup> *Id.* (Blackmun, J., dissenting).

<sup>241</sup> *Id.* (Blackmun, J., dissenting).

<sup>242</sup> *Id.* at 1802 (Blackmun, J., dissenting). The factors listed by the district attorney included the strength of the evidence, the atrociousness of the crime, and the likelihood that a jury would impose the death sentence.

<sup>243</sup> *Id.* (Blackmun, J., dissenting).

<sup>244</sup> *Id.* (Blackmun, J., dissenting). See *Coker v. Georgia*, 433 U.S. 584 (1977) (holding that the death penalty was unconstitutional for the crime of rape).

<sup>245</sup> *Id.* (Blackmun, J., dissenting). See *id.* at 1787-88 (Brennan, J., dissenting).

<sup>246</sup> *Id.* at 1802 (Blackmun, J., dissenting).

<sup>247</sup> *Id.* (Blackmun, J., dissenting).

<sup>248</sup> *Id.* (Blackmun, J., dissenting).

victim and black-victim cases at the same level of aggravating circumstances were similarly treated”—a test McCleskey’s experts performed.<sup>249</sup> Justice Blackmun argued that McCleskey’s experts “demonstrated that the racial disparities in the [capital punishment] system were not the result of differences in the average aggravation levels between white-victim and black-victim cases.”<sup>250</sup> In sum, Justice Blackmun stressed that McCleskey had demonstrated an acute trend of differential treatment due to race.<sup>251</sup>

Justice Blackmun also disputed the majority’s reasoning for not applying this analysis to *McCleskey*.<sup>252</sup> He disagreed with the Court’s analysis on the differences between this case and the venire-selection or Title VII cases.<sup>253</sup> Justice Blackmun agreed with the majority that it would be difficult to examine the juries’ decision-making process because such an examination would create “an inherent tension between the discretion accorded capital-sentencing juries and the guidance for use of that discretion that is constitutionally required.”<sup>254</sup> Justice Blackmun examined *Imbler v. Pachtman*,<sup>255</sup> in which the Court refused to require that the prosecutor provide an explanation for his actions in initiating and pursuing a criminal prosecution.<sup>256</sup> However, he stated that *Imbler* did not stand for the proposition that prosecutors could not be called upon to answer for their actions.<sup>257</sup> Justice Blackmun asserted that although prosecutors undoubtedly need adequate discretion to perform their duties, their decisions are not beyond the constraints imposed on state action under the fourteenth amendment.<sup>258</sup>

Justice Blackmun also discussed the Court’s view that this case was distinguishable from *Batson v. Kentucky*.<sup>259</sup> He believed McCleskey satisfied even the standard of *Swain v. Alabama*<sup>260</sup> “a standard that was described in *Batson* as having placed on defendants a ‘crip-

---

<sup>249</sup> *Id.* at 1802-03 (Blackmun, J., dissenting).

<sup>250</sup> *Id.* at 1803 (Blackmun, J., dissenting).

<sup>251</sup> *Id.* (Blackmun, J., dissenting).

<sup>252</sup> *Id.* (Blackmun, J., dissenting).

<sup>253</sup> *Id.* at 1803-04 (Blackmun, J., dissenting).

<sup>254</sup> *Id.* (Blackmun, J., dissenting).

<sup>255</sup> 424 U.S. 409 (1976).

<sup>256</sup> *McCleskey*, 107 S. Ct. at 1804 (Blackmun, J., dissenting).

<sup>257</sup> *Id.* (Blackmun, J., dissenting).

<sup>258</sup> *Id.* (Blackmun, J., dissenting).

<sup>259</sup> *Id.* (Blackmun, J., dissenting); see *Batson v. Kentucky*, 106 S. Ct. 1712, 1720 (1986) (reaffirming that a prosecutor’s actions are not unreviewable).

<sup>260</sup> 380 U.S. 202 (1965) (holding that a black defendant could make out a prima facie case of purposeful discrimination on proof that the peremptory challenge system as a whole was being abused).

pling burden of proof.' ”<sup>261</sup>

Justice Blackmun considered the Court’s proposition that McCleskey’s case could lead to other constitutional challenges.<sup>262</sup> He found this an insufficient reason to deny McCleskey his rights under the equal protection clause of the fourteenth amendment.<sup>263</sup> Justice Blackmun asserted that if this case did, in fact, lead to closer scrutiny of the entire system, then society as a whole could possibly benefit.<sup>264</sup>

Justice Blackmun concluded his opinion by agreeing with Justice Stevens that the acceptance of McCleskey’s claim would not eliminate capital punishment in Georgia.<sup>265</sup> Justice Blackmun suggested that the establishment of guidelines for prosecutors as to an appropriate basis for exercising their discretion would provide a measure of consistency in the process.<sup>266</sup>

#### D. JUSTICE STEVENS’ DISSENT

Justice Stevens also asserted the qualitatively different nature of the death penalty and the necessity that its use be based on reason, rather than caprice or emotion.<sup>267</sup> He agreed that the Baldus study indicated that the racial considerations were working at a constitutionally intolerable level.<sup>268</sup>

Justice Stevens stated the Court’s fear that the acceptance of McCleskey’s claim would remove the death penalty in Georgia was incorrect.<sup>269</sup> If a choice had to be made between a discriminatory death penalty and no death penalty at all, the choice would be clear.<sup>270</sup> Justice Stevens declared that the Baldus study exposed a category of extremely serious crimes, such as crimes involving multiple aggravating circumstances, in which the death penalty was imposed without regard to the race of the victim or race of the offender.<sup>271</sup> He believed that restructuring the system to reduce the class of death-eligible defendants would significantly lessen the

---

<sup>261</sup> *McCleskey*, 107 S. Ct. at 1804 (Blackmun, J., dissenting)(quoting *Batson*, 106 S. Ct. at 1720).

<sup>262</sup> *Id.* at 1805 (Blackmun, J., dissenting).

<sup>263</sup> *Id.* (Blackmun, J., dissenting).

<sup>264</sup> *Id.* (Blackmun, J., dissenting).

<sup>265</sup> *Id.* (Blackmun, J., dissenting).

<sup>266</sup> *Id.* (Blackmun, J., dissenting).

<sup>267</sup> *Id.* at 1805-06 (Stevens, J., dissenting). See *supra* note 37.

<sup>268</sup> *Id.* at 1806 (Stevens, J., dissenting).

<sup>269</sup> *Id.* (Stevens, J., dissenting).

<sup>270</sup> *Id.* (Stevens, J., dissenting).

<sup>271</sup> *Id.* (Stevens, J., dissenting).

chance of a discriminatory imposition of the death penalty.<sup>272</sup> Justice Stevens concluded his dissent by stating "that further proceedings [would be] necessary in order to determine whether McCleskey's sentence should be set aside."<sup>273</sup>

#### IV. ANALYSIS

During the past fifteen years, the Supreme Court has struggled with the task of determining constitutional requirements for the imposition of the ultimate sanction in our criminal justice system—the death penalty. After recognizing the arbitrary character of various death penalty statutes,<sup>274</sup> the Court has attempted to reduce the quantity of death-eligible defendants<sup>275</sup> and has established standards to control the discretionary aspects of capital sentencing by removing the possibility of arbitrary and capricious application.<sup>276</sup> Unfortunately, these capital punishment limitations have not proven to be as effective in practice as in theory.

In *McCleskey*, the Court was presented with unparalleled statistical evidence that the death penalty in Georgia was being applied in a racially influenced manner.<sup>277</sup> Yet, the Court turned its back on this evidence and on the history of racial bias in Georgia. Instead, it found that the Georgia capital punishment system was operating in a constitutional manner. In doing so, the Court placed a crippling burden of proof upon defendants that counters the Court's own jurisprudence.<sup>278</sup> Instead of giving direction to the state legislatures on how to more effectively filter the discretionary aspects of capital sentencing, the Court has not only further entrenched a process that is constitutionally impermissible, but has also defeated some of the major purposes behind states' continued support of the death penalty.

##### A. THE SUPERIORITY OF THE BALDUS STUDY

The quality of the Baldus study hinges upon its multiple regres-

---

<sup>272</sup> *Id.* (Stevens, J., dissenting).

<sup>273</sup> *Id.* (Stevens, J., dissenting).

<sup>274</sup> *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>275</sup> See *Coker v. Georgia*, 433 U.S. 584 (1977) (holding death penalty unconstitutional for crime of rape); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (holding automatic death penalty unconstitutional).

<sup>276</sup> See *Godfrey v. Georgia*, 446 U.S. 420 (1980) (holding that Georgia's definition of aggravating circumstances were too vague to comply with constitutional requirements); *Gregg v. Georgia*, 428 U.S. 153 (1976) (holding that Georgia's sentencing system met constitutional requirements).

<sup>277</sup> See *supra* notes 153-56 and accompanying text.

<sup>278</sup> See, e.g., *Batson v. Kentucky*, 106 S. Ct. 1712, 1720 (1986).

sion analysis. A multiple regression analysis is a procedure that makes precise and quantitative estimates of the effects of different factors on some variable of interest.<sup>279</sup> A researcher first identifies the major variables, such as race, that are believed to influence the dependent variable, here, the rate of death sentencing.<sup>280</sup> The connection between the dependent variables and the independent variable of interest is then estimated by removing the effects of the other major variables.<sup>281</sup> When this analysis is completed, a precise estimate of the effects of the variables can be made.<sup>282</sup>

Within this general framework, Professor Baldus and his team of researchers performed an exhaustive multiple regression analysis. The study's data sample examined over 2000 murder cases that occurred in Georgia during the 1970s.<sup>283</sup> Professor Baldus analyzed "230 variables that could have explained the disparities on nonracial grounds."<sup>284</sup> Thus, the results of such a study are very likely to be an accurate indicator of the effect of race on capital sentencing.

The results of the Baldus study can be described as nothing less than alarming.<sup>285</sup> The most disturbing fact revealed by the study is that "defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks."<sup>286</sup> Perhaps even more striking, the Baldus study showed that prosecutors seek the death penalty for 70% of the black defendants who are convicted of killing white victims, and only 19% of the white defendants who are convicted of killing black victims.<sup>287</sup> These statistical facts make Justice Powell's inability to find a constitutional violation even more disconcerting.

Justice Powell dispensed with the pattern of racial discrimination indicated by the Baldus study with the following reasoning:

---

<sup>279</sup> Fisher, *Multiple Regression in Legal Proceedings*, 80 COLUM. L. REV. 702, 704 (1980). There are other minor influences which combine to form a non-negligible effect; these influences are placed in what is called a random disturbance term. It is then assumed that the joint effect of the minor influences is not systematically related to the effects of the major influences being investigated; effects of the influences are treated as being due to chance. Multiple regression thus provides a means not only for extracting the systematic effects from the data sample but also for assessing how well one has succeeded in the presence of the remaining random effects. *Id.* at 705-06.

<sup>280</sup> *Id.* at 705-06.

<sup>281</sup> *Id.* at 706.

<sup>282</sup> *Id.*

<sup>283</sup> *McCleskey*, 107 S. Ct. at 1763.

<sup>284</sup> *Id.* at 1764.

<sup>285</sup> See *supra* notes 153-56 and accompanying text.

<sup>286</sup> *McCleskey*, 107 S. Ct. at 1764.

<sup>287</sup> *Id.* at 1785 (Brennan, J., dissenting).

"Apparent disparities in sentencing are an inevitable part of the criminal justice system. The discrepancy indicated by the Baldus study is 'a far cry from the major systemic defects identified in *Furman*.'"<sup>288</sup> Such reasoning is deficient in two respects. First, it ignores prior jurisprudence, in which statistics were used to show patterns from which the Court inferred a constitutional violation. Second, it misses the proper focus of eighth amendment jurisprudence in this context, namely, the risk of arbitrariness in the application of punishment.

The majority opinion used the Baldus study in a curious manner. Although the Court assumed the validity of the study, it disregarded the very results the study yielded.<sup>289</sup> The fact that the validity of the study was assumed is not curious because the Baldus study is the most accurate and comprehensive statistical analysis of capital punishment ever completed. Thus, the "discrepancy that appears to correlate with race"<sup>290</sup> should not have been so easily passed over by the Court.

Statistics from a multiple regression analysis indicate patterns in the aggregate of a data sample. Thus, the Baldus study cannot prove, with absolute certainty, the intent of an individual to discriminate. This problem is compounded by the discretionary aspects of the capital sentencing process. Nevertheless, the Court has previously accepted statistics to establish constitutional violations in other forms, specifically, in the selection of the jury venire<sup>291</sup> and to prove a Title VII violation.<sup>292</sup> In both instances, a common sense analysis prevailed and a stark discriminatory pattern was recognized. In a case in which both contemporary and historical evidence existed, the Court held the statistics sufficient to imply discriminatory intent.<sup>293</sup> No direct evidence of discriminatory intent, such as direct testimony, was provided by the statistics in *Arlington Heights* and *Bazemore*. A similar situation existed in *McCleskey*: a strong statistical pattern existed, but direct testimony was absent from the record.

Justice Powell's attempt to distinguish *McCleskey* from the jury venire selection and Title VII cases is unconvincing.<sup>294</sup> Justice Powell stated that these other cases "relate to fewer entities, and fewer

---

<sup>288</sup> *Id.* at 1777 (footnote omitted)(quoting *Pulley v. Harris*, 465 U.S. 37, 54 (1984)).

<sup>289</sup> Justice Powell stated that the assumption that the Baldus study is statistically valid did not include the assumption that the study shows that racial considerations actually entered into any sentencing decisions in Georgia. *Id.* at 1775.

<sup>290</sup> *Id.* at 1777.

<sup>291</sup> *Bazemore v. Friday*, 106 S. Ct. 3000 (1986).

<sup>292</sup> *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977).

<sup>293</sup> *Id.* See also *Arlington Heights*, 429 U.S. at 268-71.

<sup>294</sup> *McCleskey*, 107 S. Ct. at 1767-68.

variables are relevant to the challenged decisions.”<sup>295</sup> The exhaustive quality of the Baldus study eliminates this worry. Professor Baldus took so many variables into account that the pattern of discrimination his study indicates is, in reality, even more oppressive. With an effective regression analysis, the fact that more variables exist does not automatically render the study any less accurate.

Justice Powell argued that in *McCleskey* the state had no opportunity to explain the statistical disparity, while in the jury venire and Title VII cases, such an opportunity existed.<sup>296</sup> True enough, procedural safeguards are necessary to protect the integrity of jurors and other decisionmakers in the capital sentencing process.<sup>297</sup> Yet, such procedural safeguards should not be used to remove the constitutional rights of a more significant actor in the system: the defendant. A defendant, such as McCleskey, should not have to suffer the penalty of death because of other functional infirmities in the criminal justice system.

Justice Powell's analysis seems generally counterintuitive. The majority employs stricter standards to show discrimination in the capital punishment system than to show discrimination in jury venire or Title VII cases. It must be reiterated that death is a graver punishment, so superior safeguards are necessary to insure an even-handed application of the death penalty. Justice Powell, however, dismissed evidence which indicated that this goal was not being satisfied.<sup>298</sup>

#### B. THE RISK OF ARBITRARINESS AND THE LEGACY OF *FURMAN*

A second major error in Justice Powell's reasoning is that it fails to recognize the proper focus of the Court's eighth amendment jurisprudence. The eighth amendment requires an examination of the risk that a death penalty was arbitrarily and capriciously imposed.<sup>299</sup> Justice Brennan's eloquent dissent accurately maps out how the Court, since *Furman*, has consistently focused on the risk that a death sentence was arbitrarily imposed.<sup>300</sup> “[T]hat the death penalty ‘may not be imposed under sentencing procedures that create a substantial risk that punishment will be inflicted in an arbitrary and capricious manner’ ”<sup>301</sup> is a succinct and completely accurate

---

<sup>295</sup> *Id.* at 1768.

<sup>296</sup> *Id.*

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

<sup>298</sup> *Id.* at 1777-78. See *supra* notes 129-33 and accompanying text.

<sup>299</sup> *Id.* at 1783 (Brennan, J., dissenting).

<sup>300</sup> *Id.* (Brennan, J., dissenting).

<sup>301</sup> *Id.* (Brennan, J., dissenting)(quoting *Godfrey*, 446 U.S. at 427).

statement of what precedent requires the focus to be in analyzing the *McCleskey* evidence. This method of analysis has been consistently affirmed.<sup>302</sup> Thus, Justice Powell's insistence that the evidence should prove the invalidity of individual sentences is inappropriate and establishes a virtually impossible burden of proof for the defendant.

The only way to get better results than those provided by the Baldus study would be to ask the discretionary actors within the capital sentencing infrastructure whether they had discriminated in a particular case. Unfortunately, the possibility of getting this information is highly improbable. First, such an admission would be extremely unlikely, even if the actor knew he had consciously discriminated. Second, subconscious discrimination would definitely not be discovered, because by definition the actor would be unaware of his discriminatory tendencies. Third, such an admission would be precluded because the discretionary actors cannot be asked about these influences. Attempts to show discrimination through testimony are effectively foreclosed, and empirical evidence is effectively disregarded. Thus, defendants are precluded from asserting any viable claim that an arbitrary sentence has been handed out.

Upon closer inspection, it appears that Justice Powell is aware that the risk of racial discrimination is a crucial factor in eighth amendment analysis. Justice Powell acknowledged the risk of racial prejudice influencing a jury's decision in a criminal case.<sup>303</sup> He quoted from *Turner v. Murray*:<sup>304</sup> "the question is at what point that risk becomes constitutionally unacceptable."<sup>305</sup> Such an acknowledgement is surprising considering Justice Powell's focus on individual sentencing. Thus, Justice Powell does not question the empirical results of the Baldus study, yet, because they are unsatisfactory to establish a constitutional violation, the Court has effectively established an insurmountable burden of proof.

*Furman* and its progeny presented a pattern which should have

---

<sup>302</sup> See, e.g., *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985) ("constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere"); *Roberts v. Louisiana*, 428 U.S. 325, 335 (1976) (mandatory death sentences held invalid for same reasons expressed in *Woodson*); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

<sup>303</sup> *McCleskey*, 107 S. Ct. at 1775.

<sup>304</sup> 90 L. Ed. 27, 37 (1986) (holding that a "defendant accused of an interracial crime is entitled to have prospective jurors informed of the victim's race and questioned on the issue of racial bias").

<sup>305</sup> *Id.* at 45.



been followed by the Court, but unfortunately was not. In 1971, the Court in *McGautha v. California* reviewed the procedures used by the states to administer their death penalty statutes and gave those statutes constitutional approval.<sup>306</sup> Only one year later, *Furman* struck down these statutes,<sup>307</sup> finding that they were unconstitutional in their application.<sup>308</sup> *Furman* thus reaffirmed a critical principle: statutes, although neutral and fair on their face, must still demonstrate, in practice, that fair and nonarbitrary death sentences are handed down by the capital punishment systems in order for those systems or sentences to be deemed constitutionally acceptable.<sup>309</sup>

Although a situation was presented in which the Court could have applied the *Furman* standard, the *McCleskey* Court failed to follow the *Furman* Court's lead. According to Justice Brennan, the *Gregg* Court stamped the various states' death penalty statutes as being valid on their face.<sup>310</sup> As noted by Justice Brennan, "*Gregg* bestowed no permanent approval on Georgia's capital punishment system," just approval in the absence of contrary evidence.<sup>311</sup> Once again, the Court has been presented with evidence that a death penalty statute is still constitutionally unacceptable in its application. The Court, however, broke from the analogous situations of *McGautha* and *Furman* and ruled that the Georgia statute is constitutional in application. The Court finally had contrary evidence, but it failed to employ that evidence although precedents warranted its use. The reasons given for this break with precedents do not attack the evidence presented by *McCleskey*. Instead, the Court simply offered policy reasons for ignoring the results of the Baldus study. This sort of analysis is inadequate to protect the rights of *McCleskey* and other prisoners on death row in Georgia.

Justice Brennan noted the four policy reasons cited by the Court for not yielding to "the implications of *McCleskey*'s evidence: the desirability of discretion for actors in the criminal justice system, the existence of statutory safeguards against abuse of that discretion, the potential consequences for broader challenges to criminal sentencing, and an understanding of the contours of the judicial

---

<sup>306</sup> 402 U.S. 183 (1971).

<sup>307</sup> *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>308</sup> *Id.*

<sup>309</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976); see also *Jurek v. Texas*, 428 U.S. 262 (1976) (the Texas capital sentencing system's requirement of a finding of statutory aggravating circumstance was held valid for the same reasons expressed in *Gregg*); *Proffitt v. Florida*, 428 U.S. 242 (1976) (a capital sentencing system where trial judges make sentencing determinations was constitutional for the same reasons noted in *Gregg*).

<sup>310</sup> *McCleskey*, 107 S. Ct. at 1791 (Brennan, J., dissenting).

<sup>311</sup> *Id.* (Brennan, J., dissenting).

role.”<sup>312</sup> These are, perhaps, sound policy reasons for establishing the facial validity of a capital punishment statute. Yet, these reasons are not strong enough to overcome the mandates of the Constitution under the eighth amendment. Justice Brennan correctly recognized that the Baldus study calls these same safeguards into question.

Justice Brennan gave a fine substantive analysis of why the Court defeated the very policies it purported to promote. In general, when presented with empirical results that some aspect of our criminal justice system is discriminatory, the Court is required to take whatever steps are necessary to eradicate this evil from the system. Instead of addressing this task, the Court relied on conclusory policy arguments which do not go to the substantive claim, namely, that arbitrary capital sentencing exists at the expense of the rights of defendants such as Warren McCleskey.

#### C. JUSTICE BLACKMUN'S FOURTEENTH AMENDMENT ANALYSIS

Justice Blackmun's artful opinion demonstrated that the Georgia capital sentencing also violates the equal protection clause of the fourteenth amendment.<sup>313</sup> Justice Blackmun accurately showed that McCleskey has fulfilled the three-prong requirements of *Batson v. Kentucky*<sup>314</sup> and *Castaneda v. Partida*.<sup>315</sup> The policy reasons selected by the *McCleskey* Court are insufficient to ignore the evidence that an equal protection violation has occurred. An individual should not be deprived of his constitutional rights even though safeguards exist to protect the integrity of the process, if, in fact, these safeguards are ineffective. The Court's reasoning is contrary to the guarantees of the Constitution and, therefore, is incongruent with the goals of American society.

#### D. THE DEATH KNELL OF THE DEATH PENALTY?

As noted by Justice Stevens, the majority's decision appears in part based on a fear that the acceptance of McCleskey's claim would lead to the destruction of the death penalty in Georgia.<sup>316</sup> The Baldus study shows that this worry is inappropriate. There exists a group of crimes for which the death penalty is consistently imposed without regard to the race of the victim or defendant.<sup>317</sup> Defend-

---

<sup>312</sup> *Id.* at 1789-90 (Brennan, J., dissenting).

<sup>313</sup> *Id.* at 1795 (Blackmun, J., dissenting).

<sup>314</sup> 106 S. Ct. 1712 (1986).

<sup>315</sup> 430 U.S. 582 (1977).

<sup>316</sup> *McCleskey*, 107 S. Ct. at 1798-803 (Stevens, J., dissenting).

<sup>317</sup> *Id.* (Stevens, J., dissenting).

ants who commit murders of an extremely heinous nature are consistently given the death penalty. The Baldus study indicates that in a sample which includes all defendants convicted of murder, death sentences are rendered at a rate of over 50% in which more than three statutory aggravating circumstances are present.<sup>318</sup> A similar result is shown by examining the rate at which cases proceed to a penalty trial. In cases which three or more aggravating factors are present, the cases advance to a penalty trial at a rate of at least 50%.<sup>319</sup> Of the cases that do advance to a penalty trial, namely those cases in which four or more aggravating factors exist, death sentences are handed down at a rate of at least 77%.<sup>320</sup> If the heinousness of the crime is measured by the aggravation level, these patterns indicate that heinous murders lead to high death sentencing rates.

One method to alter the racially discriminatory patterns shown by the Baldus study would be to limit death sentencing to those cases in which multiple aggravating circumstances are present. Such a plan could be implemented without removing the discretionary aspects of death sentencing. Currently, all cases that involve multiple aggravating circumstances do not result in the giving of death sentences. This plan would limit the class of death-eligible defendants to those that society has already shown they feel are most opprobrious, regardless of the race of the defendant or the victim.

This proposal still leaves the opportunity for racial discrimination to operate. Yet, the Baldus study shows that race is less of a factor in high aggravation cases. The Court remarked in *Singer v. United States*<sup>321</sup> that constitutional guarantees are met when "the mode [for determining guilt or punishment] itself has been surrounded with safeguards to make it as fair as possible."<sup>322</sup> This plan would guard against racial prejudice in the system because blacks would stand a lesser chance of receiving differential treatment. To eliminate the death penalty entirely would be inappropriate because the states have shown they want the death penalty to exist.<sup>323</sup> Still, the statutes must satisfy constitutional requirements. Further limiting of the class of death eligible defendants would satisfy the inter-

---

<sup>318</sup> Baldus, *supra* note 28, at 700.

<sup>319</sup> *Id.* at 706.

<sup>320</sup> *Id.* at 707.

<sup>321</sup> 380 U.S. 24, 36 (1965) ("a defendant's only constitutional right concerning the method of trial is to an impartial trial by jury").

<sup>322</sup> *Id.* at 35.

<sup>323</sup> See *supra* note 78.

ests of the states while also going further to fulfill the requirements of the Constitution.

E. MCCLESKEY'S NEGATIVE EFFECT ON DETERRENCE AND RETRIBUTION

Two goals often cited as reasons for the retention of capital punishment are deterrence of future murders and retribution for the ultimate wrong of taking another person's life.<sup>324</sup> Both of these justifications are subject to considerable debate. Empirical studies have not determined with any degree of certainty whether the death penalty deters more murders than does a lesser sentence.<sup>325</sup> Justice Stewart summed up this view stating that:

[a]lthough some . . . studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view. . . . [W]e do not know, and for systematic and visible reasons cannot know what the truth about this "deterrent" effect may be. . . . A "scientific"—that is to say, a soundly based—conclusion is simply impossible, and no methodological path out [of] this tangle suggests itself.<sup>326</sup>

The retribution goal also is the subject of much disagreement. First, whether or not revenge should be considered in our punishment system is an issue of much debate.<sup>327</sup> Second, whether retribution goals can possibly be met due to the fact that the death penalty is applied relatively infrequently is another point of contention.<sup>328</sup>

These two enumerated gray areas have important implications when considered in tandem with the results of the Baldus study. Since the deterrent and retributive effects of capital punishment are unclear, particular care should be taken in its application. The Baldus study indicates that this care has not been exercised to the greatest extent possible.<sup>329</sup> Even if one assumes that capital punishment does have substantive deterrent effects, the Baldus study shows that capital punishment will have a lesser deterrent effect on certain prospective murderers, most significantly, white murderers with black victims, because these criminals are the least likely to re-

---

<sup>324</sup> For collections of opposing views on the deterrent effects of the death penalty, compare D. BENDER AND B. LEONE, *THE DEATH PENALTY: OPPOSING VIEWPOINTS* (1985); B. NAKELL AND K. HARDY, *THE ARBITRARINESS OF THE DEATH PENALTY* (1987); T. SELLIN, *THE PENALTY OF DEATH* (1980).

<sup>325</sup> See T. SELLIN, *supra* note 324, at 35-53.

<sup>326</sup> *Gregg v. Georgia*, 428 U.S. 153, 185-86 (1976).

<sup>327</sup> T. Sellin, *supra* note 324, at 35-53.

<sup>328</sup> *Id.*

<sup>329</sup> Baldus, *supra* note 28, at 728.

ceive the death penalty. Finally, a similar result should be realized for the retribution goal because black victims will not receive the same rate of retribution for their lost lives as white victims.<sup>330</sup> Overall, the Baldus study indicates that the current capital sentencing system in Georgia presents a devaluation of black lives that is intolerable.

The uniqueness of the death penalty should require superior rationality in its application; "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."<sup>331</sup> This view is strengthened by the uncertain effects of capital punishment. It seems logical that a force with uncertain effects should be employed in as predictable a fashion as possible or else not used at all. The Court's ruling in *McCleskey*, however, shies away from this ideal. The Court's decision allows less rationality while at the same time sanctioning a negative form of predictability at the expense of black lives—both victims and defendants. These factors should lead to tighter restrictions; unfortunately, the Court allows the perpetuation of a system that is highly unpredictable.

The deterrent effects of the death penalty, assuming that they exist, are also obviated. Georgia has demonstrated a very low death sentencing rate in black victim cases.<sup>332</sup> The Baldus study shows the rate is 6% in black victim cases compared with 24% in white victim cases.<sup>333</sup> The study also notes that this inequity is particularly prevalent when prosecutors are deciding whether to seek a death sentence. Furthermore, the disparity persists after adjustment for the aggravation level of different cases.<sup>334</sup> Georgia juries and prosecutors appear to tolerate greater levels of aggravation without imposing the death penalty in black victim cases as compared with white victim cases.<sup>335</sup> Thus, the black community is not receiving the same protection against murder that the white community is receiving. Equal protection of the laws is therefore unfulfilled. This fact is particularly disturbing when one considers the proportion of black victim murders in the entire Baldus study sample and the proportion of blacks in the total population in Georgia.<sup>336</sup> The black community is overrepresented in the low income strata, making it

---

<sup>330</sup> *Id.*

<sup>331</sup> *California v. Ramos*, 463 U.S. 992, 998-99 (1983)(footnote omitted).

<sup>332</sup> Baldus, *supra* note 28, at 708-09.

<sup>333</sup> *Id.* at 709.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.* at 710.

<sup>336</sup> Baldus, *supra* note 28, at 708-09.

especially prone to the violence that often accompanies impoverishment. It would seem that more deterrent factors should be concentrated on the black community, regardless of the race of the defendant. However, the opposite result obtains. This devaluation of black lives is at odds with the ideals of American society and should be eliminated.

A similar argument can be made with regard to the retributive effects of the death penalty. If the purpose of the death penalty is to give society revenge for the ultimate wrong, the Baldus study indicates that this goal is unsatisfied when blacks are murdered.<sup>337</sup> If retribution is a legitimate goal—an ideal to which the states seem to adhere—then the uneven application of capital punishment yields uneven retribution for those families whose lives are altered by the loss of one of its members. The devaluation of black lives is again the end result. With the existence of such a pattern, the equal protection mandated by the fourteenth amendment is a hollow aspiration for black Americans.

#### F. DISCRIMINATION AND PROSECUTOR DISCRETION

Prosecutorial discretion is perhaps the most important discretionary element in the Georgia capital sentencing system. The prosecutor controls the type of conviction sought. The prosecutor also controls the plea bargaining process and the dismissals of cases at the postindictment-preconviction stage.<sup>338</sup> Most significantly, the prosecutor decides whether a trial proceeds to the penalty phase.<sup>339</sup> This unbridled discretion provides ample opportunity for discrimination to operate.

Racial bias can infect the prosecutor's decisionmaking in two possible ways. First, the prosecutor himself may be biased. This could influence a prosecutor to attempt not only to vindicate the lives of white victims more quickly than those of black victims, but also to punish black defendants more severely than white defendants. Second, a prosecutor may determine that juries discriminate on a racial basis. In turn, this knowledge could affect the rate and circumstances in which a prosecutor seeks the death penalty; the prosecutor would seek the death penalty more often in white victim and black defendant cases heard by a jury because of a greater chance of success due to the biases of the jury. Either situation is unacceptable under the rubric of the Constitution. Unless changes

---

<sup>337</sup> *Id.* at 708-09.

<sup>338</sup> *McCleskey*, 107 S. Ct. at 1801 (Blackmun, J., dissenting).

<sup>339</sup> *Id.* (Blackmun, J., dissenting).

are made, the system depicted by the Baldus study will retain discretionary aspects that allow the influence of racial bias.

Changes could be easily implemented to lessen the chance of prosecutor bias. Narrowing the class of death-eligible defendants is one method.<sup>340</sup> Another possible change would be to establish guidelines for the actors in the district attorney's office to ensure more consistency in the decision to seek the death penalty. Currently, no guidelines exist to channel the discretion wielded by prosecutors.<sup>341</sup> Such guidelines would not completely remove the discretion demanded by prosecutors. However, they would provide incentive for regular, thoughtful decisions which would make scrutiny easier. This change would not constitute a major inconvenience, and it would further the goal of making the system as fair as possible by limiting the opportunities for abuse.

#### V. CONCLUSION: THE PROPER PARAMETERS OF THE JUDICIAL ROLE

The Court argues that McCleskey's arguments should best be presented to the various state legislatures.<sup>342</sup> Justice Powell stated:

It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are “constituted to respond to the will and consequently the moral values of the people.” . . . Legislatures also are better qualified to weigh and “evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.”<sup>343</sup>

Justice Powell confused the issues and the evidence in this statement. McCleskey's evidence did not suggest that capital punishment was inappropriate for the crime of murder. McCleskey's evidence instead was directed at whether punishment was being administered fairly; the Baldus study indicates that fair administration was not the practice in Georgia. The constitutional requirement of the consistent and fair application of punishment was the heart of the *Furman* decision.<sup>344</sup> The *McCleskey* Court abdicates its duty by not adhering to the ideals set forth in *Furman*, resulting in the ignoring of the consequences of McCleskey's claims.

Furthermore, the Court has always taken an assertive role in racial issues. The Court consistently has come to the rescue of ra-

---

<sup>340</sup> See note 275 and accompanying text.

<sup>341</sup> *McCleskey v. Zant*, 580 F. Supp. 338, 377, n.15 (1984).

<sup>342</sup> *McCleskey*, 107 S. Ct. at 1781.

<sup>343</sup> *Id.* (quoting *Furman v. Georgia*, 408 U.S. 238, 383 (1972) and *Gregg v. Georgia*, 428 U.S. 153, 186 (1976)).

<sup>344</sup> *Furman v. Georgia*, 408 U.S. 238 (1972).

cial minorities, who are often both politically and economically impoverished.<sup>345</sup> Presently, society has formally repudiated racism. Yet, racial bias still exists, and it is the Court's duty to eradicate this evil to the best of its ability. If recognizing McCleskey's evidence challenges other aspects of our criminal justice system, so be it. This is a challenge that is constitutionally mandated to protect all Americans equally, irrespective of race. Racism is not something that can be eliminated by one decision; it is too deeply rooted in our society. Nevertheless, every small step in that direction contributes to a larger good that benefits all of society.

ANDERSON E. BYNAM

---

<sup>345</sup> Perhaps the most famous example is *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). In *Brown*, the Court struck down the segregation of public schools, which at that time was a highly accepted practice.