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McCleskey v. Kemp: The Supreme Court Pulls the Switch on Future Judicial Challenges to the Death Penalty, 22 J. Marshall L. Rev. 215 (1988)

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McCLESKEY v. KEMP:* THE SUPREME COURT PULLS THE SWITCH ON FUTURE JUDICIAL CHALLENGES TO THE DEATH PENALTY

The United States Supreme Court, in *McCleskey v. Kemp*,¹ again approved Georgia's capital punishment system,² a system many have challenged on constitutional grounds.³ The Court did so

* 107 S. Ct. 1756 (1987).

1. *Id.*

2. See *infra* note 19 for the text of the pertinent statutory provisions.

3. The Supreme Court struck down Georgia's system of capital punishment in 1972 (per curiam). *Furman v. Georgia*, 408 U.S. 238 (1972). *Furman*, a consolidation of three cases, *Furman v. Georgia*, 225 Ga. 253, 167 S.E.2d 628 (1969) (jury found that defendant shot his victim during a burglary and sentenced him to die); *Jackson v. Georgia*, 225 Ga. 790, 171 S.E.2d 501 (1969) (jury convicted defendant of rape and sentenced him to die); and *Branch v. Texas*, 447 S.W.2d 932 (Tex. Crim. 1969) (jury convicted defendant of rape by force and sentenced him to die), held that Georgia's capital punishment system was violative of the eighth amendment. *Furman*, 408 U.S. at 240. See *infra* note 9 for the text of the eighth amendment. In *Furman*, Justices Brennan and Marshall, as they would again later in *McCleskey*, found that the death penalty is unconstitutional per se. *Furman*, 408 U.S. at 305 (Brennan, J., concurring) (punishment of death "fatally offensive to human dignity" and is therefore "cruel and unusual"). Justices Douglas, Stewart and White found that the existing discretionary system was too arbitrary and, therefore, cruel and unusual. *Id.* at 256-57 (Douglas, J., concurring); *Id.* at 309-10 (Stewart, J., concurring); *Id.* at 313-14 (White, J., concurring). Justices Blackmun, Powell and Rehnquist, and Chief Justice Burger dissented, wishing to leave the issue for the legislature. *Id.* at 405 (Blackmun, J., dissenting); *Id.* at 465 (Powell, J., dissenting); *Id.* at 465-70 (Rehnquist, J., dissenting); *Id.* at 403-05 (Burger, C.J., dissenting).

The Court's decision in *Furman* turned on its finding that a system of capital punishment is violative of the eighth amendment if it is "unusual." See *id.* at 256-57 (Douglas, J., concurring). Justice Douglas defined "unusual" in the eighth amendment sense as follows: "It would seem to be incontestable that the death penalty inflicted on one defendant is unusual if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices." *Id.* at 242 (emphasis added). The Court, therefore, left open the possibility that a system of capital punishment could exist if not infected with these problems. After *Furman*, several states undertook to create such a system. See Note, *Capital Punishment Statutes After Furman*, 35 OHIO ST. L.J. 651 (1974) (statutes passed since *Furman* comply with letter of ruling, but not its spirit).

Georgia is one of the states that created such a statute. See *infra* note 19 for the text of that statute. A convicted murderer challenged this law, but it withstood the attack. *Gregg v. Georgia*, 428 U.S. 153 (1976) (bifurcating guilt and sentencing portions of trial, requiring aggravating circumstances to support death sentence, and providing automatic appeal to state supreme court were adequate safeguards preventing arbitrary imposition of death sentence). See also companion cases, *Jurek v. Texas*, 428 U.S. 262 (1976) (convicted murderer challenged the Texas capital sentencing system but failed); *Proffitt v. Florida*, 428 U.S. 242 (1976) (Florida capital sentencing procedure). But see *Roberts v. Louisiana*, 431 U.S. 633 (1977) (Louisiana system violative of the eighth and fourteenth amendments because its mandatory death

despite the findings of the Baldus Study,⁴ a highly complex statistical study⁵ that demonstrates sentencing disparities based on the race of the defendant⁶ and, more strikingly, the race of the victim.⁷ By its ruling, the Supreme Court allowed the state of Georgia to

sentence did not allow for consideration of particularized mitigating factors); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (North Carolina statute invalidated for failing to provide adequate procedural safeguards in imposing death sentence). The *Gregg* Court ultimately concluded that the death penalty is not "cruel" and therefore not unconstitutional per se because it has received overwhelming public support. *Gregg*, 428 U.S. at 179-80. The *Gregg* Court also held that a system of capital punishment is not "unusual" if the statute is carefully drafted to provide adequate procedural safeguards. *Id.* at 195.

4. The Supreme Court considered two studies that were submitted as evidence in the district court—the Procedural Reform Study and the Charging and Sentencing Study. See *McCleskey v. Zant*, 580 F. Supp. 338, 353 (N.D. Ga. 1984), *aff'd*, 753 F.2d 877 (11th Cir. 1985), *aff'd*, 107 S. Ct. 1756 (1987). In addition to reviewing the testimony that Professors Baldus, Woodworth, Berk, Katz and Burford gave at trial, the Court considered several published studies: D. BALDUS AND J. COLE, *STATISTICAL PROOF OF DISCRIMINATION* § 1.13 (1980 & Supp. 1986); Baldus, Woodworth and Pulaski, *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons From Georgia*, 18 U.C. DAVIS L. REV. 1375 (1985); Baldus, Pulaski and Woodworth, *Comparative Review of Death Sentences: An empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983). The district court criticized the study for its failure to take into account certain variables the court perceived as important, and the court also expressed concern for the existing degree of multicollinearity among some of the variables. *McCleskey*, 580 F. Supp. at 353-79. The court of appeals, however, chose to accept the validity of the study, and therefore addressed the constitutional issues posed. *McCleskey v. Kemp*, 753 F.2d 877, 886 (11th Cir. 1985). The Supreme Court also assumed the statistical validity of the Baldus Study. *McCleskey v. Kemp*, 107 S. Ct. at 1756 n.7.

The Court noted that the study included 230 variables and covered over 2000 murder cases in Georgia. *Id.* at 1763-64. The Court also noted the following Baldus Study conclusions: "The death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims." *Id.* at 1763. Baldus also noted the following in regard to prosecutorial discretion: "[P]rosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims." *Id.* at 1763-64. The Court also acknowledged that in regard to the mid-range cases, those cases that are the most difficult to decide and contain the greatest amount of discretion, the Baldus Study found that a twenty percentage point disparity existed between black-victim and white-victim cases. *Id.* at 1764 n.5.

5. The Baldus Study is generally regarded as the most comprehensive study of its kind ever done. In fact, Professor Berk stated in his testimony:

[Baldus' studies] ha[ve] very high credibility, especially compared to the studies that [the National Academy of Sciences] . . . reviewed. We review hundreds of studies on sentencing . . . and there's no doubt that at this moment, this is far and away the most complete and thorough analysis of sentencing that's ever been done. I mean there's nothing even close.

Petition for Writ of Certiorari at 17, *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985) (No. 84-8176).

6. For statistics illustrating sentencing disparities based on the defendant's race, see Appendix A.

7. For statistics illustrating sentencing disparities based on the victim's race, see Appendix B.

violate the spirit of the eighth⁸ and fourteenth⁹ amendments, set dangerous precedent regarding the use of statistics as evidence,¹⁰ and effectively foreclosed any further, broad-based challenges to the death penalty.¹¹ While the Court based this ruling in large part upon its concern for the practical impact a contrary ruling might have had on this nation's criminal justice system,¹² those concerns were unwarranted. Moreover, even if those concerns had merit, they were insufficient to support the Court's abandonment of its long history of striking down discriminatory or arbitrary laws.¹³

On May 13, 1978, Warren McCleskey and three others committed the armed robbery of an Atlanta, Georgia furniture store.¹⁴ During the robbery, a bullet struck and killed an investigating officer.¹⁵

8. The eighth amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII (emphasis added).

9. The fourteenth amendment to the United States Constitution provides, in pertinent part: "[N]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

10. Several scientists raised the following concerns in an *amici curiae* brief: It is possible that the extraordinary reluctance of the Court of Appeals to place reliance upon Baldus' research reflects no more than an unwillingness, despite the evidence, to invalidate post-*Furman* capital statutes. The opinion, however, does not expressly limit its holding to death penalty cases. Instead, it articulates a standard of proof that seems applicable to other Equal Protection Clause challenges . . . If so, the opinion raises important issues about the usefulness of social scientific evidence that transcend the *McCleskey* case itself . . . Its opinion in *McCleskey* insists upon a level of methodological purity in data quality, model design, and analysis that can only be achieved in theory . . . If left unreviewed the opinion . . . will erect formidable barriers against the use of reliable statistical evidence that can, and *amici* believe, properly should be used by the courts to resolve complex legal issues that regularly come before them for decision.

Motion for leave to file Brief *Amici Curiae* and Brief *Amici Curiae* For Dr. Peter W. Sperlich, Dr. Marvin E. Wolfgang, Professor Hans Zeisel & Professor Franklin E. Zimring In Support Of The Petition For Writ Of Certiorari, *McCleskey v. Kemp*, 107 S. Ct. at 1756 (1987) (No. 84-6811).

11. *Foe's Hopes Dashed, Justices Are Not Swayed by Study Citing Role of Victims' Color*, [hereinafter *Foe's Hopes Dashed*] N.Y. Times, Apr. 23, 1987, at B12, col. 2 ("[t]he ruling ended what opponents had called their last sweeping constitutional challenge to capital punishment").

12. The Court stated that its decision was swayed by a concern for the effect it would have on the entire criminal justice system. The Court noted: "Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty." *McCleskey*, 107 S. Ct. at 1779. See *infra* notes 117-121 and accompanying text, discussing the flaws in this reasoning.

13. See *infra* note 71 (laws that impermissibly discriminate violate fourteenth amendment), and note 91 (previous Georgia capital punishment statute held violative of the eighth amendment because it allowed impermissible prejudices to affect sentencing).

14. *McCleskey*, 107 S. Ct. at 1762.

15. *Id.* Two shots were fired. One hit the officer in the face and killed him. The jury later determined that the fatal bullet came from McCleskey's gun. *Id.*

McCleskey and the three others fled, but the police later apprehended all four.¹⁶ At trial, the jury found that McCleskey shot the officer¹⁷ and subsequently convicted him of two counts of armed robbery and one count of murder.¹⁸ The jury then, pursuant to Georgia's newly installed sentencing procedure,¹⁹ heard arguments and sentenced Warren McCleskey to die.²⁰

On appeal, the Supreme Court of Georgia affirmed both the convictions and the sentence.²¹ After exhausting all of his remedies

16. *Id.* McCleskey, who was in police custody for an unrelated offense, confessed to his participation in the robbery, but denied that he shot the officer. *Id.*

17. *Id.* McCleskey carried a .38 caliber Rossi revolver during the robbery. *Id.* Ballistics tests indicated that at least one of the bullets that struck the officer came from the same, or a similar gun. *Id.*

18. *Id.* A person commits murder in Georgia "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).

19. Georgia law provides that a person convicted of murder "shall be punished by death or by imprisonment for life." GA. CODE ANN. § 16-5-1(d) (1984). Under Georgia's newly installed bifurcated sentencing system, after conviction "the court shall resume the trial and conduct a pre-sentence hearing before the jury." *McCleskey*, 107 S. Ct. at 1762 n.2 (quoting GA. CODE ANN. § 17-10-2(c) (1982)). The jury is restricted in that it cannot impose the death penalty unless it finds the presence of one of these statutory aggravating circumstances:

- (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 commission 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 great 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 the 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.

McCleskey, 107 S. Ct. at 1762-63 n.3 (quoting GA. CODE ANN. § 17-10-30(b),(c) (1982)).

20. The jury found that the murder was committed while McCleskey was engaged in an armed robbery, and that the murder was committed upon a peace officer engaged in the performance of his official duties. *McCleskey*, 107 S. Ct. at 1763.

21. *McCleskey v. Georgia*, 245 Ga. 108, 263 S.E.2d 146 (1980).

within the Georgia courts,²² McCleskey filed a petition for a writ of habeas corpus in the United States district court.²³ The district court found all but one of his eighteen grounds to be without merit.²⁴ Additionally, the district court questioned the findings of the Baldus Study in regard to the degree of multicollinearity between some of the variables.²⁵ The court, however, granted the writ of habeas corpus²⁶ based on *Giglio v. United States*,²⁷ because it found that the state might have adversely influenced one of the witnesses. The court of appeals affirmed the district court's ruling that McCleskey's eighth and fourteenth amendment claims must fail,²⁸ and reversed the district court's decision to grant habeas corpus relief based on the *Giglio* claim.²⁹ Although the district court found fault with the Baldus Study, the court of appeals assumed the validity of the study and went on to address the constitutional issues it presented.³⁰ The Supreme Court followed a similar line of reasoning.³¹

22. Immediately after the Georgia Supreme Court handed down its decision on McCleskey's appeal, he petitioned for certiorari in the United States Supreme Court, which the Court denied. *McCleskey v. Georgia*, 449 U.S. 891 (1980). McCleskey then filed an extraordinary motion for a new trial in the Superior Court of Fulton County, Georgia for which no hearings were held. The Superior Court then considered McCleskey's subsequent petition for a writ of habeas corpus, which was denied. *McCleskey v. Zant*, No. 4909 (Sup. Ct. of Butts County, Apr. 8, 1981). McCleskey's subsequent application for a certificate of probable cause to appeal the Superior Court's denial of his petition was denied by the Georgia Supreme Court. No. 81-5523. Again, the United States Supreme Court denied certiorari. *McCleskey v. Zant*, 454 U.S. 1093 (1981). Justices Brennan and Marshall dissented to the denial of certiorari consistent with their shared view that the death penalty is per se unconstitutional. *Id.*

23. *McCleskey v. Zant*, 580 F. Supp. 338, 345 (N.D. Ga. 1984), *aff'd*, 753 F.2d 877 (11th Cir. 1985), *aff'd*, 107 S. Ct. 1756 (1987). McCleskey filed his petition for a writ of habeas corpus on December 30, 1981, asserting eighteen different grounds. *Id.*

24. The district court found that the state had provided favorable treatment to a key witness and that such treatment might have affected the jury verdict. *Id.* (citing *Giglio v. United States*, 405 U.S. 950 (1972), in which the court found it impermissible for an assistant state's attorney to promise leniency to a co-conspirator for his testimony).

25. *McCleskey*, 580 F. Supp. at 353-79.

26. *McCleskey*, 580 F. Supp. at 338, 345 (Offie Gene Evans, who was in the cell next to McCleskey's and who testified against him, had his escape charge dropped after McCleskey's trial).

27. 405 U.S. at 950. See *supra* note 24 discussing *Giglio*.

28. *McCleskey v. Kemp*, 753 F.2d 877, 899-900 (11th Cir. 1985), *aff'd*, 107 S. Ct. 1756 (1987). McCleskey's contentions were that (1) Georgia's system of capital punishment is "cruel and unusual" in violation of the eighth amendment, and (2) that Georgia's system of capital punishment is violative of the equal protection clause. *McCleskey*, 580 F. Supp. at 346.

29. *McCleskey*, 753 F.2d at 883 (court of appeals found that no promise was involved, and even if there was it would have been harmless).

30. *McCleskey*, 753 F.2d at 886-877 ("We affirm the district court on the ground that, assuming the validity of the research, it would not support a decision that the Georgia law is being unconstitutionally applied").

31. *McCleskey v. Kemp*, 107 S. Ct. 1756, 1766 n.7 (1987) ("As did the Court of Appeals, we assume the study is valid statistically without reviewing the factual findings of the District Court").

The United States Supreme Court granted certiorari to decide whether the Baldus Study proved that McCleskey's death sentence violated either the eighth or fourteenth amendments.³² The Court refused to recognize that the empirical evidence Professor Baldus provided³³ proved that purposeful discrimination exists within Georgia's criminal justice system in violation of the equal protection clause.³⁴ The Court was equally unreceptive to McCleskey's allegation that Georgia's capital sentencing system violates the eighth amendment's prohibition of "cruel and unusual" punishment.³⁵

The Court's analysis began with McCleskey's equal protection claim.³⁶ The Court posited that a defendant alleging an equal protection violation has the burden of proving the presence of purposeful discrimination.³⁷ That is, McCleskey bore the burden of establishing that individuals within Georgia's judicial structure discriminated against him personally.³⁸ The Supreme Court was unable to find the existence of discrimination directed specifically toward McCleskey and, therefore, was unable to find an immediately apparent equal protection violation.³⁹

The Court then addressed McCleskey's argument that the Baldus Study compelled an inference that purposeful discrimination existed in his case because of the overwhelming disparity in sentencing throughout the system.⁴⁰ Although the Court assumed the valid-

32. *Id.* at 1761.

33. For a partial description of the findings that the court considered, see *supra* note 4.

34. See *infra* notes 36-46 and accompanying text for a discussion of the Court's equal protection analysis.

35. See *infra* notes 47-60 and accompanying text for a discussion of the Court's eighth amendment analysis.

36. *McCleskey v. Kemp*, 107 S. Ct. 1756, 1765-66 (1987).

37. *Id.* at 1766. The Court cites *Whitus v. Georgia*, 385 U.S. 545, 550 (1967). Justice Clark, writing for the majority in *Whitus*, noted: "The burden is, of course, on the petitioners to prove the existence of purposeful discrimination." *Id.* (quoting *Pierre v. Louisiana*, 306 U.S. 354, 358 (1939)). The Court also noted, however, that once a *prima facie* case is made out, the burden shifts to the prosecution. *Id.* See also *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the equal protection clause"); *Washington v. Davis*, 426 U.S. 229, 240 (1976) ("[t]he basic equal protection principal [is] that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose").

38. *McCleskey*, 107 S. Ct. at 1766. McCleskey did not offer evidence to support this analysis. *Id.* Instead, McCleskey directed his arguments toward convincing the Court that the evidence mandated the inference that purposeful discrimination exists in Georgia in violation of the equal protection clause. *Id.* at 1767.

39. *Id.* at 1766-67 ("he offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence").

40. The Court has found that statistical evidence compels an inference of purposeful discrimination in several instances. *Bazemore v. Friday*, 478 U.S. 385 (1986) (Title VII); *Casteneda v. Partida*, 430 U.S. 482 (1977) (jury venire); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (boundary alteration shown to exclude black voters);

ity of the statistics⁴¹ and acknowledged the apparent corollary between capital sentencing, jury venire, and Title VII cases,⁴² it rejected the proposition that the Baldus Study mandated an inference of purposeful discrimination in McCleskey's case.⁴³

The opinion then moved to McCleskey's last equal protection argument. The Court refused to accept that the Baldus Study proved the state as a whole acted with a discriminatory purpose in adopting a capital punishment statute that would be unequally applied.⁴⁴ The Court held that intent is not established when a state adopts a statute with a discriminatory impact, but only when a state adopts a statute because of this effect.⁴⁵ The *McCleskey* Court, therefore, rejected the argument that the Georgia legislature had acted with a discriminatory purpose.⁴⁶

Having discarded McCleskey's equal protection arguments, the

Yick Wo v. Hopkins, 118 U.S. 356 (1886) (business permit issuance).

41. *McCleskey*, 107 S. Ct. at 1766 n.7. The Court was not forced to make a thorough inquiry into the intricacies of the Baldus Study, but merely reviewed the findings of the court of appeals regarding the constitutional issues assuming the study's validity. In a footnote, however, Justice Blackmun stated: "Like Justice Stevens, however, I am persuaded that the Baldus Study is valid and would remand merely in the interest of orderly procedure." *Id.* at 1795 n.1 (Blackmun, J., dissenting).

42. Jury venire concerns the manner in which juries are composed. Title VII of the Civil Rights Act of 1964 is a federal statute designed to prevent employment discrimination. 42 U.S.C. § 2000 et seq. (1982). If the State of Georgia excluded black persons from juries at rates comparable to those displayed by the Baldus Study, the Court would be compelled to find the existence of an equal protection violation. *See Casteneda*, 430 U.S. at 486-87 (79% Mexican-American population but only 39% were summoned for grand jury duty); *Turner v. Fouche*, 396 U.S. 346, 349-52 (1970) (60% black population but only 37% sat on the grand jury); *Whitus*, 385 U.S. at 545, 552 (27% black population on the tax digest, but only 9.1% on the grand jury and 7.8% on the petit jury). So too, if black persons were being excluded from employment at rates approaching those revealed by Professor Baldus, a finding of an equal protection violation would be assured. *See Bazemore*, 478 U.S. 385 (1986) (plaintiffs displayed discrepancies between black employee and white employee salaries). Where the state of Georgia is executing black defendants, and those convicted of killing whites, at the rates actually disclosed by the Baldus Study, however, the Court is unwilling to find a constitutional violation. *McCleskey*, 107 S. Ct. at 1769. This is difficult to reconcile.

43. *McCleskey*, 107 S. Ct. at 1769. The *McCleskey* Court rejected this proposition based on some rather nebulous distinctions. *See infra* note 87 for a discussion of the flaws in these distinctions.

44. Arguably, the Georgia legislature was not aware of the racially discriminatory effects its statute embraced when it passed the law. In light of the highly publicized findings of Professor Baldus and others, however, further, long-term inaction by the Georgia legislature is morally reprehensible, if not strictly violative of a constrained interpretation of the fourteenth amendment.

45. *McCleskey*, 107 S. Ct. at 1769-70, citing Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (Massachusetts civil service preference for veterans that held women in stereotypical positions was constitutionally permissible because it was passed in spite of those effects rather than because of those effects).

46. *McCleskey*, 107 S. Ct. at 1769-70 ("[i]here was no evidence then, and there is none now, that the Georgia Legislature enacted the capital punishment statute to further a racially discriminatory purpose") (footnote omitted).

Court then addressed his eighth amendment claims.⁴⁷ This analysis began with an historical discussion of the eighth amendment, concluding that society still permits capital punishment.⁴⁸ The Court reasoned that the death penalty is not per se unconstitutional because it is not now outside society's "evolving standards of decency."⁴⁹ The Court looked to the actions of legislatures⁵⁰ and jurors,⁵¹ which the judiciary regards as representative of those "standards of decency."⁵²

McCleskey further argued, pursuant to *Furman v. Georgia*,⁵³ that the death sentence in Georgia violates the eighth amendment because the Georgia judicial system arbitrarily imposes it.⁵⁴ The Court reasoned, however, that pursuant to its more recent decision in *Gregg v. Georgia*,⁵⁵ sufficient procedural safeguards exist to eliminate the danger of arbitrariness that is inherent in the discretionary

47. *Id.* at 1770. McCleskey argued that Georgia's system of capital punishment is "cruel and unusual." *Id.* His argument, centered around *Furman v. Georgia*, 408 U.S. 238 (1972), was that Georgia's capital punishment statute is arbitrarily and capriciously applied. *McCleskey*, 107 S. Ct. at 1770.

48. Originally, executions were "cruel and unusual" only if the particular method used was so perceived. *See Wilkerson v. Utah*, 99 U.S. 130, 137 (1879) ("[I]f he be hanged by the neck . . ." was deemed not "cruel" or "unusual"). Then, in *Weems v. United States*, 217 U.S. 349, 353 (1910), the Court broke free from that restricted view and acknowledged that the meaning of the terms "cruel and unusual" changes with time such that a penalty is "unusual" if excessive. That is, the Court recognized that a punishment does not necessarily have to involve physical pain to be deemed "cruel and unusual" but, rather, the Court began to focus on the imbalance between the crime and the punishment. *Id.* at 366. *See also Robinson v. California*, 370 U.S. 660 (1962) (a statute making it unconstitutional to be addicted to narcotics was deemed "cruel and unusual"); *Trop v. Dulles*, 356 U.S. 86 (1958) (it is unconstitutional to strip an individual of his nationality for deserting the armed forces). Finally, in *Furman*, the Court recognized that a system of capital punishment is within the bounds of the eighth amendment only if it is consistent with society's contemporary values. *Furman*, 408 U.S. at 429-30.

49. *McCleskey*, 107 S. Ct. at 1771 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

50. *McCleskey*, 107 S. Ct. at 1771. The Court chose to use legislatures as proxies "because the . . . legislative judgment weighs heavily in ascertaining contemporary standards." *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 175 (1976)).

51. *McCleskey*, 107 S. Ct. at 1771. The Court also found jury sentencing trends to be reflective of the public attitude because juries are "a significant and reliable objective index of contemporary values." *Id.* (quoting *Gregg*, 428 U.S. at 181).

52. *McCleskey*, 107 S. Ct. at 1771 (quoting *Trop*, 356 U.S. at 101).

53. The *Furman* Court found that capital punishment statutes which were arbitrarily and capriciously applied were violative of the eighth amendment. *Furman*, 408 U.S. at 313.

54. *McCleskey*, 107 S. Ct. at 1774. McCleskey argued that there is no excusable reason for the existing racial disparities in sentencing, forcing the conclusion that the statute is arbitrarily applied. *Id.*

55. 428 U.S. at 196-98 (court found that the new sentencing procedure in Georgia was tolerable because it bifurcated the guilt and sentencing proceedings, narrowed the class of murders subject to the death penalty, allowed defendants to introduce mitigating factors and allowed juries to consider the peculiar circumstances of each case).

nature of the task.⁵⁶ The McCleskey Court, moreover, refused to accept that the Baldus Study displays an impermissible risk that arbitrariness does, in fact, exist in Georgia's system of capital punishment.⁵⁷ It reasoned that statistical discrepancies are an inevitable consequence of a jury process that contains a wide range of discretion, and are, therefore, acceptable.⁵⁸ Finally, the Court concluded its analysis by raising some of the pragmatic concerns that it thought would accompany a finding that the sentencing procedure in Georgia operates impermissibly,⁵⁹ such as the risk that an individual's physiognomy might affect his sentence.⁶⁰ The majority then deferred to the legislature⁶¹ with its affirmance of the ruling of the court of appeals.⁶²

The Court's reasoning in *McCleskey* is flawed and it illustrates the ill effects of judicial submission to pragmatism. The decision was wrong for two reasons. First, the Court erred by failing to recognize that purposeful discrimination, in violation of the equal protection clause,⁶³ was successfully established by the Baldus Study. Second, the Court incorrectly concluded that a profound risk that jury determinations are vilely infected with racism does not offend the eighth amendment.⁶⁴ The effects of this decision, moreover, are two-fold. First, the Court has set aside as unpersuasive one of the most comprehensive and illuminating statistical studies ever introduced to the judiciary, thus creating an overwhelming standard for the introduction of statistical data.⁶⁵ Second, the Court has made it clear

56. *McCleskey*, 107 S. Ct. at 1772-74. See also *supra* note 3 for a discussion of Georgia's capital sentencing history.

57. *McCleskey*, 107 S. Ct. at 1775. McCleskey argued that, although *Gregg* held that Georgia's capital sentencing procedure was constitutional on its face, as the statute is applied, the State of Georgia still acts arbitrarily. *Id.*

58. *McCleskey*, 107 S. Ct. at 1777 ("[t]he capital sentencing decision requires the individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant"). Apparently, however, this includes the defendant's race. See appendix B illustrating the race-of-victim impact on the sentencing process.

59. *Id.* at 1779. See *Foe's Hopes Dashed*, *supra* note 11 ("Death Penalty Ruling is Said to Prevent Judicial Disarray"). See *infra* notes 117-121 and accompanying text discussing why these fears are unfounded.

60. *McCleskey*, 107 S. Ct. at 1780 (Justice Powell asserts that "there is no limiting principle to the type of challenge brought by McCleskey"). Justice Powell fails, however, to recognize that people have not been discriminated against throughout the history of this nation in regard to the examples he provides. Simply stated, Georgia has had a nasty habit of imposing harsher sentences on people who happen not to be caucasian and, while not as conspicuous as before, this habit continues.

61. *McCleskey*, 107 S. Ct. at 1781 ("McCleskey's arguments are best presented to the legislative bodies").

62. *Id.*

63. See *infra* notes 70-90 and accompanying text discussing the flaws in the Court's equal protection analysis.

64. See *infra* notes 91-109 and accompanying text discussing the flaws in the Courts eighth amendment analysis.

65. See *infra* notes 122-129 and accompanying text discussing the effects this

that further, broad-based judicial challenges to capital punishment as an institution are bound for failure,⁶⁶ thus creating frightening constitutional precedent for those who remain convinced that capital punishment transcends the bounds of constitutionality,⁶⁷ not to mention fundamental human dignity⁶⁸ and simple common sense.⁶⁹

The Court erred first by failing to recognize that Georgia's system of capital punishment is repugnant to the equal protection clause. The fourteenth amendment to the United States Constitution protects all citizens from governmentally imposed racial discrimination.⁷⁰ Throughout its history people have used the equal protection clause as a shield against the piercing blow of governmentally sanctioned racism.⁷¹ The history of our nation, including the history of Georgia, is replete with many such incidents.⁷² Now, a highly praised scientific study reveals that the state of Georgia is exercising its most awesome power in a manner that assesses a lesser value to a black person's life than it does to a white person's life.⁷³

decision will have on the use of social-scientific data as evidence.

66. See *Foe's Hopes Dashed*, *supra* note 11 (opponents' last challenge to the death penalty failed).

67. Justices Brennan and Marshall are two distinguished jurists who remain convinced that the death penalty is cruel and unusual punishment in every instance and, therefore, violative of the eighth amendment. *McCleskey v. Kemp*, 107 S. Ct. 1756, 1781 (1987) (Brennan, J., dissenting).

68. The California Supreme Court has noted: "The dignity of man, the individual, and the society as a whole, is today demeaned by our continued practice of capital punishment." *People v. Anderson*, 6 Cal. 3d 628, 650, 493 P.2d 880, 895, 100 Cal. Rptr. 152, 167 (1972) (quoted in Rosenberg & Levy, *Capital Punishment: Coming to Grips With the Dignity of Man*, 14 Cal. W.L. Rev. 275 (1978)).

69. It might be true that capital punishment makes some people feel better, but that is an insufficient reason to tolerate a system which responds to the taking of a life by taking another. Gayle, *Retribution, Punishment, and Death*, 18 U.C. DAVIS L. Rev. 973 (1985) ("neither retributive nor utilitarian theories can justify the imposition of capital punishment"). Capital punishment, moreover, does not deter crime in this country. Glaser, *Capital Punishment-Deterrent or Stimulus to Murder? Our Unexamined Deaths and Penalties*, 10 U. Tol. L. Rev. 317 (1979) ("executions are no more of a deterrent to murder than the usual penalty, life imprisonment"). The costs of executing a defendant, moreover, are far greater than the costs of keeping him in prison for the duration of his life. Note, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. Rev. 1221 (1985) ("[a] criminal justice system that includes the death penalty costs more than a system that chooses life imprisonment").

70. See *supra* note 8 for the partial text of the fourteenth amendment; see also *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880) (the fourteenth amendment's design "was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it").

71. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1974) (Wisconsin law forbidding marriage if resident with minor children did not comply with support obligations is unconstitutional); *Hernandez v. Texas*, 347 U.S. 475 (1954) (exclusion of Mexican-Americans from Texas juries is unconstitutional); *Brown v. Board of Educ.*, 347 U.S. 483 (1953) (racial discrimination in public education is unconstitutional).

72. See, e.g., *Beardon v. Georgia*, 461 U.S. 660 (1983) (equal protection prohibits the state from revoking defendant's probation for failure to pay a fine).

73. See appendices A and B (the mid-range cases display a marked disparity in

The Supreme Court, however, refused to recognize that this is repugnant to the equal protection clause.

The Supreme Court, until now, has consistently found that instances of racial discrimination within the criminal justice system are intolerable.⁷⁴ The Court, moreover, has found that instances of racial discrimination in the institution of capital punishment are particularly reprehensible because of the gravity and finality of such a sentence.⁷⁵ In *McCleskey*, however, the Court ruled that the evidence offered was insufficient to prove that Georgia discriminated against Warren McCleskey because of the color of his, or his victim's, skin.⁷⁶

The Court's refusal to recognize the impact of such striking statistical evidence is inconsistent with many of its earlier decisions.⁷⁷ The *McCleskey* Court acknowledged that it has previously found that statistical evidence of general racial discrimination compels an inference that such discrimination exists in a particular case.⁷⁸ The Court did this in *Yick Wo v. Hopkins*.⁷⁹ In *Yick Wo*, the Court found irresistible the conclusion that purposeful discrimination existed in regard to a system of business permit issuance which, in its application, obviously discriminated against people of oriental ancestry.⁸⁰ So too, the Court found that a boundary alteration shown to exclude black voters operated unconstitutionally.⁸¹ The *McCleskey* Court, however, found that these prior cases demonstrated a "stark" pattern that the Court was unwilling to find in McCleskey's case.⁸² The Court failed to acknowledge that the fact that those who kill white people are eleven times more likely to be executed than

sentencing).

74. *Swain v. Alabama*, 380 U.S. 202 (1965) (it is unconstitutional for a prosecutor to continually exclude blacks from grand juries).

75. *California v. Ramos*, 463 U.S. 992, 998-99 (1983) ("The Court . . . has recognized the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination").

76. *McCleskey v. Kemp*, 107 S. Ct. 1756, 1769 (1987). *But cf.* D. BALDUS & J. COLE, *STATISTICAL PROOF OF DISCRIMINATION* § 1.13 (1980 & Supp. 1986) (illustrates in detail the racial disparities that the Court found were insufficient).

77. *See supra* note 40 for a list of some instances in which the Court has found the existence of an equal protection violation based on statistical disparities.

78. *McCleskey*, 107 S. Ct. at 1767.

79. 118 U.S. 356, 359 (1886) (all of the over two hundred persons of Chinese ancestry seeking to gain or renew permits to operate laundries in San Francisco were turned down while all but one of the white persons seeking permits were granted them).

80. *Id.* at 374.

81. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (the officers and mayor of Tuskegee, Alabama changed the boundary lines of their city from a square shape to an amorphous twenty-eight sided figure thereby excluding all but four or five of the city's 400 black voters).

82. *McCleskey*, 107 S. Ct. at 1767 (quoting *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)).

those who kill black people displays a "stark" pattern sufficient to support an equal protection claim.⁸³

The Court also acknowledged that less striking statistical evidence has compelled an inference of purposeful discrimination in jury venire and Title VII cases,⁸⁴ but distinguished these cases based on the number of entities⁸⁵ and variables involved.⁸⁶ The distinctions, however, are unpersuasive.⁸⁷ The equal protection clause is specifically designed to prohibit inequities based upon race, such as those that the Baldus Study shows.⁸⁸ Despite the Court's historical abhorrence for racial discrimination in the criminal justice system,⁸⁹

83. There was more than a twenty percentage point disparity in the mid-range cases. See appendices A and B displaying these disparities. Although these results are not tantamount to those found in *Yick Wo* and *Gomillion*, they do, nevertheless, display a "stark" pattern. Goldberg, *McCleskey Hit*, 74 A.B.A. J. Oct. 1, 1988, at 18, quoting Professor Noval Morris, Julius Kreeger Professor of Law, University of Chicago Law School (court ignored "starkest evidence of racial bias in the criminal justice system").

84. See *supra* note 42, illustrating that the Court consistently draws the inference of purposeful discrimination in these instances.

85. The Court discussed the number of entities distinction in a footnote. *McCleskey*, 107 S. Ct. at 1768 n.15. First, the Court had a problem with identifying the decision maker. *Id.* That is, the footnote stated that disparities in jury selection or employment can be attributed to the individual jury commission or individual employer, and that entity can be held individually accountable. *Id.* The Court reasoned that the Baldus Study provides data for system-wide disparities and, therefore, no one entity could be held accountable. *Id.*

86. The Court also made a distinction based on the number of variables. *Id.* at 1768 n.14. It found that venire selection is statutorily restricted so that only a few variables can be considered. *Id.* In regard to employment, It found that any variable considered must be, at least, job-related. *Id.* In capital sentencing, however, the Court found that the jury can take into account anything. *Id.*

87. First, the number of entities involved in capital sentencing decisions are equally identifiable, and just as few, as those in jury selection and Title VII cases. *McCleskey*, 107 S. Ct. at 1797 (Blackmun, J., dissenting) ("The primary decision-maker at each of the intermediate steps of the [capital sentencing] process is the prosecutor, the quintessential state actor in a criminal proceeding"). That is, one entity, the prosecutor, decides whether to seek the death penalty. So too, one entity, the jury commission, decides how to choose the jury. The number of people who decide whom to employ, moreover, is no more copious. Although the Baldus Study is based on data for the state-wide criminal justice system in Georgia, and not for any one group of decision-makers, the whole is merely a sum of its parts and each must be equally responsible. *Id.* ("Discrimination extends to every actor in the Georgia criminal sentencing process").

Second, the number of variables in all three instances is infinite. Although jury commissions are restricted as to whom they may exclude, employers can only exclude for job-related reasons and jurors must find a statutory aggravating circumstance to impose the death sentence beyond that, any variable may be considered. The Baldus Study, however, served to discount the impact of 230 of those variables that might have also affected the capital sentencing decision process. See *supra* note 4 discussing the Baldus Study findings. The Court, nevertheless, decided that because the statistical discrepancies might be explained otherwise, it would not assume race played a major role. The opposite assumption is drawn in jury venire and Title VII cases. See *supra* note 42 discussing these situations.

88. *McCleskey*, 107 S. Ct. at 1795 (Blackmun, J., dissenting).

89. See *supra* notes 75-76 and accompanying text discussing the Court's previ-

and especially in the institution of capital punishment, the *McCleskey* Court requires less scrutiny under the equal protection clause for a capital punishment challenge than it would in a Title VII or jury venire case. The irony, moreover, is that had McCleskey brought a Title VII action against the Georgia court system for refusing to hire him, his evidence of racial disparity would likely have been sufficient to prove discriminatory purpose.⁹⁰ Instead, McCleskey's statistical evidence was insufficient to prevent the Georgia court from deciding that he must die.

In addition to its flawed equal protection analysis, the Court also analyzed McCleskey's eighth amendment claim incorrectly and thereby relegated its earlier ruling in *Furman v. Georgia*⁹¹ to mere historical trivia. The *Furman* Court acknowledged that eighth amendment jurisprudence has now evolved to the point where arbitrary and unpredictable application of the death penalty is impermissible.⁹² Justice Douglas, in the first published opinion of the majority in *Furman*, stated emphatically that the death penalty is "unusual" if inflicted upon an individual because of race, or even if such a risk is present.⁹³ The Baldus Study does more than illustrate the existence of a potential risk, it demonstrates that the risk is real.⁹⁴

The *McCleskey* Court did not disregard the fact that the existence of a likelihood of racial discrimination would render a capital sentencing procedure unconstitutional⁹⁵ but, rather, it ruled that the

ous posture concerning racial discrimination in capital punishment.

90. See, e.g., *Bazemore v. Friday*, 478 U.S. 385 (1986). See also C. Harrison, *Crime and Punishment: A Question of White and Black*, IOWA ALUMNI REV. July-Aug. 1987, at 15-17 (quoting Professor Baldus).

91. 405 U.S. 238 (1972). The *Furman* Court found that the then existing Georgia capital sentencing structure violated the eighth amendment to the United States Constitution because it allowed impermissible prejudices to affect the sentencing decisions. *Id.* at 257 (Douglas, J., concurring). See *supra* note 3 for a more detailed discussion of the *Furman* decision.

92. *Id.*

93. *Id.* at 242. Justice Douglas' words are transcribed in full in *supra* note 3. A system in which blacks, and especially those who kill whites, are executed with alarmingly disproportionate frequency certainly "gives room for the play" of exactly the type of prejudices Justice Douglas and the rest of the majority in *Furman* feared. *Id.*

94. See *supra* note 4 for a discussions of the findings contained in the Baldus Study. Whether in regard to the defendant or the victim, it is apparent from the findings that race is a factor in the capital sentencing system in Georgia. Justice Powell noted the following: "Defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks [sic] received the death penalty in only 1% of the cases." *McCleskey*, 107 S. Ct. at 1763. Justice Powell assuredly meant to include black persons within the human race. Such an error, nevertheless, is not benign simply because it is buried in a long opinion. A similar error, moreover, is literally fatal as it appears in Georgia's system of criminal justice.

95. The Court defined a "constitutionally permissible range of discretion in imposing the death penalty." *McCleskey*, 107 S. Ct. at 1774. First, the Court described a

Baldus Study did not prove that enough racial discrimination was present.⁹⁶ The Court, therefore, chose to pit the goal of eradicating racial prejudice from the criminal justice system against the interest of maintaining discretion for prosecutors and jurors.⁹⁷ This was an unnecessary and unhealthful exercise in futility because the discretion of prosecutors and jurors is not jeopardized by a system that is free from racial bias.

A defendant's right to a trial by jury is unquestioned in our criminal justice system,⁹⁸ and the discretion of prosecutors in whether to seek,⁹⁹ and the discretion of jurors in whether to implement, the death penalty are inherent in such a system.¹⁰⁰ Thus, discretion breeds unpredictability which, with certain safeguards, breeds fairness. Unpredictability, contrary to the Court's interpretation, is not present in Georgia's capital sentencing system.¹⁰¹ The Baldus Study displays, in the mid-range of cases, a remarkable predisposition of prosecutors to seek, and jurors to implement, the death penalty in cases in which the victim was white.¹⁰² As Justice Brennan describes in his dissent, this fact is a conspicuous part of Georgia's criminal justice system.¹⁰³ To acknowledge the existence of

"threshold below which the death penalty cannot be imposed." *Id.* That is, society sets a standard for the imposition of the death penalty that is in some way commensurate with the crime, and this standard must be followed. *Id.* Second, the Court found that the state must allow the sentencer to take into account all the relevant circumstances and, therefore, one cannot challenge a prosecutor's decision not to seek the death penalty. *Id.* The Court held, therefore, that so long as a prosecutor acts within his permitted discretion and focuses only "on the particularized nature of the crime and the particularized characteristics of the individual defendant," he acts within the bounds of the Constitution. *Id.* at 1775 (quoting *Gregg v. Georgia*, 428 U.S. 153, 206 (1976)). Because, however, the Baldus Study reveals that race is as important a criteria in the prosecutor's decision-making process as many of the permitted foci, it follows that the system is fatally flawed because the particularized characteristics of the defendant to which Justice Powell refers inevitably include his race. *Id.* at 1800 (Blackmun, J., dissenting).

96. *Id.* at 1775 (the Court refused to recognize that the Baldus Study demonstrated "an unacceptable risk" of racial bias affecting the Georgia capital sentencing process).

97. *Id.* at 1778 ("Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious").

98. U.S. CONST. amend. VI.

99. See *McCleskey*, 107 S. Ct. at 1777 ("[t]he capacity of prosecutorial discretion to provide individualized justice is firmly entrenched in American Law") (quoting 2 W. LAFAYETTE & D. ISRAEL, *CRIMINAL PROCEDURE* § 13.2(a), at 160 (1984)).

100. *McCleskey*, 107 S. Ct. at 1777 ("it is the jury's function to make the difficult and uniquely human judgments that defy codification and that 'buil[d] discretion, equity, and flexibility into a legal system'") (quoting in part H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 498 (1966)).

101. The Baldus Study reveals conclusively that the odds of receiving the death penalty are far greater for blacks, and those who kill whites. See appendices A and B.

102. See appendix B.

103. *McCleskey*, 107 S. Ct. at 1782. (Brennan, J., dissenting). Justice Brennan describes the inevitable conversation between attorney and defendant in Georgia. *Id.* That is, it would be the duty of the attorney to tell her client that his criminal record,

racial prejudice in Georgia's capital punishment system,¹⁰⁴ and to take steps to eliminate it,¹⁰⁵ therefore, would not infringe upon the discretion of prosecutors and jurors, but would enhance it.¹⁰⁶ As it stands, unfortunately, the victim's race plays at least as important a role in Georgia's capital sentencing system as many of the specific sentencing criteria Georgia law prescribes.¹⁰⁷ Elimination of race as either a conscious or subconscious consideration would leave more room for consideration of the myriad of other allowable factors that lend to a fair disposition of the criminal sentencing process.¹⁰⁸ If, however, discretion and fairness cannot coexist in a system of capital punishment, the system cannot exist.¹⁰⁹

Georgia's system of capital punishment, nevertheless, could conceivably be repaired and made consistent with the mandate set forth in *Furman v. Georgia*.¹¹⁰ That is, the Baldus Study reveals that the infection of racism occurs primarily in the mid-range of cases.¹¹¹ These are the cases that are the most difficult to decide and, there-

for instance, is no more important than the color of his, or his victim's, skin. *Id.* The defendant would be left knowing, therefore, that his race, at least in part, would determine whether he lived or died. This is a sobering thought.

104. Baldus, Woodworth, and Pulaski, *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons From Georgia*, 18 U.C. DAVIS L. REV. 1375, 1404 (1985) (findings demonstrate a "strong anti-black defendant bias").

105. See Bowers, *The Pervasiveness Of Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1099 (1983) ("statutory reforms possibly may affect how and where arbitrariness occurs in the handling of cases, but changes are apt to be more apparent than real."). Justice Stevens advocates a system in which the only death-eligible defendants are those who fall within a category in which race is consistently not a factor. *McCleskey*, 107 S. Ct. at 1806 (Stevens, J., dissenting). See also *infra* notes 110-116 and accompanying text discussing possible solutions.

106. *McCleskey*, 107 S. Ct. at 1776 quoting *Peters v. Kiff*, 407 U.S. 493, 503 (1972) ("Individual jurors bring to their deliberations 'qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable'").

107. *McCleskey*, 107 S. Ct. at 1800 (Blackmun, J., dissenting) ("race of the victim is more important in explaining the imposition of a death sentence than is the factor whether the defendant was a prime mover in the homicide").

108. H. KALVEN & H. ZEISEL, *supra* note 100 (juries bring human judgment into the legal system).

109. *McCleskey*, 107 S. Ct. at 1806 (Stevens, J., dissenting), citing *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) ("If society were indeed forced to choose between a racially discriminatory death penalty (one that provides heightened protection against murder "for whites only") and no death penalty at all, the choice mandated by the constitution would be plain").

110. 408 U.S. 238 (1972). The *Furman* Court condemned the then operative Georgia capital punishment statute because it was racially arbitrary in its application and, therefore, unusual in the eighth amendment sense. 408 U.S. at 257 (Douglas, J., concurring). The *Furman* Court ruled, therefore, that the statute could not operate unless the arbitrariness was eliminated. *Id.* The Supreme Court later ruled that Georgia had apparently eliminated the racial arbitrariness with its new statute. *Gregg v. Georgia*, 428 U.S. 153, 206-07 (1975). See *supra* note 19 for the text of Georgia's capital sentencing statute.

111. Baldus, Woodworth and Pulaski, *supra* note 4 at 1401.

fore, require the greatest degree of discretion.¹¹² When it is clear, for instance, to prosecutors and jurors that a certain defendant should not be executed, race is of little value in the decision-making process. Likewise, when it is clear in the minds of prosecutors and jurors that a particular defendant deserves to die, that defendant will likely be executed irrespective of his, or the victim's, race.¹¹³ When the decisions are tough, however, race plays too large a role. Georgia's death penalty, therefore, should be restricted to a class of defendants unaffected by the conscious or subconscious biases of prosecutors and jurors. One suggestion is to restrict the class of death-eligible defendants to those convicted of particularly heinous crimes.¹¹⁴ That restriction, however, would require specific delineation of the types crimes which would warrant the death penalty rather than repetition of the flaw found in some state systems which merely add "particularly heinous" to the list of statutory aggravating circumstances.¹¹⁵ Without such a restriction, however, the Court cannot uphold Georgia's death penalty while also considering it consistent with the eighth amendment.¹¹⁶

Justice Powell's articulated fear that if the court had ruled McCleskey's death sentence unconstitutional, it would have sent a shock wave through this country's entire criminal justice system, is unsupported by the facts.¹¹⁷ The Court cites a published study to support its reasoning that all sentencing structures are infected with racism, and it is somewhat encouraging that the Court was willing to

112. *McCleskey*, 107 S. Ct. at 1784 ("almost 6 in 10 defendants comparable to McCleskey [mid-range defendants] would not have received the death penalty if their victims had been black").

113. *Id.* ("the jury exercises virtually no discretion because . . . only one outcome is appropriate").

114. Justice Stevens suggests this procedure in his dissent. *McCleskey*, 107 S. Ct. at 1806 (Stevens, J., dissenting). Justice Powell, however, responding in his opinion to Justice Steven's dissenting opinion, criticizes it because, "'consistently' is a relative term, and narrowing the category of death-eligible defendants would simply shift the borderline between those defendants who received the death penalty and those who did not." *Id.* at 1780 n.45. See also Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C.L. REV. 941 (1986) ("especially heinous" aggravating circumstance is too vague). Justice Powell's argument is unpersuasive. Simply stated, there are identifiable classes of defendants whose sentences are unaffected by their race. These defendants are the only defendants the eighth amendment permits society to execute.

115. Professors Baldus, Woodworth and Pulaski illustrate a six-level index based on 18 factors which, at level six (the highest level of aggravation), eliminates all arbitrariness because all of the defendants in this group received the death penalty. Baldus, Woodworth & Pulaski, *supra* note 4, at 1396.

116. See *supra* notes 91-94 and accompanying text discussing the eighth amendment as construed in *Furman v. Georgia*, 408 U.S. 238 (1972).

117. *McCleskey*, 107 S. Ct. at 1779-80 ("McCleskey's claim throws into serious question the principles that underlie our entire criminal justice system"). *McCleskey*, however, is not the only one questioning our criminal justice system. See Goldberg, *supra* note 83 (racial discrimination is present in every stage of the criminal enforcement and sentencing process).

acknowledge this fact.¹¹⁸ The study that the Court cites, however, unlike the Baldus Study, was unable to prove that race played a significant role in the system that was the subject of the study.¹¹⁹ In fact, it is unlikely that any study could establish, to the degree of accuracy that the Baldus Study does, that race alone is an equally important sentencing criterion in an overall sentencing system.¹²⁰ Additionally, capital punishment, because of the severity and finality of the sentence, has warranted a greater degree of scrutiny than other sentencing procedures.¹²¹ If, however, a study could prove, to the degree of accuracy that the Baldus Study proves, that race plays an important role in this country's overall sentencing structure, that structure would require change as well, such as requiring stricter sentencing guidelines.

In addition to its several unfortunate constitutional interpretations,¹²² the *McCleskey* Court has also confused the standard for the introduction of statistical evidence. The Court's failure to recognize that the Baldus Study has demonstrated purposeful discrimination in violation of the fourteenth amendment,¹²³ or a great enough risk that racial discrimination exists to support an eighth amendment claim,¹²⁴ sent a resounding message to an array of scientific disciplines: the judiciary will not accept their work as dispositive of what it seeks to prove.¹²⁵ At no time in the past has anyone introduced such an elaborate social-scientific study to the judiciary.¹²⁶ The

118. *McCleskey*, 107 S. Ct. at 1779 n.38, citing Spohn, Gruhl & Welch, *The Effect of Race on Sentencing: A Reexamination of an Unanswered Question*, 16 LAW & SOC. REV. 71 (1981-82).

119. Spohn, Gruhl & Welch, *supra* note 118, at 85-86 (study found no direct relationship between race and sentence severity, but acknowledged the existence of "well-documented and pervasive discrimination").

120. *McCleskey*, 107 S. Ct. at 1793 (Brennan, J., dissenting) ("McCleskey presents evidence that is far and away the most refined data ever assembled on any system of punishment").

121. *California v. Ramos*, 463 U.S. 992, 998-99 (1983), citing *Eddings v. Oklahoma*, 455 U.S. 104, 117-18 (1982) (O'Connor, J., concurring) ("[t]he Court . . . has recognized that the qualitative difference of death from all other punishments requires a corresponding greater degree of scrutiny of the capital sentencing determination").

122. See Brief *Amicus Curiae* Of The International Human Rights Law Group at 11, *McCleskey*, 107 S. Ct. at 1756 (concluding that, in addition to misapplying eighth and fourteenth amendment jurisprudence, the Court's decision violates the supremacy clause by ignoring the role of international law and human rights in its decision).

123. See *supra* notes 70-90 and accompanying text discussing the flaws in the Court's equal protection analysis (Court found that the state had not acted with discriminatory intent).

124. See *supra* notes 91-109 and accompanying text discussing the flaws in the Court's eighth amendment analysis (Court found that Georgia's capital sentencing system was neither arbitrary nor capricious).

125. See *supra* note 10 for a description of some of the scientific community's concerns.

126. See *supra* note 5 (the studies were described as the most complete analysis

Baldus Study indisputably demonstrates that race is a factor in Georgia's criminal justice system.¹²⁷ The Court, however, chose to give less credence to these findings than they deserve,¹²⁸ thereby leaving the scientific community to wonder what it needs to do to satisfy the judiciary.¹²⁹

The *McCleskey* Court, in addition to abandoning its long settled trend of striking down laws that act to discriminate on the basis of race,¹³⁰ has also retreated from taking any stand against capital punishment.¹³¹ *Furman v. Georgia*, by summarily halting the executions of hundreds of defendants on death row, seemed to indicate that the Court would recognize capital punishment as something more than a purely political issue.¹³² *Gregg v. Georgia*, however, left serious doubt as to what constitutional challenges the Supreme Court would be willing to address in regard to the death sentence.¹³³ *McCleskey* now clearly indicates that the Court wishes to put the issue of capital punishment, and the fate of those charged, into the hands of the various state legislatures.¹³⁴ This unfortunately includes legislatures in states that have a long history of racial discrimination apparently not yet cured, with an inclination to reflect the colloquial southern phrase, "fry them all and let God sort them out."

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of sentencing ever done).

127. *McCleskey*, 107 S. Ct. at 1785 (Brennan, J., dissenting) ("This evidence shows that there is a better than even chance in Georgia that race will influence the decision to impose the death penalty").

128. Anything short of a ruling that the Baldus Study demonstrated a constitutionally impermissible degree of arbitrariness or purposeful discrimination in Georgia's capital sentencing system effectively rules that the findings of the study are insignificant. Goldberg, *supra* note 83.

129. See *supra* note 5 (Baldus Study the most comprehensive study of its kind).

130. See *supra* notes 71-72 for some examples of the Court's historical stance regarding state sanctioned racial discrimination.

131. See *supra* note 11 (the ruling marks opponents' last challenge to the death penalty).

132. *Furman*, 408 U.S. at 256-57 (Douglas, J., concurring) (a death sentence is "unusual" if it discriminates because of race).

133. *Gregg v. Georgia*, 428 U.S. 153, 174 (1976) ("[t]he [e]ighth [a]mendment must be applied with an awareness of the limited role to be played by the courts").

134. *McCleskey*, 107 S. Ct. at 1781 ("McCleskey's arguments are best presented to the legislative bodies").

APPENDIX A
RACE OF DEFENDANT

| A | B | C | | D | E |
|--|---|--|-----------------------|---|---|
| Predicted Chance of a Death Sentence 1 (least) to 8 (highest) | Average Actual Sentencing Rate for the Cases at Each Level | Death Sentencing Rates for Black Defendants Involving | | | Arithmetic Difference in Rate of the Victim Rates (Col. C - Col. D) |
| | | White Victim Cases | Black Victim Cases | | |
| 1 | .0 (0/33) | .0 (0/9) | .0 (0/19) | | .0 |
| 2 | .0 (0/55) | .0 (0/8) | .0 (0/27) | | .0 |
| 3 | .08 (6/76) | .30 (3/10) | .11 (2/18) | | .19 |
| 4 | .07 (4/57) | .23 (3/13) | .0 (0/15) | | .23 |
| 5 | .27 (15/58) | .35 (9/26) | .17 (2/12) | | .18 |
| 6 | .17 (11/64) | .38 (3/8) | .05 (1/20) | | .33 |
| 7 | .41 (29/71) | .64 (9/14) | .39 (5/13) | | .25 |
| 8 | .88 (51/58) | .91 (20/22) | .75 (6/8) | | .16 |

Brief for Petitioner at 20, *McCleskey v. Kemp*, 107 S. Ct. 1756 (1987) (No. 84-6811). Column A represents the degree of aggravation in various classifications of cases. A degree of 1 means that the crime was the least aggravated, and is where the death penalty is seldom, if ever, imposed. Level 8, conversely, represents the most aggravated crimes, and is where the death penalty is most often implemented. Little, if any, discrepancies are noticed at these extreme levels because there is very little discretion involved in those cases. Where the decisions become more difficult, in the mid-range cases, more of a discrepancy is noticeable.

APPENDIX B
RACE OF VICTIM

| A | B | C | D | E |
|--|---|---|---|--|
| Predicted Chance of a Death Sentence 1 (least) to 8 (highest) | Average Actual Sentencing Rate for the Cases at Each Level | Death Sentencing Rates for <u>White Victims Involving</u> Black Defendants | Death Sentencing Rates for <u>White Victims Involving</u> White Defendants | Arithmetic Difference in Race of the Defendant Rates (Col. C - Col. D) |
| 1 | .0 (0/33) | .0 (0/9) | .0 (0/5) | .0 |
| 2 | .0 (0/55) | .0 (0/8) | .0 (0/19) | .0 |
| 3 | .08 (6/76) | .30 (3/10) | .03 (1/39) | .27 |
| 4 | .07 (4/57) | .23 (3/13) | .04 (1/29) | .19 |
| 5 | .27 (15/58) | .35 (9/26) | .20 (4/20) | .15 |
| 6 | .18 (11/64) | .38 (3/8) | .16 (5/32) | .22 |
| 7 | .41 (29/71) | .64 (9/14) | .39 (15/39) | .25 |
| 8 | .88 (51/58) | .91 (20/22) | .89 (25/28) | .02 |

Id.