The Dangerous Intersection of Race and Capital Punishment

An analysis of the grave errors embodied in the Supreme Court’s McCleskey v. Kemp decision

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On September 21, 2011, Troy Davis, a black man, was executed by the state of Georgia for the murder of a white police officer, maintaining his innocence from the date of his conviction in 1989 until his death. On September 25, 1991, Warren McCleskey, a black man, was executed by the State of Georgia for the murder of a white police officer while in the progress of committing an armed robbery in 1978. Although twenty years separate these men, they share two important common threads. First, they both maintained their innocence from their conviction until their death and had trials tainted by faulty eyewitness testimony. Second, both men may have been sentenced to death as a consequence of their race and the race of their victim – a fact more disturbing because of their innocence claims. Davis attempted to get relief from his sentence through repeated claims of innocence. McCleskey, after he was denied post-conviction relief by state courts, claimed habeas corpus relief in Federal District Court on the basis that Georgia’s capital sentencing system was operated in a discriminatory way. He justified his claims using the results of a statistical study, the Baldus study, to prove that race was an important and impermissible factor in the death sentence decision.

In a 5-4 decision, The Supreme Court, in *McCleskey v. Kemp* (1987), evaluated his claims, ultimately ruling against McCleskey and rejecting the gravity of the implications of the Baldus study. The Court held: 1) that the Baldus study “does not establish that the administration of the Georgia capital punishment system violates the Equal Protection Clause,” 2) that the Baldus study does not demonstrate that “the Georgia capital sentencing system violates the Eighth Amendment’s prohibition of cruel and unusual punishment...in light of this Court’s decisions under that Amendment” specifically in *Furman v. Georgia* and *Gregg v. Georgia*, 3) that the Baldus study does not demonstrate an Eighth Amendment violation in disproportionality

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of sentencing or capricious application of the death penalty, and 4) that the “petitioner’s claim, taken to its logical conclusion, throws into serious question the principles that underlie the entire criminal justice system.” In effect, the Court’s opinion condoned the permeation of racism into a policy that governs the implementation of the highest form of punishment permissible by the criminal justice system.

Justice Brennan’s dissent decried the majority’s ruling as conjuring similarities to the infamous *Plessy v. Ferguson* (1896) decision, a sentiment shared by many of the decision’s present detractors. Professor Randall Kennedy of Harvard University expounded upon the camaraderie between notorious decisions like *Dred Scott* and *Korematsu*, stating that “as in those prior disasters of judicial decisionmaking, the majority in *McCleskey* repressed the truth and validated racially oppressive official conduct,” displaying “more than moral callousness informed the Court’s analysis.”

The consequences are compounded by the fact that “no race-based challenge to a capital sentence has been sustained” 13 years after the *McCleskey* ruling despite statistical indications continued racially-impacted sentencing decisions. Justice Powell, the writer of the majority opinion, stated that *McCleskey* was the one case of his entire tenure wherein he would change his vote if given the chance, testifying to the constitutional violations and societal ramifications sanctioned by the Court’s decision.

It is ludicrous and naïve to assume that the impermissible factor of race has not causally affected a single capital sentence since the Court’s decision. The Court pronounced that racial discrimination is virtually impossible to prove in a case without outward discriminatory actions.

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performed or said by actors of the State.

To understand the extent of logical fallacies within the Court’s opinion, one must first understand the findings of the Baldus study and of more recent reincarnations of the study to which demonstrate and pervading relationship between sentencing and race. Second, the precedent set in *Furman* and *Gregg* must be assessed with respect to its impact on the Court’s decision and dissenting opinions. Third, discretion must be defined and critically evaluated. Fourth, the Court’s opinion regarding McCleskey’s claims must be addressed. Finally, proposed and adopted solutions are evaluated based on the feasibility and conjectured efficacy of their modus of action. These steps produce clarify the flawed nature of the Court’s conclusions and uphold the assertion that the only rational scheme to mitigate capricious application of the death sentence is to suspend the punishment indefinitely.

**I. Baldus and its Reincarnations**

McCleskey’s arguments were based around the findings of the Baldus study (hereafter referred to as “Baldus”), a set of two multivariate regression analyses utilizing data gleaned from more than 2,000 murder cases transpiring during the 1970s in Georgia. The study accounted for 230 other potentially influential variables (ex. education level) in order attempt to isolate and solidify a correlation between race and the death penalty. Conducted by Professor David Baldus of the University of Iowa and his colleagues, the study aimed to demonstrate to the Court that racial discrimination permeates of the capital sentencing process, manifesting as a disparity in death sentencing decisions correlating with race. The study had three principal findings: the race of the defendant has a small impact on whether the defendant received the death penalty, the race of the victim is one of the most powerful predictors of a defendant’s eventual sentence, and an increase in the aggravation level of a crime corresponds to a decrease in calculated sentencing
discrepancies among the races of both victim and defendant.

Whereas 60.7% of homicides in Georgia during the articulated time frame involved black victims, only 1% of persons charged with murder of a black person were given the death sentence.\(^5\) This is partially because prosecutors pursued a death sentence for 70% cases including a white victim and black defendant, 32% of white-victim/defendant, 19% of white-defendant/black victim, and only 15% of black-victim/defendant cases.\(^6\) Of all murders, 22% of white-victim/black-defendant cases resulted in death compared to just 8% of black-victim/black-defendant cases. A capital sentencing system wherein a white-victim case is 4.3 times as likely to lead to a death sentence as other races and a black defendant is 1.1 times as likely to be sentenced to death as other races would appear to augur a conspicuous permeation of race considerations into sentencing decisions.

Professor Baldus categorized McCleskey’s case as an “intermediate” level of aggravation based on the number of aggravating factors. Whereas low aggravation or high aggravation levels “[suggest] that only one outcome is appropriate,”\(^7\) the jury’s decision is far more straightforward and void of discretion than with cases of “intermediate” aggravation level; it is the “intermediate” level where the jury truly chooses whether a defendant will live or die based on their interpretations of the defendant and of the crime. Thus, at the “intermediate” level, 34% of white-victim cases and 14% of black-victim cases receive the death penalty; 59% of “defendants comparable to McCleskey would not have received the death penalty if their victim had been black,” and, without accounting for aggravating effects, 55% of all defendants in white-victim cases given the death penalty would have been given life instead if their victim were black.\(^8\)

The disturbing results of Baldus have been replicated numerous times in varying venues. While a holding in favor of McCleskey would have likely seen its immediate effect of Georgia’s sentencing statutes, the Baldus study reincarnations postulate a nationwide trend that racial disparities entering into the death penalty decision. A General Accounting Office (GAO) survey of all studies that address racial disparities in capital sentencing post- *Furman* found that 82% of the studies, regardless of the study’s quality, displayed race-of-victim discrimination and over 50% established a race-of-defendant independent of the race-of-victim effect.9

Professor Baldus and his colleagues conducted another study between 1996 and 1998 to assess the application of death sentences in Philadelphia, PA.10 Philadelphia was chosen for its notoriously “deadly” District Attorney and its suspect death row composition (83% black). In Philadelphia, the prosecutorial decision is limited to the ability to provide a plea bargain or waive a death penalty prior to a trial, resulting in smaller race-of-victim effects are smaller than in the original Baldus study. Ergo, the penal jury is the primary locus of discretion. If they find no mitigating factors in a case with at least one aggravating factor, the defendant is given a mandatory death sentence; with at least one mitigating factor found, the jury is required to weigh mitigating factors against aggravating factors and issue a death penalty if aggravating factors are greater than mitigating factors. The “liberation hypothesis” effect (“midrange cases in which the decision maker is ‘liberated’ from the ‘grip of fact’ that virtually compels a particular result when the case is very clear cut”)11 corroborates the original Baldus findings. The “liberation” effect is supported by the appearance of the greatest magnitude of racial disparities for midrange-aggravation cases: 1) when no mitigating factors are found, an average culpability level

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corresponds with 75% of white-victim cases versus 35% of black-victim cases receiving the death penalty and 2) when mitigating factors are found, 65% of black-defendant cases with an average number of aggravating and mitigating circumstances result in the death penalty versus 10% of white victim cases. Furthermore, the presence of mitigating factors only influenced the ultimate weighing decision in white-defendant cases; perhaps this is because less mitigative weight was given to circumstances in black-defendant cases than in white-defendant cases. The race-of-victim was perceived by jurors to be an independent aggravating factor and corresponded with a tendency for jurors to perceive less mitigating factors in white-victim cases, resulting in more white-victim cases receiving the death penalty.

In South Carolina\textsuperscript{12}, the Baldus-esque study found that, controlling for aggravating factors, a prosecutor will seek the death penalty is 43.2\% in white-victim cases versus 17.2\% in black victim cases, approximately two and a half times greater; this disparity increases when race-of-defendant is taken into account (49.5\% for black-defendant/white victim cases, 11.3\% black defendant/victim cases). When allowing for aggravating factors, a large discrepancy is seen when a homicide occurs alongside a murder: the prosecutorial seek rate is almost three times greater in white-victim (27.2\% seek rate) cases than with black-victims (9.1\% seek rate) Furthermore, death requests were greater in white-victim cases almost universally higher than in black victim cases. This revealed the most troubling aspect of the study: the death sentence request rate is higher in a white-victim case with a greater number of aggravating factors (39.1\% for single-victim homicides with a white victim) than a case with a black victim and less aggravating factors (25\% for multiple homicides featuring black victims). The overall finding was that prosecutorial seek rates were significantly higher for the black-defendant/white-victim

class than for all others.

A California\textsuperscript{13} study that divided “white” into Hispanic and non-Hispanic white affirmed the conclusions in Baldus while proposing that ethnoracial sentencing disparities are present for Hispanics as well. The study showed that white-victim cases result in a death sentence at a rate 7.6 times greater than black-victim cases when there are no aggravating circumstances, 2.28 with one aggravating circumstance, and 2 with two aggravating circumstances. Death sentences per 100 homicides increase as the white percentage of a county increases. The likelihood of a death sentence for a Hispanic-victim case was 67.1\% lower than a white-victim case; black-victim cases were 59.3\% lower than white-victim cases. The study indicates that racial gaps begin to close but are still evident with an increased number of aggravating factors.

In North Carolina\textsuperscript{14}, a study indicated that 79.1\% of all executions were for defendants in white-victim cases between 1984 and 2011, whereas only 43.2\% of all homicide victims were white. Black-defendant/white-victim cases resulted in death sentences at a rate five times higher than black defendant/victim cases. The trend of white-victim cases resulting in the death penalty at a greater rate than black-victim cases is seen regardless of aggravating factors. Over time, the disparities closed slightly but not significantly: white-victim cases were 3.3 times more likely to receive a death sentence than black-victim cases between 1980 and 1989 but dropped to a likelihood 3 times greater than black-victims between 1990 and 2007. By concluding that the race-of-victim effect was significant in determining death sentence probability, the study sent shockwaves through North Carolina and eventually resulted in the passage of a Racial Justice Act in 2009.

A study of the death penalty was conducted in Harris County, Texas, the “capital of capital punishment” that, if it were a state, would rank second in number of executions behind Texas as a whole. The study found that black-defendant cases frequently had less aggravating factors but had a prosecutorial seek rate equal to that white defendants. Black victims, on the other hand, were frequently involved in murders with other victims (24% of black-victim cases involved more than one victim), indicating more “serious” murders, yet prosecutors sought death in less than half of black-victim cases. The evidence suggests that prosecutors seek death for more black defendants and on behalf of more white victims; however, the death sentencing rate disparities are reduced to indicate that juries attenuate, but do not eliminate, racial disparities by a margin. The study found that the odds of a death trial for black-victim cases were 43% lower than white-victim cases but only 38% lower in actual death sentences. For black defendants, the odds of a death sentence are 1.49 times greater for black defendants than for white defendants, but the odds that a prosecutor seeks a death trial are higher (1.75 times higher odds of death trial for black defendants than for white defendants). The study suggests that prosecutors consistently “overreach” for death sentences for black defendants.

Persistence of these trends across time and geography suggests that the mechanism behind the racial disparities during McCleskey endure today. When presented with the Baldus study in McCleskey, the Court said that it assumed the study’s results were valid and interpretation of the statistics purports that “a discrepancy that appears to correlate with race” in the application of Georgia’s capital punishment system yet “does not constitute a major systemic defect.” Rationally, if the “systemic defect” were minor, it would not have not been able to register

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16 McCleskey v. Kemp. Footnote 6; The Court’s assessment that the $R^2$ of the regression was not large enough to assert significance, as the $R^2$ indicated that the 230 variables account for between .46 and .48 of variance in death sentences, does not take into account the true meaning of the $R^2$: variables calculated in the model may also be
racial discrepancies consistently for over twenty years without its discriminatory effect being significantly ameliorated or eliminated by the system’s safeguards against discrepancies.

IIa. Furman and Gregg: Legitimate Purpose for the Death Penalty

Furman v. Georgia (1972)’s per curium opinion in the 5-4 decision averred that the death penalty was applied in a manner far too capricious and arbitrary; thus, it constituted a major systemic defect and violated the Eighth Amendment’s prohibition of “cruel and unusual punishment” by allowing impermissible variables to influence sentencing decisions. Furman effectively placed a moratorium on the death penalty because, as Justice Douglas’s concurring opinion harangued, “Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.” Georgia and other jurisdictions were willing to fashion new standards in order to reintroduce capital punishment into their criminal justice system. Georgia’s new statutes were tested in Gregg v. Georgia (1976), a 7-2 decision. Gregg affirmed the constitutionality of the death penalty as punishment for murder and established two criteria to govern states’ death penalty statutes: 1) the sentencing authority must be “given adequate information and guidance…and provided with standards to guide its use of that information” and 2) that the situation of the individual defendant is considered in the sentencing decision.

Before delving into the specifics of McCleskey’s claims, it is necessary to examine the apparatuses that, in the view of the Court, sanction deference to decisions made by State actors over Baldus’ indicated risk of discriminatory sentencing. In Gregg and reiterated in McCleskey, the Court ruled that Georgia’s death penalty statute does not foster a “racially discriminatory

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17 Furman v. Georgia. 408 U.S. 238 and 408 U.S. 254
18 Gregg v. Georgia; 428 U.S 155

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purpose,” and is neutral on face and in application; furthermore, the Court deemed a “legitimate reason” for the state to “adopt and maintain capital punishment.”\(^{19}\) In decreeing that Georgia’s capital punishment statutes were conceived in a neutral fashion, no defendant, including McCleskey, would be able to prove Georgia’s laws were crafted with a purposeful intent to discriminate; an Equal Protection Clause argument claiming “intent” to discriminate is muted as disparate impact necessarily cannot indicate discriminatory intent.

The assertion of a “legitimate” purpose in the maintenance of capital sentencing is rebuffed by Justices Brennan and Marshall in Part I of the McCleskey dissent: “Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment ... I would vacate the decision below insofar as it left undisturbed the death sentence imposed in this case.”\(^{20}\) Practically, though, approval for the death penalty in murder cases is consistently high; however, the approval rate for capital punishment for those convicted of murder in the US has fallen from a high of 80% in 1995 to 61% in 2011.\(^{21}\) Still, about 40% of persons in the US believe the death penalty is performed too infrequently. Advocates frequently indicate “an eye for an eye/deserving the death penalty” as the primary reason for their support; the “deterrent/crime prevention” argument is the second most often reason given. The veracity of both the former argument and its philosophical nemesis (Part I of the McCleskey dissent) cannot be ascertained.

Deterrence’s effect, however, is interesting when viewed in light of McCleskey: if the death penalty has deterrent value, then Baldus’s indication that black-victims conjure the least


\(^{21}\) “Death Penalty,” Gallup Poll.\(<\text{http://www.gallup.com/poll/1606/death penalty.aspx}>\) The Poll indicated the lowest overall percentage in favor of the death penalty during the mid- to late 1960s, corresponding to the civil rights movement with an all-time low in 1967 (42% approval of the death penalty), with a drastic increase in death penalty approval occurring around 1976 (66% approval).
severe punishment should increase the number of black-victim cases as the threat of death is far more palpable for those whose potential victims are white. As most black-victim cases involve black defendants, the murder rate among blacks will increase and elicit devastation within majority-black communities by increasing incarceration and murder simultaneously; resultantly, Georgia’s statute decreases the protection of blacks. Professor Kennedy expounded upon this proposed effect, “It consists of facilitating a spirit of lawlessness that preys upon black communities…the extent that capital punishment has any deterrent force, that force is undermined in a fashion particularly burdensome to black citizens by racially disparate leniency.”

Furthermore, as a death penalty advocate, Kennedy perceives Baldus as indicating a deprivation of the “rights of the black community to an equal share of death penalty services” that amounts to an Equal Protection Violation claim not articulated by McCleskey but nevertheless would be rejected by the Court for failing the “intentional discrimination” qualification. With deterrence, it is plausible that if black-victim crimes are given harsher sentences, the result will be a deterrence of black-victim crimes wherein the majority of perpetrators are black defendants - an overall decrease in both black defendants and victims. Without deterrence, Kennedy’s protection claim assuredly fails: the net effect is greater execution probability in black-victim cases, the majority of which involve black defendants, without impacting the number of future black victim cases such that a black community is forced to deal with an increased in the number of deaths of its members. Effecting Kennedy’s system may assuage the families in black-victim cases by providing “an eye for an eye” justice and alleviate the devaluation of a black victim’s life that inevitably transpires if law is perceived to

operate in the method supposed by Baldus.

IIb. Furman & Gregg: the “Moral Consensus” Governing Georgia’s Capital Statutes

Gregg averred that the Georgia state legislature’s decision to reenact the death penalty approximates a “moral consensus concerning the death penalty and its social utility as a sanction” among their constituents.24 In McCleskey, the Court reasoned that the two best “objective indicia” to proxy as a litmus test in determination of “contemporary values” held by the population of Georgia were the capital punishment scheme crafted by the state legislature and jury sentencing decisions25; therefore, the continuation and employment of the death penalty indicates the public’s tacit approval of the system and its effects, including the effects particularized in Baldus. In the 111th United States Congress, 95% of all members held at least a college degree and only 17% of the members were women26. Whereas members of Congress are said to “represent” the people of their jurisdictions, it is certain that less than 95% of all constituents hold college diplomas and more than 17% are women; similarly, the Court’s assumption here is gravely misguided.

Discrepancies between characteristics of legislators and their constituents cause many elected officials to “represent” the people yet truly not be “of” the people and represent their interests. Seamless movement from “will of people” to legislative action is completely unrealistic; following, the Court’s assumption that Georgia’s legislators acted without discriminatory purpose because society has an interest in the protection provided by capital

25 McCleskey v. Kemp. 481 U.S. 300. The Court draws from Chief Justice Warren’s plurality opinion in Trope v. Dulles (1958) upholding the death penalty as it “must draw its meaning from the evolving standards of decency…” This implies that, in the future, society will have progressed enough to a “standard of decency” wherein capital punishment is no longer constitutional.
punishment is unrealistic as well. Thus, as legislators and their actions are not pure substitutes for their constituents, their decisions are, at least in part, a consequence of their individual characteristics. Moreover, Georgia’s history of tumultuous race-relations further removes the probability that its capital punishment statute was enacted free from discrimination. McCleskey addressed the issue of past racist policies affecting present policies in his Equal Protection claim.

In *Furman*, “the specter of race discrimination was acknowledged by the Court” as a factor contributing to their ruling of the unconstitutionality of Georgia’s capital sentencing system. Logically, when Georgia’s state legislature convened to redraft a capital sentencing policy free from racial discrimination, decisions made regarding the new system were influenced by members who previously, had contributed to discriminatory provisions in the prior statute struck down by *Furman*. Resultantly, some of the invidiousness found in the pre-*Furman* statute must have been carried over to the post-*Gregg* statute through incumbent state legislators. As a whole, it should be assumed that the Georgia capital punishment statute was mostly conceived without conscious discrimination, but the lack of intent does not change the outcome of the law for a defendant.

By *McCleskey*, Georgia’s death penalty statute was sufficiently shaped by the Court’s post-*Furman* decisions, culminating in a “constitutionally permissible range of discretion”: the penalty could only be applied in instances wherein the defendant is guilty beyond a reasonable doubt of at least one aggravating circumstance, defendants may introduce mitigating evidence to convince the jury to lessen their eventual sentence, the jury is allowed to consider only relevant information during sentencing, and the jury must base its sentence solely on “the particularized

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27 *McCleskey v. Kemp*. 481 U.S. 297. Majority Channels *Gregg v. Georgia* 428 U.S. 153 AND 428 U.S 226; “‘[O]ne of society's most basic tasks is that of protecting the lives of its citizens, and one of the most basic ways in which it achieves the task is through criminal laws against murder.”

characteristics of the individual defendant and the particularized nature of the crime” to alleviate the risk of irrelevant factors tainting the decision-making process.

Georgia, in order to buffer against potentially capricious application of the death penalty, added an additional safeguard to its statute mandating appeal of a death sentence to the State Supreme Court in order for that court to determine whether “passion or prejudice” invidiously influenced any facet of the jury’s decision.\(^{29}\) The mere existence of safeguards within the capital punishment statute signify that the state legislators crafted the statute with at least a semblance of awareness that increasing the boundaries of permissible discretion will simultaneously increase the probability that discriminatory impacts will have a tangible and irrefutable impact on the ultimate sentencing decision. Still, the efficacy of Georgia’s additional safeguards against racial animus is dubious at best when Baldus and subsequent studies have shown no overall progression toward greater equality in sentencing, indicating that the safeguard may not have been more than a cursory gesture to appease those critical of an increased range of discretion for state actors.

III. Discretion: Charles Lane & the Discretion Ideal

Charles Lane argues that, after reinstatement of capital punishment in \textit{Gregg}, the death penalty has operated in a way “less blatantly racist” than ever before despite the systematic disparities indicated in Baldus and other studies; moreover, he maintains that Baldus “does not necessarily reflect racism at all.”\(^{30}\) He recognizes that the history of the United States is fraught with race conflict such that there is always a constant risk of racism entering into that sentencing decision; however, his overall conclusion is that the “risk” is neither “large” nor “inerradicable.”\(^{31}\)


Between 1976 and 1998, 51.5% of all murders in the US were perpetrated by black persons; between 1977 and 1999, black persons accounted for 41.3% of death row. That 10.2% accounts for the “tug” of two distinct racial realities indicated in Baldus: while black-defendant/white-victim cases foster an increased application of the death penalty, the impact of a disproportionately high number of black-defendant/white-victim death convictions is greatly outweighed by the disproportionately low number of any-defendant/black-victim to account for underrepresentation of black murderers on death row.

Lane justifies a dearth of black-victim cases on death row as an inevitable consequence of prosecutorial realism, the tendency of prosecutors to pursue cases they perceive to likely result in a jury imposing the death penalty: “the death sentence rate in black defendant/black victim homicides decreased as the percentage of blacks in a county’s population increased.” African Americans, as a demographic group, tend to be against the death penalty; knowing this trend and seeking reelection, an elected prosecutor in a majority-black community will levy the death penalty seldom to never to increase favor with constituents. The increased political power of African Americans necessarily indicates racial progress, further emphasized that Lane finds a “de facto” abolishment of the death penalty in majority-black areas. Thus, Lane concludes, “race-of-the-victim disparities can be said to reflect racial progress” since the moral consensus of the community shapes the trajectory of capital punishment implementation in a degree unimaginable in 1960.32

Lane’s interpretation of race-of-victim disparities illuminates the “discretion” ideal: the “moral consensus” of the public is manifested in laws and verdicts such defendant is charged based on transgressions of the morals held by their peers. Reexamining the tendency for death sentencing rates in black-victim cases to drop as black share increases in population, darker and

more invidious factors appear. Regardless of prosecutorial intent, the gargantuan disparity
between black-defendant/black-victim and black-defendant/white-victim sentencing rates
definitively avers a greater overall valuation of white lives as compared to black lives. Juries and
Prosecutor’s “selective indifference…toward the plight of black victims” is palpable when
confronted with prosecutors’ unequivocally higher seek rate for white victims and the “tendency
of juries in black defendant cases to give less weight to mitigators they find than they do in the
nonblack-defendant cases.” Moreover, a black defendant in a black-victim case is seen as less
“deathworthy” than in a white-victim case at the highest levels of aggravation based on flagrant
disparities sentencing rates for those cases (47% for white-victim versus 4% for black-victim
cases), affirming a pervasive propensity for Sentencers to inaccurately perceive a crime
because of the distorting effects of some impermissible factor, likely race. If prosecutors are
indeed motivated to pursue the death penalty for “homicides that are visible and disturbing to the
majority of the community,” the lack of black-defendant/black-victim cases resulting in the
death penalty does not, as Lane claims, indicate racial progress but rather indifference to
aggression against black people leading to the overall devaluation of black life.

The United States Sentencing commission issued a report two weeks prior to McCleskey
proposing guidelines to avoid “unwanted sentencing disparities among defendants” and
effectively excluded “any consideration of individual offender characteristics,” but the actual
effect of the guidelines was to increase racial disparities in sentencing wherein sentences given to
black defendants averaged 41% longer than those given to similarly situated whites. In

35 Brian Edelman. Racial Prejudice, Juror Empathy, and Sentencing in Death Penalty Cases. LFB Scholarly
displaying grave consequences when sentencing decisions allow for no discretion or inclusion of mitigating factors, the Court’s protection of discretion in *McCleskey* is warranted. Discretion, when applied in a proper manner, benefits the defendant by permitting their individual considerations to impact the ultimate sentence, most desirably in the form of leniency. The Court recognizes a tenuous balance required in the exercise of discretionary power: “the power to be lenient [also] is the power to discriminate… but a capital punishment system that did not allow for discretionary acts of leniency ‘would be totally alien to our notions of criminal justice.’”

**IIIb. Discretion: The Court’s Heightened Standard & the Rationale of Racism**

Georgia’s capital sentencing statute purports that discretion places the sentencing decision at a happy medium between arbitrary sentencing, wherein the fate of a defendant is wholly determined by the whim of the Sentencers, and mandatory sentencing, wherein the individual circumstances of a crime are discarded in favor of a standardized punishment governed by guidelines that result from perception of a crime’s heinousness as determined solely by the drafters of the statute. Unbounded discretion characteristic of arbitrary sentencing is tempered by the implementation of standards akin to mandatory sentencing: discretion occurs only after the determination that a defendant’s crime included at least one aggravating factor. In the event that discretion is “suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action,” no discriminatory effect can be found. This, however, does not appear to be the case in light of the findings of Baldus: the discriminatory effect is not tactile at the individual level, but the summation of all the non-tactile discriminatory effects defines discretion’s inability to culminate in a proportionate sentence.

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In *McCleskey*, the Court states that they “would demand exceptionally clear proof before we would infer that the discretion has been abused” in the implementation of criminal laws, effectively dictating that an allegation of discriminatory impact resulting from the execution of discretion must be proven beyond a reasonable doubt or to a moral certainty in order to challenge a death penalty statute on the basis of an Equal Protection claim. This is a departure from the Court’s jurisprudence as “constitutional claims ordinarily need to be proven only by a preponderance of the evidence.” Essentially, the Court makes a demand that is impossible to fulfill because of the inherent nature of discretion: the motivations of a human being are inherently unobservable.

A jury composed of rational persons would never condemn a defendant to death instead of granting life because the victim’s race fostered a perception of a more heinous crime; however, juror decisions are influenced by myriad of unconscious factors, like the propensity for persons to empathize more with a person of the same race, such that a system championing discretion invariably permits this kind of irrationality. Discretionary judgments analyze every aspect of the defendant to ensure that death is appropriate given all factors of the individual; however, if that defendant were to focus on particularized characteristics of Sentencers involved in their sentencing decision to determine whether their backgrounds, proclivities, or other factors resulted in bias unjustly entering their particular sentencing decision, their findings likely could never meet the standard for the burden of proof to vacate their sentence. The probability of meeting that burden of proof is further diminished as neither jury nor prosecutor is required to explain their decision making process but is rather granted the benefit of the doubt that conscious or unconscious racial motives were not at play.

41 Brian Edelman. *Racial Prejudice...* Page 153
Professor Charles Lawrence, in response to the Court’s decision in Washington v. Davis that “discriminatory purpose” was necessary to prove an Equal Protection claim, wrote that “the existing intent requirement's assignment of individualized fault or responsibility for the existence of racial discrimination distorts our perceptions about the causes of discrimination” because every action is influenced by a combination of an individual’s conscious and subconscious needs, desires, and beliefs.\(^42\) This not only rejects the reality that a “large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation” but additionally absolves the individual from the manifestations of their unconscious thoughts. For example, during a trial, the use of word that conjures a stereotype can affect a jurors’ subconscious mind’s “confirmation of the negative internal attribution inferred from the stereotype” and lead to “the rejection of the external or internal attribution asserted by the defendant” such that individualized consideration becomes consideration of a stereotype.\(^43\) Ergo, the discretion requirement inadvertently opens a conduit for impermissible factors it intended to eliminate.

Notions of racial influence are inherently hard to address in a candid setting. Many of a person’s unconscious racist processes are never manifested in intentional actions because of the societal pressure to reject any racist idea as immoral and inconsistent with society. Lawrence points to a condition of Americans wherein “Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites.”\(^44\) This history,


\(^{43}\) Brian Edelman. Racial Prejudice...Page 72.

\(^{44}\) Charles Lawrence. “The Ego...” Page 322
though, functions as a trigger: it recognizes the unconscious racist thoughts as conflicting with the egalitarian requirement of society, pushing the idea further into the recesses of the mind where it is likely to remain unaddressed.

The most perilous effect of the Court’s decision is that it condones stigmatization. In *Brown v. Board of Education*, the Court decried systems of separate-but-equal as conferring a detrimental effect on black students by “genera[ting] a feeling of inferiority...in the community.”^45 Whereas *Brown* dealt with the stigma of being forced to attend a different and inferior school, *McCleskey* could be construed an unjust impingement upon and disrespect for black lives, resulting in a stigmatizing effect wherein blacks being to perceive *themselves* as being worth less. Moreover, it hearkens back to the era of slavery when whites were unilaterally superior while blacks were merely inhuman, able to be traded and worked to death without consequence. Fostering the perception of inherent inequality, it has a negative impact on collective black self-esteem and trust in the government, harming the collective black psyche. If the equal protection clause mandates equal treatment, the presence of a stigmatizing effect in a law causing one group to be valued as *more* than the others cannot hold. Baldus shows the effects of injuries on the individual level resulting in patterns of “stigmatizing actions that cumulate to compose an injurious whole that is greater than the sum of its parts”^46 when applied to death penalty statutes. In ignoring this fact, the Court is actively stigmatizing blacks, allowing for evidence of their misfortune to proceed unaltered. Instead of capitalizing on one of the rare opportunities to force people to recognize and reevaluate the deeply-embedded racist thoughts and tendencies embedded in their subconscious, the Court endorses them, perhaps a result of their own unconscious devaluation of black lives. Lawrence argues that a law resulting in stigma

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^45 Charles Lawrence. “The Ego…” Page 349
^46 Charles Lawrence. “The Ego…” Page 351
was ineludibly tainted during its inception by unconscious racial proclivities in its creators which preexist the discriminatory impact.  

Like Hurricane Katrina, wherein many professed the situation would have been dealt in a far more efficient manner were those to be impacted mostly white instead of predominantly black, the risk of the impact of Baldus plausibly would have been perceived as a more eminent threat were the population unjustly impacted identified as white.

IIIc. Discretion: Shielding State Actors’ Impermissible Proclivities

In denying that the irrationality of racism which invariably penetrates each sentencing decision poses a risk of arbitrary implementation of the death penalty, the Court neglects a vital tenant of capital punishment: as the greatest punishment able to be inflicted under law, it necessarily carries with it the pressure involved in making a decision of such magnitude. Juries, saddled with the ultimate determination, face immense pressure in determining whether the circumstances of the crime are deplorable enough to inflict death upon the defendant. As a result, juries tend to act “differently” in death penalty cases when compared with those in non-capital offenses trials; a juror’s race, religion, and myriad of other personal beliefs have a far more palpable impact on their decision than the norm.

The Court avows that “individual jurors bring to their deliberations ‘qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable’ that allow for them to use discretionary judgment to ‘make the difficult and uniquely human judgments that …’buil[d] discretion, equity, and flexibility into a legal system.’” Conversely, it is these personal experiences that limit the ability of jurors to empathize and properly interpret mitigating circumstances presented by the defendant. Juror

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empathy is dependent on two factors: 1) the ability to identify personally with a defendant and 2) to appraise the life events of the defendant either by personal experience or through a cognitive effort to vicariously experience the life events. The typical juror does not have the experience or exposure the conditions typically found in the lives of defendants in capital cases to enable the juror to properly empathize with a defendant. These conditions include, but are not limited to, extreme poverty, hunger, sexual abuse, drug addiction, violent upbringing, and other situations typically found in conjunction with a low socioeconomic status. The juror's inability to empathize culminates in in-group favoritism, leading to harsher convictions in white-victim cases. It is far easier to distance oneself from and condemn the “other” in the out-group than a “same” in the in-group as “we are less likely to see someone who we identify with as inherently evil.”

Typical juries determine whether guilt can be affirmed based on the presented evidence: the result is either that the evidence is sufficient to prove guilt beyond a reasonable doubt or it is not sufficient. In a death sentencing trial, the jurors are asked whether the crime and behavior of a defendant merits their death; essentially mandating that subjectivity and bias enter into a decision. The cumulative effect of their decisions, as shown in Baldus, suggests a probability that race, whether of victim or defendant, will impact a sentencing decision. These decisions signal a message to society, whether disseminated through media coverage of the crime or another means, of the tragedy of white victimization and of the standard devaluation of black life. Operating in a vicious cycle, the message sent by previous decisions reaches future jurors and infects their unconscious minds and, as a result, their future sentencing decision. If juror actions

51 Thomas Brewer. “Race and Jurors…” Page 532
are indicative of the “moral compass” of society as the Supreme Court claimed, society’s moral compass is askew.

A jury only makes a decision on the life of a defendant in cases where a prosecutor seeks the death penalty. Whereas a jury changes from case to case, the prosecutor is a constant such that their decisions can formulate a pattern. The Court concedes that a prosecutor has “wide discretion” in their decision to seek death for a defendant but does not require them to defend their decisions. Asking the prosecutor to defend their motivations behind seeking the death penalty for an individual would, according to the court, cause “his energy and attention” to be “diverted from the pressing duty of enforcing the criminal law.” In effect, the Court is pardoning prosecutors from the burden of providing rational answers for discriminatory patterns in seek decisions, excusing the myriad of irrational reasons why prosecutors may seek death for a particular defendant. A statistical indication of an invidious effect confirmed with 99% confidence, such as the fact that that a prosecutor’s “death request in murder/armed robbery is .272 when the victim is white but decreases to .091 for black victims,” will never result in an explanation able to sufficiently satisfy the black-victim families denied justice. As discussed, some of the prosecutor’s irrationality manifests itself in the tendency for a prosecutor to seek death in white-victim cases, the prosecutor’s predisposition to make seek decisions based on their prediction of the jury’s vote, and the prosecutor’s interest in maximizing political gain from their death penalty seek decisions. He, as a government actor, is prohibited by the Court’s decision *Palmore v. Sidoti* from making a decision “catering to private discrimination” by trying

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53 *McCleskey v. Kemp*. 481 U.S. Footnote 18. Majority Opinion. The Court states that a prosecutor does not need to explain the rationale behind a decision unless a defendant presents a prima facie case of discrimination. Still, their claim that it would be an undue burden on the prosecutor’s time to explain his rationale in determining a life-or-death decision cannot be substantiated. The Court is weighing the Prosecutor’s time as more valuable than the whole of the defendant’s life.
to replicate perceived biases in society although their seek decision violates the Equal Protection Clause.\textsuperscript{55}

Alabama’s “Judicial Override” system grants an elected trial judge permission to use his discretionary judgment to overturn a jury’s decision in a capital punishment case if the judge feels it does not fit the defendant’s crime; 92\% of judicial overrides involve an override of a jury’s “life” decision to sentence the defendant to death. Although judicial overrides constitute a greater proportion of all death in election years and 75\% of judicial overrides involve a white victim (only 35\% of Alabama murder victims are white), the system was upheld by the Court in \textit{Harris v. Alabama} (1995) because a judge is mandated to use discretion and give weight to the jury’s recommendation\textsuperscript{56}. Whether directly, as in Alabama, or through seeking a penalty hearing, as is the case in the 31 of 34 states with death penalty statutes without judicial override, the prosecutor’s decisions deem who, of all persons convicted of murder, are the most worthy of a death sentence. Thus, the prosecutors are the “loci of discrimination within the capital sentencing system”\textsuperscript{57} wherein their ability to determine which defendants are offered the opportunity to plea, are not charged, and have their fate placed in the hands of a capital sentencing jury begins the formation of the racial disparities evident in Baldus.

\textbf{IIId. Discretion: What Risk Level Merits Unconstitutionality}

Presumably, the Court set the minimum threshold of the burden of proof at an impossibly high level as a safeguard, stating a ruling in favor of McCleskey could have caused a ripple effect throughout the entire criminal justice system. For this end, they stated that Baldus and the appearance of racial disparities could not \textit{prove} but “at most [this] indicates a discrepancy

\textsuperscript{56}“The Death Penalty in Alabama: Judge Override.” \textit{Equal Justice Initiative.} July 2011.
appears to correlate with race.”

Professor Kennedy chides this remark retorting “a statement as vacuous as one declaring, say, that "at most" studies on lung cancer indicate a discrepancy that appears to correlate with smoking.”

The Court’s acknowledgement of Baldus’ validity statistically coupled with the ultimate conclusion that it was insufficient to prove that the laws were not equally protecting people on the basis of any invidious factor serves as an example of the unconscious discrimination they contend is not great enough to impose a “risk.” They accept differential treatment of persons based on race as an inescapable and uncorrectable aspect of the criminal justice system. The Court again acts in a manner akin to the unconscious discrimination found in typical juries: they judge McCleskey in a way that conforms to their preconceived stereotypes about what the death penalty should be, not what it is shown to be. Brennan’s dissent counters that Gregg does not require “proof” to successfully posit a constitutional violation but rather needs only the demonstration of “a pattern of arbitrary and capricious sentencing.”

The Court justifies their invalidation of Baldus by stating their belief in the ability of discretion and safeguards to minimize risk, in the value of jury trials, and in the ideology that discretion benefits defendants as a whole. As previously mentioned, Baldus’s findings are an unequivocal testament to the inherent weakness and fallibility of safeguards. Wherein the theory of “discretion” is predicated on the best intentions, the saturation of individual moral ethics that occurs at every step in the criminal justice process culminates in a tangible disparate impact that cannot be justified with the Court’s mantra of discrimination as a necessary consequence of individualized discretion. The Court expresses that “the Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order

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60 McCleskey v. Kemp. 481 U.S. 323. Justice Brennan’s dissent. He holds that a violation under Gregg need only to indicate a pattern, not proof, of arbitrary sentencing. As statistics show patterns, the Baldus study would seem to be an Eighth Amendment violation.
to operate a criminal justice system that includes capital punishment.\textsuperscript{61} Thus, it essentially sanctions States to ignore that some people may unfairly reach death as a result of immutable characteristics beyond their control, an outcome discretion was envisioned to eliminate, not perpetuate.

Most of the Court’s faulty reasoning about discretion’s value stems from their concern that acknowledging Baldus will inevitably lead to the erosion of the entire criminal justice system. The Court seems to forget or disregard the fact that the death penalty and the processes in the criminal justice system leading to the death penalty are inherently different from all other crimes. The aftermath of invidious discrimination entering into the sentencing process for a cocaine possession versus crack-cocaine possession presents itself in the form of disparities in sentence length, opportunities for rehabilitation, and other effects. Conversely, once the disparity is addressed, the options for recourse for those who wrongly experienced a sentence disproportionate for their crime remain available - the same cannot be said when invidious discrimination enters the death sentencing process. The Court avows that “\textit{Gregg}-type statutes” for capital punishment automatically meet the requirement of high rationality as necessitated by the gravity of the death decision: “these ensure a degree of care in the imposition of the sentence of death that can only be described as unique,” furthering that “heightened rationality in the imposition of capital punishment does not ‘plac[e] totally unrealistic conditions on its use.’”\textsuperscript{62} It is not a “totally unrealistic” condition to require that a death sentence decision be made completely free from prejudice, whether conscious or unconscious; the possibility that, under \textit{Gregg}, one person’s death sentence would have been life but-for their race or the race of their

\textsuperscript{61} \textit{McCleskey v. Kemp}. 481 U.S. 319. Majority opinion.
\textsuperscript{62} \textit{McCleskey v. Kemp}. 481 U.S. Footnote 37. Majority opinion.
victim must invalidate the constitutionality of the statute. Death, especially with respect to Supreme Court jurisprudence, is a different entity.

Since “death is different” in that “[t]he risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence,” (Turner v. Murray, 1986), the consequences that the Court fears are essentially nullified. The Court states that the implications of the Baldus study, “taken to its logical conclusion… throws into question the principles that underlie our entire criminal justice system.”63 The implications of the Court’s decision, as well, throw into question the principles that underlie our entire criminal justice system: whereas the Court has the unique task of adjudicating based on Constitution, here, their decision appears to have been made with regard to feasibility instead of constitutionality. As Professor Kennedy notes, “The Justices have made the violations they are willing to recognize dependent upon the remedies they are willing to provide” because the facts necessitated a remedy that would inescapably hemorrhage remedial costs.64 Justice Brennan’s dissent affectionately referred to the Court’s decision to disregard fact and find no constitutional violation because of the “fear that recognition of McCleskey’s claim would open the door to widespread challenges to all aspects of criminal sentencing.”65

IV: McCleskey’s Claims

McCleskey presented the Court with Baldus to show evidence of system-wide discrimination that, as a black-defendant with a white-victim with aggravating factors triggering the effects of the “liberation hypothesis,” his death sentence violated the Equal Protection Clause

63 McCleskey v. Kemp. 481 U.S. 315. Majority opinion. The Court is mistaken as any system that show the type of disparities in Baldus should cast doubt on the principles of a justice system that permit for such egregious outcomes to persist. Furthermore, McCleskey’s claims and Baldus concentrate on one aspect of the system, not the system in its entirety. Were the Court to accurately perceive the ways in which “death is different,” they would not have arrived at this wholly misguided supposition.
of the Fourteenth Amendment and the Cruel and Unusual Punishment provision of the Eighth Amendment. McCleskey first claims an equal protection violation in that racial motivations are present in the capital sentencing process in Georgia as shown in two ways: 1) because white-victim cases are more likely to result in a death sentence than black-victim cases and 2) because black-defendant cases are more likely to experience the death penalty than white-defendant cases. McCleskey’s Fourteenth Amendment claim implies discriminatory intent on behalf of individual state actors because they adopted the capital punishment statute and continued its practice despite indications of a racially disparate impact.

The Court weighs McCleskey’s claims against its reiterated belief that “discretion” and “individual consideration” statutes were conceived with a race-neutral intention and, as a result, the Court “will not infer a discriminatory purpose on the part” of Sentencers.66 Furthermore, by analyzing Baldus’s discoveries in the context of their direct relationship to McCleskey’s specific case, the Court preemptively removes both the purposes of the Baldus study. Baldus aims to show that conscious or unconscious racial motivation, unable to be assessed on the individual level, is evident when assessing the whole; however, by requiring McCleskey to prove an intent to discriminate in his individual case, the Court is promoting an antiquated view that only conscious racism can constitute a harm to the individual in lieu of recognizing the fact that most racist beliefs are internalized in a society wherein racism is openly chastised. This antiquated view may also account for the Court’s refusal to consider McCleskey’s argument that the historical use of discriminatory laws and policies in Georgia is “evidence of current intent,”67 especially in light of the fact that the permeation of racial animus into Georgia’s capital punishment statute led to new guidelines for acceptable death penalty statutes in Furman.

In Justice Blackmun’s dissent, he berates the Court for treating the case “as if it is limited to challenges to the actions of two specific decisionmaking bodies – the petit jury and the state legislature,”68 when evaluating whether prejudice entered into McCleskey’s death sentence. Between the legislature’s final draft of the statute and the jury’s decision, countless other state actors make discretionary judgments as the case gradually moves from the indictment phase to the eventual sentence. Accordingly, each additional actor in the decision-making process shrouds proper assessment of both intentional and unconscious racially discriminatory motives for a particular actor.

In rejecting McCleskey’s Fourteenth Amendment equal protection claim, the Court concludes that exceptionally clear proof would be needed for the Court to “infer that the discretion has been abused” by state actors in the determination of McCleskey’s sentence.69 Baldus’s evidence indicating the increased likelihood for a person in McCleskey’s situation to receive the death penalty cannot prove intent on behalf of the actors; the Court finds McCleskey’s conviction of a crime punishable by the death penalty according to the laws of Georgia further evidence that the prosecutor had no discriminatory intent in seeking McCleskey’s death penalty. McCleskey’s sentencing trial involved the judgments of one jury that was never to reconvene for future decisions; the impossibility of proving any sort of discrimination from a single jury decision shields their motivations from scrutiny. Whereas only a Prosecutor’s pattern of seek decisions could hypothetically be used to indicate discriminatory intent, the Courts automatic approval of the actions of prosecutors invalidates the option of using prosecutorial intent to discriminate as a viable recourse. As Justice Blackmun notes, the Court’s

69 McCleskey v. Kemp. 481 U.S.297. Court’s opinion. The problem is that the Court’s obscuring of methods to gauge the Sentencers’ intentions necessarily prevents the possibility of proving “clear proof” of violating the sanctity of disparity.
assertion that a conviction suggests no discrimination entered into a sentencing decision is a dangerous and wholly defective line of reasoning as it discounts all possible instances of earlier discrimination.  

The requirement for intentional discrimination to be found in order to find a violation of the Equal Protection Clause was detailed by the Court in *Washington v. Davis* (1976), creating a high burden of proof for the defendant to seek retribution against invidious state action. The Court stated “Discriminatory impact…may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.” With *McCleskey*, the statistics do not indicate the possibility of a racial bias but rather affirm its existence; it is impossible to explain why prosecutors consistently seek the death penalty for white victims at a rate much higher than for black victims without a racial factor. The Court’s neglect to establish a prima facie case to “sharpen the inquiry into the elusive factual question of intentional discrimination,” despite significant indication of disparities, detail the Court’s close-minded refusal to acknowledge the possibility that the state actors may be significantly influenced by impermissible factors. They merely contend that the presence of varied actors that, through complex interactions, facilitate the appearance of racially disparate sentencing requires a higher burden of proof to prove discrimination than Baldus can provide.

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71 *Washington v. Davis*. 426 U.S. 242. The case, although setting rigid standards to prove intentional discrimination, states that “disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution” and must have other factors present to trigger an Equal Protection Clause violation.

In *Castaneda v. Partida* (1977), unconstitutional race discrimination in jury selection was found by making a *prima facie* case with statistics of less magnitude than those presented in Baldus. In his dissent, Blackmun argues that a *prima facie* case can be made by focusing on the “primary decisionmaker at each of the intervening steps of the process,” the prosecutor. In McCleskey’s case, the prosecutor exercised discretion by not giving McCleskey the opportunity to enter a plea and by seeking the death penalty in his case after found he was found guilty by a jury of his “peers.” The prosecutor, it follows, acted twice to inch McCleskey closer to the death penalty. Justice Blackmun concludes that a *prima facie* case can be established to prove an equal protection violation based on the standards in *Castaneda*: McCleskey has shown that 1) Baldus implies a probability that “black persons are a distinct group that are singled out for differential treatment,” 2) his death sentence may have been the result of racial considerations as shown by the tendencies of the justice system, 3) the disparity according to race becomes constitutionally unacceptable at the point where racial factors eclipse some constitutionally permissible factors, like aggravating circumstances, in terms of determining the likelihood of the death penalty, and 4) the prosecutor’s discretionary power was susceptible to abuse. The State, in rebuttal, presented statistics of tenuous merit and at a sophistication level far beneath the Baldus

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73 *Castaneda v. Partida* (1977). 430 U.S. 93. “If a disparity is sufficiently large, than it is unlikely that it is solely due to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class-based factors entered into the selection process.” Although dealing with jury composition, the implications of McCleskey and Castaneda: whereas both cases were predominately evidenced by statistical studies, Castaneda was determined to have enough risk to be constitutionally impermissible through the evidence of a *prima facie* case. It is curious why McCleskey, with more statistically significant data and greater correlations, was automatically denied this opportunity by the Court to prove a *prima facie* case. *Castenada* utilized a system of four steps to prove a *prima facie* case and shift the burden to the State, leaving the state to prove that it was not acting in a discriminatory instead of the Court’s automatic assumption that States act in a non-discriminatory way.

74 *McCleskey v. Kemp*. 481 U.S. 351-357. Justice Blackmun dissent. The Justice analyzes the evidence to establish a that a *prima facie* case could be found with the given statistical data.

75 I use “peer” in a slightly dismissive manner because uniform racial composition in a jury is typical in cases with sentencing decisions that allude to the impermissible consideration of race entering into the decision. Brian Edelman in *Racial Prejudice* on page 43 (see note 25) expounds upon the “white male dominance effect” and the “black male presence effect” which culminate in death sentences imposed at a far higher rate (72%) in a jury without a black male than with a black male (43%).
study. Thus, there is a high probability that the court erred in their determination that an Equal Protection Claim could not be found; armed with prosecutorial records, it is difficult to imagine that a state could not take notice of the pattern of prosecutorial seek requests.

McCleskey’s Eighth Amendment claim alleged that his race and the race of his victim impermissibly affected his sentence severity. McCleskey purports that similarly situated persons involved in murders with similar aggravating effects would receive a lesser sentence as a result of a difference in either race-of-defendant or in race-of-victim. The Court adjudicates Eighth Amendment claims primarily based on *Gregg* and *Furman*. The Georgia Supreme Court stated that they did not find that McCleskey’s sentence was disproportionate when compared with other cases wherein the death penalty was issued, and this result was accepted by the Court. The Court then determined that Baldus does not indicate a significant risk that McCleskey’s sentence was “arbitrary” or “capricious” because requirements of discretion and individual inquiry in sentencing mandate every jury to act only with respect to the defendant and the specific circumstances of the case, not according to consideration of race.

Because of the inherent racism in the unconscious of all persons, as indicated by Professor Lawrence, this line of reasoning is inherently flawed and cannot be used to justify the tactile effects that juror discrimination has in the decision of whether to grant or take the life of a human being. The Court affirms its commitment to “eradicate racial prejudice from our criminal justice system” but will not recognize the culpability of the decisionmaking bodies. Furthermore, allowing only for McCleskey to be compared with persons for whom the death penalty was issued will undoubtedly cause his sentence to seem proportionate. Recalling the “liberation hypothesis,” a significant number of persons with aggravation levels akin to McCleskey’s will be sentenced to death arbitrarily while the rest will receive life based on the jury’s perceptions;
therefore, the only way to accurately measure disproportionality in sentencing is to compare sentencing for persons with similar aggravation levels across both death recipients and life recipients. Baldus and subsequent studies detail that safeguards, regulations, and other methods implemented to suppress the risk of racial prejudice cannot alleviate risk anywhere near the necessary level to ensure that the death penalty is not operated in an arbitrary fashion. The consistency of statistical data furthers that none of the safeguards have a substantial ameliorative impact on the undue onus placed on a defendant because of their race or the race of their victim. Justice Brennan, in his dissent, eloquently quotes, “that the effort to eliminate arbitrariness in the infliction of that ultimate sanction is so plainly doomed to failure that it – and the death penalty – must be abandoned altogether.”

V. Proposed Solutions & Attempted Solutions

In *Rose v. Mitchell* (1979), the Court declared that “discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice” wherein “disparate enforcement” of the consequences of violating laws “destroys the appearance of justice, and thereby casts doubt on the integrity of the judicial process.” The Court deliberately transgressed the sentiment in *Rose* by justifying racial disparities in sentencing as a necessary consequence of the system articulated in *Gregg*. There is no easy solution to the problem presented in *McCleskey*, but a difficult solution does not merit selective ignorance of a pressing problem. Justices Stevens and Blackmun proposed that the threshold for the number of aggravating factors determining whether a prosecutor can seek the death penalty be raised to the Baldus-indicated tipping point wherein the aggravating factors are so severe that they overpower any consideration of race. As aggravating factors are determined by state legislatures and district

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attorneys, it is possible that the threshold could have some racial implications. Professor Kennedy notes that there is no objective way to determine a minimum standard above which indicates inherent “deathworthiness” of the defendant and the crime.\(^7\) Professor Kennedy proposes a “level up” solution, advocating for a race-conscious system aimed at executing more black defendants such that equal distribution of a public good (capital punishment) can be achieved while the legislature works to craft a system of punishment that will guarantee future equality of capital punishment distribution. Whereas the Stevens/Blackmun proposal creates mandatory sentencing as prohibited in \textit{Furman} and Kennedy’s proposal is a clear violation of the Fourteenth Amendment in causing prosecutors to literally \textit{hunt} for perpetrators in black-victim cases, typically black-defendants, to execute.

The Court insisted that the issues presented in \textit{McCleskey} should be addressed by the “legislative bodies” of the state\(^8\) such that the “moral values” of the people be reflected in the statute. In 1998, Kentucky became the first state to pass the Racial Justice Act, likely in response to the findings of a 1995 study revealing 100% of death row inmates were convicted of killing a white person despite the fact that over 1,000 murders committed between 1976 and 1995 involved a black victim\(^9\). The Racial Justice Act allows for defendants to challenge their death sentences by challenging prosecutor decisions to commit a death sentence. North Carolina passed a Racial Justice Act in 2009 after the aforementioned study found the incidence of death sentence in white-victim cases was greater than in black victim cases.\(^{10}\) Since the Act’s passage, only three death row inmates have not filed appeals to their death sentences. Whereas some opponents of the Act claim that it serves as a “get-out-of-jail-free card” for convicted persons in

\(^8\) \textit{McCleskey v. Kemp}. 481 U.S. 319. Majority opinion.
\(^{10}\) Glenn Pierce & Michael Radelet. “Race and Death Sentencing in North Carolina….” Page 2141.
a “desperate, last-ditch attempt” to escape their sentences, others contend that it is necessary in a state where four people have been exonerated in recent years.\(^8^2\) A Racial Justice Act was introduced to Congress by Representative John Conyers (D-MI) and Senator Edward Kennedy (D-MA) in 1998 to respond to the Court’s decision in McCleskey; it would have placed the original burden of proof on the Sentencers and permitted unconscious discrimination to be considered in a sentence reduction decision were it to have passed.

With only two states making an effort to perform capital punishment in a way that reduces impermissible considerations, it is clear that the legislatures cannot be entrusted to protect the rights of defendants to receive a sentence free from impermissible factors. Moreover, this reluctance to address racial disparities in sentencing reinforces the consequences of the Court’s decision. The Court did not base their decision in Brown v. Board of Education on the “moral consensus” encompassed by the number of states vehemently supporting and enforcing separate-but-equal statutes but rather on the constitutionally impermissible effects and motivations of those statutes. McCleskey represents the Court’s preference to placate supporters of a wholly detrimental but popular policy instead of correcting the lack of equal protection of the laws within those policies.

Although there may be a social value conferred in the utilization of the death penalty, it is clear that fair application of the statute cannot be achieved. The Court may have disparagingly that asserted that McCleskey’s claim would lead to frivolous Eighth Amendment claims that any element, like a defendant’s attractiveness, could be influential in jury decision-making\(^8^3\); however, this illuminates the fundamental problem within discretionary sentencing in capital cases. When myriad of impermissible factors influence a capital sentencing decision, leading


\(^8^3\) Page 481 U. S. 317
some persons arbitrarily to death and others arbitrarily to life, the system cannot guarantee that any person’s sentence is not unduly influenced such that it constitutes a violation of cruel and unusual punishment. Race has left a mark on the history of the United States and on the psyches of all its citizens. In a discretionary system, some differences in sentencing are to be expected on a person-to-person basis: each defendant has unique circumstances that contribute to their sentence. But discretion shows a pervasive, systematic disparate impact on the basis of race, culminating in a life or death system; furthermore, the numerical evidence leads to the conclusion that these disparities have not dissipated, but remain constant in their effects. Thus, society must make a choice: either to keep a system where the death decision is unduly impacted by discriminatory factors or to eliminate it and the possibility of invidiousness altogether. For a society that recognizes the significance of life, the only ethical option is to eliminate the system that unjustifiably places a defendant’s life at risk.

VI. A New Decision

*Held:*

1. The Court’s finding that Baldus did not represent a significant risk in the enforcement of the death penalty is in violation of the Eighth Amendment prohibition of cruel and unusual punishment. The inference that racial considerations affected capital sentencing decisions in a systematic way necessitates that they affect the individual as well. Simply because the harm is not as visceral at the individual level does not justify its existence.

2. The Court, in rejecting Baldus, violated the Fourteenth Amendment’s equal protection clause by implying that racially-influenced sentencing decisions did not have an invidious effect on certain racial groups. The Court’s decision instill the same
inferiority maligned in *Plessy* and *Dred Scott* by signifying that favoring one racial
group over another in the execution of a government is constitutionally permissible.

3. In neglecting to form a *prima facie* case wherein the elements for such an indication
of discrimination were in place, the Court violated McCleskey’s right to equal
protection under the law.

4. The higher scrutiny in capital punishment requires that the punishment not be
performed if there is a risk of arbitrary sentencing. Whereas the risk of prejudicial
sentencing, as is essentially guaranteed to permeate the ultimate decision as a
consequence of the permissible amount of discretion given by the Court to State, has
the greatest consequences in capital sentencing cases, the Decision does not affect
criminal statutes pertaining to non-capital cases.

5. Evident that state legislators have taken little initiative to correct the patterns of
Baldus, through safeguards or otherwise, the State’s judgement regarding acceptable
use of capital punishment is dubious as best. As such, the State cannot be trusted to
implement capital punishment in a way free from arbitrary and capricious sentencing.

6. To be consistent with the Constitution of the United States, there must be proof that
capital sentencing statutes can operate in a way that does not inflict undue harm
through sentences either too arbitrary or too mandatory. The inability to perform this
task throughout the history of the United States must place a moratorium on the
punishment indefinitely.

Accordingly, we reject the judgment of the Supreme Court of the United States and place
an indefinite moratorium on the death penalty in the United States.

*It is so ordered.*