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# COMMENT

## Racial Disparities and the Law of Death: The Case for a New Hard Look at Race-Based Challenges to Capital Punishment

### INTRODUCTION

A review of capital sentences imposed throughout the United States during this century suggests that Blacks have been executed in disproportionate numbers to the general population,<sup>1</sup> and certainly relative to all defendants prosecuted for capital offenses.<sup>2</sup> Since the Supreme Court's reinstatement of the death penalty in 1976<sup>3</sup> and its concomitant rejection of judicial execution as inherently violative of the eighth amendment, death row challenges have been advanced on a host of other theories.<sup>4</sup> However, with the recent failure of challenges premised on due process arguments,<sup>5</sup> major legal impediments to capital punishment have been cleared away.

This Comment considers the jurisprudential problems engendered by a recent race-based challenge to the imposition of the death penalty in Georgia. This Comment advances a rationale for sustaining race-based fourteenth amendment challenges to execution.

The thesis of this Comment is that although demographics establish that the administration of the death penalty is infected with racism, the Supreme Court in *McCleskey v. Kemp*<sup>6</sup> engaged in lame judicial analysis and expounded an extremely narrow interpretation of the equal protection clause of the fourteenth amendment. I argue that *Furman v. Georgia*,<sup>7</sup> and *Batson v. Kentucky*,<sup>8</sup> when taken together, stand for the proposition that any risk of

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1. Since 1930, there have been 3,894 people lawfully executed; 2,077 were Black, which is over half of the total, and almost five times the proportion of Blacks in the population as a whole. Gross and Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 38 n.43 (1984).

2. See, e.g., Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981).

3. *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding Georgia's death penalty statute); *Proffitt v. Florida*, 428 U.S. 242 (1976) (upholding Florida's capital sentencing statute); *Jurek v. Texas*, 428 U.S. 262 (1976) (upholding Texas' capital sentencing procedure).

4. This Comment is not about any of the following theories for challenging the imposition of capital punishment: whether execution of juveniles and the mentally insane is unconstitutional, see *Ford v. Wainwright*, 477 U.S. 399 (1986); the cruelty of capital punishment as judged by contemporary social science and moral theory; the evidence for or against the deterrent effects of executing convicted murders; the economics of the death penalty; the cruelty of executions and conditions on death row; or the problems of selecting jurors in capital trials (except as indicative of racism).

These theories are beyond the scope of my inquiry. But see Stillman, *Abolish the Death Penalty*, 4 LEGAL REFERENCE SERVICE Q. (Fall 1984); Dolinko, *How to Criticize the Death Penalty*, 77 J. CRIM. L. & CRIMINOLOGY 546 (1986).

5. See generally Geimer, *Death At Any Cost: A Critique of the Supreme Court's Recent Retreat from Its Death Penalty Standards*, 12 FLA. ST. U.L. REV. 737 (1980).

6. 107 S. Ct. 1756 (1987).

7. 408 U.S. 238 (1972).

8. 476 U.S. 79 (1986). *Batson* has instructive precedential value for the thesis of this Comment.

racism brought about by uncircumscribed prosecutorial discretion in criminal prosecutions is prohibited.

This Comment begins by tracing the historically demonstrated racism against Black defendants,<sup>9</sup> resulting in the judicial execution of a disproportionate percentage of Blacks. Next, I focus on the efforts of the Supreme Court to redress some of the palpably unfair procedures used to facilitate such discrimination.

The Court's decision in *McCleskey* is then discussed, with reference to other competing principles underlying the equal protection doctrine. Since *McCleskey* improperly delineates the scope of prosecutorial discretion, I propose that the Supreme Court circumscribe that discretion by applying strict scrutiny to evaluate race-based challenges in death penalty cases under the equal protection clause of the fourteenth amendment.<sup>10</sup>

I conclude that because this is the proper result under case precedents, the Supreme Court should invalidate subsequent capital sentences of defendants whose petitions make a *prima facie* case of probable racial discrimination in their criminal trial.<sup>11</sup>

#### HISTORICALLY DEMONSTRABLE ANTI-BLACK BIAS IN THE CRIMINAL JUSTICE SYSTEM

##### *The Facts*

Even a cursory surveyor of the criminal process during the first hundred and ninety years of the United States history could not fail to be flabbergasted by the legal and political biases confronting Blacks in the judicial process. Chapter upon chapter in the annals of injustice demonstrate that in early constitutional interpretation,<sup>12</sup> Blacks were considered nothing more than chattel, to be bought, sold and disposed of, at the pleasure of their proprietor. Consonant with this viewpoint, Blacks were given short shrift by the federal judiciary.<sup>13</sup>

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9. See Gross and Mauro, *supra* note 1. The Court itself best lent credence to this contention in *McCleskey*, 107 S.Ct. at 1779 n.38. ("Studies already exist that allegedly demonstrate a racial disparity in the length of prison sentences."); see, e.g., Spohn, Gruhl & Welch, *The Effect of Race on Sentencing: A Reexamination of an Unsettled Question*, 16 L. & SOC. REV. 71 (1982); Unnever, Frazier & Henretta, *Race Differences in Criminal Sentencing*, 21 SOCIOLOGICAL Q. 197 (1980).

10. *Oyler v. Boles*, 368 U.S. 448, 456 (1962) (dictum suggesting that the Court would invalidate discriminatory prosecutions for felonies based on "an unjustifiable standard such as race . . ."); *accord*, *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

11. Evidence of such discrimination could be based on either the defendant's race, the victim's race or a correlation between the two. In this regard see *infra* note 51.

12. The text of the Constitution itself reflected the lowly status of Blacks. Though the document's drafters had the prescience to avoid using the word "slavery," nevertheless, all the antonyms ("free Persons") and euphemisms ("persons held to Service or Labour") could not mask the irony that slavery was officially sanctioned in a document whose preamble proclaimed the equality of "all men" while counting a Black as "three-fifths" of a person. See U.S. CONST. art. I, § 2; U.S. CONST. art I, § 9; see also U.S. CONST. art. IV, § 2.

13. See *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 407-08 (1857) ("[Blacks] for more than a century before [1776] . . . had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. . . . [91] And, accordingly, a negro of the African race was regarded by them as an article of property, and held, and brought and sold as such, in every one of the thirteen colonies . . .").

Most New England states abolished slavery fairly soon after the 1776 Declaration of Independence: Vermont (1777), Maine (1783), Rhode Island (1784), Massachusetts (1793) and Connecticut

Towards the end of the Civil War, President Lincoln, proclaimed the emancipation of all slaves domiciled in the rebellious Confederacy,<sup>14</sup> albeit with reluctance.<sup>15</sup> After the war, Blacks throughout the United States were encompassed within the proclamation for all practical purposes.

During the Reconstruction period, however, several southern states attempted to frustrate the newly gained liberty of Blacks.<sup>16</sup> Georgia was no exception to this effort.<sup>17</sup> In response to this, the United States Congress in 1865 passed the thirteenth amendment<sup>18</sup> and in 1868, Congress passed the fourteenth amendment.<sup>19</sup> Moreover, in 1866,<sup>20</sup> Congress enacted criminal penalties for violations of the constitutional rights and privileges of Black citizens.<sup>21</sup> These political developments were however soon overshadowed by a reactionary judicial response.

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(1784 and 1797). New Hampshire did not abolish slavery until 1857, and then only by way of constitutional interpretation. L. LITWACK, *NORTH OF SLAVERY* 3-20 (1961).

14. Proclamation of Jan. 1, 1863, No. 17, 12 Stat. 1268 (1863). The Emancipation Proclamation, while purporting to free all "persons held as slaves within any state," specifically exempted from its application "the forty-eight counties designated as West Virginia" and states deemed not in rebellion against the federal government.

15. In a famous reply to an abolitionist newspaper editor, Lincoln stated that "[m]y paramount object in this [Civil War] is to save the Union, and is not either to save or to destroy slavery. If I could save the Union without freeing any slave, I would do it . . . . What I do about slavery and the colored race, I do because I do believe what I am doing hurts the cause . . . ." *SPEECHES AND LETTERS OF ABRAHAM LINCOLN, 1832-1865* at 165 (M. Rowe ed. 1907) *cited in* D. BELL, JR., *RACE, RACISM AND AMERICAN LAW* 5 (2d ed. 1980).

Earlier in his first inaugural address, Lincoln disavowed any intention "to interfere with the institution of slavery in the States where it exists." Dillard, *The Emancipation Proclamation in the Perspective of Time*, 23 L. IN TRANSITION 95, 96 (1963), *cited in* BELL, JR., *supra* at 15.

16. See *Memphis v. Green*, 451 U.S. 100, 132 (1981) (White, J., concurring) ("Individual Southern States had begun enacting the so-called Black Codes, which, although not technically resurrecting the institution of slavery, were viewed by the Republican Congress as a large step in that direction.") (footnote omitted).

This post-Civil War backlash against Blacks apparently persists to this day, in less overt forms. In fact, one reason for limiting my choice of cases to those from southern states in this Comment is that over half of all death row inmates are in the six southern states that constitute the fifth and eleventh circuit courts of appeal. Gross & Mauro, *supra* note 1 at 121 n.262. Another reason for focusing exclusively on the southern states is that Black defendants have not generally been discriminated against in the use of the death penalty outside of the South. Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783 (1981).

17. Georgia operated a dual system of crime and punishment by statute from the days of slavery until after the Civil War. See A. HIGGINBOTHAM, *IN THE MATTER OF COLOR: RACE IN THE AMERICAN LEGAL PROCESS* 256 (1978).

18. See *THE RECONSTRUCTION AMENDMENTS' DEBATES: THE LEGISLATIVE HISTORY AND CONTEMPORARY DEBATES IN CONGRESS ON THE 13TH, 14TH AND 15TH AMENDMENTS* (A. Avins ed. 1967); see generally J. TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951).

19. See generally J. TENBROEK, *supra* note 18. The fourteenth amendment prohibits any state from making or enforcing "any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV (emphasis added).

20. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27. This act initially declared all persons born in the United States, without regard to race, would enjoy the "full and equal benefits of all laws and proceedings for the security of person and property. . ." as were "enjoyed by white citizens. . .".

21. After assaults against Blacks continued unabated, Congress in 1870 and again in 1874, expanded the prohibitions and accompanying criminal penalties. These laws are still in effect today. See 18 U.S.C.A. §§ 241 and 242 (1969).

Section 241 is derived from § 6 of the 1870 Civil Rights Act, via § 5508 of the Revised Statutes, 1874-78; § 19 of the Criminal Code of 1909, and § 51 of the 1946 edition of 18 U.S.C. Section 242 is derived from § 2 of the 1866 Civil Rights Act, as amended by § 17 of the 1870 Act, via § 5510 of the

*The Supreme Court: A Citadel For White Supremacy?*<sup>22</sup>

When Congress enacted the Civil Rights Act of 1875<sup>23</sup> pursuant to section five of the fourteenth amendment, the Supreme Court, in the *Civil Rights Cases*<sup>24</sup> held this act to be unconstitutional. Other adverse court decisions<sup>25</sup> added judicial sanction to the social oppression that Black suspects suffered at the hands of whites.<sup>26</sup>

In the context of criminal trials, Blacks fared no better. Although the Supreme Court held that state systematic exclusions of Blacks from eligibility to serve on state juries violated the Civil Rights Act of 1875<sup>27</sup> or the equal protection clause of the fourteenth amendment,<sup>28</sup> the Court refused to declare unconstitutional ingenious state strategies to exclude Blacks from actual participation on the juries that tried people of color,<sup>29</sup> especially when capital

Revised Statutes, 1874-78; § 20 of the Criminal Code of 1909, and § 52 of the 1946 edition of 18 U.S.C.

22. This phrase is borrowed from Wilhelm, Book Review, *The Supreme Court: A Citadel for White Supremacy*, 79 MICH. L. REV. 847 (1981).

23. Act of Mar. 1, 1875, ch. 114, 18 Stat. 335. This act declared that all persons within the jurisdiction of the United States were entitled to equal accommodations regardless of color and previous condition of servitude. As such, it was the most comprehensive postwar civil rights act.

24. 109 U.S. (16 Wall.) 3 (1883).

25. See, e.g., *United States v. Harris*, 106 U.S. 629 (1882) (criminal conspiracy section of Ku Klux Klan Act of 1871, which made it an offense to conspire to deprive any person of equal protection of the laws or privileges and immunities under the laws, held unconstitutional); *United States v. Cruikshank*, 92 U.S. 542 (1876) (reversing murder conspiracy conviction of whites who massacred Black deputies as not within the scope of the 1870 Civil Rights Act); *United States v. Reese*, 92 U.S. 214 (1876) (sections three and four of the 1870 Civil Rights Act held unconstitutional); Cf. *Screws v. United States*, 325 U.S. 91 (1945) (eliminating state action limitation for criminal prosecutions for violating the rights secured by the due process clause of the fourteenth amendment). See generally Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952).

26. The withdrawal of federal troops from the southern states and the concomitant end of the protection of the newly freed Blacks, encouraged a racist, lethal backlash from Southerners. The Ku Klux Klan and other organs of terror had a field day lynching thousands of Blacks. This genocide is documented in C. WOODWARD, *REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* (1966); see also BELL, JR., *supra* note 15, at 207-220.

27. *Ex Parte Virginia*, 100 U.S. 339 (1880).

28. *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880). In *Strauder* the Court asked: "Is not protection of life and liberty against race or color prejudice, a right, a legal right, under the constitutional amendment?" The Court's opinion is an affirmative answer on the scope of the fourteenth amendment.

29. See *Swain v. Alabama*, 380 U.S. 202 (1965) (use of peremptory challenges to strike Blacks from the jury panel in one particular case does not deny defendant equal protection of the laws). *Swain* has been resoundingly criticized by jurists and scholars alike; see *McCray v. New York*, 461 U.S. 961, 967 (1983) (Marshall, J., dissenting from the denial of certiorari) ("*Swain* should be reconsidered"); see also *People v. Wheeler*, 22 Cal.3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); *Johnson v. State*, 418 So. 2d 1063 (Fla. Dist. Ct. App. 1980); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499 (1979); *State v. Crespin*, 94 N.M. 486, 612 P.2d 716 (N.M. Ct. App. 1980).

The literature on *Swain* includes, Martin, *The Fifth Circuit and Jury Selection Cases: The Negro Defendant and His Peerless Jury*, 4 HOUS. L. REV. 448 (1966); *Recent Development—Racial Discrimination in Jury Selections*, 41 ALB. L. REV. 623 (1977); Note, *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 103, 135-39 (1965); Note, *The Jury: A Reflection of the Prejudice of the Community*, 20 HASTINGS L.J. 1417 (1969); Note, *Peremptory Challenge—Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 MISS. L.J. 157 (1967); Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process*, 18 ST. LOUIS U.L.J. 662 (1974); Comment, *The Prosecutor's Exercise of Peremptory Challenge to Exclude Nonwhite Jurors: A Valued Common Law Privilege in Conflict with the Equal Protection Clause*, 46 U. CIN. L. REV. 554 (1977); Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52

offenses were involved.<sup>30</sup>

Anyone assuming that the modern judicial system would accord consideration to the foregoing facts is apt to be profoundly disappointed. A cardinal principle of American criminal law, that of individual responsibility, seems to have been abandoned where the prosecution of Blacks is concerned. Instead, the judicial system, applying an unspoken principle of greater culpability without corresponding criminal liability, metes out harsher punishments to Black defendants simply because of their race.

Although in civil cases the Court has been willing to extend protection to a *future* group of Blacks because of *prior* racial discrimination,<sup>31</sup> it has been most unwilling to do so where criminal prosecutions are concerned. The Court's reluctance to extending this remedy to criminal cases may, ironically be due also to the notion of individual responsibility.

If the Supreme Court wants to ensure the reliability and respectability of its decisions,<sup>32</sup> it will have to recognize the remedial nature of the equal protection clause of the fourteenth amendment and reconstrue it more liberally in death penalty cases where racism is most pernicious.<sup>33</sup>

#### CAPITAL PUNISHMENT PRIOR TO *FURMAN V. GEORGIA*

In 1935, 199 persons were executed in the United States.<sup>34</sup> This is the highest recorded number of state-sanctioned executions since the federal government started keeping proper track of the figures.<sup>35</sup> This figure, of course, does not fully reflect the number of people actually sentenced to death but for whom the penalty was not carried out, or those for whom the penalty was unsuccessfully sought by the prosecutor at trial.

VA. L. REV. 1157 (1966); Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715 (1977).

However, *Swain* has been limited, if not overruled by *Boston*, 106 S. Ct. at 1725 n.25 (1986).

30. "Whenever a Negro defendant is charged with a capital offense, there is a substantial chance that the prosecution will employ its peremptory challenges to remove Negroes and other minorities from the jury panel." *Williams v. Illinois*, 466 U.S. 981, 982 (Marshall, J., dissenting from the denial of certiorari); see also *State v. Brown*, 371 So. 2d 751 (La. 1979) (holding that record of seven cases alleging abuse of peremptories in the same county during the past seven years demonstrated a pattern of systematic exclusion under *Swain*); *State v. Washington*, 375 So. 2d 1162 (La. 1979) (same).

31. See, e.g., *United States v. Paradise*, 480 U.S. 149 (1987); *Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986); *Brown v. Bd. of Education*, 347 U.S. 483 (1954).

32. In the criminal context, the Court has warned against purposeful race-based selection procedures that "undermine public confidence in the fairness of our system of justice." *Boston*, 106 S. Ct. at 1718.

33. "Discrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others' ". *Id.*, (quoting from *Strauder*, 100 U.S. at 308.).

34. *Greenburg, Capital Punishment as a System*, 91 YALE L.J. 908, 925 (1982).

35. The petitioner's brief in *Coker v. Georgia*, 433 U.S. 584 (1977) (No. 75-5444) explained the impact of such laws: "[W]hen reliable statistics began to be kept by the federal government, 48 whites, 405 blacks and 2 members of other minorities have been put to death for [the crime of rape]." 97 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 797 (P. Kurland and G. Casper eds. 1978) (citing UNITED STATES DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, National Prisoner Statistics Bulletin No. SD-NPS-CP-3, *Capital Punishment 1974* (Nov. 1975) 16-17)).

Although every year since 1976 about 250 death sentences are imposed, just over ninety death sentences have been carried out. There are another 2000 death row inmates awaiting appeals or final implementation of their death sentences.

Traditionally, in the United States, especially in the southern states,<sup>36</sup> the process whereby a Black defendant in a capital case proceeded from arrest or indictment to gallows was so rank as to rankle the most skeptical student of equal protection jurisprudence. Racism played *the* key role in determining who got the chair and who got spared.<sup>37</sup> The statistics speak for themselves. Hugo A. Bedau noted that since 1930, Georgia has legally executed 366 persons, of whom 81% or 298 were Black.<sup>38</sup> Both numerically, and as a proportion, Georgia led all other states in the number of Blacks put to death.<sup>39</sup>

In 1972 Georgia's death penalty statute was challenged in *Furman v. Georgia*.<sup>40</sup> Furman's counsel argued that as historically applied, the death penalty was discriminatory, with a greater proportion of Blacks executed compared with whites. In addition to identifying sources of institutionalized discrimination in the Georgia capital sentencing system, the petitioner argued that the imposition of the death penalty was standardless, arbitrary and capricious. In criticizing the fact that the jury and sentencing judge in capital cases had untrammelled discretion under contemporary statutes to choose whether

36. See, e.g., Kleck, *supra* note 16.

37. *Id.*; see also Zeisel, *supra* note 2; Gross and Mauro, *supra* note 1, at 121 n.262; *id.* at 42 n.61.

38. Bedau, *Witness to a Persecution: The Death Penalty and the Dawson Five*, 8 BLACK L.J. 7, 7 (1983).

39. *Id.* at n.7. As of 1983 the District of Columbia's 40 total executions, 37 of who were Black (92.5%) exceeded Georgia. Maryland (80.8%), Virginia (80.6%) and Mississippi (80.5%) approached Georgia in the ratio of Blacks executed in a state. *Id.*

40. 408 U.S. 238 (1972) ((Georgia Code Ann. § 26-1005) (Supp. 1971) (effective prior to July 1, 1969)).

The following chart, illustrative of the prevalence of racism in capital cases, is reproduced for emphasis from Zeisel, *supra* note 2, at 461. Zeisel notes that at the time of *Furman*, 67% of Florida's death row inmates were Black. *Id.* at 464.

Ratio of Offenders on Florida Death Row to the Number of Florida Arrests for Murder During a Felony, by Race of Offender and Race of Victim

Offender: Victim:	Black White	White White	Black Black	White White
Percentage of Arrestees Reaching Death Row	47%	24%	1%	0%
Total Number	78	190	102	8

Moreover, a series of studies have raised serious doubts about whether convicts are executed for rape on a color-blind basis. See Dorin, *Two Different Worlds: Criminologists, Justices and Racial Discrimination in the Imposition of Capital Punishment in Rape Cases*, 72 J. CRIM. L. & CRIMINOLOGY 1667 (1981); see also *infra* note 50 and accompanying text.

Further, in his pro-capital punishment amicus curie brief in *Gregg* the Solicitor General of the United States admitted that an Arkansas study was a careful and comprehensive one. "[W]e do not question its conclusion that during the 20 years in question, in southern states, there was discrimination in rape cases." Brief for the United States as Amicus Curiae app. A at 5a, *Gregg v. Georgia*, 428 U.S. 153 (1976) (No. 74-6257), cited in Zeisel, *supra* note 2, at 428.

to send one defendant to death and another to life imprisonment for identical crimes, Furman insisted that there was no meaningful way of determining who would be executed and that this sentencing scheme violated the eighth amendment.<sup>41</sup> The Supreme Court reversed not only Furman's conviction as violative of the eighth amendment's prohibition on cruel and unusual punishment, but also death sentences in four companion cases.<sup>42</sup> Moreover, the Court's action effectively invalidated all state capital statutes in force at the time. Although not central to their concurrence in the Court's result, Justices Douglas and Marshall voiced concern that the administration of the death penalty was racially tainted.<sup>43</sup>

*GREGG'S* PROGENY: WHY A BIFURCATED TRIAL/SENTENCING PROCESS  
STILL PERMITS THE INFUSION OF RACISM INTO THE  
DETERMINATION OF WHO WILL BE SENT  
TO DEATH ROW

From *Furman To Gregg*

After its wholesale invalidation of the capital punishment statutes in *Furman*, the Supreme Court next squarely confronted challenges to the constitutionality of the death penalty in 1976. In the landmark case of *Gregg v. Georgia*,<sup>44</sup> the Court noted that 35 state legislatures had re-enacted death penalty laws, reflecting popular consensus that this form of penal sanction be available to the state in its arsenal to combat serious felonies.<sup>45</sup>

The Court opined that the Georgia legislature had eliminated the procedural irregularities in the death sentencing process condemned in *Furman*.<sup>46</sup> Moreover, the Justices suggested that formal guidelines and standards for capital cases reduced arbitrariness and capriciousness.<sup>47</sup> The Court felt that this balkanization of the conviction-sentencing process of capital trials, among judge and jury, would restrict the discretionary abuse of the sentencing scheme.

Since *Gregg*, many scholars have studied trends in capital sentencing in several southern states to determine whether racial considerations caused some convicted murderers to be sentenced to death while others were spared

41. Brief for Petitioner, at 13-27, *Furman v. Georgia*, 408 U.S. 238 (1972) (No. 69-5003).

42. *Pope v. Nebraska*, 408 U.S. 933 (1972) (mem.) (vacating Nebraska death sentence); *Johnson v. Louisiana*, 408 U.S. 932 (1972) (mem.) (vacating Louisiana death sentence); *Stewart v. Massachusetts*, 408 U.S. 845 (1972) (per curiam) (vacating Massachusetts death sentence); *Moore v. Illinois*, 408 U.S. 786, 800 (1972) (vacating death sentence).

43. 408 U.S. at 257 (Douglas, J., concurring) ("[The statutes] are pregnant with discrimination. . ."); *id.* at 364 (Marshall, J., concurring) ("[T]here is evidence of racial discrimination. . .").

44. 428 U.S. 153 (1976).

45. *Id.* at 179-80.

46. *Id.* at 195. As a consequence of the legislative reform undertaken in reaction to the *Furman* decision, the Georgia code has been revised and renumbered since 1972; however, the changes do not alter the substance of the law vis-a-vis capital punishment. *See id.* at 163 n.6.

47. *Id.* at 196-207. These guidelines included the right of the defendant to present mitigating evidence, a bifurcated trial whereby the jury did not consider punishment until after it had decided separately the question of guilt, automatic review by the highest state court of the validity of any post-conviction death sentence, as well as the availability of federal level review. *Id.*

In short, the Georgia death penalty laws and those of the states from which challenges were brought in the companion cases to *Gregg* passed constitutional muster because they had revised their statutes to satisfy the directives of *Furman*.



the death penalty, despite having committed comparably heinous crimes.<sup>48</sup> Although the Supreme Court's decisions in *Furman*<sup>49</sup> and *Gregg* have been widely perceived as having rectified the problem of discretionary imposition of the punishment of death in homicide cases,<sup>50</sup> the reality, suggested by statistics,<sup>51</sup> indicates a continuing problem of racial discrimination at various stages of the criminal justice process.<sup>52</sup>

The disparity in the numbers of Blacks versus whites sentenced to die cannot be fully explained away on other than racial grounds. In fact, in some post-*Gregg* cases, a minority of Justices on the Court have continued to assert that racism pervades the imposition of the death penalty.<sup>53</sup> Nevertheless, a majority of the Justices have not been very keen on accepting the premise that the capital sentencing procedure is infested with racism.<sup>54</sup>

Particularly problematic is prosecutorial bias. This enables the factoring in of the illegitimate and irrelevant consideration of race into what should be purely legal procedures to determine who will be admonished.

Focusing on the prosecutor is appropriate for two reasons. Primarily, because more than judge or jury, he controls who will embark on the journey to death row.

"His power stems from three crucial opportunities to intervene in the criminal process. First, he formulates the charge that determines whether or not the death penalty is permitted if a conviction is obtained. Second, the prosecutor has almost unbounded discretion to offer a life sentence in exchange for a guilty plea in cases for which capital punishment is possible. Third, even after conviction at trial the prosecutor may or may not demand the death penalty, or may demand it only perfunctorily. Jury and judge come into play only if the prosecutor by his first three decisions, invites them to

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48. See also Jacoby and Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J. CRIM. L. & CRIMINOLOGY 379 (1982); Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918 (1981); Bowers and Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 CRIME & DELINQUENCY 563 (1980); see also *infra* note 51 and accompanying text. See generally Zeisel, *supra* note 2.

49. In light of *Gregg*, *Furman* seems to have actually addressed the issue of the jury discretion and the sentencing power of the courts vis-a-vis the imposition of the death penalty, with the justices frowning upon the hitherto unbridled abuse of such discretion.

50. But see Jacoby and Paternoster, *supra* note 48, at 387. They conclude that "the courts have succeeded in introducing only the illusion of the rule of law, cloaking inequitable outcomes with rules that appear to guarantee equity. The post-*Gregg* death statute of South Carolina, thus far, has resulted in a pattern of discrimination more subtle than that evidenced before *Furman*." *Id.* (emphasis in original). That is, the systematic irregularities that have degraded the quality of justice in capital cases still exist.

51. See, e.g., Baldus, Woodworth, and Pulaski, Jr., *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons From Georgia*, 18 U.C. DAVIS L. REV. 1375 (1985) [hereinafter the Baldus study]. See also, Lindsay, *Prosecutorial Abuse of Peremptory Challenges in Death Penalty Litigation: Some Constitutional and Ethical Considerations*, 8 CAMPBELL L. REV. 71 (1985); Baldus, Pulaski, Jr., and Woodworth, *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133 (1986); Goodman, *Demographic Evidence in Capital Sentencing*, 39 STAN. L. REV. 499 (1987); Gross and Mauro, *supra* note 1.

52. "There is evidence from investigations in other states that . . . hidden forms of discrimination do exist in constitutionally acceptable death penalty statutes." Jacoby and Paternoster, *supra* note 48 at 380; see also Bowers and Pierce, *supra* note 48.

53. *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (Marshall, J., concurring) (Justice Marshall in a brief statement referred to his dissent in *Gregg* as "That continues to be my view.").

54. See *McCleskey v. Kemp*, 107 S. Ct. 1756, 1777 (1987).

participate in the process."<sup>55</sup>

Secondly, the Baldus study<sup>56</sup> and numerous others have (demonstrated empirically), evidence of prosecutorial bias predicated on racism.

The bifurcated trial-sentencing procedure which passed eighth amendment muster in *Gregg* is constitutionally inadequate for equal protection purposes because it has little impact on the ability of a prosecutor to aggressively seek the imposition of the death penalty on Black murderers with white victims. Conversely, a prosecutor can offer a white murderer the opportunity to plea bargain, or simply decline to seek the death penalty against such an offender.

Procedural bias in charging decisions precedes submission of a capital case to either judge or jury. Therefore, this bias is insulated from the assumed prophylactic purpose of the bifurcated trial-sentencing procedure *ab initio*.<sup>57</sup>

Between 1930 and 1977, Georgia executed 62 men for rape, of whom 58 were Black.<sup>58</sup> Clearly, prosecutorial discretion triggered and influenced the winnowing process. Yet no Justice went so far as to characterize Georgia's capital sentencing system as functionally racist. Indeed, no Justice ever criticized a prosecutor's manipulative role in the death penalty system in any State as functionally racist until *McCleskey*.<sup>59</sup>

## McCleskey v. Kemp

### Facts And Procedural History

A trial court judge sentenced Warren McCleskey to death upon the recommendation of a Fulton County, Georgia, jury which had earlier convicted him of felony-murder and two counts of armed robbery. His death sentence was affirmed by the Georgia Supreme Court upon automatic review.<sup>60</sup> The Supreme Court denied certiorari,<sup>61</sup> and McCleskey exhausted his round of post-conviction remedies in the state courts.<sup>62</sup>

He then raised eighteen claims in his federal habeas corpus action,<sup>63</sup> among which were allegations that the Georgia capital sentencing scheme was racially administered in violation of the eighth and fourteenth amendments. McCleskey offered the Baldus study, a complex statistical study based on over

55. Zeisel, *supra* note 2, at 466.

56. Baldus study, *supra* note 51.

57. See Lindsay, *supra* note 51.

58. Brief for Petitioner at 56, *Coker v. Georgia*, 433 U.S. 584 (1977) (No. 75-5444) in 97 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 800 (P. Kurland and G. Casper eds. 1978) (citing UNITED STATES DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, National Prisoner Statistics Bulletin No. SD-NPS-CP-3, *Capital Punishment 1974* (Nov. 1975) at 21).

59. *McCleskey*, 107 S. Ct. at 1781-82 (Brennan, J., dissenting); *id.* at 1802 (Blackmun, J., dissenting).

60. *McCleskey v. State*, 245 Ga. 108, 263 S.E.2d 146 (1980). The defendant's name apparently was misspelled until the case reached the United States Supreme Court the first time around in 1980.

61. *McCleskey v. Georgia*, 449 U.S. 891 (1980).

62. McCleskey unsuccessfully filed an extraordinary motion for a new trial, then sought state habeas corpus relief in a different county. *McCleskey v. Zant*, No. 4909 (Apr. 8, 1981). The Georgia Supreme Court refused his application for a certificate of probable cause to appeal the denial of his habeas corpus motion and the United States Supreme Court again denied certiorari. *McCleskey v. Zant*, 454 U.S. 1093 (1981).

63. *McCleskey v. Zant*, 580 F. Supp. 338 (N.D. Ga. 1984).

2000 murder cases in Georgia during the 1970s, into evidence to support his claims.

The Baldus study contains data relating to the victim's race, the defendant's race, and various combinations thereof as they pertained to the prosecutor's decision to request the death penalty in intra- and interracial homicide prosecutions. The intensive analysis indicated that Blacks who killed whites were four times as likely to receive the death penalty than whites who killed Blacks. More crucially, the study established that prosecutors sought the death penalty in 70% of Black defendant-white victim cases, but only 19% for white defendant-Black victim, and 15% for Black victim-Black defendant cases, a statistically significant discrepancy.

The federal district court rejected the proffered Baldus study as untrustworthy, and refused relief on the basis that the statistics did not demonstrate prima facie evidence of alleged racism in the imposition of the Georgia death penalty. However, the court granted the habeas corpus petition, on the ground that the prosecution's failure to reveal a deal struck with a witness was reversible error.<sup>64</sup> Both McCleskey and Georgia appealed. The Eleventh Circuit, sitting en banc, reversed the grant of habeas corpus petition.<sup>65</sup> The court of appeals,<sup>66</sup> while assuming the validity of the study, rejected McCleskey's arguments and held that he had failed to demonstrate that discriminatory sentencing results constituted arbitrariness in violation of the eighth amendment, or discriminatory intent, which the court concluded was required to prevail in a fourteenth amendment claim.<sup>67</sup>

### The Supreme Court Opinion

Justice Powell, writing for a bare majority of the Court<sup>68</sup> rejected McCleskey's fourteenth amendment claim of racial animus in the administration of Georgia's death penalty system.<sup>69</sup> Although, like the Eleventh Circuit, the Supreme Court assumed the validity of the Baldus study,<sup>70</sup> the Court held that there was no evidence, despite the disproportionate racial impact, that the Georgia legislature had passed or maintained the death penalty laws because of this impact.<sup>71</sup>

The Court pointed out that McCleskey had committed a heinous crime, and that Georgia law permitted him to be put to death for the crime. It emphasized that Georgia's system of capital sentencing had survived constitu-

64. *McCleskey v. Zant*, 580 F. Supp. at 356-62. The district judge implied that McCleskey had alleged facts bearing more on a denial of due process than an equal protection violation. Significantly, the court conceded that racial discrimination had been a historic reality in the South. *Id.* at 368 n.5.

65. *Spencer v. Zant*, 729 F.2d 1293, 1294 (11th Cir. 1985).

66. *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985) (en banc). Three judges dissented insofar as McCleskey's claims were based on the Baldus study.

67. *Id.* at 892.

68. Justice Powell's majority opinion was joined by Chief Justice Rehnquist and Associate Justices White, O'Connor and Scalia. Justices Brennan, Marshall, Blackmun and Stevens dissented.

69. McCleskey's eighth amendment claim, although presented before the Court with reliance on the same Baldus study, is beyond the scope of this Comment. Had either McCleskey's eighth or fourteenth amendment challenges been sustained, hundreds of the nation's condemned inmates would have been saved from death, just as in 1972 when the Court in *Furman* imposed a moratorium on executions. *Nat. L. J.*, Jan. 11, 1988, at 3, col. 2.

70. One wonders whether the Court would have accepted the validity of the Baldus study *sua sponte* if it had been confronted with deciding *de novo* the question of validity.

71. *McCleskey*, 107 S. Ct. at 1769-70.

tional attack in *Gregg*.<sup>72</sup> As far as the Court saw it, the bifurcated trial-sentencing approach maintained by Georgia and approved in *Gregg* safeguarded the constitutional rights of criminal defendants in capital cases.<sup>73</sup>

The Court also characterized its reluctance to overturn McCleskey's sentence as a federalism issue.<sup>74</sup> It was impressed by the fact that many states and the federal government had re-enacted death penalty statutes, which had re-instituted the traditional discretion accorded state prosecutors, juries and judges, even in the wake of *Furman*.<sup>75</sup>

The Court had another troubling question: it was concerned that the standard requested by McCleskey was unworkable and that the challenge was so broad-based that it would sound the death knell for capital punishment.<sup>76</sup> Faced with the prospect that a contrary decision would mean the functional equivalent of abolishing capital punishment by judicial fiat, the Court proceeded to rule that McCleskey had failed to prove a purposeful legislative intent to discriminate on the basis of race, and that he must show that the decision makers had been racially motivated when imposing his sentence.<sup>77</sup> It then faulted McCleskey for neglecting to do so and instead relying on the Baldus study.

There were vigorous dissents by Justices Brennan, Blackmun, and Stevens. Brennan began by reiterating his view that capital punishment was inherently violative of the eighth amendment. He then opined that McCleskey had demonstrated sufficiently, via the Baldus study, that race cast a long shadow on the administration of the death penalty in Georgia, including in Fulton County, in violation of the eighth amendment.<sup>78</sup> Brennan reminded his brethren that earlier decisions had only emphasized the *risk* of miscar-

72. *Id.* at 1772-74. The reliance on *Gregg* is inapposite. *Gregg* stated only that "[o]n their face these [new] procedures seem to satisfy the concerns of *Furman*." 428 U.S. at 198. (emphasis added). *Gregg* is therefore not the constitutional edifice the Court made it out to be in *McCleskey*.

73. McCleskey was foreclosed from arguing against any impropriety in the prosecutor's use of his peremptory challenges during the petit jury impaneling process because the Supreme Court held in *Allen v. Hardy*, 478 U.S. 255 (1986) that *Boston* would not be applied retroactively on collateral attack to a conviction that had become final.

74. *McCleskey*, 107 S. Ct. at 1771-72. The Court's conservative stance ignores the fact that the fourteenth amendment was passed for the purpose of curbing the discriminatory use of the state's police powers against minorities.

75. *Id.* at 1774-77.

76. *Id.* at 1779. "McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system . . . . McCleskey's arguments are best presented to the legislative bodies. It is not the responsibility—or indeed the right—of this Court to determine the appropriate punishment for particular crimes." *Id.* at 1781. The Court made this statement in reference to the eighth amendment only, and did not discuss the impact on the judicial system of McCleskey's fourteenth amendment challenge.

However, this is precisely the outcome the Court sought to circumvent when it articulated the *Gregg* standards. "Perhaps the Justices were haunted by the ghosts of past and future capital cases . . . . A specific endorsement of this kind of study would have opened the floodgates to a similar attack upon the entire criminal process . . . ." Dorkin, *supra* note 40, at 1685-86.

77. The Court relied on case precedents decided outside the criminal prosecution context. *Id.* at 1766-69. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976) (facially neutral employment test with racially disproportionate impact does not violate the equal protection component of the fifth amendment absent proof of racially discriminatory purpose); *Bazemore v. Friday*, 478 U.S. 385 (1986) (accepting statistics in the form of multiple regression analysis to prove violation of Title VII).

78. *McCleskey*, 107 S. Ct. at 1781-94. Because differential sentencing based on race is the penultimate affront to the fourteenth amendment's even-handedness mandate, the eighth amendment standard, which does not require intentional discrimination, but mere risk of discrimination, was satisfied when the Court assumed the validity of the Baldus study.

riages of justice as a prerequisite for reversal.<sup>79</sup>

In a separate, lengthy dissent, Justice Blackmun, specially concurred with that portion of Brennan's dissenting opinion discussing the evidentiary value of the Baldus study.<sup>80</sup> Disagreeing with the majority's reliance on *Gregg*, he emphasized that the statistical study ought to be considered in the proper social context. He recited the long history of racism in Georgia's criminal justice system. Blackmun took issue with the majority's refusal to inquire into the discretion of the state's instrumentalities in a criminal proceeding—the prosecutor, the judge, and the jury.

Blackmun pointed out that prosecutors had wide latitude in deciding what to charge and how vigorously to prosecute a capital crime. To him the very decision to allocate scarce resources towards the costly prosecution of capital crimes was a value judgment in which racial bias could creep in. He further stated that the Baldus study had amply demonstrated a link between offender and victim racial characteristics and the imposition of the death penalty in Georgia, thereby creating a rebuttable presumption of unconstitutional prosecutorial conduct.

Blackmun responded to the majority's statement that to accept McCleskey's arguments at face value would open the floodgates to allegations that discrimination existed in other aspects of criminal prosecutions and result in a functional abolition of the death penalty. He emphasized the uniqueness of the Baldus study,<sup>81</sup> and opined that its thoroughness could not be easily duplicated for other jurisdictions.

He went on to cite an impressive list of case precedents to demonstrate that the Court's previous fourteenth amendment jurisprudence had applied social science data. Blackmun also noted that the majority's analysis articulated a standard of review akin to that of plain error. Previously, Blackmun pointed out, the Court had accepted arguments making out a prima facie case only, and placed the burden on the state to rebut the presumption.

Although he joined in the opinions of his fellow dissenters, Justice Stevens wrote separately to emphasize his view that the proper standard was a *Swain*-type requirement, whereunder race-based appeals in capital cases would be dismissed only where the state demonstrated that in that county prosecutors had consistently sought, and juries had consistently imposed, the death penalty without regard to race.<sup>82</sup>

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79. Justice Brennan cited Justice O'Connor's recent opinion in *Caldwell v. Mississippi*, 472 U.S. 320 (1985) for the proposition that a death sentence must be struck down when the circumstances under which it has been imposed "creat[es] and unacceptable risk that [it] has been meted out arbitrarily or capriciously." *Id.* at 343. Justice Brennan stressed that petitioners had never previously had to prove that impermissible considerations actually infected prosecution, but rather that the system under which they were sentenced posed a significant risk of such an occurrence. *McCleskey*, 107 S. Ct. at 1783-84.

80. *Id.* at 1794-1805.

81. The Baldus study is unique because it involved comprehensive data, uses complex multiple-regression analysis, and includes statistics from Fulton County, the very county in which McCleskey was prosecuted.

82. *Id.* at 1805-06.

## THE CASE FOR STRICTER SCRUTINY AFTER *MCCLESKEY*

### Critique Of The Court's Technique

In *McCleskey*, a case involving the outer limits of the equal protection clause, the Supreme Court adversely decided a Georgia death row inmate's race-based challenges to Georgia's imposition of the death sentence.

The Court, in language reminiscent of *Swain*,<sup>83</sup> held that the Baldus study did not establish that Georgia's capital sentencing scheme purposefully discriminated against Black defendants. In order to make a claim of a denial of equal protection a petitioner would have to demonstrate exceptionally clear proof of purposeful racial discrimination in his own case and that *McCleskey* had failed to show purposeful discrimination in his case.

The Court expressly rejected the contention that prosecutors in Georgia abuse their prosecutorial discretion, but did not elaborate.<sup>84</sup> Applying a standard of review akin to the "margin of appreciation"<sup>85</sup> yardstick used by the European Court of Human Rights,<sup>86</sup> the Court accorded presumptive validity to prosecutorial acts. In no way did the Court try to resolve whether prosecutorial bias required strict scrutiny review, implying that the prosecutorial discretion involved in the case satisfied even strict scrutiny.

This represents a departure from the Court's usual analytical approach in criminal cases involving equal protection.<sup>87</sup> *McCleskey* cannot be squared with *Batson*, and perhaps not even with *Furman*. The thrust of these two cases suggested a willingness by the Court to broaden the scope of constitutional protections to allow for transformations in the socio-political arena since the mid-twentieth century.

The one-time liberal and restrictive analysis detailed in *Furman* provides the guiding principles with respect to *McCleskey*. In *Furman*, it must be recalled, the Court invalidated the Georgia laws because the sentencing system provided for too much discretion. *Furman* stands for the proposition that

83. Dicta in *Swain* pointed the way to the result in *McCleskey* and, even as it tried to distance itself from its holding in *Swain*, the Court unconsciously extended the underlying rationale of that case to *McCleskey*.

84. *Id.* at 1778.

85. In a broad sense, this doctrine stands for the principle that a state is the best judge of how to regulate its own affairs. See generally Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, 3 CONN. J. INT'L L. 111, 118-59 (1987).

86. See, e.g., *The Case of Campbell and Fell*, 80 Eur. Ct. H.R. (ser. A) (1984). Like the United States Supreme Court vis-a-vis state courts, the European Court is a constitutional court, subsidiary to the national courts of the member countries. All applicants are required to exhaust domestic remedies in their own nations' legal systems before petitioning the Court. The similarity ends however because the United States Supreme Court does not have to defer to state courts on federal constitutional matters, and must invalidate unconstitutional laws, whereas the European Court does not purport to strike down any laws. See also Walsh, *The European Court of Human Rights*, 2 CONN. J. INT'L L. 271 (1987).

87. Prior to *McCleskey*, a petitioner could prove discriminatory prosecution by showing that other offenders similarly situated were not prosecuted to the same degree; that the selection of the petitioner was purposeful; and that the selection was made because of an irrelevant classification.

*McCleskey* satisfied this three-pronged test. He proved, via the Baldus study, that prosecutors in Georgia in general and Fulton County in particular did not aggressively seek the death penalty for white persons who had committed correspondingly horrible crimes. He also showed that the advocacy of the death penalty against Black defendants was intentional, because their victims were whites. Finally, *McCleskey* could have shown that the criteria for selecting him to face the death sentence—his race—was a totally arbitrary classification unrelated to any valid penal interest. See *McCleskey*, 107 S. Ct. at 1798-1805 (Blackmun, J., dissenting).

discretion in a capital punishment system, while necessary to satisfy the Constitution, must be guided discretion to prevent illegal considerations—such as race—from being taken into account. This is especially so since the Supreme Court subsequently cited *Furman* in stating that “the risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the finality of the death sentence,”<sup>88</sup> and that discretion in this arena should not be unbounded.

The Supreme Court, until *Batson* had never had the occasion to hold that a prosecutor’s charging decision was exercised in contravention of the equal protection clause. Nevertheless, the Court had intimated that such a defect was constitutionally possible.<sup>89</sup>

In *Batson* the Court found a prima facie case of racial discrimination in violation of the equal protection clause because prosecutors within a county repeatedly exercised their preemptory challenges to disqualify all potential Black petit jurors from deciding criminal cases.<sup>90</sup> Despite the historic use of peremptories for “any reason or no reason,” the Court held that a defendant could establish a prima facie case of purposeful discrimination in the selection of a petit jury solely on evidence concerning the prosecutor’s exercise of peremptory challenges at the defendant’s trial.

The Court, in *Batson*, criticized *Swain* for placing on defendants a crippling burden of proof which was unnecessary in light of intervening decisions of the Court that a defendant could make a prima facie showing of purposeful racial discrimination in the selection of the venire by relying on the facts concerning its selection in his own case.<sup>91</sup>

In prohibiting the prosecutorial exercise of peremptories on the basis of the race of the offender, the *Batson* majority implied that the application of the presumption of prosecutorial bias is more or less mechanical, with little interpretation required, besides the threshold question of its application. In *McCleskey*, this logic should have applied, too.

*Batson* did not make clear whether, in addition to applying an invidious racial purpose requirement, that is, the presumption of prosecutorial bias test, its holding was equally triggered by racial impact—where the end result of the prosecutor’s repeated exercise of his peremptories resulted in no Blacks on the jury.

Since this distinction between purpose and impact had been emphasized in almost every equal protection case, *Batson* may have signaled the Court’s momentary abandonment of the purpose versus disparate impact distinction. If that were true, *Batson* and *McCleskey* would require identical outcomes!

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88. *Turner v. Murray*, 476 U.S. 28 (1986) (defendant in a capital case accused of an interracial crime is entitled to have prospective jurors informed of the race of his victim and to be queried on the issue of racial bias). Four members of the majority asserted that the death sentence, but not the conviction, be vacated.

89. *See, e.g., United States v. Batchelder*, 442 U.S. 114 (1979); *Oyler v. Boles*, 368 U.S. 448 (1962); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961).

90. Although *Batson* stated his claim on the fair cross-section requirement of the sixth amendment, the Court rejected that argument, and in fact has held that the fair cross-section right can not be used to invalidate prosecutorial challenges to prospective jurors. *Lockhart v. McCree*, 106 S. Ct. 1758 (1986).

91. *See Vasquez v. Hilery*, 474 U.S. 254 (1986); *Wayte v. United States*, 470 U.S. 598 (1985); *Donnelly v. DeChristofor*, 416 U.S. 637 (1974); and *Whitus v. Georgia*, 385 U.S. 545 (1967).

The *McCleskey* holding constitutes an aberration in light of *Batson* because *Batson* enunciated a principle whereby constitutional defects engendered by race-sensitive prosecutions could possibly be cured by shifting the burden onto the state when a prima facie case of racism was shown.

The discriminatory use by prosecutors of their wide discretion<sup>92</sup> in seeking the death sentence is inconsistent with the spirit, if not the letter, of the standards that should govern capital cases.<sup>93</sup> The ability of a prosecutor to infuse racial bias into his decision to bring capital charges is a flaw in the process of determining who will be executed and voids "any rational legislative purpose underlying the enforcement of capital statutes".<sup>94</sup>

The statistics compiled and testified about by Baldus, and relied on by McCleskey, constitute prima facie evidence of bias, a showing strong enough to suggest that the burden of proving that no such bias exists should shift to the prosecutor. Even if the Baldus conclusions had been proven to be less than watertight, the Court should have invoked one of its case precedents on statistical uncertainties<sup>95</sup> and still required the state to rebut the evidence.

Other fourteenth amendment precedents that should have helped the Court include the landmark case of *Brown v. Board of Education*,<sup>96</sup> which was decided on the basis of statistics.<sup>97</sup> *Brown* held that the segregation of children in public schools solely on the basis of race, even assuming substantially equal facilities, deprived the minority group of equal education opportunities in violation of the equal protection clause of the fourteenth amendment.

In *Brown* the Court considered the congressional debates over the fourteenth amendment, ratification by the states, contemporaneous practices in racial segregation, and the views of proponents and opponents of the amendment, and concluded that the history of the amendment was inconclusive with respect to the status of public education at the time. The Court consequently relied on extensive social science data to dispose of the case.

There were also lower federal court decisions which had accepted statistical evidence in discriminatory prosecution cases. Among these were *United States v. Ojala*,<sup>98</sup> where the defendant made a strong showing that his selection for prosecution for tax delinquency, when thousands of similarly situated delinquents were not, constituted a prima facie case of intentional discrimination. In *United States v. Robinson*,<sup>99</sup> a policy to prosecute a private investigator who violated wiretap laws, but to disregard public officials who

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92. "Whether this exercise of discretion at the charging stage is a vice or a virtue is a matter on which there is not complete agreement." W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* 560 (1985). "But this is not to suggest that there does not reside in the prosecutorial screening function considerable potential for abuse. The danger, of course, is that the screening process is so informal and invisible and so lacking in adequate information and policy guidance or rules that it may [not] operate fairly upon those individuals subjected to the process . . . ." *Id.*

93. Bedau, *supra* note 38, at 25.

94. *Id.* at 13.

95. *See, e.g., Faretta v. California*, 422 U.S. 806 (1975).

96. 347 U.S. 483 (1954).

97. *Id.* at 494 n.11. Though *Brown* arose in the civil context and involved *de jure*, as opposed to *de facto* discrimination, it nonetheless demonstrates that the Supreme Court has previously acted in this area.

98. 544 F.2d 940 (8th Cir. 1976).

99. 311 F. Supp 1063 (W.D. Mo. 1969).



also violated the same laws was held to be a violation of equal protection, since there was no legitimate basis for the distinction.

Nevertheless, the *McCleskey* Court disavowed expertise in the use of social science data.<sup>100</sup> This analytic approach to *McCleskey's* impressive and unimpeached Baldus study represents an intellectual eclipse of *Brown* by a Court which had previously relied extensively on *Brown* and other cases where the accepted statistics were impeachable.<sup>101</sup> In comparison to Title VII and jury composition cases, the Court's requirement of "exceptionally clear proof" makes little logical sense.

Instead of denying the significance of the racial patterns shown by the Baldus study, the Court should have remanded the case to the district court to see whether *McCleskey* could demonstrate racism in his own case under the evidentiary standard of "clear probability." Once *McCleskey* met this preliminary burden, the trial court should then have had to ask the prosecution to show, if possible, how this disparate trend in death row candidates is justified in light of *Furman*, *Batson*, and the fourteenth amendment.

Unfortunately, the majority did not reread *Furman*, and *Batson* carefully. Further the Court neither overruled these cases nor reconciled them, nor fully distinguished them; rather it ignored their critical mandates. The Court instead added a level of obscurity to fourteenth amendment jurisprudence by disregarding these precedents.

### *Strict Scrutiny*

Although the fourteenth amendment was passed specifically as part of a constitutional package to remedy the racial oppression endured by Blacks as a result of hostile legislative enactments from the birth of the United States through the aftermath of the Civil War, its broad language has resulted in its being invoked in virtually any constitutional litigation which alleges a denial of equal protection, even where the conduct complained of is executive action.<sup>102</sup>

In accordance with the fourteenth amendment's central concern with procedural due process, the Supreme Court has developed two levels of scrutiny against which to measure state action allegedly violative of a petitioner's equal protection claim.<sup>103</sup> The two levels are "strict scrutiny" and "minimal scrutiny."

Minimal scrutiny requires a rational relationship between the statutory purpose and the means adopted. Under a strict scrutiny analysis, the government must show a substantial relationship between the law and a compelling governmental interest. Strict scrutiny, in terms of congruence, requires a very

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100. "Legislatures also are better qualified to weigh and 'evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.'" *McCleskey*, 106 S. Ct. at 1781 (quoting *Gregg v. Georgia*, 428 U.S. at 186).

101. It is axiomatic that the Court shied away from giving full weight to the impressive data compiled by Baldus. The Court did note that it "has accepted statistics as proof of intent to discriminate in the context of a State's selection of the jury venire and in the context of statutory violations under Title VII of the Civil Rights Act of 1964." *Id.* at 1767.

102. See *Oyler v. Boles*, 368 U.S. 448 (1962); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

103. See generally Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

close means-end nexus between the classification and the governmental purpose sought to be advanced by the classification.

Strict scrutiny has been traditionally reserved for suspect classes. Suspect classes share one or more of the following characteristics: possession of an unalterable trait, discrete and insular minority status, political impotence requiring judicial solicitude, or a trait rarely relevant to legitimate governmental objectives, yet traditionally used to discriminate against those who possess it.

The advent of strict scrutiny analysis represents a major development in fourteenth amendment jurisprudence. The Court utilized its inherent responsibility to interpret the Constitution in order to revolutionize the scope of constitutional redress. Strict scrutiny is now entrenched as a basic premise of the Court's fourteenth amendment jurisprudence.

The strict scrutiny standard-of-review approach has never expressly been applied by the Court to administrative policies which do not have their genesis in any legislative or regulatory source. It has rarely been articulated in the review of discriminatory policies in civil, let alone criminal, cases.

Nevertheless, the fourteenth amendment is process-oriented and, as such, any state action—as opposed to legislation alone—should be scrutinized under the higher standard of review when it classifies on the basis of race. Moreover, the Constitution requires that the Court look beyond the face of a statute defining an offense or punishment, and also consider challenged selection practices to afford “protection against actions of the State through its administrative officers in effecting the prohibited discrimination.”<sup>104</sup>

The Supreme Court has approached racial discrimination cases involving voting, welfare, education and public facilities under an “effects test.”<sup>105</sup> Moreover, in *Arlington Heights v. Metropolitan Housing Development Corp.*<sup>106</sup> the Court stated four alternate sources of circumstantial and direct evidence from which supplementary proof of discriminatory purpose could be inferred, two of which are pertinent here: “(1) [t]he impact of the official action—whether it bears more heavily on one race than another’;<sup>107</sup> (2) [t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes.”<sup>108</sup> Similarly, state policies in the criminal arena should be reviewed under the strict scrutiny analysis.<sup>109</sup>

In *McCleskey*, there was little doubt that the petitioner satisfied the prerequisite characteristics normally associated with strict scrutiny analysis.

104. *Boston*, 106 S. Ct. at 1718 (citations omitted).

105. See, e.g., Brinon, “Intent” and Equal Protection: A Reconsideration, 1983 SUP. CT. REV. 397.

106. 429 U.S. 252 (1977).

107. Although the prosecutor's discretion and not the Georgia death penalty statute itself, was under direct challenge, the evidence collected by Baldus showed clearly that prosecutors in Georgia were engaged in what were essentially purposeful race-based classifications of defendants in determining suitability for seeking the death penalty, and that the impact was heavier on Blacks than whites.

108. *Id.* at 267. Cf. *Castaneda v. Partida*, 430 U.S. 482 (1977) (proof of overt intent unnecessary to establish prima facie case of discrimination in grand jury selection process). *Castaneda* enunciated three prerequisites of an equal protection violation: (1) demonstration of the exclusion of a cognizable group; (2) historic under-representation of the excluded group; and (3) a discretionary selection procedure susceptible to abuse. The state would then have to rebut this presumption by articulating nonracial reasons for its selectivity. *Id.* at 494-95.

109. I am not arguing that the use of strict scrutiny will guarantee the elimination of racism in capital prosecutions in Georgia or anywhere else. I do mean to suggest, however, that this will decrease the ability of the prosecution to use racial motivation as a proxy for deciding when to seek the death penalty.

There was also no doubt that the prosecutor's actions constituted state action in its paradigmatic form. In refusing to find the Georgia capital sentencing scheme constitutionally offensive, the Court did not apply any more than deferential review to the allegations of prosecutorial bias.

The analogy between statutory classifications that are race-based and policy decisions that appear to be race-based may appear attenuated. There is the problem of symmetry: under the strict scrutiny analytic mode, benign race-based classifications have been subjected to a less searching analysis than invidious racial classifications. There is no counterpart in the criminal procedure sphere which is akin to benign racial classifications, except in the scenario opposite to that alleged by *McCleskey*—that is, where whites are favorably treated because they are white.

Moreover, applying a standard of review developed for entirely different purposes to the area of prosecutorial judgment, may be problematic. Nevertheless, even if one accepts the Court's analytic approach to *McCleskey*, and rejects the proposition advanced in this Comment, *McCleskey* still seems unprincipled, because the Justices focused on the defendant's conviction, rather than the central issue of his appeal: the apparently racist objectives of Georgia's prosecutors.

#### CONCLUSION

*McCleskey* compounded the difficulties already inherent in construing and applying the outer limits of the equal protection clause. The problem with *McCleskey* is not in its holding; it lies in its rationale. The Court opined that there was no limiting principle to the type of challenge brought by *McCleskey*—a convenient fiction for the majority's decision to reject the consequences of the Baldus study while paradoxically accepting its empirical validity—and simply ignored the fundamental constitutional importance of what was at stake.

The goal of constitutionalism is deterrence of unlawful state activity. It has little to do with innocence or guilt, but rather focuses on the procedures accorded by the state when it pits its power against the constitutional rights of an individual accused in response to a criminal act. Accordingly, criminal procedures should not be looked at in a legal vacuum, but rather social and political implications should be factored in.

The Court did not clarify the basis for its rejection of the consequences of the Baldus study:<sup>110</sup> there was no methodological approach here.<sup>111</sup> The several reasons given by the majority for its conclusions are less than convincing in light of *Swain*, *Furman* and *Gregg* which, after all, are grounded on the proposition that arbitrariness will not be tolerated in criminal prosecutions.

The Court's decision narrows the parameters of the traditional test in death penalty cases and legitimizes an unconstitutional Georgia procedure, a

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110. "The possibility that some omitted potentially important data might change the observed patterns of racial influence in the study is endemic to research of this type—indeed, it may be inevitable—but it does not, in itself, call the conclusions into question." Gross and Mauro, *supra* note 1, at 45.

111. The Court failed to analyze whether the state had a legitimate penal purpose for the targeting for execution of Black murderers of whites.

result that previously seemed foreclosed by *Batson*.<sup>112</sup> The Court justified its result on the ground that the general populace supported the death penalty, that "[a]pparent disparities in sentencing are an [unavoidable by-product of the discretion in decisionmaking that characterize] our criminal justice system,"<sup>113</sup> and that it is up to state legislatures, not the courts, to amend their capital sentencing procedures.<sup>114</sup>

In a future case,<sup>115</sup> the Supreme Court should take a new hard look at the problem of racism in the imposition of the death penalty. It must live up to its constitutional responsibility to "say what the law is"<sup>116</sup> and not let a prosecutor use race as the basis for deciding against whom to seek the death penalty.

It should invoke its inherent supervisory role and curb prosecutorial abuses which rise to a constitutional dimension. Prosecutors should be required to articulate convincing reasons for exercising their discretion in a manner that would lead disinterested observers to conclude that the resulting statistical discrepancy is the result of functional racism or bias, or risk having convictions nullified.

Otherwise, *McCleskey*, although apparently an exception to the Court's willingness to extend prohibitions on race to all areas of the law,<sup>117</sup> will come to symbolize "the impotence of an equal protection remedy that is available only upon proof of specific discriminatory intent."<sup>118</sup> It will send out a foreboding message that state-sanctioned racism is prohibited everywhere except where it really counts the most: in a life or death matter.<sup>119</sup>

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EDITORS NOTE—After this Comment was accepted for publication, the Racial Justice Act was introduced in the 100th Congress.

The Act would forbid states from imposing and carrying out death sentences if it is shown that either the race of a defendant or the race of a victim more likely than not influenced the decision to sentence a defendant to

112. The majority in *McCleskey* evidenced a paucity of precedent as *Batson* specifically examined a prosecutor's discretion. Consequently, the Court appears to apply an amorphous standard.

113. *But see* Lindsay, *supra* note 51, at 63.

114. Admittedly, unilateral action by the Court in invalidating Georgia's death sentencing scheme would have raised serious federalism questions in the face of legislative compliance with the procedures required by the Constitution, as articulated by the Court itself in *Furman*.

115. The Court has already rejected *McCleskey's* final effort to persuade it of the constitutional implications of the correlation between race and the imposition of the death penalty. *McCleskey v. Kemp*, 107 S. Ct. 3199, *rehearing denied*, (1987).

116. *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

117. *See generally* Brennan, *Constitutional Adjudication and the Death Penalty: A View From the Court*, 100 HARV. L. REV. 313 (1986).

118. Comment, *McCleskey v. Kemp: Constitutional Tolerance For Racially Disparate Capital Sentencing*, 41 U. MIAMI L. REV. 295, 297 (1987).

119. Interestingly, Warren *McCleskey* has been spared execution. In a 38-page December 23, 1987 ruling, Judge Owen Forrester, who had initially rejected *McCleskey's* racism challenges, granted *McCleskey* a new trial based upon a violation of *Massiah v. United States*, 377 U.S. 201 (1964), and the fifth amendment. *McCleskey v. Kemp*, Civ. C87-1517A (1987). Judge Forrester had earlier issued a stay of execution in November of 1987.

*McCleskey* must, of course, serve a life sentence for his robbery conviction, and Georgia prosecutors have appealed *McCleskey's* failure to raise the self-incrimination argument during his initial habeas corpus petition. Nat'l. L.J., Jan. 11, 1988, at 3, col 2.

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death. It would also allow a defendant to offer statistical evidence as proof of discrimination, just as could be offered in any other civil rights case. A state would be able to refute a claim of discrimination by demonstrating relevant non-racial factors in sentencing, like the severity of a crime, or criminal history of a defendant.

Representative John Conyers, Jr. (D-MI) sponsored the bill in the House of Representatives. Since it was never assigned to a committee, no action was taken. Senator Edward Kennedy (D-MA) introduced an amendment to the Omnibus Drug Initiative Act of 1988, that was substantively similar to the Racial Justice Act. That amendment was defeated by a vote of 35 to 52. At press time, there were tentative plans to reintroduce similar bills in the next legislative session.