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***McCleskey v. Kemp*: Constitutional Tolerance for Racially Disparate Capital Sentencing**

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COMMENT

McCleskey v. Kemp: Constitutional Tolerance for Racially Disparate Capital Sentencing

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I. INTRODUCTION

Warren McCleskey is one of the more than 1600 death row inmates in the United States.¹ A Georgia court sentenced him to death for the felony murder of a white policeman during the course of

1. Greenberg, *Against the American System of Capital Punishment*, 99 HARV. L. REV. 1670, 1672 (1986). Almost half of the people on death row in America are in the six states that comprise the Fifth and Eleventh Circuits. Gross & Mauro, *Patterns of Death*, 37 STAN. L. REV. 27, 121 n.262 (1984).

an armed robbery in 1978.² McCleskey lost on appeal to the Supreme Court of Georgia,³ and the Supreme Court of the United States denied his petition for certiorari.⁴ In his federal action for habeas corpus relief, he introduced evidence that, at the time he was sentenced, convicted killers of white victims in Georgia were more than twice as likely to receive the death penalty than were convicted killers of black victims.⁵ He derived this evidence from a comprehensive, sophisticated statistical study of the results of Georgia's death-sentencing system for the years 1973-79.⁶ The study's findings indicated that murderers of white victims, whose crimes, like McCleskey's, were in the "mid-range" of statutory aggravating circumstances, were 2.4 times more likely to receive death sentences than were defendants convicted of comparably aggravated murders of black victims.⁷ This disparity, McCleskey argues, proves that there was an impermissible risk that the race of his victim was a "silent aggravating circumstance" in his sentencing jury's decision to impose the death penalty.⁸

Consequently, McCleskey argues that the Georgia death penalty statute is arbitrarily and capriciously applied, in violation of the eighth amendment.⁹ McCleskey argues also that killers of white victims are themselves victims of a fourteenth amendment equal protection violation, because sentencing otherwise similarly situated defendants to death on the basis of race is constitutionally impermissible.¹⁰ The United States Court of Appeals for the Eleventh Circuit, sitting en banc, denied McCleskey's eighth and fourteenth amendment claims.¹¹ Relying upon circuit precedent of dubious validity, the court held that McCleskey was required to prove discriminatory intent as an element of his eighth amendment challenge.¹² The court then concluded that even if McCleskey's evidence proved discriminatory sentencing results, it did not compel an inference of discriminatory intent, without which eighth amendment and equal protection

2. In addition to the murder conviction, McCleskey was convicted of two counts of armed robbery. *McCleskey v. State*, 245 Ga. 108, 263 S.E.2d 146, *cert. denied*, 449 U.S. 891 (1980). On the robbery convictions, he was sentenced to two consecutive life terms. *Id.*

3. *Id.*

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

5. See *infra* notes 365-68 and accompanying text.

6. See *infra* note 335.

7. See *infra* notes 369-70 and accompanying text.

8. Brief for Petitioner at 35, *McCleskey* (No. 84-6811).

9. See *infra* notes 21-90 and accompanying text.

10. See *infra* notes 117-65 and accompanying text. McCleskey raised other claims of constitutional defects in his sentence which this Comment will not address.

11. *McCleskey v. Kemp*, 753 F.2d 877, 890-92 (11th Cir. 1985), *cert. granted*, 106 S. Ct. 3331 (1986).

12. See *infra* notes 62-87 and accompanying text.

claims must fail.¹³ The court, nonetheless, devoted much of its opinion to attempts to trivialize and discredit McCleskey's evidence, misreading the statistics, and misleading the reader.¹⁴ This Comment endeavors to explain why the Eleventh Circuit erected arguably unprecedented and perhaps insurmountable doctrinal and evidentiary barriers to the vindication of McCleskey's claims.

This case epitomizes the problems that inhere in a capital sentencing system created and administered by human beings. Although the Supreme Court's decisions require that there be some degree of discretion in the capital sentencing process to eliminate unfairness, discretion necessarily permits arbitrariness.¹⁵ The Court's treatment of discretion may have created a doctrinal quagmire from which there is no escape. The Court has rejected both unlimited discretion,¹⁶ and mandatory death sentencing which permits no discretion.¹⁷ Upon its certiorari review of the Eleventh Circuit's decision in this case,¹⁸ the Court may be compelled to declare that some arbitrariness, born of "permissible" levels of human discretion, is constitutionally tolerable.

A contrary decision might be the functional equivalent of abolishing the death penalty. Some fear, and others hope, that McCleskey's evidence of Georgia's preference for avenging white victims will compel a rational Court to conclude that Georgians' unspoken racial animus frustrates, and always will frustrate, the constitutional administration of a facially constitutional death-sentencing statute. This is a wrong that arguably cannot be remedied except by shutting down Georgia's power to execute anyone. Thus, McCleskey's argument is a brilliant, yet problematic attempt to circumvent the Supreme Court's long-held majority view that the death penalty is not per se cruel and unusual.¹⁹ Further, this case illustrates the impotence of an equal protection remedy that is available only upon proof of specific discriminatory intent.²⁰ Even a cursory glance at McCleskey's evidence strongly suggests that something is rotten in Georgia. A realistic investigation of the system might show that, as a society, we are incapable of administering the death sentence without considering the unconstitutional factor of race. To preserve the death penalty, the Justices of the Supreme Court may be forced to avert their eyes.

13. *Id.*

14. *See infra* notes 357-75 and accompanying text.

15. *See infra* notes 43-47 and accompanying text.

16. *See infra* notes 37-42 and accompanying text.

17. *Id.*

18. *McCleskey v. Kemp*, 106 S. Ct. 3331 (1986) (granting certiorari).

19. *See infra* note 30.

20. *See infra* notes 67-69, 155 and accompanying text.

II. THE EIGHTH AMENDMENT

It is, by now, axiomatic that the arbitrary imposition of the death penalty violates the eighth amendment's prohibition against cruel and unusual punishment.²¹ Accordingly, McCleskey argued that the Georgia capital sentencing system, by its arbitrary enforcement, deprived him of his constitutional right to be free from cruel and unusual punishment.²²

After examining McCleskey's evidence, the Eleventh Circuit concluded that even if the statistical proof were valid, it was insufficient to substantiate his claim.²³ In so doing, the court ignored the data upon which the statistical proof was based and which, of itself, raised a strong inference that the Georgia sentencing system was not constitutionally sound.²⁴ Moreover, the court rejected McCleskey's claim because he had not proved that state actors had intentionally applied the Georgia capital sentencing statute²⁵ so as to violate his eighth amendment rights. The court reasoned that McCleskey's statistical evidence did not establish sufficient disparate racial impact to necessitate the inference that the state had intentionally discriminated against him.²⁶ The court, however, incorrectly and improperly required McCleskey to prove intent as an element of his eighth amendment sentencing challenge.²⁷

21. See *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). The Court in *Furman* stated simply that the imposition of the death penalty constituted cruel and unusual punishment in the murder case and the two rape cases before it. *Id.* at 240. Concurring opinions, however, identified the element of arbitrariness in sentencing as the reason behind the Court's decision. *Id.* at 253 (Douglas, J., concurring); *id.* at 274-76 (Brennan, J., concurring); *id.* at 309-10 (Stewart, J., concurring). The Court later stated, "In *Furman* [this] Court held that the penalty of death may not be imposed under sentencing procedures that create substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980). For an historical and philosophical analysis of the eighth amendment, see Comment, *Constitutional Law: The Death Penalty: A Critique of the Philosophical Bases Held to Satisfy the Eighth Amendment Requirements for Its Justification*, 34 OKLA. L. REV. 567 (1981).

22. *McCleskey v. Kemp*, 753 F.2d 877, 885 (11th Cir. 1985), cert. granted, 106 S. Ct. 3331 (1986).

23. *Id.* at 895-98. For a discussion of McCleskey's statistical evidence, see *infra* notes 335-75 and accompanying text.

24. See *infra* notes 328-31 and accompanying text.

25. GA. CODE ANN. § 17-10-30 (1982).

26. *McCleskey*, 753 F.2d at 894.

27. See *infra* notes 63-87 and accompanying text. The Supreme Court has imposed a state of mind requirement for a damages claim under the eighth amendment. See *Whitley v. Albers*, 106 S. Ct. 1078, 1084 (1986) ("wantonness" requirement); *Estelle v. Gamble*, 429 U.S. 97 (1976) ("deliberate indifference"). The Court has not imposed, however, a similar requirement for sentencing challenges. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (Stewart, Powell & Stevens, JJ., concurring) (eighth amendment prohibits the unnecessary infliction of pain). It may be that the Court is more receptive to capital defendants simply because they

A. Background: "Cruel and Unusual" Punishment

The cruel and unusual punishment clause²⁸ originated in the English Bill of Rights.²⁹ Historians and the Court have generally accepted that the Framers of the eighth amendment did not intend to include the death penalty within the scope of prohibited cruel and unusual punishment.³⁰ Over time, as the courts faced diverse claims of cruel and unusual punishment, the scope of the clause gradually expanded.³¹ Long before McCleskey first appeared in federal district

raise the eighth amendment as a *shield* to prevent a violation, whereas prisoners seeking damages in less severe contexts raise the amendment as a *sword* to vindicate a past injury. The Court's failure to articulate the reason for this distinction also suggests that it has never viewed the imposition of such a requirement as worthy of consideration. The Court has acknowledged "that the death sentence is different from all other sentences, and therefore special care is exercised in judicial review." *Sullivan v. Wainwright*, 464 U.S. 109, 112 (1983) (*per curiam*).

For a description of the "process model," which the Court has erected to protect the rights of those who might be sentenced to death, see Hubbard, "Reasonable Levels of Arbitrariness" in *Death Sentencing Patterns: A Tragic Perspective on Capital Punishment*, 18 U.C. DAVIS. L. REV. 1113, 1114-64 (1985).

28. The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

29. The English Bill of Rights, enacted December 16, 1689, stated that "[e]xcessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Furman v. Georgia*, 408 U.S. 238, 243 n.3 (1972) (quoting Bill of Rights, 1688, 1 W. & M., Sess. 2, ch. 2). *But see* Granucci, "Nor Cruel and Unusual Punishments Inflicted: The Original Meaning", 57 CALIF. L. REV. 839, 843 (1969) (tracing history of the clause and arguing that Congress misunderstood the use of the clause in England).

30. It is generally agreed that the Framers of the Constitution approved of the death penalty when justly implemented. This agreement is based in part on the command of the fifth amendment, which was ratified contemporaneously with the eighth amendment. *Furman*, 408 U.S. at 419 (Powell, J., dissenting). The fifth amendment implicitly permits the government to impose the death penalty only so long as it adheres to due process guidelines. *See* U.S. CONST. amend. V ("nor shall any person . . . be deprived of life, liberty, or property, without due process of law"). Inasmuch as no constitutional provision should be read so as to eviscerate another, one may argue that the eighth amendment does not prohibit that which the fifth amendment purports to allow.

31. The Court's first occasion to refer to the clause occurred eighty years after its enactment. *See* *Pevear v. Commonwealth*, 72 U.S. (5 Wall.) 475, 479-80 (1867), *cited in* *Furman v. Georgia*, 408 U.S. 238, 264 (1972) (Brennan, J., concurring). During this early period, courts conducted a retrospective eighth amendment analysis. In order for a penalty to rise to the level of an eighth amendment violation, a litigant had to show that the Framers themselves would have regarded it as cruel and unusual. *See* *Furman v. Georgia*, 408 U.S. 238, 265 (1972) (Brennan, J., concurring). In time, this historical approach gave way to a more flexible interpretation of the clause, in which contemporaneous moral and jurisprudential considerations became determinative. In *Weems v. United States*, the Court rejected a strictly historical approach to the interpretation of the clause. 217 U.S. 349 (1910). The Court acknowledged that the eighth amendment's "restraint upon legislatures" possesses an "expansive and vital character" which is "essential . . . to the rule of law and the maintenance of individual freedom." *Id.* at 376-77. The *Weems* Court stated further that the prohibition of cruel and unusual punishments "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.* at 378.

court, the Supreme Court rejected several different types of penalties under the "cruel and unusual" rubric.³²

In the 1960's, our society witnessed a vigorous attack on the death penalty by a coalition of death penalty abolitionists and the NAACP, which fought the battle from a racial discrimination perspective.³³ In 1972, the Court finally bridged the conceptual chasm between torture, a "substantively" cruel and unusual punishment, and an arbitrary death sentence, a "procedurally" cruel and unusual punishment, in *Furman v. Georgia*.³⁴ Despite the brief interlude during which the Court struck down state death penalty statutes because of arbitrary sentencing practices,³⁵ the present Court prefers to spare the rhetoric and save the penalty.³⁶

32. First, the Court held that the clause prohibited only outright torture and physical cruelty. See *In Re Kemmler*, 136 U.S. 436 (1880) (electrocution held constitutional); *Wilkerson v. Utah*, 99 U.S. 130 (1879) (execution by firing squad in public held constitutional). Later, the Court banned excessive or disproportionate penalties. See *Weems v. United States*, 217 U.S. 349 (1910). The *Weems* Court held, under the cruel and unusual punishment clause, that to punish a forger with fifteen years of hard labor in chains was "cruel and in excess." *Id.* at 377. Justice Brennan more recently commented on the concept of excessiveness:

The final principle inherent in the Clause is that a severe punishment must not be excessive. A punishment is excessive under this principle if it is unnecessary:

The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering.

Furman v. Georgia, 408 U.S. 238, 279 (1972) (Brennan, J., concurring).

In modern times, the Court has concluded that a penalty offending society's evolving standards of decency is cruel when society perceives it as cruel. In *Trop v. Dulles*, the Court stated that the cruel and unusual punishment clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U.S. 86, 101 (1958). Certain punishments, such as torture, are cruel and unusual because they are offensive to the "dignity of man," irrespective of public acceptance of these punishments. "The basic concept underlying the [clause] is nothing less than the dignity of man. While the State has the power to punish, the [clause] stands to assure that this power be exercised within the limits of civilized standards." *Id.* at 100.

Finally, in *Furman*, the Court held that, although the death penalty was not per se cruel and unusual, the eighth amendment prohibited its imposition in an arbitrary, capricious, and unevenhanded manner. *Furman*, 408 U.S. at 239-40. There is no definitive list of punishments which the Court deems cruel and unusual. The evolving nature of the clause means new types of punishments could be added to this list in the future.

33. See generally M. MELTSNER, *CRUEL AND UNUSUAL—THE SUPREME COURT AND CAPITAL PUNISHMENT* (1973).

34. 408 U.S. 238 (1972). In a five-to-four, per curiam decision, the *Furman* Court rejected unguided capital sentencing. The Court held that the penalty of death in the three cases before it constituted cruel and unusual punishment, thus violating the eighth amendment. *Id.* at 239-40.

35. *Furman v. Georgia* represents the Court's first rejection of arbitrariness in sentencing. 408 U.S. 238 (1972) (per curiam). In *Gregg v. Georgia*, the Court accepted a guided discretionary death penalty sentencing system as correcting that problem. 428 U.S. 153 (1976).

36. For the proposition that the Court has since modified the position it had taken in *Furman*, see *California v. Ramos*, 463 U.S. 992 (1983) (The eighth and fourteenth amendments neither require nor prohibit an instruction regarding the Governor's power to

In *Furman*, the Supreme Court made it clear that permitting unbridled arbitrariness to taint the sentencing process contravenes the eighth amendment.³⁷ In so holding, the Court radically departed from the position it had taken only one year earlier in *McGautha v. California*.³⁸ Although the eighth amendment was not at issue in *McGautha*,³⁹ the Court specifically condoned the "untrammelled discretion" of the jury in the death sentencing process.⁴⁰ It rejected the argument that a sentencer was capable of exercising discretion according to articulable, objective standards.⁴¹ In *Furman*, however, the Court seemingly reversed its prior acceptance of arbitrariness in death penalty sentencing.⁴²

Nonetheless, the Supreme Court's opinions since *Furman* appear to recognize limitations on the Court's ability to eradicate arbitrariness from death sentencing. Four years after *Furman*, in *Gregg v. Georgia*,⁴³ the Court noted that a minimal amount of discretion in the application of a death sentencing system was unavoidable.⁴⁴ Analogously, the concurring Justices stated that "discretion must be suitably . . . limited so as to *minimize* the risk of *wholly* arbitrary and capricious action."⁴⁵ Later, in *Godfrey v. Georgia*,⁴⁶ the Court retracted further from its *Furman* posture and held that "death may not be imposed under sentencing procedures that create *substantial* risk that the punishment will be inflicted in an arbitrary and capricious manner."⁴⁷

Since the sixties and early seventies, judicial and national atti-

commute a life sentence.); *Barclay v. Florida*, 463 U.S. 939 (1983) (upholding a death sentence, even though the state trial court's consideration of the defendant's criminal record as an aggravating circumstance was improper under state law); *Zant v. Stephens*, 462 U.S. 862 (1983) (The Constitution does not require a state to adopt specific standards to instruct a jury in its consideration of aggravating and mitigating circumstances under the death penalty.).

37. *Furman*, 408 U.S. at 293 (1972).

38. 402 U.S. 183 (1971).

39. In *McGautha*, the Court considered a challenge to California's capital punishment system under the due process clause of the fourteenth amendment. The Court rejected as illusory the concept of guided discretionary sentencing. It reasoned that past efforts to identify, "before the fact," cases in which the penalty should be imposed, had been "uniformly unsuccessful." *Id.* at 197.

40. *Id.* at 207-08.

41. *Id.*

42. See *supra* note 37 and accompanying text.

43. 428 U.S. 153 (1976).

44. *Id.* at 192.

45. *Id.* at 189 (emphasis added) (Stewart, Powell & Stevens, JJ., concurring). Moreover, the *Gregg* Court concluded that to accept the argument that the system operated arbitrarily after post-*Furman* reforms would be to place "totally unrealistic conditions" on the implementation of capital punishment. *Id.* at 198-200.

46. 446 U.S. 420 (1980) (plurality opinion).

47. *Id.* at 427 (emphasis added).

tudes have shifted in favor of capital punishment.⁴⁸ Contemporary death sentencing legislation reflecting such an attitude shift, however, must not exceed the constitutional boundaries which the Court drew in *Furman*: Death penalty statutes must not be arbitrary and capricious, but rather, must be consistent and rational in their application.⁴⁹ Not surprisingly, the Supreme Court has not succeeded in

48. Bedau, *Gregg v. Georgia and the "New" Death Penalty*, CRIM. JUST. ETHICS, Summer/Fall 1985, at 1, 3 (general public approves of death penalty by wide margin).

The Court's willingness to tolerate some arbitrariness may reflect a belief that such arbitrariness is a reasonable societal cost in exchange for the societal benefits associated with the death penalty, such as retribution and deterrence. Apparently, the presumed retributive component of the penalty has become increasingly appealing. See *Furman*, 408 U.S. at 394-96 (Burger, C.J., dissenting) (arguing that retribution and deterrence are appropriate aims of the death penalty); see also *Gregg*, 428 U.S. at 183 (Retribution is neither "a forbidden objective nor one inconsistent with our respect for the dignity of men."); cf. *Furman*, 408 U.S. at 453-54 (Powell, J., dissenting) ("While retribution alone may seem an unworthy justification in a moral sense, its utility in a system of criminal justice requiring public support has long been recognized."). In part, capital punishment is a means of expressing society's moral outrage at particularly offensive conduct. Retributionists argue that it is essential that citizens be able to rely on the legal process rather than on self-help to vindicate their rights. *Furman*, 408 U.S. at 308 ("When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.").

Courts recognize that the death penalty offers an additional, although perhaps less significant, societal benefit: incapacitation of the criminal. In effect, the penalty absolutely guarantees that the criminal will not perpetrate another crime in the future. See *Gregg*, 428 U.S. at 183 n.28; *Furman*, 408 U.S. at 301 (Brennan, J., concurring); *id.* at 355 (Marshall, J., concurring).

Although courts that uphold death penalty statutes and sentencing systems may be partly reflecting public opinion, one may argue that fundamental constitutional principles that proscribe judicial intervention in this context mandate the same result. Death penalty advocates may invoke the separation of powers doctrine to prohibit *judicial* interference into the establishment of criminal penalties—essentially a *legislative* function. See, e.g., *Trop v. Dulles*, 356 U.S. 86, 119-20 (1958) (Frankfurter, J., dissenting); see also *Gregg*, 428 U.S. at 175 (Stewart, Powell & Stevens, JJ., concurring) (citing *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring) (Courts are not democratic bodies and, therefore, are not well-suited to make policy decisions.)).

Similarly, notions of federalism counsel that no branch of the *federal* government involve itself in matters primarily of *state* concern. See *Engle v. Isaac*, 456 U.S. 104, 128 (1982) (cautioning against liberal grants of federal habeas corpus relief because criminal law is primarily within the domain of state government); C. WRIGHT, *LAW OF FEDERAL COURTS* 344 (4th ed. 1983) (granting federal habeas corpus relief to a state prisoner affronts state judges). *But see generally* Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 *YALE L.J.* 71 (1984) (criticizing judicial abstention doctrines which courts invoke to avoid addressing state intrusions into civil rights and other areas).

49. Significantly, some commentators assert that arbitrariness and discrimination still infect the Georgia capital sentencing system, despite the Court's position in *Furman*. See Bedau, *supra* note 48, at 10-12 (arguing that *Gregg*, a compromise decision, was based on faulty reasoning); Bentele, *The Death Penalty in Georgia: Still Arbitrary*, 62 *WASH. U.L.Q.* 573, 579-82 (1985) (concluding that discrimination stills occurs *after* an aggravating factor has been identified, rather than at the outset of the sentencing process, as was the case in *Furman*); Bowers, *The Persuasiveness of Arbitrariness and Discrimination Under Post-Furman Capital*

creating a standard by which either to measure the arbitrariness inherent in a sentencing system, or to determine whether that arbitrariness rises to constitutionally unacceptable levels.⁵⁰

Significantly, although the Court in *Furman* condemned the free reign of discretion, it has since condemned the complete *absence* of discretion in capital sentencing systems as well. Several states had responded to *Furman* by enacting systems that *required* the imposition of the penalty for certain crimes, thereby completely eliminating sentencing discretion.⁵¹ The Court rejected this approach in *Woodson v. North Carolina*⁵² and *Roberts v. Louisiana*.⁵³ Georgia's present capital sentencing system⁵⁴ thus represents an attempt to afford a constitutionally permissible quantum of discretion, or to locate a point along the continuum of discretion sentencing that exists between the extremes of *Furman* and *Woodson*.

Four years after *Furman's* rejection of totally discretionary sentencing, the Court approved a system allowing sentencers to exercise

Statutes, 74 J. CRIM. L. & CRIMINOLOGY 1067, 1070 (1983) ("To the extent that such reforms are effective at one point in the process, they may simply shift or displace arbitrariness to other points in the process."); Rabkin, *Justice and Judicial Hand-Wringing: The Death Penalty Since Gregg*, 4 CRIM. JUST. ETHICS 18, 18-29 (1985) (arguing that the Court was neither willing to follow through with its analysis in *Furman*, nor willing to reject it). *But cf.* Note, *Distinguishing Among Murders When Assessing the Proportionality of the Death Penalty*, 85 COLUM. L. REV. 1786-1807 (1985) (arguing that the Supreme Court will not uphold a statute allowing the arbitrary imposition of the death penalty).

50. The Court was unable to discern a logical explanation as to why the Georgia jury had chosen to execute the three convicted criminal petitioners, while defendants convicted of similar crimes had received life sentences. *Furman*, 408 U.S. at 249-53 (Douglas, J., concurring).

51. See *Woodson v. North Carolina*, 428 U.S. 280 (1976). The *Woodson* Court supported the rejection of mandatory capital sentencing by noting that legislatures and courts had been engaged in a two hundred year struggle to effect death penalty justice. *Id.* at 289-301. Over time, reforms limited the number of crimes subject to the death penalty and gave juries discretion in choosing between life and death for first-degree offenders. *Id.* at 289-92. There were two primary rationales for such changes. First, the evolving public conscience came to demand a more humane and contained system for the infliction of punishment. *Id.* at 295-96. Second, the court characterized these reforms as a legislative effort to prevent jury nullification, that is, finding defendants not guilty in order to avoid harsh mandatory sentences associated with certain crimes. *Id.* at 293. These two concerns motivated the Court's rejection of mandatory death penalties. See *id.* at 302-05; see also BOWERS, EXECUTIONS IN AMERICA 1-30 (1974) (noting that the reluctance of jurors to impose the death sentence may result in its abandonment).

52. 428 U.S. 280 (1976).

53. 428 U.S. 325 (1976). The Court held Louisiana's mandatory death sentence statute unconstitutional. The Louisiana Legislature had attempted to mitigate the harshness of a mandatory capital punishment system by implementing a narrow definition of first-degree murder. The Court held that this was an inadequate response to the inflexibility of the sentencing statute. *Id.* at 331-36.

54. GA. CODE ANN. § 17-10-30 (1982). See *infra* note 58.

“guided discretion.”⁵⁵ In *Gregg v. Georgia*,⁵⁶ the Court found that the Georgia sentencing statute was consonant with the spirit of *Furman*. The carefully drafted statute provided for a bifurcated sentencing procedure⁵⁷ and required the sentencer to consider a list of aggravating circumstances.⁵⁸ In order to impose the death penalty, the sentencer had to find that one or more of these aggravating circumstances inhered with respect to the defendant or his crime.

55. A guided discretion system limits the sentencer's range of discretion so as to force him to focus upon appropriate facts in rendering a sentence. By enumerating aggravating and mitigating factors, which must be considered before a death sentence is appropriate, states have attempted to eliminate the consideration of impermissible factors, such as race. See *Gregg*, 428 U.S. at 192-95, 206-07; *Proffitt v. Florida*, 428 U.S. 242, 259 (1976); *Jurek v. Texas*, 428 U.S. 262, 274 (1976).

56. 428 U.S. 153 (1976).

57. A bifurcated procedure splits the trial into two parts. The first part contemplates the determination of guilt or innocence—the “guilt trial.” The second part allows for the determination of the penalty. This split procedure allows the jury to hear additional information as to aggravating and mitigating circumstances that would be inadmissible as proof of guilt, but which a sentencer legitimately may consider in sentencing. See *Gregg*, 428 U.S. at 162-64, 190-91.

58. The current Georgia statute provides as follows:

17-10-30. Procedure for imposition of death penalty generally.

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony;

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree;

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

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

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

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

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

(8) The offense of murder was committed against any peace officer,

The only occasion on which the Court disapproved of a guided-discretion system was in *Godfrey v. Georgia*.⁵⁹ Although Georgia had attempted to solve the discretion problem by establishing a system of aggravating circumstances, the Court viewed one of Georgia's statutory aggravating circumstances as permitting the exercise of open-ended arbitrariness in sentencing.⁶⁰ The Court, therefore, held the statute as applied to be void for vagueness under the eighth and fourteenth amendments.⁶¹

B. *The Eleventh Circuit's Intent Requirement*

McCleskey argued that, in view of Georgia's history of racial prejudice and the statistical evidence of discriminatory impact, the Georgia sentencing system was arbitrary because it allowed too much discretion to juries in the sentencing stage of the criminal process.⁶²

correction employee, or fireman while engaged in the performance of his official duties;

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

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

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the aggravating circumstances enumerated in subsection (b) of this Code is so found, the death penalty shall not be imposed.

GA. CODE ANN. § 17-10-30 (1982).

The Court upheld two other systems of guided discretion the same year it upheld Georgia's system in *Gregg*. The Court approved Florida's system of weighing aggravating versus mitigating circumstances in *Proffitt v. Florida*, 428 U.S. 242 (1976). See FLA. STAT. § 921.141 (1977). The Court also affirmed the constitutionality of the Texas sentencing system in *Jurek v. Texas*, 428 U.S. 262 (1976). In the Texas system, once the jury finds that the statutory aggravating circumstances were present, it is compelled to sentence the defendant to death. See TEX. CRIM. PROC. CODE ANN. § 37.071 (Vernon 1981).

The system presently operating in Georgia, and the one upon which McCleskey based his claim, allows more discretion than either the Florida or Texas systems. For a detailed analysis and comparison of the various guided discretion systems that states adopted in the wake of *Furman*, see Bowers & Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563, 565-68 (1980).

59. 446 U.S. 420 (1980).

60. *Godfrey*, 446 U.S. at 432 (statutory provision allowing death penalty for commission of "outrageously and wantonly vile" crime held unconstitutionally vague).

61. *Id.*

62. In his brief, the petitioner argued that the Court should consider Georgia's long history of racial discrimination as circumstantial evidence of discriminatory intent. Although this argument seems more appropriate with respect to McCleskey's equal protection claim, the

This argument did not convince the Eleventh Circuit. The court improperly evaluated McCleskey's eighth amendment claim of arbitrariness under the intent analysis that normally arises in the equal protection context.⁶³ The court thus treated McCleskey's distinct eighth and fourteenth amendment challenges as a generic constitutional claim of racism,⁶⁴ and then rejected it as such.⁶⁵

If this means that discriminatory intent must be proved, then the Eleventh Circuit, in effect, has closed the courtroom door to those who claim *systemic* discrimination. The intent requirement appears especially inappropriate to the type of issue McCleskey presented. McCleskey did not allege, and probably could not prove, purposeful discrimination by any specific actor in the Georgia capital sentencing system. Instead, McCleskey argued that the *system* was functioning in a manner that produced discriminatory results, and thus violated his eighth amendment right to have his penalty determined in a manner free from consideration of irrelevant and constitutionally imper-

Eleventh Circuit's counterintuitive hybridization of eighth and fourteenth amendment doctrine arguably makes it relevant here. See Brief for Petitioner at 59-61 nn.17-18, *McCleskey* (No. 84-6811).

63. See, e.g., *Washington v. Davis*, 426 U.S. 229, 238-42 (1976) (An employment test that is racially neutral on its face but has a racially disproportionate impact does not violate the equal protection component of the fifth amendment without a showing of a racially discriminatory purpose.).

64. *McCleskey*, 753 F.2d at 892. In essence, the Eleventh Circuit regarded the distinctions between the eighth and fourteenth amendments as matters of little consequence. The court decided that claims under any provision of the Constitution, if based on racial discrimination, give rise to identical proof requirements. Significantly, the court saw no need to cite authority for its decision to collapse the Bill of Rights into a single constitutional cause of action, which is not realistically capable of proof. See *supra* notes 62-63 & *infra* notes 65-87 and accompanying text.

65. See *McCleskey*, 753 F.2d at 890-92.

Historically, the Court's interpretation of the cruel and unusual punishment clause has focused on the correctness of the punishment, not the *intent* of the governmental body inflicting the punishment. The Eleventh Circuit conceded this point in analyzing McCleskey's claim. "Due process and cruel and unusual punishment cases do not normally focus on the intent of the governmental actor." *Id.* The court argued, however, that when the claim is based on *decisions* made *within* the process, "then purpose, intent, and motive are natural components of the proof that discrimination actually occurred." *Id.* This is a distinction without a difference. Conceiving of a due process or eighth amendment claim that does not focus on, or is not triggered by, decisions made within the challenged governmental process is a daunting task indeed.

Critics of the intent requirement in equal protection challenges attacked *Washington v. Davis* as placing discrimination claims beyond the practical reach of proof. 426 U.S. 229 (1976). See Binion, *Intent and Equal Protection: A Reconsideration*, 1983 SUP. CT. REV. 397, 397-411 (requiring proof of intent in the equal protection context is unjust and impracticable); Note, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111, 124 (1983) (the intent requirement permits legislatures to disproportionately burden minorities so long as its stated purpose is nondiscriminatory).

missible factors.⁶⁶ In his brief to the Supreme Court, McCleskey cited concurring opinions in *Furman* for the proposition that the Eleventh Circuit's intent requirement was novel and unprecedented.⁶⁷ Studies have demonstrated that juries may act in a discriminatory fashion even when they have no conscious intention to do so.⁶⁸ Consequently, requiring proof of intent may be requiring the impossible.⁶⁹

In dissent, Judge Johnson questioned the Eleventh Circuit's inappropriate amalgamation of McCleskey's eighth and fourteenth amendment claims, and its improper rejection of them under an equal protection intentionality test:

Discretion hinders inquiry into intent: if unfairness and inconsistency are to be detected even when they are not overwhelmingly obvious, effects evidence must be relied upon. . . .

. . . .

. . . the need for the state to constrain the discretion of juries in the death penalty area is unusual by comparison to other areas of the law. It demonstrates the need to rely on systemic controls as a way to reconcile discretion and consistency; the same combined objectives argue for the use of effects evidence rather than waiting for evidence of improper motives in specific cases.⁷⁰

66. See Brief for Petitioner at 97. McCleskey argues that the court of appeals erred in demanding proof of "specific intent to discriminate" as a necessary element of the eighth amendment claim. He also argues that none of the concurring opinions in *Furman* required proof of intent, and finally that it is the state's "constitutional responsibility to tailor and apply its law in a manner that avoids this outcome." Brief for the Petitioner at 97-99 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980); *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977)).

67. The sentencing process's results are the focus of eighth amendment inquiries. "The death penalty is cruel and unusual if there is no meaningful basis of distinguishing the few cases in which it is imposed from the many cases in which it is not." *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring). McCleskey argues that his claim should be analyzed after "put[ting] . . . to one side" the question of intent. Brief for the Petitioner at 97-98 (citing *Furman*, 408 U.S. at 310 (Stewart, J., concurring)). He claims that the Court's task is not "to divine what motives compelled these death penalties." Brief for Petitioner at 98 (citing *Furman*, 408 U.S. at 253 (Douglas, J., concurring)).

68. See, e.g., Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 *passim* (1985) (Social scientists using mock jury settings have proven that even where completely unintended, jury bias based on race has occurred in a totally subconscious manner thereby making proof of intent impossible.).

69. McCleskey argues that:

The task of identifying precisely where and how, consciously or unconsciously, race is influencing the literally thousands of actors involved in criminal sentencing—prosecutors, judges, jurors who assemble to make a single decision in a single case, only to be replaced by other jurors in the next case, and still others after them—is virtually impossible.

Brief for Petitioner at 100, *McCleskey* (No. 84-6811).

70. *McCleskey v. Kemp*, 753 F.2d 877, 909-10 (11th Cir. 1985) (Johnson, Hatchett & Clark, JJ., dissenting in part, concurring in part), *cert. granted*, 106 S. Ct. 3331 (1986).

In support of its position, the Eleventh Circuit cited cases which either appear irrelevant to the eighth amendment issue, or are based on circuit precedent of questionable validity.⁷¹ In *Adams v. Wainwright*,⁷² the Eleventh Circuit required proof of intent, but specifically associated that requirement with a fourteenth amendment challenge.⁷³ Although the *Adams* court did not mention the eighth amendment, it specifically cited one plausible reading of a former Fifth Circuit opinion, *Spinkellink v. Wainwright*,⁷⁴ for the proposition that a facially neutral death sentencing statute forecloses all eighth amendment challenges.⁷⁵ In *McCleskey*, the Eleventh Circuit rejected this reading of *Spinkellink*.⁷⁶ In *Smith v. Balkcom*,⁷⁷ the Fifth Circuit stated that an eighth amendment challenge requires a showing of intent,⁷⁸ but it may have reached that conclusion because it wrongly believed that *Spinkellink* compelled such a result.⁷⁹ In *Sullivan v. Wainwright*,⁸⁰ the court based its rejection of a claim of systemic racial discrimination on *Spinkellink* and *Adams*.⁸¹ In *McCleskey*, the Eleventh Circuit partially overruled *Spinkellink* while, at least, in part, basing its intent requirement on cases which had relied on *Spinkellink*.⁸² Defendants in all three of the cases cited presented statistical data purporting to show discriminatory sentencing in the Florida system.⁸³ The Supreme Court denied a request for a stay of execution in *Sullivan*,⁸⁴ and denied petitions for certiorari in *Adams*⁸⁵

71. *McCleskey*, 753 F.2d at 890.

72. 709 F.2d 1443 (11th Cir. 1983), *cert. denied*, 104 U.S. 745 (1984).

73. *Adams*, 709 F.2d at 1449.

74. 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979).

75. *Adams*, 709 F.2d at 1449-50. *See also* *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979).

76. *McCleskey*, 753 F.2d at 891.

77. 660 F.2d 573 (5th Cir. Unit B Nov. 1981), *reh'g denied*, 671 F.2d 858 (5th Cir. Unit B 1982), *cert. denied*, 459 U.S. 882 (1982).

78. *Smith*, 660 F.2d at 584.

79. *See McCleskey*, 753 F.2d at 910 n.5 (Johnson, Hatchett & Clark, JJ., dissenting in part, concurring in part); *see also Smith*, 660 F.2d at 584 (Petitioner failed to prove "intentional discrimination against him in this particular case.").

80. 721 F.2d 316 (11th Cir.), *petition for stay denied*, 464 U.S. 109 (1983).

81. *Id.* at 317.

82. *McCleskey*, 753 F.2d at 890-91.

83. The *McCleskey* court reasoned that the statistical showing of discrimination in the Florida cases was stronger than those numbers presented by *McCleskey* and, as the Supreme Court had rejected further consideration of those cases, it was fair to assume the Court would likewise reject the evidence that *McCleskey* submitted. *See McCleskey*, 753 F.2d at 897.

84. *Sullivan v. Wainwright*, 721 F.2d 316 (11th Cir. 1983), *petition for stay denied*, 464 U.S. 109 (1983).

85. *Adams v. Wainwright*, 709 F.2d 1143 (11th Cir. 1983), *cert. denied*, 104 U.S. 745 (1984).

and *Smith*.⁸⁶ The Eleventh Circuit implied that these denials supported its intent requirement, but the Supreme Court gave no such endorsement and, in fact, has held that such actions are not to be taken as comments on the merits of a case.⁸⁷

Contrary to the Eleventh Circuit's position, the Supreme Court has consistently taken a systemic perspective when confronted with death penalty challenges based on the eighth amendment.⁸⁸ The Court's observation, in *Gregg v. Georgia*,⁸⁹ that a "pattern of arbitrary and capricious sentencing" violates the eighth amendment demonstrated this approach.⁹⁰

The Eleventh Circuit may have reasoned that if it found McCleskey's statistics persuasive, it would be unable to give an adequate remedy without crippling or shutting down the Georgia death sentencing system. McCleskey, however, insisted that even if the current version of the Georgia death sentencing statute is not unconstitutional per se, the unspoken, yet pervasive, racial animus of Georgia's state actors prevents them from *administering* it constitutionally.

Similarly, although the Supreme Court has adhered to a systemic approach in the past, it might be reluctant to do so in *McCleskey*. Because McCleskey questions the ability of sentencers to apply the death penalty without regard to race, it appears to impugn the very heart of our legal heritage: the notion of an impartial jury.

III. THE FOURTEENTH AMENDMENT

A. Introduction

In *McCleskey v. Kemp*,⁹¹ the Eleventh Circuit, perhaps reflexively protecting a belief that any death sentencing system which affords some discretion must necessarily tolerate some racial discrimination,⁹² attempted to neutralize statistical proof of the impact of dis-

86. *Smith v. Balkcom*, 671 F.2d 858 (5th Cir.), cert. denied, 459 U.S. 882 (1982).

87. As the petitioner pointed out in his brief, first, the Court did not address the magnitude of disparities in these cases; second, Court orders respecting applications for stays of execution "may not be taken . . . as a statement . . . on the merits." *Graves v. Barnes*, 405 U.S. 1201, 1204 (1972) (Powell, J., in chambers); accord *Alabama v. Evans*, 461 U.S. 230, 236 n.* (1983) (Marshall, J., dissenting), cited in Brief for Petitioner at 95, *McCleskey* (84-6811).

88. *McCleskey*, 753 F.2d at 909-10 (Johnson, Hatchett & Clark, JJ., dissenting in part, concurring in part).

89. 446 U.S. 153 (1976).

90. *Id.* at 195 n.46 (cited in *McCleskey*, 753 F.2d. at 909 (Johnson, Hatchett & Clark, JJ., dissenting in part, concurring in part) (emphasis added); cf. *Pulley v. Harris*, 465 U.S. 37, 51-54 (1984) (examining the California capital sentencing system *in its entirety* in deciding whether it provided sufficient safeguards against arbitrariness).

91. 753 F.2d 877 (1985), cert. granted, 106 S. Ct. 3331 (1986).

92. See *supra* notes 43-47 and accompanying text.

crimination. Two aspects of the court's fourteenth amendment analysis evidence this intent.⁹³ First, the court imposed upon McCleskey's equal protection claim a nearly insurmountable threshold of proof of *purposeful* intent, which was higher than Supreme Court precedent mandated⁹⁴ and was unreasonably stringent in view of the stakes involved.⁹⁵ Second, the court failed to consider an obvious and persuasive due process argument, which the facts of *McCleskey* presented and recent Supreme Court precedent supported.⁹⁶

B. Equal Protection

1. STANDING

A petitioner must first establish standing before he can argue any constitutional claim. Jurists have called standing one of "the most amorphous [concepts] in the entire domain of public law."⁹⁷ Criminal defendants' constitutional challenges based on race-of-the-victim discrimination make the standing analysis even more nebulous because the defendant may be really asserting the victim's rights.⁹⁸ Beyond the preliminary standing requirements of Article III,⁹⁹ a petitioner

93. For a discussion of the intent requirement in the eighth amendment context, see *supra* notes 62-90 and accompanying text.

94. See *infra* notes 145-55 and accompanying text.

95. See *infra* notes 156-61 and accompanying text.

96. See *infra* notes 166-207 and accompanying text.

97. Flast v. Cohen, 392 U.S. 83, 98-99 (1968) (quoting *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm.*, 89th Cong., 2d Sess. 465, 467-68 (1966)).

98. See *infra* notes 111-12.

99. U.S. CONST. art. III, § 2. A petitioner seeking standing in federal court to allege *his own* constitutional injury must first vault the moderate hurdles of Article III. Those hurdles restrict the power of the judiciary to deciding "cases" and "controversies." See *United States v. Richardson*, 418 U.S. 166, 180 (1974) (Powell, J., concurring). In order to satisfy the "case" or "controversy" requirement, a petitioner must allege a "present or immediate *injury in fact*." *Phillips Petroleum v. Shutts*, 105 S. Ct. 2965, 2971 (1985) (emphasis added) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Second, he must allege "such a *personal stake in the outcome* of the controversy as to assure that concrete adverseness which sharpens the presentation of the issue." *Baker*, 369 U.S. at 204 (emphasis added) (quoting *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)). Third, he must allege some "*causal connection* between the asserted injury and the challenged action." *Id.* (emphasis added). Finally, the injury alleged "must be of the type *likely to be redressed* by a favorable decision." *Id.* (emphasis added).

A petitioner who seeks to represent the rights of injured *third parties*, however, must satisfy certain additional *prudential limitations* on standing. See *Warth v. Seldin*, 422 U.S. 490 (1975) (absence of judicial self-governance would force courts to decide issues more suitably decided by other governmental institutions). The Court itself has imposed these limitations as a further restriction on the scope of its judicial power. See *Phillips Petroleum*, 105 U.S. at 2971 (recent overview of standing requirements). These limitations may impose high hurdles upon a petitioner, such as McCleskey, who arguably seeks to vindicate the rights of third parties by a race-of-the-victim discrimination claim.

seeking to represent the rights of someone not before the court faces a particularly burdensome, judicially-imposed "prudential limitation"¹⁰⁰ on standing: "[O]ne may not claim standing . . . to vindicate the constitutional rights of some third party."¹⁰¹

There are, however, exceptions to this general rule. The Court has granted certain petitioners standing to assert the rights of third parties under the doctrine of *jus tertii*.¹⁰² In general, the Supreme Court has permitted *jus tertii* standing when (1) there exists a substantial relationship between the claimant and third parties;¹⁰³ (2) it is impossible for third parties to assert their own constitutional rights;¹⁰⁴ (3) a dilution of third-party rights might result if a court denied *jus tertii* standing;¹⁰⁵ (4) the injury to the petitioner is great;¹⁰⁶ and (5) the petitioner will act as an effective advocate of the third-party rights involved.¹⁰⁷

100. See *supra* note 99.

101. *Barrows v. Jackson*, 346 U.S. 249, 255 (1953). See *Eisenstadt v. Baird*, 405 U.S. 438, 444 (1972); *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449, 459 (1958). Georgia argues that McCleskey impliedly asserts a third-party claim with his equal protection theory. See *infra* notes 127-28 and accompanying text.

102. See, e.g., *Warth v. Seldin*, 422 U.S. 490 (1975); Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962); Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974).

103. See *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977) (granting standing to mail order contraceptive seller to assert privacy rights of potential customers); *Craig v. Boren*, 429 U.S. 190 (1976) (granting standing to beer seller to assert equal protection rights of 18 to 20-year-old beer-drinking men); *Singleton v. Wulff*, 428 U.S. 106 (1976) (granting standing to physicians to assert patient's right to challenge statute limiting abortions); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (granting standing to contraceptive distributor to assert right of potential contraceptive user to challenge statute limiting access to contraceptives); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (granting standing to physicians prescribing contraceptives to assert rights of patients with whom they had a professional relationship).

104. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Linda R.S. v. Richard D.*, 401 U.S. 614 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Bailey v. Patterson*, 369 U.S. 31 (1962); *Poe v. Ullman*, 367 U.S. 497 (1961); *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449 (1958); *Barrows v. Jackson*, 346 U.S. 249 (1953).

105. See *Barrows v. Jackson*, 346 U.S. 249 (1953); *Traux v. Raich*, 239 U.S. 33 (1915).

106. See *Phillips Petroleum v. Shutts*, 105 S. Ct. 2965 (1985).

107. The Court, in *Singleton v. Wulff*, articulated two reasons for this final *jus tertii* consideration:

First, the courts should not adjudicate such [third-party] rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not. . . . Second, third parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them. The holders of the rights may have a like preference to the extent they will be bound by the courts' decisions under the doctrine of *stare decisis*.

428 U.S. 106, 113-14 (1976).

Standing to raise a fourteenth amendment equal protection violation based on "inverse" discrimination based on the victim's race can proceed under either a first-person theory, a third-party theory, or both. Under a first-person equal protection theory, McCleskey plausibly asserted that the sentencing system imposed upon him, as a member of a certain group, a harsher punishment than it imposes upon others charged with the commission of a similar crime.¹⁰⁸ Under a third-party equal protection theory, McCleskey could assert, *jus tertii*, the equal protection rights of potential black victims, whose deaths the state's allegedly discriminatory sentencing system does not vindicate as fully as it vindicates the deaths of white victims.¹⁰⁹

Third-party standing is the petitioner's most attenuated standing theory. The satisfaction of some of the *jus tertii* considerations might compel the Supreme Court to grant the petitioner standing to assert the rights of potential black victims. One *jus tertii* factor in particular suggests that the Court should grant standing under a third-party analysis: the insurmountable standing requirements facing *potential* victims.¹¹⁰ No one will have first-person standing to assert the rights of the victims, if only *actual* victims may persuasively allege the necessary injury in fact, and these actual victims are dead.¹¹¹

108. See *infra* notes 124-26.

109. See *infra* notes 127-28 and accompanying text.

110. See *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). To establish standing, an "[a]bstract injury is not enough. The plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate . . .'" *Id.* at 101-02.

111. A close examination of the district court's analysis reveals its fundamental confusion regarding the petitioner's standing to raise an equal protection claim in the victim discrimination context. In apparent deference to the district court's determination of McCleskey's standing, the court of appeals did not address his standing to assert any of his fourteenth amendment claims. The district court reluctantly concluded that Eleventh Circuit precedent compelled granting the petitioner standing to assert an equal protection claim. The district court stated that, had it been writing on a "clean slate," it would have granted the petitioner standing to assert a due process claim, but would have denied his eighth amendment and equal protection claims on standing grounds. *McCleskey v. Zant*, 580 F. Supp. 338, 347 (N.D. Ga. 1984) (construing *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978)), *rev'd sub nom.* *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985), *cert. granted*, 106 S. Ct. 3331 (1986).

The district court's reasons for wishing to deny McCleskey standing to raise his race-of-the-victim discrimination claim are, at best, questionable. The district court argued:

From a study of equal protection jurisprudence, it becomes apparent that the norms that underlie equal protection involve two values: (i) the right to equal treatment is inherently good; and (ii) the right to treatment as an equal is inherently good. . . . In this case, however, *the evidence shows that the petitioner is being treated as any member of the majority would*, or that petitioner's immutable characteristics have no bearing on his being treated differently from any member of the majority. Thus, with reference to his argument that he is

Two *jus tertii* factors, however, suggest that the Court could

being discriminated against on the basis of the race of his victim, equal protection interests are not being implicated.

McCleskey v. Zant, 580 F. Supp. at 347 (emphasis added).

The district court's conclusion is wrong irrespective of the missing phrase which implicitly completes the language emphasized above. If the court meant to say "the evidence shows that the petitioner is being treated as any member of the majority would be treated *if he had killed a white person*," then the statement is true, but it misdefines the proper *comparative class* for purposes of equal protection. To compare the petitioner's treatment to that of the narrow class of other killers of whites is tantamount to comparing, in a sex discrimination context, the treatment afforded to an individual woman with the treatment afforded to women as a class. Both comparisons create the *illusion* of equal treatment by comparing the disadvantaged individual with other members of his disadvantaged class. The proper comparison, in an equal protection context, is between the disadvantaged individual and all individuals. If, however, the court meant to say "the evidence shows that the petitioner is being treated as any member of the majority would be treated *if he had killed a person*," then the statement is false; the evidence shows that the system treats killers of whites more severely than it does killers in general. The thrust of the petitioner's first-person equal protection argument is that he, as a killer of a white victim, is not receiving treatment equal to that which other killers receive under the law.

Despite the district court's contrary desires, it granted McCleskey standing, relying upon a footnote in a previous Eleventh Circuit case, *Spinkellink v. Wainwright*, 578 F.2d 582, 612 n.36 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979). In *Spinkellink*, a convicted murderer based eighth and fourteenth amendment due process and equal protection challenges on a statistical study purporting to demonstrate disparate impact in sentencing. The *Spinkellink* court gave the standing issue cursory treatment, addressing it only in this footnote:

Spinkellink has standing to raise the equal protection issue, even though he is not a member of the class allegedly discriminated against, because such discrimination, if proven, impinges on his constitutional right under the Eighth and Fourteenth Amendments not to be subjected to cruel and unusual punishment.

Id. at 612 n.36.

In support of this conclusion, the *Spinkellink* court deferred to the Supreme Court's reasoning in *Taylor v. Louisiana*, 419 U.S. 22 (1975). *Taylor* involved a male defendant who objected to the exclusion of women from his jury. Regarding standing, the Court held that although "Taylor was not a member of the [injured] class . . . there is no rule that claims such as Taylor presents may be made only by those defendants who are members of the [injured class]." *Id.* at 526. In support of this statement, the Court relied on the petitioner's sixth amendment right to an impartial jury, and on its own reasoning in the analogous case of *Peters v. Kiff*, 407 U.S. 493 (1972).

Peters appears to be the foundation case upon which the Eleventh Circuit relied to establish the petitioner's standing to raise an equal protection argument based on the race of his victim. In *Peters*, the Supreme Court granted a white defendant standing to challenge the exclusion of blacks from his jury. The jury exclusion cases, at first glance, appear analogous to race-of-the-victim cases to the extent that, in each, the court afforded an injured petitioner standing to represent the rights of injured members of a group to which he did not belong.

The Court in *Peters*, however, expressly limited the scope of the petitioner's standing *to due process grounds*. *Id.* at 497. In dismissing Peter's equal protection claim, the Court said: "He [petitioner] also claims his own rights under the equal protection clause have been violated, a claim we need not consider in light of our disposition." *Id.* at 497 n.5 (emphasis added). It may be argued that *Peters* is a procedurally inappropriate case upon which to base equal protection standing. The district court in *McCleskey v. Zant* agreed, saying: "[F]or *Spinkellink* to articulate an equal protection standing predicate based upon Sixth Amendment and due process cases can be characterized, at best, as curious." 580 F. Supp. at 347.

The district court seemed to approve of the state's standing analysis, which supports the

arguably deny standing to McCleskey under a third-party analysis.¹¹²

argument that jury exclusion cases are analytically inappropriate to a race-of-the-victim claim. See *McCleskey v. Zant*, 580 F. Supp. at 347. In *Peters*, the exclusion of a class from the jury violated not only the rights of potential jurors, but also directly violated the petitioner's right to a representative jury. *Peters*, 407 U.S. at 499-500 (All people have a right to partake in the fair application of justice as jurors, and the sixth amendment guarantees the petitioner a jury representative of a fair cross-section of society.). Consequently, by redressing the violated rights of the excluded jurors, the *Peters* court simultaneously redressed the petitioner's violated right to a representative jury. This nexus between the respective injuries, and the availability of a single remedy to redress those injuries, supported the petitioner's standing to represent, *jus tertii*, the rights of the excluded jurors.

In the victim discrimination context, however, the potential victim's claim, which McCleskey would like to represent *jus tertii*, lacks such a direct relationship with the petitioner's first-party claim if one assumes that potential victims complain that *not enough killers of blacks* are executed, and the petitioner complains that *too many killers of whites* are executed. Consequently, one remedy would not concurrently redress both the potential victim's and the petitioner's injuries. If one assumes that both groups complain of unequal justice, however, a rational system that does not impermissibly favor white life at the expense of both killers of whites and black victims' lives would be a common remedy.

112. At least one federal court has denied a petitioner standing on a similar theory. See *Britton v. Rogers*, 631 F.2d 572 (8th Cir. 1980), *cert. denied*, 451 U.S. 939 (1981). In this case, however, only the district court addressed the standing issue. See *McCleskey v. Zant*, 580 F. Supp. at 346-47. Because the state's brief to the Supreme Court only treats the standing argument in a short footnote, the Supreme Court may not address the issue.

The state's treatment of standing reads:

Respondent submits that a claim of discrimination based on race of the victim is not cognizable under the circumstances of the instant case. *At least one circuit court has specifically rejected statistical evidence based on race of the victim, finding that the defendant lacked standing.* Even those justices raising a question of possible racial discrimination in *Furman* seemed to focus on race of the defendant and not race of the victim. Thus, respondent submits the instant claim is not cognizable due to the lack of standing.

Brief for Respondent at 10 n.1, *McCleskey* (No. 84-6811) (citations omitted) (emphasis added).

An Eighth Circuit case, *Britton v. Rogers*, which denied a petitioner standing to raise a claim nearly identical to that of McCleskey, offered this rationale:

[The petitioner] . . . also maintains that when the victim of a rape is white, the sentence imposed . . . will be significantly harsher than when the victim is black. [The petitioner] has no standing to raise this claim as a basis for invalidating his sentence. It is the *black women* . . . if anyone, who should be raising this claim, not [the petitioner], a convicted rapist. Moreover, it is not even clear whether . . . black women could show sufficient injury in fact to have standing to sue in federal court. As Professor Tribe wrote:

A citizen's interest in the fair enforcement of the law by government agencies or administrators presents a particularly troubling claim as a basis for standing. Even if one assumes, as seems reasonable, that proper enforcement of the law maintains public security and provides an environment for individual productivity and tranquility, the connection between this general premise and any particular person's material interest is highly attenuated. . . . These perspectives manifest themselves in stringent limits on standing to challenge allegedly discriminatory administration of the criminal laws.

Thus, while discriminatory enforcement of criminal laws may be challenged by those against whom such laws are enforced, persons injured by criminal conduct which goes unpunished because of discriminatory law enforcement do not

First, the relationship between the murderer and the potential victim may be substantially less close than any other first-party/third-party relationship that the Supreme Court has relied on thus far to support a granting of *jus tertii* standing.¹¹³ Second, the petitioner may not be an effective advocate¹¹⁴ of the rights of potential victims. It may be argued that the petitioner's desired remedy is the opposite of the remedy desired by potential victims, if one assumes that the underprotected victims want the courts to sentence *more killers of blacks* to death. Conversely, the petitioner wants the courts to sentence *fewer killers of whites* to death.¹¹⁵ Nevertheless, Georgia has lost on the standing issue twice already in McCleskey's case;¹¹⁶ it is unlikely, therefore, that the state will fare any better before the Supreme Court.

2. THE EQUAL PROTECTION CLAUSE

The equal protection clause of the fourteenth amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."¹¹⁷ The Supreme Court of the United States has acknowledged that the purpose of the clause is "to prevent hostile and discriminating State action against any person or class of persons."¹¹⁸ Further, equal protection under the laws implies that people "shall not be subjected, for the same offense, to any greater or different punishment."¹¹⁹

ordinarily have standing to challenge the discrimination: a victim of an undeterred crime is not automatically deemed a victim of nonenforcement.

631 F.2d 572, 577 n.3 (8th Cir. 1980) (emphasis added) (quoting R. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-19, at 87-88 (1978)).

Contrary to the Eighth Circuit's intended conclusion, Professor Tribe's analysis proposes a convincing argument *for* permitting the petitioner to assert the rights of the potential victim. Assuming that a court would deny the victim standing, then *jus tertii* considerations suggest that the wrong will go unredressed unless the petitioner can assert the victim's rights. *But cf. infra* notes 114-16 and accompanying text (discussion of how the petitioner might make a poor advocate of victims' rights and the arguable incompatibility of their respective remedies).

Finally, because the district court determined the petitioner's third-party claim on the merits, a reviewing court should not deny the petitioner standing to assert that claim. The Supreme Court, in *Craig v. Boren*, refused to deny a petitioner standing to represent third-party interests because such a preclusion would not further the objectives of prudential limitations where the lower court had already entertained the relevant constitutional challenge, and the parties had sought, or had not resisted, a constitutional determination on the issue. 429 U.S. 190, 193-94 (1976).

113. *See supra* note 103.

114. *See supra* note 107.

115. *See supra* note 111 and accompanying text.

116. *McCleskey v. Zant*, 580 F. Supp. 338, 346-47 (N.D. Ga. 1984), *rev'd sub nom. McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985), *cert. granted*, 106 S. Ct. 3331 (1986).

117. U.S. CONST. amend XIV, § 1.

118. *Pace v. Alabama*, 106 U.S. 583, 584 (1882).

119. *Id.*

The Supreme Court has held that as long as all members of a class receive like treatment, the equal protection clause is not violated.¹²⁰ It is also true, however, that such a classification cannot be drawn arbitrarily,¹²¹ but must “rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.”¹²² Thus, the arbitrary delineation of classes is itself violative of the clause. Further, “[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality offense and [punishes] one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.”¹²³

3. EQUAL PROTECTION ANALYSIS

A petitioner in McCleskey's position who asserts an equal protection violation may assert one of two general theories. The first theory supports a first-party equal protection argument.¹²⁴ First, the petitioner is a member of the class of killers of whites. Second, members of that class are more likely to receive the death sentence than are killers of blacks.¹²⁵ Third, such a classification, having no reasonable and just relation to the sentencing determination, is arbitrary.¹²⁶ Finally, an increased likelihood of a stricter sentence based on an arbitrary classification violates the equal protection rights of those killers of whites to whom the law is applied.

The petitioner's second possible equal protection approach is a

120. *McLaughlin v. Florida*, 379 U.S. 184, 190 (1964).

121. *Id.*

122. *Id.*

123. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1941) (citing *Gaines v. Canada*, 305 U.S. 337 (1938); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

124. For a discussion of the first-party standing perspective, see *supra* note 99.

125. A weakness inheres in the petitioner's first-party equal protection argument at the second step. The petitioner's generalized systemic evidence shows only an *increased likelihood* of the imposition of the death sentence based on the arbitrary classification. The petitioner can allege only that a certain percentage of defendants receive more severe sentences based solely on an arbitrary classification; he cannot allege that he, in particular, received the more severe sentence. This also undercuts the petitioner's ability to assert *injury in fact*, one of the requisites of Article III standing. See *supra* note 99.

126. Arbitrary state action is constitutionally infirm under both the eighth and fourteenth amendments. See *supra* text accompanying note 123. Interestingly, one concurring judge in *McCleskey* doubted that the petitioner had presented arbitrariness under the eighth amendment because McCleskey devoted his entire case to proving that the state was applying the death penalty in an altogether *explicable*—albeit impermissible—fashion. *McCleskey*, 752 F.2d at 905 (Vance, J., concurring). The fact that the application of the death penalty is *explicable* on racial grounds, however, does not mean that it is rational, or lacks arbitrariness or capriciousness.

third-party,¹²⁷ race-of-the-victim argument which parallels his first-party argument. First, there exists a class of "potential black capital crime victims." Second, because fewer killers of blacks are sentenced to death, the lives of the members of that class are less effectively protected and vindicated under the law than are the lives of "potential white capital crime victims."¹²⁸ Third, such a classification, bearing no reasonable and just relation to the extent of legal protection a citizen deserves, is arbitrary. Finally, less-effective protection and vindication under the law based on an arbitrary classification violates the equal protection rights of those whose rights are less-effectively protected and vindicated.

4. THE COURT'S TREATMENT OF MCCLESKEY'S CLAIM

a. Precedent

The petitioner relied on the Baldus study in support of the claim that his death sentence was unconstitutional because Georgia discriminatorily applied the death penalty on the basis of the race of both the defendant¹²⁹ and the victim.¹³⁰ McCleskey claimed this data proved that the Georgia system violated the equal protection clause of the fourteenth amendment.¹³¹

Consistent with equal protection precedent, the court of appeals affirmed the district court's determination that proof of purposeful discriminatory intent was an element of the petitioner's equal protec-

127. For a discussion of the third-party standing perspective, see *supra* notes 110-16 and accompanying text.

128. This logical step assumes that the death penalty, when imposed, effectively vindicates the deaths of actual victims by executing actual murderers and protects the lives of potential victims by deterring potential murderers. Vindication and deterrence theories are not universally accepted, however; at least one commentator has argued that capital punishment is unjustified because it fails to fully satisfy its retributive/vindictive purpose. She argues that true retribution or vindication requires a defendant to experience, and even accept, his just deserts. But because no one can fully appreciate the ultimate finality of death, capital sentencing fails to be fully retributive. Gale, *Retribution, Punishment, and Death*, 18 U.C. DAVIS L. REV. 973 (1985).

129. The Eleventh Circuit only superficially discussed the race-of-the-defendant discrimination approach in its opinion. It is surprising that the court treated the argument at all in light of the reason McCleskey proffered the Baldus study. Moreover, Dr. Baldus himself has denied any conclusiveness as to race-of-the-defendant discrimination based on the data he gathered: "We found that in rural areas black defendants with white victims still received somewhat more severe treatment, *but the differences were not statistically significant.*" Baldus, *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia*, 18 U.C. DAVIS L. REV. 1375, 1404 (1985) (emphasis added).

130. *McCleskey*, 753 F.2d at 885.

131. The district court suggested that the petitioner had alleged facts more appropriately supporting a due process violation. *McCleskey v. Zant*, 580 F. Supp. 338, 348 (N.D. Ga. 1984), *rev'd sub nom.* *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985), *cert. granted*, 106 S. Ct. 3331 (1986).

tion claim.¹³² The court relied upon *Village of Arlington Heights v. Metropolitan Housing Development Corp.*¹³³ in support of this proposition. Perhaps consciously attempting to screen statistical challenges, such as that of the petitioner, from judicial review, the Eleventh Circuit set up an exceedingly difficult requisite threshold for proof of discriminatory intent in the capital punishment context. The *McCleskey* threshold surpasses even that which the Supreme Court imposed in *Arlington Heights*,¹³⁴ and is unreasonably demanding because in this context, the problems of proof are more pronounced¹³⁵ and the injury suffered is unquestionably more severe.¹³⁶

In *Arlington Heights*, the Supreme Court held that a municipality's refusal to rezone certain land to permit the construction of racially integrated, low and moderate income housing did not violate the equal protection clause, even though the refusal was likely to have a disproportionately adverse impact on blacks. The Court found that racial discrimination had not motivated the rezoning refusal.¹³⁷ Rather, the Court suggested that the actual motive was the municipal residents' legitimate desire to protect the value of their real property.¹³⁸ Citing *Washington v. Davis*,¹³⁹ the Court held that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact,"¹⁴⁰ and that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."¹⁴¹ In proving intent or purpose,

132. *McCleskey*, 753 F.2d at 892.

133. 429 U.S. 252 (1977).

134. See *infra* notes 137-48 and accompanying text.

135. See *infra* notes 155-60 and accompanying text.

136. *Id.*

137. *Arlington Heights*, 429 U.S. at 270.

138. *Id.*

139. 426 U.S. 229 (1976).

140. *Arlington Heights*, 429 U.S. at 264-65. One commentator has observed that before a law is presumptively unconstitutional under [a disproportionate impact theory] . . . three factors must be present. First, the plaintiff must be a member of a group that has suffered from a history of discrimination and that is still suffering from that discrimination. Second, there must be government action that disproportionately affects the group. And third, there must be some causal connection between the history of discrimination and the disproportionate character of the impact. In most cases, however, there will be little controversy over the presence of these factors. The crucial issue is more likely to be whether the disproportion is greater than necessary to achieve the governmental objective.

Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 559 n.100 (1977).

141. *Arlington Heights*, 429 U.S. at 265. In contrast with *Washington*, every circuit court of appeals that had previously faced the question of intent in a fourteenth amendment context had declined to impose an intent requirement, focusing instead on the effects of various public policies. Binion, *supra* note 65, at 410 n.55 (citing *MHDC v. Arlington Heights*, 517 F.2d 409

“[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of state action even when the governing legislation appears neutral on its face.”¹⁴² Absent a *stark* pattern, however, the Court would not consider impact alone to be determinative.¹⁴³

Significantly, if there is no stark pattern of adverse impact, “the Court *must* look to *other* evidence.”¹⁴⁴ In *Arlington Heights*, the Court enumerated four sources of circumstantial and direct evidence from which a court may draw supplementary proof of discriminatory intent: (1) “[t]he impact of the official action—whether it ‘bears more heavily on one race than another,’ ”¹⁴⁵ (2) “[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes,”¹⁴⁶ (3) “[t]he specific sequence

(7th Cir. 1975); *Douglas v. Hampton*, 512 F.2d 976 (D.C. Cir. 1975); *Otero v. New York City Hous. Auth.*, 484 F.2d 1122 (2d Cir. 1973); *Chance v. Board of Examiners*, 458 F.2d 1167 (2d Cir. 1972); *Cisneros v. Corpus Christi Indep. School Dist.*, 467 F.2d 142 (5th Cir. 1972), *cert. denied*, 413 U.S. 920 (1973); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971); *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971); *Kennedy Park Homes Ass’n v. Lackawanna*, 436 F.2d 108 (2d Cir.), *cert. denied*, 401 U.S. 1010 (1970); *Southern Alameda Spanish Speaking Org. v. Union City*, 424 F.2d 291 (9th Cir. 1970)).

One legal analyst has suggested two rationales to explain why the judiciary favors an intent rule over an impact approach in the equal protection context. (1) *Courts are preoccupied with process-based theories*. “In the realm of equal protection, the Court appears to be concerned with only the cleanliness of the *process* by which to make policy choices, but not independently with the *consequences* of these choices. When laws are challenged as racist or sexist, a preoccupation with process values explains the tendency to ask whether this result motivated the decisionmakers, that is, whether the process of decisionmaking was perverted by a discriminatory intent.” Binion, *supra* note 65, at 403-08. (2) *Courts are apprehensive about potential, far-reaching judicial remedies*. There is concern about both the extensiveness of the remedies and the frequency with which they would be sought. *Id.*

Professor Binion objects to the intent rule in the equal protection context because first, the clause itself includes no reference to intent. Second, precedent suggests an impact approach rather than an intent approach. Prior to *Washington*, every circuit court case facing the issue took an impact approach, and the Supreme Court cases addressing the issue in the voting, welfare, education, and public facilities contexts suggest an effects approach is more appropriate than an intent approach. And third, there is no reason to impose the intent requirement on the equal protection clause when it had not existed in any other constitutional provision. *Id.* at 409-20.

142. *Arlington Heights*, 429 U.S. at 266 (citing *Washington*, 426 U.S. at 242). In *Washington*, the petitioner brought a claim under the implied *federal* equal protection component of the *fifth* amendment. *Washington*, 426 U.S. at 288. Because equal protection challenges under the fifth and the fourteenth amendments require the same analysis, *Arlington Heights* appropriately incorporated the *Washington* holding. *Arlington Heights*, 429 U.S. at 264-66.

143. *Arlington Heights*, 429 U.S. at 266.

144. *Id.* (emphasis added).

145. *Id.* (citing *Washington*, 426 U.S. at 242).

146. *Arlington Heights*, 429 U.S. at 267.

of events leading up to the challenged decision,"¹⁴⁷ and (4) "[t]he legislative or administrative history . . . especially where there are contemporary statements of the decisionmaking body."¹⁴⁸

b. Ignored Sources of Evidence

In *Arlington Heights*, the Supreme Court expressly delineated the proper sources from which a court must draw evidence to supplement insufficient proof of disproportionate impact.¹⁴⁹ To follow accurately the *Arlington Heights* guidelines, rather than dismissing the Baldus study as unconvincing and the petitioner's equal protection claim with it, the *McCleskey* court of appeals first should have looked to the historical background of discrimination in the South.¹⁵⁰ It did not do this. The court ignored the obvious fact that the equal protection clause amended the Constitution specifically to protect the freed slaves from racial persecution by the Southern White majority.¹⁵¹ Additionally, the court ignored the Black Codes, which facially provided for harsher punishments for blacks than whites charged with similar crimes after emancipation.¹⁵² More recently, the persistent volume of civil rights claims illustrates the lingering tradition of Southern racial discrimination.¹⁵³ Instead, the *McCleskey* court looked no further than the petitioner's statistics, ignoring at least one

147. *Id.*

148. *Id.* at 268.

149. *Id.* at 266-68.

150. The district court in *McCleskey v. Zant* defensively acknowledged the historic reality of racial discrimination in the South. 580 F. Supp. 338, 368 n.5 (N.D. Ga. 1984), *rev'd sub nom.* *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985), *cert. granted*, 106 S. Ct. 3331 (1986). Conveniently, the district court found the Baldus study convincing insofar as it tended to "put to rest . . . stereotypical prejudice against Southern jurisdictions . . ." *Id.* (emphasis added).

151. See, e.g., *Kimble v. D.J. McDuffy, Inc.*, 454 U.S. 1110 (1981) (White, J., dissenting); *Griffin v. Breckenridge*, 403 U.S. 88 (1971); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Monroe v. Pape*, 365 U.S. 167 (1961).

152. See *Memphis v. Greene*, 451 U.S. 100, 132 (1981). "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." *Id.* at 132 (citing E. MCPHERSON, *THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF THE RECONSTRUCTION 29-44* (1871) (compilation and discussion of the Black Codes)).

One scholar has suggested that in American society, with its history of racial oppression, those states whose laws disproportionately disadvantage blacks should bear a threefold burden. First, the state must prove that the challenged law bears a substantial relation to its purported objective. Second, the state must prove that alternative means to the same objective would not work nearly as well. Third, the state must demonstrate that the objective outweighs the disadvantage disproportionately affecting blacks. Perry, *supra* note 140, at 561 n.104 (1977). This approach considers many of the same factors the Supreme Court used when evaluating the due process propriety of administrative action. See *infra* note 178 and accompanying text.

153. See Diamond & Cottrol, *Codifying Caste*, 29 LOY. L. REV. 255, 265 (1983); Finkelman, *Exploring Southern Legal History*, 64 N.C.L. REV. 77, 88-101 (1985).

of the supplemental and potentially persuasive evidentiary sources that the Supreme Court afforded him in *Arlington Heights*.¹⁵⁴ Only if the court looked at this evidence could the petitioner have hoped to meet the difficult burden of proof of intentional discrimination.

c. Reduced Proof of Intent When the Stakes Are High and Discrimination May Go Undetected

Even if the Eleventh Circuit rightfully ignored historical evidence of discrimination in Georgia, it should not have placed the element of intent beyond the practical limits of proof. In *McCleskey*, the court of appeals expressed a particularly rigid view of the *Arlington Heights* intent requirement, making it extremely difficult for the petitioner to satisfy that requirement.¹⁵⁵ This occurred despite the Supreme Court's statement in *Arlington Heights* that in certain analogous contexts, the *Arlington Heights* intent requirement should be relaxed.¹⁵⁶ For example, the Supreme Court has stated that, because of the nature of the jury selection task, a constitutional violation may be found even when the statistical pattern does not compel the inference of intentional discrimination.¹⁵⁷

The Supreme Court probably was wary of the difficulty in detecting the *existence* of discrimination, given the discretion inherent in the jury selection process.¹⁵⁸ It was likely concerned over the profound *impact* that undetected discrimination could have on the freedom and rights of the defendant.¹⁵⁹ These two concerns ultimately may have compelled the Court to relax the burden of proof of intent in the jury cases. Because both concerns are present and are *magnified* in the capital sentencing cases,¹⁶⁰ the Court should relax the burden of proof of intent in this context as well.

In another setting, the Supreme Court held that proof of express discriminatory purpose is not required to establish a *prima facie* case of discrimination in the grand jury selection process. Instead, in *Castaneda v. Partida*,¹⁶¹ the Court laid out three showings that a petitioner must make to establish an equal protection violation. The petitioner must show that (1) the group allegedly being excluded is a

154. See *supra* note 146 and accompanying text.

155. "[T]he majority's evaluation of the evidence in this case is, if anything, more strict than in other contexts." *McCleskey*, 753 F.2d at 913 n.14 (Johnson, J., dissenting).

156. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 n.13 (1977).

157. *Id.*

158. *McCleskey*, 753 F.2d at 911-13 (Johnson, J., dissenting).

159. *Id.*

160. *Id.*

161. 430 U.S. 482 (1977).

recognizable class; (2) that group has been substantially under-represented over time; and (3) the selection procedure is discretionary and susceptible to abuse. The petitioner's successful showing shifts the burden of proof to the state to rebut the presumption of discrimination by offering neutral grounds for its selectivity.¹⁶²

In a related context, a very recent Supreme Court case suggested three showings that would establish a prima facie case of racially biased peremptory challenges to jurors.¹⁶³ The petitioner must show that (1) he is a member of of a recognizable racial group; (2) the prosecutor has exercised peremptory challenges to remove from the venire members of the petitioner's racial group; and (3) other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude the veniremen from the jury on account of their race. In *Batson v. Kentucky*,¹⁶⁴ the Court held that such a showing, as in *Castaneda*, shifts the burden to the State to come forward with a neutral explanation for challenging the jurors.¹⁶⁵

C. Due Process

1. THE DUE PROCESS CLAUSE

The due process clause of the fourteenth amendment provides that "[n]o state shall . . . deprive any person of life, liberty, or property without due process of law."¹⁶⁶ Unlike an equal protection analysis, due process arguments do not lend themselves to discrete, step-by-step analysis. This is primarily because "[f]or all its consequences, 'due process' has never been, and perhaps never can be, precisely defined."¹⁶⁷

In determining whether a death sentencing system is "fundamentally fair"¹⁶⁸ to a petitioner, "due process of the law within the mean-

162. *Id.* at 494-95. See generally Note, *To Infer or Not to Infer a Discriminatory Purpose: Rethinking Equal Protection Doctrine*, 61 N.Y.U. L. REV. ___ (1986) (arguing that the *Castaneda* requirements should be applied to the victim discrimination context).

163. *Batson v. Kentucky*, 106 S. Ct. 1712, 1722-23 (1986).

164. *Id.* at 1723.

165. The *Batson* requirements, however, seem to require proof that the prosecutor removed black members specifically from the petitioner's jury, while the *Castaneda* requirements appear only to require a history of discrimination against the group in general. This suggests a shift in the Supreme Court's attitude toward requiring a particularized showing of discrimination, analogous to that which the court of appeals required in *McCleskey*.

166. U.S. CONST. amend. XIV, § 1.

167. *Lassiter v. Department of Social Serv.*, 452 U.S. 18, 24-25 (1981).

168. "[F]undamental fairness [is] a requirement whose meaning can be as oblique as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake." *Id.*

ing of the fourteenth amendment mandates that the laws operate on all alike such that an individual is not subject to an *arbitrary exercise of governmental power*.¹⁶⁹ Further, “[d]ue process requires a competent and *impartial* tribunal.”¹⁷⁰ “[T]he Due Process Clause protects a defendant from jurors who are actually incapable of rendering an impartial verdict, based on the evidence and the law.”¹⁷¹ Under a due process analysis, a defendant is entitled to protection not only from *actual* jury bias, but also from the mere likelihood or appearance of bias.¹⁷²

2. DUE PROCESS ANALYSIS

Adhering to constitutional principles, McCleskey plausibly may assert the following procedural¹⁷³ due process argument challenging the “fundamental fairness”¹⁷⁴ of the Georgia death sentencing system: The petitioner, as a member of the class of killers of whites, is more likely to receive the death penalty than are the killers of blacks. Because the death sentencing system “does not operate on all alike,” he is subject to “an arbitrary exercise of governmental power.”¹⁷⁵ In permitting the consideration of an impermissible factor, namely the race of McCleskey’s victim, in determining his death sentence, the court went beyond its jurisdiction and based his sentence, not “on the

169. *McCleskey v. Zant*, 580 F. Supp. 338, 348 (N.D. Ga. 1984) (emphasis added) (citing *Leeper v. Texas*, 139 U.S. 18, 24-25 (1891); *Hurtado v. California*, 110 U.S. 516, 535-36 (1884)), *rev'd sub nom. McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985), *cert. granted*, 106 S. Ct. 3331 (1986).

170. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

171. *Peters v. Kiff*, 407 U.S. 493, 501 (1971).

172. The Supreme Court “has held that due process is denied by circumstances that create the *likelihood or appearance of bias*.” *Id.* at 502 (emphasis added).

173. The petitioner’s allegations may implicate concerns of *substantive* due process as well. He might claim a denial of his fundamental right to life without due process of law. The Supreme Court, however, has held that “it is not necessary to resolve [a] substantive [due process] claim, if a narrower inquiry discloses that essential procedures have not been followed.” *Hampton v. Mow Sun Wong*, 426 U.S. 88, 103 (1976). Accordingly, in addressing the propriety of discrimination in the capital sentencing system where interracial crimes are involved, the Supreme Court has considered the due process issue at only the procedural level. *See, e.g., Turner v. Murray*, 106 S. Ct. 1683, 1689 (1986). Thus, it may be more appropriate to treat the due process issue in *McCleskey* at the *procedural* level rather than at the *substantive* level. Further, the availability of the specific constitutional command that defines a criminal defendant’s right to be free from arbitrary death-sentencing makes a substantive due process theory unnecessary to the Court’s consideration of McCleskey’s claim. *See Furman v. Georgia*, 408 U.S. 238 (1972).

174. *See supra* note 168 and accompanying text.

175. The Constitution condemns arbitrary state action not only through the eighth amendment but through fourteenth amendment due process as well. *See supra* text accompanying note 169.

evidence or the law,"¹⁷⁶ but rather on the race of his victim. This argument, while not entirely unrelated to the equal protection argument, is free from the more rigorous strictures of equal protection analysis because it proceeds under the flexible "fundamental fairness concept."¹⁷⁷

The Supreme Court weighs three factors in determining whether state action violates the fundamental fairness standard of procedural due process:

First, the private interest that will be affected by the official action; second, *the risk of an erroneous deprivation of such interest through the procedures used*, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements will entail.¹⁷⁸

The Supreme Court originally articulated these factors in order to determine the propriety under the due process clause of administrative actions.¹⁷⁹ Courts, however, have employed these factors in the

176. See *supra* note 171 and accompanying text.

177. Interestingly, on certiorari to the Supreme Court, McCleskey has not yet raised a due process argument. The questions presented in the petitioner's brief raise only equal protection and eighth amendment issues:

(1) To make out a prima facie case under the Equal Protection Clause of the Fourteenth Amendment, must a condemned inmate alleging racial discrimination in a State's application of its capital sentencing statutes present statistical evidence "so strong as to permit no inference other than that the results are a product of racially discriminatory intent or purpose?"

(2) Is proof of intent to discriminate a necessary element of an Eighth Amendment claim that a State has applied its capital statutes in an arbitrary, capricious and unequal manner?

(3) Must a condemned inmate present specific evidence that he was personally discriminated against in order to obtain either Eighth or Fourteenth Amendment relief on the grounds that he was sentenced to die under a statute administered in an arbitrary or racially discriminatory manner?

(4) Does a proven racial disparity in the imposition of capital sentences, reflecting a systematic bias against black defendants and those whose victims are white, offend the Eighth or Fourteenth Amendments irrespective of its magnitude?

(5) Does an average 20-point racial disparity in death-sentencing rates among that class of cases in which a death sentence is a serious possibility so undermine the evenhandedness of a capital sentencing system as to violate the Eighth or Fourteenth Amendment rights of a death sentenced black inmate?

Brief for Petitioner at i-ii, *McCleskey* (No. 84-6811).

McCleskey's failure to make a due process argument, however, does not bar the Court from raising the issue *sua sponte*. See, e.g., *Wood v. Georgia*, 450 U.S. 261, 264-65 (1981) (concluding that the Court was empowered to consider the due process issue even though petitioners raised only an equal protection claim).

178. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (emphasis added).

179. *Id.*

criminal context to determine the procedural propriety of state action.¹⁸⁰ Because it involves consequences that are infinitely more severe than the consequences of either administrative or typical criminal proceedings,¹⁸¹ capital sentencing deserves closer due process scrutiny. The Court's factors, therefore, suggest a *minimal* level of due process scrutiny with which to consider the propriety of the Georgia capital sentencing system.

The private interest at stake in the *McCleskey* context—the petitioner's life—certainly has no equal. To deprive McCleskey of this one interest is to deprive him of all.

The second factor, the value of alternate procedures, strikes a balance between the risk of error and the availability and effectiveness of potential reform. Here, the risk is an *increased likelihood* that a sentencer will prescribe death on the basis of the constitutionally impermissible criteria of the victim's race.¹⁸² If this risk exists, it exists in a system that *demand*s discretion. Discretionary systems, by definition, allow the decision maker to privately consider impermissible criteria.¹⁸³ If the Supreme Court is intent on upholding the death penalty, there is no ideal remedy.¹⁸⁴

The third factor, the government interest at stake, considers the purpose of the challenged action and the administrative repercussions of reform. The state typically contends that the death penalty deters capital crimes, punishes capital offenders, vindicates the lives of victims, and incapacitates capital offenders who otherwise might inflict further harm on society.¹⁸⁵ Whether capital punishment actually

180. See, e.g., *Britton v. Rogers*, 631 F.2d 572, 581 (8th Cir. 1980).

181. See *supra* notes 156-60 and accompanying text.

182. See *supra* note 177 and accompanying text.

183. A system of mandatory death sentencing would eliminate discretion at the sentencing level. Such a solution, however, generates consequences as severe as the problem it purports to solve. For example, mandatory systems leave no room for the administration of mercy in cases where mercy is appropriate. As a result, the Court has invalidated mandatory capital sentencing schemes. See *supra* notes 51-54 and accompanying text.

184. Repeated attempts at "reform" could ease the collective conscience of a "moral" society, but even the most thorough reform of a discretionary system can only reduce, not eliminate, discrimination. Further, apparent but meaningless reform could conceivably continue *ad infinitum*. Even the most moderate reform would render obsolete old data evidencing discrimination in the system. Consequently, years would have to pass while statisticians amassed new data analyzing sentencing patterns under the "reformed" system. If a discriminatory pattern emerged from the new data, a new "reform" could be implemented. But, like halving the distance between oneself and a wall, this procedure could continue indefinitely. See Hubbard, *supra* note 27, at 1136.

Recently, however, the Supreme Court has suggested that procedural due process compels the implementation of reasonable safeguards geared towards the *minimization* of discrimination in the interracial crime context. *Turner v. Murray*, 106 S. Ct. 1683 (1986).

185. See *supra* note 48 and accompanying text.

achieves any of these ends is the subject of considerable dispute.¹⁸⁶ The cost of any procedural safeguards to the state is minimal compared to the value of the individual interest at stake in the instant case.¹⁸⁷

As is often the case when examining a balancing test, one is left without definite answers. In a very recent decision, *Turner v. Murray*,¹⁸⁸ however, the Supreme Court struck a procedural due process balance in a context analogous to this case. *Turner* may be a harbinger of the Court's approach to the *McCleskey* case. The Court's conclusions in *Turner* suggest that procedural due process requires systemic reform, but not the constitutional invalidation, of the death-sentencing system.

3. THE AVAILABILITY OF A REMEDY: *Turner v. Murray*

In *Turner v. Murray*,¹⁸⁹ a black petitioner in Virginia had received the death sentence for killing a white jeweler.¹⁹⁰ Prior to the voir dire, the defendant submitted to the trial judge a list of questions designed to eliminate racially biased jurors.¹⁹¹ The trial judge refused to present these questions to the jury.¹⁹² The defendant petitioned for habeas corpus relief, arguing that the trial judge's refusal deprived him of his constitutional right to a fair trial.¹⁹³ The district court denied his petition and the Court of Appeals for the Fourth Circuit affirmed.¹⁹⁴ The Supreme Court, after granting certiorari, held that a defendant accused of an interracial capital crime has a right to inform prospective jurors of the victim's race and to question them on the issue of racial bias.¹⁹⁵

186. See generally Gale, *supra* note 128 (Capital punishment is not fully retributive.).

187. See generally Comment, *The Cost of Taking Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221 (1985) (Capital punishment and procedural safeguards are more costly than life imprisonment.).

188. 106 S. Ct. 1683 (1986).

189. *Id.*

190. *Id.* at 1685.

191. The proposed questions included the following: "The defendant . . . is a member of the Negro Race. The victim . . . was a white Caucasian. Will these facts prejudice you against [the defendant] or affect your ability to render a fair and impartial verdict based solely on the evidence?" *Id.* at 1685. Note that this instruction could stem only *conscious* discrimination, while *unconscious* discrimination is just as harmful and possibly more pervasive. *Id.* at 1687; see Johnson, *supra* note 68, at 1679.

192. *Turner*, 106 S. Ct. at 1685.

193. *Id.* at 1686.

194. *Id.*

195. *Id.* at 1688. In the state trial court, the petitioner proffered a statistical study showing that black defendants who kill white victims are sentenced to death with disproportionate frequency. The district court stated that the study, which was based on statistics compiled in *other states*, had little utility in establishing the potential for racial prejudice in *Virginia*.

Significantly, several of the Court's concerns in *Turner* are directly relevant to a race of the victim discrimination claim:

Because of the range of discretion entrusted to a jury in a capital sentencing hearing, *there is a unique opportunity for racial prejudice to operate but remain undetected*. On the facts of this case, a juror who believes that blacks are violence-prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law. . . . *More subtle, less consciously held racial attitudes could also influence a juror's decision* in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.

The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence.¹⁹⁶

This language signifies that the Court has recognized the existence of, and the undetectable danger inherent in, *unconscious* discrimination. Because this form of discrimination evades detection, and because the stakes are so high, the Court expressed sincere concern over situations, such as interracial crimes, that create a mere *risk* of jury bias. The *Turner* Court placed interracial crimes among a class of offenses in which the possibility of racial discrimination in conviction and sentencing always merits attention: " 'It remains an unfortunate fact in our society that violent crimes perpetrated against members of other racial or ethnic groups often raise [a reasonable possibility that racial prejudice would influence the jury].' "¹⁹⁷

Most significantly, the Court explicitly recognized the necessity of weighing the risk of discrimination against the availability and utility of a remedy in a due process-styled balance. "[W]e find the risk of racial prejudice may have infected the petitioner's capital sentencing unacceptable *in light of the ease with which that risk could have been minimized*."¹⁹⁸ This statement implies that the Constitution tolerates a minimal risk of discrimination, provided that the judicial system takes all reasonable precautions to reduce the risk. Procedures designed to reduce the risk of racial bias can reduce—to a degree—the risk of prejudicial sentencing by screening prejudice at a number

Turner v. Commonwealth, 221 Va. 513, 523 n.9, 273 S.E.2d 36, 42 n.9 (1980). The Supreme Court found it unnecessary to evaluate the statistical studies in light of its disposition of the other issues. *Turner*, 106 S. Ct. at 1689 n.11. The Supreme Court in *McCleskey* could dispose of the Baldus study in much the same manner.

196. *Turner*, 106 S. Ct. at 1687-88 (emphasis added) (footnotes omitted).

197. *Id.* at 1687 n.7 (brackets in original) (quoting *Rosales-Lopez v. United States*, 451 U.S. 182, 192 (1981)).

198. *Id.* at 1688 (emphasis added).

of critical stages of the conviction/sentencing system. Specifically, existing procedural safeguards in this context work toward (1) screening out biased jurors, and (2) assuring representative juries.

The *Turner* Court's requirement of voir dire on racial prejudice for trials of interracial crimes¹⁹⁹ illustrates the Court's method of screening out biased jurors. This approach, however, suffers from two mistaken assumptions. First, it assumes that superficial questioning could make an unconsciously-biased juror recognize his prejudice and disclose it.²⁰⁰ Second, it assumes that consciously-biased jurors would answer truthfully when questioned as to their prejudicial tendencies. Only a much more probing—and a much lengthier and expensive—voir dire could approach an effective remedy in the *McCleskey* context.²⁰¹

Under *Batson v. Kentucky*,²⁰² a prima facie case of racially selective peremptory challenges was fairly easily made out.²⁰³ *Batson* is indicative of the Supreme Court's method of assuring the defendant a representative jury. The requisite showings, however, include proof that the state has used peremptory challenges to exclude members of the petitioner's race from the petitioner's jury.²⁰⁴ While it may be a simple matter for a petitioner alleging racially biased peremptory challenges to show specific examples of such conduct, it is nearly impossible for a petitioner alleging racially influenced sentencing, like *McCleskey*, to make such a particularized showing.²⁰⁵ To apply the *Batson* elements to *McCleskey*'s case would not ease his burden of proof at all. His inability to prove individualized, intentional discrimination in his particular case, which arguably defeats his equal protection claim under *Arlington Heights*,²⁰⁶ would similarly defeat his due process claim under *Batson*.²⁰⁷ The risk of bias might nonetheless

199. *Id.* See *supra* note 195 and accompanying text.

200. See Johnson, *supra* note 68, at 1675.

201. *Id.* at 1676.

202. 106 S. Ct. 1712 (1986).

203. *Id.* at 1722-24. See *supra* notes 163-65 and accompanying text (discussion of the *Batson* elements of a prima facie case).

204. See *supra* notes 163-65 and accompanying text.

205. See *supra* notes 66-69 and accompanying text (discussion of the petitioner's generalized showing of systemic, not particularized, discrimination).

206. 429 U.S. 252 (1977).

207. *Contra* Note, *supra* note 162 (arguing that the *Batson* elements would aid a petitioner like *McCleskey*).

There remains an innovative but unprecedented alternative remedy to the problem of racially prejudiced death sentencing. The Court could create for defendants like *McCleskey*, accused of interracial capital crimes, a right to a jury that includes jurors of the defendant's race. Ideally, if six, or even three jurors were of the same race as the defendant, one of the group could "hang" a jury otherwise prone to imposing a racially motivated death sentence. This approach allows the race at risk to fight fire with fire. Proponents of this remedy argue

prompt the Court to examine the record below to see if a *Turner*-styled voir dire took place, and to remand if such was prevented by the trial judge.

IV. STATISTICS AND THE LAW

The use of statistics dates back to Biblical times when the sovereign employed people to determine the number of persons who could be counted as royal subjects.²⁰⁸ Since Louis Brandeis's use of empirical evidence before the Supreme Court,²⁰⁹ litigants have successfully persuaded the courts to take judicial notice of social facts.²¹⁰ The Brandeis brief has received wide acceptance. The brief argues only that a set of social science data which is relevant to the issue in dispute exists, and not that a particular interpretation of the data is valid.²¹¹ The courts, therefore, still have to resolve the problem of the validity of any scientific material that a litigant brings to their attention.²¹²

The use and significance of statistical techniques in litigation, particularly multiple regression,²¹³ have increased significantly since the end of World War II.²¹⁴ Litigants most frequently use multiple

that such a remedy would (1) appease society's dissatisfaction with racially selective peremptory challenges, (2) lead to more fair decisions, on the assumption that jurors are more able to correctly judge the character of a racially similar petitioner, and (3) increase society's faith in the fairness of the judiciary. See Johnson, *supra* note 68, at 1706-07. Such a remedy, however, appears equally likely to reinforce the racially similar juror's perception of his role as the equalizing element in an unfair and racist system, compelling him to vote, not his conscience, but a bias in favor of the petitioner, to counterbalance the biased votes of the racially different jurors.

208. Dawson, *Scientific Investigation of Fact—The Role of the Statistician*, 11 FORUM 896 (1976).

209. Justice Brandeis, in his brief for *Muller v. Oregon*, 208 U.S. 412 (1908), "assembled a substantial body of medical and social science research tending to show the debilitating effect on women of working long hours. . . ." Monahan and Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 480 (1986).

210. See, e.g., *McCleskey v. Kemp*, 753 F.2d 877, 888 (11th Cir. 1985), *cert. granted*, 106 S. Ct. 3331 (1986).

211. *Id.* "*Muller v. Oregon*, [208 U.S. 412 (1908)] was the first in what became a series of 'Brandeis briefs' that used empirical data to persuade a court to uphold specific legislation. . . . The Mueller brief dealt specifically with state regulation of maximum working hours for women." Note, *Statistics in the Law: Potential Problems in the Presentation of Statistical Evidence*, 40 WASH. & LEE L. REV. 313, 313 n.1 (1983) (citations omitted).

212. Sperlich, *Social Science Evidence and the Courts: Reaching Beyond the Adversary Process*, 63 JUDICATURE 280, 285 n.31 (1980).

213. See Rubinfeld, *Econometrics in the Courtroom*, 85 COLUM. L. REV. 1048 n.2 (1985) (the use of multiple regression has increased faster than that of other statistical techniques).

214. R. WEHMHOEFER, *STATISTICS IN LITIGATION: PRACTICAL APPLICATION FOR LAWYERS* § 1.01 (1985). The increase in the use of statistical techniques is attributable to the growth in academic programs offering specializations in statistics; the recognition of quantitative analysis as an important tool for business and governmental

regression in cases involving sex and race discrimination under Title VII.²¹⁵ Other applications of multiple regression have included such varying contexts as jury selection, housing, and school desegregation cases.²¹⁶

Those who support the use of statistical data in the courtroom praise the capacity of statistics to present a plethora of facts clearly and provide consistency to a fact finder's analysis.²¹⁷ Statistics present complex empirical issues in an understandable and workable format.²¹⁸ "Opponents of the legal use of mathematical data object to a potential bias that may not be discoverable upon cross-examination, a feared over-emphasis on the data's probative value, and the ease with which an attorney or statistician may manipulate the data."²¹⁹ Critics fear that a jury could decide to convict or acquit solely on the basis of a statistical probability, rather than on the totality of the evidence.²²⁰

Nevertheless, statistical evidence plays an important role in judicial decisionmaking. The usefulness of such evidence, however, depends upon what one attempts to prove.²²¹ Statistical evidence is more effective when a litigant seeks to prove the existence rather than the cause of a disparity. Such evidence is even less effective when intent or motivation is at issue.²²² A review of the contexts in which courts have allowed litigants to prove institutional bias or discrimina-

planning and forecasting; federal legislation requiring the reporting of statistics in numerous areas of the law such as discrimination, environmental issues, public utilities, criminal law, and antitrust; and the recent invention of powerful and relatively inexpensive personal computers that give lawyers and others instant access to software allowing statistical analyses to be performed.

Id.

215. See Rubinfeld, *supra* note 213, at 1048-49.

216. *Id.*; see also Comment, *Judicial Use, Misuse, and Abuse of Statistical Evidence*, 47 J. URB. L. 165 (1970) (discussing the use of statistics in tax, antitrust, and paternity suits).

217. See Note, *supra* note 211, at 313 (footnote omitted).

218. See Rubinfeld, *supra* note 213, at 1065.

219. See Note, *supra* note 211, at 313-14 (footnote omitted); see also Rubinfeld, *supra* note 213, at 1095 (presenting a two-pronged solution to the problems associated with the use of statistical data in litigation).

220. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1372-74 (1971).

221. *Id.* Although the Supreme Court in *International Brotherhood of Teamsters v. United States* supported the use of statistics in cases in which the existence of discrimination is a disputed issue, the Court also cautioned that "statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." 431 U.S. 338, 340-41 (1977).

222. See *McCleskey v. Kemp*, 753 F.2d 877, 888 (11th Cir. 1985), *cert. granted*, 106 S. Ct 3331 (1986); see also R. WEHMHOFER, *supra* note 214, at § 1.02 (discussing the conditions that favor and disfavor the use of statistical proof); Dawson, *supra* note 208, at 899.

tion through the use of statistical evidence provides a valuable comparison with the use of statistics in capital punishment cases.

A. *The Use of Statistics in Litigation*

1. JURY CASES

The Supreme Court has held that it is a denial of fourteenth amendment equal protection²²³ to try a defendant under an indictment issued by a grand jury, or before a petit jury, from which the state, solely on a racial basis, has excluded all persons of the defendant's race.²²⁴ Racial discrimination in jury selection receives strong negative reaction in part because courts recognize that such discrimination taints the structure and processes of the criminal justice system. Unless the process of fact finding is entrusted to an impartial and representative jury, courts have reasoned, the risk of unfairness is intolerably high²²⁵ and the structural integrity of the court is compromised.²²⁶

The courts fear that discrimination in the criminal justice system would tend to legitimize the prejudices of society. Jury exclusion brands the excluded group as inferior, stimulates and perpetuates the prejudices of society, and facilitates the entrenchment of a vicious cycle of discrimination.

Early jury selection cases involved the absolute *exclusion* of an identifiable group.²²⁷ Later cases established the principle that *substantial underrepresentation*²²⁸ of a group constitutes a constitutional violation if it is the result of purposeful discrimination.²²⁹ To show an equal protection violation, one must prove that officials employed a jury selection procedure that resulted in a substantial underrepresentation of the race or identifiable group to which a defendant

223. See *supra* note 117 and accompanying text.

224. *Hernandez v. Texas*, 347 U.S. 475, 477 (1953).

Section 4 of the 1875 Civil Rights Act, 18 Stat. 336, now codified as 18 U.S.C. § 243, affirms and reinforces this constitutional right: "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than \$5,000."

Alexander v. Louisiana, 405 U.S. 625, 629 n.8 (1972).

225. *Labat v. Bennett*, 365 F.2d 698, 723 (5th Cir. 1966).

226. *Vasquez v. Hillery*, 106 S. Ct. 617, 624 (1986); *Labat v. Bennett*, 365 F.2d 698, 723 (5th Cir. 1966).

227. *Hernandez v. Texas*, 347 U.S. 475, 477 (1954).

228. See *infra* notes 236-46 and accompanying text.

229. *Castaneda v. Partida*, 430 U.S. 482, 494 (1977) (emphasis added).

belongs.²³⁰ This method is known as the "rule of exclusion" and is available to prove discrimination against a delineated class in jury selection.²³¹ First, a litigant must establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws as written or applied.²³² Second, the litigant must prove the degree of underrepresentation "by comparing the proportion of the group in the total population to the proportion called to serve as . . . jurors, over a significant period of time."²³³ When a defendant has shown a substantial underrepresentation of his group, a prima facie case of discriminatory purpose is established,²³⁴ and the burden would then shift to the state.²³⁵

In *Castaneda v. Partida*,²³⁶ for example, a defendant challenged his indictment under the equal protection clause of the fourteenth amendment, claiming that officials discriminated against Mexican-Americans in the grand jury selection process.²³⁷ The defendant established that Mexican-Americans constituted a clearly identifiable class.²³⁸ Next, he proved, using statistics, that although the population of the county in question was 79.1% Mexican-American, only 39% of those summoned for grand jury service were Mexican-American.²³⁹ The Court determined that a disparity of 40.1% alone "was enough to establish a prima facie case of discrimination against Mexican-Americans in the Hidalgo County grand jury selection."²⁴⁰ Because the state failed to rebut the presumption of purposeful discrimination with competent evidence, the Court held that there had been a denial of equal protection in the process of selecting grand juries.²⁴¹

The defendant in *Alexander v. Louisiana*²⁴² also used statistical

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 495; see *infra* note 240.

235. *Id.*

236. 430 U.S. 482 (1977). See *supra* notes 161-62 and accompanying text.

237. *Castaneda*, 430 U.S. at 485-86.

238. *Id.* at 495.

239. The statistics used were compiled from the 1970 census and the Hidalgo County grand jury records. *Id.* at 486.

240. *Id.* at 496. The Court stated that the disparity fell within the range accepted in previous cases. *Id.* In particular, the Court cited *Whitus v. Georgia*, 385 U.S. 545 (1967) (blacks comprised 27.1% of taxpayers but only 9.1% of grand jury venire); *Sims v. Georgia*, 389 U.S. 404 (1967) (blacks comprised 24.4% of taxpayers but only 4.7% of grand jury list); *Jones v. Georgia*, 389 U.S. 24 (1967) (19.7% of taxpayers but only 5% of jury list).

241. 430 U.S. at 501.

242. 405 U.S. 625 (1972). In *Alexander*, a defendant challenged his indictment by the Lafayette Parish grand jury as violative of the equal protection clause of the fourteenth

evidence to prove systematic exclusion of potential jurors on the basis of race. Blacks comprised 21.06% of the population of Lafayette Parish eligible for jury service.²⁴³ Yet 6.75% of the group from which the jury commission drew the grand jury panels, 5% of the petitioner's grand jury venire, and none of the grand jury members that indicted the petitioner were black.²⁴⁴ The Court held that these statistics, together with a selection procedure that was not racially neutral,²⁴⁵ established a prima facie case of racial discrimination.²⁴⁶

Token summoning of members of an underrepresented group for jury service does not meet the requirements of the equal protection clause.²⁴⁷ The equal protection clause, however, does not require an exact proportion between the percentage of the population which the group comprises and the percentage of the jury list which it comprises.²⁴⁸ Additionally, an accused is not "constitutionally entitled to demand a proportionate number of his race [or group] on the jury which tries him"²⁴⁹

In the context of jury cases, a litigant may use statistical evidence to establish a presumption of discriminatory intent by demonstrating the requisite substantial underrepresentation of the race or group to which the defendant belongs.²⁵⁰ Proof of discriminatory intent is indispensable in proving a violation of the equal protection clause of

amendment in that the jury selection process systematically excluded potential jurors on the basis of race.

243. *See id.* at 627 ("According to 1960 census figures admitted into evidence below, Lafayette Parish contained 44,986 persons over 21 years of age and therefore presumptively eligible for grand jury service: of this total, 9,473 persons (21.06%) were Negro.')

244. *Id.* at 628.

245. The Court observed that questionnaires sent to potential grand jurors for the all-white Lafayette Parish jury commission included a space to indicate the race of the recipient. *Id.* at 627. When the respondents returned the questionnaires, the commissioners attached an information card to each questionnaire noting several things including the recipient's race. The Court further noted that out of 7374 questionnaires returned to the commission, 1015, or 13.76%, were from blacks. The commissioners "culled out" 5000 questionnaires "ostensibly on the grounds that these persons were not qualified for grand jury service or were exempted under state law." *Id.* Out of the remaining 2000, "400 persons were selected, purportedly at random, and placed in a box from which the grand jury panels of 20 for Lafayette Parish were drawn." *Id.* at 628. The Court mentioned that, according to one technique for calculating probability, the chances are 1 in 20,000 that only 27 blacks would have been randomly selected from the 400 member final jury list, when 1015 of the 7374 respondents were black. *Id.* at 630.

246. *Id.*

247. *See Brown v. Allen*, 344 U.S. 443 (1952).

248. *See Swain v. Alabama*, 380 U.S. 202, 208 (1964).

249. *Id.*

250. *See, e.g., Vasquez v. Hillery*, 106 S. Ct. 617 (1986) (low statistical probability that chance or accident could have accounted for the exclusion of blacks from the grand jury during the years at issue).

the fourteenth amendment.²⁵¹

2. TITLE VII CASES

"Title VII of the 1964 Civil Rights Act prohibits discrimination on the basis of race, color, religion, sex or national origin by private and public employers, employment agencies, labor organizations, and training programs."²⁵² The basic goal of Title VII is to create equality in the job market.²⁵³ This goal is motivated in part by a desire to ensure that minority groups are not disadvantaged by racially stratified job environments.²⁵⁴ To reach this congressional goal, courts strive to identify and eliminate arbitrary and discriminatory devices and practices.²⁵⁵ Furthermore, the Act operates to invalidate barriers to employment, regardless of the employer's neutral intentions, if these barriers invidiously discriminate against minorities.²⁵⁶ The court, therefore, may strike down not only overtly discriminatory practices, but also facially neutral practices that perpetuate the effects of prior discrimination.²⁵⁷

Title VII plaintiffs have used statistical evidence as a major tool in establishing prima facie cases of discrimination.²⁵⁸ An inference of discrimination arises whenever the statistics indicate a likelihood that the racial or gender composition of the work force did not occur by chance.²⁵⁹

A Title VII complainant may proceed under one of two distinct theories—disparate *impact* or disparate *treatment*.²⁶⁰ Statistics are crucial to a plaintiff's case under the disparate impact model at the prima facie stage.²⁶¹ Under the disparate treatment theory, however,

251. *Castaneda v. Partida*, 430 U.S. 482, 493 (1977).

252. Comment, *supra* note 216, at 515 (discussing 42 U.S.C. §§ 2000e to 2000e-17 (1982)).

253. *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

254. *Id.*

255. *Id.*

256. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Segar v. Smith*, 738 F.2d 1249, 1266-71 (D.C. Cir. 1984).

257. *International Bhd. of Teamsters*, 431 U.S. at 349; *Duke Power Co.*, 401 U.S. at 432.

258. Comment, *supra* note 216, at 516.

259. *See id.* at 517.

260. In disparate impact cases, the complainant seeks to uncover and eliminate employment practices that are facially neutral but adversely affect minorities, and are unnecessary to an employer's legitimate business interests. *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984). In disparate treatment cases, the complainant seeks to uncover and eliminate intentional discrimination. *Id.* at 1267.

261. *Id.* at 1269. To establish a prima facie case under the disparate impact test, the plaintiff must show a substantial disparate impact due to the selection procedure. The employer then has the burden to establish a business necessity for the challenged procedure. If no such necessity is shown, the practice is prohibited. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); Comment, *supra* note 216, at 519.

the litigant introduces statistical evidence at the third or pretextual stage. The evidence, in the form of summary statistics, is useful only after the defense has rebutted the plaintiff's prima facie case.²⁶²

A litigant can often only establish a prima facie case of discrimination by using statistical evidence to demonstrate the existence of a disparate impact.²⁶³ Although a study of selected employment decisions may not reveal a discriminatory pattern in an employer's selection process, a statistical analysis of the employer's work force may show such a discriminatory pattern.²⁶⁴ Racial statistics are often the only available means of proof of clandestine and covert discrimination by an employer or union.²⁶⁵

In *Griggs v. Duke Power Co.*,²⁶⁶ black employees of the defendant company challenged the company's policy of requiring employees to earn a high school diploma and passing grades on intelligence tests in order to transfer between departments.²⁶⁷ The employees presented:

[North Carolina] census statistics [which] show that, while 34% of white males had completed high school, only 12% of Negro males had done so. . . . Similarly, with respect to standardized tests, the EEOC in one case found that use of a battery of tests, including the Wonderlic and Bennett tests used by the Company in the instant case, resulted in 58% of whites passing the tests, as compared with only 6% of the blacks.²⁶⁸

Regardless of the company's lack of discriminatory intent in estab-

If an employer does then meet the burden of proving that its tests are "job related," it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in "efficient and trustworthy workmanship. . . ." Such a showing would be evidence that the employer was using its test merely as a "pretext" for discrimination.

Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1974) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973)). In Title VII cases, many courts use a .05 level of significance to infer discrimination. *Segar*, 738 F.2d at 1282. This indicates that the odds are one in twenty that the result occurred by chance. *Id.*

262. Comment, *supra* note 216, at 517 n.22. Statistics alone are rarely dispositive. To establish a prima facie case under a disparate treatment theory, a plaintiff must show that "he belongs to a protected group, he applied and was qualified for a position for which the employer was seeking applicants, he was rejected, and after his rejection the position remained open and the employer continued to seek applicants with the plaintiff's qualifications." *Id.* at 518 n.23 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

263. Comment, *supra* note 216, at 520.

264. *Id.*

265. *United States v. Ironworkers Local 86*, 443 F.2d 544, 551 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971).

266. 401 U.S. 424 (1971).

267. *Id.* at 425-26. "The requisite scores used for both initial hiring and transfer approximated the national median for high school graduates." *Id.* at 428.

268. *Id.* at 430 n.6 (citation omitted).

lishing transfer requirements, the Court held that the company violated the Act by failing to show that such requirements were job-related.²⁶⁹

In *International Brotherhood of Teamsters v. United States*,²⁷⁰ the government produced statistical evidence of systemwide discrimination in driver hiring practices.²⁷¹ Testimony recording over forty specific instances of discrimination bolstered the statistical evidence.²⁷² The Court, holding that the government had established a prima facie case of discrimination,²⁷³ noted that

[s]tatistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.²⁷⁴

When using statistical data to establish a prima facie case in an employment discrimination case, it is critical to compare the under-represented group to the relevant general population.²⁷⁵ Thus, to

269. *Id.* at 432-33.

270. 431 U.S. 324 (1977). In *Teamsters*, the government alleged that a common carrier of motor freight with a nationwide operation and the union representing a large group of its employees engaged in a pattern and practice of employment discrimination against blacks and Spanish-surnamed Americans, specifically in the hiring of line drivers.

271. Specifically, the government demonstrated that

[T]he company had 6,472 employees. Of these, 314 (5%) were Negroes and 257 (4%) were Spanish-surnamed Americans. Of the 1,828 line drivers, however, there were only 8 (0.4%) Negroes and 5 (0.3%) Spanish-surnamed persons, and all of the Negroes had been hired after the litigation commenced. With one exception—a man who worked as a line driver at the Chicago terminal from 1950 to 1959—the company and its predecessors *did not employ a Negro on a regular basis as a line driver until 1969*. And, as the Government showed, even in 1971 there were terminals in areas of substantial Negro population where all of the company's line drivers were white. A great majority of the Negroes (83%) and Spanish-surnamed Americans (78%) who did work for the company held the lower paying city operations and serviceman jobs, whereas only 39% of the nonminority employees held jobs in those categories.

Id. at 337-38 (emphasis in original). Similarly, in the company's Atlanta terminal, no blacks held line driver positions despite the fact that blacks composed 22.36% of the greater metropolitan population and 51.31% of the city. In the company's two Los Angeles terminals, no blacks held line driver positions even though blacks composed 10.84% of the greater metropolitan population and 17.88% of the city population. *Id.* at 337 n.17.

272. *Id.* at 338. See also *Eastland v. Tennessee Valley Auth.*, 704 F.2d 613, 618 (11th Cir. 1983).

273. *International Bhd. of Teamsters*, 431 U.S. at 337.

274. *Id.* at 340 n.20.

275. *Hazelwood School District v. United States*, 433 U.S. 299 (1977). In *Hazelwood*, the government alleged that the hiring practices of a school district discriminated against blacks.

establish a presumption of an equal protection violation under the disparate impact model, the litigant may use statistical evidence derived from multiple regression analysis to prove a substantial disparate impact of the employment selection procedure.

3. HOUSING CASES

Litigants may also employ statistics to establish a prima facie case of discrimination in housing.²⁷⁶ Congress enacted the Fair Housing Act²⁷⁷ in an effort to provide fair access to housing throughout the country.²⁷⁸ A court will find that the defendant engaged in a "pattern or practice" of discrimination if the litigant establishes that the difference between the racial composition of the pool of prospective purchasers and the racial composition of actual purchasers from or through an individual or company is statistically significant.²⁷⁹ In addition, such individual or company must have committed at least one discrete, provable discriminatory act.²⁸⁰ Thus, a litigant may use comparative statistics to prove a violation of the equal protection clause by showing racial disparity in the pertinent housing market.

4. SCHOOL DESEGREGATION CASES

Education is perhaps the most important function of state and local governments.²⁸¹ The Court has recognized that denying a child the opportunity for education may also deny him success in life.²⁸²

The Court rejected a comparison of the racial composition of a teacher work force to the general student population. *Id.* at 308. "[A] proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market." *Id.*; see also *Wilkins v. University of Houston*, 654 F.2d 388, 396 (5th Cir. Unit B Aug. 1981) ("The seemingly simple and straight forward task of comparing the number of women hired with the number of women available is complicated by the fact that the availability component is to a significant extent dependent upon the subject matter field in which the faculty person is hired.").

276. *Williams v. Matthews Co.*, 499 F.2d 819 (8th Cir.), *cert. denied*, 419 U.S. 1021 (1974).

277. 42 U.S.C. §§ 3601-3631 (1976).

278. See *Williams v. Matthews Co.*, 499 F.2d 819, 825 (8th Cir. 1974).

279. "A 'significant difference' is one where the likelihood of such a disparity occurring in a random distribution is less than five per cent." Bogen & Falcon, *The Use of Racial Statistics in Fair Housing Cases*, 34 MD. L. REV. 59, 73-74 (1974). "This does not mean that there is a ninety-five percent chance that the pattern was deliberately created. It means that, assuming no discrimination, an all-white area would still occur five percent of the time." *Id.* at 74 n.43.

280. *Id.* at 73.

281. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

282. For example, the Court noted in *Brown* that

[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is even greater when it has the sanction of law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of the child to learn. Segregation with the sanction of law, therefore,

The courts have therefore imposed a duty under the fourteenth amendment upon school systems to desegregate and ensure equal educational opportunities for minority children.

For a litigant to establish a prima facie violation of the equal protection clause in the school segregation context, he must prove both historically and statistically that a segregated system²⁸³ presently exists and that such a system is a result of intentionally discriminatory state action.²⁸⁴ Because of the difficulty of proving discriminatory intent, the Court has found it necessary to infer the existence of this element.²⁸⁵ Where a school board has a history of segregative practices²⁸⁶ and continues to act in a discriminatory manner, the Court will infer that any present discrimination is the result of a discriminatory intent on the part of the school board.²⁸⁷ The litigant historically establishes past discrimination and statistically proves a present discriminatory school system.²⁸⁸

has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.

Id. at 494.

283. In *Keyes v. School Dist. Number 1*, the Court stated that in determining whether a school is to be considered "segregated," not only must the court examine racial and ethnic considerations of the school's student body, but it must also consider the composition of the faculty and staff, and the attitudes of the community and administration toward the schools. 413 U.S. 189, 196 (1973).

284. See *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464 (1979) ("[T]o prevail the plaintiffs were required to 'prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action.'") (quoting *Keyes v. School Dist. Number 1*, 413 U.S. 189, 198 (1973)).

285. History is a necessary tool in uncovering discriminatory intent because state actors simply do not announce that their intention in enacting a specific piece of legislation is to discriminate. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954). In *Brown*, the Court examined both historical and sociological factors. The Court's historical analysis examined the status of public education at the time of the enactment of the fourteenth amendment. *Id.* at 489-90. The Court examined sociological factors to reveal "the effect of segregation itself on public education." *Id.* at 492. After taking these historical and sociological factors into account, the Court concluded that "[s]eparate educational facilities are inherently unequal." *Id.* at 495.

286. "[T]o say that a system has a 'history of segregation' is merely to say that a pattern of intentional segregation has been established in the past." *Keyes v. School Dist. Number 1*, 413 U.S. 189, 210 (1973).

287. The court stated in *Keyes* that if a plaintiff proves the existence of a segregated school district where a statutory dual system was in effect at the time of *Brown v. Board of Education*, then the state automatically assumes an obligation to terminate such segregation. *Id.* at 200.

The court further stated that even if no statutory dual system existed, a predicate for a finding of a dual system exists if a plaintiff proves that school authorities effected a "systematic program of segregation," having a substantial discriminatory result. *Id.* at 201 (emphasis added).

288. See *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 530 n.1 (1979). Such statistics describe racially dominant schools within the school system; see also *Columbus Bd. of Educ. v.*

Once a litigant has established a prima facie case of school discrimination, the burden shifts to the school board to rebut the inference of discriminatory intent or causation. Specifically, the defendant school board must prove that it did not formulate its policies and practices in order to "create or maintain segregation,"²⁸⁹ or that such policies and practices "were not factors in causing the existing condition of segregation in [the] schools."²⁹⁰ The plaintiffs will prevail unless the school board offers sufficient countervailing evidence.²⁹¹

The courts have recognized that racial discrimination is a consistent theme in the history of the United States and that it continues to exist in society today.²⁹² Analysis of the jury selection, Title VII, housing, and school desegregation cases demonstrates that the courts are striving to move society toward the ideal of a discrimination-free society. This requires the removal of barriers to minorities in employment,²⁹³ housing,²⁹⁴ and education.²⁹⁵ The courts must also root out discrimination from jury selection and other judicial processes because such discrimination fosters and legitimizes society's prejudices.²⁹⁶ To reach these goals, the courts have been willing to employ the admittedly imperfect tool of statistics as proof of discrimination.²⁹⁷ The judicial use of statistics and the burden-shifting mechanism ensure that problems of proof do not thwart the courts' goal of eliminating discrimination in all sectors of society.

B. *Statistics in the Capital Sentencing Context*

Although the official discrimination of the pre-Civil War era no longer exists, discrimination still permeates the legal system.²⁹⁸ Legal scholars and social scientists have extensively documented the magnitude and pervasiveness of racial discrimination through statistical studies.²⁹⁹ Such studies have concluded that race still plays an active

Penick, 443 U.S. 449, 452 (1979). In *Columbus*, the plaintiffs offered statistics to show that the present school system was comprised of 96,000 students, 32% of whom were black. Approximately 70% of all students attended schools that were at least 80% black or white and half of the 172 schools were 90% black or white. *Id.* at 537.

289. *Keyes*, 413 U.S. at 213-14.

290. *Id.*

291. *Brinkman*, 443 U.S. at 537.

292. See *supra* notes 151-53 and accompanying text.

293. See *supra* notes 252-75 and accompanying text.

294. See *supra* notes 276-80 and accompanying text.

295. See *supra* notes 281-91 and accompanying text.

296. See *supra* notes 223-26 and accompanying text.

297. See *supra* notes 208-91 and accompanying text.

298. See *Bowers & Pierce*, *supra* note 58, at 595.

299. For a discussion of early studies that examined the subject of racial discrimination in the criminal justice system, see *Brearley, The Negro and Homicide*, 9 SOC. FORCES 247, 252

role in the prosecution,³⁰⁰ trial,³⁰¹ and sentencing³⁰² of criminals. Racial discrimination in capital sentencing is all the more disturbing because the death penalty is undoubtedly the "ultimate sanction."³⁰³

Despite rhetoric to the contrary, and notwithstanding that it has welcomed the use of statistics in proving a variety of claims,³⁰⁴ the judiciary has been skeptical of the utility of statistical evidence in capital sentencing challenges. The 1966 case of *Maxwell v. Bishop*³⁰⁵

(1930); Garfinkel, *Research Note on Inter- and Intra-Racial Homicides*, 27 SOC. FORCES 369, 378-80 (1949); Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 CRIME & DELINQ. 132, 141 (1969).

300. Several studies have focused on the relationship between prosecutorial decisions and race. See Jacoby & Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J. CRIM. L. & CRIMINOLOGY 379, 385 (1982) ("Blacks accused of killing whites are twice as likely to have the death penalty requested as are whites accused of killing blacks."); Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754, 783 (1983) ("The effects of race of victim and geographical area operate independently of one another to produce glaring disparities in the likelihood of a death request."); Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456, 466-68 (1981) (showing a relationship between prosecutorial decisions to seek death penalty and the race of offender); cf. Bentele, *supra* note 49, at 638 ("The broad, unreviewable discretion of prosecutors, deemed either not significant for eighth amendment purposes or assumed to be exercised properly by the Justices in *Gregg* contributes immeasurably to the risk of arbitrary or discriminatory imposition of death sentences.") (discussing *Gregg v. Georgia*, 428 U.S. 153 (1976)).

301. Researchers have studied the effects of race at various stages in criminal prosecutions. See, e.g., Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067, 1098 (1983) ("[A]rbitrariness is manifold in its links to race, location within a state, and other personal, situational, and social influences; pervasive in its presence at various decision points in the handling of capital cases.").

302. See J. PETERSILIA, RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM 32 (1983) ("If convicted of felony charges, blacks and Hispanics are more likely than whites to receive prison sentences."); Radelet & Vandiver, *The Florida Supreme Court and Death Penalty Appeals*, 74 J. CRIM. L. & CRIMINOLOGY 913, 919 (1983) (showing that in similar circumstances, in Florida, "black-victim" murder defendants were much less likely than are "white-victim" defendants to receive death sentences); see also Gibson, *Race as a Determinant of Criminal Sentences: A Methodological Critique and a Case Study*, 12 LAW & SOC'Y REV. 455, 475 (1978) (Georgia study showing racial disparity in sentencing is attributable to pro-black and pro-white predispositions of individual judges, and not to institutional biases); Spohn, Gruhl & Welch, *The Effect of Race on Sentencing: A Re-Examination of an Unsettled Question*, 16 LAW & SOC'Y REV. 71, 86 (1981-82) (study showing that judges discriminate against black males in deciding whether or not defendants will be incarcerated). For discussion of quantitative techniques in comparative sentencing litigation, see Baldus, Pulaski, Woodworth & Kyle, *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach*, 33 STAN. L. REV. 1 (1980).

303. *Furman v. Georgia*, 408 U.S. 238, 346 (1972) (Marshall, J., concurring).

304. Chief Justice Burger, recognizing the importance and complexity of the matter, pointed out that "[t]he case against capital punishment is not the product of legal dialectic, but rests primarily on factual claims, the truth of which cannot be tested by conventional judicial processes." *Furman*, 408 U.S. at 405 (Burger, C.J., dissenting), quoted in Bowers & Pierce, *supra* note 298, at 72.

305. 398 F.2d 138 (8th Cir. 1968), vacated on other grounds, 398 U.S. 262 (1970).

illustrates the treatment that the courts have given statistical evidence. In *Maxwell*, a black petitioner, appealing a death sentence for the rape of a white woman, introduced into evidence a statistical study purporting to show that race affected the likelihood of a defendant receiving the death sentence. Specifically, the evidence indicated that a black man convicted of criminally assaulting a white woman had approximately a 50% chance of receiving a death sentence, whereas a man convicted of 'criminally assaulting' a woman of the same race had about a 14% chance of receiving the death sentence.³⁰⁶

The United States Court of Appeals for the Eighth Circuit questioned the integrity of the study³⁰⁷ and ultimately rejected the petitioner's claim under the equal protection clause of the fourteenth amendment.³⁰⁸ The court deemed the study and its findings too broad and thus, inapplicable to the petitioner's *particular* case.³⁰⁹ In the court's view, the petitioner failed to show "factually" that his race caused him "greater or different punishment than a member of another race."³¹⁰ Bespeaking its implicit skepticism towards the utility of such studies in capital sentencing appeals, the court stated that it was "not certain that, for Maxwell, statistics [would] ever be his redemption."³¹¹

From a practical standpoint, the Eighth Circuit's position presented an insurmountable barrier to proving discrimination in capital sentencing. In most situations, the refusal to consider general statistical studies showing disparate imposition of the death penalty dooms constitutional challenges to racial discrimination within the sentencing process. A petitioner will rarely be able to demonstrate that a sentencer acted with racial discrimination in his particular

306. *Maxwell*, 398 F.2d at 145 (quoting *Maxwell v. Bishop*, 257 F. Supp. 710, 719 (E.D. Ark. 1966)). The study consisted of a survey of rape convictions during the years 1945-65, sampling nineteen counties in Arkansas. *Id.* at 141.

307. The court maintained that the study did not relate to the specific county where the defendant was tried and that it did not take every variable into account. Additionally, the court stated that the study failed to show that the petit jury in *the defendant's case* acted with racial discrimination. *Maxwell*, 398 F.2d at 146-47.

Surprisingly, however, the court at the same time credited the study as "interesting and provocative." *Id.* In addition, the court stated, "We do not say that there is no ground for suspicion that the death penalty for rape may have been discriminatorily applied over the decades in that large area of states whose statutes provide for it. There are recognizable indicators of this." *Id.* at 148.

308. See *supra* note 117 and accompanying text.

309. *Maxwell*, 398 F.2d at 147.

310. *Id.* at 148. The court declared, additionally, that it was "not inclined to accept as constitutional doctrine an abstraction which provides equality only through assumed and hoped-for day-to-day practicalities." *Id.* Furthermore, the court stated, "It is the law, not probabilities or possibilities, which must afford equal protection." *Id.*

311. *Id.*

case.³¹²

The Supreme Court also demonstrated an aversion to statistical evidence in *Gregg v. Georgia*.³¹³ The Court, considering the very same study of racial discrimination that the Eighth Circuit had rejected in *Maxwell*,³¹⁴ along with other evidence, constitutionally validated the death penalty in Georgia. Thus, like the *Maxwell* court, it upheld the defendant's death sentence despite the proffer of statistical evidence purporting to show racial discrimination.³¹⁵

1. THE RACE-OF-THE-VICTIM APPROACH

Significantly, the defendants in the above cases predicated their arguments on invidious discrimination against their own race. The next phase in the evolution of the death penalty appeals was more innovative and sophisticated by taking into account the race of the victim.³¹⁶

In *Spinkellink v. Wainwright*,³¹⁷ the petitioner introduced evidence that "although the estimated number of black felony murder victims and white felony murder victims for the years 1973-1976 is the same, 92% of the inmates on Florida death row had murdered

312. The judiciary again faced statistical evidence of racial discrimination in *Furman v. Georgia*, 402 U.S. 238 (1972). This time the forum was the Supreme Court of the United States. A plurality, in which the Justices wrote nine separate opinions, struck down all death penalty statutes then in existence. The Court directed that capital juries consider predefined standards in their deliberations, but paid little attention to the statistics submitted by the petitioner, which purported to show a racially biased imposition of the death penalty.

Justice Douglas discussed those studies, concluding that: "We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black." *Id.* at 253 (Douglas, J., concurring). Justice Douglas conceded, however, that the state statutes were "pregnant with discrimination." *Id.* at 257; *cf. id.* at 310 (Stewart, J., concurring) (concluding that "racial discrimination had not been proved").

Justice Marshall, concurring, observed in contrast to Justices Douglas and Stewart: "It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population. Studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination." *Id.* at 364 (Marshall, J., concurring) (footnote omitted).

313. 428 U.S. 153 (1976).

314. *See Zeisel, supra* note 300, at 458.

315. Although the Court did not find the study persuasive, it is interesting that the Solicitor General of the United States, in his brief supporting the death penalty, stated: "This is a careful and comprehensive study, and we do not question its conclusion that during the twenty 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), *quoted in Zeisel, supra* note 300, at 458 (footnote omitted). The Solicitor General and the Court, however, contended that there was no showing of discrimination in the defendant's particular case. *Zeisel, supra* note 300, at 458.

316. *See Zeisel, supra* note 300, at 456.

317. 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979).

white victims, while only 8% had murdered black victims.”³¹⁸ The court, however, dismissed this evidence placing emphasis on the state’s contention that “murders involving black victims have, in the past, generally been qualitatively different from murders involving white victims.”³¹⁹ In addition to offering this explanation for the study’s conclusions, the state questioned the study’s accuracy, reliability, and methodology.³²⁰

Although the court tacitly accepted the state’s position³²¹ and assumed the validity of the petitioner’s findings, the court ultimately rejected the petitioner’s claim.³²² Specifically, the court concluded that the petitioner had failed to show that the death penalty was operating in an arbitrary and capricious manner in violation of his eighth amendment right.³²³ The court also rejected the petitioner’s fourteenth amendment equal protection claim, asserting that the “discrimination is explainable on nonracial grounds,”³²⁴ and that the petitioner had made no showing of any *intentional* discrimination.³²⁵

Although the court assumed the validity of the statistical study that the petitioner proffered, the court stated that:

318. *Id.* at 612.

319. *Id.* (footnote omitted). Despite the staggering disproportion between those death row prisoners who had killed whites and those who killed blacks, the state contended that the level of aggravation present in white-victim murders was generally higher than black-victim murders. The state testified that “Florida murders involving black victims have in the past fallen into the category of ‘family quarrels, lovers quarrels, liquor quarrels, [and] barroom quarrels.’” *Id.* at 612 n.37.

320. *Id.* at 612.

321. *Id.* at 612. The court, after discussing the “qualitative” differences between murders involving black and white victims, stated that: “The petitioner’s own expert witness also testified that factors other than race could have caused the disparate figures, and could single out no defendant convicted of first degree murder for killing a black who, under the facts and circumstances of the case, should have received the death penalty instead of life imprisonment.” *Id.* at 615.

322. *Id.* at 613.

323. The court further stated, “The allegation that Florida’s death penalty is being discriminatorily applied to defendants who murder whites is nothing more than an allegation that the death penalty is being imposed arbitrarily and capriciously, a contention we previously considered and rejected.” *Id.*

The court posited that as long as a capital statute satisfied the requirements of *Furman* and *Gregg*, racial discrimination would not violate the eighth amendment. *McCleskey v. Kemp*, however, in effect overrules this section of the opinion. 753 F.2d 877 (11th Cir. 1985), *cert. granted*, 106 S. Ct. 3331 (1986). In *McCleskey*, the court of appeals held that “*Spinkellink* can not [sic] be read to foreclose automatically all Eighth Amendment challenges to capital sentencing conducted under a facially constitutional statute.” *Id.* at 891.

324. *Spinkellink*, 578 F.2d at 615.

325. *Id.* at 615-16. The court cited *Washington v. Davis*, 426 U.S. 229 (1976), and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), in support of its position that an equal protection clause claimant must show intent in order to prevail on this theory.

In order to ascertain through federal habeas corpus proceedings if the death penalty had been discriminatorily imposed upon a petitioner whose murder victim was white, a district court would have to compare the facts and circumstances of the petitioner's case with the facts and circumstances of all other Florida death penalty cases involving black victims in order to determine if the first degree murderers in those cases were equally or more deserving to die.³²⁶

The court's discussion indicated its unwillingness to undertake the burden of conducting a proportionality review.³²⁷ The burden, however, appears light because the court considered the study valid.

2. *McCleskey v. Kemp*

*McCleskey v. Kemp*³²⁸ represents the first occasion on which comprehensive statistical evidence of race-of-the-victim discrimination in capital sentencing has reached the Supreme Court of the United States. An examination of raw data³²⁹ indicates that Georgia imposes the death penalty with varying frequency, depending upon the race of the defendant and the victim. Between the years 1973 and 1979, 1% of black defendants convicted of the murder or voluntary manslaughter of black victims received the death sentence, while 22% of those with white victims were sentenced to death.³³⁰ In murders involving white defendants and white victims, 8% of the defendants

326. *Spinkellink*, 578 F.2d at 613.

327. The Supreme Court of Georgia is required by statute to review each case in which the death penalty is imposed. GA. CODE ANN. § 17-10-35(a) (1982). In its review, the court must determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant." *Id.* § 17-10-35(c)(3). The Georgia Code also provides that "[b]oth the defendant and the state shall have the right to submit briefs within the time provided by the court and to present oral argument to the court." *Id.* § 17-10-35(d).

328. Professor David Baldus and his associates compiled the data. See *infra* note 335 and accompanying text.

329. Brief for Petitioner, Supplemental Exhibits at 47, *McCleskey* (No. 84-6811). Out of 2375 cases, 1438 involved blacks who had murdered blacks. Only 18 defendants in these cases received the death sentence. There were 228 cases involving black defendants and white victims, and 50 of these defendants received the death sentence. *Id.*

330. *Id.* Out of 2375 cases, 58 defendants of the 745 cases that involved white defendants and white victims received the death sentence. Furthermore, defendants in only 2 of 64 cases involving white murderers of black victims received the death sentence. *Id.* The fact that there were so few cases involving whites murdering blacks may indicate that prosecutorial decisions to seek the death penalty are related to race. See *infra* note 335 and accompanying text.

Additionally, because all decisionmakers in the criminal system exercise discretion at each stage of the proceedings, discrimination may pervade every facet of the criminal justice system. The initiation of the criminal process itself—police arrests—allows for the manifestation of racial bias. See generally Smith, Visher & Davidson, *Equity and Discretionary Justice: The Influence of Race on Police Arrest Decisions*, 75 J. CRIM. L. & CRIMINOLOGY 234 (1984)

received death sentences.³³¹

If one focuses solely on the race of the *victim*, 11% of white victim cases resulted in the imposition of the death penalty, whereas defendants were sentenced to death in only 1% of black victim cases.³³² Therefore, not only are profound disparities apparent from evidence on the various racial combinations, but a wide disparity is also apparent from the evidence on the race of the victim alone. Such disparities strongly suggest that race is a powerful factor in the decision to sentence a defendant to death. Looking at the unadjusted statistics alone, a layman could easily conclude that racial discrimination pervades the Georgia capital sentencing system.³³³

In *McCleskey*, the Eleventh Circuit addressed the "Baldus Study," which applied multiple regression analysis³³⁴ to examine the rate of death sentencing in Georgia using the race of the victim and the defendant as independent variables.³³⁵ The court interpreted the

(Although there is little direct evidence of suspect-directed racial bias in police arrests, police are more responsive to white victims of crime.)

Moreover, the quantum of discretion afforded to the prosecutor has also elicited criticism. See Scofield, *Due Process in the United States Supreme Court and the Texas Capital Murder Statute*, 8 AM. J. CRIM. L. 1, 10 n.48 (1980) ("[I]t is impossible to know what considerations guided the prosecution . . .").

331. Brief for Petitioner, Supplemental Exhibits at 46, *McCleskey* (No. 84-6811).

332. Justice Marshall, concurring in *Furman v. Georgia*, indicated that raw data can provide powerful insight into the operation of a capital sentencing system. In discussing such data on executions, he stated that "a look at the bare statistics regarding executions is enough to betray much of the discrimination." 408 U.S. 238, 364 (1972) (Marshall, J., concurring).

333. *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985), *cert. granted*, 106 S. Ct. 3331 (1986).

334. Multiple regression is a statistical technique used to estimate the impact of two or more independent variables on a dependent variable. The technique provides a test of the hypothesis of no relationship between the combined independent variables and the dependent variables. For discussion of this statistical technique, see N. DRAPER & H. SMITH, *APPLIED REGRESSION ANALYSIS* (1981).

335. Dr. David Baldus, Professor of Law at the University of Iowa, a recognized expert on statistical proof, directed the study. *McCleskey v. Zant*, 580 F. Supp. 338, 352 (N.D. Ga. 1984), *rev'd sub nom. McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985), *cert. granted*, 106 S. Ct. 3331 (1986).

Professor Baldus and his associates set out to study data on homicides in Georgia. They conducted two analyses. The first, known as the Procedural Reform Study, focused on all offenders in Georgia convicted of murder at a guilt trial. See *infra* note 57. It also included several offenders who, after pleading guilty to murder, received the death penalty. The offenders included were convicted under the Georgia death penalty statute effective on March 28, 1973, and were arrested before June 30, 1978. The universe for the study consisted of approximately 550 cases, 264 of which were used in the analysis. Researchers gathered information from case files and government agencies, and coded, or quantified, variables particular to each case according to a questionnaire which Professor Baldus developed.

After collecting and organizing the data, Baldus and his associates constructed a 200 variable regression model, which attempted to determine the impact of variables, such as race, on prosecutorial decisions to seek the death penalty and on the rate of death sentencing.

study's regression models, which took into account numerous factors, to indicate that "on average a white victim crime is 6% more likely to result in the [death] sentence than a comparable black victim crime."³³⁶ In "mid-range" cases, that is, cases in which intermediate levels of aggravation were present, the court viewed the study as showing that white-victim defendants stood a 20% higher chance of receiving the death penalty than black-victim defendants.³³⁷

The Eleventh Circuit declined to reject the district court's conclusion that deficiencies in both the data base³³⁸ and the regression

Professor Baldus found the relationship significant in the former, and insignificant in the latter.

The second study, called the Charging and Sentencing Study, was based on a sample of those in Georgia convicted of murder or voluntary manslaughter whose crimes occurred after March 28, 1973, and whose arrests occurred before December 21, 1978. The universe for this study consisted of 2484 cases, of which Professor Baldus included 1084 in the sample.

The researchers revised the questionnaire in this study, making it more comprehensive than that of the Procedural Reform Study. They coded over 500 variables for each defendant, including the strength of the prosecutor's case. Professor Baldus, using 230 of these variables, constructed a regression model from which he drew his primary conclusions. The study indicated a statistically significant race-of-the-victim effect on the rate of death sentencing. Specifically, it showed a .06 disparity in the rate of death sentencing attributable to the victim's race. The disparity was significant at the .02 level.

A 250 variable model, controlling for the effect of Georgia appellate review, indicated .04 disparity attributable to the race-of-the-victim effect. The race-of-the-victim effect was significant at the .04 level. *McCleskey v. Zant*, 580 F. Supp. 338, 353-55 (N.D. Ga. 1984), *rev'd sub nom.* *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985), *cert. granted*, 106 S. Ct. 3331 (1986).

336. *McCleskey*, 753 F.2d at 896. The court observed further that Professor Baldus had calculated a "death odds multiplier" of 4.3 to 1. *McCleskey*, 753 F.2d at 897. This indicates "that killing a white victim increases the odds of a death sentence in Georgia by a factor of 4.3." Gross, *Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing*, 26 CRIME & DELINQ. 1275, 1296 (1985). Moreover, the study indicated that "blacks who killed whites were sentenced to death at nearly 22 times the rate of blacks who killed blacks, and more than 7 times the rate of whites who killed blacks." Brief Amici Curiae for Dr. Franklin M. Fisher, Dr. Richard O. Lempert, Dr. Peter W. Sperlich, Dr. Marvin E. Wolfgang, Professor Hans Zeisel & Professor Franklin E. Zimring in Support of Petitioner Warren McCleskey at 9, *McCleskey* (No. 84-6811) [hereinafter Brief Amici Curiae for Dr. Franklin M. Fisher].

337. *McCleskey*, 753 F.2d at 898.

338. The trial court faulted the collection of quantitative information, or data base that Professor Baldus used in his statistical calculations, stating that "no statistical analysis, much less a multivariate analysis, is any better than the accuracy of the data base." *McCleskey v. Zant*, 580 F. Supp. 338, 354 (N.D. Ga. 1984), *rev'd sub nom.* *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985), *cert. granted*, 106 S. Ct. 3331 (1986). The court found that the questionnaires used in the study could not "capture every nuance of every case." *Id.* at 356. This statement, however, indicates a fundamental misunderstanding of the design of questionnaires. The objective of the design is not to "capture every nuance" of the phenomenon of interest, but *only* the critical characteristics.

The court also expressed concern over perceived deficiencies in coding, miscoding in a substantial number of cases, and a flawed system of recoding. *Id.* at 355-60. If these assertions are true, the reliability, or internal consistency in the coding, would be compromised, and the

models,³³⁹ and the presence of multi-collinearity³⁴⁰ rendered the study fatally defective. Although the Eleventh Circuit apparently did not find the lower court's judgment on this point clearly erroneous,³⁴¹ it held that even if the study were valid, it would still be insufficient to warrant reversal.³⁴²

validity of the study as a whole could be brought into question. It appears, however, that the court's concern on this point was unwarranted. See *infra* note 357 and accompanying text.

339. The court dismissed the regression models in the Baldus Study on the basis of the coefficient of determination, " r^2 ," which measures the "portion of the variance in the dependent variable (here death-sentencing rate) . . . accounted for by the independent variables included in the model." *McCleskey v. Zant*, 580 F. Supp. at 361.

The court found that the r^2 value for the 230-variable regression model, reportedly between .46 and .48, was inconclusive, because the regression equation did "not predict the outcome in half of the cases." *Id.* Moreover, the court noted that as "none of the other models produced by the petitioner [had] an r^2 even approaching .5, . . . none of the models are [sic] sufficiently predictive to support an inference of discrimination." *Id.*

It is important to point out that these statements fail to interpret accurately the meaning of r^2 . The test is one of significance. If the r^2 reaches an acceptable level of significance, then its exact value is not determinative of whether an inference of discrimination should be drawn. For further discussion of the analysis of r^2 , see *infra* note 359 and accompanying text.

The trial court further found that the regression models used in the Baldus Study assumed "that all of the information available to the data-gatherers was available to each decision-maker in the system at the time the decisions were made." *Id.* The court's argument here is that the researchers had access to more information than did the sentencer.

This, however, argues for more reliance on a simple, or "restrictive" regression model, which has fewer variables than the larger, or "full" models. Yet the court would rather have the full model because it found that the 230-variable model did not include and control for all relevant variables. See *infra* note 347 and accompanying text.

Larger models, especially those with hundreds of variables, contain more information than a sentencer could possibly process. Thus, the "bounded rationality" of the sentencer precludes consideration of all data included in larger regression equations. The utility of including such data is, therefore, severely limited.

340. The trial court described multi-collinearity as a distortion occurring when "variables in an analysis are correlated with one another." *McCleskey v. Zant*, 580 F. Supp. at 363. In the court's opinion, if "there is any degree of interrelationship among the independent variables, the regression coefficients are somewhat distorted by that relationship and do not measure exactly the net impact of the independent variable of interest upon the dependent variable." *Id.* Specifically, the court found "[a]ll or a big portion of the major nonstatutory aggravating factors and statutory aggravating factors show positive correlation with both the death sentencing result and the race of the victim." *Id.* The court concluded that "[b]ecause of this it is not possible to say with precision what, if any, effect the racial variables have on the dependent variable." *Id.*

341. *McCleskey*, 753 F.2d at 894-95. The court of appeals applied the "clearly erroneous" standard of review, as it considered the Baldus Study a finding of fact. It stated, "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *McCleskey*, 753 F.2d at 894 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948)).

Although the appellate court's task was to review the trial court's findings concerning the study under the "clearly erroneous" standard, it chose to use the "even if valid" approach, thereby implicitly approving the lower court's findings without subjecting them to the requisite appellate scrutiny.

342. *McCleskey*, 753 F.2d at 895. On this point, the court of appeals stated: "We review

The court stated that none of the figures that the petitioner proffered were a “definitive quantification” of the impact of race in a particular case.³⁴³ Nevertheless, the court asserted that “the figures serve to enlighten us on how the system operates.”³⁴⁴ In particular, the court observed that the data set yielding the 6% figure represented “*a composite of all cases* and contains both low aggravation cases, where the penalty is almost never imposed regardless of the victim’s race, and high aggravation cases, where both white and black victim crimes are likely to result in the penalty.”³⁴⁵ The figure, therefore, included many cases in which the sentencer *appropriately* imposed the death penalty as well as those cases in which the race of the victim was a factor.³⁴⁶

Moreover, the court noted that in very simple regression models, the race-of-the-victim effect greatly contributed to the disparity in the imposition of the death penalty, but as the researchers added additional variables to the model, the disparity decreased sharply.³⁴⁷ The impact, according to the court, ranged from 17% in the very simple model, utilizing 39 variables,³⁴⁸ to 6% in the 230 variable model, and finally to 4% in the 250 variable model which took into account the effect of Georgia appellate review.³⁴⁹

The 20% disparity figure for cases in the “mid-range” levels of

this finding of fact by assuming the validity of the study and rest our holding on the decision that the study, even if valid, not only supports the district judge’s decision under the clearly erroneous standard of review, but compels it.” *Id.*

343. *Id.* at 896.

344. *Id.*

345. *Id.* (emphasis added).

346. In low aggravation cases, juries have limited discretion to impose the death penalty, regardless of the race of the victim, because the level of aggravating circumstances does not rise to the level at which juries find the penalty warranted. The Baldus Study showed an average actual sentencing rate of .00 (0/89) in the lowest two of eight levels of aggravation. *McCleskey*, 753 F.2d at 922. This indicates a decided absence of sentencer discretion in the low range. The relevance of this low range to the analysis, therefore, is questionable. See *infra* note 363 and accompanying text.

347. *McCleskey*, 753 F.2d at 896. Here the court is arguing simply that multiple regression may be an unreliable technique for assessing racial disparity. In the simple model (39 variable), the effects of discrimination, if any, may be significant. The court argued, in essence, that as a researcher adds more relevant independent variables, the apparent impact of the initial variables may decrease. The extension of this argument is that *innumerable* variables impact on the dependent variable, rate of death sentencing.

Adding variables to a regression equation is likely to increase the r^2 and decrease the coefficient of the race-of-the-victim. Nonetheless, the court should examine each variable in terms of its contribution to the explained variance and the reduction in the error term. As a general rule, regression models with fewer variables are preferable to models with *innumerable* variables.

348. *McCleskey v. Zant*, 580 F. Supp. at 375.

349. *McCleskey*, 753 F.2d at 896.

aggravation presented a more difficult problem for the court to resolve. As in its analysis of the 6% disparity, the court expressed doubt about the figure's validity. The court stated that the 20% figure represented a disparity in the death sentencing rate that Dr. Baldus had not conclusively demonstrated to be a function of the victim's race.³⁵⁰ The court, in addition, argued that the "mid-range" was not a "well-defined" class of cases and was not representative of the universe of cases involving the death sentence such as to depict accurately the race of the victim effect.³⁵¹

Assuming the validity of the 20% figure, the court stated that "a disparity only in the mid-range cases, and not in the system as a whole, cannot provide the basis for a system-wide challenge."³⁵² Even though McCleskey's crime fell within the "mid-range," the court did not find the 20% disparity figure persuasive.³⁵³ The court concluded that "[t]he statistics alone [were] insufficient to show that McCleskey's sentence was determined by the race of his victim, or even that the race of his victim contributed to the imposition of the penalty in his case."³⁵⁴ Under *McCleskey*, a showing of disparate

350. Additionally, the court mentioned that the Baldus testimony did not include a statement that the 20% figure was statistically significant. *Id.* at 898.

351. *Id.* Although the court did not fully address this issue, it rejected the claim that a system which produces a 20% disparity violates the eighth amendment. The court stated that "the system as a whole is operating in a rational manner, and not in a manner that can fairly be labeled arbitrary or capricious." *Id.* As to the equal protection claim, the court stated that "the statistics cannot show that the race-of-the-victim factor operated in a given case, even in the mid-range." *Id.*

352. *Id.* This position, however, is not entirely a logical one. As the court itself mentioned, while sentencers seldom impose the death penalty in low aggravation cases, sentencers are far more likely to impose it in high aggravation cases. In both instances, according to the Baldus Study, race plays a smaller role than in the cases that fall between these two poles. In these "mid-range" cases, the chances of discrimination are greatly increased because the sentencer's discretion is at its highest point. The court's narrow view of the significance of the "mid-range" challenge ignores the fact that if discrimination occurs at all, it is likely to be in the "mid-range" cases.

Furthermore, the court seems to have concluded that even if a much higher race-of-the-victim disparity in mid-range cases existed, this would present no basis for invalidation of the penalty in its entirety. This approach, in effect, has neutralized a litigant's ability to challenge racism which, while *seriously infecting* a capital sentencing system, has not pervaded the system at every possible level.

353. *Id.* at 897-98.

354. *Id.* The court insisted that the petitioner's evidence did not indicate discrimination in his particular case, and that even if systemic discrimination could be shown, it would not necessarily require the invalidation of the petitioner's death sentence.

The court took this position because it viewed the petitioner's eighth and fourteenth amendment challenges as requiring largely the same proof. That is, "where racial discrimination is claimed, not on the basis of procedural faults or flaws in the structure of the law, but on the basis of decisions made within that process, then purpose, intent and motive are a natural component of the proof that discrimination actually occurred." *Id.* at 892 (citing *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252

impact alone is insufficient to support a constitutional claim of discrimination, unless it compels a "conclusion that the system is unprincipled, irrational, arbitrary and capricious such that purposeful discrimination . . . can be presumed to permeate the system."³⁵⁵ The court's opinion, however, conspicuously lacked guidance on the magnitude of the disparity that would compel an inference of discriminatory intent.³⁵⁶

3. THE CREDIBILITY OF THE OPINION

In the opinions of the district court and the court of appeals, the Baldus Study did not accurately reflect the relationship between race and death sentencing in Georgia. The district court, in particular, objected to Baldus's method of coding variables and accounting for missing data,³⁵⁷ and asserted that the study failed to include and control for the appropriate variables in the regression models.³⁵⁸ Additionally, the district court disputed Baldus's interpretation of the r^2 value³⁵⁹ and the effect of multi-collinearity.³⁶⁰ Such objections, how-

(1977), and *Washington v. Davis*, 426 U.S. 229 (1976), for the proposition that a petitioner must prove discriminatory intent, in the context of a fourteenth amendment equal protection claim, even after a showing of disparate impact).

355. *McCleskey*, 753 F.2d at 892. Addressing the disparity issue, given its existence in the system, the court ruled that a discretionary system necessarily entails "some imprecision." *Id.* at 897-98; see also *McGautha v. California*, 402 U.S. 183 (1971) (holding that a jury may constitutionally exercise untrammelled discretion in the imposition of the death penalty in capital cases).

The exercise of discretion, according to the *McCleskey* court, "means that persons exercising discretion may reach different results from exact duplicates." *McCleskey*, 753 F.2d at 898. Because the *McCleskey* court mischaracterized the 6% differential as "marginal," it demanded that the petitioner prove that the disparity was a function of racial bias. *Id.* at 899.

356. The Eleventh Circuit's interpretation of the disparity figures clearly was misguided. It seems, therefore, that a proper interpretation of the disparity figures might have compelled the court to draw an inference of discriminatory intent. See *infra* notes 365-70 and accompanying text.

357. Judge Johnson, dissenting from the Eleventh Circuit's affirmation of the district court's decision, stated, "Several of the imperfections noted by the district court were not legally significant because of their minimal effect." *McCleskey*, 753 F.2d at 915 (Johnson, J., dissenting). He further stated that "[t]he race of the victim was uncertain in 6% of the cases at most; penalty trial information was unavailable in the same percentage of cases. The relatively small amount of missing data, combined with the large number of variables used in several of the models, should have led the court to rely on the study." *Id.* (footnotes omitted).

358. The district court took the position that the study's regression models did not include all of the relevant variables. In *Bazemore v. Friday*, however, the Supreme Court indicated that multiple regression evidence need only include the major variables. 106 S. Ct 3000 (1986).

359. The trial court concluded that the r^2 measurement rendered the 230-variable regression model invalid. Judge Johnson, dissenting in the court of appeals opinion, pointed out that the court "based that finding on the fact that a model with an r^2 less than .5 'does not predict the outcome in half of the cases.'" *McCleskey*, 753 F.2d at 917 n.27. He stated further, "This is an inaccurate statement, for an r^2 actually represents the percentage of the original 11-to-1 differential explained by all the independent variables combined. A model

ever, are tenuous.³⁶¹

In addition to these shortcomings in both courts' analyses, they were mistaken in the belief that the 6% disparity was inflated, rather than underestimated. The 6% figure is a composite of all cases including those in the low aggravation range.³⁶² The effect of including low range cases in the regression analysis, however, would tend to reduce the regression coefficient, because the average actual sentencing rate for the lower two of eight levels of aggravation was zero. Approximately 19% of the cases fell within this range.³⁶³

The discretion of a sentencer is effectively limited in the low aggravation range because the level of aggravating circumstances does not rise to the level where the sentencer imposes the death penalty. The low range cases, absent sentencer discretion, are of little consequence to the determination of the existence of systemic racial discrimination. Yet, cases in this range are still reflected in the composite.

More significantly, the court of appeals's interpretation of another aspect of the 6% disparity figure demonstrates a critical lack of statistical expertise. The court viewed this figure as a percentage increase in the rate of sentencing attributable to the race of the victim. A 6% increase in the likelihood of a defendant receiving the death sentence did not appear egregious to the court, as evidenced by the court's refusal to reverse the decision of the district court.³⁶⁴

If one properly interprets the disparity figure, however, it repre-

with an r^2 of less than .5 would not necessarily fail to predict the outcome in half the cases because the model improves upon pure chance as a way of correctly predicting an outcome. For dichotomous outcomes (i.e., the death penalty is imposed or it is not), random predictions could succeed half the time." *Id.*

360. It is doubtful that the effects of multi-collinearity were so significant as to justify invalidating the results of the study. Experts testified that multi-collinearity decreases the standard deviation of the regression coefficients, which in turn reduces the statistical significance. *McCleskey v. Zant*, 580 F. Supp. 338, 364 (N.D. Ga. 1984), *rev'd sub nom. McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985), *cert. granted*, 106 S. Ct. 3331 (1986). The result is a dampening of the effect of the racial variable. *Id.* The conclusion of this argument is that the "6%" figure is actually an *underestimate* of the racial discrimination operating in the capital sentencing system.

361. *See supra* notes 357-360.

362. *McCleskey*, 753 F.2d at 896.

363. Out of 472 cases, covering 8 levels of aggravating circumstances, 89, or 19%, fell within the two lowest levels. Of these cases, none received the death sentence. Out of the total number of cases, 116, or 25%, received the death sentence. *Id.* at 922 (Hatchett, J., dissenting in part, concurring in part).

364. The figure, even as interpreted by the court, still raises serious questions as to constitutional tolerance because the likelihood of a death sentence would be increased based on an illegitimate consideration. That is, a person's race would be a factor which demonstrably impacts on the likelihood of a death sentence. Allowing for a constitutionally acceptable level of consideration of constitutionally impermissible factors is a contradiction in terms.

sents a *six percentage point increase* in the rate of sentencing.³⁶⁵ As previously discussed, the death sentencing rate in white victim cases is 11%. The regression model used in the Baldus Study indicated that the overall rate in comparably aggravated black-victim cases is 5%, which reveals the six percentage point differential.³⁶⁶ If the six percentage point disparity exists in fact, then “at the average level of aggravating and mitigating circumstances represented by the white-victim cases, the rate of capital sentencing in a white-victim case is 120% greater than the rate in a black-victim case.”³⁶⁷ Stated another way, the defendant is 2.2 times more likely to receive the death penalty if the victim is white as opposed to black. This would mean that for “six out of every 11 death penalty cases in which the victim was white, race-of-victim was a determining aggravating factor in the sense that the defendants would not have received the death penalty if the victims had been black.”³⁶⁸ Additionally, in the case of the 20% disparity in “mid-range” cases, there would be a 139% increase in the rate of capital sentencing.³⁶⁹ A “mid-range” defendant, therefore, is 2.4 times more likely to receive the death sentence if his victim is white rather than black. In this case, it would mean that “out of every 34 death-penalty cases in the mid-range in which victims were white, 20 defendants would not have received the death penalty if their victims had been black.”³⁷⁰

Not only did the Eleventh Circuit misunderstand the statistics,³⁷¹ but it also affirmed the lower court after giving only cursory treatment to its findings of fact, notwithstanding the lower court’s misconstruction of the study.³⁷² To justify its reluctance to engage in an

365. Brief Amici Curiae for Dr. Franklin M. Fisher, *supra* note 336, at 17.

366. *Id.* at 18.

367. *Id.*

368. *Id.* at 19.

369. *Id.*

370. *Id.*

371. Another possible defect in the court’s opinion is its implied analogy between the 6% figure and the disparities in jury selection cases. In *Swain v. Alabama*, a leading jury selection case, the Court viewed a showing of a 10% disparity in representation as insufficient to establish a claim of discrimination. 380 U.S. 202 (1965). The *McCleskey* court apparently viewed this as support for its rejection of the 6% figure. This analogy, however, is ill-formed. The 10% figure indicated a ten point disparity in rate of representation, while in the *McCleskey* case, the 6% figure indicated a disparity in the rate of selection. The figures, therefore, measure disparities entirely different in kind. A direct comparison of the two measures would be misleading. Gross, *supra* note 336, at 1298.

372. Alternatively, the court of appeals reviewed the decision of the district court under an analysis assuming the validity of the study. *McCleskey*, 753 F.2d at 895. Thus, the court may not only have been unwilling to analyze the data, but apparently was not averse to emasculating future statistical challenges in advance.

Another possible explanation for the courts’ treatment of the Baldus Study may be a lack

independent analysis of the data, the court invoked the "clearly erroneous" standard of review.³⁷³ It appears, however, that the court may have been predisposed to reject the statistical evidence. In the court's opinion, "[g]eneralized studies would appear to have little hope of excluding every possible factor that might make a difference between crimes and defendants, exclusive of race."³⁷⁴

Due to the quality of the Baldus Study, the *McCleskey* decision may have particularly significant implications. By declining to disturb the invalidation of one of the most ambitious and comprehensive studies of racial bias,³⁷⁵ the *McCleskey* court may have implicitly set an unattainable standard of methodology for proving racial discrimi-

of judicial expertise in statistics. See generally Kaye, *Statistical Evidence of Discrimination*, 77 J. AM. STATISTICAL A. 773 (1982) (criticizing the courts' lack of expertise in handling statistics); Korn, *Law, Fact, and Science in the Courts*, 66 COLUM. L. REV. 1080 (1966) (problems in the transmission of technical information to the courts); cf. Lempert, *Statistics in the Courtroom: Building on Rubenfeld*, 85 COLUM. L. REV. 1098 (1985) (statisticians and attorneys need to learn more about the proper use of statistics and the law); Comment, *supra* note 216 (attorneys and judges often lack the mathematical skills and inclinations to use statistics properly and attorneys often lay improper foundations for statistical evidence).

Because statistical evidence is often complicated, confusing, highly technical, and capable of multiple interpretations, considerable expertise is required. For a discussion of statistical techniques used in discrimination cases, see D. BALDUS, *STATISTICAL PROOF OF DISCRIMINATION* (1980).

It cannot be denied that inaccuracies in statistical studies do sometimes exist. See generally Fisher, *Multiple Regression in Legal Proceedings*, 80 COLUM. L. REV. 702 (1980) (studies often do not control for additional variables or for the relationship between variables, and experts often do not elucidate the hypotheses of their models); Tribe, *supra* note 220 (statistics carry a high risk of misuse, and mathematical devices sometimes destroy societal values in trial conduct); Note, *supra* note 211 (mistakes made in the planning stages may invalidate statistical studies).

The inherent fallibility of statistics, perceived or actual, may have provided impetus to the courts' rejection of the Baldus Study. Scholars have frequently examined the attitudes of the judiciary and lawyers toward statistical evidence. See, e.g., Dawson, *supra* note 208 (problems created by judicial attitudes toward the role of statisticians as expert witnesses); Hallack, *The Numbers Game—The Use and Misuse of Statistics in Civil Rights Litigation*, 23 VILL. L. REV. 5 (1977) (inherent limitations in the probative value of statistics have created an environment of judicial caution); Wilson, *The Use of Statistics and Statisticians in the Litigation Process*, 20 JURIMETRICS J. 109 (1979) (mistrust of statistics and awareness of potential for misuse and distortion have led the courts to limit the use of statistics). The courts' distaste for the abuses of statistics, however, does not provide a satisfactory or conscionable explanation for the outright rejection of statistical evidence of racial bias in capital sentencing.

373. Review under the "clearly erroneous" standard may actually bring about opposite results in future cases. If trial courts find studies valid, appellate courts, predisposed toward rejecting such findings, will have difficulty doing so.

374. *McCleskey*, 753 F.2d at 894.

375. Experts have characterized the Baldus Study as "far and away the most complete analysis of sentencing" ever carried out. *McCleskey*, 753 F.2d at 907-08 n.1 (Johnson, J., dissenting in part, concurring in part) (quoting Dr. Richard Berk, member of the panel of the National Academy of Sciences charged with reviewing and developing standards for criminal sentencing research).

nation in capital sentencing. If the court did not consider *this* study valid and reliable, then, in essence, the court may have effectively precluded the introduction of *all* empirical evidence of such discrimination.

V. CONCLUSION

If people are sentenced to death based upon their race or the race of their victims, their executions must be considered grave injustices, made more unjust by judicial indifference. Criminal defendants should not live or die because of the color of their victims, anymore than they should live or die because of their own color. If *McCleskey* is right, then Georgia, by the unspoken racial animus of its prosecutors, judges, and juries, has made race a "silent" aggravating circumstance in death sentencing. The Supreme Court has stated that to do so overtly would be impermissible,³⁷⁶ and Georgia should not be permitted to do indirectly what it cannot do directly.

It may be true that racial discrimination is deeply, if not inextricably, rooted in the subconscious of our society. Judges may despair of ever finding a way to prevent sentencers, in the necessary exercise of their discretion, from considering race in the sentencing decision. This does not justify fixing a constitutional seal of approval upon such a repugnant practice, especially in a context as severe as death sentencing.

Courts should not take formal account of race hatred simply because it exists.³⁷⁷ This is a core principle of equal protection, and is no less applicable to a death sentencing system than to a judge's child-custody decision,³⁷⁸ or to a city council's zoning ordinance.³⁷⁹ Judges should not be permitted to throw up their hands when solutions are difficult: the Court should not approve a sentencing system that metes out a higher penalty for killing a white man rather than a black man. To do so, in effect, would resurrect the despised Black Codes,³⁸⁰ in a subtle, but unconvincing disguise.

In deciding *McCleskey*, the Supreme Court must come to terms with the apparently contradictory goals of eliminating arbitrariness

376. See *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (If "Georgia attached the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as . . . the race . . . of the defendant . . . due process of law would require that the jury's decision to impose death be set aside.").

377. *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249 (1985); *Palmore v. Sidotti*, 466 U.S. 429 (1984).

378. *Palmore v. Sidotti*, 466 U.S. 429 (1984).

379. *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249 (1985).

380. See *supra* note 152 and accompanying text (discussion of the Black Codes).

and preserving a death sentencing system that permits human discretion. The Eleventh Circuit attempted to protect the "new" death penalty by making McCleskey's claim impossible to prove. In light of the severity and irreversibility of the death penalty, this solution is, at best, disingenuous, and at worst, constitutionally intolerable.

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