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# The Loss of Constitutional Faith: *McCleskey v. Kemp* and the Dark Side of Procedure

Scott E. Sundby\*

If one is known by the company that one keeps, Justice Powell no doubt wished for far better company for one of his final decisions, *McCleskey v. Kemp*.<sup>1</sup> After the opinion's release, legal and lay commentators quickly compared *McCleskey* to infamous decisions like *Dred Scott*, *Korematsu*, and *Plessy*.<sup>2</sup> And a quarter of a century later, *McCleskey* has become firmly entrenched as a resident in the exclusive but not so desirable neighborhood of Notorious Cases, joined by a few new arrivals like *Bowers v. Hardwick*.<sup>3</sup> Especially in the criminal law area, a legal scholar can invoke *McCleskey* confident that the reader will understand that the case is being used as shorthand for 'cases in which the Supreme Court failed the Constitution's most basic values.'

This raises the intriguing question of how Lewis F. Powell, Jr., a Justice known for his cautious, incremental decisions, could come to author an opinion upon which so much opprobrium has been heaped. If one were to have wagered prior to *McCleskey* which Justice would write an opinion that would generate such a backlash, the genteel Justice Powell who often sought to thread the needle of

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\* Professor of Law and Dean's Scholar, University of Miami School of Law. Many thanks are owed to John Jacob, the archivist of the Lewis F. Powell Archives, for his always helpful assistance in tracking down needed materials. This article benefited greatly from a faculty workshop at the University of Georgia School of Law and from comments by Professors Susan Bandes, David Bruck, Russell Gabriel, J.D. King, and Joseph Miller. All mistakes and views are solely the author's.

<sup>1</sup> *McCleskey v. Kemp*, 481 U.S. 279 (1987).

<sup>2</sup> See, e.g., Anthony G. Amsterdam, *Race and the Death Penalty Before and After McCleskey*, 39 COLUM. HUM. RTS. L. REV. 34, 47 (2007) ("*McCleskey* is the *Dred Scott* decision of our time."); Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1389 (1988) ("Professor Bedau does not exaggerate when he compares *McCleskey* to *Plessy* and *Korematsu*."); Bryan Stevenson, *Keynote Address, Symposium: Race to Execution*, 53 DEPAUL L. REV. 1699, 1707 (2004) (describing *McCleskey* as the *Plessy* and *Dred Scott* decisions "of our generation."); Hugo Adam Bedau, *Someday McCleskey Will Be Death Penalty's Dred Scott*, L.A. TIMES (May 1, 1987) [http://articles.latimes.com/1987-05-01/local/me-1592\\_1\\_death-penalty](http://articles.latimes.com/1987-05-01/local/me-1592_1_death-penalty). New York Times columnist Anthony Lewis did much to draw public attention to the decision immediately after its release, stating that *McCleskey*, "effectively condoned the expression of racism in a profound aspect of our law." Anthony Lewis, *Bowing to Racism*, N.Y. TIMES (April 28, 1987), <http://www.nytimes.com/1987/04/28/opinion/abroad-at-home-bowing-to-racism.html>.

<sup>3</sup> In a 2008 survey of the worst Supreme Court decisions in recent decades, *McCleskey* was in the top tier among "liberal" legal commentators. See David G. Savage, *Supreme Court Report: How Did They Get It So Wrong?*, 95 A.B.A. J. 20 (Jan. 2009).

compromise would have commanded very long odds indeed. This was the Justice, after all, who joined the opinion in *Gregg v. Georgia*<sup>4</sup> upholding the new regime of “guided discretion” death penalty statutes, but then tried to find a novel way to not affirm those death sentences already imposed in “an attempt to distance himself from the consequences of his own acts.”<sup>5</sup>

Nor in the end did Justice Powell rest easy with the decision. Just four years afterwards, Justice Powell famously said “*McCleskey*” when asked if there was a case in which he would change his vote if given an opportunity.<sup>6</sup> In giving his answer, he did not attribute his change of heart to an acceptance of McCleskey’s statistical argument but to an overall disillusionment with the death penalty and the byzantine legal process that had grown up around it.<sup>7</sup> And this in many ways was his reasoning in *McCleskey* coming full circle. For while we will see that a number of factors were at work in producing the opinion, this Article will suggest that it was largely Powell’s belief in the legal process and its actors, coupled with his distrust of “statistical jurisprudence,” that drove his resistance to McCleskey’s arguments. Indeed, one of the lessons that our examination of *McCleskey* will teach is that procedure, despite its many benefits, can also have a dark side if it becomes a veneer behind which injustice is obscured.

In exploring Justice Powell’s *McCleskey* opinion, this Article’s goal is to better understand the makings of the opinion and why it came to be perceived in such a negative light. In trying to unpack the opinion, this Article relies extensively on Justice Powell’s papers, looking at his memoranda and in-chamber communications with the clerks working on the opinion. This effort is not an attempt to psychoanalyze Justice Powell, but to explore how the opinion came to be written in a manner that engendered such unremitting criticism. As part of its exploration, the Article also focuses on the underlying messages that Powell’s opinion can be seen as communicating to its audience,<sup>8</sup> messages that it will be argued triggered a loss of constitutional faith for many. The Article will pay particular attention to Part Five of Powell’s opinion that has received relatively little attention in how it shaped reaction to the decision. In Part Five, Powell made a slippery slope argument that if McCleskey’s statistical challenge was allowed to prevail, his claim had the potential to bring down the entire criminal justice system. This line of reasoning it will be argued was a major rhetorical misstep and heightened the loss of constitutional faith. By examining Powell’s opinion, the hope is to shed some insight both into a specific understanding of why *McCleskey* failed as an opinion and, more generally, into how we interact with judicial

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<sup>4</sup> *Gregg v. Georgia*, 428 U.S. 153, 158 (1976).

<sup>5</sup> JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 427–29 (1994).

<sup>6</sup> *Id.* at 451.

<sup>7</sup> *Id.* at 451–52.

<sup>8</sup> For an insightful look at the different rhetorical strategies used by Justice Powell in writing the opinion, see Anthony Amsterdam & Jerome S. Bruner, *The Rhetorics of Death: McCleskey v. Kemp*, in *MINDING THE LAW* 195 (2001).

decisions and the messages they convey.

## I. THE MAKING OF *McCLESKEY* v. *KEMP*

### A. *Furman*, *Gregg*, and the Rise of “Guided Discretion”

A brief recounting of the death penalty leading up to *McCleskey* is a critical reminder of why the case held such import. In 1972, the Court in *Furman v. Georgia*<sup>9</sup> by a five-to-four vote had struck down capital punishment statutes across the country as violating the Eighth Amendment. Prior to *Furman*, the states’ capital punishment statutes gave unfettered discretion to the jury over whether to impose a death sentence in a capital case. In the years leading up to *Furman*, however, an interesting phenomenon was beginning to occur: the number of death sentences was declining and executions were only being rarely carried out. This decline was happening despite expansive capital punishment statutes that on their face encompassed a large number of murders and in some states even extended to crimes like rape and kidnapping.<sup>10</sup> The fact that death sentences were being meted out to only a fraction of those who were eligible raised troubling questions about how and on whom capital punishment was being imposed. Finally, after one false pass,<sup>11</sup> the Court in *Furman* struck down all existing death penalty statutes as violating the Eighth Amendment because they were “arbitrary and capricious.”

Although the *Furman* decision was highly fragmented with each Justice writing a separate opinion, the majority was united in agreeing, as Justice White wrote, that “no meaningful basis [existed] for distinguishing the few cases in which it is imposed from the many cases in which it is not.”<sup>12</sup> Or, as Justice Stewart’s famous line vividly described the problem, “These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”<sup>13</sup> But while Justice Stewart’s line was poignant, in reality it was not the most accurate metaphor, because if death sentences were lightning bolts, then lightning had an eerily consistent way of striking those who were black, poor, or disadvantaged.

Indeed, *Furman* was the culmination of a litigation strategy led by Anthony Amsterdam that had highlighted the inequities of how capital punishment was

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<sup>9</sup> *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>10</sup> For the decade preceding *Furman*, approximately one hundred death sentences were imposed on average annually, see *Gregg v. Georgia*, 428 U.S. 153, 182 n.26 (1976), and only ten executions were carried out between 1965 and 1972, see JEFFRIES, *supra* note 5, at 407.

<sup>11</sup> The Court in *McGautha v. California*, 402 U.S. 183 (1971), by a 6–3 margin had rejected arguments almost identical to those later made in *Furman* but brought under the Due Process clause rather than the Eighth Amendment; see also *infra* note 20.

<sup>12</sup> *Furman*, 408 U.S. at 313 (White, J., concurring) (emphasis added).

<sup>13</sup> *Id.* at 309 (Stewart, J., concurring).

being administered by juries and judges.<sup>14</sup> At the fore of these inequities was racial inequality. The starkest picture of racial bias emerged by looking at how the death penalty was applied in states that made rape a capital offense (two of the three petitioners in *Furman*, all of whom were black, were on death row for rape). Of 455 persons executed for rape between 1930–65, all but fifty were African-Americans,<sup>15</sup> and all were in states with a history of racial discrimination.<sup>16</sup> Moreover, while elaborate statistical studies like the one presented in *McCleskey* twenty-five years later did not exist, studies had found that racial bias was entering the death penalty process in different states.<sup>17</sup> The discriminatory fashion in which the death penalty was being imposed was thus the backdrop against which the Court's finding that the current system was arbitrary and capricious had been projected.

With popular support for the death penalty in the United States waning,<sup>18</sup> many expected that *Furman* spelled the end of capital punishment. Justices White and Stewart both appeared to have expected that states would not try to implement new statutes.<sup>19</sup> And given that the Court a year earlier had declared that any attempt to guide the death penalty decision was an impossible task,<sup>20</sup> it was unclear what such an effort would even look like. But the vacuum created by *Furman* was quickly filled by states rushing to pass new statutes, with most states using the Model Penal Code as a blueprint to hammer together “guided discretion” statutes that attempted to meet *Furman*'s critique.<sup>21</sup> These statutes tried to constrain sentencer discretion by specifying certain “aggravating factors” that had to be found before a defendant became eligible for the death penalty (for example, that the killing was of a police officer during the course of her duties), and by requiring that the aggravating factors were to be weighed against mitigating factors that also were often specified in the statute. The key question, of course, was whether these schemes could now provide a “meaningful basis” to distinguish who received the death penalty from those who did not.

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<sup>14</sup> JEFFRIES, *supra* note 5, at 408; Amsterdam & Bruner, *supra* note 8, at 195

<sup>15</sup> *Furman*, 408 U.S. at 364 (Marshall, J., concurring).

<sup>16</sup> JEFFRIES, *supra* note 5, at 407.

<sup>17</sup> See, e.g., Marvin E. Wolfgang & Marc Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS 119 (1973) (study finding racial bias in Arkansas's administration of the death penalty for rape that was presented to federal courts and considered in *Maxwell v. Bishop*, 398 F.2d 138 (1968)).

<sup>18</sup> See Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 33–34 (2007) (documenting the ebbing support for the death penalty leading up to *Furman*).

<sup>19</sup> JEFFRIES, *supra* note 5, at 413–14.

<sup>20</sup> *McGautha v. California*, 402 U.S. 183, 204–07 (1971) (“To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and so express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.”).

<sup>21</sup> Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1152–53 (1991).

In 1976, the Court in *Gregg v. Georgia* and its companion cases gave constitutional approval to the guided discretion statutes as satisfying the deficiencies that *Furman* had identified.<sup>22</sup> Although acknowledging that avenues remained through which unbridled discretion could find a way in, such as prosecutorial and jury discretion, the plurality opinion placed its confidence in the Georgia statute's procedures to ensure that the Georgia death penalty scheme would not be "wholly arbitrary and capricious." These procedures included not only the narrowing function of the aggravating factors and the weighing of mitigating and aggravating circumstances, but that the Georgia Supreme Court would be reviewing every death sentence to ensure that it was proportional to other death sentences being handed down.

#### B. *The Baldus Study: To Accept or Not Accept*

Having identified the guided discretion scheme as the cure for the *Furman* deficiencies, the Court labored in the ensuing decade to keep the system constitutionally afloat through a number of decisions. Evidence, however, quickly began accumulating that such fixes were more akin to judicial duct tape than fine-tuning. Cases began emerging that highlighted how the human actors in the system—defense attorneys, prosecutors, and juries—were portals through which arbitrariness was seeping back into the death penalty process. While some defense attorneys were honing the art of presenting the defendant's case for life, far too many were displaying a staggering level of incompetence, ranging from failing to present any mitigation to actively selling out their clients to the jury or appearing in court drunk or high.<sup>23</sup> Moreover, it soon became apparent that the death penalty was being sought disproportionately by certain prosecutors and primarily in cases with black defendants and white victims.<sup>24</sup> And as if the combination of incompetent defense counsel and prosecutors disproportionately seeking the death penalty in black-on-white killings was not sufficiently potent, blacks were underrepresented on the juries handing down death sentences both because of underrepresentation in the venire<sup>25</sup> and the use of peremptory challenges to exclude potential black jurors.<sup>26</sup> The challenge for death-penalty opponents,

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<sup>22</sup> *Gregg v. Georgia*, 428 U.S. 153, 196–98 (1976).

<sup>23</sup> For an overview of the dismal state of capital representation for many defendants, see Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

<sup>24</sup> The role of prosecutorial discretion in skewing the death penalty towards black-on-white killings was a central finding of the empirical studies at issue in *McCleskey v. Kemp*, 481 U.S. 279, 356 (1987) (Blackmun, J., dissenting) (black-on-white killings advance to the penalty stage at over three times the rate of white-on-black killings).

<sup>25</sup> See *Amadeo v. Zant*, 486 U.S. 214, 217 (1988) (deliberate manipulation of master jury list to underrepresent black jurors without triggering Sixth Amendment challenge).

<sup>26</sup> See generally, David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3 (2001).

therefore, was translating what was happening in individual courthouses around Georgia and other states into a systematic analysis that demonstrated that the *Gregg* death penalty system was not the cure-all that the Court had hoped.<sup>27</sup>

The answer came in the form of a comprehensive study performed by David Baldus that examined over two thousand cases from Georgia from 1973 and 1979.<sup>28</sup> After controlling for 230 variables that might influence a death sentence, Baldus found that a defendant who killed a white victim was 4.3 times more likely to be sentenced to death than a defendant who killed a black victim. This meant the victim's race was a *more* powerful factor in producing a death sentence than whether the defendant was the "prime mover" behind the homicide (which made a death sentence 2.3 times more likely) and only slightly less important than a prior conviction for murder, armed robbery, or rape in increasing the odds of a death sentence (4.9 times more likely).<sup>29</sup> Baldus further found that the effect of the victim's race was most pronounced where a case fell within the middle range of capital murders, rather than being either extremely aggravated or mitigated.<sup>30</sup> It was in this intermediate range of cases that jurors' discretion over whether to impose a death sentence was at its greatest as they weighed aggravating and mitigating circumstances.

The Baldus study eventually found its way to the Supreme Court through the case of Warren McCleskey, a young black man convicted in Fulton County, Georgia of killing a white police officer during a robbery gone awry. McCleskey introduced the Baldus study as part of his habeas petition in federal district court and argued that the study showed that his death sentence violated the Equal Protection Clause and the Eighth Amendment. The claims were particularly potent because if accepted they would place the death penalty between a constitutional rock and a hard place. If racial bias was seeping in through the exercise of the jury's discretion, the only realistic remedy would be to take away the jury's discretion. Yet, the Court had held in earlier cases that sentencer discretion was constitutionally required under the Eighth Amendment principle of "individualized consideration."<sup>31</sup> At most, then, a state might attempt to restrict capital cases to only the most aggravated cases, the type of case where the Baldus study found the

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<sup>27</sup> Amsterdam & Bruner, *supra* note 8, at 199 (describing involvement of Legal Defense Fund in *McCleskey*).

<sup>28</sup> The Baldus study actually consisted of two separate studies that each examined Georgia homicide cases between 1973 and 1979; the two studies are generally referred to collectively as the Baldus study. For a summary of the study's methodology and findings, see generally *id.* at 199–201.

<sup>29</sup> *McCleskey*, 481 U.S. at 355 n.9–10 (Blackmun, J., dissenting).

<sup>30</sup> As the dissent summarized: "In [the intermediate] cases, death is imposed in 34% of white-victim crimes and 14% of black-victim crimes, a difference of 139% in the rate of imposition of the death penalty . . . . In other words, just under 59%—almost 6 in 10—defendants comparable to *McCleskey* would not have received the death penalty if their victims had been black." *Id.* at 325.

<sup>31</sup> See *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976); see also *Roberts v. Louisiana*, 428 U.S. 325, 333 (1976) (striking down mandatory death penalty schemes). See also generally Sundby, *supra* note 21, at 1168–86.

effect of racial bias to be least pervasive.<sup>32</sup> If McCleskey's claim succeeded, therefore, the death penalty either would be constitutionally abolished or at least dramatically reduced in scope.

The District Court's reaction provided an early indication that the Baldus study's challenge to a regime that the courts had labored mightily to put in place was likely to meet stiff judicial resistance. Despite empiricists and statisticians of high standing having attested to the Baldus study's design and execution,<sup>33</sup> Judge Forrester found that the study was not based on "good statistical methodology."<sup>34</sup> In particular, the District Court appeared to reject the basic idea of statistical analysis as a method for identifying factors at work through the canvassing of a large number of cases rather than being able to account for "absolute knowledge" in every case.<sup>35</sup> The District Court was especially skeptical of the ability to identify through statistical analysis all of the nuances that enter the death penalty decision. Judge Forrester concluded that the Baldus study was methodologically flawed and failed to prove McCleskey's claim that the victim's race was infecting the death penalty decision.<sup>36</sup>

In an en banc decision, the Eleventh Circuit declined to immerse itself in the District Court's findings concerning methodology that would require grappling with "P values" and random stratified samples. Instead, the Eleventh Circuit opted to assume that the Baldus study was methodologically sound and statistically valid. In the end, however, this did not benefit McCleskey. The appellate court concluded that, even if methodologically sound, Baldus's findings failed to prove the intentional discrimination that the majority believed necessary to find either an Equal Protection or Eighth Amendment violation. With the District Court and Eleventh Circuit having rejected McCleskey's claim, the stage was set for the Supreme Court.

Powell expressed a tentative willingness to hear the case when it arrived at the Court in the summer of 1985. He had handwritten "A majority of CA11 rejected the study[,] but perhaps we should grant on this issue" at the top of a clerk's

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<sup>32</sup> Justice Stevens in his *McCleskey* dissent suggested that a statute limiting the death penalty to the most aggravated cases would be constitutional given the Baldus study's findings that racial disparity was primarily in the intermediate range of cases. *Id.* at 481 U.S. at 367 (Stevens, J., dissenting). For an example of a later effort to write a statute that limited the death penalty to a narrow band of aggravated cases, see *Toward A Model Death Penalty Code: The Massachusetts Governor's Council Report*, 80 IND. L.J. 1, 4 (2005).

<sup>33</sup> See Kennedy, *supra* note 2, at 1399–1400 (summarizing "distinguished researchers" analysis of the Baldus study).

<sup>34</sup> *McCleskey v. Zant*, 580 F. Supp. 338, 351 (N.D. Ga. 1984).

<sup>35</sup> Kennedy, *supra* note 2, at 1400.

<sup>36</sup> The District Court had in fact granted habeas relief to McCleskey based on a "*Giglio*" violation. The Eleventh Circuit, however, had reversed the habeas grant finding that, if error had occurred, it was harmless. Justice Powell found the *Giglio* issue "troublesome" but ultimately agreed with the Eleventh Circuit that any error was harmless. Preliminary Memo (Sept. 30, 1985) [hereinafter *Preliminary Memo*], at 13, in *MCCLESKEY V. KEMP BASIC FILE 1*, 13 available at <http://law.wlu.edu/deptimages/powell%20archives/McCleskeyKempBasic.pdf>.



preliminary memo on whether to grant certiorari.<sup>37</sup> The clerk who had written the initial memo had not taken a position on whether to grant certiorari, but another clerk wrote a supplemental memo to further explain the Baldus study.<sup>38</sup> The supplemental memo was much more supportive of McCleskey's claim, citing the dissenting opinion from the Eleventh Circuit for the proposition that intentional discrimination should not be necessary to prove an Eighth Amendment claim. The supplemental memo also took on the District Court opinion in which the judge had found Baldus's study to be invalid as a matter of methodology, concluding that, "in my opinion, the district court was clearly erroneous in ruling that the study was invalid. The finding of the court is replete with errors and misunderstandings of statistical analysis (a common danger in this field). It should not be an impediment to a review of the Baldus study if this Court wishes." This memo triggered a handwritten question from Powell that was to later become one of the major foundations for his opinion: "What if one accepts the study as reflecting sound statistical analysis? Would this require that no blacks be sentenced to death where victim was white?"<sup>39</sup> This question and other implications of the Baldus study, however, had to wait because McCleskey's case was held over pending a Supreme Court decision on another issue.<sup>40</sup>

By the time the case was active again the following summer, Powell had decided to actively oppose granting certiorari, circulating to the Court a four-page memo outlining his reasons for why certiorari should be denied.<sup>41</sup> Although by his own admission Powell's "understanding of statistical analysis—particularly what is called regression analysis—range[d] from limited to zero,"<sup>42</sup> he expressed his

<sup>37</sup> *Id.*

<sup>38</sup> Supplemental Statement to Preliminary Memo (no date provided) [hereinafter *Supplemental Statement*], at 1, in MCCLESKEY v. KEMP BASIC FILE 16, 16, available at <http://law.wlu.edu/deptimages/powell%20archives/McCleskeyKempBasic.pdf>.

<sup>39</sup> *Id.* at 17.

<sup>40</sup> The Court held the case to await a decision in *Rose v. Clark*, 478 U.S. 570 (1986), on whether an instruction in violation of *Sandstrom v. Montana*, 442 U.S. 510 (1979), could be harmless error. *McCleskey* also was making a *Sandstrom* claim. Conference Voting Sheet (September 30, 1985) [hereinafter *9/30 Voting*], at 1, in MCCLESKEY v. KEMP BASIC FILE 15, 15, available at <http://law.wlu.edu/deptimages/powell%20archives/McCleskeyKempBasic.pdf>.

<sup>41</sup> Memorandum to the Conference (June 27, 1986) [hereinafter *Powell 6/27/86 Memo*], at 1–4, in MCCLESKEY v. KEMP BASIC FILE 19, 19–22, available at <http://law.wlu.edu/deptimages/powell%20archives/McCleskeyKempBasic.pdf>.

<sup>42</sup> Memo to Law Clerk (Sept. 16, 1986) [hereinafter *9/16/86 Memo*], at 1, in MCCLESKEY v. KEMP BASIC FILE 27, 27, available at <http://law.wlu.edu/deptimages/powell%20archives/McCleskeyKempBasic.pdf>. Nor did this appear to be a statement of false modesty. Powell would note at various points on clerks' memos and opinion drafts the need for explanation of statistical concepts like  $r^2$  values; see, e.g., Powell's Handwritten Notes on Draft Opinion (Oct. 11, 1986) [hereinafter *Powell Draft Opinion*], at 1, in MCCLESKEY v. KEMP BASIC FILE 124, 124, available at <http://law.wlu.edu/deptimages/powell%20archives/McCleskeyKempBasic.pdf> ("Is there a brief definition of 'regression analysis'?" and "what are 'r<sup>2</sup>' measures[?]"). Almost always encouraging in his feedback to the clerks, Powell went out of his way to praise his clerks for their work concerning

core doubts about the ability of the Baldus study to measure all of the variables that go into the death penalty decision. In expressing his skepticism of the statistical mission of the Baldus study, Powell echoed the District Court, whose opinion he stated he admired, and argued that because “juries and judges are constitutionally required to consider a host of individual-specific circumstances,”<sup>43</sup> then “[n]o study can take all of these individual circumstances into account, precisely because they are fact-specific to each defendant.”<sup>44</sup> He further argued that because aggravating and mitigating circumstances will vary from case to case, “the Baldus study [can]not eliminate the possibility that the unexplained disparity is due to these kinds of permissible factors rather than race.”<sup>45</sup> Thus while Powell did not pretend to have the statistical background to critique and determine on his own that Baldus’s study was flawed, he was inclined to agree with the District Court “as to the unreliability of Baldus.”<sup>46</sup>

More directly critical of the Baldus study itself was Justice White.<sup>47</sup> Also admiring of the District Court’s “impressive performance,” and noting that the District Court Judge had a Bachelor of Science degree from Georgia Tech, White believed that the District Court opinion successfully “took the Baldus study apart piece by piece.”<sup>48</sup> White characterized the petitioners as having “offered nothing

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the statistics; see, e.g., Powell Memorandum, (November 11, 1986), at 1, in MCCLESKEY V. KEMP BASIC FILE 124, 124, available at <http://law.wlu.edu/deptimages/powell%20archives/McCleskeyKempBasic.pdf>. (“Your description of the Baldus studies impresses me because I could not have possibly written it.”).

Interestingly, despite Justice Powell’s aversion to statistics in *McCleskey*, he employed sophisticated economic analysis in writing several influential antitrust opinions. See E. Thomas Sullivan & Robert B. Thompson, *Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571, 1609–10 (2004) (describing Powell’s active role in creating an efficiency rationale for antitrust cases before the Court). While not the same as statistical methodology, one might wonder whether Powell’s comfort in employing sophisticated economic analysis reflects that a person’s ‘numberphobia’ to some extent tracks one’s ideological priors. Complex theories look helpful and clear when they lead to conclusions that are congenial with our views, but appear confusing and incomplete when leading to conclusions less favorable to our predispositions.

<sup>43</sup> Powell 6/27/86 Memo, *supra* note 41, at 1.

<sup>44</sup> *Id.* at 3. In a footnote, he also noted that Baldus’s pool of cases did not include post-*Lockett* cases which he believed “presumably had a significant, non-discriminatory effect on sentencing proceedings . . . .” *Id.* at 3 n.1. Powell does not elaborate why the expanded discretion provided to juries by *Lockett* would be exercised in a non-discriminatory fashion rather than providing a further portal through which racial attitudes could creep in.

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

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

<sup>47</sup> According to one of Powell’s clerks, Justice White had handed his clerk back a bench memo supporting McCleskey’s claim stating, “This is a very nice memo recommending reversal. Now write one recommending affirmance.” Memorandum to Justice Powell (October 14, 1986), at 4, in MCCLESKEY V. KEMP BASIC FILE 82, 85, available at <http://law.wlu.edu/deptimages/powell%20archives/McCleskeyKempBasic.pdf>.

<sup>48</sup> Justice White Memorandum to the Conference (October 16, 1986) [hereinafter *White Memo*], at 1, in MCCLESKEY V. KEMP BASIC FILE 100, 100, available at

in contravention except to say how careful Professor Baldus was.” Moreover, White was persuaded by the District Court’s finding that the specific data for Fulton County (where McCleskey’s murder had occurred) when compared to the statewide data, was, in Justice White’s words, “woefully inadequate to prove any disparity and was pure conjecture.”<sup>49</sup> While White favored affirming the Eleventh Circuit,<sup>50</sup> if a majority wanted to reverse by finding that a constitutional claim was viable if the Baldus study was valid, he saw a remand as necessary for the Eleventh Circuit to review the District Court’s findings that the Baldus study in fact was flawed. He wrote that such a remand, “may [itself] be cruel and unusual punishment, but it might be hard to find any of the district court’s findings clearly erroneous, Professor Baldus notwithstanding.”<sup>51</sup>

Once certiorari was granted (Stevens, Brennan, Blackmun, and Marshall voting for the grant), Powell ultimately decided that, like the Eleventh Circuit, the best route was to not address the validity of the Baldus study directly, but to assume the study’s validity and decide if the findings established a constitutional violation. In a memo, he outlined two reasons to do so. The first was that he had decided as a matter of law to adopt the position that statistics alone could not prove a constitutional violation: “Apart from the fact that they may be statistically sound, this Court should not undertake—in this or other cases—to determine constitutional cases based on statistics.” The second was more pragmatic: “Moreover, if we found these [statistics] unsound, we would promptly be confronted by new statistical studies.”<sup>52</sup>

Justice Powell might also have started to develop an aversion to the prospect of tackling the District Court’s critique of the Baldus methodology after one of his clerks presented an extensive and favorable analysis of Baldus’s findings. The clerk’s memo pointed out numerous places where the District Court and Eleventh Circuit had misunderstood the Baldus study, and then forcefully argued that “the significance of the Baldus results is not easy to dismiss . . . . The study is of a type well respected by social scientists. Moreover, the results have been confirmed by numerous other scientists conducting similar studies. The consensus of clerks with more statistical experience . . . is that the Baldus study is well done and that the D[istrict] C[ourt] was very wrong in its analysis.” The memo likely made Powell even less willing to enter the dense thicket of multiple regression analysis about which he admittedly understood little and more inclined to simply assume the study’s validity. He wrote an exuberant “I agree!” in the margin next to the clerk’s conclusion that “this Court should not be the forum for an extensive review of

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<http://law.wlu.edu/deptimages/powell%20archives/McCleskeyKempBasic.pdf>.

<sup>49</sup> *Id.* at 105.

<sup>50</sup> *Id.* at 12.

<sup>51</sup> *Id.*

<sup>52</sup> The Constitutional Analysis Memo (October 13, 1986) [hereinafter *Constitutional Analysis*], at 1, in *MCCLESKEY V. KEMP BASIC FILE 69, 69*, available at <http://law.wlu.edu/deptimages/powell%20archives/McCleskeyKempBasic.pdf>.

statistical techniques.”<sup>53</sup>

Although perhaps counterintuitive, the Court’s decision to “assume” the validity of the Baldus study actually put McCleskey’s claims in a disadvantageous position by allowing a skeptical majority to have its analytical cake and eat it too. If the majority had undertaken a review of the study’s methodology and rejected it, they would have been forced to provide a rather uncomfortable explanation of why their statistical understanding was superior to experts in the field who had found it “the most complete and thorough analysis of sentencing that has ever been done.”<sup>54</sup> Instead, by assuming the study’s validity without endorsing it, the majority avoided this analytical discomfort while depriving the study’s findings of much of their persuasive force by only “assuming” the study’s validity. As will be seen, the majority’s approach thus allowed it to play the role of analytical sniper, giving voice at various points to their doubts about the study’s ability to statistically capture the death penalty decision without ever having to confront the study’s methodology directly.<sup>55</sup>

### C. *The Problem of McCleskey’s Facts and the Emotions of Justice*

Adding to McCleskey’s uphill climb in getting the Court to directly grapple with the Baldus study’s findings were the facts of his particular case. Powell and several other Justices were dubious that Baldus had even properly classified McCleskey’s case as falling within the middle range of cases where the influence of the victim’s race was most statistically significant. Echoing the District Court’s findings, Powell noted in a memo that, “At the outset, it is not at all clear to me that Baldus is even relevant to this case” because the case involved the murder of a police officer and no mitigating circumstances.<sup>56</sup> In a later memo, Powell more

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<sup>53</sup> Bench Memorandum (October 1, 1986) [hereinafter *10/1/86 Bench Memorandum*], at 7, in MCCLESKEY V. KEMP BASIC FILE 35, 41, available at <http://law.wlu.edu/deptimages/powell%20archives/McCleskeyKempBasic.pdf>. In a footnote, the clerk also sounded concerns that would arise if the Court attacked the study’s statistical validity, including the appearance of “intellectual dishonesty” given that “[t]he experience of this country with race discrimination, especially in Georgia makes the Baldus study believable . . . . Because the idea that race may enter into sentencing decisions is intuitive, it may appear disingenuous for this Court to reject it on statistical grounds.” *Id.* at 8 n.1.

<sup>54</sup> Kennedy, *supra* note 2, at 1399 & n.41 (quoting testimony of Richard Berk, National Academy of Sciences’ Committee on Sentencing Research).

<sup>55</sup> See *infra* notes 93–105 and accompanying text. In addition to the doubts expressed in the opinion, Justice Powell’s comments in memoranda and other documents made his skepticism clear. At one point, for instance, on a draft of Justice Blackmun’s dissent he underlined a reference to “McCleskey’s experts” and wrote “college kids” in margin. This notation was apparently a less-than-flattering reference to the fact that Baldus had utilized students in collecting and coding data; Blackmun, on the other hand, was clearly referring to Professor Baldus and his collaborators. See Blackmun Dissent (Circulated April 9, 1987) (Powell annotated copy).

<sup>56</sup> *Cf. infra* notes 97–100 and accompanying text (discussing that no mitigating circumstances were presented at trial).

bluntly declared that, “The opponents of capital punishment hardly could have picked a weaker case for [the] argument [for proving racial discrimination]. Petitioner planned the armed robbery, was the trigger man, he shot an officer twice, and had a substantial record of other serious felonies.”<sup>57</sup>

Justice White shared this skepticism, noting with approval that “the [district court] judge was convinced that Baldus had ignored significant factors in McCleskey’s case that would have escalated the degree of aggravation [and removed McCleskey from the middle range of cases].”<sup>58</sup> Justice White also wrote a memo that followed up on a statement by petitioner’s counsel at oral argument that no plea discussions had been held. After oral argument, White tracked down the trial counsel’s state habeas testimony in which he had stated that the prosecutor had been willing to consider a guilty plea in exchange for a life sentence, but that McCleskey had refused to consider it.<sup>59</sup> For White, this was evidence that “it would be difficult to conclude that McCleskey suffered racial discrimination at the plea-bargaining stage, and there is a reduced chance that racial considerations influenced the prosecutor to proceed to a sentencing hearing,”<sup>60</sup> information that Powell wrote in a margin note was “helpful.”

Thus while the majority stated that they were willing to assume Baldus’s findings were valid, the constitutional claim at the heart of *McCleskey* was clearly hampered by the fact that McCleskey had been the triggerman in a police killing. Because Powell understood “[McCleskey’s] argument—in effect—[a]s no less than that no black defendant in Georgia may ever be given the death sentence,”<sup>61</sup> and yet he saw McCleskey’s actions as legally justifying a death sentence, McCleskey’s fact pattern became for Powell emblematic of how a defendant could coast in the draft of Baldus’s statistical findings even though he himself had not suffered actual discrimination. From Powell’s perspective, that would mean a windfall for McCleskey as a defendant with prior serious felonies who had murdered a policeman and had no mitigating circumstances.

While it is doubtful that the case ultimately would have been decided differently even with a less aggravated fact pattern, the facts of *McCleskey* as they had been developed at his trial further enabled the majority to have it both ways with the Baldus study. They were able to state for decisional purposes that they

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<sup>57</sup> Powell Memorandum, (November 1, 1986) [hereinafter *11/1/86 Memo*], at 3, in MCCLESKEY v. KEMP BASIC FILE 110, 112, available at <http://law.wlu.edu/deptimages/powell%20archives/McCleskeyKempBasic.pdf>.

<sup>58</sup> *White Memo*, *supra* note 48, at 4–5.

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

<sup>60</sup> *Id.* Powell in his opinion repeated the attorney’s testimony that McCleskey had declined to engage in plea negotiations, *McCleskey v. Kemp*, 482 U.S. 279, 312 n.34 (1987); Justice Blackmun in his dissenting opinion pointed out, on the other hand, that the District Attorney did not recall any plea bargaining being discussed. *Id.* at 368 n.12 (Blackmun, J., dissenting).

<sup>61</sup> *11/1/86 Memo*, *supra* note 57, at 4. This comment comes immediately after also stating, “And, to repeat, petitioner makes no claim that the jury in his case was improperly constituted or that it had discriminatory intent.” *Id.*

accepted the study as methodologically sound, but then point to *McCleskey's* specific facts at various points as something of a raised judicial eyebrow saying, "but do you really think *McCleskey's* death sentence can be explained by the fact the victim was white . . . or might it be that he killed a policeman?" At a minimum, given that Powell was firmly convinced that *McCleskey's* case was not one where race played a role, the facts allowed him to affirm the death sentence without any haunting doubts that a more sympathetic fact pattern might have raised for him.<sup>62</sup>

#### D. *The Problem of the Victim and the Emotions of Justice*

When thinking about the difficulty of making *McCleskey's* constitutional claim rhetorically and emotionally appealing, one also has to take into account that a claim based on the crime victim's race does not intuitively strike a chord in the same manner as prior discrimination claims that had been made in the death penalty context. Before *McCleskey*, the focus had been on the defendant's race and how African-Americans disproportionately populated the nation's death rows. And that is an easy picture around which to rally a constitutional and rhetorical argument, especially because certain scenarios, such as an African-American man summarily convicted and lynched for raping a white woman, are archetypes of injustice for the deep South.<sup>63</sup> The Baldus study, however, had found that statistically the defendant's race played only a marginal role as an independent factor (a finding which the majority later seized upon as a finding of vindication that guided discretion was working<sup>64</sup>).

By contrast,<sup>65</sup> the Baldus study's core finding—that it was the victim's race that was the primary axis around which racial discrimination now spun—posed a

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<sup>62</sup> For a fascinating look at how a judge's "moral imagination" and ability (or inability) to relate to a situation affects judging, see Susan A. Bandes, *Moral Imagination in Judging*, 51 WASHBURN L.J. 1 (2011). Interestingly for the purposes of this article, Professor Bandes uses Justice Powell's concurrence in *Bowers v. Hardwick*, 478 U.S. 186 (1986) to illustrate how his admitted inability to comprehend love between two men kept him from understanding the nature of the constitutional claim of privacy that was at stake. *Id.* at 19. Also of interest is that *Bowers* was another case like *McCleskey* in which Powell later stated he made a "mistake." JEFFRIES, *supra* note 5, at 530.

<sup>63</sup> See ALEX HEARD, *THE EYES OF WILLIE MCGEE: A TRAGEDY OF RACE, SEX AND SECRETS IN THE JIM CROW SOUTH* (2010); JAMES H. MADISON, *A LYNCHING IN THE HEARTLAND: RACE AND MEMORY IN AMERICA* (2001).

<sup>64</sup> See *infra* notes 103–06 and accompanying text. The Baldus study's core finding is often misunderstood as having found that African-American defendants were being racially discriminated against, JEFFRIES, *supra* note 5, at 438. The simple statement that the defendant's race was not relevant, however, also misunderstands the study, see *infra* note 106 (observing that race of the defendant was relevant in the context of Baldus's findings of racial disparity in seeking a death sentence where race of the victim is involved).

<sup>65</sup> See generally Bandes, *supra* note 62 (discussing the importance of a judge's ability to relate to a situation in affecting his or her view of a claim's legitimacy).

greater challenge in inspiring feelings of emotional injustice. Viewed from a broad societal perspective, the idea that the race of the victim is dictating who walks to the death chamber is clearly morally repugnant. When presented in the far more confined context of a discrete legal claim by a particular defendant, however, the larger moral element risks becoming obscured.<sup>66</sup> Raised as a legal claim in a specific case, the defendant is placed in the position of having to rely upon his victim's race—the very person whom he has been convicted of murdering—as the basis for his argument that he was unfairly treated. The defendant's reliance on his victim's status, in turn, can be unsympathetically portrayed as the defendant trying to benefit from the harm that he caused. Or as the first draft of *McCleskey* stated in a footnote that was later omitted, "Presumably the interests of murder victim [sic] would be in assuring punishment of his killer. In this case, petitioner seeks to use the alleged victim-based discrimination to evade punishment."<sup>67</sup>

Powell's struggle to find that *McCleskey* even had standing to raise his Equal Protection claim gives a sense of the rhetorical and emotional difficulties that *McCleskey*'s claim faced as a legal proposition.<sup>68</sup> From the outset, Powell was troubled by the idea that a criminal defendant would have standing based on the victim.<sup>69</sup> The first draft of the opinion equivocated on the question, with Powell rewriting the standing section to begin, "This Court has never held that defendant in a criminal case can rely on his *victim*'s race as the basis for an equal protection

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<sup>66</sup> For an insightful discussion of how the issue changes when viewed through a community perspective rather than a particular defendant's claim, see Kennedy, *supra* note 2, at 1391 (exploring how the undervaluing of black victims is an injury to black communities).

<sup>67</sup> *Powell Draft Opinion*, *supra* note 42, at 31 n.6. These sentences were part of a lengthy footnote by the clerk writing the draft trying to think her way through whether *McCleskey* could invoke third-party standing doctrine on behalf of the victim. Powell noted in the margin, "An interesting note, but its relevance is marginal and note is way too long." The gist of the sentences, though, capture well the challenge that *McCleskey* faced to the extent his claim was seen as in some way invoking discrimination against the victim.

<sup>68</sup> The question of standing was raised in several memoranda between Powell and his clerks, and Powell began one memo noting, "For the reasons we have often discussed, a defendant in a criminal case has no standing to rely on the victim's race." *11/1/86 Memo*, *supra* note 56 on Equal Protection claim. That the question of standing was also being batted around other chambers is evident from an earlier memo in which a clerk informed Powell that "You should be informed that the Fourteenth Amendment theory which is now popular in the Marshall and Stevens chamber is based on the race of the defendant." The clerk then outlined the other chambers' theory that because black defendants under the Baldus study who killed whites were more likely to receive the death penalty than whites who kill whites, "this eliminates any standing problem." The clerk concluded by noting that, "I recognize this will not change your thinking on the case, but I thought you would like to be informed of the thinking in other chambers so that you would not be surprised at argument or at conference." Memorandum (October 14, 1986) [hereinafter *10/14/86 Memo*], at 4, in *MCCLESKEY v. KEMP BASIC FILE 81, 85, available at* <http://law.wlu.edu/deptimages/powell%20archives/McCleskeyKempBasic.pdf>.

<sup>69</sup> Powell's concerns were shared by at least one other Justice. According to Powell's notes on the conference, Justice O'Connor believed that *McCleskey* did not have standing. Powell Notes, 10/17/86 Conference on *McCleskey v. Kemp*.

challenge.”<sup>70</sup> And while Powell ultimately did conclude that standing existed,<sup>71</sup> the debate over standing highlighted the difficulty that McCleskey faced in articulating his claim in a manner that created a sense of injustice for a majority of the Justices.

But if McCleskey’s challenge was to find a way to make his legal argument resonate emotionally, Powell’s challenge in writing the opinion upholding the death sentence was to respond not only to the legal points at stake, but to account for the larger societal context within which his opinion would be judged. And Powell’s opinion failed to meet the challenge for two reasons. First, his confidence in the legal structure that the Court had erected was one that struck many as blinking reality and placing capital defendants in a Catch-22: telling them that they must prove an unacceptable risk of racial discrimination but effectively finding that the primary means of showing the risk, statistical studies, would not suffice. Second, and most importantly, he appeared to make a policy judgment in the end that valued maintaining an illusion of justice over the value and dignity of African-Americans. For those who placed their constitutional faith in the Court to vigilantly protect against racial discrimination, both failures struck at the core of their faith.

## II. THE DISILLUSIONMENT OF BROKEN CONSTITUTIONAL PROMISES

### A. *In Rules and Procedure We Trust*

By the time certiorari was granted in *McCleskey*, the Court had been struggling for a decade with constructing a constitutional death penalty scheme. Although a dissenter in *Furman*, Powell had become an active participant in the construction effort after providing a critical vote in *Gregg v. Georgia*, the case that first upheld the “guided discretion” scheme.<sup>72</sup> He then actively supported holdings in subsequent cases that he viewed as key articulations of the principles that would shore up the constitutionality of the “guided discretion” schemes. Nor did Powell fail to see the likely consequences of a ruling in favor of McCleskey. As he wrote in an early memo to one of his clerks:

This case presents, as we know, an attack on capital punishment itself. In a multi-racial society like the United States, the petitioner and amici are saying that judges and juries—lawfully qualified—cannot decide capital

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<sup>70</sup> *Powell Draft Opinion*, *supra* note 42, at 30 (handwritten edits). The draft proceeded to question McCleskey’s standing before finally retreating to the catch-all position of “assuming that petitioner has standing . . .” as a means of allowing the Court to proceed to address the Equal Protection issue. *Id.* at 34.

<sup>71</sup> Powell found standing on the theory that McCleskey was challenging “enforcement of [Georgia’s] laws on ‘an unjustifiable standard such as race . . . .’” *McCleskey v. Kemp*, 481 U.S. 279, 291 n.8 (1987).

<sup>72</sup> See *supra* notes 20–22 and accompanying text.



cases fairly. It will not be easy for me to accept this view. I nevertheless want your views . . . .<sup>73</sup>

He thus saw McCleskey's claim as an attack on *Gregg* itself and the constitutionality of the death penalty: "Of course, this case is not simply an attack on McCleskey's conviction and sentence. Rather, it is a challenge to the validity of the Georgia statute—and similar statutes—that have been approved by this Court and scores of other courts."<sup>74</sup> Revealingly, in describing the Eleventh Circuit's holding to his clerks, Powell characterized the dissenting judges' views of McCleskey's claim primarily in terms of their opposition to capital punishment, noting that while three judges had dissented and he had "a high opinion of all three . . . particularly Frank Johnson[. . . ] it is [also] fair to say . . . that these judges are frequent dissenters in capital cases."<sup>75</sup>

Not surprisingly, then, much of Powell's communications within chambers was focused on stressing the protections that he saw *Gregg* and its progeny as providing. Powell extensively listed in several memos to his clerks the safeguards approved by *Gregg* and "[d]ecisions since *Gregg* that tend to prevent arbitrary or discriminatory imposition of death." In the group of decisions he included both capital cases (*Lockett*, *Bullington*, *Edmund*, *Skipper*, and *Turner*) as well as cases trying to make the criminal jury more representative, namely *Taylor v. Louisiana* and Powell's own opinion in *Batson*.<sup>76</sup> He wrote a separate "Memo on Our Decision in *Gregg v. Georgia*" that explained the decision and reiterated the statutory safeguards in the Georgia statute that the Court had relied upon.<sup>77</sup> Also surfacing was Powell's ongoing concern about the amount of litigation involved in capital cases. He listed post-conviction review as a safeguard, albeit with an undercurrent of frustration ("the repetitive post conviction reviews with which we are all too [familiar]),"<sup>78</sup> and later included in the file a separate memo on "The Relevance of Finality," which concluded with the observation that, "When

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<sup>73</sup> 9/16/86 Memo, *supra* note 42.

<sup>74</sup> *Id.* at 3. See also, Powell, Handwritten Summary Notes for Conference (no date provided), at 2, in MCCLESKEY V. KEMP BASIC FILE 105, 106, available at <http://law.wlu.edu/deptimages/powell%20archives/McCleskeyKempBasic.pdf> ("This case, if we agreed with McCleskey 1. Would overrule *Gregg* and its progeny[;]2. End the imposition of death penalty . . ."); 3/5/87 Memo (March 5, 1987) [hereinafter 3/5/87 Memo], at 1, in MCCLESKEY V. KEMP BASIC FILE 108, 108, available at <http://law.wlu.edu/deptimages/powell%20archives/McCleskeyKempBasic.pdf> ("[T]he necessary implication of the dissent is that *Gregg* and the long line of cases that have followed it, should be overruled.").

<sup>75</sup> 9/16/86 Memo, *supra* note 42, at 1.

<sup>76</sup> *Constitutional Analysis*, *supra* note 52, at 2–4.

<sup>77</sup> Memorandum on Our Decision in *Gregg v. Georgia* (October 13, 1986) [hereinafter *Gregg Memo*], at 1–4, in MCCLESKEY V. KEMP BASIC FILE 65, 65–69, available at <http://law.wlu.edu/deptimages/powell%20archives/McCleskeyKempBasic.pdf>.

<sup>78</sup> *Constitutional Analysis*, *supra* note 52, at 3.

appropriate, I would like to quote what Harlan says . . . on the societal need for an ‘end to the litigable aspect of the criminal process.’”<sup>79</sup>

For Powell, the thrust of these recaps of *Gregg* and the ever more elaborate lattice of constitutional rules which the Court had erected to try and support *Gregg* was “to emphasize that the special procedural safeguards in the Georgia statute and in our decisions are carefully designed to minimize—if not entirely prevent—the relevance of race in any criminal case.”<sup>80</sup> By the time Powell was reading and commenting on Blackmun and Brennan’s proposed dissents, one detects perhaps even a trace of exasperation that the Court’s full efforts were not being appreciated. In a memo to his clerks about the dissents, he wrote “it is important to make some response” given that “[t]he necessary implication of the dissents is that *Gregg*, and the long line of cases that have followed it, should be overruled.”<sup>81</sup> He further stated:

The dissents emphasize the uniqueness of death as a sentence. This is specifically addressed with great care in *Gregg*, and standards are articulated that are not applicable in any other criminal sentence—not even life imprisonment without parole. Capital punishment is the only penalty in which there is a dual sentencing system, and one that compels the jury to focus explicitly on whether death is appropriate in light of the most relevant aggravating and mitigating factors.<sup>82</sup>

Moreover, he continued, “Since *Gregg* this Court uniformly places every capital case on the discuss list. This assures a quality of review by this Court not accorded any other criminal sentence.”<sup>83</sup> He concluded this line of protest with the statement that, “the extent and quality of judicial review of death sentences is unparalleled in this or—I would be reasonably certain—in any other country in which the death sentence is still imposed.”<sup>84</sup>

This rosy view of procedural protections is on full display in the final opinion as it details how the “[n]umerous features of the . . . Georgia statute met the

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<sup>79</sup> *Gregg Memo*, *supra* note 77, at 2. After his retirement, Powell eventually had an opportunity to address his concerns over the need to streamline post-conviction review for capital cases with his appointment to chair a committee looking at ways to reform the process. After considerable controversy, engendered in part by Chief Justice Rehnquist’s not waiting for the Judicial Conference to give its views before transmitting the proposed reforms to Congress, the committee report failed to be enacted in law. JEFFRIES, *supra* note 5, at 445–47.

<sup>80</sup> Memorandum (November 3, 1986) [hereinafter *11/3/86 Memo*], at 1–9, in MCCLESKEY V. KEMP BASIC FILE 115, 115–23, available at <http://law.wlu.edu/deptimages/powell%20archives/McCleskeyKempBasic.pdf> (dictating responses to first draft of opinion).

<sup>81</sup> *3/5/87 Memo*, *supra* note 74, at 1.

<sup>82</sup> *Id.* at 2.

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

<sup>84</sup> *Id.* at 3.

concerns articulated in *Furman*.”<sup>85</sup> And someone simply reading the list of safeguards without asking how they were operating in reality might well think that if a state were to have a death penalty, the guided discretion statutes, once wisely supplemented by the Court, did provide impressive safeguards. At length the opinion outlines how “the jury can receive all relevant information;” how “[t]he statute narrows the class of murders;” how the defendant can “introduce any relevant mitigating evidence;” how the statute provides for automatic appeal and the trial judge must answer a detailed questionnaire, “including detailed questions as to the quality of the defendant’s representation [and] whether race played a role in the trial;”<sup>86</sup> how the state must provide “specific and detailed guidance” to the sentencer.”<sup>87</sup> And, Powell adds, there’s more, because “we have not stopped at the face of a statute, but have probed the application of statutes to particular cases,”<sup>88</sup> and “[b]ecause of the risk that the factor of race may enter the criminal justice process, we have engaged in ‘unceasing efforts’ to eradicate racial prejudice from our criminal justice system.”<sup>89</sup> Add in “meticulous review of each sentence in both state and federal courts” with a heralding of the jury as the linchpin to the community (albeit with acknowledgements that the discretion “essential to a humane and fair system of criminal justice”<sup>90</sup> will make some discrepancy inevitable), and the opinion paints an admiring picture of a system that “despite . . . imperfections . . . ‘has been surrounded with safeguards to make it as fair as possible.’”<sup>91</sup> Powell ends his tour of the post-*Furman* capital punishment landscape with the conclusion that given the “unprecedented safeguards” and “a degree of care in the imposition of the sentence of death that can be described only as unique,”<sup>92</sup> “the dissent’s call for greater rationality is no less than a claim that a capital punishment system cannot be administered in accord with the Constitution.”<sup>93</sup>

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<sup>85</sup> *McCleskey v. Kemp*, 481 U.S. 279, 302 (1987).

<sup>86</sup> *Id.* at 302–03.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 304.

<sup>89</sup> *Id.* at 309.

<sup>90</sup> *Id.* at 313 n.37.

<sup>91</sup> *Id.* at 313.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 313 n.37. At several places in critiquing a draft of Brennan’s dissent, Powell made margin notes suggesting that Brennan as a consistent dissenter from *Gregg* and its progeny lacked standing, so to speak, to rely on points made in those cases. At one juncture for instance, Brennan wrote “As we said in *Gregg* . . .,” and Powell circled the “we” and wrote “WJB did not join it.” Powell Annotated Copy of Brennan Dissent (January 30, 1987), at 1, in MCCLESKEY V. KEMP BASIC FILE 4, 4, available at <http://law.wlu.edu/deptimages/powell%20archives/McCleskeyKempBasic.pdf> (handwritten note). Similarly when Brennan later wrote, “As a result, our inquiry under the Eighth Amendment has been . . .,” Powell wrote “not WJB’s” in the margin.

*B. Procedure's Dark Side: When Procedure Becomes the Trojan Horse for Injustice*

Powell's adamant and lengthy defense of the post-*Gregg* world as a system that is as "fair as possible" no doubt explains much of the sharp backlash against the *McCleskey* opinion. First and foremost, after the grand tour ends, one is still left with the most basic question at the heart of the case unresolved: If the system is operating so well, then how does one explain that the Baldus study—a study the majority claimed to accept as statistically valid—found that the victim's race is such a powerful factor that it increases the likelihood of a death sentence roughly on par with the effect of a prior conviction for murder, armed robbery, or rape? Given that the Baldus study controlled for 230 non-racial factors, it would seem incumbent on those arguing that its findings are inadequate to at least hypothesize what other possible factors they wanted explored. Justice Powell's clerk had critiqued in detail why the lower courts were incorrect in "impl[ying] that the Baldus study did not measure enough variables to make the statistics meaningful."<sup>94</sup> The clerk had further explained that even if unaccounted-for variables existed, they could only affect the study's finding on the victim's race effect if the variable itself "were at the same time significantly tied to the race of the victim."<sup>95</sup> Yet these points go unaddressed in the final opinion; nowhere does the majority posit an alternative 'smoking gun' explanation that could explain the victim's race effect.

It would seem, therefore, that either the majority was not really accepting the Baldus study as valid despite their statement that they would, or, even if treating it as valid, that they believed some unidentified variable explained the race effect, even if no one could name it. In either case, after Powell has listed safeguard after safeguard, one is still left asking, 'but *what* explains why someone who kills a white victim is 4.3 times more likely to be sentenced to death than if they kill a black victim?' Astonishingly, given that they at least give lip service to accepting the Baldus study as statistically valid, the majority never even attempts to answer the question.<sup>96</sup>

Moreover, for many familiar with how capital punishment operates in practice, Powell's tribute to the many safeguards will strike them as naïve at best. What he describes is all true on one level (the procedures do of course exist), but those safeguards are often like a Hollywood set—once one peeks behind the facade, nothing is behind it. This article is not the place to engage in an extended

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<sup>94</sup> 10/1/86 Bench Memorandum, *supra* note 53, at 6–7.

<sup>95</sup> *Id.* at 6–7. The clerk also explains why, if anything, the study underestimates the effect of race. *Id.* at 7. Justice Powell's underlining and margin notes make clear that he read this section with some thoroughness.

<sup>96</sup> Cf. Evan Tsen Lee & Ashutosh Bhagwat, *The McCleskey Puzzle: Remedying Prosecutorial Discrimination Against Black Victims in Capital Sentencing*, 1998 SUP. CT. REV. 145, 156–60 (1998) (critiquing Powell's use of statistics and concluding, "Ultimately, *McCleskey* appears to rest on a misunderstanding of the statistical evidence provided by the Baldus study.").

critique of the many safeguards that Powell outlines, but one basic point is worth stressing in thinking about Powell's opinion: all of the safeguards that he identifies rely upon human actors implementing them, whether prosecutors, jurors, judges, or defense attorneys. And the most elegant procedural scheme in the world matters little if those charged with carrying it out are incapable, either by desire or competency, of fulfilling their roles, and perhaps no legal process in the world has more moving parts and is more dependent on its human actors than capital punishment.

Interestingly, the facts of *McCleskey* themselves poignantly highlight how the most elaborately fine-tuned death penalty procedure can break down in practice. In extolling the post-*Gregg* process, Powell relied in part on the Court's rejection in *Woodson v. North Carolina* of the mandatory death penalty based on its rationale that the "respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender . . .,"<sup>97</sup> a concept that he then observes *Lockett v. Ohio* broadened into a constitutional right to present mitigating evidence. In describing this safeguard, Powell used some of *Woodson's* poetic language: "[a]ny exclusion of the 'compassionate or mitigating factors stemming from the diverse frailties of humankind' that are relevant to the sentencer's decision would fail to treat all persons as 'uniquely individual human beings.'"<sup>98</sup>

Sounds wonderful. And so how was this critical piece of the legal machinery that Powell identifies as ensuring "respect for humanity" and "compassion[] . . . stemming from the diverse frailties of humankind" used in *McCleskey*? What was the mitigating evidence that *McCleskey's* lawyer introduced so we can rest assured that *McCleskey* was treated as a "uniquely individual human being"?

*McCleskey's* lawyer introduced not a single shred of evidence. While subsequent investigation revealed that mitigating evidence did indeed exist (two jurors in an affidavit later stated the mitigation would have influenced their decision),<sup>99</sup> the jury heard none of it. Nor was it hard to surmise that any lack of mitigation was far more likely due to attorney failure or lack of resources than the absence of such evidence. The Court had already seen such cases and *Lockett's* definition of mitigation was so expansive ("any evidence about the defendant or crime arguing for a sentence less than death") it would be difficult to conceive of a defendant who had *no* mitigation in his life.

Out of fairness to Justice Powell, it is true that at the time *McCleskey* was decided, the Court was just beginning to grapple with defining the constitutional

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<sup>97</sup> *McCleskey*, 481 U.S. at 303, 304 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).

<sup>98</sup> *Id.* at 304 (quoting *Woodson*, 428 U.S. at 304 (1976)).

<sup>99</sup> Robert H. Stroup, *The Political, Legal, and Social Context of the McCleskey Habeas Litigation*, 39 COLUM. HUM. RTS. L. REV. 74, 78 & n.21 (2007). The failure to investigate mitigation evidence appears to have largely been due to a lack of family financial resources. *McCleskey's* family had hired a private attorney because of concerns over the public defender office's ability to defend *McCleskey*, but as a result had no money available for an investigation. *Id.* at 78–79, 82.

standards for ineffective representation.<sup>100</sup> That is quite a separate question, however, from whether the majority should have been able to rely upon *Woodson* and *Lockett* as reassuring “safeguards” when in the very case before them the safeguards had conspicuously failed, whether formally labeled ineffective assistance or not. Indeed, the lack of mitigating evidence is even more disturbing in *McCleskey* because Powell affirmatively relied upon the *absence* of mitigation as a reason that one could rest assured that McCleskey’s sentence had been constitutionally imposed on the merits. By focusing more on the fact that McCleskey had a *right* to introduce mitigation rather than on what his lawyer in reality failed to do, the opinion effectively turned *Woodson*’s ode to “respect for humanity” and “compassion” from a poetic safeguard into a judicial dirge for affirming his death sentence.

This heralding of a rule while turning a blind eye to its failure is one of the primary reasons why *McCleskey* failed as a constitutional decision and triggered such a strong backlash: few actions by the Court can be more disillusioning than using the very procedures meant to protect an individual’s rights as a way to deny them. This sense of injustice is especially true when coupled with a sense that the Court is satisfying itself with “paper justice”—rules that look impressive when written down—but that in practice do not bring about real justice. It is not surprising, then, that when the Baldus study emerged waving red flags that racial bias was still infecting the system, and the Court’s response was that all of the post-*Gregg* “safeguards” meant in fact there was not “a constitutionally significant risk” of racial bias,<sup>101</sup> the image that came to mind was of a Court allowing its belief in rules to blind itself to the realities of the world.

*McCleskey* thus is a reminder that procedure, despite its many benefits, can have a dark side as well. As much as we may place confidence in the ability of the law and rules and procedures to produce justice, those same rules and procedures can also provide a veneer of respectability behind which injustice can hide. And it is when the rule of law is used in such a way, as a legal Trojan Horse to smuggle hidden injustices inside the constitutional walls, that procedure turns dark. The argument of course is not with the rules themselves, but with having such unbounded faith in the rules that they are used as a justification to dismiss concerns that the system may not be working as intended.

*McCleskey*’s reliance on the Court’s legal structure governing capital punishment (a structure Justice Blackmun was later to famously call “the machinery of death”) was thus bound to disillusion those who did not share Justice Powell’s confidence in *Gregg* and its progeny. One might question, though,

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<sup>100</sup> The Court three years earlier in *Strickland v. Washington*, 466 U.S. 668 (1984) had found no ineffective assistance despite an attorney’s failure to meaningfully investigate the case in mitigation. Even in the *Strickland* case, however, the Court was aware from the habeas proceedings that mitigating evidence had existed that the trial attorney had failed to uncover. Powell, therefore, had to be aware that an attorney’s failure to produce mitigation evidence at trial was likely more of a comment on the attorney than on whether such evidence existed.

<sup>101</sup> *McCleskey*, 481 U.S. at 313.

whether the opinion would have become infamous if the opinion had ended there. While one might disagree with Justice Powell's confidence in legal procedures, one could at least point to several reasons why Powell might have maintained his belief.<sup>102</sup>

First, Powell could point to some indications in the Baldus study itself that the post-*Furman* procedures were improving the state of affairs. Baldus had found, for instance, that the defendant's race standing alone held little statistical significance in explaining death sentences and that death sentences tended to correlate with increased aggravating factors.<sup>103</sup> For Powell, this showed that the new death penalty schemes were working in combating racial bias: "one would expect that if there were race-based sentencing the Baldus study would show a bias based on the defendant's race. The Baldus study suggests *no* such effect . . . ."<sup>104</sup> When coupled with Baldus's general finding that the odds of a death sentence increased with the severity of aggravating factors and declined as the factors became less severe, Powell was ready to claim, "[t]his pattern suggests precisely the kind of careful balancing of individual factors that the Court required in *Gregg*."<sup>105</sup> While these findings were not nearly as supportive of his position as Powell wanted to believe,<sup>106</sup> and show the majority picking and choosing from the Baldus study's

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<sup>102</sup> For an interesting argument that Powell used his judicial role as a way to shield himself from the moral questions that after his retirement led him to say that he would vote against the death penalty, see Ori Lev, *Personal Morality and Judicial-Decision Making in the Death Penalty Context*, 1 J.L. & RELIGION 637, 664–73 (1994–95). Justice Powell displayed a similar trust in rules and actors in other areas as well. With the Sixth Amendment right to counsel, for example, Powell did not want categorical lines to be drawn that would have to be applied automatically, but instead wanted to maintain some system of guiding discretion along with a healthy dose of trusting the decision makers to use their discretion wisely. For the right-to-counsel, this would have meant essentially keeping the *Betts v. Brady* case-by-case determination of who needs counsel and trusting judges to faithfully and accurately make those decisions. See John D. King, *The Right to Counsel in Misdemeanor Cases*, 48 HARV. C.R.-C.L. L. REV. (forthcoming 2013).

<sup>103</sup> *McCleskey*, 481 U.S. at 313 n.36 ("The Baldus study in fact confirms that the Georgia system results in a reasonable level of proportionality among the class of murderers eligible for the death penalty. As Professor Baldus confirmed, the system sorts out cases where the sentence is highly likely and highly unlikely, leaving a mid-range of cases where the imposition of the death penalty in any particular case is less predictable."); see also *id.* at 290 ("Viewed broadly, it would seem that the statistical evidence presented here, assuming its validity, confirms rather than condemns the system . . . . In pre-*Furman* days, there was no rhyme or reason as to who got the death penalty and who did not. But now, in the vast majority of cases, the reasons for a difference are well-documented.") (quoting the Eleventh Circuit opinion).

<sup>104</sup> *Powell 6/27/86 Memo*, *supra* note 41 (emphasis in original). As noted earlier, this is not an entirely accurate characterization because a disparity did exist based on whether the white victim was killed by a black or white defendant. See *supra* notes 63 & 67 and *infra* note 105.

<sup>105</sup> *Powell 6/27/86 Memo*, *supra* note 41.

<sup>106</sup> For example, the race of the defendant did make a difference when considered in conjunction with the race of the victim: twenty-two percent of black defendants killing white victims received death sentences compared to eight percent of white defendants killing white victims. Amsterdam and Bruner, *supra* note 8 at 200. Moreover, while the Baldus study did show death sentences correlated with a rise in aggravation, this was probably true even before *Furman*, i.e. that

findings only as it supported their views, the findings at least gave a colorable basis for his claim that the system was working.

Moreover, Powell could adopt the position that the framework of rules being challenged was a relatively new work-in-progress, so there might be reason to believe that the system would progressively become less arbitrary. The upshot of a critique at this point, in other words, would be that Powell was placing too much confidence in the rule of law and in the abilities of the human actors involved in the death penalty, but at least the decision was driven by a belief that the rules would triumph over racial bias. For those who saw this belief as naive, it would mean the decision was misguided but not necessarily a decision that rubbed shoulders with *Korematsu* and *Plessy*.

Powell, however, did not stop there. If as lawyers are often warned it is possible to ask one question too many, Part Five of *McCleskey* shows it is also possible for a jurist to write one rationale too many. It is in Part Five that Powell's opinion becomes most vulnerable to being seen as driven not simply by naiveté but also by willful blindness.

### III. PART FIVE: CHOOSING THE APPEARANCE OF JUSTICE OVER THE REALITY OF JUSTICE?

“McCleskey’s claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties . . . . Thus, if we accepted McCleskey’s claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race could easily be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender. Similarly, since McCleskey’s claim relates to the race of his victim, other claims could apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the criminal justice system, such as defense attorneys, or judges. Also, there is no logical reason that such a claim need be limited to racial or sexual bias. If arbitrary and capricious punishment is the touchstone under the Eighth Amendment, such a claim could—at least in theory—be based upon any arbitrary variable, such as the defendant’s facial characteristics, or the physical attractiveness of the

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the likelihood of a death sentence rose and fell according to the level of aggravation. That, however, is not the point of either *Furman* or the Baldus study—if two cases both have a level of aggravation which could be expected to return a death sentence, but it is sought in Case A where the victim is white and not in Case B where the victim is black, it does not matter from an Equal Protection or Eighth Amendment perspective that Case A had a high level of aggravation. What matters is that the death penalty was sought and given in one case and not in the other because of the influence of race.



defendant or the victim, that some statistical study indicates may be influential in jury decisionmaking. As these examples illustrate, there is no limiting principle to the type of challenge brought by *McCleskey*.”<sup>107</sup>

Justice Blackmun in his dissent stated that Part Five “may be the most disturbing aspect”<sup>108</sup> of the majority opinion. Indeed, Part Five is uncharacteristic for Justice Powell as it shows a tin ear to the sensitivities of how his claim would be heard by others and, for a Justice known for cautious compromise, is somewhat shocking in putting forward a “the-sky-will-fall” argument that simply does not ring true on either a constitutional or emotional level. And perhaps most importantly, its message undermines the sincerity of the preceding sections that at length survey the post-*Furman* world and describe a reassuring landscape of towering rules and laws.

Arguments based on contingent possibilities are of course part of the stock and trade of good lawyers (“Your Honor, we think A to be true, but even if you should disagree, you need to consider B”), and slippery slope arguments are a classic form of this type of argument. But by their nature, slippery slope arguments are discomfoting, because they implicitly acknowledge that a claim may be legitimate while simultaneously arguing against it. What Part Five vividly demonstrates is that a lawyerly-like slippery slope argument does not necessarily translate into persuasive judicial reasoning where broader messages are at stake, and in certain constitutional contexts in fact can be disastrous.

And it is because of the implicit message sent about the Constitution and race that Powell’s slippery slope argument fails on a fundamental level comparable to *Korematsu*, *Plessy*, and *Dred Scott*. Powell’s expressed concern in Part Five comes across as a fear that if *McCleskey*’s claim was allowed to go forward, the truth simply would be too much for the system to handle.<sup>109</sup> Coming immediately on the heels of Powell’s extensive protestations that all is well on the post-*Furman* front, this sounds like a warning not to pull back the curtain concealing the Wizard lest we see that the rule of law is not so magical after all.

Part Five thus jarringly casts into doubt the sincerity of the preceding pages that assured the reader that the system is functioning well, causing the reader to ask herself, ‘So are you saying, ‘you *have* to believe the system is working because the consequences of not believing simply are too great?’ As a matter of legal reasoning that would be disturbing enough, but in the context of the issue at stake in *McCleskey*, it becomes alarming because it reads as if Powell is saying we have a choice—we either can protect the illusion of the rule of law or we can

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<sup>107</sup> *McCleskey*, 481 U.S. at 314–18 (internal citations omitted) (quotations included for clarity).

<sup>108</sup> *Id.* at 365 (Blackmun, J., dissenting). Amsterdam and Bruner, *supra* note 8, at 214, characterize the passage as “rhetorically remarkable.”

<sup>109</sup> Kennedy, *supra* note 2, at 1415 (“Paralyzed by fear that seeing would entail doing, the Justices inflicted upon themselves a myopia reminiscent of the one that afflicted the Court during the reign of *Plessy v. Ferguson*.”).

acknowledge that racial bias is indeed infecting the system—and we choose to maintain illusion over confronting reality. Or stated more bluntly, and why on an emotional level so many reacted with hostility to the opinion, the raw message undistilled through the filters of legal argument can be heard as: Even if it is true that black life is being valued less than white life, we cannot afford to acknowledge that fact, because we need to protect the image of our system at all costs, even if that system we are protecting might be broken.<sup>110</sup>

Not surprisingly, if one hears such a message, it is going to bring about a crisis in one's constitutional faith. A decision like *Korematsu* is greeted with opprobrium not only because of its immediate failure to protect a vulnerable minority, but because we see the Court as tacitly admitting that the Constitution is not the fail-proof protector that we as citizens want to believe. And any event that triggers a crisis of faith—whether it be religious or constitutional—is destined to bring about disappointment, disillusionment, and anger.

And while Powell may not have intended to send a message of constitutional impotence, the very way in which he crafted his slippery slope argument exacerbated the effect. A slippery slope argument only works if the threat that the system is going into an uncontrollable free fall is real and the consequences at the end of the slope clearly are to be avoided. Part Five's examples fail on both accounts. His opening examples, for instance, are that challenges to death sentences might extend to prison sentences and to challenges by minority groups other than African-Americans to criminal justice disparities. The response of many will probably mirror that of Justice Brennan's dissent, that "the statement seems [to] suggest a fear of too much justice."<sup>111</sup> That is, to the extent Justice Powell's opinion can be read as saying that a ruling for *McCleskey* would allow African-Americans to constitutionally challenge disproportionately long prison sentences based on race (and he provides the citation to such evidence!),<sup>112</sup> this would seem to be exactly the type of statistical evidence of racial bias that we would want the Court to care about and not constitutionally ignore. Likewise, if statistical evidence should show that minorities in addition to African-Americans (or even as Powell suggests, whites in areas where they constitute a minority<sup>113</sup>) are also suffering from bias, many are not going to see this as an example that *McCleskey*'s claim will lead to the abyss, but as precisely the type of situation that the Eighth Amendment and Equal Protection Clause should be patrolling. In short, these examples tend only to heighten rather than allay the crisis in constitutional faith triggered by Part Five's beginning premise.

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<sup>110</sup> See Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1320–21 (1999) (using *McCleskey* as an example of how a judge's "selective empathy" can affect his or her decision, such as the "desire to perpetuate the status quo and [a] fear that disturbing the status quo will lead to chaos").

<sup>111</sup> *McCleskey*, 481 U.S. at 339 (Brennan, J., dissenting).

<sup>112</sup> *Id.* at 315 & n.7.

<sup>113</sup> *Id.* at 316 n.39.

It is when Powell raises the examples of “the defendant’s facial characteristics, or the physical attractiveness of the defendant or victim,”<sup>114</sup> however, that his opinion seems to go completely tone deaf in understanding that it is a constitutional decision that is being written and not a lawyer’s brief in a torts case. To raise these examples in a case about racial bias in the death penalty appears to suggest that we should downplay the risk of racial discrimination—one of the nation’s core struggles since its inception and over which a Civil War was waged—because a homely defendant might later challenge his sentence on the grounds that a good looking defendant would have received a lower sentence.

Even a reader unfamiliar with the law is likely to intuit that the Court could figure out a meaningful way to distinguish a death sentence infected with racial bias from a claim based on a defendant or victim’s good looks. And a reader familiar with the Court’s capital punishment jurisprudence will know that the Court in fact had available two major doctrinal exit ramps if the slippery slope proved too perilous. First, by the time of *McCleskey*, “death is different” had become a mantra from the Court’s earlier capital cases precisely as a way to provide heightened safeguards that did not apply in non-capital cases. The Court, therefore, could have crafted a narrow holding limiting the use of statistical evidence to establish a prima facie case of discrimination to the death penalty context.<sup>115</sup> Second, as Justice Brennan pointed out in his dissent, if the concern was that defendants would begin to invoke statistical disparities outside of race, the Court could have logically limited the reach of its ruling to racial discrimination as a form of discrimination expressly prohibited by the Constitution and with a long and troubling history that gave meaning and critical context to the statistical findings (unlike, say, hair color).<sup>116</sup>

So why, despite these means to limit the holding’s scope, did Justice Powell decide to double-down on his slippery slope argument? One cannot know for sure, but it was not because he did not recognize the options for limiting the opinion’s reach (he had asked his clerk to write bookend memos, one arguing that *McCleskey* could be limited to capital cases and the other arguing that the decision could not be so limited).<sup>117</sup> The explanation may be as simple as he sincerely believed that

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<sup>114</sup> *Id.* at 317.

<sup>115</sup> Judge Clark in his dissent in the Eleventh Circuit expressly addressed the concern that a Baldus-type study could pose real challenges outside the death penalty, contemplating the possible consequences. He concluded, however, that such a concern could not keep the court from acting against racial discrimination where the “ultimate sanction” was involved and that the solution might have to be to not allow such claims in a non-capital context. *McCleskey v. Kemp*, 753 F.2d 898, 924–27 (11th Cir. 1985) (Clark, J., dissenting). *But cf.* *Kennedy*, *supra* note 2, at 1407 (suggesting that the Court in the years prior to *McCleskey* had not given much heed to the “death is different” idea).

<sup>116</sup> For a look at how constitutional claims based on appearance might be framed even after *McCleskey*, see David L. Wiley, *Beauty and the Beast: Physical Appearance in American Criminal Trials*, 27 ST. MARY’S L.J. 193 (1995) (reviewing empirical research on how appearance affects criminal justice and proposing remedies).

<sup>117</sup> 10/14/86 Memo (*Part One*), *supra* note 68 (“You asked me to explain how a decision under

the Court would be opening a Pandora's box and he failed to hear how the argument would sound when presented as a slippery slope argument.<sup>118</sup> It may also be, however, that the slippery slope argument was his way of objecting to a worldview represented by the Baldus study—what he termed “statistical jurisprudence”—that was at sharp odds with his beliefs in the legal system. He stressed in his comments on the first draft of the opinion the need to more clearly “make the critically important argument that petitioner’s challenge is no less than to our entire criminal justice system.”<sup>119</sup> In another memo, Powell included a subsection entitled, “*Petitioner challenges our jury system*,” followed by the statement that:

Our system is based on the assumption that jurors who are sworn to decide a case impartially will [follow] their oath and the instructions of the court. This necessarily involves some discretion, and the Constitution by providing for jury trial recognized that citizens drawn from the community are best qualified to decide criminal cases.<sup>120</sup>

Similar themes run throughout Powell’s in-chamber communications (and, of course, throughout the opinion itself)—expressions of confidence in the need for discretion, in the law’s power to shape behavior, in a state’s ability to overcome a history of racism, and in a view of cases as individualized inquiries that resist characterization.

By contrast, he saw reliance on studies like the Baldus study as “invit[ing] a

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the Eight Amendment could not be limited to capital cases.”); *10/14/86 Memo (Part Two)* (“You asked me to explain how a decision under the Eighth Amendment could be limited to capital cases.”). The clerk does an admirable job of fairly outlining in each memo the arguments for and against; the memo arguing for limits expressly draws upon the “arguments circulating among the chambers” and largely presages the limitations argued for in Justice Brennan’s dissent.

<sup>118</sup> Powell raised concerns over how to limit McCleskey’s claim as early as the summer of 1985 when the petition was first filed, making a note at the end of the first memo he received from a clerk on the case, “What if one accepts the study as reflecting sound statistical analysis? Would this require that no black be sentenced to death where victim was white?”. Addendum to *Preliminary Memo*, *supra* note 36, at 2 (handwritten note). Over time, he expanded his concern over limiting McCleskey’s claim to include non-capital cases and other minority groups. Interestingly, in his memo to the conference arguing against a grant of certiorari, Powell argued that if certiorari was granted, no cases from other states should be held, because, “[t]he claim is based solely on the practical application of those rules in a single state . . . and [the Baldus] study was more sophisticated than its counterparts in other states . . . .” “I think it unlikely that a ruling in petitioner’s favor in this case would have consequences for States other than Georgia.” *Powell 6/27/86 Memo*, *supra* note 41 at 4.

<sup>119</sup> *11/3/86 Memo*, *supra* note 80 at 6. In the same memo, Powell stated that the opinion needed to “focus [more] consistently on the argument that there is no limiting principle to McCleskey’s challenge.” *Id.*

<sup>120</sup> *Constitutional Analysis*, *supra* note 52, at 4. In the memo, Powell accidentally wrote “ignore their oath” rather than “follow,” though from the context he clearly meant “follow.” (Freudians may differ).

system of ‘statistical jurisprudence’—unprecedented in civilized history,”<sup>121</sup> a jurisprudence that would lead to a fragmentation of justice based on statistics. “It is not easy,” he argued, “to see how we can have a criminal justice system that operates differently according to the race or national ancestry of defendants.”<sup>122</sup> (Justice White exhibited a similar jaundiced view of the “cold, mathematical perfection in system-wide sentencing outcomes” that he saw the petitioner as “press[ing] upon this Court, a ‘mathematical’ ‘perfection’ . . . unattainable under any system”).<sup>123</sup>

In short, the undercurrent of Part Five’s “the sky will fall” argument may be less a realistic concern that the Court soon would be hearing Eighth Amendment ‘Cary Grant claims’ based on the lack of good looks, and more of a protest that the Baldus study if accepted diminished the majesty of the law in which Powell believed. McCleskey’s claim challenged the traditional concept of what the legal system stood for: the conscious power of the law to accomplish justice carried out by good faith actors. If a study like the Baldus study could bring down an elaborate structure like the post-*Gregg* capital punishment scheme by identifying forces at work not overtly detectable except through multiple regression analysis, then it meant the truth of the system might lay not in the elaborate edifice of statutes and wisely crafted judicial opinions, but with the statistician’s tables and equations.<sup>124</sup> And as his writings in *McCleskey* repeatedly make clear, such a conclusion would have struck at the very foundation of how Justice Powell wanted to believe the legal system worked.

#### IV. THE VIRTUE OF FACING DISQUIETING TRUTHS: JUSTICE SCALIA’S PROPOSED CONCURRENCE

I plan to join Lewis’s opinion in this case, with two reservations. I disagree with the argument that the inferences that can be drawn from the Baldus study are weakened by the fact that each jury and each trial is

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<sup>121</sup> Powell annotated copy of Brennan dissent (January 30, 1987), at 19 (handwritten note). And, as noted earlier, Powell had expressed his opposition to deciding constitutional issues based on statistics soon after certiorari was granted, *10/1/86 Bench Memorandum, supra* note 53 and accompanying text.

<sup>122</sup> Memo to File (September 30, 1986), at 1, in *MCCLESKEY V. KEMP BASIC FILE 33, 33*, available at <http://law.wlu.edu/deptimages/powell%20archives/McCleskeyKempBasic.pdf>.

<sup>123</sup> *White Memo, supra* note 48, at 10. Indeed, Justice White suggested the only solution if they accepted McCleskey’s claim would be to overrule *Woodson* and allow the mandatory death penalty to be reinstated (“that would certainly provide a compelling answer to any questions raised by system-wide statistical studies”). *Id.*

<sup>124</sup> Compare DAVID L. FAIGMAN, *LABORATORY OF JUSTICE: THE SUPREME COURT’S 200-YEAR STRUGGLE TO INTEGRATE SCIENCE AND THE LAW* (2004), for a comprehensive and fascinating examination of the Supreme Court’s struggles over the years to reconcile the scientific method with the law; see also DAVID L. FAIGMAN, *LEGAL ALCHEMY: THE USE AND MISUSE OF SCIENCE IN THE LAW* (1999).

unique, or by the large number of variables at issue. And I do not share the view, implicit in the opinion, that an effect of racial factors upon sentencing, if it could only be shown by sufficiently strong statistical evidence, would require reversal. Since it is my view that the unconscious operation of irrational sympathies and antipathies including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof. I expect to write separately to make these points, but not until I see the dissent.

Sincerely, [Antonin Scalia]<sup>125</sup>

One cannot help but wonder as the criticism for his opinion started to mount, if Justice Powell wistfully wished at times that Justice Scalia had written his proposed concurrence. If penned in Scalia's typical no-holds-barred colorful style, the concurrence no doubt would have commanded much of the spotlight.<sup>126</sup> The paragraph is unclear whether Scalia accepts that the Baldus study itself shows racial considerations are at work, but it certainly accepts that what McCleskey is arguing is true—that “irrational sympathies and antipathies, including racial” are present in the death penalty decision-making process. Also clear is that Scalia would not find a constitutional transgression despite that truth.

As odd as it may sound at first, while Scalia's opinion certainly would have caused an uproar, might not someone disillusioned by Powell's opinion welcome Scalia's position by comparison? For although both opinions would deny McCleskey relief, a key and fundamental difference exists between Powell's and Scalia's approaches. Unlike Scalia, Powell first joined arms with those arguing that, if proven, the Constitution could not tolerate arbitrary bias such as unconscious racial influences entering into the decision to impose a death sentence. The disillusionment, the loss of constitutional faith comes with the realization that the promise is illusory, that the Court would not take the steps necessary to protect that constitutional promise because it perceived the price to be paid as too great. And adding to the loss of faith was that rather than explicitly acknowledging that it cannot deliver on the Constitutional promise, the Court argued that it in fact was fulfilling the promise through rules and procedures. To the disillusioned, therefore, the Court provided the worst of all outcomes—denying what they believed to be undeniably true (that the system remains arbitrary) and effectively immunizing the issue from future constitutional review by placing the burden of

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<sup>125</sup> Memorandum to the Conference from Justice Antonin Scalia in No. 84-6811—McCleskey v. Kemp of Jan. 6, 1987. McCleskey v. Kemp File, Thurgood Marshall Papers, The Library of Congress, Washington, D.C.

<sup>126</sup> Justice Scalia's one-paragraph memo alone inspired a thirty-plus page law review article. See Dennis D. Dorin, *Far Right of the Mainstream: Racism, Rights, and Remedies From the Perspectives of Justice Antonin Scalia's McCleskey Memorandum*, 45 MERCER L. REV. 1035 (1994).

proving arbitrariness so high that it made proof of a violation almost impossible. Or as Justice Frankfurter once wrote in another context, the Court crafted the opinion to “keep the word of promise to the ear . . . and break it to their hope.”<sup>127</sup>

Moreover, by acknowledging the constitutional right but then expressly finding that insufficient proof of racial bias existed, the harmful effects of the majority’s opinion emanated beyond the judicial realm. Justice Powell in *McCleskey* had argued that statistical studies like the Baldus study “are best presented to legislative bodies.”<sup>128</sup> Ironically, however, his opinion arguably made such legislative reform far more difficult, because in the background of any proposed legislation<sup>129</sup> was the fact that the Supreme Court already had considered the problem and found the system working. Proponents of reform, therefore, found themselves having to argue that a serious problem of racial bias existed even though the highest court in the land had found adequate safeguards were in place. Once again, one can see the dark side of procedure if it obscures a problem within a thicket of rules and procedures so that the need for action cannot be seen.

Consider, by contrast, how Justice Scalia’s approach might have led to a different response. Most importantly, Scalia acknowledged what the Baldus study statistically described: that a discretionary system asking a question of moral judgment to a jury of human beings inescapably will be subject to a variety of unconscious factors, including racial, as the jurors try to decide if the defendant should live or die. Now, of course, Scalia would then say that the Constitution holds no promise against such factors entering the decision-making process, but at least then the question would have been front and center with no sense of a false promise or constitutional sleight of hand.

And one can easily imagine a very different public debate if the Supreme Court had acknowledged that race was dictating in part who ended up on death row, but then ruled that any remedy was beyond the Court’s reach. The ensuing debate might have been somewhat similar to the recent attention that Justice Scalia engendered by candidly stating in the Troy Davis case that in his view the Constitution may not bar the execution of one who is truly innocent.<sup>130</sup> Many found Scalia’s statement shocking,<sup>131</sup> but his statement helpfully dragged the

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<sup>127</sup> *Griffin v. Illinois*, 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring).

<sup>128</sup> *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987).

<sup>129</sup> See David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., *Reflections on the “Inevitability” of Racial Discrimination in Capital Sentencing and the “Impossibility” of Its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359, 376–404 (1994) (describing various Congressional proposals in the wake of *McCleskey*).

<sup>130</sup> *In Re Davis*, 130 S. Ct. 1, 3–4 (2009) (Scalia, J., dissenting) (describing remand to District Court for hearing on actual innocence a “fool’s errand” in part because of “considerable doubt” that a constitutional claim based on actual innocence exists).

<sup>131</sup> Justice Scalia’s statement got attention from a wide array of media sources, ranging from the New York Times to the Daily Beast. See Adam Liptak, *Justices Tell Federal Court to Step Into Death Row Case*, N.Y. TIMES, Aug. 18, 2009, at A15; Paul Campos, *Scalia’s Death Row Lunacy*, THE DAILY BEAST, Aug. 18, 2009, <http://thedailybeast.com/articles/2009/08/18/scalias-death-row->

Court's limited view of the Constitution's protections of the innocent from the shadows into the spotlight.<sup>132</sup> If a similar view had been the message coming out of the Court after *McCleskey*—the Court acknowledging that racial considerations were entering the death penalty decision but declaring any remedy beyond the Court's reach—might not statutes similar to North Carolina's Racial Justice Act<sup>133</sup> have gained traction far earlier?

It may be that in the end that even if Scalia had written his proposed *McCleskey* concurrence, the reaction would have been similar. The bottom line of both opinions would have been the same—no relief to *McCleskey*— and the result may have overshadowed any difference in how the opinions got there. It is interesting to ponder, however, how Scalia's position, an approach that at first blush might seem to be the one more certain to inspire outrage, might have with its candor, both about the realities of the decision-making process and with what it saw as the limits of the constitutional promise, have invoked a different response.

But Justice Scalia never wrote his concurrence and the fallout of *McCleskey* is still being felt a quarter of a century later. A long line of subsequent studies in a number of states have repeatedly confirmed the Baldus study's findings, further cementing *McCleskey*'s reputation as a case that chose illusion over reality. To the credit of those opposed to capital punishment, the loss of constitutional faith did not mean giving up, but it did mean that the salvation of justice had to be sought case-by-case, issue-by-issue, rather than from the Court above. And while the regrets that Justice Powell voiced after *McCleskey* cannot undo his opinion's aftermath, one can hope that they might serve as a warning to not let the concerns of the future lead one to ignore the realities of the present.

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<sup>132</sup> Despite the controversy Justice Scalia's position stirred up, his statement that the Court's precedent "expressed considerable doubt" whether a constitutional claim based on actual innocence exists was not without basis. See *Herrera v. Collins*, 506 U.S. 390, 400 (1993) (reviewing Supreme Court precedent and expressing doubts as to whether habeas relief could be granted based on a free standing claim of actual innocence). The value of Scalia's statement, therefore, was in placing the issue in the public spotlight.

<sup>133</sup> See generally Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031 (2010).