III. EMPIRICAL STUDIES

Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing*

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INTRODUCTION

The legal debate over racial discrimination in the use of the death penalty seems to have taken a peculiar turn. For years courts have rejected claims of discrimination by finding that the evidence of racial effects was too *weak*; now, in the face of mounting proof that the race of the victim plays an undeniable role in determining who is sentenced to death, they are shifting their ground. No court has actually agreed that racial factors do in fact influence capital sentencing, but that may no longer matter, at least not to the courts. The new position is that the essential question is not the existence of discrimination but its magnitude, and that even the strongest claims deserve no hearing because the quantity of racial discrimination they allege is too *small*.

The major evidence of this shift is the recent en banc decision of the Eleventh Circuit in *McCleskey v. Kemp*.[1] It may be a mistake to attribute too much importance to a single case in an intermediate appellate court, but *McCleskey* is not a common case. It is based on the most comprehensive empirical record of racial patterns in the imposition of the death penalty that has ever been developed in this country, or that

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[1] 753 F.2d 877 (11th Cir. 1985).

is likely to be developed in the foreseeable future. The *McCleskey* case is a plausible candidate for Supreme Court review, but even in the absence of such review it will influence the trend of decisions on this issue for years to come.

The problem of racial discrimination in capital sentencing is hardly new. It was one of the issues before the Supreme Court in *Furman v. Georgia*[2] in 1972, and it was one of the reasons that the Court held that all death penalty laws then in effect in the United States were defective and unconstitutional. The current issue is whether racial discrimination continues under the capital sentencing statutes that were enacted in response to the *Furman* decision. A series of studies now demonstrates that racial discrimination still affects the use of the death penalty under post-*Furman* statutes; in particular, these studies show a strong and pervasive pattern of discrimination by the race of the victim — those who kill whites are much more likely to be sentenced to death than those who kill blacks. This discrimination raises a basic question about the use of the death penalty, and *McCleskey* poses this question in high relief: the evidence is strong; the state from which it comes — Georgia — has a long history of discrimination in capital sentencing; the circuit in which it was decided leads the nation in the number of death row prisoners and has had nearly half of all post-*Furman* executions;[3] and the case is being litigated at a time when executions are once again becoming common, and when no other issue presents a fundamental challenge to the use of the death penalty in America.

The most original aspect of the *McCleskey* case is the record, which consists primarily of evidence on two exhaustive studies of capital sentencing in Georgia by Professor David Baldus and his colleagues.[4] The least original aspect is the judgment, which, like that of every other court that has faced this question, permits the system of capital sentencing to continue unaltered. But while the judgment may be familiar, the

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[2] 408 U.S. 238 (1972).

[3] NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW, U.S.A. (May 1, 1985) (mimeograph) [hereafter DEATH ROW, U.S.A.].

[4] Some of the results of these studies have already appeared in print in Baldus, Pulaski & Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983) [hereafter Baldus, Pulaski & Woodworth, *Comparative Review*]; other findings appear in this symposium — *see* Baldus, Woodworth & Pulaski, *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia*, 18 U.C. DAVIS L. REV. 1375 (1985); Barnett, *Some Distribution Patterns for the Georgia Death Sentence*, 18 U.C. DAVIS L. REV. 1327 (1985) — and others will undoubtedly continue to appear for some time to come.

justification for it is not. Other courts that have confronted this issue have been content to fault the methodology of the studies before them; that is what the district court did in *McCleskey*, at great length, providing an easy basis for the circuit court to reject the Baldus studies.[5] But the Eleventh Circuit did not follow that pattern. Rather, it decided that the methodology of the Baldus studies need not be considered at all because their findings, taken at face value, show too little discrimination to state a constitutional claim.

There are two possible explanations for the Eleventh Circuit's novel approach; most likely, both apply. The first is intellectual honesty: The court may have been unwilling to rest its judgment on the argument that the most thorough studies of sentencing patterns ever conducted in this country[6] are inadequate to satisfy its methodological requirements. The second explanation is expediency: It is apparent from its opinion that the Eleventh Circuit wanted to put an end to litigation on claims of discrimination in capital sentencing, and (unless reversed) it has succeeded. Methodological flaws, after all, might be repaired, but nothing can be done to overcome a decision that the *level* of discrimination in a jurisdiction is simply too small to matter. Moreover, since racial discrimination in capital sentencing seems to be as pronounced in Georgia as in any other state, or more so,[7] the logic of this opinion would foreclose similar claims anywhere. This is a sweeping achievement, but it comes at a cost; whatever else might be said in favor of the *McCleskey* opinion, it cannot be justified on its own terms. The opinion hinges on the conclusion that the demonstrated effects of the race of the victim on capital sentencing in Georgia are too small to be regarded as "systematic" and "pervasive," and this conclusion, as we shall see, is bizarre.

The issue of racial discrimination in capital sentencing is at a turning point. In the past few years several new studies on this topic have appeared and others are in progress, and the issue has been litigated in half a dozen or more cases. In the wake of *McCleskey*, the legal issues involved are likely to be settled, one way or the other, during the next

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[5] McCleskey v. Zant, 580 F. Supp. 338, 353-79 (N.D. Ga. 1984), *rev'd on another issue sub nom.* McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc).

[6] *See McCleskey*, 753 F.2d at 907 (Johnson, J., dissenting and concurring in part) (Baldus study characterized in record as "far and away the most complete and thorough analysis of sentencing" ever conducted) (quoting Dr. Richard Berk, member of National Academy of Sciences panel on sentencing research).

[7] *See* Gross & Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 74, 78, 95-96 (1984) (estimating magnitude of racial discrimination in capital sentencing in Georgia and in seven other states).

Term of the Supreme Court. Before that happens, it may be worth the trouble to step back and briefly review the state of the research and of the law on this question. The *McCleskey* opinion provides a convenient focus for such a review, for two reasons: First, because of the importance of the record on which it is based and the novelty of its approach; and second, because it highlights two perennial problems in the peculiar arena of constitutional litigation on capital punishment: the troubled relationship between social scientific data and judicial policy, and the federal courts' continuing devotion to a fiction of their own invention — the fiction of the efficacy of the procedural reforms in capital sentencing that were instigated by the Supreme Court's decision in *Furman*.

I. The Issue: Discrimination Under Post-*Furman* Death Penalty Statutes

In 1972 the Supreme Court held, in *Furman v. Georgia*,[8] that all death sentencing statutes then in effect in the United States violated the eighth amendment prohibition of cruel and unusual punishments. This decision is a watershed that divides the history of capital punishment in the United States into two major eras, before *Furman* and after. It is no news that *Furman* has been a difficult case to interpret. It contains nine different opinions, including five separate one-vote opinions that form the majority. Some of these opinions are ambiguous; some, we have since been told, do not mean what they say. Ultimately, *Furman* has proved to be not so much a legal precedent as a Rorschach test.[9] At the time, many people interpreted *Furman* as the abolition of capital punishment in the United States. This was a mistake. In 1976 the Court upheld several newly written capital sentencing statutes, and announced that *Furman* actually only prohibited the *arbitrary* infliction of capital punishment, and that this arbitrariness might be removed by procedural reforms — specifically, by statutory procedures that "guide" the "discretion" of the sentencer. In upholding the new statutes, the Court said that they contained sufficient safeguards to prevent this arbitrariness.[10] Unfortunately, this reconstruction left several key terms

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[8] 408 U.S. 238 (1972).

[9] *See* Weisberg, *Deregulating Death*, 1983 Sup. Ct. Rev. 305.

[10] Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976). At the same time, the Court held that the mandatory death sentencing statutes that had been enacted by other states were unconstitutional. Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); *see also* Roberts v. Louisiana, 431 U.S. 633 (1977).

undefined. Since 1976 a mass of litigation has focused on the major gaps: the meaning of "arbitrariness" in the use of capital punishment, and the nature of the procedures that are needed to guard against it.[11] In most of these cases, each side has been able to argue plausibly that its position is dictated by *Furman*.

While in most respects the concept of eighth amendment "arbitrariness" has been remarkably fluid, one component has remained constant: the condemnation of racial discrimination in the use of the death penalty. The original text is clearer on this point than on most. Three of the Justices in the *Furman* majority discussed discrimination in capital sentencing,[12] and at least two of them seemed to rely on it in reaching their separate judgments.[13] In any event, the received wisdom since 1976 has been that discrimination is an element of the arbitrariness that "was condemned in *Furman*," and one of the evils that the post-*Furman* capital-sentencing reforms were designed to cure.[14] In addition, racial discrimination in capital sentencing, like racial discrimination in any other state conduct, is prohibited by the equal protection clause of the fourteenth amendment.[15] Not surprisingly, a number of researchers have been interested in determining whether the revised death penalty statutes did in fact eliminate racial discrimination in capital sentencing. By now, thirteen years after *Furman* and nine years after the first post-*Furman* death penalty statutes were upheld, enough data have accumulated for some new racial patterns to be apparent.

II. Empirical Research on Racial Discrimination in Capital Punishment Since *Furman*

At least ten separate studies have investigated racial discrimination in the administration of the death penalty after *Furman*, and all have found substantial discrimination by the race of the victim. Detailed re-

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[11] *See generally* Gross & Mauro, *supra* note 7, at 34 n.30; Weisberg, *supra* note 9.

[12] 408 U.S. at 249-57 (Douglas, J., concurring); *id.* at 310 (Stewart, J., concurring); *id.* at 363-66 (Marshall, J., concurring). In addition, two of the dissenters discuss the issue. *Id.* at 389 n.12 (Burger, C.J., dissenting); *id.* at 448-50 (Powell, J., dissenting).

[13] *Id.* at 249-57 (Douglas, J., concurring); *id.* at 363-66 (Marshall, J., concurring).

[14] *See, e.g.*, *McCleskey*, 753 F.2d at 890-91; Spinkellink v. Wainwright, 578 F.2d 582, 613-14, 613 n.38 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979).

[15] *See, e.g.*, Oyler v. Boles, 368 U.S. 448, 456 (1962) (dictum); Ah Sin v. Wittman, 198 U.S. 500 (1905); Yick Wo v. Hopkins, 118 U.S. 356 (1886). In the context of death penalty cases, see Maxwell v. Bishop, 398 F.2d 138, 148 (8th Cir. 1968) (dictum), *vacated and remanded on other grounds*, 398 U.S. 262 (1970), *cited in Furman*, 408 U.S. at 449-50 (Powell, J., dissenting).

views of this literature are available elsewhere[16] and need not be repeated here, but a brief synopsis is in order.

The studies can be divided into two methodological categories: those that relied primarily on information available directly from police agencies or other official sources, and those that compiled detailed original files of information on the homicide cases they examined. The oldest study in the first category was conducted by William Bowers and Glenn Pierce, who found death-sentencing discrimination based on the race of the victim and the race of the defendant in four states from 1973 through 1977, controlling for the commission of a separate felony during the homicide.[17] Hans Zeisel arrived at parallel findings, using overlapping data from one of these states, Florida.[18] Michael Radelet examined all murder indictments in twenty Florida counties over a two-year period and found that death sentences were more likely in white-victim cases, regardless of the relationship of the killer to the victim.[19] A separate study by Radelet and Pierce examined an earlier step in the process, and found that Florida prosecutors discriminated by race of victim in their initial charging of homicides.[20] Jacoby and Paternoster studied the same issue in South Carolina and found, after controlling for several relevant variables, that the victim's race influenced capital charging decisions of prosecutors in that state.[21] Finally, Robert Mauro and I conducted a study of all reported homicides in eight states over a five-year period; after controlling for half a dozen actual and potential

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[16] *See* Dike, *Capital Punishment in the United States, Part II: Empirical Evidence*, 13 CRIM. JUST. ABSTRACTS 426, 441-47 (1981); Gross & Mauro, *supra* note 7, at 38-49.

[17] Bowers & Pierce, *Arbitrariness and Discrimination Under Post-*Furman *Capital Statutes*, 26 CRIME & DELINQ. 563 (1980).

[18] Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981).

[19] Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918 (1981).

[20] Radelet & Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. (1985) (forthcoming). In addition, Steve Arkin conducted a study of first degree murder prosecutions in Dade County, Florida. Arkin found disparities by race of victim, but the small size of his sample (10 death penalty cases) precluded any conclusions about the existence of racial discrimination. Note, *Discrimination and Arbitrariness in Capital Punishment: An Analysis of Post-*Furman *Murder Cases in Dade County, Florida, 1973-1976*, 33 STAN. L. REV. 75 (1980). See Gross & Mauro, *supra* note 7, at 43, 43 n.69 for a discussion of Arkin's findings.

[21] Jacoby & Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J. CRIM. L. & CRIMINOLOGY 379 (1982); *see also* Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754 (1983).

sentencing considerations, we found that white-victim homicides were much more likely to result in death sentences than black-victim homicides, in each state.[22] Our study has been replicated in at least one additional state.[23]

Studies in the second category, those based on detailed original data, are much more difficult to conduct than those that use official data directly, and are therefore less numerous. In the earliest post-*Furman* study of this type, David Baldus, Charles Pulaski, and George Woodworth compiled information on over 200 variables for each of 594 defendants tried and sentenced for murder in Georgia from March 1973 through July 1978.[24] This study (the *Procedural Reform Study*) was more comprehensive than any previous empirical investigation of sentencing; still, it lacked information on the strength of the evidence of the defendant's guilt, and, since it was restricted to murder convictions, it did not examine the possibility of pretrial discrimination in charging and plea bargaining.[25] These gaps were filled in a later study by the same researchers (the *Charging and Sentencing Study*) that covered 1066 Georgia homicide prosecutions from 1973 through 1980 — manslaughter convictions and guilty pleas as well as murder convictions — and included data on an expanded list of over 400 variables.[26] The relevant findings of these two studies are the same: there is a strong statewide pattern of discrimination by race of victim in the imposition of death sentences in Georgia, and a weaker and less consistent pattern of discrimination by race of defendant. Finally, Richard Berk and Joseph Lowery, in a study modeled on the Baldus *Charging and Sentencing Study*, examined detailed information on some 400 homicide prosecutions in Mississippi, from 1976 through 1982.[27] Their findings are fa-

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[22] Gross & Mauro, *supra* note 7.

[23] Study by Professor M. Dwayne Smith, Department of Sociology, Tulane University, New Orleans, Louisiana, described in part in DeParle, *Quirky System Picks Who Dies*, The Times-Picayone (New Orleans), Apr. 7, 1985, at 1, 16; *see also* Demmons, *Death Penalty Rare When Victims Are Black, Study Shows*, Baton Rouge (Louisiana) Sunday Advocate, Mar. 5, 1985, at 1, 1-13 (discussing doctoral research by Marti Klemm on capital sentencing in Louisiana).

[24] *See McCleskey v. Zant*, 580 F. Supp. at 353-55.

[25] The second of these two limitations mitigates the first: because the study is restricted to murder convictions, the strength of the evidence is controlled, to an extent, since all cases in the sample had sufficiently strong evidence to obtain such convictions.

[26] *See McCleskey v. Zant*, 580 F. Supp. at 353-55.

[27] R. Berk & J. Lowery, Sentencing Determinants in Mississippi: A Study of Factors Affecting Penalties for Murder and Manslaughter (Sept. 1984) (unpublished manuscript, Dept. of Sociology, Univ. of Calif. at Santa Barbara; cited with permission of authors).

miliar: an unmistakable pattern of discrimination by race of victim, a weaker and less consistent pattern of discrimination by race of defendant.

The scientific implications of these studies are simple. The evidence indicates, unmistakably, that there has been substantial discrimination in capital sentencing by race of victim, at least in those states that have been extensively studied. Whatever the methodological limitations of any particular study, it is impossible to overlook the consistent findings of so many separate studies, conducted by different researchers in several jurisdictions using different types of data.[28] Few social scientific findings have such strong support.

III. Litigation on Racial Discrimination in Capital Sentencing

*A. Pre-*Furman *Discrimination*

The earliest attacks on racial discrimination in the use of the death penalty focused on rape cases. This is unsurprising, since capital punishment for rape — when it was still available[29] — was one of the most visible examples of racism in the American system of criminal justice. From the 1880's on, almost all executions for rape in this country took place in the South, and the overwhelming majority of those executed — 85 percent — were black.[30] The most important of these early legal challenges was a federal habeas corpus petition by William Maxwell, a black man sentenced to death for the rape of a white woman in Arkansas, who claimed that his sentence violated the equal protection clause of the fourteenth amendment.[31] Maxwell based his claim on a major study by Professor Marvin Wolfgang, a noted criminologist, who collected detailed information on 3000 rape convictions in selected counties of eleven southern states, from 1945 through 1965.[32] Wolfgang found that black men who were convicted of rape were seven times more likely to be sentenced to death than white men, and that black men who

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[28] *See* Gross & Mauro, *supra* note 7, at 102-06.

[29] *See infra* note 38 and accompanying text.

[30] W. Bowers, Legal Homicide: Death as Punishment in America, 1864-1982, at 57-58 (1984).

[31] Maxwell v. Bishop, 257 F. Supp. 710 (E.D. Ark. 1966), *aff'd*, 398 F.2d 138 (8th Cir. 1968), *vacated and remanded on other grounds*, 398 U.S. 262 (1970).

[32] Wolfgang & Reidel, *Race, Judicial Discretion, and the Death Penalty*, 407 Annals 119 (1973) [hereafter Wolfgang & Reidel, *Race*]; *see also* Wolfgang & Reidel, *Rape, Race, and the Death Penalty in Georgia*, 45 Am. J. Orthopsychiatry 658 (1975).

were convicted of raping white women were eighteen times more likely to be sentenced to death than men convicted of rape in any other racial combination.[33] Wolfgang also examined a host of other variables that might bear on sentencing, and found that the only one that was strongly related to capital sentencing — the commission of a contemporaneous felony — did not explain or mitigate these racial patterns. In short, the *Maxwell* case included uncommonly persuasive evidence of a systematic pattern of racial discrimination.

Despite this evidence, Maxwell's claim was rejected both by the district court that heard it and by the Eighth Circuit on appeal. The reasons given for this rejection have set the pattern for similar rejections in many cases since: *First*, the data are too broad, since few of the rape cases examined came from the county in which Maxwell was convicted.[34] *Second*, the data are too shallow, since "[t]hey admittedly do not take every variable into account." [35] *Third*, the social scientific evidence is faulty because it does not demonstrate that Maxwell's own sentence was the product of any specific acts of discrimination by the jury that imposed it.[36] The Supreme Court declined to review the claim of discrimination in *Maxwell*, although it did grant certiorari and vacate the judgment on other grounds.[37] Several years later, in *Coker v. Georgia*,[38] the Court held that the use of the death penalty for rape violates the eighth amendment because it is "excessive"; one of the more conspicuous things about the *Coker* opinion is the absence of any reference to race.

The most important case that examines racial discrimination in capital sentencing prior to *Furman* is *Furman* itself. The issue in *Furman*, of course, was the meaning of the eighth amendment prohibition of cruel and unusual punishments, but the claim of racial discrimination was a central part of the argument that capital punishment violated the eighth amendment, and it is discussed in three of the opinions of the *Furman* majority: Justice Douglas cites evidence that poor people and blacks are more likely than others to be sentenced to death, and concludes that the capital sentencing statutes before the Court are unconstitutional because "[t]hey are pregnant with discrimination."[39] Justice

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[33] *See* Wolfgang & Reidel, *Race, supra* note 32, at 122.

[34] *Maxwell*, 398 F.2d at 146.

[35] *Id.* at 147.

[36] *Id.*

[37] 398 U.S. 262 (1970).

[38] 433 U.S. 584 (1977).

[39] 408 U.S. at 257 (Douglas, J., concurring).

Marshall discusses similar evidence to support his contention that this punishment is unconstitutional because it is abhorrent to the values of the American public.[40] And Justice Stewart, while stating that "racial discrimination has not been proved," agrees that Douglas and Marshall "have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race."[41] Equally important, two of the dissenters mention the issue of racial discrimination. Chief Justice Burger and Justice Powell, in separate opinions for the four dissenting Justices, both acknowledge the historical evidence of discrimination against blacks, especially for intra-racial rapes in the South, and both argue that this issue ought to be presented as an equal protection claim rather than an eighth amendment claim.[42] Indeed, both Burger and Powell point to *Maxwell* as a model for equal protection litigation on the issue — an ambiguous citation, since they also both approve the lower courts' rejection of the evidence of discrimination in that case.

*B. Post-*Furman *Cases*

After *Furman*, capital defendants could attack racial discrimination in the use of the death penalty on two grounds: as a violation of the equal protection clause of the fourteenth amendment, and as a violation of the cruel and unusual punishments provision of the eighth amendment. These two claims, however, are not identical. To secure relief under the equal protection clause, a litigant must prove that she was the victim of "intentional discrimination."[43] The standard under the eighth amendment is less clear, but intent would not seem to be a requirement. No Justice in the *Furman* majority discusses intent as an element of eighth amendment "arbitrariness,"[44] and the very nature of the concept would seem to preclude a requirement of intent. What it takes to prove intent is a separate question. In most cases, discriminatory "intent" — which is not synonymous with motive or design — must be inferred from circumstantial evidence, generally evidence that negates other possible explanations for a pattern of actions; the courts

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[40] *Id.* at 363-66, 369 (Marshall, J., concurring).

[41] *Id.* at 310 (Stewart, J., concurring).

[42] *Id.* at 389 n.12 (Burger, C.J., dissenting); *id.* at 448-50 (Powell, J., dissenting).

[43] Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-66 (1977); Washington v. Davis, 426 U.S. 229 (1976); *cf.* Oyler v. Boles, 368 U.S. 448, 456 (1961) (selective enforcement of habitual criminal statute does not violate equal protection clause absent discriminatory intent).

[44] *See supra* notes 8-13 and accompanying text.

use widely differing standards in judging such evidence in different types of cases.[45] As a result, judges can, if they wish, use an intent requirement to make proof of discrimination difficult, or impossible.

The earliest post-*Furman* case on discrimination in capital sentencing was *Spinkellink v. Wainwright*.[46] In *Spinkellink*, the petitioner raised both an eighth amendment and an equal protection claim on the basis of evidence that murderers convicted of killing white victims in Florida were more likely to be sentenced to death than those convicted of killing blacks.[47] The former Fifth Circuit dealt with these two claims separately. First, it refused even to consider the cruel and unusual punishment claim, despite its recognition that the eighth amendment concept of arbitrariness that was developed in *Furman* includes racial discrimination as an element,[48] and that *Furman* prohibited discrimination by the race of the victim as well as discrimination by the race of the defendant.[49] The court justified its refusal by interpreting the Supreme Court's 1976 death penalty decisions as not merely affirming the facial validity of the statutes before the Court, but also "as holding that if a state follows a properly drawn statute in imposing the death penalty, then the arbitrariness and capriciousness — and therefore the racial discrimination — condemned in *Furman* have been conclusively removed."[50] The Supreme Court itself has not treated the state death penalty statutes that it upheld in 1976 with that degree of

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[45] See Gross & Mauro, *supra* note 7, at 116-19 for a discussion of the legal standards for proof of discriminatory intent in this context.

[46] 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979). The court's spelling of the petitioner's name in the title of the case is incorrect; the correct spelling is Spenkelink. *Id.* at 582 n.1. For clarity, however, the court's spelling will be used in this Article.

[47] Apparently, this was the same type of data later published by Bowers and Pierce, *see supra* note 17.

[48] 578 F.2d at 613 n.38.

[49] *Id.* at 613, 614 n.40.

[50] *Id.* at 613-14 (footnotes omitted). The Florida death penalty law under which Spinkellink was sentenced had been upheld in Proffitt v. Florida, 428 U.S. 242 (1976), and was therefore "a properly drawn statute." The *Spinkellink* court recognized a narrow exception to this rule: it would consider claims of arbitrariness if a defendant could point to "some specific act or acts [of] . . . racial discrimination" directed at him individually, 578 F.2d at 614 n.40, or show that his death sentence was "patently unjust and would shock the conscience." *Id.* at 606 n.28; *see also* Mitchell v. Hopper, 538 F. Supp. 77, 90 (S.D. Ga. 1982) (applying *Spinkellink*), *vacated sub nom.* Spencer v. Zant, 715 F.2d 1562 (11th Cir. 1983), *order aff'd in part sub nom.* Mitchell v. Kemp, 762 F.2d 886 (11th Cir. 1985); McCorquodale v. Balkcom, 525 F. Supp. 431, 434-35 (N.D. Ga. 1981) (same).

respect.[51]

On the other hand, the circuit court did entertain Spinkellink's equal protection claim, but rejected it on the merits because the evidence "could not prove discriminatory intent or purpose."[52] The *Spinkellink* opinion emphasizes the lack of any direct evidence that a discriminatory motive or purpose resulted in the petitioner's sentence, but it does not clarify whether, and how, Spinkellink might have proved his case in the absence of such direct evidence.[53] Later Eleventh Circuit cases clarify the point somewhat: Apparently, under *Spinkellink* discriminatory intent can sometimes be inferred from statistical evidence of racial disparities, but "[o]nly if the evidence of disparate impact is so strong that the only permissible inference is one of intentional discrimination."[54] Evidence of the type offered by Spinkellink is insufficient for that purpose — indeed, insufficient to require a hearing or even a response[55] — because it "leaves untouched countless racially neutral variables."[56]

In sum, *Spinkellink* and the Eleventh Circuit cases following it revived two of the three themes that originated in *Maxwell*: Evidence of discrimination in capital sentencing can be ignored if it does not (1) directly demonstrate racial animus in a particular case, or (2) include information on every possible variable. Two other federal courts have

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[51] *See, e.g.*, Godfrey v. Georgia, 446 U.S. 420 (1980), in which the Supreme Court, contrary to the Fifth Circuit's assumption in *Spinkellink*, showed no reluctance to examine Georgia's actual practice under a facially valid capital sentencing statute and to condemn it for arbitrariness.

[52] *Spinkellink*, 578 F.2d at 616.

[53] Spinkellink offered evidence that "although the estimated number of black felony murder victims and white felony murder victims for 1973-1976 is the same, 92 per cent of the inmates on Florida death row had murdered white victims, while only 8 per cent had murdered black victims." *Id.* at 612. The court responded variously that: (1) no hearing was required on this allegation, *id.* at 590, 616 n.41; (2) Spinkellink had not presented a prima facie case of discrimination, *id.* at 615; and (3) the state had adequately rebutted the evidence of racial disparities by showing "that murders involving black victims generally have been qualitatively different from murders involving white victims," *id.* at 615. This last point was based, apparently, not on any evidence but on an argument by the state that homicides of black victims tended to fall into the category of "family quarrels, lovers' quarrels, liquor quarrels, [and] barroom quarrels," *id.* at 612 n.37; it overlooks the fact that the comparison at issue — between black-victim and white-victim *felony* homicides — already excluded all killings occasioned by quarrels.

[54] Adams v. Wainwright, 709 F.2d 1443, 1449 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 745 (1984).

[55] Smith v. Balkcom, 671 F.2d 858, 860 (5th Cir. 1982) (modifying 660 F.2d 573 (1981)), *cert. denied*, 459 U.S. 882 (1982). (*Smith* was decided by Unit B of the former Fifth Circuit, the immediate predecessor of the present Eleventh Circuit.)

[56] *Id.* at 859 (footnote omitted).

taken an even dimmer view of the possibility of proving discrimination in capital sentencing, resurrecting the third negative theme from *Maxwell*: Evidence of discrimination can be disregarded if it is derived from cases that differ from the one at issue in their location or their facts. In *Shaw v. Martin*[57] the petitioner argued, on the basis of Dr. Paternoster's findings,[58] that South Carolina prosecutors violated the equal protection clause by seeking the death penalty more often in white-victim homicides than in black-victim homicides. The Fourth Circuit held that this evidence was insufficient to warrant an evidentiary hearing because, among other reasons, "it did not adequately compare murders of similar atrocity . . . incidents where, for example, black and white young women of tender years have been kidnapped, raped, murdered, and mutilated and the prosecutor has prosecuted only the murderer of the white girl."[59] Needless to say, it is unlikely that any evidence could ever satisfy this requirement. Similarly, in *Prejean v. Blackburn*[60] the Fifth Circuit held that to prove discrimination the petitioner would have to tailor his evidence precisely to the facts of his case, and show "that for murders of peace officers engaged in their lawful duties, juries in these two districts of Louisiana recommend death sentences only, or more often, against blacks, young or old, whose victims were white than for non-white victims."[61] This requirement, by no coincidence, makes the task impossible. At the time of the *Prejean* decision there had been only three other first degree murder convictions in those two districts under Louisiana's current death penalty statute; all three involved killings by family members, none of the victims was a police officer, and none of the three resulted in a death sentence.[62]

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[57] 733 F.2d 304 (4th Cir.), *cert. denied*, 105 S. Ct. 230 (1984).

[58] *See supra* note 21 and accompanying text.

[59] *Shaw*, 733 F.2d at 312 (footnote omitted).

[60] 743 F.2d 1091 (5th Cir. 1984).

[61] *Id.* at 1102.

[62] *Id.* at 1099 n.9.

In addition to the cases cited in the text, unpublished drafts of the Gross and Mauro study, *supra* note 7, have been presented in court several times in support of petitions for stays of execution by death-sentenced prisoners in Florida; they have not been well received. *See, e.g.*, Ford v. Wainwright, 734 F.2d 538 (11th Cir.), *application to vacate stay denied*, 104 S. Ct. 3498 (1984); Adams v. Wainwright, 734 F.2d 511 (11th Cir.), *application to vacate stay granted*, 104 S. Ct. 2183 (1984); Sullivan v. Wainwright, 721 F.2d 316 (11th Cir.), *petition for stay of execution denied*, 104 S. Ct. 450 (1983). None of these opinions discusses the merits of the study. In *Sullivan* the court concluded that the statistical evidence before it, including the Gross and Mauro study, was insufficient to prove discrimination in the imposition of the death penalty in Florida, or to warrant a stay. (There is no direct reference to the Gross and Mauro study in

C. McCleskey

1. The Context

Proof of discrimination in capital sentencing depends on studies that are far beyond the means of any capital defendant. As a consequence, defendants who have raised this issue have had to rely on whatever research happened to be available at the time they presented their

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Sullivan, but it is mentioned in *Ford*, 734 F.2d at 541, and *id.* at 543 (Henderson, J., dissenting), which describes the *Sullivan* record.) In *Adams*, on the other hand, a panel of the same court found our study sufficient to warrant a stay pending the disposition of Spencer v. Zant, 715 F.2d 1562 (11th Cir. 1983), *vacated for rehearing en banc*, 729 F.2d 1293 (11th Cir. 1984), in which the issue of the right to an evidentiary hearing on a claim of discrimination in the use of the death penalty was pending before the entire court en banc. The panel distinguished *Sullivan* on the ground that the decision to deny a stay in that case preceded both the Eleventh Circuit's vote to rehear *Spencer* en banc, and the Supreme Court's decision to grant a stay of execution on similar grounds in a Georgia case. *Adams*, 734 F.2d at 513 n.2 (citing Stephens v. Kemp, 104 S. Ct. 562 (1983)). The Supreme Court, however, vacated the stay in *Adams* without comment. 104 S. Ct. 2183 (1984). In *Ford*, a panel of the Eleventh Circuit once again granted a stay to permit consideration of two independent claims: a claim of racial discrimination based on this study, and a claim that Ford could not be executed because he was presently insane. The Supreme Court denied an application to vacate the stay in *Ford*, 104 S. Ct. 3498 (1984), but this denial appears to have been based exclusively on the present-insanity claim. Three Justices (Chief Justice Burger and Justices Rehnquist and O'Connor) voted to vacate the stay, while Justice Powell, writing for himself and Justices White and Blackmun, concurred in the denial of the application to vacate but stated that "the statistical evidence relied upon by Ford to support his claim of discrimination [is] not sufficient to raise a substantial ground upon which relief might be granted." *Id.* at 3499. The Eleventh Circuit has apparently accepted this as a holding on the merits of the study, at least for the purposes of applications for stays of execution from the State of Florida. Washington v. Wainwright, 737 F.2d 922, 923 (11th Cir. 1984). (For a discussion of the current Eleventh Circuit interpretation of these stay opinions, see *infra* notes 141-45 and accompanying text.)

It may be a mistake, however, to read too much into opinions on applications to grant or vacate stays. A decision to deny a stay pending a petition for certiorari "imports no more than a decision to deny certiorari, which does not express any views on the merits of the claims presented." Ritter v. Smith, 726 F.2d 1505, 1511 n.16 (11th Cir.) (citing Alabama v. Evans, 461 U.S. 230, 236 n.* (1983) (Marshall, J., dissenting); Graves v. Barnes, 405 U.S. 1201 (1972) (Powell, J., in chambers)), *cert. denied*, 105 S. Ct. 148 (1984); *id.* at 1511 n.17 (the same "well established principles" govern applications to vacate stays) (quoting Named & Unnamed Children v. Texas, 448 U.S. 1327, 1330 (1980) (Powell, J., in chambers)). In the past two years, the wisdom of this rule has become disturbingly apparent: The Supreme Court's consideration of petitions to grant or vacate stays in capital cases has been marked repeatedly by hurried, rash, and ill-considered decisions. *See, e.g.*, Sullivan v. Wainwright, 104 S. Ct. 450, 452 (1983) (Brennan, J., dissenting from denial of stay); *cf.* TIME, Dec. 24, 1984, at 18-20 (describing the Court's "flip-flop" on staying the execution of Alpha Stephens).

claims. The earliest post-*Furman* cases — *Spinkellink* in 1978 and *Smith* in 1980[63] — were based on the studies that could be most readily completed, in particular, the work of Bowers and Pierce.[64] As I have noted, the courts rejected this evidence as insufficient, but in *Smith* the Eleventh Circuit specified what was missing: the studies left "untouched countless racially neutral variables" — specifically variables that describe the charging of the reported homicides, the disposition of those charges at trial, and the presence of aggravating and mitigating factors.[65]

By 1982 Professor Baldus and his colleagues had completed their first study of capital sentencing in Georgia, the *Procedural Reform Study*,[66] and three death row prisoners in Georgia — Ross, Spencer, and Mitchell — offered it in a federal habeas corpus proceeding in support of their joint claim of discrimination in capital sentencing. The district court demurred, stating:

> [The petitioners] would show that sentencing patterns under the new statute still reveal glaring disparities in the imposition of the death penalty based upon race, sex and poverty. This allegation may be true, and, if so, would be sad and distressing, but this allegation does not alone show any infirmity in a statute otherwise found to be acceptable under the Constitution.[67]

In a modification of this opinion (entered in light of the intervening revision of the circuit court opinion in *Smith*), the district court added that the proffered evidence still "leaves untouched countless racially neutral variables."[68]

Judicial decisionmaking is often formulaic; once an appellate court has faulted a particular study of discrimination for leaving countless variables untouched, other courts inevitably will reject other studies using identical terms. In this case, however, the rote description was so conspicuously wide of the mark — Baldus's research is noteworthy for

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[63] Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979); Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981), *modified*, 671 F.2d 858 (5th Cir.), *cert. denied*, 459 U.S. 882 (1982). The dates in the text refer to the presentation of the discrimination claims in the trial courts.

[64] *See supra* note 17 and accompanying text.

[65] *Smith v. Balkcom*, 671 F.2d at 860 n.33.

[66] *See supra* note 24 and accompanying text.

[67] Mitchell v. Hopper, 538 F. Supp. 77, 90 (S.D. Ga. 1982), *vacated sub nom.* Spencer v. Zant, 715 F.2d 1562 (11th Cir. 1983), *order aff'd in part sub nom.* Mitchell v. Kemp, 762 F.2d 886 (11th Cir. 1985).

[68] Ross v. Hopper, 538 F. Supp. 105, 107 (S.D. Ga. 1982) (quoting *Smith v. Balkcom*, 671 F.2d at 860 n.33), *aff'd in part, remanded in part sub nom.* Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985).

the remarkable number of racially neutral variables that it does touch — that it drew a reversal. In *Spencer v. Zant*,[69] the first of these three cases to reach the Eleventh Circuit, a panel of the court reversed and remanded the case for an evidentiary hearing, noting that the petitioner had alleged that "Dr. Baldus's study addressed the very defects identified in the evidence in . . . *Smith*," and that "[t]he merits of this allegation cannot be assessed without a more detailed consideration of the evidence."[70] By the time *Spencer* was decided on appeal, however, in September 1983, both Baldus studies — the more comprehensive *Charging and Sentencing Study*[71] as well as the *Procedural Reform Study* — had been completed and presented in support of Warren McCleskey's federal habeas corpus petition in the Northern District of Georgia. As a result, the two cases became interwoven: in December 1983 the Eleventh Circuit voted to rehear *Spencer* en banc;[72] in February 1984 the district court filed its opinion in *McCleskey*;[73] in March 1984 the trial court decision in *McCleskey* was appealed, and the Eleventh Circuit ordered the *McCleskey* appeal to be heard originally en banc and stayed consideration of the *Spencer* rehearing pending the determination of *McCleskey*.[74]

2. The District Court Opinion

The district court begins its discussion of the discrimination claim in *McCleskey* with a review of the legal framework. The petitioner, having conceded that any claim under the eighth amendment was foreclosed by contrary Eleventh Circuit opinions, had pressed his claim under the equal protection clause.[75] The court agrees with this analysis under the compulsion of the *Spinkellink* opinion, but states its own opinion that the major issue before it — discrimination by race of victim — is better analyzed as a violation of the due process clause.[76] The court then em-

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[69] 715 F.2d 1562 (11th Cir.), *vacated for rehearing en banc*, 715 F.2d 1583 (11th Cir. 1983).

[70] *Id.* at 1582. This decision was followed in the appeal of Spencer's co-petitioner, Ross v. Hopper, 716 F.2d 1528, 1539 (11th Cir. 1983).

[71] *See supra* note 26 and accompanying text.

[72] 715 F.2d 1583 (11th Cir. 1983).

[73] McCleskey v. Zant, 580 F. Supp. 338 (N.D. Ga. 1984).

[74] Spencer v. Zant, 728 F.2d 1293, 1284 (11th Cir. 1984). At the same time, the court also ordered a rehearing en banc in *Ross v. Hopper*, and consolidated that hearing with *McCleskey*. *Id.*

[75] *McCleskey v. Zant*, 580 F. Supp. at 346.

[76] *Id.* at 347-49. The district court's argument on this point makes a good deal of sense, although the choice of the clause of the fourteenth amendment does not appear to

phasizes that to establish a violation of equal protection the petitioner must prove "intentional discrimination" and that statistical evidence alone will not suffice "unless the evidence of disparate impact is so strong that the only permissible inference is one of intentional discrimination."[77]

Given this legal framework, the district court proceeds to analyze and reject the Baldus studies at length. Like other courts that faced this issue, the judge here finds that the empirical research is too faulty to support the claim; unlike them, however, he is unable to do so on the usual basis — the failure to examine a sufficient number of variables. Instead, he launches an attack on several other fronts: (1) The data base is too inaccurate to form a basis for useful conclusions;[78] (2) the statistical models are flawed;[79] (3) the data, if they show anything, demonstrate that the capital sentencing system in Georgia is fair;[80] and (4) the statistical methodology used has no value in this context.[81]

Much could be said about the district court opinion in *McCleskey*. Many of the criticisms of Professor Baldus's research are unfair,[82] and many of the statements about statistics are ill-informed and wrong.[83]

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make any practical difference in this context.

[77] *Id.* at 349.

[78] *Id.* at 354-60.

[79] *Id.* at 360-64.

[80] *Id.* at 364-69, 372-77.

[81] *Id.* at 369-72.

[82] By contrast, social scientists who have commented on the Baldus studies have generally praised them highly. For example, Dr. Richard Berk, evaluating these studies in light of a National Academy of Sciences report on sentencing research, described them as "far and away the most complete and thorough analysis of sentencing" ever conducted. *McCleskey*, 753 F.2d at 907 (Johnson, J., concurring and dissenting); *see also* Barnett, *supra* note 4, at 1334 (describing the importance of the Baldus *Procedural Reform Study); id.* at 1355 (praising the data collected for that study).

[83] A few examples will suffice. (1) The district court says that "valid" multiple regression models must be able to "predict . . . the variations in the dependent variable [in this case, sentencing] to some substantial degree," 580 F. Supp. at 351, and that the Baldus regression models are unreliable because the proportion of this variance that they explain, as measured by the R^2 statistic, is under .5. *Id.* at 361. In fact R^2 is a difficult statistic to interpret and is not generally useful in this context, and a high R^2 is not a requirement for a valid (i.e., well specified) multiple regression model. *See* R. PINDYCK & D. RUBINFELD, ECONOMETRIC MODELS AND ECONOMIC FORECASTS 78-82 (2nd ed. 1981); Fisher, *Multiple Regression in Legal Proceedings*, 80 COLUM. L. REV. 702, 720 (1980). (2) The district court says that "[m]ultiple regression requires complete correct data to be utilized." 580 F. Supp. at 360. It seems that the court is referring to the well-known "errors in variables" problem in multiple regression analysis, *see* Finkelstein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases*, 80 COLUM. L. REV. 737, 747-49 (1980); if so, it over-

However, since the Eleventh Circuit sidestepped entirely the district court's analysis, the opinion is of limited interest. As a result, I will confine myself to a discussion of a particularly curious aspect of the district court's analysis: its discussion of the appropriate methodology for proving discrimination.

The court starts with an assertion that "[t]o determine whether or not race was being considered, it is necessary to compare very similar cases."[84] However, because of the large number of variables that must be considered, direct comparisons using cross tabulations are impractical, and "[a]ccordingly, the [Baldus] study principally relies upon mul-

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states the issue. As with most things, this problem is one of degrees, and useful analyses are regularly and inevitably performed with imperfect data. *See* R. PINDYCK & D. RUBINFELD, *supra*, at 176-80. (3) The district court faults the regression models before it because they fail to include many "unique circumstances or uncontrolled-for variables." 580 F. Supp. at 362. As a result, the court says that these models "are insufficiently predictive to support an inference of discrimination." *Id.* In fact, it is neither required nor generally useful that a regression model include all possible variables; what is important is that the model be "well specified," which, in this context, means (roughly) that the omitted variables be uncorrelated with the key variables of interest. *See* R. PINDYCK & D. RUBINFELD, *supra*, at 128-30; Fisher, *supra*, at 713-15. (4) The district court says that "[i]f the variables in an analysis are correlated with one another, this is called multicollinearity." 580 F. Supp. at 363. Multicollinearity occurs, in the court's view, whenever "there is any degree of interrelationship among the variables," and it distorts the regression coefficients. *Id.* This is false. There is nothing in the assumptions of multiple regression analysis that requires uncorrelated regressors; indeed, multiple regression analysis is primarily useful in analyzing data in which there *are* correlations among the predictor variables. Multicollinearity exists when two or more predictor variables are *very highly* correlated, and it is not necessarily a problem. In this context, multicollinearity would only be a problem if one of the highly inter-correlated variables was a racial variable of interest. *See* D. BELSLEY, E. KUH & R. WELSCH, REGRESSION DIAGNOSTICS 92 (1980); R. PINDYCK & D. RUBINFELD, *supra*, at 87-90, 99-103; Fisher, *supra*, at 713. (5) The district court says that the Baldus analyses are unreliable because many variables "are correlated to the race of the victim and to the death sentencing result," 580 F. Supp. at 363, and, therefore, "it is not possible to say with precision what, if any, effect the racial variables have on the dependent [sentencing] variable." *Id.* This is a fundamental misunderstanding. If there were no variables that were correlated both to the racial variables and to death sentencing, multiple regression analysis would be completely unnecessary. In that unlikely situation, no nonracial variables could possibly explain the correlations between race and sentencing, and racial effects could be determined simply and directly by comparing the death-sentencing rates of different racial categories of cases. The purpose of multiple regression analysis is precisely to separate the effects of different causal variables that are partially intertwined. *See generally* D. BELSLEY, E. KUH & R. WELSCH, *supra*, at 85-191.

[84] 580 F.2d at 354 (emphasis omitted).

tivariate analysis."[85] So far, so good: the court believes it is essential to consider many variables, and the researcher has done so using the appropriate technique, multivariate analysis — specifically, multiple regression analysis. But there is a catch. After a series of remarkable and inaccurate statements about the meaning and value of multiple regression analysis,[86] the court concludes that "multivariate analysis is ill suited to provide the court with circumstantial evidence of the presence of discrimination, and it is incapable of providing the court with measures of qualitative difference in treatment which are necessary to find that a prima facie case has been established with statistical evidence."[87] This sequence of statements can be reorganized as a simple syllogism: (1) Multivariate analysis is the only statistical method appropriate for dealing with the large number of variables that must be considered to prove discrimination; (2) multivariate analysis is incapable of proving discrimination; therefore, (3) discrimination cannot be proved with statistical evidence. Lest the point be lost, the court drives it home: "To the extent that McCleskey contends that he was denied either due process or equal protection of the law, his methods fail to contribute anything of value to his cause."[88] The court makes no attempt to reconcile this position with the many cases in which litigants successfully relied on statistical evidence in general, and multiple regression in particular, to prove intentional discrimination in other contexts.[89]

3. The Circuit Court Opinion

The Eleventh Circuit's opinion in *McCleskey* is the main focus of the remainder of this Article. In this section I will merely summarize the major points made by the court in its discussion of the discrimination claim and by the three judges who dissented on that issue.[90]

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[85] *Id.* (emphasis omitted).

[86] *Id.* at 360-72.

[87] *Id.* at 372 (emphasis omitted).

[88] *Id.* (emphasis omitted).

[89] *See generally* D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION (1980); Finkelstein, *supra* note 83.

[90] In addition, Chief Justice Godbold wrote an opinion, in which three other judges joined, dissenting from the court's holding on a separate issue, McCleskey's *Giglio* claim. 753 F.2d at 906-07; *see also id.* at 882-85 (majority opinion on *Giglio* issue).

a. The Use of Social Science Research in Law in General[91]

After a brief description of the background of the case, the circuit court launches into a rambling discussion of the history of the use of social science evidence in litigation. The court notes various problems with such evidence, but nonetheless "take[s] a position that social science research does play a role in judicial decisionmaking in certain situations."[92] Specifically, in discrimination cases statistics can provide circumstantial evidence of discrimination. "[T]he inferences to be drawn from the statistics are for the factfinder, but the statistics are accepted to show the circumstances."[93]

b. The Constitutional Standards Governing Claims of Discrimination in Capital Sentencing.[94]

The Eleventh Circuit takes this occasion to overrule its earlier decision in *Spinkellink* that arbitrariness was "conclusively removed" from the capital sentencing statutes approved by the Supreme Court in 1976.[95] As the court points out, that decision is inconsistent with the later Supreme Court holding in *Godfrey v. Georgia*[96] that a portion of the Georgia capital sentencing scheme was unconstitutional as applied. The circuit court goes on to hold, however, that it makes no difference whether the claim is litigated under the equal protection clause, the cruel and unusual punishments clause of the eighth amendment, or the due process clause — the factual issue is the same: intentional discrimination. The court recoginzes that "[d]ue process and cruel and unusual punishment cases do not usually focus on the intent of the government actor," but it holds that when the content of the claim is racial discrimination in sentencing decisions, "intent and motive are natural components of the proof."[97] The court does not explain what makes this special requirement so natural; in other contexts, courts are usually particularly sensitive to claims of racial discrimination, not peculiarly exacting.[98]

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[91] *Id.* at 887-90.

[92] *Id.* at 888.

[93] *Id.* at 890.

[94] *Id.* at 890-92.

[95] *Spinkellink*, 578 F.2d at 613-14; *see McCleskey*, 753 F.2d at 891.

[96] 445 U.S. 420 (1980).

[97] *McCleskey*, 753 F.2d at 892.

[98] *See generally* Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976). The Eleventh Circuit's holding on this point draws a sharp response from Judge Johnson in dissent: "After today, in this Circuit arbitrariness

The Eleventh Circuit next holds that to prevail under any of these constitutional provisions a prisoner must present proof of a "disparate impact [that] is so great that it compels a conclusion that the system is unprincipled, irrational, arbitrary and capricious such that purposeful discrimination . . . can be presumed to permeate the system."[99] This is a more extreme requirement than the usual standard for proof of discriminatory intent: "a clear pattern, unexplainable on grounds other than race."[100] As a practical matter, the Eleventh Circuit seems to demand proof of specific racial animus in capital sentencing decisions. Once again, there is no explanation for this unusual requirement.

c. The Value of "Generalized Statistical Studies" as Evidence of Discrimination in Capital Sentencing[101]

The court proceeds to fit the type of studies at issue — "generalized statistical studies" — into the legal framework it has constructed. The court claims to reaffirm its previous holdings that statistical evidence of racial discrimination "may be so strong that the results permit no other inference,"[102] but in fact it transforms these holdings by equating *strong evidence* of discrimination with evidence of a *strong pattern* of discrimination. The court is explicit on this new rule and on its consequences: "it is a legal question as to *how much [racial] disparity* is required before a federal court will accept it as evidence of the (sic) constitutional flaws in the system."[103] No hearings are required on statistical studies of capital sentencing discrimination, regardless of their quality, unless they "reflect a disparity *so great* as to inevitably lead to a conclusion that the disparity results from intent or motivation."[104]

d. The Validity of the Baldus Study[105]

The Eleventh Circuit notes that "[t]he district court held the [Baldus] study to be invalid" and adds that "[t]he district court is to be commended for its outstanding endeavor in the handling of the detailed

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based on race will be more difficult to eradicate than any other sort of arbitrariness in the sentencing process. *McCleskey*, 753 F.2d at 910-11.

[99] *McCleskey*, 753 F.2d at 892.

[100] Washington v. Davis, 426 U.S. 229, 242 (1976).

[101] *McCleskey*, 753 F.2d at 892-94.

[102] *Id.* at 892 (quoting *Smith v. Balkcom*, 671 F.2d at 859).

[103] *Id.* at 893 (emphasis added).

[104] *Id.* at 894 (emphasis added).

[105] *Id.* at 894-95.

aspects of this case, particularly in light of the consistent arguments being made in several cases based on the Baldus study."[106] Nonetheless, the circuit court "pretermit[s] a review of this finding concerning the validity of the study itself"[107] on the ground that such a review is unnecessary, given its finding that "even if the statistical results are accepted as valid, the evidence fails to challenge successfully the constitutionality of the Georgia system."[108]

e. The Sufficiency of the Baldus Study[109]

As I have noted, the court concludes that the quantity of discrimination found by the Baldus studies is insufficient to raise a constitutional claim. This conclusion is based on three separate findings that address different aspects of these studies. First, the court states that "[t]he result of Baldus' most conclusive model, on which McCleskey primarily relies, showed an effect of .06, signifying that on average a white victim crime is 6% more likely to result in the [death] sentence than a comparable black victim crime."[110] This "6% bottom line" is "not sufficient to overcome the presumption that the statute is operating in a constitutional manner."[111] Second, the court notes that the Supreme Court denied a number of stays in Florida death penalty cases despite evidence from the Gross and Mauro study that the odds of a death sentence for killing a white victim in that state were 4.8 times greater than for killing a black. The court finds that the Supreme Court rejected this evidence because the "bottom line" was too small rather than because of the study's methodological limitations and that this disposition compels a rejection of the Baldus studies, since they made a comparable finding — that killing a white victim increases the odds of a death sentence in Georgia by a factor of 4.3.[112] Third, Baldus presented evidence that for Georgia homicides in the middle range of aggravation — and McCleskey's case fell in that range — the race-of-victim effect was 20 percent. The court rejects this evidence on two grounds: because it is "unpersuaded that there is a rationally classified, well-defined class" of mid-range cases; and because "[a] valid system challenge cannot be made only against the mid-range of cases," but must encompass "the

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[106] *Id.* at 894.
[107] *Id.* at 895.
[108] *Id.* at 894.
[109] *Id.* at 895-98.
[110] *Id.* at 896.
[111] *Id.* at 897.
[112] *Id.*

system as a whole."[113]

f. Conclusion[114]

The court concludes that the constitutionally required discretion in capital sentencing will necessarily produce some unevenness in results. Therefore, racial disparities that cannot be explained by other considerations still do not constitute prima facie evidence of discrimination.[115] Indeed, the court asserts that despite the unexplained racial disparities (which it characterizes as "marginal"), the evidence presented "confirms rather than condemns the system" of capital sentencing in Georgia.[116]

g. The Dissents

Three judges, Judges Johnson, Hatchett, and Clark, dissent from the court's holding on McCleskey's discrimination claim.[117] Judge Johnson's dissent is the most wide ranging. It argues that claims under the eighth amendment prohibition of arbitrariness in capital sentencing, unlike fourteenth amendment claims, include no element of intent; that Baldus's findings prove both arbitrariness and intentional discrimination; and that the Baldus studies are methodologically valid.[118] Judge Hatchett's dissent focuses on the 20 percent disparity that Baldus found in the mid-range of cases, and concludes that this difference is "intolerable."[119] Judge Clark's dissent argues that under traditional standards of proof the Baldus findings demonstrate intentional discrimination in violation of the equal protection clause.[120]

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[113] *Id* at 898.

[114] *Id.* at 898-900.

[115] *Id.* at 898-99.

[116] *Id.* at 899.

[117] There are also three separate opinions concurring in the court's holding on the discrimination claim. Judge Tjoflat argues that aggregate sentencing statistics are entirely inappropriate to show discrimination in capital sentencing. *Id.* at 904-05. Judge Vance expresses doubts about the court's assertion that the equal protection and eighth amendment claims require equivalent proof, but adds that a claim of discrimination — such as the one presented by McCleskey — is only appropriate under the equal protection clause. *Id.* at 905-06. Judge R. Lanier Anderson, joined by Judge Kravitch, argues that the requirements for proof of intentional discrimination ought to be less exacting in death cases than in other contexts, but that the distinction has no consequences in this case. *Id.* at 906-07.

[118] *Id.* at 907-18. This opinion was also signed by Judges Hatchett and Clark.

[119] *Id.* at 918-19.

[120] *Id.* at 920-27.

IV. How Much is Not Too Much?

At first blush, the Eleventh Circuit's analysis in *McCleskey* seems plausible enough. We all have a reasonably clear notion of what 6 percent means from other common contexts: 6 percent might be the rate for a sales tax, and, in happier times, 6 percent was a common annual interest rate on loans. It sounds right when the court describes the "6% disparity" found by Baldus as a "marginal difference." In fact, it is nothing of the sort. Although the court seems to have missed the point entirely, this disparity actually means that defendants in white-victim cases are several times more likely to receive death sentences than defendants in black-victim cases.[121]

Percentage disparities that look similar to this one appear frequently in the case law of discrimination, especially in jury representativeness cases. Not surprisingly, both the majority and the dissenters in *McCleskey* discuss the disparities found by the Baldus studies against the background of earlier jury discrimination claims. The comparison is misleading. In *Swain v. Alabama*,[122] the leading jury-representativeness case that seems comparable, the Supreme Court announced a rule that sounds similar to the Eleventh Circuit holding in *McCleskey*: "We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is underrepresented [in the jury pool] by as much as 10%."[123] This decision has been severely criticized on several grounds. First (and least important), the Court's arithmetic is faulty. The figures cited in the opinion itself show racial disparities ranging from 11 percent to 16 percent.[124] Second, the issue in *Swain* (as in *McCleskey*) was not whether discrimination had been "satisfactorily proved" but whether the state would be required to rebut a showing of apparent discrimination.[125] Third, as John Hart Ely has pointed out, rules such as these create powerful temptations: "to announce that a ten per cent disparity is not sufficient to call for such a rebuttal is practically to guarantee . . . [that]

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[121] I will not specifically discuss the 20% disparity in capital sentencing that Baldus found in the middle range of capital cases, but my discussion of the overall 6% disparity is, obviously, applicable to that finding as well. Nor will I discuss Baldus's findings on discrimination by race of defendant, which the court, for no apparent reason, ignores entirely. *See infra* text accompanying note 181.

[122] 380 U.S. 202 (1965).

[123] *Id.* at 208-09.

[124] *Id.* at 205; *see, e.g.*, Note, *Fair Jury Selection Procedures*, 75 Yale L.J. 322, 326 n.22 (1965).

[125] *See* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1264 n.173 (1970).

race very likely will be considered, [and] minorities very likely will be underrepresented — by about ten per cent."[126] Fourth, and most important for present purposes, the measure of underrepresentation used in *Swain* is of questionable value at best.

The 10 percent disparity described in *Swain* is the difference between the absolute proportion of blacks in the population and the absolute proportion of blacks in the jury pool. Specifically, 26 percent of the male county population over twenty-one was black, but only 10 percent to 15 percent of the jury panels — which, by the Court's arithmetic, is a difference of 10 percent. The problem with this measure, as various courts and commentators have pointed out,[127] is that a 10 percent difference in the rate of representation means various things in different contexts. It is one thing to have 60 percent black jurors in a county that is 70 percent black, and quite another to have 2 percent black jurors in a county that is 12 percent black. Indeed, if blacks (or any other group) constitute less than 10 percent of the population of a jurisdiction, then, under *Swain*, even their total exclusion from jury service will not constitute prima facie evidence of discrimination.

These obvious anomalies have led many commentators to suggest measures of disparity other than the absolute difference in representation.[128] In particular, the size of the group at issue can be taken into account if one examines the "comparative underrepresentation" of that group, a measure that answers the following question: By what percentage does the actual number of black jurors fall short of the expected

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[126] *Id.* at 1264-65. A telling example of this problem is cited in Judge Clark's dissent in *McCleskey*, 753 F.2d at 926 n.29: In Bailey v. Vining, No. 76-199 (M.D. Ga. 1978), the court declared the jury selection system in Putnam County, Georgia, to be unconstitutional because the Office of the Solicitor had sent a memorandum to the jury commissioners instructing them in how to underrepresent blacks and women on juries but stay within Supreme Court and Fifth Circuit guidelines. "The result was that a limited number of blacks were handpicked by the jury commissioners for service." 753 F.2d at 926 n.29.

[127] *See, e.g.*, United States v. Maskeny, 609 F.2d 183, 191 (5th Cir.), *cert. denied*, 447 U.S. 91 (1980); Quadra v. Superior Court of City & County of San Francisco, 403 F. Supp. 486, 495 n.9 (N.D. Cal. 1975); Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338, 348 (1966); Kairys, Kadane & Lehoczky, *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CALIF. L. REV. 776, 793-94 (1977).

[128] Kairys, *Juror Selection: The Law, A Mathematical Method of Analysis, and a Case Study*, 10 AM. CRIM. L. REV. 771, 776-77 (1972); Kairys, Kadane & Lehoczky, *supra* note 127, at 788-99; Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 253 (1968); Note, *Fair Jury Selection Procedures*, 75 YALE L.J. 322, 325-26 (1965).

number of black jurors? By this measure, the underrepresentation of blacks in *Swain* ranged from 42 percent to 62 percent. Some lower courts, recognizing the problems with *Swain*, have managed to distinguish it and have adopted other standards for reviewing jury discrimination cases;[129] other courts, unfortunately, have followed *Swain* uncritically,[130] sometimes openly embracing its worst consequences. For example, in one case a defendant presented evidence that Hispanic citizens constituted 5.3 percent of the jury-eligible population in the district, but only 1.1 percent of the jury pool; the court held that "[b]ecause Hispanics comprise a small percentage of the eligible population and because the absolute disparity is under 10 percent, the court, again, finds that the *prima facie* elements of a fair-cross-section violation have not been proved."[131]

Numerical guidelines for determining constitutional violations, however, are not all equally flawed. In *Gaffney v. Cummings*[132] and *White v. Regester*[133] the Supreme Court held, in effect, that disparities of up to 10 percent in the populations of state legislative districts are presumptively constitutional under the "one person, one vote" rule an-

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[129] *See, e.g.*, Hirst v. Gertzen, 676 F.2d 1252, 1258 n.14 (9th Cir. 1982); Bradley v. Judges of Superior Court for County of Los Angeles, 531 F.2d 413, 416 n.8 (9th Cir. 1976); Blackwell v. Thomas, 476 F.2d 443, 447 (4th Cir. 1973); Witcher v. Peyton, 382 F.2d 707, 710 (4th Cir. 1967); Waller v. Butkovich, 593 F. Supp. 942, 954 (M.D.N.C. 1984); Hillery v. Pulley, 563 F. Supp. 1228, 1240-41 (E.D. Cal. 1983), *aff'd*, 733 F.2d 644 (9th Cir. 1984); Villafane v. Manson, 504 F. Supp. 78, 83-88 (D. Conn. 1980); Quadra v. Superior Court of City & County of San Francisco, 403 F. Supp. 486, 495 n.9 (N.D. Cal. 1975). *See generally* Foster v. Sparks, 506 F.2d 805, 811, 835 (5th Cir. 1975).

[130] *See, e.g.*, United States v. Clifford, 640 F.2d 150, 155 (8th Cir. 1981); United States v. Butler, 611 F.2d 1066, 1070 (5th Cir.), *cert. denied*, 449 U.S. 830 (1980); United States v. Maskeny, 609 F.2d 183, 190 (5th Cir.), *cert. denied*, 447 U.S. 921 (1980); United States v. Test, 550 F.2d 577, 587 (10th Cir. 1976); United States v. Newman, 549 F.2d 240, 249 (2d Cir. 1977); United States v. Musto, 540 F. Supp. 346, 356 (D.N.J. 1982), *aff'd sub nom.* United States v. Aimone, 715 F.2d 822 (3d Cir 1983), *cert. denied*, 104 S. Ct. 3585 (1984); United States v. Haley, 521 F. Supp. 290, 293 (N.D. Ga. 1981); United States v. Facchiano, 500 F. Supp. 896, 899 (S.D. Fla. 1980); United States v. White Lance, 480 F. Supp. 920, 922 (D.S.D. 1979); United States v. Hunt, 265 F. Supp. 178, 194 (W.D. Tex. 1967).

[131] United States v. Musto, 540 F. Supp. 346, 356 (D.N.J. 1982), *aff'd sub nom.* United States v. Aimone, 715 F.2d 822 (3rd Cir. 1983), *cert. denied*, 104 S. Ct. 3585 (1984). The court goes on to say that it need not consider the difference between the proportion of Hispanics in the total population (8.6%) and in the jury pool (1.1%) because "the absolute disparity is only 7.5 percent." *Id.* at 357.

[132] 412 U.S. 735 (1973).

[133] 412 U.S. 755 (1973).

nounced in *Baker v. Carr*[134] and *Reynolds v. Sims*.[135] This rule of thumb, unlike the one in *Swain*, creates relatively few problems because the 10 percent disparity at issue is different in kind from the 10 percent disparity in *Swain*. The issue in redistricting cases is the *number* of voters in the districts and the measure used is the disparity in *distribution*. In jury cases the issue is the *proportion* of a particular racial group in the jury pools, and the measure is the disparity in *representation*. In general, our common experiences with percentages correspond much better to disparities in distribution than to disparities in representation: taxes and interest payments are distributional events, and most comparisons we commonly make (for example, comparing ourselves to those who earn 10 percent more than we do) are distributional comparisons. In all of these situations — unlike the situation in *Swain* — the percentages at issue are considered against a base of 100 percent.[136]

The problems with the 10 percent guideline in *Swain* illustrate a general rule: it is impossible to evaluate percentages meaningfully without considering the baseline against which they must be compared. If this elementary rule is ignored, absurd results follow — as when courts require a 10 percent absolute disparity in the representation of a group that constitutes 5 percent of the population. The Eleventh Circuit's discussion of "6% disparity" in the Baldus studies is a telling example of how courts can be misled in just this way.

The "6% disparity" that Baldus and his colleagues found is not, literally, a 6 percent difference in death sentencing rates between white-victim and black-victim homicides. The actual overall disparity they found was 10 percent; the 6 percent figure reflects the size of a multiple regression coefficient that represents the average difference between the probability of a death sentence in a white-victim case and the probability of a death sentence in a black-victim case, after taking into account the effects of many other variables.[137] The meaning of the

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[134] 369 U.S. 186 (1962).

[135] 377 U.S. 533 (1964).

[136] Even when the issue is equality of distribution, announcing a permissible level of disparity can become a license to generate disparities that are just under the limit. *See supra* note 126 and accompanying text. Perhaps for this reason the Court has gone to the opposite extreme in its decisions on congressional districts, and held that *no* level of deviation from absolute equality is permissible. Karcher v. Daggett, 462 U.S. 725 (1983). This rule, however, cannot be taken literally, since some deviations from equality in population are an inevitable consequence of measurement error. *See id.* at 769-70 (White, J., dissenting).

[137] *McCleskey*, 753 F.2d at 896.

McCleskey holding can be described, however, by calculating what the black-victim and white-victim death sentencing rates would be if this adjusted disparity were the actual difference in the sentencing rates of these two groups. To do so it is necessary to take three numbers into account: (1) The overall death sentencing rate in the Baldus sample, which was quite low, 5.2 percent. (2) The proportion of white-victim homicides, which was 39 percent. (3) The proportion of black-victim homicides, which was 61 percent. Given these characteristics of the Baldus sample, there would be about a 6 percent disparity between the death sentencing rates in white-victim and black-victim cases if the white-victim rate were approximately 9 percent and the black-victim rate were approximately 3 percent.[138]

It is immediately obvious that in comparing these two rates it is crucial to consider the overall rate of capital sentencing. Death sentences are uncommon, and so, inevitably, absolute differences in death sentencing rates will be small. This is, therefore, a particularly inappropriate context in which to apply a *Swain*-type guideline, every bit as inappropriate as jury-selection cases that concern minorities of 5 percent. This point is missed by both the majority and the dissenters in *McCleskey*. But there is a more basic problem. Note that the disparity here — 6 percent — is *greater* than the overall death-sentencing rate — 5.2 percent. How is that possible? The answer is that the difference here is not a difference in levels of *representation* (as in *Swain*) but in rates of *selection*. Focusing on absolute differences in rates of selection without considering the overall selection rate is even less meaningful than focusing on absolute differences in levels of representation without considering the sizes of the groups being compared.

Consider a hypothetical county in which there are 80,000 whites and 20,000 blacks who are eligible for jury service. If the jury pool consists of 900 whites and 100 blacks, the absolute disparity in the representation of blacks (the measure in *Swain*) would be 10 percent — blacks are 20 percent of the population and 10 percent of the jury pool. The disparity in *selection rates*, however, is an entirely different matter. For whites the selection rate is 1.1 percent (900/80,000), and for blacks it is 0.5 percent (100/20,000); the difference in the rates of selection (the measure in *McCleskey*) is 0.6 percent, far lower than the "marginal" 6 percent disparity that Baldus found. In fact, the maximum possible disparity in selection rates — the disparity that would exist if all 1000 potential jurors in the county were white — is 1.3 percent. (Similarly,

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[138] This illustration is derived from the following equation: .39 x (9%) + .61 x (3%) = 5.3%.

in my illustration based on the Baldus data the maximum possible disparity in rates of selection — the difference that we would find if *all* death sentences occurred in white-victim cases — is 13 percent.) In other words, while the rule in *Swain* implies that any disparity in *representation* will be tolerated if the group in question is sufficiently small, the rule in *McCleskey* implies that any disparity in *selection* is permissible, regardless of the size of the groups, as long as the overall rate of selection is low.

If we are to apply the *Swain* rule to this case (and I would not recommend it), we must compare levels of representation, not selection. The disparity in representation can be estimated reasonably accurately using my illustration: in the absence of discrimination one would expect 61 percent of the death sentences to occur in black-victim cases, but if 9 percent of white-victim cases and only 3 percent of black-victim cases result in death sentences, then only 34 percent of the death sentences would be meted out for the killing of blacks.[139] This means that the absolute underrepresentation of black-victim cases on death row (as these things are calculated in *Swain*) would be 27 percent, and the comparative underrepresentation would be 44 percent.[140]

It is accurate to say that there is a "disparity of 6 percent" when 9 percent of white-victim homicides receive death sentences compared to 3 percent of black-victim homicides, but it is uninformative. A more informative statement would be that white-victim cases are three times as likely to receive death sentences as black-victim cases — hardly a "marginal effect." The Eleventh Circuit does not discuss this ratio of probabilities, most likely because no comparable figures were before it; strictly speaking, they are not appropriate in this context. My 3 percent vs. 9 percent illustration is based on a simplification: I assume that all black-victim and all white-victim cases had the same probabilities of death sentences. In fact, many factors other than race affect those probabilities, and the analyses in the Baldus studies control for those factors. Accordingly, the disparity found is the average disparity, across all levels of likelihood of a death sentence. At some such levels a ratio of probabilities of three to one would be not only incorrect but impossible. No probability can be larger than 1, certainty; if the probability of a death sentence for a black-victim homicide in a particular category is .5 (or 50 percent), the maximum possible increment in this probability for

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[139] The actual, unadjusted proportion of black-victim death sentences in the Baldus data is only 16% (20/128). *McCleskey*, 753 F.2d at 920 (Clark, J., dissenting and concurring).

[140] See *supra* note 138.

a similar white-victim case is a factor of 2.

The court, however, does discuss an analogous measure: the odds multiplier.[141] The term "odds" in this measure refers to the common betting odds that most people will recognize; it is defined as O = P/(1-P) where "O" stands for "odds" and "P" stands for "probability." Thus, a probability of 0.5 translates into odds of 1 (or one to one, or "even money"), a probability of .6 translates into odds of 1.5 (or three to two), etc. Odds, unlike probability, is an open-ended measure — it ranges from zero to infinity — and the multiplier of the odds is an appropriate measure of the overall effect of a racial variable on capital sentencing. Baldus found that killing a white victim increased the odds of a death sentence by a factor of 4.3; the Eleventh Circuit found this insufficient. In fact, the court says that it might be "compelled" to reach this conclusion by cases in which the Supreme Court denied stays to death-sentenced inmates in Florida who presented evidence of the Gross and Mauro finding that killing a white in that state increased the odds of a death sentence by a factor of 4.8.[142]

The Eleventh Circuit states that it might be bound by these Supreme Court rulings because the High Court held that evidentiary hearings were not required on the Florida discrimination claims, and, therefore, the Court must have found the "bottom line" in Gross and Mauro to be constitutionally insufficient. "A contrary assumption, that the Supreme Court analyzed the extremely complicated Gross and Mauro study and rejected it on methodological grounds, is much less reasonable."[143] Perhaps, but the Eleventh Circuit itself rejected other evidence of discrimination in capital sentencing on methodological grounds, without a hearing, in *Smith v. Balkcom*,[144] and it did so for a simple reason: an insufficient range of control variables. The Supreme Court could have followed that lead. Needless to say, I do not agree with this criticism of the findings of the study that I conducted with Robert Mauro, but I suspect — in charity to the Supreme Court — that this is the problem the Court had in mind.[145] In any event, mathematical mis-

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[141] *McCleskey*, 753 F.2d at 897. *See generally* Gross & Mauro, *supra* note 7, at 77 n.125, 147-48.

[142] *McCleskey*, 753 F.2d at 897.

[143] *Id.*

[144] 660 F.2d 573 (5th Cir. 1981), *modified*, 671 F.2d 858 (5th Cir.), *cert. denied*, 459 U.S. 882 (1982). *Smith*, to be precise, was decided by Unit B of the former Fifth Circuit, which was the immediate predecessor of the present Eleventh Circuit.

[145] Moreover, as Judge Hatchett points out in his dissent, "[n]either the Supreme Court nor the Eleventh Circuit has passed on the Florida studies on a fully developed record (as in this case)." *McCleskey*, 753 F.2d at 919 n.2.

statements are no more correct when they are pronounced by the Supreme Court rather than by some other body — although they may be more misleading. In this case the Eleventh Circuit might have misunderstood the meaning of "death odds multiplier of 4.3 to 1," and may have been led by the Supreme Court to believe that an effect that increases the odds of an event by more than a factor of 4 can be "marginal." An Atlantic City casino that operated on that premise, however, would go bankrupt in a weekend.

The primary subject of this Article is the courts' treatment of claims of discrimination in capital sentencing, not the underlying reality. My focus, therefore, has been on the race-of-victim effect in Georgia *as the Eleventh Circuit described it.* Nonetheless, a few notes on the empirical context of this case are in order.

In a study of capital sentencing patterns by Robert Mauro and myself we found that killing a white victim increased the odds of a death sentence in Georgia by a factor of 7.2, more than the factor of 4.8 that we report for Florida and more than the factor of 4.3 that Baldus reports for Georgia.[146] Given the differences in the samples and the methodologies of these two studies, such discrepancies are to be expected. From a scientific point of view, the consistency between our findings and those of Baldus and his colleagues is more impressive than the differences. Moreover, the Eleventh Circuit's focus on the size of the estimates of these racial effects is fundamentally misplaced, since the exact figures are less important than the overall pattern. Nonetheless, it is important to realize that at least part of this discrepancy is due to the fact that the Baldus studies inevitably *underestimate* the magnitude of race-of-victim discrimination, to some extent. Several factors contribute to this systematic underestimation:

(1) The Baldus studies do not cover all stages in the process of adjudicating capital cases. Any discrimination in charging defendants with homicide, or in convicting them, would not be reflected in the Baldus findings.

(2) The more extensive of the two samples that Baldus used — the sample for the *Charging and Sentencing Study* — was restricted to cases that were charged as homicides and that resulted in prison or death sentences for a conviction of homicide. The sample for the *Procedural Reform Study* was even more restricted. That means that these samples were created by discretionary decisions within the criminal justice system — decisions by prosecutors and judges and juries — and

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[146] Gross & Mauro, *supra* note 7, at 78.

these discretionary decisions may have involved elements of discrimination by race of victim; indeed, the findings in the area suggest that is likely. If so, these studies are susceptible to the methodological problem of "sample selection bias," which, in this context, would have the effect of obscuring the magnitude of similar patterns of discrimination at later stages of the process.[147]

(3) Baldus's analyses assume that any apparent racial effect that *might* be explained by a legitimate factor *was* indeed caused by that factor. As a result, some apparently neutral effects may conceal actual discrimination. For example, prior criminal record is a legitimate aggravating factor, but its apparent use in capital sentencing may reflect an actual pattern of discrimination — either because criminal record is given weight as an aggravating factor in part because blacks are more likely to have records, or because the criminal records of black defendants are due in part to prior discrimination against them.[148]

(4) The Baldus studies rely on data from files that were generated by major actors in the criminal justice system: police officers, prosecutors, judges, and probation officers. These actors generally know how they intend to deal with the cases they describe, and they write their descriptions accordingly. If a prosecutor, for example, has decided to reduce a charge from murder to manslaughter, she will make sure that the file reflects mitigating factors that justify her decision. In part, this is an unconscious process of self-justification; in part, it is simply a response to bureaucratic and legal realities: these decisions are subject to internal and external review, and must be supported. As a result, the data will (to some extent) describe the sentencing system as more consistent and less discriminatory than it actually is.[149]

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[147] See *id.* at 46-68 for a discussion of the meaning of sample selection bias, and its likely effects on studies of discrimination in capital sentencing. *See generally* Klepper, Nagin & Tierney, *Discrimination in the Criminal Justice System, A Critical Appraisal of the Literature*, in 2 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 55, 57 (A. Blumstein, J. Cohen, S. Martin & M. Tonry eds. 1983); Berk, *An Introduction to Sample Selection Bias in Sociological Data*, 48 AM. SOC. REV. 386 (1983).

[148] *See, e.g.*, Hunter v. Underwood, 105 S. Ct. 1916 (1985) (provision of Alabama Constitution disenfranchising those convicted of certain crimes held unconstitutional because choice of crimes was motivated by intent to discriminate against blacks and had racially disproportionate impact); J. PETERSILIA, RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM 30-32 (1983) (citing evidence of sentencing discrimination against blacks).

[149] By contrast, the Gross and Mauro study, *supra* note 7, while not nearly as comprehensive as the Baldus studies, is less susceptible to three of these four problems, and less likely to produce systematic underestimates of racial effects. Specifically: (1) Gross and Mauro compared initial reports on homicides to ultimate death sentences, thereby

In sum, to the extent that the exact magnitude of race-of-victim discrimination in Georgia is important, we must recognize that the Baldus studies almost certainly present a low estimate of the actual problem — they paint a picture that is rosier than reality.[150]

It might be useful, before moving on, to put these numbers in perspective. Coronary heart disease, it is well known, is associated with cigarette smoking. But what is the magnitude of the effect? One of the pioneering studies in the field, by Hammond and Horn,[151] studied 187,783 men between the ages of fifty and sixty-nine over a forty-four month period. Deaths from coronary artery disease during the study period were fairly rare — a total of 5297 or 2.8 percent of the sample — but cigarette smokers came in far more than their share: controlling for age, smokers were 1.7 times more likely to die of coronary artery disease than nonsmokers.[152] Expressing this effect as an odds ratio hardly changes its magnitude at all.[153] This is not an isolated example. Another well-known study, by Joseph T. Doyle and colleagues, reports

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encompassing all stages of the criminal justice system. (2) The Gross and Mauro study is based on all reported homicides in each state, effectively eliminating sample selection bias as an issue. (3) The Gross and Mauro study relied on data derived from the initial police reports of the homicides, before legal proceedings were undertaken, thus minimizing (if not eliminating) the problem of self-serving reporting bias by state officials.

[150] In an article appearing in this issue, Arnold Barnett has reanalyzed some of the data from Baldus's *Procedural Reform Study*, and claims to have found a smaller race-of-victim effect than that found by Baldus and his colleagues. Barnett, *supra* note 4. This discrepancy in findings may or may not be real; Baldus, Woodworth, and Pulaski have also analyzed their own data following Barnett's methodology and they find a racial effect that is similar to the one they previously reported. Baldus, Pulaski & Woodworth, *Comparative Review, supra* note 4. To the extent that it matters, however, the Baldus estimate used in *McCleskey* is more reliable than Barnett's estimate, for two reasons: (1) Baldus relied on his more detailed and extensive *Charging and Sentencing Study*, in addition to the preliminary *Procedural Reform Study*. Barnett's reanalysis is confined to the earlier study. (2) The strength of Barnett's method — which is insightful and elegant — is its economy: he uses very few variables. This should make his methodology useful and attractive to courts in devising guidelines for determining proportionality in capital sentencing. This type of economy, however, is a drawback in analyzing data that may be susceptible to sample selection bias: the fewer the variables used, the more room for this bias to operate, and the greater the likely underestimation of racial effects. *See* Gross & Mauro, *supra* note 7, at 47-48. In addition, of course, Barnett's analysis is susceptible to all of the biases that are likely to cause underestimation in Baldus's own findings on racial effects.

[151] Hammond & Horn, *Smoking and Death Rates — Report on Forty-Four Months of Follow-up of 187,783 Men*, 166 J.A.M.A. 1294 (1958).

[152] *Id.* at 1295 Table 1.

[153] When, as here, P (probability) is small, then (1-P) is very close in value to 1 and the odds ratio — P/(1-P) — becomes very close in value to P.

that the smokers it followed faced two times the risk of death from coronary heart disease as the nonsmokers,[154] and many other medical studies reach the same conclusion: smoking cigarettes increases the risk of death from heart disease greatly, but by a considerably smaller amount than the race-of-victim effect that the Eleventh Circuit dismisses as marginal.[155]

V. Too Little or Too Uncertain?

The *McCleskey* majority claims to take the Baldus findings at face value and to focus solely on their legal implications, but, as Judge Johnson points out in his dissent, "the majority opinion in several instances questions the validity of the study while claiming to be interested in its sufficiency alone."[156] These out-of-place criticisms are familiar:

> The Baldus approach, however, would take the cases with different results on what are contended to be duplicate facts, where the differences could not be otherwise explained, and conclude that the different result was based on race alone. . . . This approach ignores the realities. It not only ignores quantitative differences in cases: looks, age, personality, education, profession, job, clothes, demeanor, and remorse, just to name a few, but it is incapable of measuring qualitative differences of such things as aggravating and mitigating factors. There are, in fact, no exact duplicates in capital crimes and capital defendants.[157]

In other words, disclaimers to the contrary notwithstanding, the Eleventh Circuit cannot resist coming home to rest on the arguments first framed in *Maxwell*: not enough variables are considered, no two cases are alike. In this case, however, these arguments have a particularly hollow ring — and not only because the court committed itself to assuming the truth of the Baldus findings. Consider the list of factors that the court says might, somehow, explain Baldus's findings: "Looks, age, personality, education, profession, job, clothes, demeanor, and remorse." At least some of these factors were in fact considered by Baldus — age, employment, and expression of remorse — and their effects are

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[154] Doyle, Dawber, Kanmel, Kinch & Kahn, *The Relationship of Cigarette Smoking to Coronary Heart Disease*, 190 J.A.M.A. 886, 889 Table 3 (1964).

[155] *See* U.S. Dep't of Health, Education & Welfare, Smoking and Health, A Report of the Surgeon General, 4—19 to 4—41, 4—65 (1979) [hereafter Smoking and Health]; U.S. Dep't of Health, Education & Welfare, The Health Consequences of Smoking, A Report of the Surgeon General: 1971, at 21-40 (1971) [hereafter Health Consequences of Smoking].

[156] 753 F.2d at 915 (Johnson, J., dissenting and concurring).

[157] *Id.* at 899.

already reflected in his findings.[158] But that is not the worst problem with this peculiar list. Why should "looks" justify racial disparities in capital sentencing? And what aspects of looks have this power — attractiveness? hair style? complexion? Can leniency be legally justified on the ground that the victim of a killing was unemployed or a high school dropout? Judge Clark in his dissent says that "these differences . . . are often used to mask, either intentionally or unintentionally, racial prejudice."[159] I think he understates the problem; these factors are themselves aspects of discrimination. In *Furman* the death penalty was condemned in part because it was used primarily against "the poor, the ignorant, and the underprivileged members of society."[160] The Eleventh Circuit now uses these same features to justify apparent racial discrimination.

The *McCleskey* majority seems to believe that racial disparities in capital sentencing — at least those which it calls "marginal" — must be explainable by nonracial considerations because the sentencing system is so complex. The dissenters, on the other hand, argue that capital sentencing is closely analogous to the much simpler process of jury selection: "[B]oth processes are discretionary in nature, vulnerable to the bias of the decision maker, and susceptible to a rigorous statistical analysis."[161] This is not a good analogy. More than any other institution in the American legal system, the jury is a tribunal that embodies a broad democratic ideal. "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."[162] Selecting citizens for jury duty can be, and often is, a simple one-step ministerial process. Discretion in choosing jury panels is not constitutionally prohibited, but it is disfavored; the ideal is random selection from the jury-eligible community. Since selection criteria other than the basic requirements for eligibility are disfavored, their "discretionary" use cannot justify racial dispari-

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[158] *See McCleskey v. Zant*, 580 F. Supp. at 357-58. The list of factors cited in the opinion is not complete, so it is possible that other factors that were mentioned by the Eleventh Circuit were also considered.

[159] 753 F.2d at 925 n.24.

[160] 408 U.S. at 365-66 (Marshall, J., concurring) (footnote omitted); *see also id.* at 250, 266 (Douglas, J., concurring).

[161] *McCleskey*, 753 F.2d at 925 (Clark, J., dissenting and concurring) (footnote omitted); *see also id.* at 912 (Johnson, J., dissenting and concurring).

[162] Smith v. Texas, 311 U.S. 128, 130 (1940); *see also, e.g.*, Duren v. Missouri, 439 U.S. 357, 363-64 (1979); Taylor v. Louisiana, 419 U.S. 522, 530 (1975); Williams v. Florida, 399 U.S. 78, 100 (1970); Ballard v. United States, 329 U.S. 187 (1946); Strauder v. West Virginia, 100 U.S. 303 (1880).

ties.[163] Therefore, racial disparities can be evaluated by simple statistical comparisons between the actual jury pool and the one that would have been obtained by random selection.[164]

Sentencing decisions, by contrast, are the end products of a long series of choices by a large number of people, starting with the initial decision to arrest and ending with the ultimate decision on penalty. It is generally recognized that the officials responsible for these decisions must take numerous factors into account — factors ranging from the strength of the evidence to the resources of the prosecutor's office — and that they must make many fine distinctions. Moreover, unlike jury selection, there is no simple model of a properly operating system to which actual patterns of decisions may be compared. As a result, discretion is accepted as an important and inevitable component of criminal sentencing and of the earlier decisions on charging, prosecuting, and plea bargaining; indeed, as the majority points out in *McCleskey*, discretion is a constitutional requirement for capital sentencing.[165] The reason a litigant can establish a prima facie case of discrimination in jury selection simply by showing a sufficient racial disparity between the jury eligible population and the jury pool is that no criteria other than eligibility are supposed to be considered.[166] By contrast, many factors are supposed to be considered in sentencing; therefore, a litigant who wishes to prove racial discrimination in sentencing must also show that plausible nonracial factors do not explain any apparent racial disparity.

The majority is correct when it says that the regression coefficients reported by Baldus do not represent "actual disparities" in the sense

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[163] The Supreme Court has recognized that the nature of jury selection makes proof of discrimination particularly easy. "Because of the nature of the jury-selection task, however, we have permitted a finding of constitutional violation even when the statistical pattern does not approach the extremes [of cases in other contexts]." Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 n.13 (1977).

[164] Castaneda v. Partida, 430 U.S. 482, 496 n.17 (1977).

[165] *McCleskey*, 753 F.2d at 898; *see* Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

[166] Judge Clark misunderstands this issue. He argues in his dissent that the statistical comparisons in early jury cases such as *Swain* were less reliable than those made by Baldus because they "did not consider many variables," 753 F.2d at 923, and he cites a classical article by Michael Finkelstein, *supra* note 127, at 363, in support of this argument. 753 F.2d at 923 n.8. Finkelstein, however, does not argue that the Court should have considered more *variables* in the context of jury selection, but rather that it should have used statistical tests to determine whether the racial disparities in *Swain* might have been caused by *chance*.

that differences in jury representation are "actual disparities."[167] The meaning of this distinction, however, is another matter, and on this point the dissenters have the better of the argument. The "actual disparity" in this case — a disparity in death sentencing rates of ten to one — is larger than what these regression coefficients represent. The regression coefficients are valuable precisely because they take into account the effects of numerous other variables that could explain the "actual" racial disparity;[168] indeed, it is all but certain that the majority would have dismissed McCleskey's claim out of hand if all he had presented were "actual disparities."

In *Smith v. Balkcom* the court held that the sketchy evidence of discrimination before it could be disregarded because it "left untouched countless racially neutral variables."[169] The comments of the *McCleskey* majority, if taken literally, go much farther: The Baldus studies analyzed data on, literally, several hundred nonracial variables;[170] if these studies do not satisfy this requirement, then all studies of capital sentencing can be disregarded because they will always fail to consider enough nonracial factors.

Once again, the relationship of smoking to heart disease may serve as a useful comparison. Numerous factors contribute to the development of coronary heart disease; the medical consensus seems to be that cigarette smoking is a major risk factor, but not an essential condition for this pathology.[171] Some of the studies on which this conclusion is based control for a number of important variables that might explain the association between smoking and heart disease — age, blood pressure, diabetes, and obesity, for example — but, inevitably, they do not completely explain the incidence of mortality from coronary heart disease;[172] as with capital sentencing, there are always many other factors that influence the health of each particular individual. None of these studies has as many control variables as the Baldus studies. Moreover, as most people know, the effects of smoking on heart disease are disputed. In particular, some researchers have claimed that the association between smoking and heart disease reflects a genetic makeup that predisposes some people to smoke and simultaneously makes them more

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[167] *McCleskey*, 753 F.2d at 898. The court makes this statement about the 20% disparity that Baldus reports for mid-range cases, but it is equally applicable to the overall 6% figure.

[168] *Id.* at 912 n.10 (Johnson, J., dissenting and concurring).

[169] 671 F.2d at 860.

[170] *McCleskey v. Zant*, 580 F. Supp. at 354-55.

[171] SMOKING AND HEALTH, *supra* note 155, at 4—21, 4—65.

[172] *Id.* at 4—21.

susceptible to heart attacks.[173] These objections notwithstanding, few medical authorities seem to doubt the Surgeon General's conclusion that "cigarette smoking is a cause of coronary heart disease."[174]

There are, to be sure, many more studies on the relationship between smoking and heart disease than on the effects of race on capital sentencing in Georgia,[175] but this is only natural since the issue is much more general: the physiological effects of cigarette smoke on the human heart. Indeed, there is some evidence that the effect of smoking on coronary heart disease may not be universal: A major study in Japan found that smokers were only 1.16 times as likely to die of cardiovascular disease as nonsmokers.[176] By contrast, the question addressed by the Baldus studies is quite specific: Was there racial discrimination in the administration of the death penalty in Georgia between 1973 and 1978? Baldus and his colleagues examined nearly half of all the homicide convictions in Georgia in that period and collected highly detailed evidence on those cases.[177] If racial discrimination means that some capital defendants received death sentences (and others avoided them) *because* of racial factors, then a finding of discrimination based on a proper analysis of these data is better viewed as an observation than as an inference.

VI. The Current System and "The One Which *Furman* Condemned"

After arguing that the Baldus findings do not in fact show racial discrimination, the Eleventh Circuit adds an odd observation: "The type of research submitted here tends to show which of the [statutorily] directed factors were effective [in determining death sentences], but is of restricted use in showing what undirected factors control the exercise of constitutionally required discretion."[178] The statement is unexplained and, in fact, inexplicable. Techniques of statistical analysis do not discriminate between variables on the basis of their legal significance; a methodology that is useful to show the effects of statutory aggravating factors on capital sentencing will be equally useful to show the effects of race. The court's assertion amounts, quite simply, to a prejudgment based on faith: evidence of evenhandedness will be believed, evidence of

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[173] Health Consequences of Smoking, *supra* note 155, at 48-52; Smoking and Health, *supra* note 155, at 60.

[174] Smoking and Health, *supra* note 155, at 60.

[175] *See id.* at 4—67 to 4—77.

[176] *Id.* at 4—21, 4—34.

[177] *McCleskey v. Zant*, 580 F. Supp. at 353-55.

[178] *McCleskey*, 753 F.2d at 899.

discrimination will not.[179]

The court's lopsided view of the value of Baldus's data permits it to reach a sweeping conclusion about the current system of capital sentencing in Georgia:

> Viewed broadly, it would seem that the statistical evidence presented here, assuming its validity, confirms rather than condemns the system. In a state where past discrimination is well documented, the study showed no discrimination as to the race of the defendant. The marginal disparity based on the race of the victim tends to support the state's contention that the system is working far differently from the one which *Furman* condemned. 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. That they are not so clear in a small percentage of the cases is no reason to declare the entire system unconstitutional.[180]

As a description of the Baldus studies, this statement contains at least two conspicuous errors. First, Baldus *did* find discrimination by race of defendant, albeit a lesser amount than by race of victim;[181] the court simply ignores this evidence. Second, the Baldus studies do not "document" the reasons for death sentences in "the vast majority of cases." These very same studies were faulted by the district court because they explain less than 50 percent of the variance in the sentencing outcomes. While this is not a legitimate criticism of statistical evidence of discrimination,[182] it does demonstrate that even with comprehensive evidence — and even when illegitimate factors such as race are considered — it is impossible to predict or explain capital sentencing decisions in Georgia with anything approaching precision. Baldus himself, in an article devoted primarily to the problem of arbitrariness, concludes the opposite of the circuit court. "Our data suggest that Georgia's [post-*Furman*] death-sentencing system has continued to impose the type of inconsistent, arbitrary death sentences that the United States Supreme Court condemned in *Furman v. Georgia*."[183] This finding has been corroborated by a more qualitative study of capital sentencing in Geor-

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[179] The district court makes a similar statement. After holding that the Baldus data were too untrustworthy to form a basis for judicial findings, the court nonetheless purports to rely on these data to conclude that it can reject "any notion that the imposition of the death penalty in Georgia is a random event unguided by rational thought." *McCleskey v. Zant*, 580 F. Supp. at 365 (emphasis omitted).

[180] *McCleskey*, 753 F.2d at 899.

[181] *McCleskey v. Zant*, 580 F. Supp. at 365.

[182] *See supra* note 83.

[183] Baldus, Pulaski & Woodworth, *Comparative Review*, *supra* note 4, at 730. This article is based on some of the data gathered in the *Procedural Reform Study*.

gia that recently has been published by Ursula Bentele.[184]

The core of the court's final judgment on capital sentencing in Georgia is the statement that "the system is working far differently from the one which *Furman* condemned." In this case the court claims to derive that conclusion from the empirical evidence assembled by Baldus, but other judges have made similar pronouncements with no record at all to support them. This sentiment was first expressed by the Supreme Court in *Gregg* and its companion cases, when three of the earliest post-*Furman* death penalty statutes were approved: "The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily . . . . No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines."[185] In *Gregg* this statement, however positive, could be read as a prediction. (Nonetheless, some lower courts interpreted it as a rule of law: "if a state follows a properly drawn statute in imposing the death penalty, the arbitrariness and capriciousness — and therefore the racial discrimination — condemned in *Furman* have been conclusively removed."[186]) Eight years later, in *Pulley v. Harris*,[187] the Supreme Court made a similar statement, this time apparently as a factual observation about the likely "aberrations" under California's post-*Furman* death penalty laws: "Such inconsistencies are a far cry from the major systemic defects identified in *Furman*." But the most striking expression of this position is contained in Justice Powell's dissenting opinion in *Stephens v. Kemp*, in which he is joined by the Chief Justice and Justices Rehnquist and O'Connor:

> Surely, no contention can be made that the entire Georgia judicial system, at all levels, operates to discriminate in all cases. Arguments to this effect may have been directed to the type of statutes addressed in *Furman v. Georgia* . . . . As our subsequent cases make clear, such arguments cannot be taken seriously under statutes approved in *Gregg*.[188]

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[184] Bentele, *The Death Penalty in Georgia: Still Arbitrary*, 62 WASH. U.L.Q. 573 (1985).

[185] Gregg v. Georgia, 428 U.S. 153, 206-07 (1976) (plurality opinion); *see also id.* at 220 (White, J., concurring); Proffitt v. Florida, 428 U.S. 242, 259-60 (1976) (plurality opinion).

[186] Spinkellink v. Wainwright, 578 F.2d 582, 613-14 (5th Cir. 1978) (footnote omitted); *see also* Mitchell v. Hopper, 538 F. Supp. 77, 90 (S.D. Ga. 1982), *vacated sub nom.* Spencer v. Zant, 715 F.2d 1562 (11th Cir. 1983), *order aff'd in part sub nom.* Mitchell v. Kemp, 762 F.2d 886 (11th Cir. 1985); McCorquodale v. Balkcom, 525 F. Supp. 431, 434-35 (N.D. Ga. 1981). *But see McCleskey*, 753 F.2d at 890-92.

[187] 104 S. Ct. 871, 881 (1984).

[188] 104 S. Ct. 562, 564 n.2 (1984) (Powell, J., dissenting) (citations omitted).

What is the factual basis for this conviction that *Furman* changed the face of capital sentencing in the United States? To answer that question it is necessary to look first at the evidence of arbitrariness and of discrimination that was before the Court in *Furman*. With the conspicuous exception of the studies of racial discrimination in the use of the death penalty for rape, there was less there than meets the eye.

Much of the evidence of racial discrimination under pre-*Furman* capital sentencing statutes consisted of the opinions of politicians and other prominent people that "[i]t is the poor, the illiterate, the underprivileged, the member of the minority group, who is usually sacrificed by society's lack of concern."[189] The major statistical evidence of racial discrimination was the undeniable fact that a disproportionate number of those executed for murder between 1930 and 1967 — 1630 out of 3334, or 49 percent — were black.[190] In addition, the petitioners cited a few studies of sentencing patterns that suggested discrimination in capital sentencing[191] (the best of these was a study by Harold Garfinkel, who found disparities by race of defendant and by race of victim in capital homicide prosecutions in ten North Carolina counties from 1930 through 1940[192]), and a few other studies that found that whites who had been sentenced to death were more likely to receive executive clemency than blacks.[193]

The petitioners in *Furman* made modest claims about this evidence:

> Racial discrimination is strongly suggested by the national execution figures; it has been borne out by a number of discrete and limited but carefully done studies; and it has seemed apparent to responsible commissions and individuals studying the administration of the death penalty in this country. Assuredly, the proof of discrimination is stronger in rape than in murder cases; and, in any case, an irrefutable statistical showing that a particular State has violated the Equal Protection of the Law by consistent racial inequality in the administration of the death penalty is

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[189] DiSalle, *Trends in the Abolition of Capital Punishment*, 1 U. TOLEDO L. REV. 1, 13 (1969), *cited in* Brief for Petitioner at 51, Aikens v. California, *cert. granted*, 403 U.S. 952 (1971), *cert. dismissed*, 406 U.S. 813 (1972) [hereafter *Aikens* Petitioner's Brief]. (*Aikens* was the original lead case in the *Furman* litigation, but was dismissed as moot in light of People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).) *See also Aikens* Petitioner's Brief at 50-52, 52 n.103; *Furman*, 408 U.S. at 251 (Douglas, J., concurring); *id.* 364-65 (Marshall, J., concurring).

[190] *Aikens* Petitioner's Brief at 52 n.101; *Furman*, 408 U.S. at 364 (Marshall, J., concurring).

[191] *Aikens* Petitioner's Brief at 52 n.102.

[192] Garfinkel, *Research Note on Inter- and Intra-Racial Homicides*, 27 SOCIAL FORCES 369 (1949), *cited in Aikens* Petitioner's Brief at 52 n.102.

[193] *Id.*

difficult to establish.[194]

This assessment of the evidence reflects in part the existence of nonracial explanations for these data, and of contrary findings: the high proportion of blacks among those executed is consistent with the proportion of blacks among those charged with homicide;[195] some studies found no racial patterns in the commutations of death sentences;[196] and, as the petitioners themselves pointed out, the most detailed study of jury sentencing in capital cases that was then available, did "not find racial discrimination by California juries at the penalty stage of jury-tried cases."[197]

The evidence of "arbitrariness" or "capriciousness" in capital sentencing before *Furman* was even sketchier than the evidence of discrimination. This is inevitable. Arbitrariness in the common sense meaning of the term is a negative concept, the absence of an explanation for a choice or a pattern of choices, and it is a particularly difficult thing to prove. As a rule, proof of arbitrariness depends on indirect evidence, evidence that excludes all plausible explanations other than random caprice. Only one study was available at the time of *Furman* that examined enough factors to be at all useful on this point — the *Stanford Law Review Study*[198] — and that study is cited by the Chief Justice in his dissent in *Furman* as showing the *absence* of arbitrariness because it found that, except for some evidence of discrimination against blue-collar defendants, California "juries follow rational patterns in imposing the sentence of death."[199] The evidence that was cited in support of the claim of capriciousness, on the other hand, consisted primarily of the opinions of legal scholars and other observers. For example, Professor Herbert Wechsler is quoted to the effect that those who are sentenced to death are "a small and highly random sample of people who

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[194] *Id.* at 52-53 (footnotes omitted).

[195] *See, e.g., id.*, Brief for Respondent at 105, Aikens v. California, *cert. granted*, 403 U.S. 952 (1971), *cert. dismissed*, 406 U.S. 813 (1972) (citing racial statistics for homicide charges and dispositions in California) [hereafter *Aikens* Respondent's Brief]; *id.* at 106 n.130 (citing national statistics on race and homicide arrests).

[196] *See* Bedau, *Capital Punishment in Oregon, 1903-1964*, 45 ORE. L. REV. 1, 11-12 (1965); Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 40-46 (1964); *see also Aikens* Respondent's Brief at 108 (citing racial statistics on commutations in California).

[197] *Aikens* Petitioner's Brief at 52 n.102 (citing *A Study of the California Penalty Jury in First-Degree-Murder Cases*, 21 STAN. L. REV. 1297 (1969) [hereafter *Stanford Law Review Study*]).

[198] *Id.*

[199] *Furman*, 408 U.S. at 389 n.12 (Burger, C.J., dissenting).

commit murder."[200] Of the two Justices whose opinions in *Furman* turn on the issue of arbitrariness, one (Stewart) cites a statement by former Attorney General Clark as the support for his conclusion that the death penalty is imposed on "a capriciously selected random handful" of convicts,[201] and the other (White) relies on his personal experience on the Supreme Court — "10 years of almost daily exposure" to potentially capital cases — to conclude that "there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."[202]

My point is not that the evidence of discrimination and of arbitrariness in *Furman* was deficient. On the contrary, taken as a whole, the evidence was telling: Such large racial disparities in the proportions of those executed over so long a period of time are hard to explain in the absence of racial discrimination of some sort; the few systematic studies that existed were, on the whole, consistent with that conclusion; and the extreme infrequency of death sentences made it all but inevitable that those who were executed were selected in part by chance. The Supreme Court knew what it was talking about; it was willing to rely in part on impressionistic evidence, but its factual conclusions were correct. My point is rather that the evidence is much stronger now, and that the comparisons that can be made show little or no change since *Furman*.

The central item of evidence of pre-*Furman* discrimination in capital sentencing was the high proportion of blacks among those executed. Comparisons with post-*Furman* executions are of limited value since relatively few have occurred, only forty-four as of June 1, 1985.[203] (For the same reason, it is too early to assess the racial patterns in post-*Furman* commutations.) Still, for what it is worth, the current pattern seems reasonably comparable to the pre-*Furman* one: 34 percent (15/44) of those executed since 1972 have been black, a decrease from the 49 percent before *Furman* but far more than the proportion of blacks in the population. A more meaningful statistic is the proportion of blacks on post-*Furman* death rows — 41 percent (627/1513) as of May 1, 1985.[204] This is a slight decrease from the pre-*Furman* figure, but most of the difference is caused by an increase in the proportion of

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[200] Wechsler, in *Symposium on Capital Punishment*, 7 N.Y.L. FORUM 247, 255 (1961), *quoted in Aikens* Petitioner's Brief at 54-55.

[201] *Id.* at 309-10, 310 n.12 (Stewart, J., concurring).

[202] *Furman*, 408 U.S. at 313 (White, J., concurring).

[203] DEATH ROW, U.S.A., *supra* note 3, at 1, 3 (supplemented by additional data provided by Mr. Richard Brody of the NAACP Legal Defense and Educational Fund on June 1, 1985).

[204] *Id.* at 1.

other minorities, from 1.2 percent to 7.3 percent.[205] In short, if there has been any change in the proportions of blacks and whites condemned to death, it has been small.

A different type of evidence on this point is provided by Gary Kleck, who has estimated the risk of a death sentence — the rate of death sentences per 1000 homicide arrests — for black and white defendants from 1967 through 1978.[206] Kleck found that the risk of a death sentence was higher for a white defendant than for a black defendant throughout this period; this apparently reflects discrimination by race of victim, and the fact that black defendants are charged primarily with killing black victims, who are "devalued crime victims."[207] For present purposes, Kleck's analysis is useful because it is possible to compare his pre-*Furman* (1967-72) and his post-*Furman* (1973-78) sub-samples. This comparison shows that the ratio of the risk of a death sentence for a black defendant to that of a white defendant changed relatively little after *Furman*, from .58 to .65,[208] but that to the extent that there has been a change, the relative risk of a death sentence for a black defendant has increased.

What about discrimination by race of victim? This issue received little attention prior to *Furman*. A look at the primary type of data used in *Furman* to show discrimination against black defendants — executions and death sentencing rates — reveals pronounced disparities by race of victim in the post-*Furman* period, disparities that approach the size of the race-of-defendant disparities for rape in pre-*Furman* capital sentencing. Of the forty-four post-*Furman* executions, 93 percent were for the killing of white victims;[209] in the same period, almost half of all homicide victims in the United States were black.[210] In the eight states

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[205] *Compare id. with Aikens* Petitioner's Brief at 52 n.101.

[206] Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783, 797-98 (1981).

[207] *Id.* at 800.

[208] These figures are recalculated from Kleck, *supra* note 206, at 798 Table 6. A parallel analysis using homicide deaths as the denominator rather than homicide arrests produces a comparable result — the relative risk for black defendants increased slightly from .82 before *Furman* to .90 after *Furman*. *Id.*

[209] DEATH ROW, U.S.A., *supra* note 3, at 3 (with additional data cited *supra* note 203).

[210] This estimate is the average percentage of blacks among reported homicide victims from 1973 through 1982. FEDERAL BUREAU OF INVESTIGATION, DEP'T OF JUSTICE, UNIFORM CRIME REPORT, CRIME IN THE UNITED STATES 15 (1973), 15 (1974), 15 (1975), 15 (1976), 8 (1977), 8 (1978), 7 (1979), 8 (1980), 7 (1981), 7 (1982).

in which Robert Mauro and I studied death sentencing patterns from 1975 through 1980, fewer than half of the homicides had white victims, but they received 86 percent of the death sentences.[211]

Only two pre-*Furman* studies of capital sentencing for homicide considered the race of the victim. Garfinkel found discrimination by race of victim as well as race of defendant in North Carolina from 1930 through 1940.[212] The pattern he found is almost identical to the racial patterns found by Bowers and Pierce and by Gross and Mauro in their studies of post-*Furman* sentencing.[213] The *Stanford Law Review Study*,[214] the only pre-*Furman* study of capital sentencing that is even remotely comparable in scope to the Baldus study, did not find discrimination by race of victim in jury sentencing in California. By contrast, ten or more post-*Furman* studies on this question have been completed; they all show discrimination by race of victim, and they are methodologically superior to the earlier studies. In sum, the evidence of widespread discrimination by race of victim in post-*Furman* capital sentencing is stronger than *any* evidence of racial discrimination in capital sentencing for homicide that was available in 1972.

Finally, there is the issue of post-*Furman* arbitrariness. The strongest evidence of arbitrariness before *Furman* was the infrequency with which the death penalty was imposed and executed; if that has changed since *Furman* the change is truly marginal. In the period from 1975 through 1980, death sentences were given to about one percent of all defendants arrested for homicide; that rate seems to be reasonably stable.[215] Nor is there any evidence that the process by which these defendants are chosen for the death penalty has become more systematic since 1972; the available research suggests the opposite.[216] The Eleventh Circuit in *McCleskey* points to findings by Baldus that legitimate factors were influential predictors of death sentencing in Georgia and concludes that the sentencing system is rational and greatly improved since *Furman*.[217] But the Chief Justice pointed to similar findings in the *Stanford Law Review Study* in his dissent *in Furman*,[218] and the evidence does not support the argument in either case. Those

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[211] These proportions are calculated from data reported in Gross & Mauro, *supra* note 7, at 55, 131, 134, 137, 140, 143.

[212] Garfinkel, *supra* note 192, at 371, Tables 2, 3.

[213] *Supra* notes 20-22 and accompanying text.

[214] *Supra* note 197.

[215] Gross & Mauro, *supra* note 7, at 28-29.

[216] *See supra* notes 183-84 and accompanying text.

[217] *McCleskey*, 753 F.2d at 899.

[218] 408 U.S. at 389 n.12 (Burger, C.J., dissenting).

who kill in the course of felonies, for example, may be much more likely to receive death sentences than those who kill in other circumstances — now and before *Furman* alike — but that fact does not negate the possibility of discrimination or of arbitrariness. Indeed, both problems could exist even if felony-murderers were the *only* defendants who were eligible for capital punishment. As long as the death penalty is rarely imposed, there will remain plenty of room for discrimination and for pure chance in the choice of those few among the eligible defendants who will actually receive it.

Rare as post-*Furman* death sentences have been, they are far more common than executions. As noted, there have been only some forty-four executions since *Furman*; by comparison, almost 3000 people were sentenced to death between the *Furman* decision and the end of 1983,[219] and over 1500 are now on death row.[220] The total number of executions may be somewhat misleading, since reasonably regular executions only began again in late 1983, but the basic pattern seems clear, at least for the present: there were twenty-one executions in 1984, and twelve in the first five months of 1985.[221] Even if this rate were to increase substantially to about fifty executions a year, as some have predicted,[222] those executed would remain the exceptions among those sentenced to death and a tiny minority of those convicted of homicide.

And who are these rare defendants who are executed? Victor Streib has compiled detailed descriptions of the cases of the first eleven men executed under post-*Furman* statutes, from Gary Mark Gilmore in January 1977, to John Elden Smith in December 1983. He summarizes his findings: "While all eleven of the executed men committed homicide, six of the homicides were fairly ordinary killings that occurred during armed robberies. They were not particularly brutal nor did they involve more than one victim . . . . [O]nly one-fourth of these eleven crimes qualified as being particularly heinous."[223] Comparing these eleven cases with "the 3000 other death sentences not resulting in executions or with the many thousands of similar crimes for which the death sentence was not imposed," Streib concludes: "No particular fac-

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[219] *See* Streib, *Executions Under Post-*Furman *Capital Punishment Statutes: The Halting Progression from "Let's Do It" to "Hey, There Ain't No Point In Pulling So Tight,"* 15 RUTGERS L.J. 443, 444 (1984).

[220] DEATH ROW, U.S.A., *supra* note 3, at 1.

[221] *Id.* and additional data cited *supra* note 203.

[222] *See* Streib, *supra* note 219, at 487.

[223] *Id.* at 485.

tors can be identified which would place these eleven cases in a clearly unique category."[224] To be sure, this is anecdotal evidence on a handful of cases; it is not conclusive proof of arbitrariness, if such a thing is possible. But it is the best evidence that has been assembled on post-*Furman* executions, and it sounds like an echo of the descriptions of arbitrariness by Justices Stewart and White in their concurring opinions in *Furman* itself.[225]

I do not claim that there have been no changes in capital sentencing since *Furman*; there may have been. There may be less discrimination and less arbitrariness now, and, for all the available evidence shows, there may be more. The evidence on discrimination and on arbitrariness in capital sentencing for homicide was much sketchier in 1972 than it is in 1985, so comparisons are difficult. To the extent that comparisons can be made, however, they certainly show no marked improvement. The courts' determined assertions that the pre-*Furman* problems have been solved must be seen as statements of faith rather than fact, or perhaps as wishful thinking, since the evidence, if it shows anything, shows constancy rather than change.

CONCLUSION

The problem with the *McCleskey* opinion is simple: The world is not as the court would have it be. Unlike most of us, judges sometimes have the power to make things as they want them merely by saying so. This power is clearest when a court determines the rule of law to apply to a case or to a category of cases, but it also extends to determinations of fact. But facts, unlike rules, are not created by authority, and courts can be mistaken in their findings. I do not mean to be unduly critical; in most common cases — when a judge, for example, decides that the traffic light was green when the school bus entered the intersection — no one else could do better. But when the "facts" have a scope that extends far beyond a particular case — what have been called "legislative facts"[226] — the position of a judge is different. In that situation (and it is the one here) there often are other more reliable arbiters, and the factual pronouncements of courts can and should be measured against an external standard.

The most dramatic factual error that the Eleventh Circuit makes in *McCleskey* is its description of the race-of-victim disparity that Baldus

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[224] *Id.* at 486.

[225] 428 U.S. at 309-10, 313; *see supra* text accompanying notes 198-202.

[226] *See, e.g.*, K.C. DAVIS, 3 ADMINISTRATIVE LAW TREATISE § 15:2, at 138-42 (1980).

found in capital sentencing in Georgia as "marginal." This is a serious mistake — this racial effect is large by any meaningful standard — but it seems to be based on an honest misunderstanding. Perhaps the complexity of the multivariate statistics in the record served to hide the forest in the trees. If it stands, however, and if it is followed in other contexts, this holding will generate a great deal of mischief in litigation on claims of discrimination.

But mistakes, even honest mistakes, do not necessarily occur at random. Judges, like the rest of us, tend to make errors that are consistent with their preconceptions and desires. In this case, the court seems to have been bound and determined to conclude that there is no evidence of racial discrimination in capital sentencing in Georgia. Ultimately, the court simply asserts that Baldus's findings to the contrary must be explainable by the operation of unexamined variables — "looks, age, personality, education," etc. — without pausing to notice that some of these are variables that Baldus *did* consider, and some are themselves illegitimate sentencing considerations.

This pronouncement on the Baldus findings leads the court to its second unsupportable assertion: that the Baldus evidence "confirms the system" and demonstrates that Georgia has moved from the pre-*Furman* dark ages, when "there was no rhyme or reason as to who got the death penalty and who did not," to a new enlightenment in which "in the vast majority of cases, the reasons . . . are well documented."[227] The evidence shows nothing of the sort, but the Eleventh Circuit is not alone is describing its hopes about capital sentencing as facts. When the Supreme Court held in 1976 that under Georgia's new death penalty statute "[n]o longer should there be 'no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many in which it is not,' "[228] this could be viewed as a hypothesis that might be disproved. It now seems to have become a statement of history made by fiat, as when Justice Powell writes that "subsequent [Supreme Court] cases make clear" that claims of systematic discrimination — which might have been valid before *Furman* — "cannot be taken seriously under statutes approved in Gregg."[229] This is a power courts do not have: to decide what description of the world may be taken seriously.

Analytically, the Eleventh Circuit's praise for the system of post-

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[227] *McCleskey*, 753 F.2d at 899.

[228] Gregg v. Georgia, 428 U.S. 153, 198 (1976) (plurality opinion) (quoting *Furman*, 408 U.S. at 313 (White, J., concurring)).

[229] Stephens v. Kemp, 104 S. Ct. 562, 564 n.2 (1984) (Powell, J., dissenting).

Furman death sentencing in Georgia is unnecessary to its decision, since the court committed itself to taking Baldus's findings of discrimination at face value and ruling only on their "sufficiency."[230] The court, it seems, cannot rest without finding that all is well after all. These two positions — "it's not bad enough to be outlawed" and "it's running like a dream" — reflect the tension between what Robert Weisberg has called the "classical" and the "romantic" views of death penalty jurisprudence.[231] The romantic view is that the problems of arbitrariness and discrimination in capital sentencing can be solved and have been solved by "good old American know-how" — specifically, by statutory rules that define the legal and moral considerations that govern capital sentencing, and describe them in clear terms for the guidance of judges and juries. In contrast, the classical view holds that the courts are not responsible for making the death penalty work without problems, and that serious problems may be an inevitable aspect of capital punishment; the sole task of the courts is to set limits by prohibiting the utterly unacceptable. The best statement of this point of view was written by Justice Harlan one year before *Furman*, in his opinion for the court in *McGautha v. California*,[232] rejecting a due process challenge to unguided capital sentencing: "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to 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."

The earliest case on discrimination in the use of the death penalty, *Maxwell v. Bishop*,[233] fits neatly into the classical mold: "We do not say that there is no ground for suspicion that the death penalty for rape may have been discriminatorily applied . . . . There are recognizable indicators of this. But improper state practice of the past does not automatically invalidate a procedure for the present." This sentiment is echoed by the district court in *Mitchell v. Hopper*,[234] passing on the Baldus studies: There may be "glaring disparities" in capital sentencing; if so, it "would be sad and distressing" but show no "infirmity in a statute otherwise found to be acceptable under the Constitution." In *McCleskey*, however, both the district court and the circuit court go out of their ways to reject this point of view and to insist, romantically, that

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[230] *McCleskey*, 753 F.2d at 886-87, 894-95.

[231] Weisberg, *supra* note 9, at 318-22.

[232] 402 U.S. 183, 204 (1971).

[233] 398 F.2d 138, 148 (8th Cir. 1968).

[234] 538 F. Supp. 77, 90 (S.D. Ga. 1982).

there are, in fact, no problems.

Perhaps a fair assessment of the facts could lead a court to conclude, rationally, that the magnitude of discrimination by race of victim in capital sentencing is too small to warrant relief — that the problem is not, in the Eleventh Circuit's words, "so great that it compels a conclusion" that "purposeful discrimination . . . permeate[s] the system."[235] This is a large racial effect, but it could be larger: Baldus found that killing a white in Georgia increased the odds of a death sentence by a factor of about 4, but in an earlier era rapes with black defendants and white victims were *eighteen* times more likely to receive death sentences in the South than other all rapes.[236] Similarly, as we have seen, smoking cigarettes increases the risk of death from coronary heart disease by a factor of about 2,[237] but it increases the risk of death from lung cancer by a factor of about 10.[238] Perhaps this difference in magnitude justifies different policies, although if it does, the implications ought to be considered: Heart disease is a much more common cause of death than lung cancer; as a result, despite the fact that cigarette smoking has a much stronger effect on the risk of lung cancer, "coronary heart disease is the chief contributor to the excess morbidity among cigarette smokers."[239] The same is true here: The effect of race on capital sentencing for rape was exceedingly strong, but such cases were uncommon. Race-of-victim discrimination in capital sentencing for homicide is less extreme but much more wide-spread, and its overall impact is much greater.

Even so, the courts could hold that discrimination by the race of the victim is not unconstitutional in capital sentencing. They could find that this type of discrimination is less unpalatable than the more familiar type — discrimination by race of defendant — and that such problems are incurable, or at least a necessary cost of the constitutional requirement of discretion in capital sentencing. I would not agree with such a decision, but it would be a factually accurate and intellectually honest judgment. It might clarify the true issues, and serve to advance the moral debate over the death penalty rather than to set it back.

When *Furman* was decided, the judges in the minority felt no responsibility to justify the use of the death penalty. Chief Justice Burger in his dissent stated that if he "were possessed of legislative power" he

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[235] *McCleskey*, 753 F.2d at 892.

[236] *See supra* note 32 and accompanying text.

[237] *See supra* notes 151-55 and accompanying text.

[238] SMOKING AND HEALTH, *supra* note 155, at 5—11.

[239] *Id.* at 1—12.

would vote to abolish or drastically restrict capital punishment,[240] and Justice Blackmun, also dissenting, expressed his "abhorrence" for the death penalty and his belief that it "serves no useful purpose."[241] These are clear expressions of the classical point of view: we do not like the death penalty, we are aware of its problems, but it is not for us as judges to do away with it. Since *Furman*, however, the courts have been at the center of most disputes over capital punishment, and they have become enmeshed in the problems of administering the death penalty. Perhaps this has led some judges to feel that they must do more than set the constitutional limits on capital sentencing, that they must also give the system a clean bill of health. Unfortunately, this cannot be done; as far as we can tell, the problems that were identified in *Furman* are still with us. Perhaps, as Justice Harlan believed, the courts cannot solve these problems; if so, they should admit it, and not mislead others by claiming to have accomplished the impossible.

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[240] 408 U.S. at 375 (Burger, C.J., dissenting).

[241] *Id.* at 405 (Blackmun, J., dissenting).