Crime and Punishment

Philosophic Explorations

Edited by

Michael J. Gorr

Illinois State University

Sterling Harwood

San Jose State University

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McCleskey v. *Kemp (1987)*

UNITED STATES SUPREME COURT

This case concerned a black male who was sentenced to death for the murder of a police officer. Part of his defense was that statistical evidence demonstrated that the process by which people in Georgia are sentenced to death was administered in a racially discriminatory manner. Hence McCleskey claimed that his execution would violate both the Eighth Amendment and the Fourteenth Amendment (which guarantees all citizens due process of law). The majority of the Court upheld McCleskey's conviction, arguing that discretion was an inevitable part of the trial process and that, if McCleskey's conviction were overturned, there would be dire implications for the entire system of criminal justice. Justice Brennan, in a vigorous dissenting opinion (part of which is also included here), argued that the majority's view was unsatisfactory since "preventing the arbitrary administration of punishment is a basic ideal of any society that purports to be governed by the rule of law."

Justice Powell delivered the opinion of the court.

This case presents the question whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that petitioner McCleskey's capital sentence is unconstitutional under the Eighth or Fourteenth Amendment.

McCleskey, a black man, was convicted of two counts of armed robbery and one count of murder in the Superior Court of Fulton County, Georgia, on October 12, 1978. McCleskey's convictions arose out of the robbery of a furniture store and the killing of a white police officer during the course of the robbery. The evidence at trial indicated that McCleskey and three accomplices planned and carried out the robbery. All four were armed. McCleskey entered the front of the store while the other three entered the rear. McCleskey secured the front of the store by rounding up the customers and forcing them to lie face down on the floor. The other three rounded up the employees in the rear and tied them up with tape. The manager was forced at gunpoint to turn over the store receipts, his watch, and $6.00. During the course of the robbery, a police officer, answering a silent alarm, entered the store through the front door. As he was walking down the center aisle of the store, two shots were fired. Both struck the officer. One hit him in the face and killed him.

Several weeks later, McCleskey was arrested in connection with an unrelated offense. He confessed that he had participated in the furniture store robbery, but denied that he had shot the police officer. At trial, the State introduced evidence that at least one of the bullets that struck the officer was fired from a .38 caliber Rossi revolver. This description matched the description of the gun that McCleskey had carried during the robbery. The State also introduced the testimony of two witnesses who had heard McCleskey admit to the shooting.

The jury convicted McCleskey of murder. At the penalty hearing, the jury heard arguments as to the appropriate sentence. Under Georgia law, the jury could not consider imposing the death penalty unless it found beyond a reasonable doubt that the murder was accompanied by one of the statutory aggravating circumstances.

. . . The jury in this case found two aggravating circumstances to exist beyond a reasonable doubt: the murder was committed during the course of an armed robbery, and the murder was committed upon a peace officer engaged in the performance of his duties. In making its decision whether to impose the death sentence, the jury considered the mitigating and aggravating circumstances of McCleskey's conduct. McCleskey offered no mitigating evidence. The jury recommended that he be sentenced to death on the murder charge and to consecutive life sentences on the armed robbery charges. The court followed the jury's recommendation and sentenced McCleskey to death.

McCleskey next filed a petition for a writ of habeas corpus in the federal District Court for the Northern District of Georgia. His petition raised 18 claims, one of which was that the Georgia capital sentencing process is administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments to the United States Constitution. In support of his claim, McCleskey proffered a statistical study performed by Professors David C. Baldus, George Woodworth, and Charles Pulaski (the Baldus study) that purports to show a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant. The Baldus study is actually two sophisticated statistical studies that examine over 2,000 murder cases that occurred in Georgia during the 1970s. The raw numbers collected by Professor Baldus indicate that defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases. The raw numbers also indicate a reverse racial disparity according to the race of the defendant: 4% of the black defendants received the death penalty, as opposed to 7% of the white defendants.

Baldus also divided the cases according to the combination of the race of the defendant and the race of the victim. He found that the death penalty was assessed in 22% of the cases involving black defendants and white victims: 8% of the cases involving white defendants and white victims: 1% of the cases involving black defendants and black victims: and 3% of the cases involving white defendants and black victims. Similarly, Baldus found that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims: 32% of the cases involving white defendants and white victims: 15% of the cases involving black defendants and black victims: and 19% of the cases involving white defendants and black victims.

Baldus subjected his data to an extensive analysis, taking account of 230 variables that could have explained the disparities on nonracial grounds. One of his models concludes that, even after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks. According to this model, black defendants were 1.1 times as likely to receive a death sentence as other defendants. Thus, the Baldus study indicates that black defendants, such as McCleskey, who kill white victims have the greatest likelihood of receiving the death penalty.

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In light of our precedents under the Eighth Amendment, McCleskey cannot argue successfully that his sentence is "disproportionate to the crime in the traditional sense." He does not deny that he committed a murder in the course of a planned robbery, a crime for which this Court has determined that the death penalty constitutionally may be imposed. *Gregg* v. *Georgia*. His disproportionality claim "is of a different sort." McCleskey argues that the sentence in his case is disproportionate to the sentences in other murder cases.

On the one hand, he cannot base a constitutional claim on an argument that his case differs from other cases in which defendants *did* receive the death penalty. On automatic appeal, the Georgia Supreme Court found that McCleskey's death sentence was not dis-

proportionate to other death sentences imposed in the State. The court supported this conclusion with an appendix containing citations to 13 cases involving generally similar murders. Moreover, where the statutory procedures adequately channel the sentencer's discretion, such proportionality review is not constitutionally required.

On the other hand, absent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, McCleskey cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty. In *Gregg*, the Court confronted the argument that "the opportunities for discretionary action that are inherent in the processing of any murder case under Georgia law," *Gregg* v. *Georgia*, specifically the opportunities for discretionary leniency, rendered the capital sentences imposed arbitrary and capricious. We rejected this contention:

> The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. *Furman*, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.

Because McCleskey's sentence was imposed under Georgia sentencing procedures that focus discretion "on the particularized nature of the crime and the particularized characteristics of the individual defendant," we lawfully may presume that McCleskey's death sentence was not "wantonly and freakishly" imposed, and thus that the sentence is not disproportionate within any recognized meaning under the Eighth Amendment.

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Although our decision in *Gregg* as to the facial validity of the Georgia capital punishment statute appears to foreclose McCleskey's disproportionality argument, he further contends that the Georgia capital punishment system is arbitrary and capricious in *application*, and therefore his sentence is excessive, because racial considerations may influence capital sentencing decisions in Georgia. We now address this claim.

To evaluate McCleskey's challenge, we must examine exactly what the Baldus study may show. Even Professor Baldus does not contend that his statistics *prove* that race enters into any capital sentencing decisions or that race was a factor in McCleskey's particular case. Statistics at most may show only a likelihood that a particular factor entered into some decisions. There is, of course, some risk of racial prejudice influencing a jury's decision in a criminal case. There are similar risks that other kinds of prejudice will influence other criminal trials. The question "is at what point that risk becomes constitutionally unacceptable." McCleskey asks us to accept the likelihood allegedly shown by the Baldus study as the constitutional measure of an unacceptable risk of racial prejudice influencing capital sentencing decisions. This we decline to do.

Because of the risk that the factor of race may enter the criminal justice process, we have engaged in "unceasing efforts" to eradicate racial prejudice from our criminal justice system. Our efforts have been guided by our recognition that "the inestimable privilege of trial by jury . . . is a vital principle, underlying the whole administration of criminal justice." Thus, it is the jury that is a criminal defendant's fundamental "protection of life and liberty against race or color prejudice." Specifically, a capital sentencing jury representative of a criminal defendant's community assures a " 'diffused impartiality,' " in the

jury's task of "express[ing] the conscience of the community on the ultimate question of life or death."

Individual jurors bring to their deliberations "qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." The capital sentencing decision requires the individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant. It is not surprising that such collective judgments often are difficult to explain. But the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that "buil[d] discretion, equity, and flexibility into a legal system."

McCleskey's argument that the Constitution condemns the discretion allowed decisionmakers in the Georgia capital sentencing system is antithetical to the fundamental role of discretion in our criminal justice system. Discretion in the criminal justice system offers substantial benefits to the criminal defendant. Not only can a jury decline to impose the death sentence, it can decline to convict, or choose to convict of a lesser offense. Whereas decisions against a defendant's interest may be reversed by the trial judge or on appeal, these discretionary exercises of leniency are final and unreviewable. Similarly, the capacity of prosecutorial discretion to provide individualized justice is "firmly entrenched in American law." As we have noted, a prosecutor can decline to charge, offer a plea bargain, or decline to seek a death sentence in any particular case. Of course, "the power to be lenient [also] is the power to discriminate," but a capital-punishment system that did not allow for discretionary acts of leniency "would be totally alien to our notions of criminal justice." *Gregg* v. *Georgia.*

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At most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system. The discrepancy indicated by the Baldus study is "a far cry from the major systemic defects identified in *Furman.*" As this Court has recognized, any mode for determining guilt or punishment "has its weaknesses and the potential for misuse." Specifically, "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death.' " Despite these imperfections, our consistent rule has been that constitutional guarantees are met when "the mode [for determining guilt or punishment] itself has been surrounded with safeguards to make it as fair as possible." Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious. In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital-sentencing process.

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

der the Eighth Amendment, such a claim could—at least in theory—be based upon any arbitrary variable, such as the defendant's facial characteristics, or the physical attractiveness of the defendant or the victim, that some statistical study indicates may be influential in jury decisionmaking. As these examples illustrate, there is no limiting principle to the type of challenge brought by McCleskey. The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment. As we have stated specifically in the context of capital punishment, the Constitution does not "plac[e] totally unrealistic conditions on its use."

Second, McCleskey's arguments are best presented to the legislative bodies. It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are "constituted to respond to the will and consequently the moral values of the people." *Furman* v. *Georgia* (Burger, C. J., dissenting). Legislatures also are better qualified to weigh and "evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts," *Gregg* v. *Georgia*. Capital punishment is now the law in more than two thirds of our States. It is the ultimate duty of courts to determine on a case-by-case basis whether these laws are applied consistently with the Constitution. Despite McCleskey's wide ranging arguments that basically challenge the validity of capital punishment in our multi-racial society, the only question before us is whether in his case the law of Georgia was properly applied. We agree with the District Court and the Court of Appeals for the Eleventh Circuit that this was carefully and correctly done in this case.

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Accordingly, we affirm the judgment of the Court of Appeals for the Eleventh Circuit.

It is so ordered.

Justice Brennan, with whom Justice Marshall joins, and with whom Justice Blackmun and Justice Stevens join. . . .

The Court assumes the statistical validity of the Baldus study, and acknowledges that McCleskey has demonstrated a risk that racial prejudice plays a role in capital sentencing in Georgia. Nonetheless, it finds the probability of prejudice insufficient to create constitutional concern. Close analysis of the Baldus study, however, in light of both statistical principles and human experience, reveals that the risk that race influenced McCleskey's sentence is intolerable by any imaginable standard.

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The Baldus study indicates that, after taking into account some 230 nonracial factors that might legitimately influence a sentencer, the jury *more likely than not* would have spared McCleskey's life had his victim been black. The study distinguishes between those cases in which (1) the jury exercises virtually no discretion because the strength or weakness of aggravating factors usually suggests that only one out come is appropriate; and (2) cases reflecting an "intermediate" level of aggravation, in which the jury has considerable discretion in choosing a sentence. McCleskey's case falls into the intermediate range. In such cases, death is imposed in 34% of white-victim crimes and 14% of black-victim crimes, a difference of 139% in the rate of imposition of the death penalty. In other words, just under 59%—almost 6 in 10—defendants comparable to McCleskey would not have received the death penalty if their victims had been black.

Furthermore, even examination of the sentencing system as a whole, factoring in those cases in which the jury exercises little discretion, indicates the influence of race on capital sentencing. For the Georgia system as a whole, race accounts for a six percentage point difference in the rate at which capital punishment is imposed. Since death is imposed in 11% of all white-victim cases, the rate in comparably aggravated black-victim cases is 5%. The rate of capital sentencing in a

white-victim case is thus 120% greater than the rate in a black-victim case. Put another way, over half—55%—of defendants in white-victim crimes in Georgia would not have been sentenced to die if their victims had been black. Of the more than 200 variables potentially relevant to a sentencing decision, race of the victim is a powerful explanation for variation in death sentence rates—as powerful as nonracial aggravating factors such as a prior murder conviction or acting as the principal planner of the homicide.

These adjusted figures are only the most conservative indication of the risk that race will influence the death sentences of defendants in Georgia. Data unadjusted for the mitigating or aggravating effect of other factors show an even more pronounced disparity by race. The capital sentencing rate for all white-victim cases was almost *11 times* greater than the rate for black-victim cases. Furthermore, blacks who kill whites are sentenced to death at nearly 22 *times* the rate of blacks who kill blacks, and more than 7 *times* the rate of whites who kill blacks. In addition, prosecutors seek the death penalty for 70% of black defendants with white victims, but for only 15% of black defendants with black victims, and only 19% of white defendants with black victims. Since our decision upholding the Georgia capital-sentencing system in *Gregg*, the State has executed 7 persons. All of the 7 were convicted of killing whites, and 6 of the 7 executed were black. Such execution figures are especially striking in light of the fact that, during the period encompassed by the Baldus study, only 9.2% of Georgia homicides involved black defendants and white victims, while 60.7% involved black victims.

McCleskey's statistics have particular force because most of them are the product of sophisticated multiple-regression analysis. Such analysis is designed precisely to identify patterns in the aggregate, even though we may not be able to reconstitute with certainty any individual decision that goes to make up that pattern. Multiple-regression analysis is particularly well-suited to identify the influence of impermissible considerations in sentencing, since it is able to control for permissible factors that may explain an apparent arbitrary pattern. While the decision-making process of body such as a jury may be complex, the Baldus study provides a massive compilation of the details that are most relevant to that decision. As we held in the Title VII context last term in *Bazemore* v. *Friday* (1986), a multiple-regression analysis need not include every conceivable variable to establish a party's case, as long as it includes those variables that account for the major factors that are likely to influence decisions. In this case, Professor Baldus in fact conducted additional regression analyses in response to criticisms and suggestions by the District Court, all of which confirmed, and some of which even strengthened, the study's original conclusions.

The statistical evidence in this case thus relentlessly documents the risk that McCleskey's sentence was influenced by racial considerations. This evidence shows that there is a better than even chance in Georgia that race will influence the decision to impose the death penalty: a majority of defendants in white-victim crimes would not have been sentenced to die if their victims had been black. In determining whether this risk is acceptable, our judgment must be shaped by the awareness that "[t]he risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence" . . . and that "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." In determining the guilt of a defendant, a state must prove its case beyond a reasonable doubt. That is, we refuse to convict if the chance of error is simply less likely than not. Surely, we should not be willing to take a person's life if the chance that his death sentence was irrationally imposed is *more* likely than not. In light of the gravity of the interest at stake, petitioner's statistics on their face are a powerful demonstration of the type of risk that our Eighth Amendment jurisprudence has consistently condemned.

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The Court cites four reasons for shrinking from the implications of McCleskey's evidence: the desirability of discretion for actors in the criminal-justice system, the existence of statutory safeguards against abuse of that discretion, the potential consequences for broader challenges to criminal sentencing, and an understanding of the contours of the judicial role. While these concerns underscore the need for sober deliberation, they do not justify rejecting evidence as convincing as McCleskey has presented.

The Court maintains that petitioner's claim "is antithetical to the fundamental role of discretion in our criminal justice system." It states that "[w]here the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious."

Reliance on race in imposing capital punishment, however, is antithetical to the very rationale for granting sentencing discretion. Discretion is a means, not an end. It is bestowed in order to permit the sentencer to "trea[t] each defendant in a capital case with that degree of respect due the uniqueness of the individual." The decision to impose the punishment of death must be based on a "particularized consideration of relevant aspects of the character and record of each convicted defendant." Failure to conduct such an individualized moral inquiry "treats all persons convicted of a designated offense not as unique individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."

Considering the race of a defendant or victim in deciding if the death penalty should be imposed is completely at odds with this concern that an individual be evaluated as a unique human being. Decisions influenced by race rest in part on a categorical assessment of the worth of human beings according to color, insensitive to whatever qualities the individuals in question may possess. Enhanced willingness to impose the death sentence on black defendants, or diminished willingness to render such a sentence when blacks are victims, reflects a devaluation of the lives of black persons. When confronted with evidence that race more likely than not plays such a role in a capital-sentencing system, it is plainly insufficient to say that the importance of discretion demands that the risk be higher before we will act—for in such a case the very end that discretion is designed to serve is being undermined.

Our desire for individualized moral judgments may lead us to accept some inconsistencies in sentencing outcomes. Since such decisions are not reducible to mathematical formulae, we are willing to assume that a certain degree of variation reflects the fact that no two defendants are completely alike. There is thus a presumption that actors in the criminal-justice system exercise their discretion in responsible fashion, and we do not automatically infer that sentencing patterns that do not comport with ideal rationality are suspect.

As we made clear in *Batson* v. *Kentucky* (1986), however, that presumption is rebuttable. *Batson* dealt with another arena in which considerable discretion traditionally has been afforded, the exercise of peremptory challenges. Those challenges are normally exercised without any indication whatsoever of the grounds for doing so. The rationale for this deference has been a belief that the unique characteristics of particular prospective jurors may raise concern on the part of the prosecution or defense, despite the fact that counsel may not be able to articulate that concern in a manner sufficient to support exclusion for cause. As with sentencing, therefore, peremptory challenges are justified as an occasion for particularized determinations related to specific individuals, and, as with sentencing, we presume that such challenges normally are not made on the basis of a factor such as race. As we said in *Batson*, however, such features do not justify imposing a "crippling burden of proof" in order to rebut that presumption. The Court in this case apparently seeks to do just that. On the basis of the need for individualized decisions, it rejects evidence, drawn from the most so-

phisticated capital-sentencing analysis ever performed, that reveals that race more likely than not infects capital-sentencing decisions. The Court's position converts a rebuttable presumption into a virtually conclusive one.

The Court also declines to find McCleskey's evidence sufficient in view of "the safeguards designed to minimize racial bias in the [capital sentencing] process." In *Gregg* v. *Georgia,* the Court rejected a facial challenge to the Georgia capital sentencing statute, describing such a challenge as based on "simply an assertion of lack of faith" that the system could operate in a fair manner." (White, J., concurring.) Justice White observed that the claim that prosecutors might act in an arbitrary fashion was "unsupported by any facts," and that prosecutors must be assumed to exercise their charging duties properly "[a]bsent facts to the contrary." It is clear that *Gregg* bestowed no permanent approval on the Georgia system. It simply held that the State's statutory safeguards were assumed sufficient to channel discretion without evidence otherwise.

It has now been over 13 years since Georgia adopted the provisions upheld in *Gregg.* Professor Baldus and his colleagues have compiled data on almost 2,500 homicides committed during the period 1973–1979. They have taken into account the influence of 230 nonracial variables, using a multitude of data from the State itself, and have produced striking evidence that the odds of being sentenced to death are significantly greater than average if a defendant is black or his or her victim is white. The challenge to the Georgia system is not speculative or theoretical; it is empirical. As a result, the Court cannot rely on the statutory safeguards in discounting McCleskey's evidence, for it is the very effectiveness of those safeguards that such evidence calls into question. While we may hope that a model of procedural fairness will curb the influence of race on sentencing, "we cannot simply assume that the model works as intended; we must critique its performance in terms of its results."

The Court next states that its unwillingness to regard the petitioner's evidence as sufficient is based in part on the fear that recognition of McCleskey's claim would open the door to widespread challenges to all aspects of criminal sentencing. Taken on its face, such a statement seems to suggest a fear of too much justice. Yet surely the majority would acknowledge that if striking evidence indicated that other minority groups, or women, or even persons with blond hair, were disproportionately sentenced to death, such a state of affairs would be repugnant to deeply rooted conceptions of fairness. The prospect that there may be more widespread abuse than McCleskey documents may be dismaying, but it does not justify complete abdication of our judicial role. The Constitution was framed fundamentally as a bulwark against governmental power, and preventing the arbitrary administration of punishment is a basic ideal of any society that purports to be governed by the rule of law.

In fairness, the Court's fear that McCleskey's claim is an invitation to descend a slippery slope also rests on the realization that any humanly imposed system of penalties will exhibit some imperfection. Yet to reject McCleskey's powerful evidence on this basis is to ignore both the qualitatively different character of the death penalty and the particular repugnance of racial discrimination, considerations which may properly be taken into account in determining whether various punishments are "cruel and unusual." Furthermore, it fails to take account of the unprecedented refinement and strength of the Baldus study.

It hardly needs reiteration that this Court has consistently acknowledged the uniqueness of the punishment of death. "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment." Furthermore, the relative interests of the state and the defendant differ dramatically in the death penalty context. The marginal benefits accruing to the state from obtaining the death penalty rather than life imprisonment are considerably less than the marginal

difference to the defendant between death and life in prison. Such a disparity is an additional reason for tolerating scant arbitrariness in capital sentencing. Even those who believe that society can impose the death penalty in a manner sufficiently rational to justify its continuation must acknowledge that the level of rationality that is considered satisfactory must be *uniquely* high. As a result, the degree of arbitrariness that may be adequate to render the death penalty "cruel and unusual" punishment may not be adequate to invalidate lesser penalties. What these relative degrees of arbitrariness might be in other cases need not concern us here; the point is that majority's fear of wholesale invalidation of criminal sentences is unfounded.

The Court also maintains that accepting McCleskey's claim would pose a threat to all sentencing because of the prospect that a correlation might be demonstrated between sentencing outcomes and other personal characteristics. Again, such a view is indifferent to the considerations that enter into a determination of whether punishment is "cruel and unusual." Race is a consideration whose influence is expressly constitutionally proscribed. We have expressed a moral commitment, as embodied in our fundamental law, that this specific characteristic should not be the basis for allotting burdens and benefits. Three constitutional amendments, and numerous statutes, have been prompted specifically by the desire to address the effects of racism. "Over the years, this Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.' " Furthermore, we have explicitly acknowledged the illegitimacy of race as a consideration in capital sentencing. That a decision to impose the death penalty could be influenced by *race* is thus a particularly repugnant prospect, and evidence that race may play even a modest role in levying a death sentence should be enough to characterize that sentence as "cruel and unusual."

Certainly, a factor that we would regard as morally irrelevant, such as hair color, at least theoretically could be associated with sentencing results to such an extent that we would regard as arbitrary a system in which that factor played a significant role. As I have said above, however, the evaluation of evidence suggesting such a correlation must be informed not merely by statistics, but by history and experience. One could hardly contend that this nation has on the basis of hair color inflicted upon persons deprivation comparable to that imposed on the basis of race. Recognition of this fact would necessarily influence the evaluation of data suggesting the influence of hair color on sentencing, and would require evidence of statistical correlation even more powerful than that presented by the Baldus study.

Furthermore, the Court's fear of the expansive ramifications of a holding for McCleskey in this case is unfounded because it fails to recognize the uniquely sophisticated nature of the Baldus study. McCleskey presents evidence that is far and away the most refined data ever assembled on any system of punishment, data not readily replicated through casual effort. Moreover, that evidence depicts not merely arguable tendencies, but striking correlations, all the more powerful because nonracial explanations have been eliminated. Acceptance of petitioner's evidence would therefore establish a remarkably stringent standard of statistical evidence unlikely to be satisfied with any frequency.

The Court's projection of apocalyptic consequences for criminal sentencing is thus greatly exaggerated. The Court can indulge in such speculation only by ignoring its own jurisprudence demanding the highest scrutiny on issues of death and race. As a result, it fails to do justice to a claim in which both those elements are intertwined—an occasion calling for the most sensitive inquiry a court can conduct. Despite its acceptance of the validity of Warren McCleskey's evidence, the Court is willing to let his death sentence stand because it fears that we cannot successfully define a different standard for lesser punishments. This fear is baseless.

Finally, the Court justifies its rejection of McCleskey's claim by cautioning against usurpation of the legislatures' role in devising

and monitoring criminal punishment. The Court is, of course, correct to emphasize the gravity of constitutional intervention and the importance that it be sparingly employed. The fact that "[c]apital punishment is now the law in more than two thirds of our States," however, does not diminish the fact that capital punishment is the most awesome act that a State can perform. The judiciary's role in this society counts for little if the use of governmental power to extinguish life does not elicit close scrutiny. It is true that society has a legitimate interest in punishment. Yet, as Alexander Bickel wrote:

> It is a premise we deduce not merely from the fact of a written constitution but from the history of the race, and ultimately as a moral judgment of the good society, that government should serve not only what we conceive from time to time to be our immediate material needs but also certain enduring values. This in part is what is meant by government under law.—A. Bickel, *The Least Dangerous Branch* (1962).

Our commitment to these values requires fidelity to them even when there is temptation to ignore them. Such temptation is especially apt to arise in criminal matters, for those granted constitutional protection in this context are those whom society finds most menacing and opprobious. Even less sympathetic are those we consider for the sentence of death, for execution "is a way of saying, 'You are not fit for this world, take your chance elsewhere.' " *Furman,* (Brennan, J., concurring).

For these reasons, "[t]he methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged." Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life. The Court thus fulfills, rather than disrupts, the scheme of separation of powers by closely scrutinizing the imposition of the death penalty, for no decision of a society is more deserving of the "sober second thought."

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At the time our Constitution was framed 200 years ago this year, blacks "had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations: and so far inferior, that they had no rights which the white man was bound to respect." *Dred Scott* v. *Sandford* (1857). Only 130 years ago, this Court relied on these observations to deny American citizenship to blacks. A mere three generations ago, this Court sanctioned racial segregation, stating that "[i]f one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane." *Plessy* v. *Ferguson* (1896).

In more recent times, we have sought to free ourselves from the burden of this history. Yet is has been scarcely a generation since this Court's first decision striking down racial segregation, and barely two decades since the legislative prohibition of racial discrimination in major domains of national life. These have been honorable steps, but we cannot pretend that in three decades we have completely escaped the grip of an historical legacy spanning centuries. Warren McCleskey's evidence confronts us with the subtle and persistent influence of the past. His message is a disturbing one to a society that has formally repudiated racism, and a frustrating one to a Nation accustomed to regarding its destiny as the product of its own will. Nonetheless, we ignore him at our peril, for we remain imprisoned by the past as long as we deny its influence in the present.

It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined. "The destinies of the two races in this country are indissolubly linked together," and the way in which we

choose those who will die reveals the depth of moral commitment among the living.

The Court's decision today will not change what attorneys in Georgia tell other Warren McCleskeys about their chances of execution. Nothing will soften the harsh message they must convey, nor alter the prospect that race undoubtedly will continue to be a topic of discussion. McCleskey's evidence will not have obtained judicial acceptance, but that will not affect what is said on death row. However many criticisms of today's decision may be rendered, these painful conversations will serve as the most eloquent dissents of all.