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The Death Penalty and Equal Protection Clause

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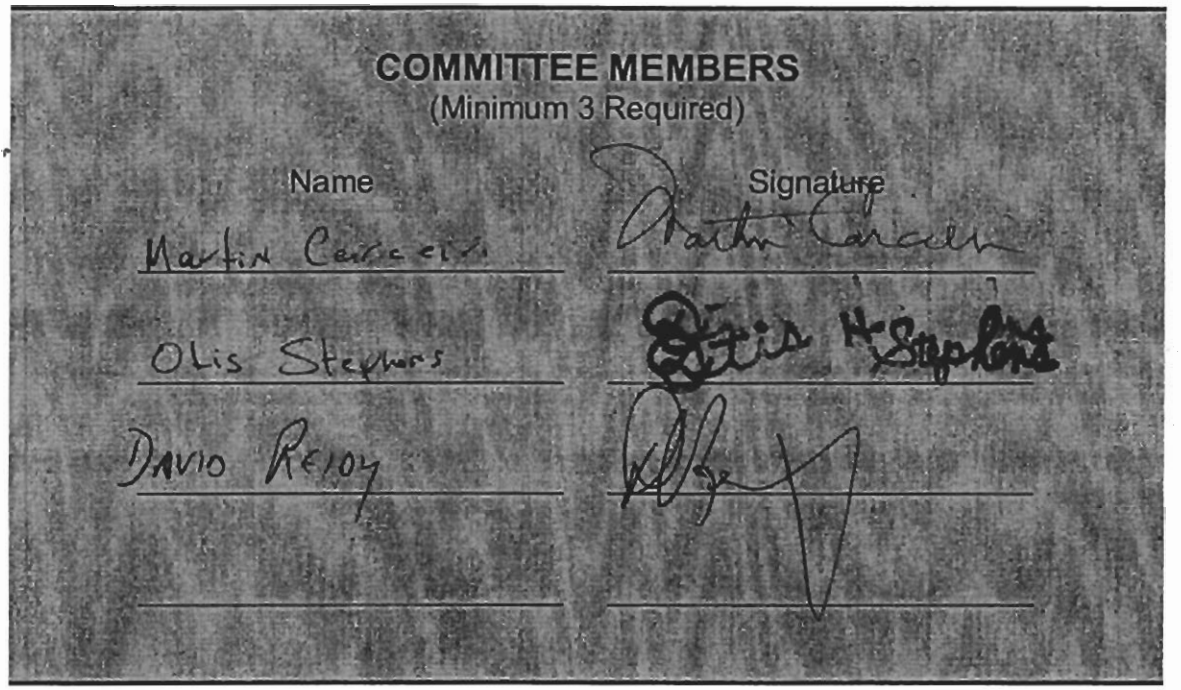

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The Death Penalty and the Implications of Group-Base Discrimination

A Case Analysis of *McCleskey v. Kemp*

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College Scholar Senior Project May 7, 2004

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Introduction

The death penalty has long been the most severe punishment afforded by the American legal system. This penalty has been reserved for the most heinous and morally reprehensible crimes. Due to the finality of such a severe punishment legislatures have assigned strict guidelines and criteria for juries to consider during the punishment phase of any given case. These aggravating factors should be the only factors considered when deciding if a person shall suffer the death penalty or life imprisonment.[1] The Supreme Court found these standards constitutional when it upheld them in *Gregg v. Georgia.* According to the *Gregg* court, these standards provided a methodology for administering the death penalty or life imprisonment. Irrelevant factors-such as race of the victim or defendant- were to be disregarded and not considered. Considering these factors would compromise the methodology established in *Gregg* and the penalty phase of any trial would be subject to 8th and 14th Amendment concerns.

In 1987 the Supreme Court revisited the death penalty question in *McCleskey v. Kemp.*[2] McCleskey claimed his death sentence was a violation of his 8th and 14th Amendment rights. McCleskey provided the Court with statistical evidence showing disparity in the application of the death penalty in the state of Georgia. After ruling that McCleskey's 8th Amendment rights had not been

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[1] Gregg v. Georgia, 428 U.S. 153 (1976) The Court found that Georgia's new statutory scheme, enacted to overcome the constitutional deficiencies found in Furman v. Georgia, guides the jury in its exercise of discretion as to whether or not it will impose the death penalty for first-degree murder, but also gives the Georgia Supreme Court the power and imposes the obligation to decide whether in fact the death penalty was being administered for any given class of crime in a discriminatory, standardless, or rare fashion.

[2] McCleskey v. Kemp, 481 U.S. 279 (1987)

violated, the Court moved to McCleskey's 14th Amendment challenge. The evidence did indicate that there was a severe disparity in the imposition of death based on the race of the victim coupled with race of the accused. Despite this evidence, the Court found that McCleskey did not fall victim to discrimination when the death penalty was applied in his case. Because McCleskey could not show direct evidence of discrimination, the Court rejected McCleskey's claim and sustained his death sentence.

The holdings indicate that even if there is widespread discrimination toward a certain class or group of people, a person must show actual individual discrimination to warrant an equal protection claim under the 14th Amendment. I argue that such a burden coupled with the unique nature of the death penalty question the validity of all death sentences. The 14th Amendment requires that all United States citizens be treated equally under the law and that no person shall be denied life, liberty, or property without due process of law. The evidence provided by McCleskey indicates that there are citizens who are not enjoying the full protection of the law and that their right to life might be suffering from this. This paper will explore the *McCleskey* decision and argue that *McCleskey* does not conform to the fundamental precepts outlined in the Equal Protection Clause of the 14th Amendment. Furthermore, this paper will argue that the inability to proscribe racial consideration during the punishment phase, coupled with a viable alternative to the death penalty - life imprisonment, the death penalty is in violation of America's 14th Amendment right to equal protection.

Facts

McCleskey was charged with two counts of armed robbery and one count of murder. During the commission of the robbery McCleskey shot and killed a police officer. McCleskey was found guilty on all charges and his trial proceeded to the punishment phase. In this case the state of Georgia sought the death penalty. The trial jury found two aggravating factors beyond a reasonable doubt: the murder was committed during an armed robbery and a police officer was murdered.[3] Upon finding that these two factors existed beyond a reasonable doubt the jury recommended McCleskey be sentenced to death.

After exhausting his appeals in Georgia, McCleskey filed a writ of habeas corpus in Federal District Court. Within this writ McCleskey alleged that death sentences were administered in a racially discriminatory manner, which violated his 8th and 14th Amendment rights. McCleskey offered the Baldus study to show that the races of the defendant and victim unduly influence the administration of the death penalty. The Baldus study, performed by Professors David Baldus, Charles Pulaski, and George Woodworth, indicates in cases that involve of white victims, the defendant is 4.3 times more likely to receive the death penalty.[4] Additionally, the study concludes that black defendants are 1.1 times more likely

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[3] McCleskey v. Kemp, 481 U.S. 279 (1987) According to Georgia law, the presence of more then two aggravating factors was sufficient to sentence a defendant to death.

[4] McCleskey v. Kemp, 481 U.S. 279 (1987) During the span of the study, the prosecution asked for the death penalty 70 percent of the time when the defendant was black and the victim was white. In contrast, when the defendant was white and the victim was black, the prosecution sought the death penalty a mere 19 percent of the time. When both defendant and victim were black, the prosecution requested the imposition of the death penalty only 15 percent of the time. In sum, a defendant convicted of killing a white person in the state of Georgia was 4.3 times more likely to receive the death penalty than those convicted of killing a black person.

to receive the death penalty. In cases where a black defendant murders a white victim, he or she will be most likely to receive the death penalty.

McCleskey offered the Baldus study to show irrelevant racial considerations tainted Georgia's capital punishment system. Due to the risk that McCleskey's own death sentence might have been influenced by racial discrimination, he asked the Court to vacate his death sentence. McCleskey did not offer any evidence to indicate that his own trial was influenced by racial factors. His claim contended that the Baldus study showed the application of the death penalty had a starkly disparate impact on blacks. McCleskey's equal protection claims assumed an implicit connection could be drawn from the statistical study. McCleskey's attorneys argued that a reasonable inference could be drawn from the Baldus study and that inference was sufficient to show race unfairly influenced the death penalty system and McCleskey's trial.

However, the Court found the statistical study was insufficient to meet a prima facie burden to warrant either an 8th or 14th Amendment concern. Justice Powell wrote the majority opinion in *McCleskey*. In his opinion, Justice Powell argues that McCleskey (or anyone seeking an Equal Protection claim) has the burden to establish (1) "the existence of purposeful discrimination"[5] and (2) that such discrimination "had a discriminatory effect."[6] Powell concedes that the Court accepts the Baldus study as evidence that:

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[5] Whitus v. Georgia, 385 U.S. 545, 550 (1967)
[6] Wayte v. United States, 470 U.S. 598, 608 (1985)

> "...Systematic and substantial disparities existed in the penalties imposed upon homicide defendants in the state of Georgia based on race of the homicide victim, that the disparities existed at a less substantial rate in the death sentencing based on the race of defendants, and that factors of race of the victim and defendant were at work in Fulton County."[7]

Regardless of this concession, Powell asserts that McCleskey's evidence does not show "purposeful discrimination" or any "discriminatory effect".

McCleskey claims that the jury, the prosecutor, and the state legislature are all complicit in perpetuating Georgia's racially biased capital punishment system. McCleskey alleges that the jury implicitly considered race when administering his death sentence, which is evident from the results of the Baldus study. Justice Powell confronts this claim by asserting that jury deliberations are made behind closed doors. Furthermore, jurors are not required to release any information pertaining to their deliberations or their motivations for assessing guilt or administering an appropriate punishment for any given crime.[8] Due to this jury privilege, the Court states that McCleskey could not show that the jury was influenced by racial factors during its deliberation for the McCleskey case.

As Justice Powell states earlier in the Court's opinion, there must be evidence of individual discrimination and harm. A petitioner cannot rely on group-based discrimination to seek an individual equal protection claim. Justice Powell argues that allowing such evidence would call into question all decisions

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[7] McCleskey v. Kemp, 481 U.S. 279 (1987)
[8] Chicago, B. & Q. R. Co. v. Babcock, 204 U.S. 585, 593 (1907) "Jurors cannot be called to testify to the motives and influences that led to their verdict."

by a jury in the criminal justice system.[9] Furthermore Justice Powell eliminates McCleskey's claims against prosecutors and the state legislature. He argues that prosecutors must have discretion when deciding to prosecute cases and what penalties to seek. Additionally, due to the nature of criminal prosecution and plea-bargaining, discretion is necessary for the system to work. To attack this discretion, there must be "exceptionally clear proof"[10] of prosecutorial abuse or indiscretion.

Finally, the Court disregards McCleskey's final claim of abuse by the state of Georgia. McCleskey claimed that Georgia is guilty of violating his equal protection rights by allowing a discriminatory capital punishment system. However, Justice Powell asserts that the state of Georgia must have chosen and affirmed this system for its discriminatory effect upon a selected group in order to have violated the Equal Protection Clause.[11] McCleskey could not offer any evidence to indicate that the Georgia legislature acted in this manner. Furthermore, the Court held in *Gregg* that Georgia's capital punishment system could function neutrally and fairly with respect to all individuals.[12] The Court

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[9] McCleskey v. Kemp, 481 U.S. 279 (1987) Justice Powell argues that if group based discrimination was solely sufficient to render a law unconstitutional, it would call into question all criminal convictions.
[10] McCleskey v. Kemp, 481 U.S. 279 (1987) "Implementation of these laws necessarily requires discretionary judgments. Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused."
[11] Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979) It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part `because of,' not merely `in spite of,' its adverse effects upon an identifiable group."
[12] Gregg v. Georgia, 428 U.S. 153 (1976) "No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines."

found that the McCleskey's evidence was not sufficient to change its earlier opinion.

Case Analysis

McCleskey raises three different equal protection claims in his complaint: one against the jury, one against the prosecutor and one against the state legislature. While McCleskey's claim against the state is weak, his other two claims present interesting legal questions. The Baldus study shows specific systematic discrimination against black defendants when their victims are white. The study takes into consideration over two hundred variables and shows that racial factors unduly influenced capital cases.

The Baldus study analyzes jury decisions during the punishment phase of a capital case. It does not explicitly examine prosecutorial discretion or examine in which cases prosecutors seek the death penalty and the characteristics of those cases versus cases in which the prosecutors only seek life imprisonment. So McCleskey can argue that prosecutorial misconduct is only implied by the study. The reason why more blacks are sentenced to death is that prosecutors seek the death penalty in cases where the victim is white and the defendant is black.[13] Additionally, in similar cases, these same prosecutors choose only to seek life imprisonment when there were black victims or white defendants. McCleskey asks the Court to make this inference from the statistical results. While this

[13] McCleskey v. Kemp, 481 U.S. 279 (1987) During the span of the study, the prosecution asked for the death penalty 70 percent of the time when the defendant was black and the victim was white. In contrast, when the defendant was white and the victim was black, the prosecution sought the death penalty a mere 19 percent of the time.

scenario is possible, it cannot be inferred from the evidence. The evidence does not strongly support that prosecutorial misconduct caused the disparate sentences in the Baldus study. Additionally, it does not show the actual existence of misconduct.[14]

The survey does analyze the presence of racial considerations during the punishment phase. In the Court's opinion, Justice Powell stated that McCleskey's argument that group statistical evidence inferred individual racial discrimination was insufficient.[15] The majority opinion required evidence of individual discrimination by the jury. The Court asked McCleskey to show that jurors acted in a discriminatory manner when assigning the death penalty.

However, as Powell noted, jurors are protected from exploring their motivations as a manner of public policy. McCleskey is unable to question the jurors about their motivations, and it is also unreasonable to expect jurors to admit to voluntarily engaging in racial discrimination. Thus McCleskey's situation provides a unique paradox. While empirical evidence suggests individual racial discrimination, McCleskey is unable to substantiate this claim by questioning the jury.

Justice Powell asserts that the Baldus study does not establish a major systematic defect. He argues that discretion is required to ensure the system works

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[14] Justice Powell states that prosecutors have complete discretion in deciding in which cases to pursue the death penalty and in which cases to only pursue life imprisonment.

[15] McCleskey v. Kemp, 481 U.S. 279 (1987) "The unique nature of the decisions at issue in this case also counsels against adopting such an inference from the disparities indicated by the Baldus study. Accordingly, we hold that the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose."

properly. The Georgia system provides a list of aggravating factors, which a jury can choose to consider and weigh against mitigating factors provided by the defense. Each defendant's case is unique and must be given individual attention. For the Court, McCleskey's claim simply provides an unexplainable statistic and the Court refuses to view the unexplainable as invidious.[16]

The United States Constitution provides for the right to trial by jury.[17] This system ensures and protects each defendant's fundamental rights. Twelve neutral men and women are charged with the responsibility to decide a defendant's guilt or innocence and in capital cases these men and women decide if defendants will be executed or spend life in prison. The jury should have nothing to gain from either an acquittal or a conviction. Thus they are presumed to render decisions according to the demands of justice.

Each capital case jury is unique as are the facts in each case tried. However, the race of the victim and the race of the defendant are not characteristics that can be considered during any part of the jury deliberation.[18] McCleskey asks the court to infer from his evidence that racial considerations are part of jury verdicts. While McCleskey concedes that he cannot put on any evidence to show his jurors knowingly or purposefully assigned him death due to his race or the race of the victim, he asks the court to vacate his death punishment

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[16] McCleskey v. Kemp, 481 U.S. 279 (1987) "Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious."
[17] United States Constitution Fifth and Sixth Amendment
[18] McLaughlin v. Florida, 379 U.S. 184 (1964) "My concurring Brothers 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."

because of the inherent risk that racial considerations influenced the jurors in his trial when deciding his fate.

However, Justice Powell too readily dismisses McCleskey's claim. In prior cases, the Court dismissed death sentences in cases where there was a chance for jury mistake.[19] In these cases, the Court did not require direct evidence that the jury had actually erred. The Court vacated death sentences in both these cases solely on the possibility that the jury considered irrelevant factors during the punishment hearing. McCleskey's claim is actually stronger than the claims made in these cases. His claim is not contingent on the possibility of the jury considering irrelevant factors but shows empirical evidence that racial considerations are evident when a jury determines a defendant's punishment.

While discretion is a necessary component to this system, it cannot be assumed that the system is not subject to abuse. Justice Powell concedes that statistical evidence can be used to raise an equal protection claim, but states McCleskey's evidence does not provide a "stark disparity" to warrant such a claim. Additionally, the Court has long held that race has no official role in any part of a criminal trial.[20] Despite this prior ruling, the Court chose to tolerate these racial discrepancies. The evidence in this case shows that jury neutrality has fallen victim to racial considerations.

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[19] Roberts v. Louisiana, 428 U.S. 325 (1976), and Woodson v. North Carolina, 428 U.S. 280 (1976) "[The Court] struck down death sentences in part because mandatory imposition of the death penalty created the risk that a jury might rely on arbitrary considerations in deciding which persons should be convicted of capital crimes. Such a risk would arise, we said, because of the likelihood that jurors reluctant to impose capital punishment on a particular defendant would refuse to return a conviction, so that the effect of mandatory sentencing would be to recreate the unbounded sentencing discretion condemned in Furman."

[20] Furman v. Georgia, 408 U.S. 238 (1972)

The Supreme Court's Interpretation of the Equal Protection Clause:

The 14th Amendment was ratified in 1868 to protect newly freed black citizens from the overt racial bias that still lingered in the post-Civil War South and throughout the entire country. Since its ratification, the 14th Amendment has granted blacks and all US citizens the right to due process and increased their political rights. This Amendment requires the equal application of the law to all United States citizens. The Court has consistently ruled that when purposeful discrimination has a discriminatory effect, an individual's 14th Amendment rights have been violated.

However, the passage of this Amendment has not prevented racial discrimination in the country. Both state and federal courts have continually struck down legislation because of its discriminatory intent. For example state laws requiring poll taxes to vote and the passage of literacy tests to vote were found to be unconstitutional because of their intent to prevent blacks from voting. Additionally, the Supreme Court has invalidated the practice of "separate but equal" institutions for blacks and whites.[21] Despite any attempt to equally establish two separate systems to accommodate blacks and whites, the Court found that separate is inherently unequal, and the Constitution demands that all US citizens be treated justly under one standardized system. Whether that system is educational opportunities, employment opportunities, or the workings of the

[21] Brown v. Board of Education, 344 U.S. 1 (1952)

criminal justice system, there must be one uniform system applied to all Americans.

Over the years the Supreme Court has developed a methodology to ascertain if a certain law or a public institution has violated the 14th Amendment. The petitioner must show that there was a discriminatory intent and that he or she was adversely affected by this discrimination.[22] Once this burden has been met, the defendant has the opportunity to explain its conduct and show that it is not in violation of the Equal Protection Clause. If the defendant is unable to provide evidence that shows the absence of either discrimination or discriminatory intent, the Court will find the defendant's actions to be unconstitutional. In three major cases the Court has established its understanding and interpretation of the Equal Protection Clause. In *Yick WO v. Hopkins*, *Batson v. Kentucky,* and *Washington v. Davis*, the Court has established the precedent for using statistical evidence to show racial discrimination.

In *Yick*, the issue was whether a San Francisco city ordinance requiring a permit to operate a laundry house in a wooden building was applied in a discriminatory manner toward Chinese Americans. The wording of the ordinance did not imply any discriminatory intent in this case; however, the law's application indicated a discriminatory effect. At the time there were 320 laundry houses in the San Francisco area and Chinese Americans owned more then two hundred of these

[22] Whitus v. Georgia, 385 U.S. 545, 550 (1967) & Wayte v. United States, 470 U.S. 598, 608 (1985)

houses.[23] While the city granted non-Asian residents permits to operate these laundry houses, they denied all Chinese-Americans' applications for permits. The Court found that the statistical evidence proved that the San Francisco city government blatantly violated the Equal Protection Clause. The Court inferred that the motivating factor for denial of these applications was race induced.[24] While there was no statutory evidence to support this assertion, the Court found the application of the ordinance to be so "unequal and oppressive"[25] that it discriminated against all Chinese laundrymen.

Yick showed that discrimination could be inferred from statistical evidence as long as the evidence indicated obvious discrimination and unequal application of a law to a selective group. The city ordinance was not equally applied to all parties, but was used as a barrier to the market, preventing Chinese-Americans entry. The Court found that a neutral law could be applied in discriminatory manner, showing that the law does not have to be written with a discriminatory intent but can be applied in a discriminatory manner.

The Court further refined these standards for assessing an Equal Protection Clause violation in *Washington v. Davis.* In *Davis,* the Court ruled that if a law, policy, or test has a highly disparate impact upon a racial group, this evidence is

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[23] YICK WO v. HOPKINS, 118 U.S. 356 (1886) "It is also admitted to be true, as alleged in the petition, that on February 24, 1880, 'there were about 320 laundries in the city and county of San Francisco, of which about 240 were owned and conducted by subjects of China…"

[24] YICK WO v. HOPKINS, 118 U.S. 356 (1886) "No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified."

[25] YICK WO v. HOPKINS, 118 U.S. 356 (1886)

not solely sufficient to claim that the law, policy, or test is racially invidious.[26] The respondents in this case claimed the District of Columbia Police Department's Test 21 had a highly discriminatory affect on black applicants. Test 21 is an examination used by many federal service agencies. This test measures an applicant's verbal ability, vocabulary, reading, and comprehension and is used to ascertain and predict the quality of subsequent job performance.[27]

The respondents claimed that black applicants were four times as likely to fail this test as white applicants were. This evidence was offered to show that their Constitutional rights had been violated. In their complaint, the respondents never claimed the test was administered or composed to purposefully discriminate against black applicants or that the test was given to intentionally prevent black applicants from becoming police officers. They simply claimed that the test had a "highly discriminatory impact in screening out black applicants".[28]

The appeals court found in favor of the respondents. That court declared that the lack of discriminatory intent was irrelevant to the respondent's claim and did not prevent them from seeking relief. The appellate court found evidence of disparate impact was the crucial fact in this case. This impact alone was enough to constitute a constitutional violation.

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[26]Washington v. Davis, 426 U.S. 229 (1976) "My point in making this observation is to suggest that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume. I agree, of course, that a constitutional issue does not arise every time some disproportionate impact is shown."

[27] Washington v. Davis, 426 U.S. 229 (1976) "Test 21 is administered generally to prospective Government employees to determine whether applicants have acquired a particular level of verbal skill."

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

However, the Supreme Court granted the District of Columbia officials' petition for certiorari. After reviewing the evidence presented in this case, the Supreme Court reversed the appellate court's decision. The Court stated that the central purpose of the 14th Amendment was the "prevention of official conduct discriminating on the basis of race".[29] The Court cited a guiding principle from *Strauder v. West Virginia*: "A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribe race or by unequal application of the law to such an extent as to show intentional discrimination."[30] From this principle the Court concluded that Test 21 was not employed to systematically exclude black applicants and that the administration of the test was not unequal.

The Court ruled that the respondents had failed to show that Test 21 was invidiously devised or administered to black applicants. In fact, the police department provided evidence showing the department's actual intent to hire more African-Americans.[31] After reviewing the totality of the evidence, the Court found the D.C. Police Department's administration and usage of Test 21 to be in conformity with the Constitution.

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[29] Washington v. Davis, 426 U.S. 229 (1976)
[30] Strauder v. West Virginia, 100 U.S. 303 (1880)
[31] Washington v. Davis, 426 U.S. 229 (1976)

The Court did concede that disproportionate impact is not irrelevant to a case.[32] However, the mere presence of disproportionate impact does not always indicate an equal protection violation. The Court stated, "invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another".[33] Additionally, Justice White affirmed the principle established in *Yick* that neutral statutes could be applied unequally to different groups. The unequal application of neutral statutes runs afoul to the intent of the 14th Amendment. Government officials cannot simply state that the construction of a statute satisfies Constitutional requirements; they must also show that its application is also done with respect to these requirements.

In both *Yick* and *Davis*, the Court held that laws applied unequally or policies designed to discriminate are constitutionally intolerable. It is necessary for a respondent to show the existence of purposeful and intentional discrimination to justify an equal protection violation. A respondent can meet this burden by showing purposeful and intentional discrimination from the totality of the facts. Disproportionate impact evidence is a tool that can be used either alone or with other evidence to show this type of discrimination. However, the mere presence of disproportionate impact does not always necessitate a constitutional violation.

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[32] Washington v. Davis, 426 U.S. 229 (1976) "This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination."

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

The Court employed these guiding principles in its analysis of *Batson v. Kentucky*. In *Batson,* the petitioner challenged the usage of peremptory challenges to exclude four African-Americans from the trial jury.[34] The petitioner claimed that the prosecutor was racially motivated to exclude these four men. Batson's attorneys argued since the prosecutor's actions were constitutionally proscribed his 14th Amendment rights were violated, and asked for his conviction to be reversed.

The facts of this case indicate that the prosecutor used four peremptory challenges to exclude the only four African-Americans from the venire. The petitioner claimed that the prosecutor inappropriately used his peremptory challenges. The petitioner claimed the only reason why the prosecutor chose to exclude these four men was because they were black. The defense counsel objected and requested a hearing to deliberate the possible violation of the 14th Amendment but was denied. The trial judge stated that all parties were able to use peremptory challenges to "strike anybody they want to".[35]

However, the Supreme Court disagreed with the trial judge. The Court had found previously that the "purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal

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[34] Swain v. Alabama, 380 U.S. 202"Petitioner also contended [476 U.S. 79, 84] that the facts showed that the prosecutor had engaged in a "pattern" of discriminatory challenges in this case and established an equal protection violation under Swain."

[35] Batson v. Kentucky, 476 U.S. 79 (1986) "Without expressly ruling on the request for a hearing, the trial judge observed that the parties were entitled to use their peremptory challenges to "strike anybody they want to." The judge then denied petitioner's motion, reasoning that the cross-section requirement applies only to selection of the venire and not to selection of the petit jury itself."

Protection Clause".[36] The Court reaffirmed this principle and further articulated the manner in which a petitioner can meet his prima facie burden.

Justice Powell stated that the petitioner's current burden was crippling. Before *Batson*, many courts required petitioners to show direct and concrete evidence of racial discrimination. This burden would require a petitioner to show direct evidence that a prosecutor excluded an African-American simply because he was black. He claimed such a burden would allow prosecutors' peremptory challenges to be immune from constitutional scrutiny. The court rationalized that such a burden was not realistic and did not serve in the interest of justice.

The Court asserted, "In deciding if the defendant has carried his burden of persuasion a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available'". [37] Justice Powell went further and stated that circumstantial evidence did include the presence of a disparate impact. Additionally, the Court found that the defendant must show that he is from a racial group subject to being singled out for differential treatment.[38] Furthermore, evidence of historical patterns and the systematic abuse of a current system can provide the necessary evidence to meet the petitioner's burden. The petitioner must be able to collect enough direct and circumstantial evidence that a reasonable inference can be made about the existence of purposeful discrimination.[39]

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[36] Swain v. Alabama, 380 U.S. 202 (1965)
[37] Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977)
[38] Castaneda v. Partida, 430 U.S. 482, (1977)

In *Batson*, the Court held that such evidence did exist. The prosecutor's systematic exclusion of black jurors coupled with a historical pattern of excluding black jurors indicated purposeful discrimination. Also, the petitioner showed that his status as a black defendant made him more susceptible to differential treatment. The Court found that the defendant had met his prima facie burden and the state would have to provide a neutral explanation for excluding the four black jurors from the trial jury.

In these three cases, the Court consistently ruled that the possibility of racial discrimination could not be tolerated. A petitioner's burden can be met by providing evidence that indicates the existence of purposeful discrimination and actual harm. After meeting this burden, the state must provide neutral explanations for the racial disparities. These standards for evaluating laws and domestic policies provide a safeguard against racial discrimination and allow the intent of the 14th Amendment to be recognized. These three cases all predate the landmark case *McCleskey v. Kemp*. In fact, the Court issued its decision in *Batson* only six months before hearing oral arguments in *McCleskey*. The equal protection jurisprudence established prior to *McCleskey* would become the Court's guiding factors when deciding if evidence of group-based discrimination was sufficient to merit a constitutional objection to the death penalty's application to blacks.

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[39] Batson v. Kentucky, 476 U.S. 79 (1986) "We have recognized that a black defendant alleging that members of his race have been impermissibly excluded from the venire may make out a prima [476 U.S. 79, 94] facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose."

McCleskey v. Kemp and the Equal Protection Clause

McCleskey is similar to the three other cases discussed previously because McCleskey claims that a racially neutral law is being applied in a discriminatory manner. Additionally, McCleskey uses statistical evidence - the Baldus Study - to show the existence of racial discrimination. The evidence used and McCleskey's approaches in his case are very comparable to the principles discussed and established in all three of the aforementioned cases.

McCleskey's argument that aggravating factors are selectively applied in cases with black defendants and white victims is similar to the argument asserted in *Yick*. While the application was much more evident in *Yick*, the same principle is found in McCleskey's case. McCleskey's evidence shows the existence of an unequal application of aggravating factors during the punishment phase. As the Court asserted in *Yick*:

> "Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."[40]

McCleskey has been able to show the unjust administration of the death penalty by showing numerically that black defendants with white victims are more apt to receive the death penalty than any other defendant/victim combination.

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[40] YICK WO v. HOPKINS, 118 U.S. 356 (1886)

However, McCleskey's evidence does not solely consist of numerical statistics. The Baldus study directly indicates that racial bias taints the capital punishment process. Baldus shows that the reason for the numerical disparity between these groups is the race of the individual. As the Court held in *Davis* and *Batson*, disproportionate impact can be used as evidence to infer purposeful discrimination. However, unlike *Davis*, McCleskey's disproportionate impact evidence is drawn from an academic study, and the Court accepted its validity.[41] Moreover, the deliberation on a punishment is different from the simple application of a uniform test. While grading Test 21 would be a more objective process, the deliberation and motivations of 12 individuals becomes subject to each individual's interpretation and the weight given to aggravating and mitigating factors.

Also as Justice Powell articulated in *Batson,* McCleskey did not have to provide direct evidence indicating the jurors purposefully discriminated when deliberating on his punishment; such a burden would be crippling. Much like the idea of prosecutors admitting the use of peremptory challenges are racially motivated, for a juror to admit that he or she condemned a person to death because of a defendant's race is absurd. The direct evidence requirement would have the same affect in death penalty cases as it had in the peremptory challenge cases - it would make all jury deliberations immune to constitutional scrutiny.

[41] McCleskey v. Kemp, 481 U.S. 279 (1987)

The totality of McCleskey's evidence allows the Court to infer purposeful discrimination. His status as an African-American places him into a group of individuals who have been historically treated unequally and differently. Additionally, his evidence shows a numerical disparity in the allocation of the death penalty and offers racial bias to account for this disparity. The burden established in *Batson* has been met. McCleskey has shown the existence of purposeful discrimination and its discriminatory impact.

As the Court has ruled, the burden should have shifted to the state to provide a neutral rationale. However, the Court departed from these principles it had established in cases prior to *McCleskey*. Its willingness to turn a blind eye to the discriminatory application of the death penalty undermines the public confidence in the system of capital punishment system. As Justice Powell argued in *Batson*:

> "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our justice system."[42]

The harm found from discrimination in *McCleskey* is actually much more severe. The unjust application of the death penalty not only undermines the public's confidence in this system, but also questions the morality of a society that allows a flawed system to continually operate under corrupt conditions, especially when a remedy is available.

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[42] Batson v. Kentucky, 476 U.S. 79 (1986)

The Death Penalty and the Equal Protection Clause

The Supreme Court has ruled in prior cases that the death penalty cannot be viewed as a unique punishment. In fact, Justice Powell expressed concern that if statistical evidence was sufficient to raise an Equal Protection Clause claim, it would lead to a slippery slope effect in which all punishments would be subject to the same analysis. However, because the death penalty is considered the most severe punishment afforded in the United States, the United States government and many states have outlined precautions and safety standards to insure that its application is not tainted by irrelevant factors. The Equal Protection Clause and the death penalty have a unique relationship due to the severity and finality of the death punishment. Both the federal and state criminal justice systems have implemented automatic appeals in cases where the jury issues the death penalty. The death penalty is already considered a unique punishment, which warrants special consideration. In this case and cases similar to McCleskey's, it would not be unusual or unprecedented for the court to examine the death penalty in a vacuum due to its unique nature in comparison with other criminal punishments.

Also, the United States legal system places a higher burden with cases where the punishment is more severe. In civil cases, monetary damages are awarded if the defendant is found liable. In these cases, the plaintiff only has to prove harm and negligence by a preponderance of the evidence. However, in criminal trials - where prison sentences become the punishment - the burden rises to beyond a reasonable doubt. Additionally, as referenced earlier, immediate

attention is granted to those cases in which the state attempts to deprive a person of his most fundamental right - life. The death penalty has been recognized as an exceptional punishment and has been given special attention that other penalties have not been given by both legislatures and the court system.

Juries have to consider a range of aggravating factors and mitigating factors when issuing a punishment.[43] The complex question they must contemplate is who deserves to live and who deserves to die. Placing such a large burden on a select few individuals requires the most critical assessment. Such an examination requires careful analysis of jury trends and empirical studies to validate the proper functioning of the jury system. From this analysis, it can be surmised whether the aforementioned burden has become too high and whether the process has become corrupted, violating both defendants' and victims' equal protection rights.

There is no system of principles sufficient to protect against erroneous considerations. Other studies, besides the Baldus Study, have shown the same racial disparities evident in Baldus. The Bowers and Pierce study show racial factors still influenced jury decisions.[44] This study affirms McCleskey's claim pertaining to racial discrimination. Additionally, this survey was conducted in 1980, nine years prior to *McCleskey*. The two studies brought together show that the principles outlined in *Gregg* are not sufficient to eliminate the arbitrary and discriminatory impact of the jury administered death sentence.

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[43] These factors were implemented after the Court found the death penalty violated both the 8th and 14th Amendments in Furman v. Georgia, 408 U.S. 238 (1972)

[44] "Arbitrariness and Discrimination under post-Furman Capital Statutes" Crime *and Delinquency* 1980: 563-635.

However, many legal scholars find this argument to be unconvincing. Ernest van den Haag argues that the discrimination argument's flaw is that it deals with criminal defendants who are actually guilty. The claim McCleskey and many other scholars have risen is not an issue of guilt, but rather the fair and equal administration of the death penalty. Haag argues that the demands of justice only require assigning the appropriate punishment to criminal defendants.[45] Punishment should be linked to individual guilt and not on the unequal distribution of punishments to a certain class of people.

Haag's principle emphasizes that an individual's punishment is not dependent on how other people are punished for similar crimes. For Haag, the sole concept governing the administration of the death penalty is to assure that it is only assigned to those who deserve to die. Evidence of discrimination does not undermine the death penalty as long as deserving defendants are receiving this punishment. According to Haag, unequal justice is still justice.[46]

However, Haag does not consider the full implications of the 14th Amendment and the Equal Protection Clause. The 14th Amendment not only assures equal treatment under the law for all individuals but provides that like cases should be treated alike. The Court originally banned the death penalty due to its capricious and discriminatory application.[47] To remedy this problem, the Georgia legislature implemented statutes to guide juries when considering either

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[45] "The Collapse of the Case Against Capital Punishment" *The National Review* 31, March 1978: 397.
[46] "The Collapse of the Case Against Capital Punishment" *The National Review* 31, March 1978: 397.
[47] Furman v. Georgia, 408 U.S. 238 (1972)

life imprisonment or the death penalty. Haag's assertion that justice simply demands punishing the guilty and that unequal administration does not warrant a flaw in the system, oversimplifies the intent of the Equal Protection Clause.

Furthermore, Haag assumes that criminal defendants can be broken down into two neat categories: the guilty and the innocent. Limiting the analysis to capital murder cases, Haag's class of guilty defendants all deserve the death penalty and have no right for relief based on the treatment of others in similar cases. However, Haag's first assumption, all convicted murder defendants deserve the death penalty, ignores that there are certain aggravating factors that must be weighed against mitigating factors before death can ever be assigned.

Secondly, current precedent requires that like cases should be treated alike. Supreme Court Justice Stewart argued that petitioners may deserve to die, but because others who equally deserve to die escape death for no legal reason, execution of these petitioners would violate their 14th Amendment rights.[48]

Stephen Nathanson provides a counter hypothetical to attack Haag's argument. A teacher tells her class if any student plagiarizes they will fail the course. Out of the entire class, three students commit plagiarism. Now, according to the initial rule, all three students should fail. However, after listening to all three students, the teacher only fails one student. For the other two students, the teacher is won over by their motivations and decides not to punish them. In this case, the teacher departs from the initial rule and bases the students' punishment

[48] Furman v. Georgia, 408 U.S. 238 (1972)

not solely on their actions but on their actions and the reasons they acted in such a manner.[49]

For Haag, the student who failed has no grounds to appeal because he violated the initial rule. However, the teacher did not follow the initial rule as well. She added an irrelevant fact to judge guilt-student motivation for cheating. By judging the students by different standards, the teacher established a dual system of punishment-one system predicated on the initial rule and the second on the initial rule and the teacher's discretion. Allowing irrelevant factors to influence the teacher's decision altered the process and the criteria for assigning a punishment.

In this case, the students are not judged on the same principles but rather on irrelevant factors. To say that guilt and punishment rested solely on the initial rule would ignore the actions taken by the teacher when assigning the punishment. While Haag might be correct to say the student deserves his failing grade, he would be ignoring the additional facts considered when assigning a punishment to all the students. There must be a standard for comparison and consistency to evaluate the inherent fairness of any system of rules and punishment allocation.

While many people might agree that the failing student deserves his punishment, the system's operating procedure is the primary concern. In criminal law, the United States Congress and the Supreme Court have consistently

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[49] "Does It Matter if the Death Penalty is Arbitrarily Administered" Journal *of Philosophy and Public Affairs:* 1980 150-164.

produced and interpreted legislation that proscribes the influence of discriminatory or arbitrary factors. The criminal justice system is designed to analyze each capital murder case as a unique fact pattern. However, the criminal statutes are written to produce uniform and similar outcomes. These statutes are to be applied uniformly to all criminal defendants.

To judge if people are treated fairly when applying these laws, it is necessary to examine the outcome of other similar cases. Comparative justice examines punishments from cases with similar fact patterns. For a system to function under the demands of justice, this analysis must result in like cases having similar outcomes. If there is a disparity between the outcomes that can only be explained by irrelevant factors, the system fails to meet justice's demands.

A comparative justice analysis must be used when assessing the administration of the death penalty. Since the issue of guilt is not called into question, the procedural administration of the death penalty must be analyzed to assure that victims' and defendants' rights are not violated. This type of analysis allows the examination of any illegitimate factors that might unfairly and illegally influence punishment determination.

The hypothetical asserted by Nathanson is the same situation that McCleskey describes in his case. While he does not deny his guilt, McCleskey claims that the jury considered irrelevant factors-his race and the race of his victim-when deciding a punishment. To evaluate McCleskey's claim, a comparative justice analysis must be employed to examine how the system works.

The demands of justice require that the outcome of this analysis indicate a just distribution of the death penalty.

A Comparative Justice Analysis of *McCleskey v. Kemp*

The acceptability of the death penalty is contingent on the equal and just application of criminal statutes. The evidence provided by McCleskey does show that there are irrelevant factors influencing jury decisions. The statistical evidence shows that juries inflate the value of a white victim's life compared to the value of a black victim's life.[50] The numbers further convey that the race of the defendant can also influence his/her likelihood of receiving capital punishment. From the initial analysis, McCleskey succeeds in showing a disparity in the administration of the death penalty. Furthermore, his evidence proffers the cause of this disparity to be an irrelevant and illegal factor-race.

However, for this analysis to completely show that the capital punishment system is flawed, there must be a stark disparity caused by racial bias. Since these defendants are guilty and the criminal code provides for their execution, the disparity must be so severe that it undermines the ideals of equality inherent in the 14th Amendment. Essentially, racial bias must cause a two-prong system of punishment - one system that punishes defendants who murder white victims and another system that punishes murders of black victims – for the application of the death penalty to violate a defendant's equality rights. This system is not a

[50] "Arbitrariness and Discrimination under post-Furman Capital Statutes" *Crime and Delinquency* 1980: 563-635.

derivative of legislative intent, but rather a manifestation of societal, racial bias tainting what is intended to be a uniform process.

McCleskey's evidence indicates the presence and operation of a two-prong punishment system predicated on the victim or defendant's race. The Georgia legislature established guidelines for juries to follow when considering the appropriate punishment in each individual case. These rules are written without a discriminatory purpose and should be applied to all classes of people equally. This process allows transparency and predictability within the punishment system. However, the evidence presented shows an unequal application of the death penalty for no good reason. The Baldus study explores alternative theories to explain the disparate impact; however, the study found that racial factors caused the disparate impact.

Considering the historical demands of justice and the current application of the death penalty, the capital punishment system fails to affirm the ideals of equality latent to the Constitution. A facially uniform system has been corrupted by racial factors. A murder defendant's punishment is not solely dependent on the comparison of aggravating and mitigating factors. Instead, the original rules have changed. Like the teacher considering the students' motivation for plagiarizing, the consideration of the victim's or defendant's race qualifies as an irrelevant factor and in this case, a discriminatory factor. The introduction of race into the capital punishment system cannot be tolerated. Its mere presence undermines the system's ability to produce just results.

To respond to this argument, a person has two options. First he can either deny the validity of these studies or he can address McCleskey's claim and attempt to disprove the two-prong capital punishment system theory. The first way to counter this argument avoids the issue and does not deal with the actual facts. A similar way a person can deny the implications of these studies is to claim it is a mere coincidence that the numbers indicate racial discrimination. However, this coincidence theory fails to recognize years of racial issues prevalent in the United States since its inception. In attempting to restore credibility to the capital punishment system, a person cannot simply deny the implications of the Baldus Study and other similar studies.

Since the issue cannot be avoided, a person must form some idea to counter the serious allegation of a two-prong system of capital punishment. However, the most common argument assembled is to claim that the two-prong system fails to show that individuals are actually influenced by racial factors. While the aggregate numbers indicate racial bias, there is no direct link, showing purposeful and deliberate discrimination. However, the logical assumption this argument's conclusion rests on - group base discrimination is not solely dependent on individual discrimination - is simply flawed. For a group discrimination to exist in an individualized system like the capital punishment system, individuals from the same or similar group must be subject to some form of discrimination. Applying this idea to the Baldus Study, individual blacks suffered from the influence of prejudice during their punishment hearing if their victims were white. Due to the

faulty logic asserted by the Court, the counter argument does not address the serious implications of the Baldus study.

A comparative justice analysis supports McCleskey's case with sufficient verification that the capital punishment system is procedurally flawed due to the influence of racial considerations. The evidence shows that juries are not adhering to the guidelines and the principles established by the legislature. The Supreme Court held that only these standards are to be considered and they must be followed to assure that the system performs properly. The problem occurs, as Justice Douglas noted due to the "uncontrolled discretion of judges and juries"[51] which leads to unintended but real results of death sentences based on illegitimate factors. *McCleskey* demonstrates Justice Douglas's concern and shows an inconsistent application of the death penalty. Coupling this inconsistency and Justice Powell's concession that racial factors were in play in Fulton County, Georgia, the capital punishment system is inherently biased by race and cannot be trusted to produce reliable and just results. Therefore, the operation of the death penalty system violates a defendant's right to equal protection and should be suspended permanently until this flaw can be remedied.

Conclusions:

In Justice Powell's biography, his biographer asked him if there was any Supreme Court decision that he regretted and wished he could change. The former

[51] Furman v. Georgia, 408 U.S. 238 (1972) Justice Douglas's Concurring Opinion

judge simply stated *McCleskey*.[52] Powell considered his decision in *McCleskey* to be a mistake and stated that he would have voted differently if he were ever given the chance. Justice Blackmun made a historical revelation echoing this same sentiment, which is known as Blackmun's revelation:

> "From this day forward, I no longer shall tinker with the machinery of death. For more then 20 years I have endeavored-indeed, I have struggled-along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed"[53]

The American death penalty experiment has failed. The capital punishment system is unable to sustain the tremendous constitutional burdens to function properly. The Court erred in rejecting McCleskey's claim. They turned a blind eye to the presence of racial discrimination during the punishment phase. The United States Congress, state legislatures, federal and state courts, and United States Supreme Court have all taken efforts to rid this country from the blight of racial discrimination. However, in *McCleskey* the Court failed to cure an evil that the 14th Amendment was created to remedy.

McCleskey not only proffered that the opportunity for discrimination existed, but provided evidence that the system has fallen victim to racial bias. As Justice Brennen stated in his dissent in *McCleskey*:

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[52] See John C. Jefferies Jr., *Justice Lewis F. Powell* 1994
[53] Callins v. Collins 510 US 1141 (1994)

> "At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell McCleskey that the few of the details of the crime or of McCleskey's past were more important than the fact that his victim was white."

This response is constitutionally intolerable. The Constitution demands that all persons be treated equally under the law. However, it has become evident that the capital punishment system does not treat all individuals equally. While the evidence in *McCleskey* might not prove that McCleskey suffered individual discrimination, the totality of the evidence shows that the capital punishment system has become corrupted. Due to this evidence and the viable alternative of life imprisonment, the demands of justice require the suspension of the death penalty. The capital punishment system has failed to produce fair and just results, and its failure cannot be tolerated. The United States Constitution only allows one solution in this case; the closure of the capital punishment system to preserve all of America's 14th Amendment right to equal protection and equal application of all laws.