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Symposium on Pursuing Racial Fairness in Criminal Justice: Twenty Years After McCleskey v. Kemp

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OPENING REMARKS: RACE AND THE DEATH PENALTY BEFORE AND AFTER MCCLESKEY

My assigned topic is "Race and the Death Penalty Before McCleskey," but I want to talk as much about the future as the past. Thurgood Marshall, in the fullness of his years, was asked, "What's the most important case you ever handled?" His answer was "the next one." [1] I hope his spirit animates this symposium. The history of our efforts to eradicate the racial caste system that has permeated and corrupted American society since 1619, when the first twenty Africans on the North American continent were offloaded by Dutch ***35** slave traders at Jamestown, Virginia, [2] would be a sorry tale if it did not shame us and instruct us to make better efforts before another 400 years of racism blight our society's pretensions to civilization, decency, and the rule of law.

A cardinal feature of the death penalty in the United States has always been its racially biased use. Prior to the Civil War, all Southern States provided by law that slaves--and sometimes free Negroes as well--should be sentenced to death for crimes punishable by lesser penalties when whites committed them. [3] After the War ended slavery, formal legal discrimination against free Negroes and Mulattoes was perpetuated by the Black Codes; African-Americans continued to be punished by death for crimes with lesser punishments for whites. [4] Both before and immediately after the War, capital punishment was imposed for crimes against whites under circumstances in which similar crimes against African-Americans were punished less severely or went unpunished. [5]

The national Legislature undertook to end all of these discriminations by the Civil Rights Act of 1866, and it proposed the Fourteenth Amendment--with its guarantee of Equal Protection of ***36** the Laws--to constitutionalize the Civil Rights Act. [6] Senator Howard, introducing the Fourteenth Amendment in the Senate, said that: "This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged." [7] In the House, Thaddeus Stevens explained that the aim of the Amendment was to assure that: "Whatever law punishes a white man for a crime shall ***37** punish the black man precisely in the same way. . . . Whatever law protects the white man shall afford equal protection to the black man." [8] That's the good news, and it is now 140 years old. The bad news is the next 140 years.

Egalitarianism has struggled against bigotry, privilege, and indifference for the soul of this country throughout those 140 years. Spurts of enthusiasm or at least of toleration for equality have alternated with relapses into the complacent acceptance of racial inequality as a settled feature of the culture of the United States. [9] Unchanged by these intellectual and occasional legal alarums and excursions, the practice of imposing and executing death sentences preponderantly upon African-American defendants and those convicted of crimes against white victims has become a ubiquitous, deeply entrenched feature of the American courthouse scene. [10] Between 1930, when nationwide official statistics begin, and 1972, when the Supreme Court of the United States decided Furman v. Georgia, almost exactly half of the persons executed for murder in the United States and about ninety percent of those executed for rape were African-American, [11] although African-Americans never constituted more than eleven percent of the nation's population ***38** during this period. [12] Unofficial figures running from 1864 to 1972 paint the same picture. [13]

After mentioning these statistics, it is obligatory to declare immediately that, of course, they do not prove race discrimination is at work in capital sentencing. [14] Raw population figures do not say anything about the rate at which people in different racial groups commit capital crimes, are arrested and prosecuted and convicted of capital crimes, or are their victims. These differences could conceivably account for the racial disproportion in the body count delivered to Boot Hill, and could theoretically be uninfluenced, themselves, by any racial bias. The fact that during these years statutes almost everywhere gave juries unrestricted discretion [15] to sentence capitally-convicted defendants to death or to imprisonment, and prosecutors everywhere enjoyed complete discretion to pursue or forego a death sentence in the case of any particular defendant, did not necessarily mean that the racially biased outcomes produced by this system were the result of anybody's racial bias. They might be the result of other factors correlated (as a natural phenomenon) with race, or of pure happenstance. True, but only a Supreme Court Justice in a state of denial or someone altogether ignorant of the history and the culture of this country could imagine these benign hypotheses to be remotely plausible. Anyone else would appreciate that neither nature nor fluke is likely to account for the remarkable correlation among the Foremost Five Facts we know about this country's use of capital punishment:

> (1) African-Americans constitute a very high percentage of the persons executed in the United States throughout the past 140 years.
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> (2) The classic observations of Emile Durkheim and Gunnar Myrdal would lead us to predict that in a caste society the harshest penalties will be inflicted upon persons of the lowest caste who dare to commit ***39** crimes against persons of the highest caste; [16] somewhat less severe penalties will be imposed for crimes against high-caste victims when the perpetrator is also high-caste; relatively lenient punishments will be dispensed to low-caste perpetrators of crimes against low-caste victims; [17] and very lenient or no punishment will be forthcoming when high-caste perpetrators commit crimes against low-caste victims. [18]
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> (3) The findings of David Baldus and his colleagues regarding interracial and intraracial sentencing in the State of Georgia, which were presented to the Supreme Court in the McCleskey litigation, [19] displayed precisely this pattern. [20]
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> (4) A wide array of subsequent studies, most of which, like the Baldus team's Georgia studies, meticulously ***40** controlled for non-racial variables, has consistently found that race alone can explain the observed death-sentencing patterns in State after State, and under every form of capital sentencing procedure. [21]
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> And:
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> (5) Local knowledge [22] agrees. In every watering hole in every American State and locality, criminal trial lawyers in their cups recite some version of the same Statement of the Real Law of Homicide, which goes: "If a black man kill a white man, that be first-degree murder; if a white man kill a white man, that be second-degree murder; if a black man kill a black man, that be mere manslaughter; whereas if a white man kill a black man that be excusable homicide (unless a woman be involved, in which cases the black man died of natural causes)." [23]

But I digress into common sense. Let me return to the litigation scene and the Supreme Court. In 1971, the NAACP Legal Defense Fund argued to the United States Supreme Court in the Furman case that the death penalty was a constitutionally prohibited cruel and unusual punishment because, in actual practice, prosecutors and judges and juries very seldom chose to use

it in the wide range of cases for which it was legally authorized, and this de facto repudiation evidenced its unacceptability under "the evolving standards of decency that mark the progress of a maturing society." [24] ***41** Evidence of caste discrimination and capricious inequality played a significant part in this argument, the point being that the death penalty would not enjoy even the limited acceptance that it has if it were not visited almost exclusively upon poor and powerless pariahs. [25] A bare majority of the Court in Furman bought the argument and held in 1972 that the death penalty could not constitutionally be applied under statutes which permitted sentencers to make a completely arbitrary and unregulated choice of life or death upon conviction for a capital offense. [26] Henceforth, the Court appeared to be saying, States that chose to retain the death penalty would have to provide sentencing standards that were sufficiently detailed, clear, and objective to assure regular, even-handed results. [27]

Then, beginning in 1976 and increasingly during the next quarter-century, the Court gutted these supposed constitutional requirements by holding them satisfied by any statutory scheme which contained even palpably illusory sentencing standards that, as a practical matter, left juries free to make life-or-death decisions in the same unregulated, ad hoc manner that they had before Furman. [28] ***43** Thus, the stage was set for the McCleskey litigation, in which the NAACP Legal Defense Fund, on the basis of empirical studies conducted by David Baldus and his University of Iowa colleagues, demonstrated that Georgia's "new" post-Furman capital sentencing procedure had, over the first half-dozen years of its implementation, produced a pattern of results explainable on no ground other than race.

I won't describe the evidence adduced in the McCleskey case in any detail. [29] Suffice it to say that David and his colleagues examined a large sample of Georgia homicide convictions between 1973 and 1979 [30] and collected information about more than five hundred factors pertinent to sentencing in each case. They subjected this information to an extensive array of statistical procedures, including multiple-regression analyses based upon alternative models that controlled for as few as ten or as many as 230 sentencing factors--all of the factors specified by Georgia law for consideration in capital sentencing and virtually every other factor recognized in the legal and criminological literature as likely to affect the choice of life or death. They found, inter alia, that defendants who killed white victims were eleven times more likely to be sentenced to death than defendants who killed African-American victims and that no factor other than race explained these results.

The multiple-regression analysis with the greatest explanatory power indicated that, after controlling for non-racial ***44** factors, convicted killers of white victims faced odds of being sentenced to death that were 4.3 times higher than the odds faced by convicted killers of African-American victims. The effects of race were not uniform across the spectrum of aggravation. In the least aggravated cases, almost no defendants were sentenced to death; in the most aggravated cases, a relatively high percentage of defendants were sentenced to death regardless of the victim's race; cases in the mid-range of aggravation, which included McCleskey's own case, showed the greatest impact of race. In these cases, death sentences were imposed on 34% of the killers of white victims and 14% of the killers of African-American victims. In other words, twenty out of every thirty-four defendants sentenced to die for killing a white victim would not have received a death sentence if their victims had been African-American. [31]

The Supreme Court rejected McCleskey's claims that either the Equal Protection Clause of the Fourteenth Amendment or the Cruel and Unusual Punishment Clause of the Eighth would be offended by putting him to death on this record. The majority opinion, by Justice Powell, purported to accept, arguendo, both the methodological validity and the principal statistical findings of the Baldus study. [32] It defined the question presented for decision in ***45** McCleskey as "whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that . . . McCleskey's capital sentence is unconstitutional under the Eighth or Fourteenth Amendment." [33] It answered that question in the negative.

With regard to the Fourteenth Amendment, Justice Powell grounded his analysis upon a premise established by earlier Supreme Court precedents [34] --that the Equal Protection Clause prohibits only purposeful discrimination by some person or persons acting under state authority--and he derived from that proposition the corollary that a capital defendant asserting an Equal Protection violation "must prove that the decisionmakers in his case acted with discriminatory purpose." [35] He found that McCleskey had not proved this because statistical evidence of statewide sentencing patterns could not establish the requisite subjective racial animus of the prosecutor, jurors, judge, or other individual actors in McCleskey's specific case. [36] With regard to the Eighth Amendment, Justice Powell concluded that the risk of racial bias demonstrated by the Baldus study was insufficient to invalidate the Georgia statute as applied. [37]

I think we must take this decision to mean that, so long as McCleskey v. Kemp remains the law, no purely statistical showing of racial differentials in the imposition or execution of death sentences will suffice to make out a violation of the federal Constitution. I recognize that the case could be read more narrowly. Technically, McCleskey's claim had to do primarily with race-of-victim disparity rather than race-of-defendant disparity; [38] technically, the Court's ***46** statements about the inefficacy of statistical data to prove racial animus had to do primarily with statewide data, not data specific to a particular county or judicial district; [39] technically, there are phrases in the opinion that might be seized upon to argue that a quantitatively larger racial differential than was found in the Baldus team's Georgia studies would support an Eighth Amendment claim. [40] But to take comfort in these technicalities would be wishful thinking. In virtually all recent studies of capital-sentencing outcomes, race-of-victim disparities greatly exceed and therefore mask race-of-defendant disparities, making it almost impossible to prove race-of-defendant disparities alone or predominantly; [41] death sentences generally are sufficiently rare so that county-specific studies are likely to encounter cell-size problems that baffle ordinary tests of statistical significance to which courts are accustomed; and the McCleskey opinion almost everywhere treats the Baldus studies as a whipping boy for the supposed sins of statistical analysis generally. ***47** Justice Powell wrote it in terms calculated to shut down statistically-based challenges to racial discrimination in capital sentencing; the lower courts do and will continue to understand it that way; [42] and so, undoubtedly, will the Supreme Court itself.

That leaves us with four possible responses to McCleskey. (1) We can accept it, swallow the brute fact that law offers no recourse against racial discrimination in capital sentencing, and pass on to fight other battles for equality and decency that are more winnable than this one. (2) We can work to get the Supreme Court of the United States to overrule McCleskey or to invalidate the death penalty generally upon some other ground. (3) We can find ways to mount effective federal constitutional challenges to racial discrimination in capital sentencing that end-run McCleskey or co-opt it. And (4) we can challenge racially discriminatory capital sentencing in other forums: state courts enforcing state constitutional law, legislatures, and the consciousness and conscience of the public.

It seems to me that the first response (or non-response)--accepting McCleskey and going about other business--is morally irresponsible. McCleskey is the Dred Scott decision of our time. It is a declaration that African-American life has no value which white men are bound to respect. It is a decision for which our children's children will reproach our generation and abhor the legal legacy we leave them. One inherent evil of the death penalty is that it extends the boundaries of permissible inhumanity so far that every lesser offense against humanity seems inoffensive by comparison, leading us to tolerate them relatively easily. McCleskey extends the boundaries of permissible discrimination and hypocrisy in that same measure. Accept McCleskey, and race discrimination in matters less momentous than life or death can be shrugged off. Accept McCleskey, and any hypocrisy with less than lethal consequences can be viewed as trivial in a legal system where the highest tribunal sits in a building bearing the proud motto “Equal Justice Under Law” on its west facade and ignores it.

***48** Our second possible course of action--to try to get the Supreme Court to overrule McCleskey or to outlaw the death penalty--is impractical at the present time. The votes are not there now and will not be there soon. In the long run, the Supreme Court will probably deliver the constitutional coup de grâce to capital punishment after enough other agents in the criminal process and organs of government--prosecutors and juries, state courts and legislatures--have become so disaffected with the penalty that death sentences turn vanishingly rare. And, doubtless, documentation of the historically race-driven nature of capital prosecutions and sentences will contribute to that ultimate outcome, because judicial guilt feelings are almost always the necessary condition for judicial reforms. But presentation of that documentation in exclusively statistical form to the present Supreme Court can produce no other result than refusals to consider it on the merits (i.e., “cert. denied”) or a reaffirmation of the McCleskey ruling. [43]

So, if we choose to try to curb the racially discriminatory use of the death penalty, we would be well advised to concentrate on the latter two courses of action--devising litigation tactics that flank McCleskey and addressing our case to forums other than the U.S. Supreme Court in the near future. I believe that these two courses can be pursued effectively by a strategy that also has potential for advancing the time when the U.S. Supreme Court finally does administer the coup de grâce. [44] Let me sketch the strategy for those of you who may want to lend your efforts to the work.

***49** The essence of it is to conduct statistical studies of the impact of race in statewide capital sentencing patterns in Southern States; identify counties or judicial districts in which some relatively irrefutable evidence of overtly bigoted talk or behavior on the part of the chief prosecuting attorney or a “culture of discrimination” in the prosecutor's office [45] is available; do some preliminary spadework to determine which of those counties also offer both a high ratio of death sentences in black-on-white

murder cases as compared to cases involving other racial combinations and a set of local institutions, conventions, and practices which are manifestly the residues of classic Southern apartheid; conduct analyses of the impact of race in the sentencing patterns (in both capital and noncapital cases) in those specific counties or venues; investigate, analyze, and prepare evidence of the legacy of apartheid embedded in the counties' political, economic, and social life, particularly as it bears on law enforcement, prosecution, and courthouse customs (including under-representation of African-Americans as jurors, judges, law-enforcement officers and officials, prosecutors, defense attorneys, and ***50** judges); select one or more manifestly death-bent prosecutions of an African-American defendant for murder of a white victim in the counties where your evidence looks strongest; associate with counsel in that case or those cases and file pretrial motions challenging the State's death-penalty statute on state and federal constitutional equal-protection and cruel-and-unusual-punishment grounds and for discovery of prosecutor's office policies and practices (including not only those relating to charging and plea-bargaining in capital cases, but those relating to jury selection practices in capital and noncapital cases, employment practices, and other activities in which conscious or unconscious race discrimination is likely to be observable), for discovery of the prosecutors' personal records relating to election and reelection campaigns and to fundraising in connection with those campaigns, club memberships and other affiliations, and so forth; for similar records of other public agencies and individuals involved in investigating or prosecuting the case (including the jury commissioners), and of prospective jurors once a jury venire or panel has been compiled; support these motions with affidavits containing the statistical, anecdotal and local-culture evidence that you have thus far gathered; and wait for the shit to hit the fan. Of course, if you get discovery, a hearing, or both, you develop your factual case accordingly; if not, you preserve a claim of error in the denial of your motions for presentation on appeal and in postconviction proceedings, including federal habeas. And you organize the African-American community around these litigation efforts, and you do appropriate media outreach at opportune times.

The objective is to use the best possible localities and cases to make the best possible record both of race-dependent capital sentencing outcomes and of the legacy of racial bias embedded in the local institutions and ways of life that process and surround capital prosecutions. It is to use McCleskey's requirement of proof of subjective racial animus--together with the probably somewhat less exacting requirement of "some evidence" of discriminatory intent as a precondition for discovery in support of a discriminatory-prosecution claim [46] --as a sword, to pry open and expose the magnitude of the ***51** culture of racism that produces the ubiquitous outcome of race-based differentials in capital sentencing. It is to turn McCleskey's ridiculous insistence that we prove the obvious into an opportunity to confront the judiciary, the media, and the public with the shame of understanding the profoundly racist roots of this country's tenacious fixation with the penalty of death that almost all of the rest of the civilized world has outgrown.

I'll say just a little more about the elements of this strategy before I wind up. The reason for selecting Southern States as the locus of the empirical research and litigation is pretty obvious. The best way to get a judge to accept any particular mode of proof is to use it to prove something that the judge already believes to be true, however much he or she may insist that it is not true until overwhelmingly proved. And Southern climes will doubtless offer more stereotypical, Faulkneresque forms of impacted race-based mores--forms that judges, the media, and the general public will ***52** recognize more easily through the filters of their own biases--than the forms found outside the South.

The statewide studies should come as close as possible to being as comprehensive and meticulous as the Baldus team's Georgia studies. Although McCleskey says that statewide statistics alone cannot prove a constitutional violation, they are indispensable to making the kind of case that needs to be made in court, in the media, and in public consciousness. Legally, they are necessary to support a claim for the invalidation of the current state capital-sentencing statute rather than for a ruling simply precluding a death sentence in the case of the individual defendant before the court. (I will come back to that point in a moment.) Conceptually, they are necessary to educate judges, commentators, opinion-makers, and eventually the public about the real nature of the phenomenon at issue: pervasive, virtually ubiquitous discrimination that is as widespread as it is because it is rooted in social institutions, mores and habits of thought that extend the length and breadth of our society, and which is self-reinforcing and resistant to eradication precisely in proportion to its pervasiveness. And dramatically, of course, statewide studies and statewide attacks on capital punishment laws are necessary to engage the media in the work of educating opinion-makers and the public.

Statewide studies should be done and litigation should be mounted in several States. The more that the studies converge and replicate each others' findings of racial disparities in capital sentencing patterns, the more solid and undeniable the overall case becomes, both as a matter of scientifically acceptable demonstration [47] and as a fixture of public understanding of what capital punishment means. It will require substantial investments of labor, intelligence, and money to produce the kinds of studies and litigation I am proposing. That is why I make the proposal at the outset of this symposium-- to get us thinking from the get-go about what level of commitment we are able and willing to make to the effort to undo the evil of McCleskey.

County-specific studies are also important. As I've said, these will often fail to produce statistically significant results because of ***53** the small number of death cases that any single county generates. But numerically striking racial disparities in capital sentencing within the county where a race-discrimination case is being litigated will serve to establish a common-sense connection between the statewide data and the particular case--a connection that the media will want to talk about, the public will understand, and even judges with a chi-square fetish cannot completely ignore. Raw numbers of death sentences imposed in the county in cases with differing racial combinations of victims and defendants should therefore be gathered before the venue for litigation is chosen and should be a factor in that choice. On the other hand, full-scale collection and analysis of county data, including data relating to nonracial "control" factors in all potentially capital cases prosecuted within the county, can ordinarily wait until after the litigation venue has been selected. This will avoid wasting resources on counties that don't make the litigation cut. And, of course, sometimes the only way to obtain the data needed for a full-scale workup of any particular county will be through court-ordered discovery. Where that's the case, raw numbers showing disparate capital-sentencing outcomes associated with different victim/defendant racial combinations can provide a part of the factual basis for a discovery motion, while the absence of available data regarding nonracial "control" factors can be made a part of the explanation of why discovery is required.

A major criterion in the choice of venue for the litigation should be the availability of evidence of racially biased attitudes on the part of the chief prosecutor, assistant prosecutors, prosecutor's office investigators, and police. Prosecutors who have been found by any court to have committed Batson violations in jury selection [48] are attractive possibilities; or, if there have been no judicial decisions on Batson claims involving a prosecutor, evidence of the kind that would be used to support such a claim (e.g., racial notations in jury-selection materials; disparate questioning and challenging of white and African-American prospective jurors; telltale discourtesy to African-American venirepersons) could be adduced. Other sorts of helpful evidence would be overtly racist or racially coded jury arguments in capital or other prosecutions by this prosecutor; [49] ***54** similar comments made in the various litigation contexts in which prosecutors characteristically make them (in examining witnesses and cross-examining defendants, in sidebar and chambers conferences, in plea negotiations, and so forth); the prosecutor's contemptuous or incredulous treatment of African-American complainants, survivors, and witnesses in cases in which African-Americans have been the victims of crimes; particularly solicitous remarks about the victim or the victim's survivors or outraged denunciations of the crime in press releases and interviews announcing the prosecutor's filing of charges, decision to seek the death penalty, or other aggressive pursuit of justice in white-victim cases; remarks reflecting racially biased attitudes or assumptions [50] in the course of election campaigns or solicitations for campaign funds and in speeches to clubs and citizens' groups; memberships in racially exclusive organizations, and so forth. Similar evidence of racial bias on the part of law enforcement officers who conduct or direct investigations or make initial charging decisions in felony cases would also be useful. [51]

This sort of anecdotal evidence of overtly bigoted language and behavior is, of course, simply the tollbooth payment that gets us onto the beltway around McCleskey. The heavy hauling on that beltway needs to be done by collecting, analyzing, and presenting evidence of the racially-determined, discrimination-perpetuating structures of local culture--by demonstrating and explaining how the local culture has been shaped by a history of racism, and how the institutions, habits, conventions, assumptions, beliefs, attitudes, and perceptions of performers in the local culture still reflect and reenact its racist heritage. [52] Evidence of racial disparities in the personnel ***55** and output of the local court systems is important: overrepresentation of whites on jury venires and juries and as judges, prosecutors, law-enforcement agents, jury commissioners, public officials and criminal defense attorneys; harsher treatment for African-Americans than whites in noncapital sentencing, bail and other court dispositions; and so forth. [53] But the more subtle forms in which our inherited racial caste system has become a structural fixture and a structuring force of daily life in the community also need to be documented and explained. This kind of explanation will require in-court testimony and out-of-court publications by cultural psychologists, anthropologists, and a range of other social-science researchers and theorists. It will require a whole lot of work on the part of these experts and of the lawyers who collaborate with them. [54] But I think the product will be worth its costs. The product will be not simply the creation of the best hope we have of undoing McCleskey in the courts. It will also be to create and teach a new level of understanding of the forces in our society that hold us captive in a caste system and prevent our seeing its effects. It will lay the foundation for correcting the error that lies at the heart of a decision like McCleskey--the error of supposing that conscious racial bigotry on the part of public officials is the sole significant form of government-supported racial inequality in this country today.

That error is both the source and the teaching of McCleskey. McCleskey assumes and declares that we need to worry about a denial of the Equal Protection of the Laws only in the short-lived ***56** situation where some individual decisionmaker, temporarily invested with the powers of government, is prompted by overt racial prejudice to act discriminatorily, and that

we need not be concerned about any denial of Equal Protection in those long-continuing, culturally impacted situations where hundreds upon hundreds of publicly empowered actors--police, prosecutors, jurors, and judges--with no need for collusion and usually with no awareness of their own racial biases, march in lockstep to produce a pattern of color-coded results that reflect the powerful prejudices of an entire population. This is wrong as a matter of fact; it is ignorant as a matter of ethnology; it is ass-backward as a matter of political science; and it is pure perversity as a matter of constitutional law. [55] A principal virtue of the strategy I propose for taking it on--a strategy centered on excavating and exhibiting the roots of racial prejudice in the institutions and life forms of local culture--is that it enables us to expose McCleskey's radical absurdity at all of these levels. That absurdity must be brought home not only to judges but to other decisionmakers and power-brokers, publicists and educators and opinion-leaders in our society, and ultimately to the public at large, if we mean to make any real progress in changing the dynamic by which race-based bias supports the death penalty and vice versa.

One final technical point for consideration by the lawyers among us. I think that the legal theory which we should advance through this litigation strategy is that the racially discriminatory administration of any extant capital punishment statute requires the courts to invalidate the statute itself on the ground that it licenses violations of the state and federal Equal Protection and Cruel and ***57** Unusual Punishment Clauses, [56] in the same way that the famous San Francisco laundry-licensing ordinance was invalidated in Yick Wo v. Hopkins. [57] This is important because it gives us a straightforward answer to the question of the appropriate remedy for the constitutional violations we assert.

It has been suggested that a major factor working against us in McCleskey was the difficulty that the Justices foresaw in prescribing a remedy for any constitutional violation that they might have found; [58] and it is certainly true that remedies such as invalidating only the death sentences of African-American defendants convicted of killing white victims, or staying executions until the State has corrected the racial imbalance by obtaining a sufficient number of death sentences in other racially defined categories of cases, are sufficiently unappealing so that judges will accept any constitutional disease rather than prescribe these cures for it. On the other hand, to invalidate the present statutes altogether, leaving legislatures to enact new ones that restrict capital punishment to a narrower class of offenses and regulate the sentencing process more tightly, is not a politically unimaginable outcome. For the past decade or so, there has been considerable support all across the political spectrum for limiting the use of the death penalty to a much smaller class of aggravated murders than are death-eligible under current law. Cost-conscious politicians and taxpayers could well be persuaded to accept this kind of limitation because, as the Columbia Broken System II studies demonstrated, capital prosecutions are economically wasteful and systemically counterproductive in proportion to the range of cases in which they are pursued. [59] When even hanging judges like Alex Kozinksi advocate a severe pruning of the gallows tree on the ground that its present luxurious growth presents too many lemons for his purportedly liberal colleagues to swallow, [60] you know that the Spirit ***58** of Moderation in capital punishment is abroad in the land. So, rulings invalidating the present forms of death-penalty statutes within the next decade or so are not out of the question.

Such rulings will not end the death penalty or racial discrimination or their symbiosis in this country soon. But they will lessen somewhat the terrible cost of both and the mortgage of shame that our generation is incurring to history on that account.

Footnotes

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1 Thurgood Marshall, The Federal Appeal, in Counsel on Appeal 141, 142 (Arthur A. Charpentier ed., 1968).

2 John Hope Franklin & Alfred A. Moss, Jr., From Slavery to Freedom: A History of African Americans 56 (7th ed. 1994); Claude Fohlen, Histoire de l'esclavage aux Etats-Unis 45 (1998).

3 See, e.g., Stuart Banner, The Death Penalty: An American History 140-42 (2002); Kenneth M. Stampp, The Peculiar Institution: Slavery in the Ante-Bellum South 210-11 (1956); William Bowers, Legal Homicide: Death as Punishment

in America, 1864-1982 139-40 (1984); Bill Quigley & Maha Zaki, The Significance of Race: Legislative Racial Discrimination in Louisiana 1803-1865, 24 S.U. L. Rev. 145, 151-52 (1997); Brief for Petitioner, Jackson v. Georgia (No. 69-5030), decided with Furman v. Georgia, 408 U.S. 238 (1972), at app. B, pp. 1b-2b. For similar provisions in colonial slave codes, see A. Leon Higginbotham Jr., In the Matter of Color: Race and the American Legal Process--The Colonial Period 181-82, 256-57, 262-63 (1978).

4 See, e.g, Randall Kennedy, Race, Crime, and the Law 84-85 (1997); Theodore Brantner Wilson, The Black Codes of the South 97, 105-06 (1965). Other legislation of the period did not draw explicit racial distinctions but accomplished the same result by increasing the allowable penalty for specified crimes to death at the discretion of the jury. See, e.g., id. at 101, 104-05, 113-14.

5 See Kennedy, supra note 4, at 29-41; Wilson, supra note 4, at 97, 105-06; Banner, supra note 3, at 141. Colonial slave codes had permitted masters to kill their refractory slaves with impunity while "correcting" them. See, e.g., A. Leon Higginbotham Jr., Shades of Freedom: Racial Politics and Presumptions of the American Legal Process 50-52 (1996); Higginbotham, supra note 3, at 188. When the killing of slaves was punishable at all, it was lightly punished. Id. at 189-90; 253-54.

6 See, e.g., Cong. Globe, 39th Cong., 1st Sess. 2459 (May 8, 1866) (Thaddeus Stevens, introducing the Fourteenth Amendment in the House: "Now different degrees of punishment are inflicted, not on account of the magnitude of the crime, but according to the color of the skin.... I need not enumerate these partial and oppressive laws. Unless the Constitution should restrain them those States will all, I fear, keep up this discrimination, and crush to death the hated freedmen. Some answer, 'Your civil rights bill secures the same things.' That is partly true, but a law is repealable by a majority. And I need hardly say that the first time that the South with their copperhead allies obtain the command of Congress it will be repealed."); id. at 2462 (Representative James Garfield: "The gentleman who has just taken his seat [Representative William Finck, Democrat of Ohio] undertakes to show that because we propose to vote for this section we therefore acknowledge that the civil rights bill was unconstitutional. He was anticipated in that objection by the gentleman from Pennsylvania [Thaddeus Stevens]. The civil rights bill is now a part of the law of the land. But every gentleman knows that it will cease to be a part of the law whenever the sad moment arrives when that gentleman's [Finck's] party comes into power. It is precisely for that reason that we propose to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it. For this reason, and not because I believe the civil rights bill unconstitutional, I am glad to see that first section here."); id. at 2961 (Senator Poland, opening Senate debate on the Amendment on July 5, 1866: "The great social and political change in the southern States wrought by the amendment of the Constitution abolishing slavery and by the overthrow of the late rebellion render it eminently proper and necessary that Congress should be invested with the power to enforce this provision throughout the country and compel its observance. Now that slavery is abolished, and the whole people of the nation stand upon the basis of freedom, it seems to me that there can be no valid or reasonable objection to the residue of the first proposed amendment .... Congress had already shown its desire and intention to uproot and destroy all such partial State legislation in the passage of what is called the civil rights bill. The power of Congress to do this has been doubted and denied by persons entitled to high consideration. It certainly seems desirable that no doubt should be left existing as to the power of Congress to enforce principles lying at the very foundation of all republican government if they be denied or violated by the States, and I cannot doubt but that every Senator will rejoice in aiding to remove all doubt upon this power of Congress.").

7 Cong. Globe, 39th Cong., 1st Sess. 2766 (May 23, 1866).

8 Cong. Globe, 39th Cong., 1st Sess. 2459 (May 8, 1866).

9 See, e.g., Anthony G. Amsterdam & Jerome Bruner, Minding the Law 246-81 (2000).

10 See, e.g., Sheri Lynn Johnson, Race and Capital Punishment, in Beyond Repair?: America's Death Penalty 121 (Stephen P. Garvey ed., 2003); Symposium, Race to Execution, 53 DePaul L. Rev. 1401 (2004); Stephen B. Bright, Discrimination,

Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty, 35 Santa Clara L. Rev. 433 (1995); Bryan A. Stevenson & Ruth E. Friedman, Essay, Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice, 51 Wash. & Lee L. Rev. 509 (1994).

11 Furman v. Georgia, 408 U.S. 364, was decided in 1972. The following are the total number of persons executed between 1930 and 1967, the date of the last pre-Furman execution, broken down by offense and race, as they appear in U.S. Dep't of Justice, Bureau of Prisons, National Prisoner Statistics, Bulletin No. 45, Capital Punishment 1930-1968, 7 (1969):

	Murder	Rape	Other	Total
White	1664 (49.9%)	48 (10.5%)	39 (55.7%)	1751 (45.4%)
Negro	1630 (48.9%)	405 (89.1%)	31 (44.3%)	2066 (53.5%)
Other	40 (1.2%)	2 (0.4%)	0 (0.0%)	42 (1.1%)
Total	3334 (100%)	455 (100%)	70 (100%)	3859 (100%)

12 United States, Dep't of Commerce, Economics and Statistics Administration, Bureau of the Census, We the Americans: Blacks 2, fig.1 (1993).

13 See Bowers, supra note 3, at app. A, pp. 395-523, summarized in id. at 43-65.

14 See, e.g., Samuel R. Gross & Robert Mauro, Death and Discrimination 17 (1989).

15 See Woodson v. North Carolina, 428 U.S. 280, 291-92 & nn.24-5 (1976) (plurality opinion).

16 See also Harold Garfinkel, Research Note on Inter- and Intra-Racial Homicides, 27 Soc. Forces 369, 371 (1949).

17 See II Gunnar Myrdal, An American Dilemma: The Negro Problem and Modern Democracy 551 (50th Anniversary ed. 1996) (1944) ("As long as only Negroes are concerned and no whites are disturbed, great leniency will be shown in most cases.... The sentences for even major crimes are ordinarily reduced when the victim is another Negro.").

18 See Hans Zeisel, Comment, Race Bias in the Administration of the Death Penalty --The Florida Experience, 95 Harv. L. Rev. 456, 467-68 (1981) (spelling out this implication of Durkheim's theory of the solidarity-affirming function of criminal punishment). Durkheim's principal exposition of the theory is in chs. 1 and 2 of Emile Durkheim, The Division of Labor in Society 49-110 (George Simpson trans., 1964).

19 McCleskey v. Kemp, 481 U.S. 279 (1987).

20 David Baldus and his colleagues examined data (most of it obtained from official state records kept by the Georgia Supreme Court and the Georgia Board of Pardons and Paroles) relating to a stratified random sample of cases of convictions for murder and non-negligent manslaughter in Georgia between 1973 and 1979. They found this sentencing pattern: 22% of black defendants who killed white victims were sentenced to death; 8% of white defendants who killed white victims were sentenced to death; 1% of black defendants who killed black victims were sentenced to death; and 3% of white defendants who killed black victims were sentenced to death. The only mathematical deviation from the precise pattern that Durkheim and Myrdal would have predicted is the last, 3% figure; and this figure is the result of findings that only 64 of the 1,066 homicide convictions studied involved killings of blacks by whites, generating a grand total of two death sentences for white-on-black killings over a six-year period. Brief for Petitioner, McCleskey v. Kemp, 481 U.S. 279 (1987) (No. 84-6811); David C. Baldus et al., Equal Justice and the Death Penalty: A Legal and Empirical Analysis (1990).

21 See authorities collected in Amicus Brief: Court of Appeals of the State of New York --People of the State of New York Against Darrel K. Harris: Constitutionality of the New York Death Penalty Statute under the State Constitution's Cruel and Unusual Punishments and Antidiscrimination Clauses, 27 N.Y.U. Rev. L. & Soc. Change 399, 442-48 & nn. 143-63 (2001-2002). Most of the studies find that the race of the victim is the principal determiner of sentence: killers of white victims are far more likely to be sentenced to death than killers of African-American victims. Some studies find bias against African-American defendants as well, but this is ordinarily weaker and is usually masked by the race-of-victim bias because (1) the overwhelming number of killings committed by African-American perpetrators involve African-American victims; (2) very few cases are found in which white perpetrators are convicted of killing African-American victims; and (3) almost no one convicted of killing an African-American victim gets the death sentence.

22 See Clifford Geertz, Local Knowledge: Further Essays in Interpretive Anthropology (1983).

23 See, e.g., Zeisel, supra note 18, at 467.

24 Brief for Petitioner, Aikens v. California, 406 U.S. 813 (1972) (No. 68-5027), 1971 WL 134168, at 15-18, citing Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion of Chief Justice Warren). (Aikens was a companion case to Furman in the Supreme Court; the Furman brief incorporated the Aikens brief by reference.)

25 Brief for Petitioner, Aikens v. California, supra note 24, at 49-55.

26 Furman v. Georgia, 408 U.S. 238 (1972); see also Godfrey v. Georgia, 446 U.S. 420, 428 (1980); Zant v. Stephens, 462 U.S. 862, 874 (1983); Maynard v. Cartwright, 486 U.S. 356, 362 (1988); Tuilaepa v. California, 512 U.S. 967, 973-75 (1994).

27 The doctrinal rule of Furman is said to be that: "[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion.' ... It must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey, 446 U.S. at 428 (plurality opinion). This mantra is frequently recited in the Court's opinions. See, e.g., Lewis v. Jeffers, 497 U.S. 764, 774-75 (1990); Arave v. Creech, 507 U.S. 463, 470-71 (1993).

28 In the 1976 cases, the Court held that post-Furman capital sentencing statutes enacted in Georgia and Florida (inter alia) satisfied Furman's constitutional commands because they (1) narrowed the pool of capitally-convicted defendants who could be sentenced to death by requiring the finding of at least one specified aggravating circumstance, in addition to the elements of the capital crime, before a capital sentence could be considered; (2) allowed the defendant to present evidence in mitigation at a sentencing hearing after conviction, and required the sentencer to make an individualized sentencing judgment dependent upon the consideration of both mitigating and aggravating circumstances; and (3) provided for appellate review of death sentences to assure that aberrant results--death verdicts imposed under circumstances deviating from the norm in other death cases--would not be tolerated. Gregg v. Georgia, 428 U.S. 153, 188-207, 220-24 (1976); Proffit v. Florida, 428 U.S. 242, 250-61 (1976). Thereafter, the Court held: (1)(a) that after a single statutory aggravating circumstance is found by a sentencing jury, the jury can be given complete discretion to consider any other matters it chooses in aggravation and to reach a sentencing decision without further guidance or direction of any sort, Zant v. Stephens, 462 U.S. 862 (1983); see also Tuilaepa v. California, 512 U.S. 967 (1994); Brown v. Sanders, 546 U.S. 212 (2006); and (1)(b) that the requisite "narrowing" needs not be performed by requiring the finding of an aggravating factor above and beyond the elements of the capital crime, but can be performed by defining the elements of the capital crime more narrowly (in which case the jury can be given discretion to impose a death sentence on any person convicted of the capital crime), Lowenfield v. Phelps, 484 U.S. 231 (1988); (2)(a) the jury needs not be instructed that it must weigh mitigating evidence against aggravating evidence or even that it must consider mitigating evidence at all, Buchanan v. Angelone, 522 U.S. 269 (1998); Weeks v. Angelone, 528 U.S. 225 (2000); and (2)(b) the jury needs not be required to find that aggravating circumstances outweigh mitigating circumstances in order to impose a death sentence, Kansas v. Marsh,

126 S. Ct. 2516 (2006); and (3) appellate review of death sentences needs not include a comparison of the circumstances of the case at bar with those of other cases to determine whether, in fact, the sentence under review is aberrant in relation to any norm, Pulley v. Harris, 465 U.S. 37 (1984). The extent to which these post-Furman decisions have made a sham of all of Furman's purported constitutional regulations of the capital sentencing process is demonstrated by the sentencing instructions approved by the Court in the Buchanan case. These, in their entirety, were:

You have convicted the defendant of an offense which may be punishable by death. You must decide whether the defendant should be sentenced to death or to life imprisonment.

Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt that his conduct in committing the murders of [his family] was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the requirements of the preceding paragraph, then you may fix the punishment of the Defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at life imprisonment.

If the Commonwealth has failed to prove beyond a reasonable doubt the requirements of the second paragraph in this instruction, then you shall fix the punishment of the Defendant at life imprisonment.

522 U.S. at 273 n.1. Except for the requirement of finding one nebulously defined aggravating circumstance, these instructions are not one whit different from those that were commonly given under the pre-1972 "standardless discretion" statutes invalidated in Furman. And the post-Furman cases resolutely insist that prosecutorial charging and plea-bargaining discretion-- probably the most important determiners of the ultimate sentence in any potentially capital prosecution--remain completely unfettered and insulated from judicial scrutiny under Furman. See, e.g., Gregg, 428 U.S. at 199, 224-26 (1976).

29 It is summarized in the Brief For Petitioner, McCleskey v. Kemp, 481 U.S. 279 (1987) (No. 84-6811), 1986 WL 727359, and discussed in detail in David C. Baldus et al., Equal Justice and the Death Penalty: A Legal and Empirical Analysis 392-419 (1990).

30 The total number of murder and voluntary manslaughter convictions in the Georgia courts during these years was 2,484; the stratified random sample of these examined by Baldus and his team consisted of 1,066 cases. Baldus, supra note 29, at 45.

31 See Brief for Petitioner, supra note 29, at 14-15 & n.9.

32 The opinion recites the study's numerical findings that I have summarized in the preceding paragraph of text and in note 20 supra without controverting any of them. McCleskey, 481 U.S. at 286-87. It includes a footnote reciting criticisms of the study by the judge who heard the case in the federal district court but does not overtly endorse these. Id. at 288-89 n.6. It then notes that "[a]lthough the District Court rejected the findings of the Baldus study as flawed, the Court of Appeals assumed the study is valid [,]" id. 291 n.7, and it says explicitly that "[a]s did the Court of Appeals, we assume the [Baldus] study is valid statistically." Id. Its only qualification of this assumption is as follows: "Our assumption that the Baldus study is statistically valid does not include the assumption that the study shows that racial considerations actually enter into any sentencing decisions in Georgia. Even a sophisticated multiple-regression analysis such as the Baldus study can only demonstrate a risk that the factor of race entered into some capital sentencing decisions and a necessarily lesser risk that race entered into any particular sentencing decision." Id. (emphasis in the original). And the way the opening sentence of the opinion states the issue to be decided in McCleskey (see the following sentence in my text) appears to accept that the Baldus study does demonstrate those risks.

It is true that after making these assumptions Justice Powell employs an array of rhetorical maneuvers to drain them of any potentially disturbing implications. See Amsterdam & Bruner, supra note 9, at 194-216. But for present purposes--to identify the constitutional rules that the Supreme Court and the lower courts can properly read the McCleskey decision as establishing--we should treat the opinion as holding what it expressly declares that it is holding.

33 McCleskey, 481 U.S. at 282-83.

34 See, e.g., Washington v. Davis, 426 U.S. 229 (1976).

35 McCleskey, 481 U.S. at 292 (emphasis in the original).

36 See id. at 292-99. The opinion's limited and tangential discussion of data for Fulton County, where McCleskey was tried and sentenced to death, leaves unclear whether capital-sentencing patterns specific to a judicial district would be equally ruled out of bounds as a basis for inference of the discriminatory animus of the official actors in that district. See infra note 39.

37 See McCleskey, 481 U.S. at 299-319.

38 Although McCleskey relied on both sorts of disparities, his argument emphasized their interaction and indicated that race-of-victim discrimination was by far the strongest finding of the Baldus studies. See Brief For Petitioner, McCleskey v. Kemp, 481 U.S. 279 (1987) (No. 84-6811), at 13-16, 33-41, 80-87. The Court appears to have focused primarily on the latter disparity. See, e.g., 481 U.S. at 317 ("since McCleskey's claim relates to the race of his victim ...").

39 In footnote 15, the McCleskey opinion categorically disparages any effort to "deduce a state policy" from a statewide pattern of jury decisions and dismisses "any inference from statewide statistics to a prosecutorial 'policy' ... as of doubtful relevance." 481 U.S. at 295-96. It then goes on to discuss McCleskey's county-specific data briefly and ambiguously as follows: "Moreover, the statistics in Fulton County alone represent the disposition of far fewer cases than the statewide statistics. Even assuming the statistical validity of the Baldus study as a whole, the weight to be given the results gleaned from this small sample is limited." Id., n.15.

Hereafter I will use "county" and "county-specific" as shorthand terms to refer to any single, distinct unit of organization of the court system for the trial of capital cases --e.g., a county that has its own court for the trial of felony cases; a judicial district; a judicial circuit; etc. In locations where there is more than a single prosecutor's office within a "county" so defined, each prosecutor's office--rather than the "county"--might be chosen as the local unit to be studied empirically and made the focus of legal challenge for purposes of the litigation strategy I will outline in a moment. That choice is a matter of tactics and practicality dependent on data distribution, the public image and notoriety of particular prosecutors, and so forth.

40 For the most part, the opinion's ultimate conclusions are stated in terms of the findings of the Baldus study, specifically. See, e.g., 481 U.S. at 309 ("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."); id. at 313 ("[W]e hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.").

41 See supra note 21.

42 See, e.g., Griffin v. Dugger, 874 F.2d 1397, 1399-402 (11th Cir. 1989); James v. Butler, 827 F.2d 1006, 1011 (5th Cir. 1987); Coleman v. Quarterman, 456 F.3d 537, 542-43 (5th Cir. 2006); Foster v. State, 614 So. 2d 455, 463-64 (Fla. 1992); Robinson v. Moore, 773 So. 2d 1, 5-6 (Fla. 2000); Robinson v. State, 865 So. 2d 1259, 1263-64 (Fla. 2004); Jones v. State, 440 S.E.2d 161, 163 (Ga. 1994) and 539 S.E.2d 154, 161 (Ga. 2000); Evans v. State, 914 A.2d 25, 47-67 (Md. 2006), and cases cited in 914 A.2d at 66.

43 Justices Scalia and Thomas are inflexibly committed to resisting constitutional rulings that could restrict the use of the death penalty or upset any significant number of death sentences; Justices Roberts and Alito were selected to clone them. Any reconsideration of constitutional rules protective of the death penalty therefore requires Justice Kennedy's approval.

Justice Kennedy has shown himself willing to chip away at extreme extensions of the death penalty which account for relatively few death sentences and still fewer executions and which are particularly embarrassing to the institution of capital punishment. See Atkins v. Virginia, 536 U.S. 304 (2002); Roper v. Simmons, 543 U.S. 551 (2005). But he is fiercely defensive of the basic structure of the Supreme Court's highly permissive death-penalty jurisprudence, see, e.g., Johnson v. Texas, 509 U.S. 350 (1993); Tuilaepa v. California, 512 U.S. 967 (1994); Ramdass v. Angelone, 530 U.S. 156 (2000), and he invariably lines up with the Court's pro-death block in dismissing arguments that could make serious inroads into that jurisprudence. See, e.g., Kansas v. Marsh, 126 S. Ct. 2516 (2006); Ayers v. Belmontes, 127 S. Ct. 469 (2006); Rompilla v. Beard, 545 U.S. 374, 396 (2005) (dissenting opinion).

44 You may properly ask why, if I advise against efforts to get the U.S. Supreme Court to overrule McCleskey in the near future on account of the hopelessness of that venture, I do not advise inaction on other fronts because of a similarly gloomy prediction. After all, it is not just the Supreme Court but the general public and most agencies of government in the United States that are now in the grip of a violently punitive spirit and a vigorous backlash against the moral imperative of racial equality. And I am not unaware of the thoughtful analyses that, from a range of perspectives, suggest we are not likely to see substantial change in these interdependent attitudes any time soon. See, e.g., Christian Parenti, Lockdown America: Police and Prisons in the Age of Crisis (1998); Joseph E. Kennedy, Monstrous Offenders and the Search for Solidarity through Modern Punishment, 51 Hastings L.J. 829 (2000); Jonathan Simon, Sanctioning Government: Explaining America's Severity Revolution, 56 U. Miami L. Rev. 217 (2001). But there are degrees of hopelessness, and degrees of confidence in predicting it. I doubt that anyone familiar with the Supreme Court would disagree with my strong conviction that it will not soon overrule McCleskey and vindicate a claim of unconstitutional racial discrimination based solely on statistics showing the racially biased administration of the death penalty. A less settled pessimism is possible regarding the likelihood of change through other avenues, even in the current cultural climate, if only because these changes are inherently harder to predict. See, e.g., David Cole, No Equal Justice: Race and Class in the American Criminal Justice System (1999); Franklin E. Zimring, The Contradictions of American Capital Punishment (2003); David Garland, Capital Punishment and American Culture, 7 (4) Punishment & Society 347 (2005); Anthony G. Amsterdam & Jerome Bruner, How Punishment Got to Be All the Rage, 32 (2) Forum 25 (2005).

45 Miller-El v. Cockrell, 537 U.S. 322, 347 (2003). Cf. Miller-El v. Dretke, 545 U.S. 231, 263-64 (2005).

46 In United States v. Armstrong, 517 U.S. 456, 458 (1996), the Supreme Court undertook to “consider the showing necessary for a defendant to be entitled to discovery on a claim that the prosecuting attorney singled him out for prosecution on the basis of his race.” It endorsed what it described as the rule previously prevailing in the federal courts of appeals, which “require [s] some evidence tending to show the existence of the essential elements of the defense: discriminatory effect and discriminatory intent. Id. at 468. In United States v. Bass, 536 U.S. 862 (2002), the Court applied the Armstrong rule to a claim of racial discrimination in the selection of cases for capital prosecution. Neither Armstrong nor Bass offers any clues as to what kind or amount of evidence of discriminatory intent satisfies that half of the required showing. Armstrong establishes that the discriminatory effect half of the requirement calls for “a credible showing of different treatment of similarly situated persons” who differ in racial characteristics, 517 U.S. at 470; and Armstrong declares it to be an open question whether this half of “the Armstrong requirement can be satisfied by a ... [jurisdiction-]wide showing (as opposed to a showing regarding the record of the decisionmakers in ... [the defendant's own] case),” 536 U.S. at 863-64. I suggest the introduction of statewide statistics plus county-specific statistics (preferably including a subset dealing with the record of the local court during the term of office of the present prosecuting, investigating, and court officials) as a means of assuring that the discriminatory effect requirement is satisfied. All of the other evidence described fore and aft of here in my text is aimed at utilizing and satisfying the discriminatory intent requirement. Of course, Armstrong and Bass purport to describe the requirements for discovery in aid of a discriminatory-prosecution claim in federal courts; they do not speak directly to the preconditions for discovery in a state prosecution-- preconditions dictated, in the first instance, by state law. But if a state criminal court denies discovery on a record that would require it under Armstrong and Bass, there is a very strong argument that the defendant who renews his or her federal Equal Protection and Cruel and Unusual Punishment claims in postconviction federal habeas proceedings will be entitled to an evidentiary hearing under [Michael] Williams v. Taylor, 529 U.S. 420 (2000), and to discovery under Bracy v. Gramley, 520 U.S. 899 (1997).

47 See, e.g., U.S. General Accounting Office, Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities (Report to Senate and House Committees on the Judiciary, February 1990) [GAO/GGD-90-57]; Baldus, et al., supra note 29, at 265-66; Gross & Mauro, supra note 14, at 109-10.

48 See Batson v. Kentucky, 476 U.S. 79 (1986).

49 See Johnson, supra note 10, at 133-35; Sheri Lynn Johnson, Racial Imagery in Criminal Cases, 67 Tul. L. Rev. 1739 (1993); Lawrence Vogelman, The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom, 20 Fordham Urb. L. J. 571 (1993).

50 See, e.g., Peggy C. Davis, Law as Microaggression, 98 Yale L.J. 1559 (1989).

51 Ways in which the conduct of these officers influences a prosecution are sketched in Bright, supra note 10, at 451-52, and Anne Bowen Poulin, Prosecutorial Discretion and Selective Prosecution: Enforcing Protection after United States v. Armstrong, 34 Am. Crim. L. Rev. 1071, 1083-85, 1109-11 (1997), and can be fleshed out by evidence of local practices and instances.

52 See Sheri Lynn Johnson, Unconscious Racism in the Criminal Law, 73 Cornell L. Rev. 1016, 1027-28 (1988). For theoretical orientations, see Gordon W. Allport, The Nature of Prejudice (Doubleday 1958) (1954), and Thomas F. Pettigrew, The Ultimate Attribution Error: Extending Allport's Cognitive Analysis of Prejudice, 5 Personality and Soc. Psychol. Bull. 461 (1979); Confronting Racism: The Problem and the Response (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998), and Susan T. Fiske, Social Beings: A Core Motives Approach to Social Psychology (2003); Cognitive Processes in Stereotyping and Intergroup Behavior (David L. Hamilton ed., 1981); Howard Schuman, Changing Racial Norms in America, 30 Mich. Q. Rev. 460 (1991); W.J. Cash, The Mind of the South (Vintage Books 1960) (1941); C. Vann Woodward, The Strange Career of Jim Crow (3d rev. ed. 1974) (1955); Franklin & Moss, supra note 2; Myrdal, supra note 17; Winthrop D. Jordan, The White Man's Burden: Historical Origins of Racism in the United States (1974); Joel Williamson, The Crucible of Race: Black-White Relations in the American South Since Emancipation (1984); Charles R. Lawrence, III, The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317 (1987).

53 Statewide data on these subjects would also be useful.

54 For example, thorough-going analysis of the differing ways in which local media report on crimes with differing racial combinations of victims and defendants and of the community's differing responses to those crimes (e.g., citizens' groups raising donations for victims' survivors or offering rewards for the apprehension of the perpetrator), together with a demonstration that the reactions of the media and the community to the crime at bar were typical of these patterns, is important.

55 It is a part of the same inversion of history, common sense, and constitutional values that has led the Supreme Court to betray the promise of Brown v. Board of Education (in, e.g., Missouri v. Jenkins, 515 U.S. 70 (1995); Freeman v. Pitts, 503 U.S. 467 (1992)), and to turn the Equal Protection Clause into a bastion of white privilege that preserves all of its prerogatives while depriving it of the least power of self-correction (in, e.g., Regents of the University of California v. Bakke, 438 U.S. 265 (1978); Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) (plurality opinion); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Shaw v. Reno, 509 U.S. 630 (1993); Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995); Miller v. Johnson, 515 U.S. 900 (1995)). See Nicholas de B. Katzenbach & Burke Marshall, Not Color Blind: Just Blind, N.Y. Times, Feb. 22, 1998, 42 (Magazine), at 45 (“[R]eading the Equal Protection Clause to protect whites as well as blacks from racial classification is to focus upon a situation that does not and never has existed in our society.”).

56 The Amicus Brief, cited supra note 21 demonstrates the way in which a state constitutional challenge can be framed and argued.

57 Yick Wo v. Hopkins, 118 U.S. 356 (1886).

58 See Randall L. Kennedy, McCleskey v. Kemp: Race, Capital Punishment and the Supreme Court, 101 Harv. L. Rev. 1388 (1988).

59 See James S. Liebman, et al., A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It (Feb. 11, 2002), http://www2.law.columbia.edu/brokensystem2/report.pdf (last visited Oct. 10, 2007).

60 See Alex Kozinksi & Sean Gallagher, Death: The Ultimate Run-On Sentence, 46 Case W. Res. L. Rev. 1, 29-32 (1995).

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