it would presumably be carried out. In any event, the decision would then be in the hands of the State which had initially imposed the death penalty, not in the hands of the federal courts.

Justice Stevens responded to this criticism by pointing out that the objection principally characterized the state of affairs between *Furman* and the death penalty decisions of 1976, a period of four years, when state responses to the Court's first decision raised a number of novel questions. That situation, he argued, no longer prevailed. Furthermore, adopting the Rehnquist proposal, he observed, meant death penalty cases would consume most of the Court's scarce time and resources and leave little for the other important constitutional and statutory issues that crowded the Court's docket.

In his opinion concurring with the judgment in *Furman*, Justice Douglas argued that imposition of the death penalty was unconstitutional because it was racially discriminatory. In *McCleskey v. Kemp*, the Court was confronted with statistical evidence that appeared to buttress Justice Douglas's contention. McCleskey argued that the system was rigged because the chances of an African American convicted of first-degree murder receiving the death penalty were far higher than for a white defendant, especially if the victim was white. Quantitative analysis of over 2,000 capital cases presented to substantiate McCleskey's argument clearly suggested that, even when all the relevant statutorily recognized sentencing variables were taken into account, the factor of race was still statistically significant. The Court's decision in *McCleskey* rejected both the Eighth Amendment and the equal protection claims based on this evidence.

## McCLESKEY v. KEMP

Supreme Court of the United States, 1987
481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262

**BACKGROUND & FACTS** Warren McCleskey, an African American, was convicted of armed robbery and murder in a Georgia county court. At the penalty hearing that followed, the jury found that the killing had been accompanied by two aggravating circumstances, either of which would have sufficed under state law to warrant the death sentence: (1) The murder was committed during an armed robbery, and (2) a law enforcement officer had been killed in the performance of his duties. McCleskey offered no mitigating evidence, and the judge, following the jury's recommendation, imposed the death penalty. The Georgia Supreme Court affirmed.

McCleskey subsequently filed a petition for a writ of habeas corpus in federal district court against his warden. Among other things, McCleskey argued that the Georgia capital-sentencing process operated to deny him equal protection of the laws in violation of the Fourteenth Amendment and amounted to cruel and unusual punishment in violation of the Eighth Amendment.

In support of his claim, McCleskey relied upon a statistical study performed by David Baldus and two other law professors. That sophisticated study of over 2,000 murder cases occurring in Georgia during the 1970s concluded that variation in the imposition of the death sentence in Georgia was related to the race of the murder victim and, to a lesser extent, the race of the defendant. The study indicated that defendants charged with killing white persons received the death penalty in 11 percent of the cases, but defendants charged with killing black persons received the death penalty only 1 percent of the time. Speaking generally, a reverse racial disparity was evident, however, when

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the race of the defendant was considered: 4 percent of the African American defendants received the death penalty as compared with 7 percent of the white defendants.

When the cases were sorted according to the combination of race of the victim and race of the defendant, the Baldus study found that the death penalty was imposed in 22 percent of the cases involving black defendants and white victims, in 8 percent of the cases involving white defendants and white victims, in 1 percent of the cases involving black defendants and black victims, and in 3 percent of the cases involving white defendants and black victims. Similarly, the Baldus study also concluded that prosecutors sought the death penalty in 70 percent of the cases involving black defendants and white victims, in 32 percent of the cases involving white defendants and white victims, in 15 percent of the cases involving black defendants and black victims, and in 19 percent of the cases involving white defendants and black victims. The authors subjected the data to extensive statistical analysis, which took account of some 230 variables that could have explained the disparities on nonracial grounds. One of the models presented in the study, even after taking account of 39 nonracial variables, nonetheless concluded that defendants charged with murdering white victims were 4.3 times as likely to receive the death sentence as defendants charged with killing blacks and that black defendants were 1.1 times as likely to receive the death penalty as white defendants. The study indicated that black defendants, such as McCleskey, who killed white persons had the greatest probability of receiving the death sentence.

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Justice POWELL delivered the opinion of the Court.

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

* * *

McCleskey's first claim is that the Georgia capital punishment statute violates the Equal Protection Clause of the Fourteenth Amendment. * * *

Our analysis begins with the basic principle that a defendant who alleges an equal protection violation has the burden of proving "the existence of purposeful discrimination." * * * A corollary to this principle is that a criminal defendant must prove that the purposeful discrimination "had a discriminatory effect" on him. * * * Thus, to prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence. Instead, he relies solely on the Baldus study. McCleskey argues that the Baldus study compels an inference that his sentence rests on purposeful discrimination. McCleskey's claim that these statistics are sufficient proof of discrimination, without regard to the facts of a particular case, would extend to all capital cases in Georgia, at least where the victim was white and the defendant is black.

The Court has accepted statistics as proof of intent to discriminate in certain limited contexts. First, this Court has accepted statistical disparities as proof of an equal protection violation in the selection of the jury venire in a particular district. Although statistical proof normally must present a "stark" pattern to be accepted as the sole proof of discriminatory intent under the Constitution,

Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266, 97 S.Ct. 555, 563 (1977), "[b]ecause of the nature of the jury-selection task, * * * we have permitted a finding of constitutional violation even when the statistical pattern does not approach [such] extremes." * * * Second, this Court has accepted statistics in the form of multiple regression analysis to prove statutory violations under Title VII. * * *

But the nature of the capital sentencing decision, and the relationship of the statistics to that decision, are fundamentally different from the corresponding elements in the venire-selection or Title VII cases. Most importantly, each particular decision to impose the death penalty is made by a petit jury selected from a properly constituted venire. Each jury is unique in its composition, and the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense. * * * Thus, the application of an inference drawn from the general statistics to a specific decision in a trial and sentencing simply is not comparable to the application of an inference drawn from general statistics to a specific venire-selection or Title VII case. In those cases, the statistics relate to fewer entities, and fewer variables are relevant to the challenged decisions.

Another important difference between the cases in which we have accepted statistics as proof of discriminatory intent and this case is that, in the venire-selection and Title VII contexts, the decisionmaker has an opportunity to explain the statistical disparity. * * * Here, the State has no practical opportunity to rebut the Baldus study. "[C]ontrolling considerations of * * * public policy," * * * dictate that jurors "cannot be called * * * to testify to the motives and influences that led to their verdict." * * * Similarly, the policy considerations behind a prosecutor's traditionally "wide discretion" suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties, "often years after they were made." * * * Moreover, absent far stronger proof, it is unnecessary to seek such a rebuttal, because a legitimate and unchallenged explanation for the decision is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty.

* * * McCleskey challenges decisions at the heart of the State's criminal justice system. * * * 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. * * * 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.

McCleskey also suggests that the Baldus study proves that the State as a whole has acted with a discriminatory purpose. He appears to argue that the State has violated the Equal Protection Clause by adopting the capital punishment statute and allowing it to remain in force despite its allegedly discriminatory application. But " '[d]iscriminatory purpose' * * * implies more than intent as volition or intent as awareness of consequences. 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." Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296 (1979) * * *. For this claim to prevail, McCleskey would have to prove that the Georgia Legislature enacted or maintained the death penalty statute *because* of an anticipated racially discriminatory effect. In Gregg v. Georgia, 428 U.S. 153, 96 S.Ct.

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is whether in his case, * * * the law of Georgia was properly applied. We agree with the District Court and the Court of Appeals for the Eleventh Circuit that this was carefully and correctly done in this case.

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

It is so ordered.

Justice BRENNAN, with whom Justice MARSHALL joins, and with whom Justice BLACKMUN and Justice STEVENS join in all but Part I, dissenting.

## I

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the decision below insofar as it left undisturbed the death sentence imposed in this case. Gregg v. Georgia, 428 U.S. 153, 227, 96 S.Ct. 2909, 2950 (1976). * * *

Even if I did not hold this position, however, I would reverse the Court of Appeals, for petitioner McCleskey has clearly demonstrated that his death sentence was imposed in violation of the Eighth and Fourteenth Amendments. * * *

* * *

## III

* * *

[I]n Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001 (1976), and Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978 (1976), we 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*. * * * We did not ask whether the death sentences in the cases before us could have reflected the jury's rational consideration and rejection of mitigating factors. Nor did we require proof that juries had actually acted irrationally in other cases.

Defendants challenging their death sentences thus never have had to prove that impermissible considerations have actually infected sentencing decisions. We have required instead that they establish that the system under which they were sentenced posed a significant risk of such an occurrence. McCleskey's claim does differ, however, in one respect from these earlier cases: it is the first to base a challenge not on speculation about how a system *might* operate, but on empirical documentation of how it *does* operate.

* * *

The statistical evidence in this case * * * relentlessly documents the risk that McCleskey's sentence was influenced by racial considerations. This evidence shows that there is a better than even chance in Georgia that race will influence the decision to impose the death penalty: a majority of defendants in white-victim crimes would not have been sentenced to die if their victims had been black. * * * Surely, we should not be willing to take a person's life if the chance that his death sentence was irrationally imposed is *more* likely than not. In light of the gravity of the interest at stake, petitioner's statistics on their face are a powerful demonstration of the type of risk that our Eighth Amendment jurisprudence has consistently condemned.

Evaluation of McCleskey's evidence cannot rest solely on the numbers themselves. We must also ask whether the conclusion suggested by those numbers is consonant with our understanding of history and human experience. * * *

For many years, Georgia operated openly and formally precisely the type of

dual system the evidence shows is still effectively in place. The criminal law expressly differentiated between crimes committed by and against blacks and whites, distinctions whose lineage traced back to the time of slavery. During the colonial period, black slaves who killed whites in Georgia, regardless of whether in self-defense or in defense of another, were automatically executed. * * *

By the time of the Civil War, a dual system of crime and punishment was well established in Georgia. * * * The state criminal code contained separate sections for "Slaves and Free Persons of Color" * * * and for all other persons * * *. The code provided, for instance, for an automatic death sentence for murder committed by blacks, * * * but declared that anyone else convicted of murder might receive life imprisonment if the conviction were founded solely on circumstantial testimony *or* simply if the jury so recommended. * * * The code established that the rape of a free white female by a black "shall be" punishable by death. * * * However, rape by anyone else of a free white female was punishable by a prison term not less than 2 nor more than 20 years. The rape of *blacks* was punishable "by fine and imprisonment, at the discretion of the court." * * * A black convicted of assaulting a free white person with intent to murder could be put to death at the discretion of the court, * * * but the same offense committed against a black, slave or free, was classified as a "minor" offense whose punishment lay in the discretion of the court, as long as such punishment did not "extend to life, limb, or health." * * *

* * *

This historical review of Georgia criminal law is not intended as a bill of indictment calling the State to account for past transgressions. Citation of past practices does not justify the automatic condemnation of current ones. But it would be unrealistic to ignore the influence of history in assessing the plausible implications of McCleskey's evidence. * * *

* * *

History and its continuing legacy thus buttress the probative force of McCleskey's statistics. Formal dual criminal laws may no longer be in effect, and intentional discrimination may no longer be prominent. Nonetheless, * * * the Georgia system gives such attitudes considerable room to operate. * * *

* * *

* * *Sentencing data, history, and experience all counsel that Georgia has provided insufficient assurance of the heightened rationality we have required in order to take a human life.

## IV

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

* * *

The Court['s] * * * unwillingness to regard the petitioner's evidence as sufficient is based in part on the fear that recognition of McCleskey's claim would open the door to widespread challenges to all aspects of criminal sentencing. * * * Taken on its face, such a statement seems

effect on Justice Blackmun. Unique among the Nixon appointees from the beginning because he agonized publicly over the death penalty in *Furman*, he ultimately concluded it posed an unsolvable constitutional conundrum. Choosing the same sort of occasion selected earlier by Justice Rehnquist in *Balkcom*, Justice Blackmun announced that, during his remaining months on the Court, he was no longer going to vote to uphold the imposition of the death penalty. His observation that members of the Court had stopped struggling with the dilemma and had chosen up sides appears to be confirmed by the trend of recent death penalty rulings (p. 708).

## NOTE—JUSTICE BLACKMUN AND THE DEATH PENALTY

Dissenting from the denial of certiorari in Callins v. Collins, __U.S. __, 114 S.Ct. 1127 (1994), a capital case disposed of midway through his last Term on the Court, Justice Blackmun announced his conclusion that "the death penalty, as currently administered, is unconstitutional." Although this view led him in subsequent cases to vote consistently against the imposition of the death penalty—as did Justices Brennan and Marshall during the remainder of their tenures on the Court after *Furman*—Justice Blackmun's view was nonetheless distinguishable from theirs. Justices Brennan and Marshall were of the opinion that "the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments," while Justice Blackmun became convinced that capital punishment, although itself constitutional, could never be administered in a constitutional fashion. In *Callins*, he explained:

> Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death, see *Furman* v. *Georgia* * * *, can never be achieved without compromising an equally essential component of fundamental fairness—individualized sentencing. See Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978).
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> To be fair, a capital sentencing scheme must treat each person convicted of a capital offense with that "degree of respect due the uniqueness of the individual." Lockett v. Ohio, 438 U.S., at 605, 98 S.Ct., at 2964 (plurality opinion). That means affording the sentencer the power and discretion to grant mercy in a particular case, and providing avenues for the consideration of any and all relevant mitigating evidence that would justify a sentence less than death. Reasonable consistency, on the other hand, requires that the death penalty be inflicted evenhandedly, in accordance with reason and objective standards, rather than by whim, caprice, or prejudice. Finally, because human error is inevitable, and because our criminal justice system is less than perfect, searching appellate review of death sentences and their underlying convictions is a prerequisite to a constitutional death penalty scheme.
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> * * * But over the past two decades, efforts to balance these competing constitutional commands have been to no avail. Experience has shown that the consistency and rationality promised in *Furman* are inversely related to the fairness owed the individual when considering a sentence of death. A step toward consistency is a step away from fairness.
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> * * *
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> The arbitrariness inherent in the sentencer's discretion to afford mercy is exacerbated by the problem of race. Even under the most sophisticated death penalty statutes,

race continues to play a major role in determining who shall live and who shall die. * * *

* * *

In the years since *McCleskey*, I have come to wonder whether there was truth in the majority's suggestion that discrimination and arbitrariness could not be purged from the administration of capital punishment without sacrificing the equally essential component of fairness—individualized sentencing. Viewed in this way, the consistency promised in *Furman* and the fairness to the individual demanded in *Lockett* are not only inversely related, but irreconcilable in the context of capital punishment. Any statute or procedure that could effectively eliminate arbitrariness from the administration of death would also restrict the sentencer's discretion to such an extent that the sentencer would be unable to give full consideration to the unique characteristics of each defendant and the circumstances of the offense. By the same token, any statute or procedure that would provide the sentencer with sufficient discretion to consider fully and act upon the unique circumstances of each defendant would "thro[w] open the back door to arbitrary and irrational sentencing." Graham v. Collins, ___U.S., at ___, 113 S.Ct., at 912 (THOMAS, J., concurring). All efforts to strike an appropriate balance between these conflicting constitutional commands are futile because there is a heightened need for both in the administration of death.

But even if the constitutional requirements of consistency and fairness are theoretically reconcilable in the context of capital punishment, it is clear that this Court is not prepared to meet the challenge. In apparent frustration over its inability to strike an appropriate balance between the *Furman* promise of consistency and the *Lockett* requirement of individualized sentencing, the Court has retreated from the field, allowing relevant mitigating evidence to be discarded, vague aggravating circumstances to be employed, and providing no indication that the problem of race in the administration of death will ever be addressed. In fact some members of the Court openly have acknowledged a willingness simply to pick one of the competing constitutional commands and sacrifice the other. * * * In my view, the proper course when faced with irreconcilable constitutional commands is not to ignore one or the other, nor to pretend that the dilemma does not exist, but to admit the futility of the effort to harmonize them. This means accepting the fact that the death penalty cannot be administered in accord with our Constitution.

Concurring with the denial of certiorari in *Callins*, Justice Scalia responded to Justice Blackmun's conclusion as follows:

Convictions in opposition to the death penalty are often passionate and deeply held. That would be no excuse for reading them into a Constitution that does not contain them, even if they represented the convictions of a majority of Americans. Much less is there any excuse for using that course to thrust a minority's view upon the people. Justice BLACKMUN begins his statement by describing with poignancy the death of a convicted murderer by lethal injection. He chooses, as the case in which to make that statement, one of the less brutal of the murders that regularly come before us—the murder of a man ripped by a bullet suddenly and unexpectedly, with no opportunity to prepare himself and his affairs, and left to bleed to death on the floor of a tavern. The death-by-injection which Justice BLACKMUN describes looks pretty desirable next to that. It looks even better next to some of the other cases currently before us which Justice BLACKMUN did not select as the vehicle for his announcement that the death penalty is always unconstitutional—for example, the case of the 11-year-old girl raped by four men and then killed by stuffing her panties down her throat. * * * How enviable a quiet death by lethal injection compared with that! If the people conclude that such more brutal deaths may be deterred by capital punishment; indeed, if they merely conclude that justice requires such brutal deaths to be avenged by capital punishment; the creation of false, untextual and unhistorical contradictions within "the Court's Eighth Amendment jurisprudence" should not prevent them.