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RACE, ANGST, AND CAPITAL PUNISHMENT: THE BURGER COURT'S EXISTENTIAL STRUGGLE

Katherine R. Kruse *

The challenge throughout has been to tell what I view as the truth about racism without causing disabling despair.¹

In my view, the proper course when faced with irreconcilable constitutional commands is . . . 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 the Constitution.²

One of the only coherent philosophical positions is [] revolt. . . . That revolt is the certainty of a crushing fate, without the resignation that ought to accompany it.³

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¹ DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* ix (1992) [hereinafter BELL, *FACES*].

² *Callins v. Collins*, 510 U.S. 1141, 1157 (1994) (Blackmun, J., dissenting).

³ Albert Camus, *An Absurd Reasoning*, reprinted in *THE MYTH OF SISYPHUS AND OTHER ESSAYS* 40 (Justin O'Brien trans., Random House 1955) [hereinafter Camus, *Absurd Reasoning*].

In *McCleskey v. Kemp*,⁴ the United States Supreme Court disregarded the most detailed and sophisticated type of statistical evidence ever produced to document that death penalty decisions were based, at least in part, on race.⁵ This unwillingness to remedy well-documented racial disparity in an area where the stakes were high,⁶ and where the Court's precedent bespoke a special commitment to eradicating racism,⁷ is a subject of considerable commentary.⁸ The majority opinion in *McCleskey*, penned by Justice Powell, has been

⁴ 481 U.S. 279 (1987).

⁵ See *infra* notes 172-73 and accompanying text.

⁶ The Supreme Court has historically been willing to extend special procedural safeguards to defendants in capital cases because death is different from other criminal penalties, "not in degree but in kind." *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring). See, e.g., *Eddings v. Ohio*, 455 U.S. 104, 117-18 (1982) (O'Connor, J., concurring) (noting that "this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake"); *Beck v. Alabama*, 447 U.S. 625, 637 (1980) (holding that the risk of an unwarranted conviction in a capital case, resulting from the failure to instruct the jury on a lesser included offense "cannot be tolerated in a case in which the defendant's life is at stake" because "there is a significant constitutional difference between the death penalty and lesser punishments"); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) ("[W]hen the choice is between life and death, th[e] risk [that the death penalty will be imposed in spite of factors which may call for a less severe penalty] is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments."); *Gardner v. Florida*, 430 U.S. 349, 357 (1977) (holding that a capital defendant has the due process right to examine a presentence report relied upon by the sentencing judge, in part because death has been "expressly recognized" as "a different kind of punishment from any other which may be imposed in this country"); *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976) (requiring "consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death . . . [b]ecause . . . there is a . . . difference in the need for reliability in the determination that death is the appropriate punishment in a specific case").

⁷ See *McCleskey v. Kemp*, 481 U.S. 279, 330-33 (1987) (Brennan, J., dissenting) (analyzing the Court's concern about racism throughout its death penalty jurisprudence); *Graham v. Collins*, 506 U.S. 461, 480-87 (1993) (Thomas, J., concurring) (arguing that the Court's early restrictions on the death penalty were motivated by its concern about racism); *id.* at 503-04 (Stevens, J., dissenting) (agreeing with Justice Thomas' conclusion that "concern about racial discrimination played a significant role in the development of our modern capital sentencing jurisprudence," but applying further analysis of the Court's death penalty cases to support his conclusion that permitting the jury to consider unlimited relevant mitigating evidence does not "in any way increase[] the risk of race-based or otherwise arbitrary decisionmaking").

⁸ See Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the*

criticized as a disingenuous avoidance of the problem of racism in death sentencing.⁹ It has been put into the context of the Court's general lack of trust of statistical evidence of racial discrimination.¹⁰ It has also been explained as a choice in favor of maintaining discretionary decision-making over ensuring fairness in capital sentencing.¹¹ Commentators and critics of *McCleskey*, however, have largely failed to capture the Court's sense of anguish and hopelessness about remedying the problem of racism's influence in the criminal justice system that *McCleskey* exemplifies.

This hopelessness and despair animated the Court not only in *McCleskey*, but throughout the Burger Court's death penalty jurisprudence. The death penalty cases decided in the fifteen years between the Court's abolition of the

Supreme Court, 101 HARV. L. REV. 1388 (1988); Stan Robin Gregory, Note, *Capital Punishment and Equal Protection: Constitutional Problems, Race, and the Death Penalty*, 5 ST. THOMAS L. REV. 257 (1992); Mary Elizabeth Holland, Note, *McCleskey v. Kemp: Racism and the Death Penalty*, 20 CONN. L. REV. 1029 (1988); Comment, *Too Much Justice: A Legislative Response to McCleskey v. Kemp*, 24 HARV. C.R.-C.L. L. REV. 437 (1989).

⁹ See Kennedy, *supra* note 8, at 1389 (comparing *McCleskey* to the Court's decisions in *Plessy v. Ferguson*, 163 U.S. 537 (1896) and *Korematsu v. United States*, 323 U.S. 214 (1944), which were characterized as "disasters of judicial decisionmaking" that "repressed the truth and validated racially oppressive official conduct"); Gregory, *supra* note 8, at 272 (calling the *McCleskey* decision "perverse and unconscionable" in its "anomalous" refusal to consider statistical evidence of discrimination in death penalty cases); Holland, *supra* note 8, at 1061-69 (arguing that the Court ignored or misapplied relevant precedent in deciding *McCleskey*).

¹⁰ See Kennedy, *supra* note 8, at 1405-06.

¹¹ See Comment, *supra* note 8, at 450. Justice Blackmun interpreted the *McCleskey* decision similarly in *Callins v. Collins*, where he dissented from the Court's denial of *certiorari*. See *McCleskey*, 510 U.S. at 1154 (Blackmun, J., dissenting). Specifically, Justice Blackmun stated that:

[d]espite this staggering evidence of racial prejudice infecting Georgia's capital-sentencing scheme, the majority turned its back on *McCleskey*'s claims, apparently troubled by the fact that Georgia had instituted more procedural and substantive safeguards than most other States since *Furman*, but was still unable to stamp out the virus of racism. Faced with the apparent failure of traditional legal devices to cure the evils identified in *Furman*, the majority wondered aloud whether the consistency and rationality demanded by the dissent could ever be achieved without sacrificing the discretion which is essential to fair treatment of individual defendants

Id.

death penalty in *Furman v. Georgia*,¹² and its rejection of the racism argument in *McCleskey*, are products of the Burger Court, which began in 1969 when Chief Justice Burger was appointed to head the Court, and ended in 1986, when the Chief Justice resigned.¹³ In its race discrimination cases generally, the Burger Court played the role of fine-tuning the sweeping but vague principles of the Warren Court.¹⁴ By contrast, in the death penalty cases, the Burger Court wrote on a clean slate. It was the Burger Court, not the Warren Court, that gave birth to modern capital punishment jurisprudence by abolishing capi-

¹² 408 U.S. 238 (1972).

¹³ See JOAN BISKUPIC & ELDER WITT, GUIDE TO THE UNITED STATES SUPREME COURT 951 (3d ed. 1990). The Burger Court came to be dominated by the appointments of Republican Presidents who controlled the White House for four of the five Presidential terms that the Burger Court spanned. See THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES 6 (Charles M. Lamb & Stephen C. Halpern eds., 1991). In addition to appointing Warren Burger in 1969, President Nixon eventually succeeded in appointing Harry Blackmun in 1970 to fill the standing vacancy created by the departure of Justice Abraham Fortas, which pre-dated Burger's appointment. See BISKUPIC, *supra* at 54-55. In 1972, President Nixon replaced Justice Hugo Black and Justice John Harlan with Lewis Powell and William Rehnquist. See *id.* at 55. In 1975, President Ford successfully nominated John Paul Stevens to replace retiring Justice William O. Douglas. See *id.* at 56. Finally, in 1981, President Reagan nominated Justice Sandra Day O'Connor to fill the seat vacated by retiring Justice Potter Stewart. See *id.* at 57. President Jimmy Carter, the only Democratic President during the Burger Court years, never had the opportunity to appoint a Supreme Court Justice during his four-year term. See *id.*

Although *McCleskey v. Kemp* was decided in the term after Chief Justice Burger resigned, it captured the waning spirit of the Burger Court. *McCleskey* was authored by the "ideological center" of the Burger Court, Justice Lewis Powell. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. xi (1994). The "Rehnquist Court" has been said not to have really begun, at least with regard to deciding race cases, until Justice Powell retired and was replaced by Justice Anthony Kennedy in 1988. See D. Marvin Jones, *Unrightable Wrongs: The Rehnquist Court, Civil Rights, and an Elegy for Dreams*, 25 U.S.F. L. REV. 1, 9 n.30 (1990). As another commentator has pointed out, minorities won eight out of nine race discrimination cases that the Rehnquist Court heard in its first two terms, with only one exception, *McCleskey v. Kemp*. See Brian K. Landsberg, *Race and the Rehnquist Court*, 66 TUL. L. REV. 1267, 1341 (1992).

¹⁴ See Haywood Burns, *The Activism is not Affirmative*, in THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT 1969-86, 1995-97 (Herman Schwartz ed., 1987) ("The counterrevolution predicted by many has yet to occur, at least in the form expected In general where questions of race were explicitly at stake, the Court proceeded cautiously."); Landsberg, *supra* note 13, at 1269 ("[T]he Warren Court (1953-69), along with the other branches of government, formulated a broad antidiscrimination principle It fell to the Burger Court (1969-86) to refine the meaning and mechanics of the antidiscrimination principle.").

tal punishment in 1972, largely because of concerns about racist capital sentencing,¹⁵ and then reinstating it in 1976, with procedural protections designed to reduce or eliminate the influence of racism.¹⁶ The Burger Court's death penalty jurisprudence reveals that the Court had a genuine, and at times anguished, concern about the possibility that capital sentencing was infected with racial bias. The Burger Court, however, was ultimately paralyzed by its inability to fashion a remedy for this deeply felt wrong, and gave up on the project of remedying racism in capital sentencing, not because it did not perceive racism as a problem, but because it seemed too complex and deeply-entrenched a problem for the Court to solve.

Professor Derrick Bell has eloquently and thoughtfully tackled the problem of despair that accompanies well-intentioned efforts to use law to remedy racism.¹⁷ A good portion of Professor Bell's scholarship has been dedicated to the task of explaining how and why racism has persisted and will continue to be a permanent fixture in American society, despite legal efforts to remedy it.¹⁸ Professor Bell has also addressed the emotional impact of his scholarship, namely, the despair and hopelessness that his "permanence of racism" thesis engenders. In his quest to find a ground on which activists could stand and continue to struggle for racial justice without losing sight of the inevitable ineffectiveness of legal remedies to eliminate racism, Professor Bell has turned to existential thought.¹⁹ As Professor Bell has suggested, existentialism provides

¹⁵ See *infra* note 73-75 and accompanying text.

¹⁶ See *infra* notes 100-05 and accompanying text.

¹⁷ See BELL, *FACES*, *supra* note 1.

¹⁸ See, e.g., DERRICK A. BELL, JR., AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987) (analyzing a variety of social reforms and explaining why they ultimately fail to better the situation of blacks); Derrick A. Bell, Jr., *After We're Gone: Prudent Speculations on America in a Post-Racial Epoch*, 34 ST. LOUIS U. L.J. 393 (1990) (arguing, by using a parable of alien space-traders, that the oppression of people of color is based on socio-economic forces that are deeply entrenched in American society); Derrick A. Bell, Jr., *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985) (arguing through conversations with the fictional character, Geneva, that neither the Supreme Court nor alliances with sympathetic white liberals will achieve racial justice); Derrick A. Bell, Jr., *A Hurdle Too High: Class-Based Roadblocks to Racial Remediation*, 33 BUFF. L. REV. 1 (1984) (arguing that gains in racial justice are inevitably followed by set-backs).

¹⁹ See BELL, *FACES*, *supra* note 1, at x-xii (quoting Albert Camus and Franz Fanon in an attempt to glean the psychological basis for resistance in the face of inevitable defeat). Recently, Professor Bell has turned to a more spiritual basis for sustaining the determination to keep fighting in the face of overwhelming odds of failure. See DERRICK BELL, *GOSPEL CHOIRS: PSALMS OF SURVIVAL IN AN ALIEN LAND CALLED HOME* 1-4 (1996) (discussing the historical role of gospel music as a source of optimism in the face of trouble and oppression).

freedom from disabling despair, exemplified by the “ethic of revolt”²⁰ captured in the writings of Albert Camus.²¹

This article turns the lens of existential thought²² onto the Burger Court’s inability to fashion a suitable remedy for racism in the discretionary system of capital sentencing. This existential lens not only explains the reasons for the Burger Court’s failure to remedy the problem, but also prescribes a more effective response. The existential ethic of revolt demands that courts persist in attempting to remedy the problem of racism, even in light of the realization that they are unable to completely eliminate racism from the discretionary workings of the criminal justice system. A “pure” existentialist perspective would demand continued struggle out of a sense of integrity, despite the fact that one’s remedial efforts are ultimately futile.²³ The existential ethic need not be adopted in its purest form, however, because the Burger Court’s efforts to

and musing on its potential to provide black people with the insight and courage to struggle against the oppression faced today).

²⁰ See *infra* notes 202-07 and accompanying text.

²¹ In the preface to his book, *FACES AT THE BOTTOM OF THE WELL*, Professor Bell gathers themes of courageous struggle in the writings of Albert Camus, Francis Fanon, and Martin Luther King, and uses them to urge struggle against racism without regard to victory in terms of the outcome. See BELL, *FACES*, *supra* note 1, at ix-xii (discussing ALBERT CAMUS, *RESISTANCE, REBELLION, AND DEATH* (1960); FRANZ FANON, *BLACK SKINS, WHITE MASKS* (1967); A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. (James Washington ed., 1986)).

²² By existential thought, I refer generally to the writings of Soren Kierkegaard, Jean-Paul Sartre, Martin Heidegger, Friedrich Nietzsche, and Albert Camus. These existentialist writers did not produce a unified, well-defined theory, and did not, in many cases, define themselves as existentialists. See MARY WARNOCK, *EXISTENTIALIST ETHICS* 1-3 (1967) (discussing the difficulties of defining the term “existentialism”). These existential writers and selected other philosophers, however, are generally classed together because they share a rejection of traditional philosophy and a focus on individual existence. See PATRICIA F. SANBORN, *EXISTENTIALISM* 18 (1968) (discussing the internal similarities of rebellion and focus on the individual that existential thinkers share). In existential thought, the world as experienced by the individual is the only reality. See MARY WARNOCK, *EXISTENTIALISM* 1 (1970) [hereinafter WARNOCK, *EXISTENTIALISM*] (“Broadly speaking, we can say that the common interest which unites Existentialist philosophers is the interest in human freedom. They are all of them interested in the world considered as the environment of man, who is treated as a unique object of attention, because of his power to choose his own courses of action.”). Sartre’s phrase “existence precedes essence” is often cited as the central premise of Existentialism. See SANBORN, *supra* at 18 (“The conception that ‘existence precedes essence’ is often cited as a defining feature of Existentialism.”).

²³ See *infra* notes 202-07 and accompanying text.

combat the influence of racism in death sentencing were not entirely ineffectual.²⁴ Although it may have been impossible to completely eliminate racism from the highly discretionary area of capital sentencing, it was not impossible to identify and curtail some of the mechanisms through which racism operated, and to make capital sentencing, at least marginally, less prone to racial influence.²⁵ Armed with an existential ethic, the Court could have, and should have, been able to continue making incremental progress toward the goal of racial fairness in the criminal justice system, even if the goal itself remained unattainable.

The Court's continual vacillation between the poles of denial and despair prevented it from utilizing an existential ethic. On the one hand, the Court permitted its employment of limited remedies, such as statutes that guided capital sentencing discretion, and remedies that controlled membership on capital sentencing juries, to blind itself to the true dimensions of the racism problem.²⁶ Rather than viewing these remedies as partial and necessarily incomplete measures, the Court acted, at times, as though these remedies could completely solve the problem of racism in capital sentencing, availing itself of what existentialists would call "bad faith."²⁷ On the other hand, when the Court faced the truth about the pervasive role of racism in the criminal justice system, it fell prey to the "disabling despair" that Professor Derrick Bell describes.²⁸ Unable to fashion a remedy to remove discretion from the criminal justice system, or to adequately control it, the Court simply gave up on the project of remedying racism in capital sentencing, and refused to find a constitutional violation.²⁹ This surrender to inevitable defeat results in a phenomenon I refer to as "remedial paralysis,"³⁰ and which existentialists refer to as "angst."³¹ By failing to avail itself of an existential ethic that could have navigated a course between the "bad faith" of denial and the surrender of "remedial

²⁴ See discussion *infra* Part III.C.

²⁵ See discussion *infra* Part III.C.

²⁶ See discussion *infra* Part II.

²⁷ See discussion *infra* Part II.

²⁸ See discussion *infra* Parts I., III.A.

²⁹ See discussion *infra* Parts I., III.A.

³⁰ See *infra* note 37 and accompanying text.

³¹ See *infra* note 37.

paralysis," the Court floundered, and eventually it gave up the search for racial fairness in death sentencing.

This article chronicles the Burger Court's journey. Part I discusses the Court's initial response, "remedial paralysis," which is evident, not only in *McGautha v. California*,³² where the Court refused to find that the Due Process Clause was violated by standardless death sentencing,³³ but also in *Furman v. Georgia*, where the Court decided to abolish the death penalty. Part II explores the Court's reinstatement of the death penalty,³⁴ and two of the Court's forays into "bad faith" denial that sustained the death penalty, particularly the Court's belief that guided discretion statutes and remedies to ensure the proper composition of juries in capital cases could cure capital sentencing of racial influences. Part II further demonstrates how the Court missed key opportunities to tailor its constitutional requirements to racial fairness, and how this failure to recognize or acknowledge the true dimensions of racism in capital sentencing impeded the Court's ability to create more effective remedies. Part III analyzes *McCleskey v. Kemp* and its themes of remedial paralysis and bad faith. The article then turns to the existential ethic of revolt, and demonstrates how such an ethic could have operated to prevent the Court from falling into the trap of existential bad faith and remedial paralysis.

I. MCGAUTHA V. CALIFORNIA AND FURMAN V. GEORGIA: EXISTENTIAL ANGST AND REMEDIAL PARALYSIS

The Burger Court's first stops in its death penalty odyssey were *McGautha v. California* and *Furman v. Georgia*. In *McGautha*, the Court held that unguided capital sentencing discretion did not violate the Due Process Clause.³⁵ One year later, in *Furman*, the Court effectively reversed that holding and ruled that unguided capital sentencing discretion violated the Eighth Amendment.³⁶ The story of *McGautha* and *Furman* may seem at first glance to be a tale of hesitance followed by remedial victory. When analyzed through an existential lens against the backdrop of the cases leading up to *McGautha* and

³² 402 U.S. 183 (1971).

³³ *See id.* at 185-86.

³⁴ This reinstatement occurred in 1976, when the Court upheld death penalty statutes in three states. *See Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976).

³⁵ *See McGautha*, 402 U.S. at 185-86.

³⁶ *See Furman*, 408 U.S. at 239-40.

Furman, however, the Burger Court seemed to be stuck in a consistent state of remedial paralysis.

Remedial paralysis is a court's response to its inability to fulfill its most basic function to remedy recognized wrongs. When a court recognizes a wrong that it cannot remedy, it experiences a loss of meaning, which existentialists claim is basic to the human condition, and which is referred to as "existential angst."³⁷ Remedial paralysis occurs when a court fails to recognize a constitutional violation, not because it cannot see the violation, but because it lacks an adequate remedy for the existing wrong. Remedial paralysis converts the call for judicial activism found in the familiar maxim, "no right without a remedy"³⁸ into a rationale for abstention, "if there is no remedy, there cannot be a right." In death penalty cases, the Burger Court was faced with the unacceptable wrong that the state could sentence a person to death because of that person's race. Its inability to remedy the pervasiveness of racism in capital sen-

³⁷ Existential angst can be generally described as the despair that arises out of the human search for meaning in a world that is incapable of providing it. Camus describes the feeling of angst, which he calls "the absurd," as follows:

[w]hat then is that incalculable feeling that deprives the mind of the sleep necessary to life? A world that can be explained even with bad reasons is a familiar world. But, on the other hand, in a universe suddenly divested of illusions and lights, man feels an alien, a stranger. His exile is without remedy since he is deprived of the memory of a lost home or the hope of a promised land. This divorce between man and his life, the actor and his setting, is properly the feeling of absurdity.

Camus, *Absurd Reasoning*, *supra* note 3, at 5.

In traditional existentialism, if there is such a thing, the experience of angst is couched within an existential ontology. See SANBORN, *supra* note 22, at 38-46 (explaining how the "anguish of non-being" arises out of an ontological search to understand "being-in-itself"). For Sartre, human beings are fundamentally different from other things in the world because of their self-consciousness. See generally, JEAN-PAUL SARTRE, BEING AND NOTHINGNESS 119-58 (1956) (Hazel Barnes trans., Washington Sq. Press 1992). Whereas other things in the world are simply what they are (beings-in-themselves), human beings alone are able to conceive of what they are not. See *id.* Due to this ability, human beings are incapable of being beings-in-themselves; their self-consciousness negates the achievement of this goal. See *id.* As humans strive to be beings-in-themselves, they encounter inevitable failure to coincide with themselves, which is the origin of angst. See *id.*; see also Martin Heidegger, *What is Metaphysics*, reprinted in EXISTENTIALISM FROM DOSTOEVSKY TO SARTRE 242-64 (Walter Kaufmann ed., rev. and exp. ed., Meridian 1975) (deriving the experience of "dread" from the search to apprehend nothing).

³⁸ The maxim is derived from the latin phrase "*ubi jus ibi remedium*," which translates literally into "where there is a right, there is a remedy." BLACKS'S LAW DICTIONARY 1363 (6th ed. 1991).

tencing cast the Court into what can best be understood as the paralysis of angst. In effect, the Court refused to find a constitutional violation because it could not envision a remedy that would eliminate racism from death sentencing decisions.

A. *MCGAUTHA V. CALIFORNIA*: DISCRETIONARY CAPITAL SENTENCING AS A NECESSARY EVIL

The Burger Court's remedial paralysis is evident at the beginning of its death penalty odyssey in *McGautha v. California*. *McGautha* is famous for its short-lived holding that due process is not offended by "committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases."³⁹ In *McGautha*, the Court accepted the "untrammelled discretion of the jury," not because it was laudable, but because it was inevitable. The Court resigned itself to unlimited jury discretion because of the perceived impossibility of controlling jury discretion with procedural remedies.

Justice Harlan wrote the majority opinion in *McGautha*, and took a profoundly skeptical view of the Court's ability to guide jury discretion. The Justice characterized the task of identifying factors on which death penalty decisions rest, and formulating them into guidelines that juries could fairly understand and apply, as "beyond present human ability."⁴⁰ Justice Harlan appealed to the failed history of mandatory death sentencing in English and American law to buttress the claim that all attempts to control jury discretion were bound to fail.⁴¹ In short, Justice Harlan concluded for a majority of the

³⁹ *McGautha*, 402 U.S. at 207. In *McGautha*, the defendant and an accomplice were convicted of two counts of armed robbery and one count of first-degree murder. *See id.* at 187. In accordance with California law, the trial proceeded in two stages, a guilt stage and a penalty stage. *See id.* at 186. At the penalty stage, the jury was instructed that it must unanimously decide which of two punishments, life imprisonment or death, to impose. *See id.* at 189-90. It was further instructed, in pertinent part that:

in this part of the trial the law does not forbid you from being influenced by pity for the defendants and you may be governed by mere sentiment and sympathy for the defendants in arriving at a proper penalty in this case; . . . [and] you are entirely free to act according to your own judgment, conscience, and absolute discretion.

Id. *McGautha* argued that the absence of standards to guide the jury's discretion on the question of punishment denied him due process of law. *See id.* at 196.

⁴⁰ *Id.* at 204.

⁴¹ *See id.* at 197-200. The history of the death penalty, Justice Harlan argued, included numerous unsuccessful attempts to identify, "before the fact," the types of homicides that justified application of the death penalty. *See id.* at 197. Justice Harlan chronicled a doc-

Court that the unlimited discretion of capital sentencing juries to pronounce life or death must be accepted as an inescapable fact of life and a necessary evil.

The Court could easily have protected the “untrammeled discretion” of sentencing juries from constitutional scrutiny by simply relying on the virtues of capital sentencing discretion without resorting to the skepticism about the power of law expressed in *McGautha*. As a matter of fact, just three years before the *McGautha* decision, the Court expressed approval of the unguided discretion of capital juries in *Witherspoon v. Illinois*.⁴² A majority of the court in *Witherspoon* held that it was a due process violation to exclude persons from jury service solely because they voiced “conscientious or religious scruples” against the death penalty,⁴³ as long as they were not irrevocably opposed to the death penalty under all circumstances.⁴⁴ Central to the holding in *Witherspoon* was a vision of the jury as the “conscience of the community,” and the conduit through which society expresses and brings about its moral vision.⁴⁵ The *With-*

trinal tug-of-war between the desire to execute and the desire to grant mercy. When the common law required the death penalty for all felonies, defendants sought relief by the “benefit of clergy.” *See id.* The Crown answered by taking away the benefit of clergy for homicides with “malice aforethought.” *See id.* at 198. The concept of “malice aforethought,” however, failed to adequately distinguish between killers that deserved the death penalty and those who did not. The result was a broadening of the definition of “malice aforethought” to the point where it could be inferred from the fact of killing itself, and a corresponding expansion of the non-capital crime of manslaughter to gather up killings in which the inference of malice could be rebutted. *See id.* at 198. The American creation of degrees of murder and attempt to limit capital crimes to “willful, deliberate and premeditated” killing fared no better in Justice Harlan’s view. *See id.* at 198. American juries, unsatisfied that death was an appropriate penalty for all “willful, deliberate and premeditated” homicides, exercised their power of nullification and refused to convict defendants not deserving of death. *See id.* at 199. Consequently, Justice Harlan viewed it as only rational that to meet the problem of jury nullification, legislatures, led by Tennessee, “adopted the method of forthrightly granting juries the discretion which they had been exercising in fact.” *Id.* at 199.

⁴² 393 U.S. 510 (1968).

⁴³ *Id.* at 522.

⁴⁴ *See id.* at 522 n.21.

⁴⁵ *See id.* at 519-20. Justice Stewart, writing for the majority, noted that in Illinois, juries were given unbounded discretion to choose life or death, “[g]uided by neither rule nor standard.” *Id.* at 519. Such a jury, the Justice reasoned, “can do little more—and *must* do nothing less—than express the conscience of the community on the ultimate question of life or death.” *Id.* (emphasis added). A jury from which all persons opposed to the death penalty have been excluded is incapable of performing this task of passing moral judgment on behalf of society. *See id.* at 519-20. Given the growing number of death penalty opponents, Justice Stewart concluded, “such a jury can speak only for a distinct and dwindling minor-

erspoon opinion suggested that juries not only *did* extend mercy based on moral grounds, rather than legal grounds, but that juries *should* be exercising that kind of discretion.⁴⁶

Although racism is barely mentioned in *McGautha*,⁴⁷ concern about the role of racism in death sentencing was a prime motivator for the Court's shift from simply accepting jury discretion in *Witherspoon* to tolerating it as a necessary evil in *McGautha*. The connection between the Court's hopelessness about an adequate remedy in *McGautha* and its consciousness of the pervasive role of racism in capital sentencing becomes clear upon considering that the opinions in *McGautha* and its companion case, *Crampton v. Ohio*,⁴⁸ were actually drafted, discussed, and circulated between the Justices in an earlier 1969 case, *Maxwell v. Bishop*,⁴⁹ which showcased the racism of standardless jury discre-

ity." *Id.* at 520.

⁴⁶ As Professor Robert A. Burt has pointed out, Justice Stewart's opinion in this passage implicitly disapproved of the continued use of the death penalty. See Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1746-48 (1987). Justice Stewart seemed to view the "distinct and dwindling minority" who still supported the death penalty as lacking in moral development. See *id.* at 1747. As Professor Burt pointed out, this tone is captured best in a footnote to this passage, in which Justice Stewart quoted Arthur Koestler, who stated that the division between supporters and opponents of the death penalty is "between those who have charity and those who have not" *Witherspoon*, 393 U.S. at 520 n.17 (quoting ARTHUR KOESTLER, REFLECTIONS ON HANGING 166-67 (1956)); see also Burt, *supra* at 1747. It has also been argued that the decision to apply or not apply the death penalty is irreducibly moral, and is more properly and honestly made without the misleading apparatus of the due process model. See Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 311-13 (1983).

⁴⁷ The only reference to race was in a footnote where Justice Harlan explained that the issue of the "constitutionally impermissible consideration" of race was not before the Court because the jury had been instructed not to base its decision on "prejudice." *McGautha v. California*, 402 U.S. 183, 207 n.17 (1971).

⁴⁸ 402 U.S. 183 (1971). *Crampton* was decided together with *McGautha* in a single opinion. See *Crampton*, 402 U.S. at 183. *Crampton* challenged the Ohio death sentencing procedure, and raised the same issue as *McGautha*, about whether a sentencing procedure that gave no guidance to the jury in imposing a death sentence violated the Constitution. See *id.* at 185. In addition, *Crampton* raised the question whether it violated a defendant's constitutional rights to impose the death sentence in a unitary trial, where both guilt and sentencing were determined by a jury in a single proceeding. See *id.* The defendant's constitutional argument in *Crampton* against the unitary capital trial was that it impermissibly pitted his right against self-incrimination during the guilt phase against his right to be heard on the issue of sentencing. See *id.* at 210-11. The Court rejected this argument, and affirmed the defendant's conviction and death sentence. See *id.* at 185-86.

⁴⁹ 398 U.S. 262 (1970).

tion.

Maxwell marked the National Association for the Advancement of Colored People ("NAACP") Legal Defense Fund's (the "Fund") first attempt to bring a case before the Supreme Court as part of its nationwide campaign to abolish the death penalty.⁵⁰ As part of this campaign, the Fund launched an in-depth study of racial sentencing patterns in rape cases, headed by prominent sociologist and criminologist Marvin Wolfgang.⁵¹ The Fund used the Wolfgang Study to argue that the capital rape statute in Arkansas was unconstitutional as applied to Billy Maxwell, a black Arkansas man convicted of raping a white woman.⁵² In 1968, the Supreme Court granted *certiorari* in *Maxwell* on two issues, including the issue of standardless capital jury discretion.⁵³ Despite the petitioner's repeated requests, the Court did not address the issue of whether the

⁵⁰ See MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 89-105, 148-67 (1973). In 1939, the NAACP formed a corporation called the Legal Defense Fund, to further the cause of racial justice by bringing test cases challenging racial segregation laws. See *id.* at 5. After its success in litigating *Brown v. Board of Educ.*, 347 U.S. 83 (1954), the Fund broadened its mission to challenge many other types of state-required or supported forms of racial discrimination. See *id.* at 7. In the 1960's, the Fund took on many death penalty cases involving Southern blacks, because of the "blatant racism" in the prosecution of these capital crimes. See *id.* at 15. In 1963, sparked by a dissenting opinion written by Justice Goldberg in *Rudolph v. Alabama*, 375 U.S. 889 (1963), which questioned the constitutionality of imposing the death penalty for rape, a few Fund lawyers began to investigate the possibility of proving the existence of racial discrimination in capital rape cases. See *id.* at 28-31. Out of this investigation, there eventually grew a strategy to attack several of the procedures by which the death penalty was imposed, including the unitary trial procedure, which was eventually upheld in *Crampton v. Ohio*, 402 U.S. 183 (1971), the standardless sentencing issue, which was eventually upheld in *McGautha v. California*, 402 U.S. 183 (1971), and the practice of removing from capital juries all persons who were opposed to the death penalty, which was rejected in *Witherspoon v. Illinois*, 393 U.S. 510 (1968). See MELTSNER, *supra* at 66-71.

⁵¹ See *id.* at 78. This study sent an army of law students into test counties in eleven Southern states, gathering exhaustive data from rape cases to substantiate the Fund's claim that the death penalty was discriminatorily imposed. See *id.* at 86-87. Students culled information from court records and any other available source to complete a twenty-eight page questionnaire for each rape conviction in the target counties. See *id.* at 98-100. Information included characteristics of the defendant, characteristics and reputation of the victim, the relationship between the defendant and the victim, if any, circumstances of the offense, such as, the degree of violence, the degree of injury, housebreaking, involvement of alcohol or drugs, defenses of consent or insanity, joinder with other charges or other defendants, and defendant's representation at various states of proceeding. See *id.* at 99-100.

⁵² See *id.* at 67-70; see also *Maxwell v. Bishop*, 257 F. Supp. 710 (E.D. Ark. 1966), *aff'd*, 398 F.2d 138 (8th Cir. 1968), *rev'd on other grounds*, 398 U.S. 262 (1970).

⁵³ See *Maxwell v. Bishop*, 393 U.S. 997 (1968) (grant of *certiorari*).

racially skewed results demonstrated by the Wolfgang Study rendered the death penalty unconstitutional for rape cases.⁵⁴

Maxwell was argued twice before the Supreme Court, once in March of 1969 and again in May of 1970,⁵⁵ and it appeared that *Maxwell* would be the case in which the Supreme Court would resolve the issue of standardless jury discretion in capital sentencing.⁵⁶ The conference vote after the first oral argument was eight to one in favor of reversal, although the Justices were not united on the grounds for reversing the conviction.⁵⁷ The Court's inability to

⁵⁴ Petition for Writ of *Certiorari* to the United States Court of Appeals for the Eighth Circuit at 2-3, *Maxwell v. Bishop*, 398 U.S. 262 (1970) (No. 622), *microformed on* U.S. Supreme Court Records and Briefs (Microform, Inc.); Petitioner's Motion for Enlargement of the Grant of *Certiorari*, *Maxwell v. Bishop*, 398 U.S. 262 (1970) (No. 622), *microformed on* U.S. Supreme Court Records and Briefs (Microform, Inc.) (arguing that, when the case was set for re-argument the next term, the Court should enlarge the grant of *certiorari* to include the racial discrimination issue).

⁵⁵ See MELTSNER, *supra* note 50, at 148, 199.

⁵⁶ See William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313 (1986) (describing the process of deliberation in *Maxwell* in a retrospective analysis of the evolution of the death penalty arguments).

⁵⁷ See *id.* at 316. Justice Douglas circulated a draft opinion reversing on both the unitary trial and the standardless sentencing issues raised in the petition for review. See *id.* Since a majority of the Court did not agree with Justice Douglas, the Justice re-wrote the opinion to reverse the lower court's decision only on the unitary trial issue. See *id.* at 316-17. Justice Brennan circulated a separate opinion reversing the conviction on the issue of standardless sentencing, arguing that due process required that decisions about life or liberty be made on the basis of pre-existing standards of law. See *id.* at 317. At conference, only three justices had agreed with Justice Brennan on this issue. See *id.* at 316. Justice Stewart and Justice White wanted the Court to reverse on the basis that the record revealed a *Witherspoon* violation in excluding persons from jury service because of their views about the death penalty, an issue that was not addressed by any party. See *id.* at 316.

This issue was raised, however, by the State of California, in their *amicus curiae* brief. Brief of *Amicus Curiae* People of California, *Maxwell v. Bishop*, 398 U.S. 262 (1970) (No. 622), *microformed on* U.S. Supreme Court Records and Briefs (Microform, Inc.). Although it did not have access to trial records, and did not know whether there had been a *Witherspoon* violation in the jury selection, the State of California pointed out that:

[s]ince the jury in petitioner's case imposed the death sentence upon him in 1962, long before the decision of this Court in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), there is a substantial possibility, and perhaps a probability, that the jury which imposed the death sentence was constituted in violation of the principles laid down in that case, which are fully retroactive.

get a majority vote, coupled with a subsequent vacancy on the Court in the wake of Justice Fortas' resignation, prompted the Court to request that *Maxwell* be re-argued the following term.⁵⁸ In the meantime, then-Eighth Circuit Judge Harry Blackmun was selected to fill the vacancy on the Supreme Court created by Justice Fortas' resignation.⁵⁹ It appeared that because he authored the *Maxwell* opinion in the Eighth Circuit,⁶⁰ Justice Blackmun would not be able to take part in the Supreme Court's decision, and the eight remaining justices ultimately decided to reverse *Maxwell* on less monumental grounds without addressing the standardless death sentencing issue.⁶¹ In *Maxwell's* stead, the Court chose *McGautha v. California* and *Crampton v. Ohio* to review the standardless jury sentencing issue.⁶²

Although twists of fate and politics kept the Court from deciding the standardless jury sentencing issue in *Maxwell*, the case, in Justice Brennan's words, "served the critical function of focusing and narrowing the arguments relevant to deciding important issues."⁶³ As a result of *Maxwell*, the standard-

Id. at 6. The State of California argued that if a *Witherspoon* violation had occurred, the petitioner's arguments on standardless sentencing and the unitary capital trial procedure should not be addressed. *See id.* at 5-7. Petitioner responded with a supplemental brief arguing that a *Witherspoon* violation had occurred, but that it did not render his other arguments technically moot, and the Court should address them regardless. *See* Supplemental Brief for Petitioner, *Maxwell v. Bishop*, 398 U.S. 262 (1970) (No. 622), *microformed on* U.S. Supreme Court Records and Briefs (Microform, Inc.).

⁵⁸ *See* MELTSNER, *supra* note 50, at 186-87; *see also* Brennan, *supra* note 59, at 317.

⁵⁹ *See* Brennan, *supra* note 56, at 317-18.

⁶⁰ *See* *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir. 1968), *rev'd on other grounds*, 398 U.S. 262 (1970).

⁶¹ *See* Brennan, *supra* note 56, at 318; *see also* *Maxwell v. Bishop*, 398 U.S. 262, 265 (1970) (remanding the case to the district court for further proceedings because it appeared that at least five prospective jurors had been removed from the jury panel because they expressed personal opinions opposing the death penalty in violation of the rule set out in *Witherspoon v. Illinois*, 391 U.S. 510 (1968)).

⁶² *See* *McGautha v. California*, 402 U.S. 183 (1971); *Crampton v. Ohio*, 402 U.S. 183 (1971). The lawyers for the NAACP Legal Defense Fund speculated that the Court had chosen cases where it was more difficult to make an argument against standardless capital sentencing, because the facts of both cases involved "sordid and vicious homicides" rather than the more sympathetic circumstances presented by *Maxwell*, which had involved a death sentence for rape in a case with evidence of racial discrimination. *See* MELTSNER, *supra* note 50, at 228.

⁶³ Brennan, *supra* note 56, at 318.

less sentencing issue became the subject of extensive written commentary and exchange between the justices in a case that highlighted the racial implications of jury discretion.⁶⁴ The NAACP Legal Defense Fund's brief on behalf of Billy Maxwell was peppered with references to the Wolfgang Study and the racial discrimination it revealed, and the findings from the Wolfgang Study were set out in a twenty-three page appendix to the brief.⁶⁵ In both the initial argument as well as the re-argument of *Maxwell*, Professor Anthony Amsterdam argued that the Wolfgang Study of capital rape sentences demonstrated the racially laden consequences of unfettered jury discretion.⁶⁶ The Court would not, Professor Amsterdam argued at one point, sanction a sentencing process that provided that death should be determined by a roll of the dice.⁶⁷ "Actually," he continued, "what Arkansas has done is worse. It is worse because I assume that the dice would not decide on the grounds of race."⁶⁸

As a result of *Maxwell*, the Court became educated about racism and the death penalty, and racism's connection to the procedural argument against standardless capital jury sentencing. Thus, it is no wonder that by the time *McGautha* was decided in 1971, the Court had reformed its view of jury discretion. The Court no longer viewed the jury as a neutral or even laudatory representative of community values, as it had in *Witherspoon*,⁶⁹ but rather as a dangerous source of hidden prejudice and racial animus.⁷⁰ Read in contrast to

⁶⁴ See *supra* note 57.

⁶⁵ See Brief for Petitioners at 6-7, 11-25, 50-53, app. A at 1a-23a, *Maxwell v. Bishop*, 398 U.S. 262 (1970) (No. 622), *microformed on* U.S. Supreme Court Records and Briefs (NCR).

⁶⁶ See MELTSNER, *supra* note 50, at 161, 205, 210-11.

⁶⁷ See *id.* at 161 (summarizing the first *Maxwell* argument before the Supreme Court).

⁶⁸ *Id.*

⁶⁹ See *supra* notes 45-46 and accompanying text.

⁷⁰ *Maxwell* was not the only racially charged case in which the Court heard arguments in the 1968 Term. On the same day that Anthony Amsterdam argued *Maxwell* for the first time, the Court heard arguments in *Boykin v. Alabama*, which challenged the constitutionality of the death penalty as a punishment for armed robbery on Eighth Amendment grounds. 395 U.S. 238 (1969); see also MELTSNER, *supra* note 50, at 168. In that case, Boykin, a black man, had pleaded guilty to five armed robberies. See *Boykin v. State*, 207 So. 2d. 412, 413 (Ala. 1968). The jury had imposed five death sentences in his case. See *id.* at 415 (Goodwyn, J., dissenting). Boykin challenged his convictions in state court, arguing that it was cruel and unusual to impose the death penalty for the crime of armed robbery. See *id.* at 413. The Alabama appellate court affirmed his sentences, holding that there was no constitutional violation. See *id.* at 414. Three dissenting justices, however, would have re-

Witherspoon and against the backdrop of *Maxwell*, *McGautha* emerged, not merely as a product of skepticism about the power of law, but as the Court's first expression of remedial paralysis in the face of the problem of racism in death sentencing. In *McGautha*, the Court declined to find a due process violation based on standardless sentencing discretion, not because it did not see the connection between jury discretion and racist death sentencing, but because it could not envision a workable remedy.

B. *FURMAN V. GEORGIA*: RACIST RESULTS, ABOLITION, AND SURRENDER

One year after its decision in *McGautha*, the Burger Court effectively reversed that decision, in *Furman v. Georgia*.⁷¹ The Court, however, retained its underlying attitude of remedial paralysis which was the engine driving Justice Harlan's majority opinion in *McGautha*. Just a little over a month after endorsing the standardless capital sentencing procedure in *McGautha*, the Court granted *certiorari* in four cases which raised Eighth Amendment challenges to the death penalty.⁷² *Furman* was decided in a short *per curiam* opinion stating only that "the imposition and carrying out of the death penalty in these cases

versed on the ground that there was no evidence on the record that Boykin had knowingly and voluntarily entered his guilty pleas. See *id.* at 415 (Goodwyn, J., dissenting). The United States Supreme Court granted *certiorari* on both the Eighth Amendment and the guilty plea issues. See *Boykin v. State*, 393 U.S. 820 (1968).

Boykin was ultimately reversed on the ground that the defendant's guilty plea had been unconstitutionally entered, but the Court did not address the Eighth Amendment claim. See *Boykin*, 395 U.S. at 244. The brief in *Boykin*, however, provided the Fund with the opportunity to once again highlight the racial injustice that plagued capital punishment, fashioning an Eighth Amendment argument that has since become familiar. See Brief for the NAACP Legal Defense and Education Fund, Inc., and the National Office for the Rights of the Indigent as *Amici Curiae*, *Boykin v. Alabama*, 395 U.S. 238 (1969) (No. 642), *microformed on* U.S. Supreme Court Records and Briefs (Microform, Inc.). The Fund argued that the only reason why Americans tolerated the death penalty was because it was applied "sparsely and spottily to unhappy minorities." *Id.* at 39. Unable to tolerate even-handed application of the penalty, society nonetheless continued to hold on to the death penalty only because the people on whom it fell most heavily were poor, disenfranchised, and politically unpopular. See *id.*; see also MELTSNER, *supra* note 50, at 182.

⁷¹ 408 U.S. 238 (1972).

⁷² See *Aikens v. California*, 403 U.S. 952 (1971); *Branch v. Texas*, 403 U.S. 952 (1971); *Furman v. Georgia*, 403 U.S. 952 (1971); *Jackson v. Georgia*, 403 U.S. 952 (1971). On the same day, the court weeded out 30 additional cases on its capital docket, vacating them for violations of *Witherspoon* or other, non-Eighth Amendment errors. See MELTSNER, *supra* note 50, at 246.

constitute[s] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”⁷³ The *per curiam* opinion was accompanied by nine separate opinions, five of which rejected the death penalty on Eighth Amendment grounds, each with its own reasoning.⁷⁴

Furman can be regarded as the high water mark in the Court’s struggle against racism in the death penalty largely because so many of the justices openly expressed their views that it was constitutionally unacceptable for race to play a role in death sentencing. In contrast to *McGautha*, where the Court remained virtually silent about the interplay between sentencing discretion and racism, *Furman* overflowed with concern about racism. Five justices, including two of the dissenting justices, noted the connection between discretionary sentencing procedures and racially discriminatory sentencing results, demonstrating how deep the Court’s concern about racism ran, even in the wake of *McGautha*’s failure to find a due process violation.⁷⁵

⁷³ *Furman*, 408 U.S. at 239-40.

⁷⁴ Two of the justices, Justice Brennan and Justice Marshall, sought to invalidate the death penalty as cruel and unusual under all circumstances. See *id.* at 257 (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring). The three others, Justice Douglas, Justice Stewart, and Justice White, were concerned primarily about the arbitrariness of the death penalty, but their concerns arose from very different sources. According to Justice Douglas, the death penalty’s major flaw was that it was selectively applied to minorities and poor people “whose numbers are few, who are outcasts in society, and who are unpopular, but whom society is willing to see suffer.” *Id.* at 245 (Douglas, J., concurring). Justice Douglas found “the basic theme of equal protection” was implicit in the Eighth Amendment ban on cruel and unusual punishment. *Id.* at 249 (Douglas, J., concurring). Justice Stewart argued that the petitioners in the cases before the Court “[we]re among a capriciously selected random handful” of the many people convicted of rape and murder during the same years. *Id.* at 309-10 (Stewart, J., concurring). This seemingly random application of the uniquely harsh penalty of death, Justice Stewart argued, was “cruel and unusual in the same way that being struck by lightning is cruel and unusual.” *Id.* at 309 (Stewart, J., concurring). Justice White echoed Justice Stewart’s concern about arbitrariness, saying that there was “no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.” *Id.* at 313 (White, J., concurring). Justice White, however, seemed to be most concerned about the infrequency of executions. Justice White noted that, under standardless capital sentencing statutes, a jury, “in its own discretion and without violating its trust or any statutory policy, may refuse to impose the death penalty *no matter what the circumstances of the crime.*” *Id.* at 314 (White, J., concurring) (emphasis added).

⁷⁵ Justice Douglas stated “[i]t would seem to be incontestable that the death penalty inflicted on one defendant is ‘unusual’ if it discriminates against him by reason of his race, religion, wealth, social position, or class, or it is imposed under a procedure that gives room for the play of such prejudices.” *Id.* at 242 (Douglas, J., concurring). Justice Stewart echoed Justice Douglas’ concern “that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race,” but Justice Stewart “put . . . [racial discrimination] to one side,” because it had not been proven. *Id.* at

Despite the Court's articulation of the racism problem in unbridled jury discretion, and even though the *Furman* decision represented an abrupt shift from the result in *McGautha*, the Burger Court still seemed at a loss as to how to adequately remedy the racism it saw and labeled as unacceptable. The Court's complex nine-opinion decision failed to provide a clear workable, constitutional standard, leaving the constitutionality of death sentencing in disarray.⁷⁶ Only Chief Justice Burger, in dissent, valiantly struggled to harmonize the diverse opinions, suggesting two options for state legislatures.⁷⁷ First, Chief Justice Burger suggested that the states could enact death penalty statutes providing standards for judges and juries to follow.⁷⁸ Second, the Chief Justice suggested that the states could provide mandatory death sentences for capital crimes, eliminating sentencing discretion altogether.⁷⁹ The constitutionality of Chief Justice Burger's suggestions was open to debate, however, and no attempt was made to harmonize *Furman* with prior cases sending contrary messages.⁸⁰

310 (Stewart, J., concurring). Justice Marshall used the racism argument to bolster his central Eighth Amendment conclusion that the public would condemn racist sentencing if fully aware of its reality. *See id.* at 362 (Marshall, J., concurring). Justice Marshall cited statistical studies substantiating racial discrimination in sentencing, which he believed "would serve to convince even the most hesitant of citizen to condemn death as a sanction." *Id.* at 363-64 (Marshall, J., concurring).

Chief Justice Burger and Justice Powell each dissented, and also left the door open for an equal protection challenge to the death penalty if racial discrimination could be proven. *See id.* at 389 n.12 (Burger, C.J., dissenting); *id.* at 449-50 (Powell, J., dissenting). Justice Powell did not suggest a constitutional test, and Chief Justice Burger indicated that he would look for a "pattern of use [of the penalty against defendants of a certain race that] can fairly be explained only by reference to the race of the defendants" and a "strong showing . . . taking all relevant factors into account." *Id.* at 389 n.12 (Burger, C.J., dissenting). Neither Justice Burger nor Justice Powell was willing to recognize a current constitutional violation, however, since each justice attributed discrimination in capital sentencing to the historical exclusion of blacks from jury service. *See id.* (Burger, C.J., dissenting); *id.* at 450 (Powell, J., dissenting).

⁷⁶ For further development of this point, and its destructive consequences for the rule of law, see Burt, *supra* note 46, at 1746-48.

⁷⁷ *See Furman*, 408 U.S. at 399-402 (Burger, C.J., dissenting).

⁷⁸ *See id.* at 400-01 (Burger, C.J., dissenting).

⁷⁹ *See id.* at 401 (Burger, C.J., dissenting).

⁸⁰ Guided discretion statutes would respond to language in Justice Stewart's and Justice White's opinions in *Furman* by condemning the arbitrary infliction of the death sentence. *See supra* note 74. Yet, *McGautha* remained ostensibly good law, not being specifically

Even Justice Douglas' opinion, which clearly tied his constitutional argument favoring the abolition of the death penalty to the racism argument,⁸¹ failed to fashion a workable remedy to combat the racism inherent in discretionary decision-making in capital sentencing, and consequently befuddled any effort to generate a coherent Eighth Amendment standard based on the discriminatory sentencing results he identified.⁸²

overruled, and *McGautha* clearly disclaimed the possibility of ever being able to capture legislative judgments about who should receive the death penalty in standards or guidelines. See *McGautha v. California*, 402 U.S. 183, 204 (1971) (arguing that the factors that determine whether a sentence of death should be imposed are so complex that it is impossible to capture them in standards or guidelines capable of application to individual cases).

Mandatory sentencing statutes would appropriately respond to concerns about limiting the exercise of mercy voiced in Justice White's opinion. See *supra* note 74. Mandatory sentences, however, might run afoul of the constitutional sensibilities of at least two of the justices dissenting in *Furman*. See *Furman*, 408 U.S. at 401 (Burger, C.J., dissenting) ("If [mandatory sentencing] is the only alternative that the legislatures can safely pursue under today's ruling, I would have preferred that the Court opt for total abolition."); *id.* at 413 (Blackmun, J., dissenting) ("This [mandatory sentencing] approach, it seems to me, encourages legislation that is regressive and of an antique mold, for it eliminates the element of mercy in the imposition of punishment. I thought we had passed beyond that point in our criminology long ago.")

⁸¹ See *supra* note 75. Under the Eighth Amendment/equal protection hybrid analysis Justice Douglas applied, he would require legislatures "to write penal laws that are even-handed, nonselective, and nonarbitrary," and "require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups." *Furman*, 408 U.S. at 256 (Douglas, J., concurring). Justice Douglas' opinion suggested that a capital sentencing scheme could pass constitutional muster if its procedures held out the probability that they would produce more fair and even-handed results. See *id.* at 242 (Douglas, J., concurring). Justice Douglas specifically stated that, "[t]he generality of a law inflicting capital punishment is one thing. What may be said of the validity of a law on the books and what may be done with the law in its application do, or may, lead to quite different results." *Id.*

⁸² Justice Douglas was less than clear about the kind of evidence that would prove an Eighth Amendment violation. See *Furman*, 408 U.S. at 248-50 (Douglas, J., concurring). The Justice's opinion was full of references to the unfairness of the death penalty, specifically, that it was "carried out on the poor, the Negro, and members of unpopular groups." *Id.* at 249-50 (Douglas, J., concurring) (quoting THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (1967)). Justice Douglas also stated that "[i]t is the poor, the sick, the ignorant, the powerless and the hated who are executed." *Id.* at 251 (Douglas, J., concurring) (quoting RAMSEY CLARK, CRIME IN AMERICA 325 (1970)). To support these statements, however, Justice Douglas mainly relied on a couple of studies giving impressionistic conclusions that blacks were more likely than whites to be sentenced to death, and on anecdotal statements by prison warden Lewis Lawes and former Attorney General Ramsey Clark. See *id.* at 249-51 (Douglas, J., concurring).

It appears that, in *Furman*, the Burger Court remained lodged in remedial paralysis, trying to wish the problem of racism in capital sentencing out of existence by making the death penalty disappear. Although the Court abolished the death penalty, it arrived at that result due to its frustration and surrender in the face of its inability to create a workable remedy for the wrong it identified. Perhaps, like Justice Stewart and Justice White, the Court was gambling on the fact that death penalty supporters were indeed a "distinct and dwindling minority," and that the death penalty would fade away on its own after being found unconstitutional.⁸³ Some justices, like Justice Marshall and Chief Justice Burger, may have hoped that the public would become educated, as had the Court, about the abuses inherent in capital sentencing, and would reject attempts to revive capital punishment through the legislative process.⁸⁴ The Court's gamble, however, did not pay off. In the wake of *Furman*, thirty-five states revised or enacted capital punishment statutes that tried to cure the constitutional deficiencies that the Burger Court had identified in *Furman*.⁸⁵ In light of this

⁸³ See *Witherspoon v. Illinois*, 391 U.S. 510, 520 (1968). Justice Powell's biographer, John C. Jeffries, described the "gamble" taken by Justice Stewart and Justice White as follows:

[t]hese Justices wanted to have done with capital punishment but without taking on themselves the responsibility for ruling it unconstitutional. They hoped a nudge would be sufficient. Executions were increasingly rare, and popular support seemed on the wane. If the Court struck down existing death-penalty statutes, exposed the defects in current practice, and made legislatures start over, perhaps they would simply give up. Perhaps the Court could goad the states into abolishing capital punishment without directly commanding that result. Stewart thought abolition inevitable. At conference he predicted that "someday the Court will hold death sentences unconstitutional. If we hold it constitutional in 1972, it would delay its abolition." Striking down the current statutes would force the states to consider their options. When they did, Stewart guessed, they would end all execution.

JEFFRIES, *supra* note 13, at 413-14.

⁸⁴ See *Furman*, 408 U.S. at 369 (Marshall, J., concurring) ("Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice."); *id.* at 403 (Burger, C.J., dissenting) ("I am not altogether displeased that legislative bodies have been given the opportunity, and indeed unavoidable responsibility, to make a thorough re-evaluation of the entire subject of capital punishment."). Chief Justice Burger further stated, "[i]f I were possessed of legislative power, I would either join with Mr. Justice BRENNAN and Mr. Justice MARSHALL or, at the very least, restrict the use of capital punishment to a small category of the most heinous crimes." *Id.* at 375 (Burger, C.J., dissenting).

⁸⁵ See John W. Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 ARIZ. L. REV. 143,

overwhelming support for capital punishment, the Burger Court was compelled once again, to attempt to remedy the problem of arbitrary and discriminatory death sentencing.

II. INDIVIDUALIZED SENTENCING AND PROCEDURAL REMEDIES IN MODERN DEATH PENALTY JURISPRUDENCE: THE BURGER COURT'S EXISTENTIAL BAD FAITH

In 1976, the Burger Court ushered in the modern era of death penalty jurisprudence, which is characterized by the Court's attempt to control, but not eliminate, capital sentencing discretion. The centerpiece of this era was the Court's individualized sentencing principle. This principle requires that, before imposing a death sentence, the judge or jury must be able to consider, "as a mitigating factor, any aspect of the defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death."⁸⁶ The Burger Court's commitment to individualized sentencing seemed to be based on its view that some amount of sentencing discretion was integral to justice, rather than on any real belief that discretion could be sufficiently guided to eliminate racist influence. By failing to clearly reconcile its commitment to individualized sentencing with its commitment to fair and unbiased sentencing, however, the Burger Court eventually fell prey to the "bad faith" described in the existential writings of Jean-Paul Sartre.

According to Sartre, bad faith arises as a natural reaction to angst.⁸⁷ Sartre believed that the harsh truth was that life had no meaning except that which an individual gave it.⁸⁸ Bad faith was an attempt to escape from the discomfort of

145, 238-47 (1986) (providing a table of the thirty-five death penalty statutes adopted by state legislatures between June 29, 1972 and July 1, 1976).

⁸⁶ *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978).

⁸⁷ LINDA A. BELL, *SARTRE'S ETHICS OF AUTHENTICITY* 32 (1987) [hereinafter BELL, *SARTRE'S ETHICS*]. Bell stated:

This view of human freedom and its consequent responsibility is an uncompromising one that invalidates most alibis and excuses. That is why Sartre refers to the recognition of our freedom and responsibility as "anguish." It is a recognition many would prefer to avoid and from which they seek an escape. Such avoidance and escape is the goal of bad faith.

Id.

⁸⁸ *See id.*

that truth by finding refuge in simplistic scientific, moral, or religious authority.⁸⁹ Sartre described bad faith as a state of self-deception where a person seeks to hide the truth from himself or herself, yet all the while knowing what he or she is doing.⁹⁰ Since existential bad faith involves self-deception, it is an inherently unstable state. As Sartre scholar Linda Bell has explained, faith in something outside of oneself can never be totally satisfying because one is always aware that it is only faith.⁹¹

The Burger Court's attempted escape from the reality of racism in capital sentencing into a "bad faith" reliance on procedural remedies became apparent between 1976 and 1986. In 1976, the Burger Court sought to avoid its remedial paralysis by shifting to the "bad faith" belief that guided discretion statutes would prevent racial influence in capital sentencing.⁹² In 1986, in the wake of decisions broadening the discretion of capital sentencing juries,⁹³ the Burger Court redirected its faith toward procedural remedies governing jury selec-

⁸⁹ See *id.*; see also Camus, *Absurd Reasoning*, *supra* note 3, at 24 ("A man who has become conscious of the absurd is forever bound to it That is natural. But it is just as natural that he should strive to escape the universe of which he is the creator."); SANBORN, *supra* note 22, at 102-03 ("One reaction to anguish is flight, aimed at escaping the consciousness of freedom. This could be flight into determinism, the claim that man is not responsible for his actions. . . . Flight can also take the form of refusal to commit oneself seriously to projects . . . [b]ut all such attempts at escape are in bad faith, since anguish is part of man's condition.").

⁹⁰ See SARTRE, *supra* note 37, at 88.

⁹¹ See BELL, SARTRE'S ETHICS, *supra* note 87, at 43. Specifically, Linda Bell stated:

According to Sartre, faith or belief involves "the adherence of being to its object when the object is not given or is given indistinctly" Thus believing carries the seeds of its own undoing within itself, since, at least potentially, it involves knowing that one believes. Knowing that one believes, however, one no longer believes: the confidence essential to faith is destroyed as soon as one becomes aware that it is merely faith, that the object believed is not given or is given indistinctly.

Id.

⁹² The Court upheld guided discretion statutes in three 1976 cases. See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); see also discussion *infra* Part II.A.

⁹³ The Court broadened capital sentencing juries' discretion in four 1983 cases. See *Zant v. Stephens*, 462 U.S. 862 (1983); *California v. Ramos*, 463 U.S. 992 (1983); *Barclay v. Florida*, 463 U.S. 939 (1983); *Barefoot v. Estelle*, 463 U.S. 880 (1983); see also discussion *infra* Part II.B.

tion.⁹⁴ The problem with the Burger Court's death penalty jurisprudence during the period between 1976 and 1986 was that the Court permitted itself to be blinded to the problems inherent in trying to control the intrusion of racism in a discretionary system. Instead of accepting the limitations of its procedural remedies, it treated them as cures for racism, so that once they were in place, racism no longer needed to be addressed. The Court's denial and self-deception, like all "bad faith" beliefs, carried within itself the "seeds of its own undoing."⁹⁵ The Court's reliance on procedural remedies lasted only until the results of more recent studies became available and proved that the procedural remedies did not fulfill their goals.⁹⁶ Nevertheless, the Court chose to ignore, rather than prepare for this eventuality, and therefore, it was caught off guard when its world of procedural remedies came crashing down around it, under the weight of statistical proof that racism persisted.

In the 1976 cases that revitalized the death penalty, the Burger Court simply avoided the potential conflict between the goals of individualized sentencing and unbiased sentencing and chose instead to assume, until proven otherwise, that guided discretion statutes would succeed in eliminating the problem of racism in capital sentencing. Thus, early on, the Court missed key opportunities to reconcile individualized sentencing and non-discrimination. Over time, individualized sentencing took on a life of its own, straying from its origin in reliability, and returning to the "untrammelled discretion" that Justice Marshall once labeled as an "open invitation to discriminate."⁹⁷ As the Court grew increasingly aware that guided discretion statutes were failing to curtail racist results in capital sentencing, it placed its faith in another type of procedural remedy, the jury voir dire. In 1986, the Court handed down two important jury selection decisions, *Batson v. Kentucky*⁹⁸ and *Turner v. Murray*,⁹⁹ each of which was designed to assist attorneys in selecting racially inclusive and racially unbiased juries. It appeared that the Court had abandoned its attempt to control the way juries exercised their capital sentencing discretion, and turned

⁹⁴ The Court attempted to address its continuing concern for racist capital sentencing in two 1986 jury selection cases. See *Batson v. Kentucky*, 476 U.S. 79 (1986); *Turner v. Murray*, 476 U.S. 28 (1986); see also discussion *infra* Part II.C.

⁹⁵ BELL, SARTRE'S ETHICS, *supra* note 87, at 43.

⁹⁶ See *infra* notes 151-52 and accompanying text.

⁹⁷ *Furman v. Georgia*, 408 U.S. 238, 365 (1972) (Marshall, J., concurring).

⁹⁸ 476 U.S. 79 (1986).

⁹⁹ 476 U.S. 28 (1986).

instead to controlling membership on the jury itself, trusting that inclusive and unbiased juries could cleanse the capital sentencing system of racial bias. Similar to guided discretion statutes, however, these procedural remedies in the jury selection process seemed attenuated in light of the Court's lofty expectations. To the extent that the Court placed faith in these remedies to cure racism in capital sentencing and used that faith to further avoid the persistent problem of racism, that faith, like the Court's faith in guided discretion statutes, exemplified existential "bad faith."

A. THE 1976 CASES: THE DISCOVERY OF THE INDIVIDUALIZED SENTENCING PRINCIPLE, AND THE COURT'S MISPLACED FAITH IN GUIDED DISCRETION

On July 2, 1976, the Court handed down a collection of decisions that addressed the various attempts by states to enact death penalty statutes that would survive constitutional scrutiny by eliminating the arbitrary and discriminatory results the Court had condemned in *Furman*.¹⁰⁰ In the cases that addressed these statutes, the Court was confronted with five statutory systems, three of which involved "guided discretion" statutes,¹⁰¹ and two of which were based on

¹⁰⁰ See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

¹⁰¹ See *Gregg*, 428 U.S. at 153; *Proffitt*, 428 U.S. at 242; *Jurek*, 428 U.S. at 262. Georgia had adopted a statute that bifurcated the capital sentencing proceeding from the guilt phase of the trial. See *Gregg*, 428 U.S. at 163. At the sentencing hearing, the jury was required to find beyond a reasonable doubt that one of ten statutorily defined aggravating factors existed. See *id.* at 164. These factors included whether the capital defendant had a prior record for a capital offense, or "a substantial history of serious assaultive crimes;" whether the offense was committed while the defendant was engaged in committing another capital offense or other serious crime; whether the offense was committed for pecuniary gain; whether it was committed while the offender had escaped from lawful custody, or to avoid a lawful arrest; and whether the offense was committed against certain individuals, such as a judicial officer, a district attorney, or a peace officer. *Id.* at 164 n.9 (citing GA CODE ANN. § 27-2543.1 (Supp. 1975)). The sentencing authority was also required to consider any mitigating circumstances offered by the defendant. See *id.* at 163-64. In addition to these statutory guidelines governing sentencing, the Georgia legislature provided for expedited direct review to the Georgia Supreme Court, which was directed to consider whether the sentence was imposed on the basis of any aggravating factors, or was excessive in relation to penalties imposed in similar cases. See *id.* at 166-67. To aid the Georgia Supreme Court in this determination, the trial judge was required to complete a six and one half page questionnaire characterizing the trial, the quality of the defense counsel, and, among other things, whether race played a role in the trial. See *id.* at 167.

Florida had a similar statute, which also created a bifurcated capital trial, separating the guilt determination from the sentencing decision. See *Proffitt*, 428 U.S. at 248. At the sentencing hearing, either side was permitted to introduce evidence relating to certain statu-

mandatory death penalty statutes.¹⁰² These state statutes gave the Burger Court two remedial choices. First, the Court could approve the elimination of discretion, thereby upholding death sentencing in the states that had adopted some form of mandatory death penalty by making death automatic upon conviction for a capital offense. Second, the Court could ignore its warnings in

torily defined aggravating and mitigating factors as well as "any matter the judge deems relevant." *Id.* The aggravating factors were similar to those in the Georgia statute, including whether the offender had been previously convicted of a violent crime, whether the offense was committed in the course of committing a serious felony, whether it was committed for the purpose of avoiding lawful arrest or effecting an escape, and whether it was committed for pecuniary gain, or to disrupt the enforcement of laws. *See id.* at 248 n.6 (citing FLA. STAT. ANN. § 921.141(5) (Supp. 1976)). The mitigating factors included whether the defendant lacked a significant criminal history, was under the influence of extreme emotional or mental disturbance, played a relatively minor role in the offense compared to accomplices, or failed to appreciate the criminality of the conduct. *See id.* (citing FLA. STAT. ANN. § 921.141(6) (Supp. 1976)). The jury could recommend a sentence only. *See id.* The judge ultimately had to determine the sentence, and make written findings that sufficient aggravating circumstances existed, and that there were insufficient mitigating circumstances to outweigh the aggravating factors. *See id.* at 249-50.

The Texas statute was significantly different from either the Georgia or Florida statutes, because it narrowly defined capital crimes, rather than providing a list of aggravating circumstances. *See Jurek*, 428 U.S. at 268. Texas permitted the death penalty to be imposed for intentional murder under only five, relatively narrow circumstances: murder of a peace officer or fireman, murder of a prison employee by a prison inmate, murder committed while escaping or attempting to escape from a penal institution, murder for hire, and murder committed in the course of a kidnapping, burglary, robbery, forcible rape, or arson. *See id.* (citing TEX. PENAL CODE ANN. § 19.03 (1974)). Before imposing a death sentence, the jury had to find, in a separate proceeding, that there was a reasonable probability that the defendant would commit criminal acts of violence in the future. *See id.* (citing TEX. CRIM. P. CODE ANN. § 37.071(b) (Supp. 1975)).

¹⁰² *See Woodson*, 428 U.S. at 280; *Roberts*, 428 U.S. at 325. After *Furman*, the North Carolina legislature responded with a new death penalty statute that left the definition of first degree murder virtually unchanged, but made death a mandatory sentence upon conviction for first degree murder. *See Woodson*, 428 U.S. at 286.

Louisiana also mandated death for all first degree murder convictions, but had gone much further than North Carolina because it also amended its definition of first degree murder to substantially limit the crime to a few relatively narrowly-defined circumstances. *See Roberts*, 428 U.S. at 332. These circumstances included when the offender was engaged in the perpetration of aggravated kidnapping, aggravated rape, or armed robbery; when the victim was a fireman or peace officer engaged in the performance of a lawful duty; where the offender was serving a life sentence, or had previously been convicted of an unrelated murder; when the offender intended to kill or harm more than one person; or when the offender had received anything of value for committing the murder. *See id.* at 329 n.3 (citing LA. REV. STAT. ANN. § 14:30 (1974)).

McGautha about the impossibility of controlling discretion,¹⁰³ and place faith in sentencing standards that employed statutory aggravating and mitigating factors to guide sentencing discretion. A pivotal plurality of three justices¹⁰⁴ cast the deciding votes in these cases, and upheld the three “guided discretion” statutes, but declared both of the mandatory death penalty statutes unconstitutional.¹⁰⁵

When the Court upheld the guided discretion statutes in 1976, it refused to apply any constitutional test that would invalidate what has come to be known as the individualized sentencing principle.¹⁰⁶ In explaining this independent

¹⁰³ See *supra* note 41.

¹⁰⁴ The bloc of swing votes was created when Justice Powell, who dissented in *Furman*, joined Justice Stewart, who concurred in *Furman*, and newcomer Justice John Paul Stevens. Justice Brennan and Justice Marshall continued to hold that the death penalty was unconstitutional under all circumstances. See *Gregg*, 428 U.S. at 227 (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting). Chief Justice Burger, Justice Blackmun, Justice Rehnquist, and Justice White would have upheld all the death penalty statutes before the Court. See *id.* at 207 (White, J., concurring); *id.* at 226 (Burger, C.J., concurring); *id.* at 227 (Blackmun, J., concurring); *Jurek*, 428 U.S. at 277 (Burger, C.J., concurring); *id.* (White, J., concurring); *id.* at 279 (Blackmun, J., concurring); *Proffitt*, 428 U.S. at 260 (White, J., concurring); *id.* at 261 (Blackmun, J., concurring); *Woodson*, 428 U.S. at 306 (White, J., dissenting); *id.* at 308 (Rehnquist, J., dissenting); *id.* at 307 (Blackmun, J., dissenting); *Roberts*, 428 U.S. at 337 (Burger, C.J., dissenting); *id.* (White, J., dissenting); *id.* at 363 (Blackmun, J., dissenting).

¹⁰⁵ See *Gregg*, 428 U.S. at 207 (upholding a guided discretion statute); *Jurek*, 428 U.S. at 271 (upholding a statute that the Court interpreted as a guided discretion statute); *Proffitt*, 428 U.S. at 259 (upholding a guided discretion statute); *Woodson*, 428 U.S. at 305 (declaring that the mandatory death penalty statute was unconstitutional); *Roberts*, 428 U.S. at 336 (declaring that the mandatory death penalty statute was unconstitutional).

¹⁰⁶ *Woodson*, 428 U.S. at 304. It was fairly easy to find the North Carolina statute in *Woodson* unconstitutional. The North Carolina statute had merely removed from its capital murder statute the jury’s pre-*Furman* discretion to make a binding recommendation for life imprisonment upon finding a defendant guilty of first degree murder. See *supra* note 102. This approach reflected what Professor Poulos has described as a “slothful substantive solution” so unresponsive to the concerns of *Furman* that “it is difficult to imagine a mandatory death penalty statute that had fewer chances of passing the cruel and unusual punishment clause’s test.” Poulos, *supra* note 85, at 204. Louisiana, however, had gone much further by substantially limiting the circumstances in which Louisiana juries could find a defendant guilty of first degree murder, and thus apply the mandatory death penalty. See *supra* note 102. The Louisiana statute seemed to provide more than adequate guidance under the *Furman* standard that rejecting statutes that failed to distinguish the “few cases in which [death] is imposed from the many cases in which it is not.” *Furman*, 408 U.S. at 313 (White, J., concurring). Nonetheless, the Court rejected even the carefully drafted Louisiana statute, because it failed to “focus on the circumstances of the particular offense and the character and propensities of the offender.” *Roberts*, 428 U.S. at 333.

constitutional requirement of individualized sentencing for the plurality of three, Justice Stewart employed his most expansive and impassioned rhetoric. To impose a death sentence upon someone without considering "compassionate or mitigating factors stemming from the diverse frailties of humankind," wrote Justice Stewart, would treat persons "not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."¹⁰⁷

Viewed within the racially charged context of the death penalty debate, the Court's rejection of mandatory death penalty statutes can be seen as a failure to address the problem of racist sentencing results. Mandatory capital sentencing, while not effective in reality as a cure for racism,¹⁰⁸ was certainly consistent with the Burger Court's belief that unfettered jury discretion was the problem.¹⁰⁹ If jurors were given discretion to view the unique circumstances of capital defendants, even under the guidance of standards, then jurors would also be given license to feel more empathy for defendants they could identify with, and less empathy for defendants when they could identify more strongly with the victims of crimes. The racial implications of such discretion are hardly obscure. As a matter of fact, guided discretion statutes produced the kind of racial results the Court might have expected had it tried to foresee potential problems with guided discretion. Empirical studies eventually showed a strong link between the application of the death penalty and the race of the victim.¹¹⁰ This connection was especially evident in cases where the facts and circumstances of the crimes were neither the most heinous nor the least aggravated, forcing juries to make more difficult judgment calls about whether the defendant deserved to live or die.¹¹¹

Conversely, in the mandatory death sentencing cases, the Burger Court reached a barrier, a constitutional "bottom line" of individualized sentencing,

¹⁰⁷ *Woodson*, 428 U.S. at 303-304.

¹⁰⁸ In discussing the effectiveness of mandatory sentencing as a cure for arbitrary sentencing, the Burger Court adopted a pragmatic approach reminiscent of *McGautha*, recognizing that even if juries were stripped of their sentencing discretion, they would inevitably "disregard their oaths" and vote not to convict sympathetic defendants of capital crimes. See *Roberts*, 428 U.S. at 335. According to the plurality, this outbreak of jury nullification would result in the same arbitrariness condemned in *Furman*, because it would be unguided by any standards, and would introduce an additional arbitrary factor into the equation: a jury's "willingness to act lawlessly." *Woodson*, 428 U.S. at 303.

¹⁰⁹ See *supra* note 75.

¹¹⁰ See *infra* notes 151, 172-76 and accompanying text.

¹¹¹ See *infra* note 174 and accompanying text.

beyond which it refused to venture, even in an attempt to remedy the unacceptable problem of racism in capital sentencing. Given the apparent choice between adopting a remedy that, by its own rhetoric, would be an effective method to reduce the influence of racism in capital sentencing, and eliminating individualized sentencing, the Court chose to preserve some amount of jury discretion. For a majority of the Court, the loss of jury sentencing discretion, so recently condemned in *Furman* as the source of all evil, was too high a price to pay for the promise of racial equity.

When it adopted the individualized sentencing principle,¹¹² the Burger Court was certainly aware of the tension between its commitment to individualized sentencing and its goal of fair and non-discriminatory sentencing.¹¹³ As the petitioner in *Gregg v. Georgia* pointed out, it was not only juries that posed the risk of discriminatory decision-making.¹¹⁴ No longer limiting its attack to standardless jury sentencing, the petitioner in *Gregg* argued that “the sentencing stage [wa]s only one of the many stages in the criminal process subject to unrestrained and arbitrary discretion.”¹¹⁵ The petitioner catalogued the many discretionary stages of a capital prosecution, before and after sentencing, including the prosecutor’s decisions to charge, dismiss charges, or plea bargain, the jury’s decision to convict on a lesser included offense, and the governor’s power to grant executive clemency.¹¹⁶ Given this breadth of discretion, petitioner argued, the death penalty remained arbitrary because it would inevitably “fall upon the isolated defendant . . . [who has] failed to arouse the conscience of one of the many participants in the criminal justice process who have explicit or disguised power to save his life.”¹¹⁷

¹¹² See *Lockett v. Ohio*, 438 U.S. 586 (1978).

¹¹³ In *Lockett v. Ohio*, the Court’s leading case on the individualized sentencing principle, Justice White and Justice Rehnquist wrote separately, warning that by permitting the jury to consider any facts or circumstances about the defendant as mitigating factors, the Court would undermine the effectiveness of the states’ efforts to guide sentencing discretion, and return capital punishment to the arbitrariness that *Furman* had condemned. See *id.* at 623 (White, J., concurring in part, dissenting in part, and concurring in the judgment); *id.* at 631 (Rehnquist, J., dissenting).

¹¹⁴ Brief for Petitioner, *Gregg v. Georgia*, 428 U.S. 153 (1976) (No. 74-6257), reprinted in LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 21 (1975 Term Supp.) (Philip B. Kurland & Gerhard Casper eds., 1977).

¹¹⁵ *Id.* at 13, reprinted in 89 LANDMARK BRIEFS at 21.

¹¹⁶ See *id.* at 18-34, reprinted in 89 LANDMARK BRIEFS at 26-42.

¹¹⁷ *Id.* at 10, reprinted in 89 LANDMARK BRIEFS at 18.

The Burger Court's response to the petitioner's argument in *Gregg* about continued opportunities for discriminatory death sentencing was to turn a blind eye toward the potential for continued racial inequities. The Court took note of the petitioner's concession in *Gregg* that there was little empirical proof of racial discrimination in capital murder sentences.¹¹⁸ Since discrimination and arbitrariness had not been proven, the Court declined to interfere with Georgia's attempts to eliminate racism based on "what is simply an assertion of lack of faith in the ability of the system of justice to operate in a fundamentally fair manner."¹¹⁹ Faced with overwhelming support for the death penalty, the Burger Court was simply unwilling to assume that racism was embedded in modern capital sentencing based on the "naked assertion" that the procedural protections enacted to guide jury discretion were fatally flawed.¹²⁰

The Court's existential "bad faith" belief that guided discretion would cure capital sentencing of racism, until proven otherwise, prevented it from tying its acceptance of guided discretion statutes to its efficacy in achieving racially just results. The Court lost the opportunity to require states to draft their capital sentencing statutes to provide for racial balance in their application. Had the Court more explicitly conditioned the constitutionality of guided discretion statutes on the racial fairness of their results, it might have encouraged states to draft capital punishment statutes with a real chance of narrowing the class of

¹¹⁸ See *Gregg v. Georgia*, 428 U.S. 153, 224-25 (1976) (White, J., concurring). The petitioner's brief in *Jurek v. Texas* addressed the racism argument that was raised in the guided discretion cases, and was adopted by reference in the briefs in *Gregg* and the other companion cases. See Brief for Petitioner at 35, *Gregg* (No. 74-6257), reprinted in 89 LANDMARK BRIEFS at 43. The brief described the available statistical evidence as follows:

[r]acial discrimination in the application of the death penalty for rape has been sufficiently blatant to allow of overwhelming statistical proof A similarly overwhelming comprehensive demonstration of racial discrimination has concededly not yet been made in connection with the death penalty for murder.

Brief for Petitioner at 81-82 n.146, *Jurek v. Texas*, 428 U.S. 262 (1976) (No 75-5394), reprinted in 89 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 141-42 (1975 Term Supp.) (Philip B. Kurland & Gerhard Casper eds., 1977).

¹¹⁹ *Gregg*, 428 U.S. at 226 (White, J., concurring). Justice White seemed most impressed with the comparative proportionality review procedure for the Georgia Supreme Court which required it to compare penalties imposed in each individual case with penalties imposed in similar cases, thus providing a safeguard to ensure that "in fact the death penalty was [not] being administered for any given class of crime in a discriminatory, standardless or rare fashion." *Id.* at 223 (White, J., concurring) (emphasis in the original).

¹²⁰ See *id.* at 222 (White, J., concurring).

homicides for which defendants would be eligible for the death penalty.¹²¹ As the Baldus statistics later showed,¹²² the real problem with racial disparity in guided discretion statutes did not manifest itself in the cases with the most egregious facts, but rather, in the “mid-range” cases, where the seriousness of the homicides were open to question and debate.¹²³ Greater attention to narrowing the class of defendants who may be subject to the death penalty may have dramatically cut back those “mid-range” cases, by limiting the death penalty to only the most serious homicides, and thus addressed the problem of racial disparity in a more meaningful way.

One year after the decision in *Gregg*, the Burger Court missed another opportunity to fashion a remedy that was specifically linked to racial fairness in death sentencing cases, when it quietly abolished the death penalty as applied to rape cases in *Coker v. Georgia*.¹²⁴ *Coker* came close on the heels of *Gregg*, and analyzed the same death penalty statute with all of its procedural protections.¹²⁵ A majority of the Court, however, that was so willing to overlook the potential problems with guided discretion in murder cases, refused to take a similar chance on the fair application of the death penalty to rape, and thus, abolished it altogether as applied to those cases.¹²⁶ Only a handful of Southern states had re-enacted death penalty statutes that included rape as a capital crime.¹²⁷ The statistical evidence available to the Court at the time it decided

¹²¹ For example, both the Georgia and Florida death penalty statutes contained broadly defined statutory aggravating factors which could easily include any murder. *See Gregg*, 428 U.S. at 201; *Proffitt v. Florida*, 428 U.S. 242, 255 (1976). One of Georgia’s aggravating factors authorized a sentence of death for any murder that was “outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim.” *Gregg*, 428 U.S. at 201. Florida’s capital sentencing statute contained a similar aggravating factor giving legislative approval to death sentences based on an aggravating circumstance where the crime is “especially heinous, atrocious, or cruel.” *Proffitt*, 428 U.S. at 255. This broad and vague language suggested little rational guidance from the legislature to assist juries in choosing which cases should receive the ultimate sanction of death.

¹²² *See infra* note 173 and accompanying text.

¹²³ *See infra* note 174 and accompanying text.

¹²⁴ 433 U.S. 584 (1977).

¹²⁵ *See supra* note 101.

¹²⁶ *See Coker*, 433 U.S. at 592.

¹²⁷ *See id.* at 594 (noting that only Georgia, North Carolina, and Louisiana included rape of an adult in their re-enacted death penalty statutes).

Coker overwhelmingly linked racism to capital sentencing in rape cases.¹²⁸ One cannot escape the conclusion that the Court feared the death penalty would be applied in a racist manner, and was therefore motivated to abolish it in rape cases as a prophylactic remedy to prevent abuse of guided discretion in rape cases. The Court, however, did not mention "race" once in its opinion.¹²⁹ The Court did not voice its implicit, grave concern about racist sentencing in rape cases, and thus failed to fashion a test that might have eventually applied to racial disparities in homicide sentencing once they were proven.

In both *Gregg* and *Coker*, the Burger Court missed opportunities to tie its reinstatement of the death penalty to its concern for fair and nondiscriminatory capital sentencing. Without using its concern about racism as an anchor, the Court's commitment to individualized sentencing drifted into troubled waters and eventually justified the Court's return to the unfettered jury discretion that it had rejected in *Furman* as "an open invitation to discriminat[e]." ¹³⁰

B. THE CHANGING FACE OF INDIVIDUALIZED SENTENCING

The individualized sentencing principle would have been consistent with the Burger Court's goal of ridding capital sentencing of racial influences if the Court had remained grounded in its original justification of individualized sentencing as a means toward reliability in sentencing. In the plurality opinion in *Lockett v. Ohio*,¹³¹ which became the Burger Court's leading opinion interpreting individualized sentencing, the Court's primary concern was to ensure that capital defendants were sentenced on the basis of the most complete and reliable information possible.¹³² The goal of reliability is not inherently incon-

¹²⁸ See *supra* note 118.

¹²⁹ See Carol S. Steiker, *Remembering Race, Rape, and Capital Punishment*, 83 VA. L. REV. 693 (1997) (reviewing ERIC W. RISE, *THE MARTINSVILLE SEVEN: RACE, RAPE, AND CAPITAL PUNISHMENT* (1995)). As Professor Carol Steiker pointed out, *Coker* "put a permanent end to such litigation [based on statistical proof of racism in capital rape sentencing] and managed to sweep the embarrassing statistics under the rug for the indefinite future" without mentioning race, thus ending the "racially charged campaign against the use of the death penalty for rape[.] . . . not with a bang but a whimper." *Id.* at 708.

¹³⁰ *Furman v. Georgia*, 408 U.S. 238, 365 (1972) (Marshall, J., concurring).

¹³¹ 438 U.S. 586 (1978).

¹³² See *id.* at 605. "Given that the imposition of death by public authority is so profoundly different from all other penalties," the Court stated, "we cannot avoid the conclusion that an individualized sentencing decision is essential in capital cases." *Id.* The difference, the Court noted, was that in non-capital cases, judges and correctional authorities had at their disposal many instruments to adjust a sentence that was based on mistaken or incom-

sistent with the goal of non-discrimination since arbitrary or discriminatory sentencing is not, after all, reliable. If the underlying goal is reliable sentencing, then individualized sentencing and non-discriminatory sentencing can co-exist because the more complete and accurate information a jury is given, the less likely it will be to base its sentencing decision on racially-charged stereotypes of black capital defendants.¹³³ In two waves of precedent, however, the Burger Court washed away the bedrock of reliability that might have harmonized individualized sentencing with the goal of racial fairness.

The first wave occurred in 1983 when an increasingly conservative Court¹³⁴ used the individualized sentencing principle to justify a major deregulation of the procedures governing the deliberations of capital sentencing juries.¹³⁵ Pro-

plete information: probation, parole, work furloughs, and postconviction remedies. *See id.* The finality of death precluded any such adjustment in capital cases. *See id.* Thus, the Court emphasized the need for accurate and complete information about an offender at the death sentencing stage in order to make the appropriate determination, to avoid "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.*

¹³³ In a later case, Justice Stevens, in dissent, argued that the facts of *Lockett* illustrated how the individualized sentencing principle "reduces . . . the chance that the decision will be based on irrelevant factors such as race." *Graham v. Collins*, 506 U.S. 461, 503 (1993) (Stevens, J., dissenting). Justice Stevens stated that:

[a] young black woman, *Lockett* was sentenced to death because the Ohio statute "did not permit the sentencing judge to consider, as mitigating factors, her character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime." . . . When such relevant factors are excluded from the sentencing determination, there is more, not less, reason to believe that the sentencer will be left to rely on irrational considerations like racial animus.

Id. (quoting *Lockett*, 438 U.S. at 597).

¹³⁴ *See* WELSH S. WHITE, *THE DEATH PENALTY IN THE EIGHTIES* 12 (1987) (discussing the growing dissatisfaction of Justice Powell, who had been a member of the "pivotal plurality" setting the parameters of the modern system of capital punishment, with the cumbersome capital punishment procedures, and suggesting that either Congress "should find a speedier way to handle death penalty appeals or the states should abolish capital punishment"). In 1983, the Court reached what is widely acknowledged as a turning point in its death penalty jurisprudence. *See id.*; *see also* Weisberg, *supra* note 46, at 305-06. Prior to 1983, the Court had decided almost all cases in favor of capital defendants, imposing significant procedural limitations on the death sentencing process. *See* WELSH S. WHITE, *THE DEATH PENALTY IN THE NINETIES* 11 (1991). After 1983, the Court was much less willing to decide in favor of capital defendants. *See id.*

¹³⁵ The cases that are said to have created this deregulation are *Zant v. Stephens*, 462 U.S. 862 (1983) (holding that the Constitution is not violated when a defendant is sentenced

fessor Robert Weisberg has chronicled the Court's doctrinal journey leading up to its deregulation in 1983.¹³⁶ Professor Weisberg has relayed the Court's early attempts to fashion procedural rules for capital sentencing by invoking a due process model that analogized capital sentencing hearings to criminal trials.¹³⁷ Under the due process model, capital sentencing juries should weigh aggravating and mitigating factors and apply guided discretion standards similar to the way juries in non-capital cases find facts and apply the substantive law to the facts in the guilt phase of a trial.¹³⁸ According to Professor Weisberg, in four cases handed down at the end of the Court's 1982 term,¹³⁹ the Court effectively switched gears, when it repudiated the due process model that justified its regulation of capital sentencing, and returned to a wholly discretionary model for capital sentencing.¹⁴⁰ The Burger Court repeatedly invoked the individualized sentencing principle as a rationale for "deregulating" the capital sentencing process.¹⁴¹

to death based on multiple aggravating factors, one of which was subsequently found to be unconstitutionally vague); *California v. Ramos*, 463 U.S. 992 (1983) (holding that it does not violate the Constitution to permit a capital sentencing jury to consider the governor's power to commute a death sentence); *Barclay v. Florida*, 463 U.S. 939 (1983) (holding that it does not violate the Constitution to impose a death sentence based partially on improper factors); *Barefoot v. Estelle*, 463 U.S. 880 (1983) (holding that it was not error to fail to stay a defendant's death sentence pending appeal of the sentence). See Weisberg, *supra* note 49, at 343 (discussing how the Court's decisions in these cases worked to "deregulate" the procedures for capital sentencing).

¹³⁶ See Weisberg, *supra* note 46, at 313-28.

¹³⁷ See *id.* at 338-43. Professor Weisberg pointed out that some early cases were based on a metaphor equating the penalty phase to a trial on the issue of guilt. See *id.* (discussing *Gardner v. Florida*, 430 U.S. 349 (1977) (due process right to see information in a presentence report); *Bullington v. Missouri*, 451 U.S. 430 (1981) (application of double jeopardy to jury determination of life imprisonment at a penalty phase)). Professor Weisberg believed that the Court was applying a "constitutional due process" model of criminal trials to the capital sentencing phase. See *id.* at 338.

¹³⁸ See *id.* at 339.

¹³⁹ See *supra* note 135.

¹⁴⁰ See Weisberg, *supra* note 46, at 343-45. Professors Carol Steiker and Jordan Steiker have similarly noted that in these cases where the Court returned to a discretionary system of capital sentencing, the Court "collapsed" its "channeling" approach to regulating capital sentencing into its "narrowing" approach. See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 380-81 (1995).

¹⁴¹ In *Zant v. Stephens*, 462 U.S. 862 (1983), for example, the Court was faced with

The individualized sentencing principle was further broadened in a second wave of cases that were decided in the three years following 1983, when a liberal bloc of justices sought to constitutionally require that capital defendants be sentenced by a jury.¹⁴² The rationale was that only the jury provided the link to

the question of whether the rule set out in *Stromberg v. California*, 282 U.S. 359 (1931), that a guilty verdict based on multiple grounds, one of which is invalid, must be set aside, applied to capital sentencing. See *Stephens*, 462 U.S. at 864. In *Stephens*, the capital sentencing jury had relied on two statutory aggravating factors in imposing a death sentence, one of which was subsequently found unconstitutional by the state court. See *id.* at 866-67. The Court refused to extend the *Stromberg* rule under these circumstances because it noted that, "[w]hat is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Id.* at 879-80 (emphasis in the original).

This language invoking the individualized sentencing principle was repeated in *Barclay v. Florida*, a case in which the trial court overrode a jury's advisory verdict for life imprisonment, enumerating several aggravating factors, some of which were unsupported by the evidence and some of which were specifically prohibited from consideration by Florida law. 463 U.S. 939, 975-80 (1983) (Marshall, J., dissenting). Writing for a plurality of four justices, Justice Rehnquist refused to find that the irregularities in the trial court's imposition of the death penalty were constitutional in magnitude. See *id.* at 958. Justice Rehnquist explained:

[t]here is no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the balance "What is important . . . is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime."

Id. (quoting *Stephens*, 462 U.S. at 879) (emphasis in the original).

¹⁴² Within the next three years after deciding the 1983 cases, the Court decided three cases involving the issue of who the proper decision maker should be in capital sentencing decisions. See *Cabana v. Bullock*, 474 U.S. 376 (1986) (holding that it did not violate the Constitution for the appellate court to make the finding that the defendant possessed the state of mind required for imposing a death sentence); *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (holding that it violated the Constitution for a sentencing jury to impose a death sentence after being led to believe that the appellate court could relieve it of responsibility for its life or death decision through a review for correctness); *Spaziano v. Florida*, 468 U.S. 447 (1984) (holding that it did not violate the Constitution for the trial judge to override the sentencing jury's non-binding recommendation for life imprisonment, and impose a death sentence).

In *Spaziano*, Justice Marshall and Justice Brennan, the liberals on the Court, joined in a partially concurring and partially dissenting opinion authored by Justice Stevens, which argued that the jury was the only appropriate decision maker. See *Spaziano*, 468 U.S. at 481 (Stevens, J., concurring in part and dissenting in part) ("[I]n the final analysis, capital pun-

community values that was necessary to make what was essentially a moral judgment about whether an individual should live or die.¹⁴³ Justice Stevens was the chief proponent of this view of individualized sentencing. Justice Stevens dissented in *Spaziano v. Florida*,¹⁴⁴ where the Court held that it is not necessary for *juries* to make a determination as to death,¹⁴⁵ and argued that death, unlike other criminal sanctions, "is the one punishment that . . . is ultimately understood only as an expression of the community's outrage—its sense that an individual has lost his moral entitlement to live."¹⁴⁶ Although a majority of the Burger Court never adopted Justice Stevens' view that death sentencing must be carried out by juries,¹⁴⁷ in *Caldwell v. Mississippi*,¹⁴⁸ a majority of the Court endorsed Justice Stevens' view of the role of capital sentencing juries. In *Caldwell*, the Court held that the Eighth Amendment was violated when a prosecutor suggested to a jury that an appellate court could overturn its verdict in favor of death.¹⁴⁹ The Court noted that an appellate court "would be relatively incapable of evaluating the 'literally countless factors that [a capital sen-

ishment rests on not a legal but an ethical judgment And if the decision that capital punishment is the appropriate sanction in extreme cases is justified because it expresses the community's moral sensibility—its demand that a given affront to humanity requires retribution—it follows, I believe, that a representative cross section of the community must be given the responsibility for making that decision."). In *Bullock*, only Justice Brennan joined Justice Stevens' dissenting opinion, which argued that "the decision whether a death sentence is the only adequate response to the defendant's moral culpability must be made by a single decisionmaker, be it the trial court or the jury." *Bullock*, 474 U.S. at 408 (Stevens, J., dissenting). Both Justice Brennan and Justice Marshall joined Justice Blackmun's more limited dissent, which argued that the appellate court lacked the institutional competence to make the finding of fact that the Constitution required. See *Bullock*, 474 U.S. at 405 (Blackmun, J., dissenting).

¹⁴³ See *Spaziano*, 468 U.S. at 480-81.

¹⁴⁴ 468 U.S. 447 (1984).

¹⁴⁵ See *id.* at 449.

¹⁴⁶ *Id.* at 468-69 (Stevens, J., dissenting).

¹⁴⁷ See *id.* at 460 ("Nothing in those twin objectives [of consistent application and individualized sentencing] suggests that the sentence must or should be imposed by a jury."); see also *Bullock*, 474 U.S. at 385 ("The decision whether a particular punishment—even the death penalty—is appropriate in any given case is not one that we have ever required to be made by a jury.").

¹⁴⁸ 472 U.S. 320 (1985).

¹⁴⁹ See *id.* at 323.

tencer] consider[s],’ in making what is largely a moral judgment of the defendant’s desert.”¹⁵⁰

As a result of these two waves of precedent, the Burger Court dramatically changed its view of capital sentencing discretion and the individualized sentencing principle. Discretion was no longer a necessary evil, and individualized sentencing was no longer just a means to the end of reliable sentencing. The ability to be merciful to some capital defendants under the individualized sentencing principle had become a necessary component of what the Court saw as justice.

Inherent in the discretion to be merciful to some defendants, however, is the power to take or spare a defendant’s life based on racial factors. While the Court was restoring, even revering, the sentencing discretion of juries, the Court was increasingly reminded of the reality that racism continued to be a problem in capital sentencing. Social scientists flushed the Court’s existential “bad faith” retreat from the racism issue out from under the cover of guided discretion.¹⁵¹ While the Court did not have strong evidence to link racism and capital sentencing in murder cases in 1976, by 1986, studies overwhelmingly showed that those who killed whites were more likely to receive the death penalty than those who killed blacks.¹⁵² Through applications for stays of execution and the documentary evidence attached to them, it was becoming apparent to the Burger Court that it would soon be faced with the question it had put off in *Gregg* and the other 1976 cases, specifically, what would happen if the procedural protections of the modern death penalty statutes produced the same discriminatory results it had condemned in *Furman*?¹⁵³ In 1984, Justice Brennan sounded a warning.¹⁵⁴ Referring to the developing body of evidence concern-

¹⁵⁰ *Id.* at 340-41 n.7 (emphasis added).

¹⁵¹ For a summary of empirical studies, see Samuel R. Gross, *Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing*, 18 U.C. DAVIS. L. REV. 1275, 1280-81 (1985). The most comprehensive study was conducted by David Baldus, Charles Pulaski, and George Woodworth which became the subject of the Court’s decision in *McCleskey v. Kemp*, 481 U.S. 279 (1987). See *infra* notes 172-73.

¹⁵² See Gross, *supra* note 151, at 1282.

¹⁵³ See, e.g., *Green v. Zant*, 469 U.S. 1143 (1985) (application for stay of execution and rehearing denied); *Wainwright v. Adams*, 466 U.S. 964 (1984) (application to vacate order staying execution granted); *Wainwright v. Ford*, 467 U.S. 1220 (1984) (application to vacate order staying execution denied); *Stephens v. Kemp*, 469 U.S. 1043 (1984) (petition for writ of *certiorari* denied); *Sullivan v. Wainwright*, 464 U.S. 109 (1983) (application for stay of execution denied); *Stephens v. Kemp*, 464 U.S. 1027 (1983) (application for stay of execution granted).

¹⁵⁴ See *Pulley v. Harris*, 465 U.S. 37, 59 (1984) (Brennan, J., dissenting).

ing race discrimination in capital cases, Justice Brennan accused a majority of the Court of "simply deluding itself, and also the American public," in suggesting that defendants on death row "ha[d] been selected on a basis that is neither arbitrary nor capricious, under any meaningful definition of those terms."¹⁵⁵ If the Burger Court were to retain the death penalty, and preserve the sentencing discretion that it found fundamental in death penalty cases, it would have to find another way to ensure that the results of capital sentencing decisions were not influenced by racial bias.

C. *BATSON V. KENTUCKY* AND *TURNER V. MURRAY*: THE BURGER COURT'S FAITH IN JURY SELECTION PROCEDURES

In 1986, the Court attempted to address its concern for the role of racism in death sentencing in two decisions concerning jury selection.¹⁵⁶ These decisions demonstrated the Court's growing focus on the composition of capital sentencing juries exercising the discretionary function the Court had assigned them. *Batson* and *Turner* created procedural remedies designed to ensure that black jurors would not be eliminated from jury service by peremptory strikes,¹⁵⁷ and that racially biased jurors could be identified and eliminated by questioning during voir dire.¹⁵⁸ These jury selection procedures were limited remedies, however, and were unable to carry the freight that the Court attached to them.¹⁵⁹ The Burger Court's acceptance of these remedies sent the Court on another journey into existential bad faith, creating the illusion that by ensuring that capital juries were inclusive and unbiased, the Court could magically cure the death penalty of racist results.

Despite their limitations, both *Batson* and *Turner* were big steps for the Burger Court. In *Batson*, the Court applied equal protection scrutiny to a prosecutor's decision to use peremptory strikes to eliminate black persons from jury service,¹⁶⁰ intruding into the realm of prosecutorial discretion, an area

¹⁵⁵ *Id.* at 60 (Brennan, J., dissenting).

¹⁵⁶ *See Batson v. Kentucky*, 476 U.S. 79 (1986); *Turner v. Murray*, 476 U.S. 28 (1986).

¹⁵⁷ *See Batson*, 476 U.S. at 96.

¹⁵⁸ *See Turner*, 476 U.S. at 36-37.

¹⁵⁹ *See infra* notes 165-70 and accompanying text.

¹⁶⁰ *See Batson*, 476 U.S. at 96. In *Batson*, the Court overruled a portion of *Swain v. Alabama*, 380 U.S. 202 (1965), which had protected a prosecutor's use of peremptory challenges to remove black venire members. *See id.* at 93. Under *Swain*, to demonstrate ra-

where discretion was the very essence of the decision, in order to control the intrusion of racism.¹⁶¹ In *Turner*, decided the same day as *Batson*, the Burger Court created a per se constitutional rule that “a capital defendant accused of an interracial crime [was] entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias.”¹⁶² The Burger Court was uncharacteristically frank in fleshing out the problems of racial bias in discretionary capital sentencing that the *Turner* rule was designed to address. The Court noted that, in addition to the problem that some jurors possess strong preconceived notions that blacks are violent or morally inferior, jurors might be influenced by “[m]ore subtle, less consciously held racial attitudes” such as “[f]ear of blacks.”¹⁶³

cially discriminatory use of peremptory challenges, a defendant was required to show that a prosecutor had used peremptory challenges consistently to remove blacks from serving on petit juries in “case after case.” *Swain*, 380 U.S. at 223. In place of *Swain*’s “crippling burden of proof,” the Court, in *Batson*, adopted a burden-shifting test to determine whether blacks were being discriminatorily excluded from jury service. *Batson*, 476 U.S. at 92 (citing *McCray v. Abrams*, 750 F.2d 1113, 1120 n.2 (2d Cir. 1984)). Under this test, a defendant could make out a prima facie case that a prosecutor had used a peremptory strike in a racially discriminatory manner by showing that he or she was a member of a cognizable racial group and that the prosecutor had exercised peremptory challenges to remove members of the defendant’s race from the jury venire. *See id.* at 96. The burden then shifted to the prosecutor to come forward with a neutral explanation for challenging black jurors, which must be more than the assumption that black jurors would be partial to members of their own race. *See id.* at 97-98.

¹⁶¹ Justice Burger and Justice Rehnquist dissented in *Batson* and voiced their concern that the Court should not be attempting to control prosecutors’ discretionary decision-making. *See id.* at 112 (Burger, C.J., dissenting); *id.* at 134 (Rehnquist, J., dissenting). Chief Justice Burger cited with favor the view of one commentator who characterized the peremptory challenge as a way to permit “the covert expression of what we dare not say but know is true more often than not.” *Id.* at 121 (Burger, C.J., dissenting) (citing Barbara Babcock, *Voir Dire: Preserving “Its Wonderful Power,”* 27 STAN. L. REV. 545, 553-54 (1975)). Likewise, Justice Rehnquist admitted that “use of peremptories is at best based upon seat-of-the-pants instincts, which are undoubtedly crudely stereotypical and may in many cases be hopelessly mistaken.” *Id.* at 138 (Rehnquist, J., dissenting). Justice Rehnquist went so far as to say that the use of group affiliations, such as race, as “proxies” for potential juror partiality, “may be extremely useful,” especially “given the need for reasonable limitations on the time devoted to *voir dire*.” *Id.* at 138-39 (Rehnquist, J., dissenting).

¹⁶² *Turner*, 476 U.S. at 36-37.

¹⁶³ *Id.* at 35. Justice Brennan wrote separately and indicated that he would have gone even further. *See id.* at 39 (Brennan, J., concurring in part and dissenting in part) (“I cannot fully join either the Court’s judgment or opinion. For in my view, the decision in this case, although clearly half right, is even more clearly half wrong.”). For Brennan, it was “incontestable” that unconscious as well as explicit “racial fears and hatreds” would influ-

The Burger Court, however, bought its faith in the procedural remedies that regulate jury membership at the same price that it had bought faith in guided discretion, by applying the denial and self-deception of existential bad faith. What was perhaps most appealing to the Burger Court about its *Batson* and *Turner* remedies was the illusion that these remedies could check abuses, not only in jury deliberation, but in other parts of the criminal justice system as well.¹⁶⁴ If a prosecutor had erred in bringing charges, or refusing to bargain for a plea, the jury, by acquitting or convicting on a lesser offense, could correct the problem. Inclusive unbiased juries could perform this curative function best while exercising the discretion inherent in individualized sentencing and by granting mercy in cases where racial attitudes had clouded earlier decisions in the criminal process. The jury membership remedies thus held out the promise of solving the problem of racism in a manner wholly consistent with the Burger Court's newfound sense of individualized justice.

The procedural remedies created in *Batson* and *Turner*, however, like the guided discretion statute approved in *Gregg v. Georgia*, were incapable of performing the Herculean task that the Burger Court, in its denial and self-deception, laid on their shoulders. Justice Marshall wrote separately in *Batson* to emphasize that the remedy enacted by the Court in *Batson* did not go far enough.¹⁶⁵ Justice Marshall noted that decisions in some state courts, already operating under a *Batson*-type approach to peremptory strikes, demonstrated that it was difficult for a defendant to make a prima facie case of discrimination, and far too easy for prosecutors to generate facially neutral explanations for striking a black juror.¹⁶⁶ Justice Marshall's predictions about the ineffec-

ence a juror at the guilt phase of a trial, as well as in capital sentencing. *Id.* at 42 (Brennan, J., concurring in part and dissenting in part). A determination of guilt was, after all, "nothing more than the sum total of a countless number of small discretionary decisions" about whether to believe the testimony of witnesses, or to credit the defendant with a motive to commit a crime. *Id.* at 42-43 (Brennan, J., concurring in part and dissenting in part).

¹⁶⁴ As Professor Susan Herman has written, *Batson* "act[ed] as a lightning rod for all of the Court's unexpressed concerns about racism in the criminal justice system." Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1813 (1993).

¹⁶⁵ See *Batson*, 476 U.S. at 102-03 (Marshall, J., concurring) ("I . . . write separately to express my views [that] [t]he decision today will not end the racial discrimination that peremptories inject into the jury-selection process[, and that] [t]hat goal can be accomplished only by eliminating peremptory challenges entirely.").

¹⁶⁶ See *id.* at 105-06 (Marshall, J., concurring) (citing examples from state law cases to point out that defendants operating under *Batson*-type frameworks are unable to attack peremptory challenges unless the challenges are "so flagrant as to establish a prima facie case," and that it is too easy for prosecutors to "assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons").

tiveness of the *Batson* remedy have been validated by subsequent experience.¹⁶⁷ Similarly, the remedy created in *Turner* would only affect jurors who were aware of their racial biases and willing to admit them in open court.¹⁶⁸ Even then, the Burger Court found a “constitutionally significant risk” of racial bias infecting a proceeding only when the crime was interracial, violent, and involved a capital sentencing proceeding.¹⁶⁹ Additionally, some members of the Court were even reluctant to create such a limited remedy because of the perceived social costs of explicitly addressing racism in open court.¹⁷⁰

Although the jury selection procedures created in *Batson* and *Turner* were major steps for the Court, they represented minuscule progress toward the goal of solving the problem of racism in capital sentencing. Just one year later,

¹⁶⁷ See, e.g., Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 460 (1996) (examining published decisions in state and federal courts, and concluding that although “it is relatively easy for a *Batson* complainant to establish a *prima facie* case . . . it is much more difficult ultimately to prevail on a *Batson* challenge”); Michael J. Raphael & Edward J. Ungvasky, *Excuses, Excuses: Neutral Explanations under Batson v. Kentucky*, 27 U. MICH. J.L. REFORM 229, 235-36 (1993) (analyzing the neutral explanations offered in lower court cases to rebut *prima facie* cases of discrimination, and concluding that “only a small number of the neutral explanations for peremptory challenges were rejected” and that “courts are often uncritical in evaluating neutral explanations”). This ineffectiveness, however, may have had more to do with the Court’s subsequent inability to commit to the *Batson* remedy wholeheartedly, rather than a flaw in the remedy itself. See Melilli, *supra* at 470 (reporting that his study of lower court cases does not confirm the hypothesis that it is too easy for the *Batson* respondent to prevail on neutral explanations when overall success rates are analyzed, but a much stronger case can be made for the hypothesis in some of the jurisdictions studied); see also *Purkett v. Elem*, 514 U.S. 765 (1995) (holding a prosecutor need not have a plausible reason for striking a juror, just a race-neutral reason and that the prosecutor’s proffered reliance on a prospective juror’s facial hair was race neutral); *Hernandez v. New York*, 500 U.S. 352 (1991) (holding that the Spanish-speaking ability of Hispanic jurors was a race-neutral reason for exercising peremptory challenges to strike them); Raphael & Ungvasky, *supra* at 267-74 (describing how to put “teeth” in the *Batson* analysis of “neutral explanations”).

¹⁶⁸ In *Turner*, the Court’s remedy was to ask prospective jurors whether they harbor racial bias when engaging in jury selection. See *Turner v. Murray*, 476 U.S. 28, 36-37 (1986).

¹⁶⁹ See *id.* at 36 n.8.

¹⁷⁰ Justice Powell, in dissent, cautioned that, although the *per se* rule adopted by the Court appeared “innocuous” in its minimal intrusion into the administration of the criminal justice system, it brought with it the unjustified presumption “that criminal justice in our courts of law is meted out on racial grounds.” *Id.* at 53 (Powell, J., dissenting). To create a presumption that racism infected the criminal justice system was, according to Justice Powell, unacceptable. See *id.*

when *McCleskey v. Kemp* presented the Court with the enormous task of cleansing capital punishment cases of racial influence, or abolishing it altogether, the Court seemed to cling to its jury selection remedies in a last surge of existential "bad faith," using these remedies to justify its failure to fulfill the promise in *Furman*. The Court's bad faith, however, was not strong enough to convince itself, and *McCleskey* seems to present more of a return to remedial paralysis than to the self-delusion exhibited in *Gregg*.

III. MCCLESKEY V. KEMP AND THE EXISTENTIAL ETHIC OF REVOLT

A. MCCLESKEY V. KEMP: THE COURT'S SURRENDER TO REMEDIAL PARALYSIS

Almost exactly one year after the decisions in *Turner* and *Batson*, the Court was once again faced with the problem of remedying racism in the criminal justice system in *McCleskey v. Kemp*. This time, however, the petitioner was asking the Court to do more than to *assume* that justice was being meted out on racial grounds.¹⁷¹ Rather, Warren McCleskey's claim which challenged the constitutionality of Georgia's capital punishment statute, was based on the Baldus Study, which linked racism to the application of the death penalty and was the most detailed and sophisticated statistical analysis produced to date.¹⁷² The

¹⁷¹ See *McCleskey v. Kemp*, 481 U.S. 279 (1987). In *Gregg v. Georgia*, the petitioner had challenged the constitutionality of Georgia's capital sentencing statute on the ground that its vaguely worded aggravating factors, along with the numerous other opportunities for the exercise of discretion in the capital sentencing process would probably continue to result in discriminatory sentencing. See *supra* notes 114-17 and accompanying text. The Court responded by rejecting the effort of the Georgia legislature had made merely on the "naked assertion that the effort is bound to fail." *Gregg v. Georgia*, 428 U.S. 153, 222 (1976) (White, J., concurring).

¹⁷² See *McCleskey*, 481 U.S. at 286. The Baldus Study was unique in its methodology. See Gross, *supra* note 151, at 1281. Earlier studies had gleaned data from police agencies and other official sources of population and crime statistics. See *id.* at 1280. The Baldus Study, however, was based on original data compiled in detailed files of information on each homicide case contained in the study. See *id.* at 1281. This permitted Baldus researchers to analyze hundreds of factors, other than race, that may have influenced a sentencing decision, thus focusing on a more exact measure of the role that race played in the capital sentencing decision. See *id.* The Baldus Study actually consisted of two studies, the Procedural Reform Study and the Charging and Sentencing Study. See *id.* The Procedural Reform Study covered 594 defendants convicted for murder, either after trial or on a plea of guilty, in Georgia from March 1973 to July 1978. See *id.* The Charging and Sentencing Study covered most homicide prosecutions in Georgia from 1973 to 1980, and included cases that resulted in manslaughter convictions. See *id.* The questionnaire for the Charging and Sentencing Study added more information on aggravating and mitigating factors as well as other

findings from the Baldus Study, which were introduced in *McCleskey*, confirmed that a prevalent pattern of discrimination existed that was linked to the race of the homicide victim, something earlier studies had suggested.¹⁷³ By ranking the homicides in the study based on the factual scenario of each case, from the least serious to the most egregious, the Baldus Study demonstrated that, in the least aggravated and most aggravated homicides, the race of the victim had little or no effect.¹⁷⁴ In the “mid-range homicides,” however, a defendant who killed a white victim was twenty percent more likely to receive the

factors designed to measure the strength of the evidence against the defendant. *See id.*; *see also* *McCleskey v. Zant*, 580 F. Supp. 338, 353-55 (E.D. Ark. 1984), *aff'd*, *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985), *aff'd*, 481 U.S. 279 (1987). The Baldus findings have been published in DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990). *See generally* David C. Baldus et al., *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lesson from Georgia*, 18 U.C. DAVIS L. REV. 1375 (1985); David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133 (1986); David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983).

¹⁷³ *See McCleskey*, 481 U.S. at 286-87. The Baldus Study indicated that blacks who killed whites were 22 times more likely to get the death penalty than blacks who killed blacks, and seven times more likely to get the death penalty than whites. *See id.* at 327 (Brennan, J., dissenting). When adjusted to control for other relevant sentencing factors, the differential diminished, but remained significant, showing that the death penalty was six percent more likely to be applied when the victim was white than when the victim was black. *See McCleskey v. Kemp*, 753 F. 2d 877, 896 (11th Cir. 1985), *aff'd*, 481 U.S. 279 (1987). Professor Gross has noted that “[a]t least ten separate studies have investigated racial discrimination in the administration of the death penalty after *Furman*, and all have found substantial discrimination by the race of the victim.” Gross, *supra* note 151, at 1279. Additionally, Professor Gross addressed that:

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

Id. at 1282.

¹⁷⁴ These findings are set out in the court of appeals’ opinion in *McCleskey*. *See McCleskey*, 753 F.2d at 922-23 (Hatchett, J., dissenting in part and concurring in part), *aff'd*, 481 U.S. 279 (1987).

death penalty than a defendant who killed a black victim.¹⁷⁵ Statistically, the race of the victim had as much, or more, influence on whether the defendant would receive the death penalty than Georgia's statutory aggravating factors, which include the existence of a prior capital record, killing to avoid arrest, or for hire, and the commission of a contemporaneous felony.¹⁷⁶

The *McCleskey* decision responded to the Baldus findings, and was the culmination of the Burger Court's fifteen-year struggle to find an adequate remedy to the problem of racism in capital sentencing. Not surprisingly, the decision contained themes of existential bad faith *and* remedial paralysis. In an attempt to justify its abdication of the long-fought struggle to rid death sentencing of racial influences, the Court stoked a dying ember of "bad faith" reliance on procedural remedies. In rejecting the petitioner's Eighth Amendment claim, Justice Powell catalogued the Court's "unceasing efforts to eradicate racial prejudice from our criminal justice system," noting the remedies recently created in *Batson* and *Turner*,¹⁷⁷ and recounting the many procedural protections included in Georgia's guided discretion statute.¹⁷⁸ This rationalization, however, was half-hearted at best, and, for the most part, it begged the question raised by Warren McCleskey's challenge. The Baldus Study confronted the Court with evidence that the criminal justice system produced unjust results despite what the Burger Court perceived as considerable procedural protections in Georgia's death penalty statute.¹⁷⁹ Unless the Court, in defending Georgia's capital sentencing system, was relying solely on the power of its jury selection remedies created in *Batson* and *Turner* to reverse the trend demonstrated by the Baldus statistics, it had to admit that the procedures already in place were inadequate, and that it was simply unwilling, or unable, to provide any further remedy against racism.¹⁸⁰

¹⁷⁵ *See id.*

¹⁷⁶ *See id.* at 921 (Hatchett, J., dissenting in part and concurring in part).

¹⁷⁷ *McCleskey*, 481 U.S. at 309.

¹⁷⁸ *See id.* at 309 n.30.

¹⁷⁹ As Justice Brennan pointed out in his *McCleskey* dissent, "[t]hese efforts . . . signify not the elimination of the problem, but its persistence." *Id.* at 333 (Brennan, J., dissenting).

¹⁸⁰ The Marshall papers have now revealed that Justice Scalia was pushing the Court to just this kind of conclusion in *McCleskey*. *See* Dennis D. Dorin, *Far Right of the Mainstream: Racism, Rights, and Remedies from the Perspective of Justice Antonin Scalia's McCleskey Memorandum*, 45 MERCER L. REV. 1035, 1038 (1994). In a memorandum circulated to his fellow justices when the Court was deliberating in *McCleskey*, Justice Scalia voiced his view that the Baldus statistics raised an inference of racism in Warren McCleskey's case, but that racism must be accepted as an inevitable intrusion of irrational

The *McCleskey* opinion was disingenuous in other ways as well.¹⁸¹ Most importantly, in both its equal protection and Eighth Amendment analyses, the Court ignored its own precedents, and avoided or changed the standards that should have controlled its decision and could have led it to strike down Georgia's death penalty statute.¹⁸² The Court, however, was startlingly honest in its surrender to remedial paralysis.¹⁸³ Justice Powell's denial of *McCleskey*'s claim was not based on the deficiency of the Baldus Study, but on his inability to develop a remedy capable of curing capital sentencing of racial influences.¹⁸⁴ Justice Powell found the more familiar equal protection remedy, fashioned in jury venire and Title VII cases,¹⁸⁵ unworkable when applied to discriminatory

influence into jury decisions, and did not warrant finding a constitutional violation. *See id.*

¹⁸¹ In a particularly embarrassing argument, the Court invoked a slippery slope argument that likened racial discrimination in capital sentencing to discrepancies based on "the defendant's facial characteristics, or the physical attractiveness of the defendant or the victim that some statistical study indicates may be influential in jury decisionmaking." *McCleskey*, 481 U.S. at 317-18. For further analysis of the "slovenly judicial analysis" in *McCleskey*, see Kennedy, *supra* note 8, at 1408-21.

¹⁸² Mary Elizabeth Holland gave an insightful analysis of the Court's failings on both scores. *See* Holland, *supra* note 8, at 1067-68. As she noted, the Court responded to *McCleskey*'s Eighth Amendment argument by redefining the question the Court had left open in *Gregg*. *See id.* at 1068. When faced with statistical proof that there was a substantial risk of racial bias in the Georgia capital sentencing system, Justice Powell imported an intent requirement into his Eighth Amendment analysis, and focused instead on whether there was a risk of intentional discrimination in Warren *McCleskey*'s individual case. *See id.* Similarly, in its equal protection analysis, the Court hastily concluded that the equal protection standards applied in its employment and housing discrimination cases were inapplicable to decisions in the criminal justice system, but proceeded to ignore the standard it had created in *Casteneda v. Partida*, 430 U.S. 482 (1977), and had applied in *Batson* to jury selection decisions in criminal cases. *See id.* at 1064.

¹⁸³ As Professor Randall Kennedy has noted, "[o]ne of the most interesting features of the Court's *McCleskey* opinion is its oscillation between candor and obfuscation." Kennedy, *supra* note 8, at 1413.

¹⁸⁴ *See id.* at 1414-16 (discussing *McCleskey* in the context of other race discrimination cases in which "[a]pprehensions over perceived remedial costs have prompted the Court . . . to narrow the definition of violations").

¹⁸⁵ Justice Powell rejected the application of previous cases that permitted a finding of discriminatory intent based solely on statistical proof of a somewhat less than "stark" pattern that the Court had applied in jury venire cases. *See McCleskey*, 481 U.S. at 293-94 (discussing *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *Casteneda v. Partida*, 430 U.S. 482 (1977); *Turner v. Fouche*, 396 U.S. 346 (1970); *Whitus v. Georgia*, 385 U.S. 545 (1967)). He also rejected application of a Title VII standard that had allowed the use of multiple-regression analysis to prove discrimination. *McCleskey*, 481

sentencing, due to the many discretionary decisions in the criminal justice system leading up to the sentencing stage.¹⁸⁶ Ultimately, Justice Powell could see no way to remedy racial discrimination other than by eliminating discretion.¹⁸⁷ Like Justice Harlan in *McGautha*, Justice Powell's solution was to surrender and accept that a certain level of racism would always exist in the criminal justice system. Unlike Justice Harlan, however, Justice Powell was willing to openly admit his remedial paralysis, conceding that "[a]pparent discrepancies in sentencing are an inevitable part of our criminal justice system," even discrepancies "that appear[] to correlate with race."¹⁸⁸

B. THE COURT'S LOST STRUGGLE

In *McCleskey*, and throughout its death penalty jurisprudence, the Burger Court was unable to fashion a remedy for racism due to its unwillingness to strip the criminal justice system of discretion. Instead of acknowledging the limits of its remedial power, and seeking to use it as effectively as it could, the Burger Court vacillated between the poles of what existentialists would call "angst," which I call remedial paralysis, and "bad faith." Typically, the Court either fell prey to its disbelief that a permanent solution to the problem of racism in capital sentencing could be found, or it deluded itself into accepting that the partial remedies it had created were sufficient to cleanse the system of racial taint. Either way, the result was a lack of motivation to continue the

U.S. 294 (discussing *Bazemore v. Friday*, 478 U.S. 385 (1986)).

¹⁸⁶ See *McCleskey*, 481 U.S. at 295 n.14. Unlike the decisions of an employer or a jury commissioner, Justice Powell observed that the death sentencing decision relied on numerous variables with "no common standard by which to evaluate all defendants." *Id.* Moreover, the statistics did not demonstrate a pattern of discriminatory decision-making by a single entity. See *id.* at 295. Instead, the statistics reflected the "combined effects of the decisions of hundreds of juries that are unique in their composition." *Id.* at 295 n.15. Additionally, unlike jury selection and employment situations where the decisionmaker is given the opportunity to rebut the statistical pattern by showing that a particular decision is justified, in death penalty cases this is not only impossible, but unnecessary. See *id.* at 296. The fact that the defendant committed a capital crime will always be a "legitimate and unchallenged" reason for imposing the death sentence. See *id.* at 296-97.

¹⁸⁷ See *id.* at 311-12 (quoting *Gregg v. Georgia*, 428 U.S. 153, 200 n.50 (1976)) ("McCleskey's argument that the Constitution condemns the discretion allowed decisionmakers in the Georgia capital sentencing system is antithetical to the fundamental role of discretion in our criminal justice system . . . [and] a capital punishment system that did not allow for discretionary acts of leniency 'would be totally alien to our notions of criminal justice.'").

¹⁸⁸ *Id.* at 312.

struggle to rid capital sentencing of racism.

Remedial paralysis was the Court's first response.¹⁸⁹ By the time *McGautha* was decided, *Maxwell v. Bishop* had faced the Court with the reality of racism in discretionary death sentencing. Further, the history of failed attempts to control capital sentencing had convinced Justice Harlan that capital juries would inevitably exercise discretion, despite the most well-intended efforts to guide or control them. The Court settled for ratifying the status quo because it was unable to formulate a remedy to eliminate racism due to the pervasiveness of discretion. In *Furman*, the Court went to the other extreme when it abolished the death penalty because the problem of discriminatory executions seemed insoluble.¹⁹⁰ Neither resignation nor abolition, however, solved the problem meaningfully. Both approaches failed to provide the Court with any legal mechanism by which to identify and remedy the way racism intruded into discretionary decision-making, not only in the death penalty context, but throughout the criminal justice system. Both were products of remedial paralysis.

The Court's half-hearted abolition in *Furman* was met with overwhelming public resistance.¹⁹¹ In response, the Burger Court was forced to manufacture a belief in a capital sentencing system that could not fall prey to the influence of racism.¹⁹² In *Gregg*, and the other guided discretion cases, the Burger Court rediscovered the importance of discretion in death sentencing, and recognized its link to fairness in the criminal justice system.¹⁹³ At that point, discretion was not merely inevitable, as it had been in *McGautha*, rather, it was a desirable feature of the criminal justice system as well. The Court, however, did not attempt to balance its protection of discretion with its desire to eliminate racism. Instead, the Court ignored the potential problems inherent in guided discretion statutes, and assumed, in bad faith, that its procedural remedies had solved the problem of racism until proven otherwise.¹⁹⁴ With these self-imposed blinders securely in place, the Burger Court drifted from grounding its individualized sentencing principle within a larger concern for reliable sentencing, back to a romanticized view of capital sentencing juries as neutral ar-

¹⁸⁹ See discussion *supra* Part I.A.

¹⁹⁰ See discussion *supra* Part I.B.

¹⁹¹ See *supra* note 85 and accompanying text.

¹⁹² See discussion *supra* Part II.A.

¹⁹³ See discussion *supra* Part II.A.

¹⁹⁴ See discussion *supra* Part II.B.

biters of community values.¹⁹⁵

Cold statistics brought the Burger Court back to reality as it struggled to find some way to regulate sentencing discretion to control racial bias.¹⁹⁶ The jury selection cases, *Batson* and *Turner*, were the Burger Court's answer.¹⁹⁷ They created procedural remedies to bar biased jurors from participating in the capital sentencing decision. Both were limited remedies, however, and held little promise of eliminating racism entirely. Falling prey to its existential "bad faith," however, the Court permitted the existence of these remedies to smooth the way for its defection in *McCleskey* from its long-fought struggle to make the death penalty racially just.¹⁹⁸ By the time it penned *McCleskey*, however, the Court was barely fooling itself. The Court was defeated by its realization that the problem of racism in the administration of justice was insoluble. Unable to find a remedy that could solve the problem, the court surrendered to remedial paralysis and refused to recognize a constitutional violation.¹⁹⁹ When confronted with the evidence that confirmed its suspicions in *Furman* and belied its assumptions in *Gregg*, the Court found itself simply unable to act.²⁰⁰

Perhaps the Court could have responded differently by succumbing neither to the bad faith of denial, nor to remedial paralysis. As Professor Derrick Bell has suggested, existential theory provides the means to persevere in struggle, while recognizing that the efforts are bound to ultimately fail.²⁰¹ This existen-

¹⁹⁵ See discussion *supra* Part II.B.

¹⁹⁶ See *supra* notes 152-53 and accompanying text.

¹⁹⁷ See discussion *supra* Part II.C.

¹⁹⁸ See discussion *supra* Part III.A.

¹⁹⁹ See discussion *supra* Part III.A.

²⁰⁰ We now know how close the Court came to abolishing the death penalty in *McCleskey*, but such abolition would have been due to the Court's weariness rather than its remedial effort. After his retirement, Justice Powell stated that *McCleskey v. Kemp* was the one opinion that he most regretted in his career as a Supreme Court justice. See JEFFRIES, *supra* note 13, at 451. According to his biographer, however, Justice Powell had not changed his mind about *McCleskey*'s statistical argument, or come to believe that capital punishment was intrinsically wrong. See *id.* at 452. Instead, Justice Powell learned, through his tenure on the Court, that the death penalty would never be applied routinely. See *id.* Justice Powell believed it would always command the special attention of judges and attorneys, and the Court would never be free of last-minute applications for stays of execution and eleventh-hour challenges. See *id.* at 453. It offended Justice Powell's sense of law's majesty and dignity that sentences imposed by state courts could not be carried out without the seemingly endless litigation that attended each death penalty decision. See *id.*

²⁰¹ See BELL, *FACES*, *supra* note 1, at xi.

tial ethic of revolt is captured in the writings of Albert Camus, and it points the way to a possible alternative response for the Burger Court.

C. THE EXISTENTIAL ETHIC OF REVOLT: COMMITMENT TO AN UNREACHABLE GOAL, AND THE CREATION OF INCREMENTAL REMEDIES

Existentialists insist that one should continue to struggle in angst.²⁰² Existentialists do not view angst as something to escape from, rather, they view it as an opportunity.²⁰³ Existentialists believe that by shattering one's beliefs about oneself and the world, one gains the freedom to choose one's own values.²⁰⁴ According to existentialists, to escape into bad faith is to be in the continual process of running away from oneself.²⁰⁵ Existentialists believe that only by turning, facing, and embracing the angst can one lead a life of integrity.²⁰⁶

Albert Camus was an existentialist writer who most vehemently and consistently advanced an ethic of revolt, by finding integrity in the continued struggle

²⁰² See WARNOCK, *EXISTENTIALISM*, *supra* note 22, at 1-2 ("[F]or Existentialists, uniquely, the problem of freedom is in a sense a practical problem. They aim, above all, to show people *that they are free*, to open their eyes to something which has always been true, but which for one reason or another may not always have been recognized, namely that men are free to choose, not only what to do on a specific occasion, but what to value and how to live.") (emphasis in the original).

²⁰³ See *id.* at 2; see also SANBORN, *supra* note 22, at 103 ("[T]he experience of anguish is also a sign of man's growth towards being. The person who does not experience anguish is spiritless, stagnating in false contentment. When he experiences anguish, salvation becomes possible because it is through anguish that he recognizes the force and extent of his freedom.")

²⁰⁴ See SANBORN, *supra* note 22, at 103; see also Heidegger, *supra* note 37, at 251 ("Only in the clear night of dread's Nothingness is what-is as such revealed in all its original overtness (Offenheit): that it 'is' and is not Nothing . . . Only on the basis of the original manifestations of Nothing can our human Da-sein advance and enter into what-is . . . Without the original manifest character of Nothing there is no self-hood and no freedom."). But see Steven L. Winter, *Human Values in a Postmodern World*, 6 YALE J.L. & HUMAN. 233 (1994) (arguing that the awareness of contingency that is central to postmodern thought provides constraint, rather than freedom, because contingency arises from a multiplicity of sources of meaning, rather than a loss of all foundations).

²⁰⁵ See BELL, *SARTRE'S ETHICS*, *supra* note 87, at 44 (discussing Sartre's conception of bad faith as attempting to "flee what it cannot flee, to flee what it is").

²⁰⁶ See *id.* at 45-46 ("An authentic individual recognizes the ambiguity of the human situation. Those in bad faith tend to deny this ambiguity by postulating as absolute only one side of the ambiguity, thereby denying the other. Authenticity, therefore, is the recovery—the awareness and acceptance of—this basic ambiguity.").

to find meaning, without being blinded by the futility of that task.²⁰⁷ The existential ethic of revolt is exemplified in Camus' treatment of the Greek myth of Sisyphus wherein Sisyphus was cursed by the gods to roll a heavy rock to the top of a mountain.²⁰⁸ Every time Sisyphus reached the top of the mountain, the rock would roll back down.²⁰⁹ For all eternity, Sisyphus was condemned to engage in this "futile and hopeless labor."²¹⁰ Despite his futile effort, Camus imagined Sisyphus happy²¹¹ because Sisyphus, conscious of his fate, had the ability to affirm it. By doing so, Camus said, "[h]is fate belongs to him. His rock is his thing."²¹² By making the project of rolling the rock his own and by embracing its futility, Sisyphus created his own integrity.

In attempting to eradicate the influence of racism from capital sentencing cases, perhaps the Burger Court could have adopted an existential ethic of revolt, similar to that embraced by Camus, by putting its shoulder to the rock and ascending the hill of remedy, despite the inevitability that the gravity of racism would repeatedly nullify its efforts. An existential ethic would have required the Court to simultaneously accept the two premises that continually threw it into remedial paralysis. The first premise was that none of the procedural remedies available to the Court could completely eradicate racism. The second premise was that, nonetheless, racism in the operation of the criminal justice system, especially in death sentencing, was unacceptable and unconstitutional.

²⁰⁷ Albert Camus wrote:

[Revolt] is a constant confrontation between man and his own obscurity That revolt gives life its value. Spread out over the whole length of a life, it restores majesty to that life. To a man devoid of blinders, there is no finer sight than that of the intelligence at grips with a reality that transcends it. The sight of human pride is unequalled. No disparagement of it is of any use. That discipline that the mind imposes on itself, that will conjured up out of nothing, that face-to-face struggle have something exceptional about them. To impoverish that reality whose inhumanity constitutes man's majesty is tantamount to impoverishing him himself.

Camus, *Absurd Reasoning*, *supra* note 3, at 40-41.

²⁰⁸ See Albert Camus, *The Myth of Sisyphus*, reprinted in *THE MYTH OF SISYPHUS AND OTHER ESSAYS* 88 (Justin O'Brien trans., Random House 1955).

²⁰⁹ See *id.*

²¹⁰ *Id.*

²¹¹ See *id.* at 91.

²¹² *Id.*

Applying the ethic of revolt by viewing racism as ineradicable, the Court could not have settled for the limited procedural remedies it created, as it did in *Gregg* and arguably after *Batson* and *Turner*, or believe that the project of remedying racism in the criminal justice system would ever be completed. The Court, however, could not have thrown its hands up, as it did in *McGautha* and *McCleskey*, and declared that there was no constitutional violation. Instead, it would have had to commit itself to the project of fighting racism in the criminal justice system as an ongoing and never-ending struggle, a struggle that it could not completely win, but a struggle in which it must continue to engage, as a condition of being a court faced with an unrightable wrong.

A pure existential ethic need not be adopted, however, to reject the Burger Court's vacillation between existential bad faith and remedial paralysis because there are pragmatic benefits to the continued struggle. In Sisyphean terms, perhaps the rock does not go *all* the way to the bottom every time, and what looks like defeat may really be incremental progress up the hill. In analyzing Sartre's "ethic of authenticity," Professor Linda Bell argued that by accepting the futility of one's project, and choosing to act in knowledge of that futility, one "changes both the nature *and the outcome* of the project."²¹³ Borrowing an example from Sartre, Professor Linda Bell stated that individuals, in bad faith, try to achieve impossible goals "through magic and incantation much like one, who, in fear, magically causes by fainting the 'disappearance' of the threat."²¹⁴ Fainting, of course, does not make the threat disappear. In fact, it makes one more vulnerable to the threat. By contrast, authentic individuals who lucidly "accept and affirm the futility of their efforts to actualize their ultimate goal[s]," will continue to do what they can to accomplish their goals and will achieve consequences that are closer to their ultimate goals than individuals who, out of bad faith, deny the futility of their projects.²¹⁵

Armed with something akin to an existential ethic of revolt, the Burger Court might have found a way to continue its struggle against racism in death

²¹³ BELL, SARTRE'S ETHICS, *supra* note 87, at 122 (emphasis added). Professor Bell argued that Sartre's remarks about seriousness and play provide his solution to the problem of futility. *See id.* at 110. According to her view, the authentic individual avoids the problem of futility because he or she chooses to live by moral rules the same way people choose to follow the rules of a game. *See id.* at 113. The ability to act according to the rules comes not from a belief that the rules are logically determined or divinely ordained. *See id.* Rather, it comes from one's continuing choice to play by them. *See id.* at 115-16. By renouncing the spirit of seriousness and engaging in play, one can strive toward goals that one knows are impossible without falling prey to the paralysis of despair. *See id.* at 120.

²¹⁴ *Id.* at 128 (citing JEAN-PAUL SARTRE, THE EMOTIONS 62-63 (Bernard Frechtman trans., Philosophical Library 1948)).

²¹⁵ *Id.* at 129.

sentencing, not because it was concerned with its integrity as a court, but because it was the best way to make incremental progress toward its goal of eliminating racism in the criminal justice system as a whole. Justice Blackmun and Justice Stevens, dissenting in *McCleskey*, analyzed the Baldus statistics carefully and suggested possible remedies for the racial discrimination revealed by their analyses.²¹⁶ Justice Blackmun's and Justice Stevens' remedial proposals, rejected by the Court in *McCleskey*, demonstrate that the Court had not exhausted all possible means of combating the intrusion of racism into the death penalty decision, even with all the levels of unavoidable discretionary decision-making in the criminal justice system.²¹⁷

Justice Blackmun, in his *McCleskey* dissent, pointed out that, contrary to the majority's conclusion that equal protection analysis was inappropriate and unworkable in the capital sentencing context, a prosecutor is the moving force in many intervening steps in the capital sentencing process and the prosecutor's decisions should be subject to review under traditional equal protection analysis.²¹⁸ Justice Blackmun seemed particularly concerned because the Fulton County district attorney's office had no guidelines to direct assistant district attorneys on how they should exercise their discretion at particular stages of a capital prosecution.²¹⁹ Justice Blackmun suggested that prosecutors could survive an equal protection challenge by developing internal guidelines for their charging decisions.²²⁰ Of course, as in *Gregg* and *Batson*, the creation of such guidelines would not be a complete remedy, and these guidelines could end up providing prosecutors with constitutional cover for biased decisions. Regard-

²¹⁶ See *McCleskey v. Kemp*, 481 U.S. 279, 345 (1987) (Blackmun, J., dissenting); *id.* at 367 (Stevens, J., dissenting).

²¹⁷ See generally David C. Baldus et al., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of Its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359 (1994) (analyzing possible statistically-based equal protection standards for evaluating racial disparities in capital punishment systems).

²¹⁸ See *McCleskey*, 481 U.S. at 350 n.3 (Blackmun, J., dissenting).

²¹⁹ See *id.* at 357-58 (Blackmun, J., dissenting). The different stages at which Justice Blackmun noted the lack of guidance for the prosecutor's discretion were the decision whether to indict for a capital offense, when to accept a guilty plea to a lesser charge as part of a plea bargain, or when to seek the death penalty for a convicted offender. See *id.* at 357 (Blackmun, J., dissenting).

²²⁰ See *id.* at 365 (Blackmun, J., dissenting) (stating that "the establishment of guidelines for Assistant District Attorneys as to the appropriate basis for exercising their discretion at the various steps in the prosecution of a case would provide at least a measure of consistency").

less, it would have been an incremental step in the right direction.²²¹

Justice Stevens, joined by Justice Blackmun in his *McCleskey* dissent, proposed a different remedy to limit racism in capital sentencing.²²² Justice Stevens admitted that the Baldus Study revealed that there was a “strong possibility” that, in *McCleskey*’s case, the jury’s expression of “the community’s outrage” had been fueled by the fact that *McCleskey* was black and his victim was white.²²³ Justice Stevens, however, further noted that the Baldus statistics revealed that “there exist certain categories of extremely serious crimes for which prosecutors consistently seek and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender.”²²⁴ If the death penalty were limited to the most serious crimes, Justice Stevens argued, the problem of racism in death sentencing would be greatly reduced.²²⁵ Of course, as Justice Harlan pointed out in *McGautha*, it is difficult to identify and codify these most serious categories of crime before the fact.²²⁶ The Burger Court had already applied a rough approximation of this task in 1977, however, when it invalidated the death penalty as applied to rape cases in *Coker v. Georgia*. In *McCleskey*, the Court was given another opportunity to do what it failed to do in *Coker*, to explicitly tie a categorical abolition of the death penalty in a certain class of cases to a well-documented showing of racial

²²¹ But see Kennedy, *supra* note 8, at 1435. Professor Randall Kennedy pointed out the difficulty of creating guidelines for prosecutors, noting that “[i]n light of the failure of statutory guidelines that supposedly channel juror discretion, it is difficult to imagine instructions to prosecutors that would compel, or even facilitate, the consistency that Justice Blackmun envisions.” *Id.*

Just before retiring, however, Justice Blackmun gave in to remedial paralysis, concluding that “no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies.” *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting). Justice Blackmun declared, in true remedial paralysis, that the death penalty must be abolished because balancing the constitutional goal of eliminating arbitrariness and discrimination with the goal of individualized sentencing was “a futile effort.” *Id.* Justice Blackmun, however, seemed to be equally motivated by frustration with the Court’s unwillingness to continue to tackle the issue, as demonstrated by its retreat in the area of federal review of state death sentences. See *id.* at 1149-50.

²²² See *McCleskey*, 481 U.S. at 366 (Stevens, J., dissenting).

²²³ *Id.*

²²⁴ *Id.* at 367 (Stevens, J., dissenting).

²²⁵ See *id.*

²²⁶ See *supra* note 41; see also Kennedy, *supra* note 8, at 1431-33.

discrimination, and thereby create a constitutional test that looked toward the future.²²⁷

By adopting one, or both, of the remedies suggested by Justice Blackmun and Justice Stevens, the Court could have remained engaged in its struggle against the influence of racism in death penalty cases, as long as it remained aware of the existential bad faith and remedial paralysis pitfalls.²²⁸ While the Court achieved incremental progress with the remedies it deployed in *Gregg*, *Coker*, *Batson*, and *Turner*, the problem was that the Burger Court lacked the existential ethic of lucid commitment to a goal that it knew was unattainable. By relying on the bad faith belief that these incremental steps had solved the problem of racism completely, the Court repeatedly hesitated to openly express its motivation for the incremental steps it took, and denied the possibility that it would eventually have to face the kind of statistics that Warren McCleskey presented. As a consequence, the Burger Court did not hold fast to the incremental progress it had made, and ended its struggle by giving up the fight.

IV. CONCLUSION

Existential theory provides a theoretical and philosophical basis for continued struggle in what seems like a useless battle. Viewed through the existential lens, it is apparent that the Burger Court desperately needed an impetus, such as Camus' ethic of revolt, to continue making incremental progress toward the goal of racial justice, while remaining free of a blind existential "bad faith" in the remedies it created. The incremental remedies that the Court was capable of providing could not "cure" the criminal justice system of racism. Had the Court found the integrity to remain true to its remedial function, however, even

²²⁷ Other commentators have suggested alternative responses. Professor Carol Steiker and Professor Jordan Steiker, while remaining "profoundly agnostic" on whether other ways of rationalizing capital punishment might have worked, have suggested that there were at least two "roads not taken" by the Burger Court, focusing on substantive outcomes, or applying a "super due process" model to death penalty decisions. See Steiker & Steiker, *supra* note 140, at 403-04, 414-26. Professor Randall Kennedy attempted to respond to death penalty supporters, arguing that the Court could have adopted a "level-up" solution in *McCleskey*, by suspending executions in a state until that state could show that statistically proven racial disparities had been eliminated. See Kennedy *supra* note 8, at 1436.

²²⁸ I do not mean to suggest that abolition could not have been the remedy chosen by the Court. But to have integrity as a remedy, abolition should come packaged in a way that makes it applicable to other sanctions that suffer from the same maladies as the death penalty. If racist application is the vice, then other penalties where race can be isolated and statistically proven to be a significant factor should also fall. Abolition, however, should not arise from the desperate surrender due to an inability to fashion an adequate remedy, as I have argued that the Court did in *Furman*.

in the face of what seemed like insurmountable odds, the Court might have been able to inch its rock up the hill, rather than leave it abandoned, in despair, at the bottom.

