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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Stevens
Justice O'Connor
Justice Scalia

From: **Justice Powell**

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6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-6811

WARREN McCLESKEY, PETITIONER *v.* RALPH
KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC
AND CLASSIFICATION CENTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

[April —, 1987]

JUSTICE POWELL delivered the opinion of the Court.

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

I

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

door. As he was walking down the center aisle of the store, two shots were fired. Both struck the officer. One hit him in the face and killed him.

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

The jury convicted McCleskey of murder.¹ At the penalty hearing,² the jury heard arguments as to the appropriate sentence. Under Georgia law, the jury could not consider imposing the death penalty unless it found beyond a reasonable doubt that the murder was accompanied by one of the statutory aggravating circumstances. Ga. Code Ann.

¹ The Georgia Code has been revised and renumbered since McCleskey's trial. The changes do not alter the substance of the sections relevant to this case. For convenience, references in this opinion are to the current sections.

The Georgia Code contains only one degree of murder. A person commits murder "when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being." Ga. Code Ann. § 16-5-1(a) (1984). A person convicted of murder "shall be punished by death or by imprisonment for life." § 16-5-1(d).

² Georgia Code Ann. § 17-10-2(c) (1982) provides that when a jury convicts a defendant of murder, "the court shall resume the trial and conduct a presentence hearing before the jury." This subsection suggests that a defendant convicted of murder always is subjected to a penalty hearing at which the jury considers imposing a death sentence. But as a matter of practice, penalty hearings seem to be held only if the prosecutor affirmatively seeks the death penalty. If he does not, the defendant receives a sentence of life imprisonment. See Baldus, Pulaski, & Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. Crim. L. & C. 661, 674, n. 56 (1983).

§ 17-10-30(c) (1982).³ The jury in this case found two aggravating circumstances to exist beyond a reasonable doubt: the murder was committed during the course of an armed robbery, § 17-10-30(b)(2); and the murder was committed upon a peace officer engaged in the performance of his duties, § 17-10-30(b)(8). In making its decision whether to impose the death sentence, the jury considered the mitigating and aggravating circumstances of McCleskey's conduct.

³ A jury cannot sentence a defendant to death for murder unless it finds that one of the following aggravating circumstances exists beyond a reasonable doubt:

"(1) The offense . . . was committed by a person with a prior record of conviction for a capital felony;

"(2) The offense . . . was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree;

"(3) The offender, by his act of murder . . . knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

"(4) The offender committed the offense . . . for himself or another, for the purpose of receiving money or any other thing of monetary value;

"(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor, or former district attorney or solicitor was committed during or because of the exercise of his official duties;

"(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

"(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

"(8) The offense . . . was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties;

"(9) The offense . . . was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or

"(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another." § 17-10-30(b).

§ 17-10-2(c). McCleskey offered no mitigating evidence. The jury recommended that he be sentenced to death on the murder charge and to consecutive life sentences on the armed robbery charges. The court followed the jury's recommendation and sentenced McCleskey to death.⁴

On appeal, the Supreme Court of Georgia affirmed the convictions and the sentences. *McCleskey v. State*, 245 Ga. 108, 263 S. E. 2d 146 (1980). This Court denied a petition for a writ of certiorari. *McCleskey v. Georgia*, 449 U. S. 891 (1980). The Superior Court of Fulton County denied McCleskey's extraordinary motion for a new trial. McCleskey then filed a petition for a writ of habeas corpus in the Superior Court of Butts County. After holding an evidentiary hearing, the Superior Court denied relief. *McCleskey v. Zant*, No. 4909 (Apr. 8, 1981). The Supreme Court of Georgia denied McCleskey's application for a certificate of probable cause to appeal the Superior Court's denial of his petition, No. 81-5523, and this Court again denied certiorari. *McCleskey v. Zant*, 454 U. S. 1093 (1981).

McCleskey next filed a petition for a writ of habeas corpus in the federal District Court for the Northern District of Georgia. His petition raised 18 claims, one of which was that the Georgia capital sentencing process is administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments to the United States Constitution. In support of his claim, McCleskey proffered a statistical study performed by Professors David C. Baldus, George Woodworth, and Charles Pulanski, (the Baldus study) that purports to show a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant. The Baldus study is actually two sophisticated statistical studies that examine over 2,000 murder cases that occurred in Georgia

⁴Georgia law provides that "[w]here a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death." § 17-10-31.

during the 1970s. The raw numbers collected by Professor Baldus indicate that defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases. The raw numbers also indicate a reverse racial disparity according to the race of the defendant: 4% of the black defendants received the death penalty, as opposed to 7% of the white defendants.

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

Baldus subjected his data to an extensive analysis, taking account of 230 variables that could have explained the disparities on nonracial grounds. One of his models concludes that, even after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks. According to this model, black defendants were 1.1 times as likely to receive a death sentence as other defendants. Thus, the Baldus study indicates that black defendants, such as McCleskey, who kill white victims have the greatest likelihood of receiving the death penalty.⁵

⁵ Baldus's 230-variable model divided cases into eight different ranges, according to the estimated aggravation level of the offense. Baldus argued in his testimony to the District Court that the effects of racial bias were most striking in the mid-range cases. "[W]hen the cases become tre-

The District Court held an extensive evidentiary hearing on McCleskey's petition. Although it believed that McCleskey's Eighth Amendment claim was foreclosed by the Fifth Circuit's decision in *Spinkellink v. Wainwright*, 578 F. 2d 582, 612-616 (1978), cert. denied, 440 U. S. 976 (1979), it nevertheless considered the Baldus study with care. It concluded that McCleskey's "statistics do not demonstrate a prima facie case in support of the contention that the death penalty was imposed upon him because of his race, because of the race of the victim, or because of any Eighth Amendment concern." *McCleskey v. Zant*, 580 F. Supp. 338, 379 (ND Ga. 1984). As to McCleskey's Fourteenth Amendment claim, the court found that the methodology of the Baldus study was flawed in several respects.⁶ Because of these de-

mendously aggravated so that everybody would agree that if we're going to have a death sentence, these are the cases that should get it, the race effects go away. It's only in the mid-range of cases where the decision makers have a real choice as to what to do. If there's room for the exercise of discretion, then the [racial] factors begin to play a role." App. 36. Under this model, Baldus found that 14.4% of the black-victim mid-range cases received the death penalty, and 34.4% of the white-victim cases received the death penalty. See Exhibit DB 90, reprinted in Supplemental Exhibits 54. According to Baldus, the facts of McCleskey's case placed it within the mid-range. App. 45-46.

⁶Baldus, among other experts, testified at the evidentiary hearing. The District Court "was impressed with the learning of all of the experts." 580 F. Supp., at 353 (emphasis omitted). Nevertheless, the District Court noted that in many respects the data were incomplete. In its view, the questionnaires used to obtain the data failed to capture the full degree of the aggravating or mitigating circumstances. *Id.*, at 356. The Court criticized the researcher's decisions regarding unknown variables. *Id.*, at 357-358. The researchers could not discover whether penalty trials were held in many of the cases, thus undercutting the value of the study's statistics as to prosecutorial decisions. *Id.*, at 359. In certain cases, the study lacked information on the race of the victim in cases involving multiple victims, on whether or not the prosecutor offered a plea bargain, and on credibility problems with witnesses. *Id.*, at 360. The court concluded that McCleskey had failed to establish by a preponderance of the evidence that the data was trustworthy. "It is a major premise of a statistical case

fects, the Court held that the Baldus Study "fail[ed] to contribute anything of value" to McCleskey's claim. *Id.*, at 372 (emphasis omitted). Accordingly, the Court dismissed the petition.

The Court of Appeals for the Eleventh Circuit, sitting en banc, carefully reviewed the District Court's decision on McCleskey's claim. 753 F. 2d 877 (1985). It assumed the validity of the study itself and addressed the merits of McCleskey's Eighth and Fourteenth Amendment claims. That is, the court assumed that the study "showed that systematic and substantial disparities existed in the penalties imposed upon homicide defendants in Georgia based on race of the homicide victim, that the disparities existed at a less substantial rate in death sentencing based on race of defend-

that the data base numerically mirrors reality. If it does not in substantial degree mirror reality, any inferences empirically arrived at are untrustworthy." *Ibid.*

The District Court noted other problems with Baldus' methodology. First, the researchers assumed that all of the information available from the questionnaires was available to the juries and prosecutors when the case was tried. The court found this assumption "questionable." *Id.*, at 361. Second, the court noted the instability of the various models. Even with the 230-variable model, consideration of 20 further variables caused a significant drop in the statistical significance of race. In the court's view, this undermined the persuasiveness of the model that showed the greatest racial disparity, the 39-variable model. *Id.*, at 362. Third, the court found that the high correlation between race and many of the nonracial variables diminished the weight to which the study was entitled. *Id.*, at 363-364.

Finally, the District Court noted the inability of any of the models to predict the outcome of actual cases. As the court explained, statisticians use a measure called an " r^2 " to measure what portion of the variance in the dependent variable (death sentencing rate, in this case) is accounted for by the independent variables of the model. A perfectly predictive model would have an r^2 value of 1.0. A model with no predictive power would have an r^2 of 0. The r^2 value of Baldus' most complex model, the 230-variable model, was between .46 and .48. Thus, as the court explained, "the 230-variable model does not predict the outcome in half of the cases." *Id.*, at 361.

ants, and that the factors of race of the victim and defendant were at work in Fulton County." *Id.*, at 895. Even assuming the study's validity, the Court of Appeals found the statistics "insufficient to demonstrate discriminatory intent or unconstitutional discrimination in the Fourteenth Amendment context, [and] insufficient to show irrationality, arbitrariness and capriciousness under any kind of Eighth Amendment analysis." *Id.*, at 891. The court noted:

"The very exercise of discretion means that persons exercising discretion may reach different results from exact duplicates. Assuming each result is within the range of discretion, all are correct in the eyes of the law. It would not make sense for the system to require the exercise of discretion in order to be facially constitutional, and at the same time hold a system unconstitutional in application where that discretion achieved different results for what appear to be exact duplicates, absent the state showing the reasons for the difference. . . .

"The Baldus approach . . . would take the cases with different results on what are contended to be duplicate facts, where the differences could not be otherwise explained, and conclude that the different result was based on race alone. . . . This approach ignores the realities. . . . There are, in fact, no exact duplicates in capital crimes and capital defendants. The type of research submitted here tends to show which of the directed factors were effective, but is of restricted use in showing what undirected factors control the exercise of constitutionally required discretion." *Id.*, at 898-899.

The court concluded:

"Viewed broadly, it would seem that the statistical evidence presented here, assuming its validity, confirms rather than condemns the system. . . . The marginal disparity based on the race of the victim tends to support

the state's contention that the system is working far differently from the one which *Furman* [v. *Georgia*, 408 U. S. 238 (1972)] condemned. In pre-*Furman* days, there was no rhyme or reason as to who got the death penalty and who did not. But now, in the vast majority of cases, the reasons for a difference are well documented. That they are not so clear in a small percentage of the cases is no reason to declare the entire system unconstitutional." *Id.*, at 899.

The Court of Appeals affirmed the dismissal by the District Court of McCleskey's petition for a writ of habeas corpus, with three judges dissenting as to McCleskey's claims based on the Baldus study. We granted certiorari, 478 U. S. ____ (1986), and now affirm.

II

McCleskey's first claim is that the Georgia capital punishment statute violates the Equal Protection Clause of the Fourteenth Amendment.⁷ He argues that race has infected the administration of Georgia's statute in two ways: persons who murder whites are more likely to be sentenced to death than persons who murder blacks, and black murderers are more likely to be sentenced to death than white murderers.⁸

⁷ Although the District Court rejected the findings of the Baldus study as flawed, the Court of Appeals assumed that the study is valid and reached the constitutional issues. Accordingly, those issues are before us. As did the Court of Appeals, we assume the study is valid statistically without reviewing the factual findings of the District Court. Our assumption that the Baldus study is statistically valid does not include the assumption that the study shows that racial considerations actually enter into any sentencing decisions in Georgia. Even a sophisticated multiple regression analysis such as the Baldus study can only demonstrate a *risk* that the factor of race entered into some capital sentencing decisions and a necessarily lesser risk that race entered into any particular sentencing decision.

⁸ Although McCleskey has standing to claim that he suffers discrimination because of his own race, the State argues that he has no standing to contend that he was discriminated against on the basis of his victim's race. While it is true that we are reluctant to recognize "standing to assert the

As a black defendant who killed a white victim, McCleskey claims that the Baldus study demonstrates that he was discriminated against because of his race and because of the race of his victim. In its broadest form, McCleskey's claim of discrimination extends to every actor in the Georgia capital sentencing process, from the prosecutor who sought the death penalty and the jury that imposed the sentence, to the State itself that enacted the capital punishment statute and allows it to remain in effect despite its allegedly discriminatory application. We agree with the Court of Appeals, and every other court that has considered such a challenge,⁹ that this claim must fail.

A

Our analysis begins with the basic principle that a defendant who alleges an equal protection violation has the burden of proving "the existence of purposeful discrimination."

rights of third persons," *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 263 (1977), this does not appear to be the nature of McCleskey's claim. He does not seek to assert some right of his victim, or the rights of black murder victims in general. Rather, McCleskey argues that application of the State's statute has created a classification that is "an irrational exercise of governmental power," Brief for Petitioner 41, because it is not "necessary to the accomplishment of some permissible state objective." *Loving v. Virginia*, 388 U. S. 1, 11 (1967). See *McGowan v. Maryland*, 366 U. S. 420, 425 (1961) (statutory classification cannot be "wholly irrelevant to the achievement of the State's objective"). It would violate the Equal Protection Clause for a State to base enforcement of its criminal laws on "an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles*, 368 U. S. 448, 456 (1962). See *Cleveland Bd. of Ed. v. LaFleur*, 414 U. S. 632, 652-653 (1974) (POWELL, J., concurring). Because McCleskey raises such a claim, he has standing.

⁹ See, e. g., *Shaw v. Martin*, 733 F. 2d 304, 311-314 (CA4), cert. denied, 469 U. S. 873 (1984); *Adams v. Wainwright*, 709 F. 2d 1443 (CA11 1983) (*per curiam*), cert. denied, 464 U. S. 1063 (1984); *Smith v. Balkcom*, 660 F. 2d 573, 584-585 (CA5 Unit B 1981), modified, 671 F. 2d 858, 859-860 (CA5) (*per curiam*), cert. denied, 459 U. S. 882 (1982); *Spinkellink v. Wainwright*, 578 F. 2d 582, 612-616 (CA5 1978), cert. denied, 440 U. S. 976 (1979).

Whitus v. Georgia, 385 U. S. 545, 550 (1967).¹⁰ A corollary to this principle is that a criminal defendant must prove that the purposeful discrimination "had a discriminatory effect" on him. *Wayte v. United States*, 470 U. S. 598, 608 (1985). Thus, to prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence. Instead, he relies solely on the Baldus study. McCleskey argues that the Baldus study compels an inference that his sentence rests on purposeful discrimination. McCleskey's claim that these statistics are sufficient proof of discrimination, without regard to the facts of a particular case, would extend to all capital cases in Georgia, at least where the victim was white and the defendant is black.

The Court has accepted statistics as proof of intent to discriminate in certain limited contexts. First, this Court has accepted statistical disparities as proof of an equal protection violation in the selection of the jury venire in a particular district. Although statistical proof normally must present a "stark" pattern to be accepted as the sole proof of discriminatory intent under the Constitution,¹¹ *Arlington Heights v.*

¹⁰ See *Arlington Heights v. Metropolitan Housing Dev. Corp.*, *supra*, at 265; *Washington v. Davis*, 426 U. S. 229, 240 (1976).

¹¹ *Gomillion v. Lightfoot*, 364 U. S. 339 (1960), and *Yick Wo v. Hopkins*, 118 U. S. 356 (1886), are examples of those rare cases in which a statistical pattern of discriminatory impact demonstrated a constitutional violation. In *Gomillion*, a state legislature violated the Fifteenth Amendment by altering the boundaries of a particular city "from a square to an uncouth twenty-eight-sided figure." 364 U. S., at 340. The alterations excluded 395 of 400 black voters without excluding a single white voter. In *Yick Wo*, an ordinance prohibited operation of 310 laundries that were housed in wooden buildings, but allowed such laundries to resume operations if the operator secured a permit from the government. When laundry operators applied for permits to resume operation, all but one of the white applicants received permits, but none of the over 200 Chinese applicants were successful. In those cases, the Court found the statistical disparities "to war-

Metropolitan Housing Dev. Corp., 429 U. S. 252, 266 (1977), "[b]ecause of the nature of the jury-selection task, . . . we have permitted a finding of constitutional violation even when the statistical pattern does not approach [such] extremes." *Id.*, at 266, n. 13.¹² Second, this Court has accepted statistics in the form of multiple regression analysis to prove statutory violations under Title VII. *Bazemore v. Friday*, 478 U. S. —, — (1986) (opinion of BRENNAN, J., concurring in part).

But the nature of the capital sentencing decision, and the relationship of the statistics to that decision, are fundamentally different from the corresponding elements in the venire-selection or Title VII cases. Most importantly, each particular decision to impose the death penalty is made by a petit jury selected from a properly constituted venire.¹³

rant and require," *Yick Wo v. Hopkins*, *supra*, at 373, a "conclusion [that was] irresistible, tantamount for all practical purposes to a mathematical demonstration," *Gomillion v. Lightfoot*, *supra*, at 341, that the State acted with a discriminatory purpose.

¹² See, e. g., *Castaneda v. Partida*, 430 U. S. 482, 495 (1977) (2 to 1 disparity between Mexican-Americans in county population and those summoned for grand jury duty); *Turner v. Fouche*, 396 U. S. 346, 359 (1970) (1.6 to 1 disparity between blacks in county population and those on grand jury lists); *Whitus v. Georgia*, 385 U. S. 545, 552 (1967) (3 to 1 disparity between eligible blacks in county and blacks on grand jury venire).

¹³ JUSTICE BLACKMUN's conclusion that "[t]he Court treats the case as if it is limited to challenges to the actions of two specific decisionmaking bodies—the petit jury and the state legislature," *post*, at — (slip op., at 6), is incorrect. While the fact that the Baldus study seeks to measure and quantify the decisions of hundreds of uniquely composed juries is "[m]ost importan[t]" to our analysis, see *supra*, this page, our decision does not overlook McCleskey's challenge to the exercise of prosecutorial discretion. We note that "McCleskey's claim of discrimination extends to . . . the prosecutor who sought the death penalty," *ante*, at — (slip op., at 10), that compelling policy considerations make clear the inadvisability of requiring prosecutor's to justify their decisions, *post*, at — (slip op., at 14), and that implementation of the criminal laws necessarily requires a wide measure of prosecutorial discretion, *post*, at — (slip. op., at 16). These con-

Each jury is unique in its composition, and the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense. See *Hitchcock v. Wainwright*, ante, at —; *Lockett v. Ohio*, 438 U. S. 586, 602–605 (1978) (plurality opinion of Burger, C. J.). Thus, the application of an inference drawn from the general statistics to a specific decision in a trial and sentencing simply is not comparable to the application of an inference drawn from general statistics to a specific venire-selection or Title VII case. In those cases, the statistics relate to fewer entities, and fewer variables are relevant to the challenged decisions.¹⁴

siderations indicate that McCleskey has failed to establish a prima facie case of discrimination.

“JUSTICE BLACKMUN ‘fail[s] to understand . . . why there would be fewer variables relevant’ to the decisions at issue in venire-selection or employment discrimination cases. *Post*, at — (slip op., at 18). In venire-selection cases, the factors that may be considered are limited, usually by state statute. See *Castaneda v. Partida*, 430 U. S., at 485 (“A grand juror must be a citizen of Texas and of the county, be a qualified voter in the county, be ‘of sound mind and good moral character,’ be literate, have no prior felony conviction, and be under pending indictment ‘or other legal accusation for theft or of any felony.’”); *Turner v. Fouché*, 396 U. S., at 354 (jury commissioners may exclude any not ‘upright’ and ‘intelligent’ from grand jury service); *Whitus v. Georgia*, 385 U. S., at 548 (same). These considerations are uniform for all potential jurors, and although some factors may be said to be subjective, they are limited and, to a great degree, objectively verifiable. While employment decisions may involve a number of relevant variables, these variables are to a great extent uniform for all employees because they must all have a reasonable relationship to the employee’s qualifications to perform the particular job at issue. Identifiable qualifications for a single job provide a common standard by which to assess each employee. In contrast, a capital sentencing jury may consider *any* factor relevant to the defendant’s background, character, and the offense. See *Eddings v. Oklahoma*, 455 U. S. 104, 112 (1982). There is no common standard by which to evaluate all defendants who have or have not received the death penalty.

JUSTICE BLACKMUN also “do[es] not understand” why the venire-selec-

Another important difference between the cases in which we have accepted statistics as proof of discriminatory intent and this case is that, in the venire-selection and Title VII contexts, the decisionmaker has an opportunity to explain the statistical disparity. See *Whitus v. Georgia*, *supra*, at 552; *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. 248, 254 (1981); *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 802 (1973). Here, the State has no practical opportunity to rebut the Baldus study. “[C]ontrolling considerations of . . . public policy,” *McDonald v. Pless*, 238 U. S. 264, 267 (1915), dictate that jurors “cannot be called . . . to testify to the motives and influences that led to their verdict.” *Chicago, B. & Q. R. Co. v. Babcock*, 204 U. S. 585, 593 (1907). Similarly, the policy considerations behind a prosecutor’s traditionally “wide discretion”¹⁵ suggest the

tion and employment decisions would be made by fewer entities. *Post*, at — (slip op., at 18). We refer here not to the number of entities involved in any particular decision, but to the number of entities whose decisions necessarily are reflected in a statistical display such as the Baldus study. The decisions of a jury commission or of an employer over time are fairly attributable to the commission or the employer. Therefore, an unexplained statistical discrepancy can be said to indicate a consistent policy of the decisionmaker. The Baldus study seeks to deduce a state “policy” by studying the combined effects of the decisions of hundreds of juries that are unique in their composition. It is incomparably more difficult to deduce a consistent policy by studying the decisions of this many unique entities. It is also questionable whether any consistent policy can be derived by studying the decisions of prosecutors. The District Attorney is elected by the voters in a particular county. See Ga. Const., Art. 6, § 7, ¶ 5. Since decisions whether to prosecute and what to charge necessarily are individualized and involve infinite factual variations, coordination among DA offices across a State would be relatively meaningless. Thus, any inference from statewide statistics to a prosecutorial “policy” is of doubtful relevance. Moreover, the statistics in Fulton County alone represent the disposition of only 17 murders. Even assuming the statistical validity of the Baldus study as a whole, the weight to be given the results gleaned from this small sample is limited.

¹⁵ See *Wayte v. United States*, 470 U. S. 598, 607 (1985); *United States v. Goodwin*, 457 U. S. 368, 380, n. 11 (1982); *Bordenkircher v. Hayes*, 434

impropriety of our requiring prosecutors to defend their decisions to seek death penalties, "often years after they were made."¹⁶ See *Imbler v. Pachtman*, 424 U. S. 409, 425-426 (1976).¹⁷ Moreover, absent far stronger proof, it is unnecessary to seek such a rebuttal, because a legitimate and unchallenged explanation for the decision is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty.¹⁸

U. S. 357, 365 (1978). See also ABA Standards for Criminal Justice 3-3.8—3-3.9 (2d ed. 1980).

¹⁶ Requiring a prosecutor to rebut a study that analyzes the past conduct of scores of prosecutors is quite different from requiring a prosecutor to rebut a contemporaneous challenge to his own acts. See *Batson v. Kentucky*, 476 U. S. — (1986).

¹⁷ Although *Imbler* was decided in the context of § 1983 damage actions brought against prosecutors, the considerations that led the Court to hold that a prosecutor should not be required to explain his decisions apply in this case as well: "if the prosecutor could be made to answer in court each time . . . a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law." 424 U. S., at 425. Our refusal to require that the prosecutor provide an explanation for his decisions in this case is completely consistent with this Court's longstanding precedents that hold that a prosecutor need not explain his decisions unless the criminal defendant presents a prima facie case of unconstitutional conduct with respect to his case. See, e. g., *Batson v. Kentucky*, *supra*; *Wayte v. United States*, *supra*.

¹⁸ In his dissent, JUSTICE BLACKMUN misreads this statement. See *post*, at — (slip op., at 5). We do not suggest that McCleskey's conviction and sentencing by a jury bears on the prosecutor's motivation. Rather, the fact that the United States Constitution and the laws of Georgia authorized the prosecutor to seek the death penalty under the circumstances of this case is a relevant factor to be weighed in determining whether the Baldus study demonstrates a constitutionally significant risk that this decision was motivated by racial considerations.

JUSTICE BLACKMUN implies that a "systematic review of . . . charging and sentencing patterns to determine whether there was a disparity in terms of racial factors" may be constitutionally required to justify prosecutorial decisions. *Post*, at — (slip op., at 14). We have never required such a burdensome and intrusive showing to justify prosecutorial decisions.

Finally, McCleskey's statistical proffer must be viewed in the context of his challenge. McCleskey challenges decisions at the heart of the State's criminal justice system. "[O]ne of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder." *Gregg v. Georgia*, 428 U. S. 153, 226 (1976) (WHITE, J., concurring). Implementation of these laws necessarily requires discretionary judgments. Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused. The unique nature of the decisions at issue in this case also counsel against adopting such an inference from the disparities indicated by the Baldus study. Accordingly, we hold that the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose.

B

McCleskey also suggests that the Baldus study proves that the State as a whole has acted with a discriminatory purpose. He appears to argue that the State has violated the Equal Protection Clause by adopting the capital punishment statute and allowing it to remain in force despite its allegedly discriminatory application. But "[d]iscriminatory purpose" . . . implies more than intent as volition or intent as aware-

If systematic reviews of prosecutorial decisionmaking in Fulton County were required to justify the imposition of any death penalty, similar reviews presumably would have to be made in the other Georgia counties, and in the counties of all other States that have a capital punishment system. If such reviews were required by the Equal Protection Clause, it is difficult to see how they could be limited to capital punishment. Prosecutorial decisions respecting all crimes and punishments could be implicated. The dissent does not suggest how frequently these reviews would be required, what standard would be used to determine whether prosecutorial decisions met constitutional requirements, or who would determine the adequacy and significance of particular reviews.

ness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Massachusetts v. Feeney*, 442 U. S. 256, 279 (1979) (footnote and citation omitted). See *Wayte v. United States*, 470 U. S. 598, 608-609 (1985). For this claim to prevail, McCleskey would have to prove that the Georgia Legislature enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect. In *Gregg v. Georgia*, 428 U. S. 153 (1976), this Court found that the Georgia capital sentencing system could operate in a fair and neutral manner. There was no evidence then, and there is none now, that the Georgia Legislature enacted the capital punishment statute to further a racially discriminatory purpose.¹⁹

Nor has McCleskey demonstrated that the legislature maintains the capital punishment statute because of the racially disproportionate impact suggested by the Baldus study. As legislatures necessarily have wide discretion in the choice of criminal laws and penalties, and as there were legitimate reasons for the Georgia Legislature to adopt and maintain capital punishment, see *Gregg v. Georgia*, *supra*, at 183-187 (joint opinion of Stewart, POWELL, and STEVENS, JJ.), we will not infer a discriminatory purpose on the part of

¹⁹ McCleskey relies on "historical evidence" to support his claim of purposeful discrimination by the State. This evidence focuses on Georgia laws in force during and just after the Civil War. Of course, the "historical background of the decision is one evidentiary source" for proof of intentional discrimination. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U. S., at 267. But unless historical evidence is reasonably contemporaneous with the challenged decision, it has little probative value. Cf. *Hunter v. Underwood*, 471 U. S. 222, 228-233 (1985) (relying on legislative history to demonstrate discriminatory motivation behind state statute). Although the history of racial discrimination in this country is undeniable, we cannot accept official actions taken long ago as evidence of current intent.

the State of Georgia.²⁰ Accordingly, we reject McCleskey's equal protection claims.

III

McCleskey also argues that the Baldus study demonstrates that the Georgia capital sentencing system violates the Eighth Amendment.²¹ We begin our analysis of this claim by reviewing the restrictions on death sentences established by our prior decisions under that Amendment.

A

The Eighth Amendment prohibits infliction of "cruel and unusual punishments." This Court's early Eighth Amendment cases examined only the "particular methods of execution to determine whether they were too cruel to pass constitutional muster." *Gregg v. Georgia*, *supra*, at 170. See *In re Kemmler*, 136 U. S. 436 (1890) (electrocution); *Wilkerson v. Utah*, 99 U. S. 130 (1879) (public shooting). Subsequently, the Court recognized that the constitutional prohibition against cruel and unusual punishments "is not fastened to the obsolete but may acquire meaning as public opin-

²⁰ JUSTICE BLACKMUN suggests that our "reliance on legitimate interests underlying the Georgia Legislature's enactment of its capital punishment statute is . . . inappropriate [because] it has no relevance in a case dealing with a challenge to the Georgia capital sentencing system *as applied* in McCleskey's case." *Post*, at — (slip. op., at 5) (emphasis in original). As the dissent suggests, this evidence is not particularly probative when assessing the application of Georgia's capital punishment system through the actions of prosecutors and juries, as we did in Part II-A, *supra*. But that is not the challenge that we are addressing here. As indicated above, the question we are addressing is whether the legislature maintains its capital punishment statute because of the racially disproportionate impact suggested by the Baldus study. McCleskey has introduced no evidence to support this claim. It is entirely appropriate to rely on the legislature's legitimate reasons for enacting and maintaining a capital punishment statute to address a challenge to the *legislature's* intent.

²¹ The Eighth Amendment applies to the States through the Due Process Clause of the Fourteenth Amendment. *Robinson v. California*, 370 U. S. 660, 667 (1962).

ion becomes enlightened by a humane justice." *Weems v. United States*, 217 U. S. 349, 378 (1910). In *Weems*, the Court identified a second principle inherent in the Eighth Amendment, "that punishment for crime should be graduated and proportioned to offense." *Id.*, at 367.

Chief Justice Warren, writing for the plurality in *Trop v. Dulles*, 356 U. S. 86, 99 (1958), acknowledged the constitutionality of capital punishment. In his view, the "basic concept underlying the Eighth Amendment" in this area is that the penalty must accord with "the dignity of man." *Id.*, at 100. In applying this mandate, we have been guided by his statement that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.*, at 101. Thus, our constitutional decisions have been informed by "contemporary values concerning the infliction of a challenged sanction," *Gregg v. Georgia*, *supra*, at 173. In assessing contemporary values, we have eschewed subjective judgment, and instead have sought to ascertain "objective indicia that reflect the public attitude toward a given sanction." *Ibid.* First among these indicia are the decisions of state legislatures, "because the . . . legislative judgment weighs heavily in ascertaining" contemporary standards, *id.*, at 175. We also have been guided by the sentencing decisions of juries, because they are "a significant and reliable objective index of contemporary values," *id.*, at 181. Most of our recent decisions as to the constitutionality of the death penalty for a particular crime have rested on such an examination of contemporary values. *E. g.*, *Enmund v. Florida*, 458 U. S. 782, 789-796 (1982) (felony murder); *Coker v. Georgia*, 433 U. S. 584, 592-597 (1977) (plurality opinion of WHITE, J.) (rape); *Gregg v. Georgia*, *supra*, at 179-182 (murder).

B

Two principal decisions guide our resolution of McCleskey's Eighth Amendment claim. In *Furman v. Georgia*, 408

U. S. 238 (1972), the Court concluded that the death penalty was so irrationally imposed that any particular death sentence could be presumed excessive. Under the statutes at issue in *Furman*, there was no basis for determining in any particular case whether the penalty was proportionate to the crime: "the death penalty [was] exacted with great infrequency even for the most atrocious crimes and . . . there [was] no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not." *Id.*, at 313 (WHITE, J., concurring).

In *Gregg*, the Court specifically addressed the question left open in *Furman*—whether the punishment of death for murder is "under all circumstances, 'cruel and unusual' in violation of the Eighth and Fourteenth Amendments of the Constitution." 428 U. S., at 168. We noted that the imposition of the death penalty for the crime of murder "has a long history of acceptance both in the United States and in England." *Id.*, at 176. "The most marked indication of society's endorsement of the death penalty for murder [was] the legislative response to *Furman*." *Id.*, at 179. During the 4-year period between *Furman* and *Gregg*, at least 35 states had reenacted the death penalty, and Congress had authorized the penalty for aircraft piracy. 428 U. S., at 179–180.²² The "actions of juries" were "fully compatible with the legislative judgments." *Id.*, at 182. We noted that any punishment might be unconstitutionally severe if inflicted without penological justification, but concluded:

"Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death pen-

²² Thirty-seven States now have capital punishment statutes that were enacted since our decision in *Furman*. Thirty-three of these States have imposed death sentences under the new statutes. NAACP Legal Defense & Educational Fund, *Death Row*, U. S. A. 1 (Oct. 1, 1986). A federal statute, amended in relevant part in 1974, authorizes the death penalty for aircraft piracy in which a death occurs. 49 U. S. C. App. § 1472(i)(1)(b).

alty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe." *Id.*, at 186-187.

The second question before the Court in *Gregg* was the constitutionality of the particular procedures embodied in the Georgia capital punishment statute. We explained the fundamental principle of *Furman*, that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." 428 U. S., at 189. Numerous features of the then new Georgia statute met the concerns articulated in *Furman*.²³ The Georgia system bifurcates guilt and sentencing proceedings so that the jury can receive all relevant information for sentencing without the risk that evidence irrelevant to the defendant's guilt will influence the jury's consideration of that issue. The statute narrows the class of murders subject to the death penalty to cases in which the jury finds at least one statutory aggravating circumstance beyond a reasonable doubt. Conversely, it allows the defendant to introduce any relevant mitigating evidence that might influence the jury not to impose a death sentence. See 428 U. S., at 163-164. The procedures also require a particularized inquiry into "the circumstances of the offense together with the character and propensities of the offender." *Id.*, at 189 (quoting *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U. S. 51, 55 (1937)). Thus, "while some jury discretion still exists, 'the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application.'" 428 U. S., at 197-198 (quoting *Coley v. State*, 231 Ga. 829,

²³ We have noted that the Georgia statute generally follows the standards of the ALI Model Penal Code § 201.6 (Prop. Off. Draft No. 13, 1961). *Gregg v. Georgia*, 428 U. S., at 194, n. 44.

834, 204 S. E. 2d 612, 615 (1974)). Moreover, the Georgia system adds "an important additional safeguard against arbitrariness and caprice" in a provision for automatic appeal of a death sentence to the State Supreme Court. 428 U. S., at 198. The statute requires that court to review each sentence to determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate to sentences imposed in generally similar murder cases. To aid the court's review, the trial judge answers a questionnaire about the trial, including detailed questions as to "the quality of the defendant's representation [and] whether race played a role in the trial." *Id.*, at 167.

C

In the cases decided after *Gregg*, the Court has imposed a number of requirements on the capital sentencing process to ensure that capital sentencing decisions rest on the individualized inquiry contemplated in *Gregg*. In *Woodson v. North Carolina*, 428 U. S. 280 (1976), we invalidated a mandatory capital sentencing system, finding that the "respect for humanity underlying the Eighth Amendment requires 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." *Id.*, at 304 (plurality opinion of Stewart, POWELL, and STEVENS, JJ.) (citation omitted). Similarly, a State must "narrow the class of murderers subject to capital punishment," *Gregg v. Georgia*, *supra*, at 196, by providing "specific and detailed guidance" to the sentencer.²⁴

²⁴ Although the Court has recognized that jury sentencing in a capital case "can perform an important societal function," *Proffitt v. Florida*, 428 U. S. 242, 252 (1976) (joint opinion of Stewart, POWELL, and STEVENS, JJ.) (citing *Witherspoon v. Illinois*, 391 U. S. 510, 519, n. 15 (1968)), it "has never suggested that jury sentencing [in a capital case] is constitutionally required." 428 U. S., at 252. Under the Florida capital punishment

Proffitt v. Florida, 428 U. S. 242, 253 (1976) (joint opinion of Stewart, POWELL, and STEVENS, JJ.).

In contrast to the carefully defined standards that must narrow a sentencer's discretion to *impose* the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence.²⁵ "[T]he sentencer . . . [cannot] be precluded from considering, as a *mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U. S., at 604 (plurality opinion of Burger, C. J.) (emphasis in original; footnote omitted). See *Skipper v. South Carolina*, 476 U. S. — (1986). Any exclusion of the "compassionate or mitigating factors stemming from the diverse frailties of humankind" that are relevant to the sentencer's decision would fail to treat all persons as "uniquely individual human beings." *Woodson v. North Carolina*, *supra*, at 304.

Although our constitutional inquiry has centered on the procedures by which a death sentence is imposed, we have not stopped at the face of a statute, but have probed the application of statutes to particular cases. For example, in *Godfrey v. Georgia*, 446 U. S. 420 (1980), the Court invalidated a Georgia Supreme Court interpretation of the statu-

system at issue in *Proffitt*, the jury's verdict is only advisory. The trial judge determines the final sentence. Unlike in Georgia, a Florida trial judge may impose the death penalty even when the jury recommends otherwise. In *Proffitt*, we found that the Florida capital sentencing procedures adequately channeled the trial judge's discretion so that the Florida system, like the Georgia system, on its face "satisfie[d] the constitutional deficiencies identified in *Furman*." *Id.*, at 253.

²⁵ We have not yet decided whether the Constitution permits a mandatory death penalty in certain narrowly defined circumstances, such as when an inmate serving a life sentence without possibility of parole commits murder. See *Shuman v. Wolff*, 791 F. 2d 788 (CA9 1986), cert. granted *sub nom.* *Sumner v. Shuman*, 479 U. S. — (1986).

tory aggravating circumstance that the murder be "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga. Code § 27-2534.1(b)(7) (1978).²⁶ Although that court had articulated an adequate limiting definition of this phrase, we concluded that its interpretation in *Godfrey* was so broad that it may have vitiated the role of the aggravating circumstance in guiding the sentencing jury's discretion.

Finally, where the objective indicia of community values have demonstrated a consensus that the death penalty is disproportionate as applied to a certain class of cases, we have established substantive limitations on its application. In *Coker v. Georgia*, 433 U. S. 584 (1977), the Court held that a State may not constitutionally sentence an individual to death for the rape of an adult woman. In *Enmund v. Florida*, 458 U. S. 782 (1982), the Court prohibited imposition of the death penalty on a defendant convicted of felony murder absent a showing that the defendant possessed a sufficiently culpable mental state. Most recently, in *Ford v. Wainwright*, 477 U. S. — (1986), we prohibited execution of prisoners who are insane.

D

In sum, our decisions since *Furman* have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit

²⁶ This section is substantially identical to the current Georgia Code Ann. § 17-10-30(b)(7) (1982), which is reprinted in n. 3, *supra*.

the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

IV

A

In light of our precedents under the Eighth Amendment, McCleskey cannot argue successfully that his sentence is "disproportionate to the crime in the traditional sense." See *Pulley v. Harris*, 465 U. S. 37, 43 (1984). He does not deny that he committed a murder in the course of a planned robbery, a crime for which this Court has determined that the death penalty constitutionally may be imposed. *Gregg v. Georgia*, 428 U. S., at 187. His disproportionality claim "is of a different sort." *Pulley v. Harris*, *supra*, at 43. McCleskey argues that the sentence in his case is disproportionate to the sentences in other murder cases.

On the one hand, he cannot base a constitutional claim on an argument that his case differs from other cases in which defendants *did* receive the death penalty. On automatic appeal, the Georgia Supreme Court found that McCleskey's death sentence was not disproportionate to other death sentences imposed in the State. *McCleskey v. State*, 245 Ga. 108, 263 S. E. 2d 146 (1980). The court supported this conclusion with an appendix containing citations to 13 cases involving generally similar murders. See Ga. Code Ann. § 17-10-35(e) (1982). Moreover, where the statutory procedures adequately channel the sentencer's discretion, such proportionality review is not constitutionally required. *Pulley v. Harris*, *supra*, at 50-51.

On the other hand, absent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, McCleskey cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty. In

Gregg, the Court confronted the argument that "the opportunities for discretionary action that are inherent in the processing of any murder case under Georgia law," *Gregg v. Georgia*, *supra*, at 199, specifically the opportunities for discretionary leniency, rendered the capital sentences imposed arbitrary and capricious. We rejected this contention:

"The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. *Furman*, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant." *Ibid.*²⁷

²⁷ The Constitution is not offended by inconsistency in results based on the objective circumstances of the crime. Numerous legitimate factors may influence the outcome of a trial and a defendant's ultimate sentence, even though they may be irrelevant to his actual guilt. If sufficient evidence to link a suspect to a crime cannot be found, he will not be charged. The capability of the responsible law enforcement agency can vary widely. Also, the strength of the available evidence remains a variable throughout the criminal justice process and may influence a prosecutor's decision to offer a plea bargain or to go to trial. Witness availability, credibility, and memory also influence the results of prosecutions. Finally, sentencing in state courts is generally discretionary, so a defendant's ultimate sentence necessarily will vary according to the judgment of the sentencing authority. The foregoing factors necessarily exist in varying degrees throughout our criminal justice system.

Because McCleskey's sentence was imposed under Georgia sentencing procedures that focus discretion "on the particularized nature of the crime and the particularized characteristics of the individual defendant," *id.*, at 206, we lawfully may presume that McCleskey's death sentence was not "wantonly and freakishly" imposed, *id.*, at 207, and thus that the sentence is not disproportionate within any recognized meaning under the Eighth Amendment.

B

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

To evaluate McCleskey's challenge, we must examine exactly what the Baldus study may show. Even Professor Baldus does not contend that his statistics *prove* that race enters into any capital sentencing decisions or that race was a factor in McCleskey's particular case.²⁸ Statistics at most may show only a likelihood that a particular factor entered into some decisions. There is, of course, some risk of racial prejudice influencing a jury's decision in a criminal case. There are similar risks that other kinds of prejudice will influence other criminal trials. See *infra*, at 28-30. The question "is at what point that risk becomes constitutionally unacceptable," *Turner v. Murray*, 476 U. S. —, —, n. 8 (1986).

²⁸ According to Professor Baldus:

"McCleskey's case falls in [a] grey area where . . . you would find the greatest likelihood that some inappropriate consideration may have come to bear on the decision.

"In an analysis of this type, obviously one cannot say that we can say to a moral certainty what it was that influenced the decision. We can't do that." App. 45-46.

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McCleskey asks us to accept the likelihood allegedly shown by the Baldus study as the constitutional measure of an unacceptable risk of racial prejudice influencing capital sentencing decisions. This we decline to do.

Because of the risk that the factor of race may enter the criminal justice process, we have engaged in "unceasing efforts" to eradicate racial prejudice from our criminal justice system. *Batson v. Kentucky*, 476 U. S. —, — (1986).²⁹ Our efforts have been guided by our recognition that "the inestimable privilege of trial by jury . . . is a vital principle, underlying the whole administration of criminal justice," *Ex parte Milligan*, 4 Wall. 2, 123 (1866). See *Duncan v. Louisiana*, 391 U. S. 145, 155 (1968).³⁰ Thus, it is the jury that is

²⁹ This Court has repeatedly stated that prosecutorial discretion cannot be exercised on the basis of race. *Wayte v. United States*, 470 U. S. 598, 608 (1985); *United States v. Batchelder*, 442 U. S. 114 (1979); *Oyler v. Boles*, 368 U. S. 448 (1962). Nor can a prosecutor exercise peremptory challenges on the basis of race. *Batson v. Kentucky*, 476 U. S. — (1986); *Swain v. Alabama*, 380 U. S. 202 (1965). More generally, this Court has condemned state efforts to exclude blacks from grand and petit juries. *Vasquez v. Hillery*, 474 U. S. — (1986); *Alexander v. Louisiana*, 405 U. S. 625, 628–629 (1972); *Whitus v. Georgia*, 385 U. S. 545, 549–550 (1967); *Norris v. Alabama*, 294 U. S. 587, 589 (1935); *Neal v. Delaware*, 103 U. S. 370, 394 (1881); *Strauder v. West Virginia*, 100 U. S. 303, 308 (1880); *Ex parte Virginia*, 100 U. S. 339 (1880).

Other protections apply to the trial and jury deliberation process. Widespread bias in the community can make a change of venue constitutionally required. *Irwin v. Dowd*, 366 U. S. 717 (1961). The Constitution prohibits racially-biased prosecutorial arguments. *Donnelly v. DeChristoforo*, 416 U. S. 637, 643 (1974). If the circumstances of a particular case indicate a significant likelihood that racial bias may influence a jury, the Constitution requires questioning as to such bias. *Ristaino v. Ross*, 424 U. S. 589, 596 (1976). Finally, in a capital sentencing hearing, a defendant convicted of an interracial murder is entitled to such questioning without regard to the circumstances of the particular case. *Turner v. Murray*, 476 U. S. — (1986).

³⁰ In advocating the adoption of the Constitution, Alexander Hamilton stated:

"The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or

a criminal defendant's fundamental "protection of life and liberty against race or color prejudice." *Strauder v. West Virginia*, 100 U. S. 303, 309 (1880). Specifically, a capital sentencing jury representative of a criminal defendant's community assures a "diffused impartiality," *Taylor v. Louisiana*, 419 U. S. 522, 530 (1975) (quoting *Thiel v. Southern Pacific Co.*, 328 U. S. 217, 227 (1946) (Frankfurter, J., dissenting)), in the jury's task of "express[ing] the conscience of the community on the ultimate question of life or death," *Witherspoon v. Illinois*, 391 U. S. 510, 519 (1968).³¹

if there is any difference between them, it consists in this: the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government." *The Federalist* No. 83, p. 519 (J. Gideon ed. 1818).

³¹ In *Witherspoon*, JUSTICE BRENNAN joined the opinion for the Court written by Justice Stewart. The Court invalidated a statute that permitted a prosecutor to eliminate prospective jurors by challenging all who express qualms about the death penalty. The Court expressly recognized that the purpose of the "broad discretion" given to a sentencing jury is "to decide whether or not death is 'the proper penalty' in a given case," noting that "a juror's general views about capital punishment play an inevitable role in any such decision." 391 U. S., at 519 (emphasis omitted). Thus, a sentencing jury must be composed of persons capable of expressing the "conscience of the community on the ultimate question of life or death." *Id.*, at 519-520. The Court referred specifically to the plurality opinion of Chief Justice Warren in *Trop v. Dulles*, 356 U. S. 86 (1958), to the effect that it is the jury that must "maintain a link between contemporary community values and the penal system . . ." 391 U. S., at 519, n. 15 (quoting 356 U. S., at 101).

The dissent's condemnation of the results of the Georgia capital punishment system must be viewed against this background. As to community values and the constitutionality of capital punishment in general, we have previously noted, *supra*, n. 17, that the elected representative of the people in 37 States and the Congress have capital punishment statutes, most of which have been enacted or amended to conform generally to the *Gregg* standards, and that 33 States have imposed death sentences thereunder. In the individual case, a jury sentence reflects the conscience of the community as applied to the circumstances of a particular offender and offense. We reject the dissent's contention that this important standard for assessing the constitutionality of a death penalty should be abandoned.

Individual jurors bring to their deliberations "qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." *Peters v. Kiff*, 407 U. S. 493, 503 (1972) (opinion of MARSHALL, J.). The capital sentencing decision requires the individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant. It is not surprising that such collective judgments often are difficult to explain. But the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that "buil[d] discretion, equity, and flexibility into a legal system." H. Kalven & H. Zeisel, *The American Jury* 498 (1966).

McCleskey's argument that the Constitution condemns the discretion allowed decisionmakers in the Georgia capital sentencing system is antithetical to the fundamental role of discretion in our criminal justice system. Discretion in the criminal justice system offers substantial benefits to the criminal defendant. Not only can a jury decline to impose the death sentence, it can decline to convict, or choose to convict of a lesser offense. Whereas decisions against a defendant's interest may be reversed by the trial judge or on appeal, these discretionary exercises of leniency are final and unreviewable.³² Similarly, the capacity of prosecutorial dis-

³²In the guilt phase of a trial, the Double Jeopardy Clause bars re-prosecution after an acquittal, even if the acquittal is "based upon an egregiously erroneous foundation." *United States v. DiFrancesco*, 449 U. S. 117, 129 (1980) (quoting *Fong Foo v. United States*, 369 U. S. 141, 143 (1962)). See Powell, *Jury Trial of Crimes*, 23 Wash. & Lee L. Rev. 1, 7-8 (1966) (Despite the apparent injustice of such an acquittal, "[t]he founding fathers, in light of history, decided that the balance here should be struck in favor of the individual").

In the penalty hearing, Georgia law provides that "unless the jury . . . recommends the death sentence in its verdict, the court shall not sentence the defendant to death." Georgia Code Ann. § 17-10-31 (1982). In *Bullington v. Missouri*, 451 U. S. 430 (1981), this Court held that the Double

cretion to provide individualized justice is "firmly entrenched in American law." 2 W. LaFare & D. Israel, *Criminal Procedure* § 13.2(a), p. 160 (1984). As we have noted, a prosecutor can decline to charge, offer a plea bargain,³³ or decline to seek a death sentence in any particular case. See n. 12, *supra*. Of course, "the power to be lenient [also] is the power to discriminate," K. Davis, *Discretionary Justice* 170 (1973), but a capital punishment system that did not allow for discretionary acts of leniency "would be totally alien to our notions of criminal justice." *Gregg v. Georgia*, 428 U. S., at 200, n. 50.

C

At most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system.³⁴ The discrepancy indicated by the Baldus study is "a far cry from the major systemic defects identified in *Furman*," *Pul-*

Jeopardy Clause of the Constitution prohibits a State from asking for a sentence of death at a second trial when the jury at the first trial recommended a lesser sentence.

³³ In this case, for example, McCleskey declined to enter a guilty plea. According to his trial attorney, "[T]he Prosecutor was indicating that we might be able to work out a life sentence if he were willing to enter a plea. But we never reached any concrete stage on that because Mr. McCleskey's attitude was that he didn't want to enter a plea. So it never got any further than just talking about it." Tr. in No. 4909 (Jan. 30, 1981) p. 56.

³⁴ Congress has acknowledged the existence of such discrepancies in criminal sentences, and in 1984 created the United States Sentencing Commission to develop sentencing guidelines. The objective of the guidelines "is to avoid *unwarranted* sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct, while maintaining sufficient flexibility to permit individualized sentencing when warranted by mitigating or aggravating factors not taken into account in the guidelines." 52 Fed. Reg. 3920 (1987) (emphasis added). No one contends that all sentencing disparities can be eliminated. The guidelines, like the safeguards in the *Gregg*-type statute, further an essential need of the Anglo-American criminal justice system—to balance the desirability of a high degree of uniformity against the necessity for the exercise of discretion.

ley v. Harris, 465 U. S., at 54.³⁵ As this Court has recognized, any mode for determining guilt or punishment “has its weaknesses and the potential for misuse.” *Singer v. United States*, 380 U. S. 24, 35 (1965). See *Bordenkircher v. Hayes*, 434 U. S. 357, 365 (1978). Specifically, “there can be ‘no perfect procedure for deciding in which cases governmental authority should be used to impose death.’” *Zant v. Stephens*, 462 U. S. 862, 884 (1983) (quoting *Lockett v. Ohio*, 438 U. S., at 605 (plurality opinion of Burger, C. J.)). Despite these imperfections, our consistent rule has been that constitutional guarantees are met when “the mode [for determining guilt or punishment] itself has been surrounded with safeguards to make it as fair as possible.” *Singer v. United States*, *supra*, at 35. Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious. In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.³⁶

³⁵ The Baldus study in fact confirms that the Georgia system results in a reasonable level of proportionality among the class of murderers eligible for the death penalty. As Professor Baldus confirmed, the system sorts out cases where the sentence of death is highly likely and highly unlikely, leaving a mid-range of cases where the imposition of the death penalty in any particular case is less predictable. App. 35–36. See n. 5, *supra*.

³⁶ JUSTICE BRENNAN’s eloquent dissent of course reflects his often repeated opposition to the death sentence. His views, that also are shared by JUSTICE MARSHALL, are principled and entitled to respect. Nevertheless, since *Gregg* was decided in 1976, seven members of this Court consistently have upheld sentences of death under *Gregg*-type statutes providing for meticulous review of each sentence in both state and federal courts. The ultimate thrust of JUSTICE BRENNAN’s dissent is that *Gregg* and its progeny should be overruled. He does not, however, expressly call for the overruling of any prior decision. Rather, relying on the Baldus study, JUSTICE BRENNAN, joined by JUSTICE MARSHALL and JUSTICE BRENNAN,

V

Two additional concerns inform our decision in this case. First, McCleskey's claim, taken to its logical conclusion,

questions the very heart of our criminal justice system: the traditional discretion that prosecutors and juries necessarily must have.

We have held that discretion in a capital punishment system is necessary to satisfy the Constitution. *Woodson v. North Carolina*, 428 U. S. 280 (1976). See pp. 19–20, *supra*. Yet, the dissent now claims that the “discretion afforded prosecutors and jurors in the Georgia capital sentencing system” violates the Constitution by creating “opportunities for racial considerations to influence criminal proceedings.” *Post*, at 14. The dissent contends that in Georgia “no guidelines govern prosecutorial decisions . . . and that Georgia provides juries with no list of aggravating and mitigating factors nor any standard for balancing them against another.” *Post*, at 14. Prosecutorial decisions necessarily involve both judgmental and factual decisions that vary from case to case. See ABA Standards for Criminal Justice, 3–3.8–3–3.9 (2d ed. 1980). Thus, it is difficult to imagine guidelines that would produce the predictability sought by the dissent without sacrificing the discretion essential to a humane and fair system of criminal justice. Indeed, the dissent suggests no such guidelines for prosecutorial discretion.

The reference to the failure to provide juries with the list of aggravating and mitigating factors is curious. The aggravating circumstances are set forth in detail in the Georgia statute. See *supra*, n. 3. The jury is not provided with a list of aggravating circumstances because not all of them are relevant to any particular crime. Instead, the prosecutor must choose the relevant circumstances and the State must prove to the jury that at least one exists beyond a reasonable doubt before the jury can even consider imposing the death sentence. It would be improper and often prejudicial to allow jurors to speculate as to aggravating circumstances wholly without support in the evidence.

The dissent's argument that a list of mitigating factors is required is particularly anomalous. We have held that the Constitution requires that juries be allowed to consider “any relevant mitigating factor,” even if it is not included in a statutory list. *Eddings v. Oklahoma*, 455 U. S. 104, 112 (1982). See *Lockett v. Ohio*, 438 U. S. 586 (1978). The dissent does not attempt to harmonize its criticism with this constitutional principle. The dissent also does not suggest any standard, much less a workable one, for balancing aggravating and mitigating factors. If capital defendants are to be treated as “uniquely individual human beings,” *Woodson v. North Carolina*, *supra*, at 304, then discretion to evaluate and weigh the circum-

throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties. *Solem v. Helm*, 463 U. S. 277, 289–290 (1983); see *Rummel v. Estelle*, 445 U. S. 263, 293 (1980) (POWELL, J., dissenting). Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.³⁷ Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups,³⁸ and even to gender.³⁹ Similarly, since McCleskey's claim relates to the race of his victim, other claims could

stances relevant to the particular defendant and the crime he committed is essential.

The dissent repeatedly emphasizes the need for "a uniquely high degree of rationality in imposing the death penalty." *Post*, at 15. Again, no suggestion is made as to how greater "rationality" could be achieved under any type of statute that authorizes capital punishment. The *Gregg*-type statute imposes unprecedented safeguards in the special context of capital punishment. These include: (i) a bifurcated sentencing proceeding; (ii) the threshold requirement of one or more aggravating circumstances; and (iii) mandatory state Supreme Court review. All of these are administered pursuant to this Court's decisions interpreting the limits of the Eighth Amendment on the imposition of the death penalty, and all are subject to ultimate review by this Court. These ensure a degree of care in the imposition of the sentence of death that can be described only as unique. Given these safeguards already inherent in the imposition and review of capital sentences, the dissent's call for greater rationality is no less than a claim that a capital punishment system cannot be administered in accord with the Constitution. As we reiterate, *infra*, the requirement of heightened rationality in the imposition of capital punishment does not "place totally unrealistic conditions on its use." *Gregg v. Georgia*, 428 U. S., at 199, n. 50.

³⁷ Studies already exist that allegedly demonstrate a racial disparity in the length of prison sentences. See, e. g., Spohn, Gruhl, & Welch, *The Effect of Race on Sentencing: A Reexamination of an Unsettled Question*, 16 *Law & Soc. Rev.* 71 (1981–1982); Unnever; Frazier & Henretta, *Race Differences in Criminal Sentencing*, 21 *Sociological Q.* 197 (1980).

apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the criminal justice system, such as defense attorneys⁴⁰, or judges.⁴¹

³⁸ In *Regents of the University of California v. Bakke*, 438 U. S. 265, 295 (1978) (opinion of POWELL, J.), we recognized that the national "majority" "is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals." See *id.*, at 292 (citing *Strauder v. West Virginia*, 100 U. S., at 308 (Celtic Irishmen) (dictum); *Yick Wo v. Hopkins*, 118 U. S. 356 (1886) (Chinese); *Truax v. Raich*, 239 U. S. 33, 36, 41-42 (1915) (Austrian resident aliens); *Korematsu v. United States*, 323 U. S. 214, 216 (1944) (Japanese); *Hernandez v. Texas*, 347 U. S. 475 (1954) (Mexican-Americans)). See also Guidelines on Discrimination Because of National Origin, 29 CFR § 1607.4(B) (employer must keep records as to the following races and ethnic groups: Blacks, American Indians (including Alaskan natives), Asians (including Pacific Islanders), Hispanics (including persons of Mexican, Puerto Rican, Cuban, Central or South America, or other Spanish origin or culture regardless of race), and Whites (Caucasians) other than Hispanics); U. S. Bureau of the Census, 1980 Census of Population, vol. 1, ch. B (PC80-1-B), reprinted in 1986 Statistical Abstract of the United States 29 (dividing United States population by "race and Spanish origin" into the following groups: White, Black, American Indian, Chinese, Filipino, Japanese, Korean, Vietnamese, Spanish origin, and all other races); U. S. Bureau of the Census, 1980 Census of the Population, Supplementary Report, series PC80-S1-10, reprinted in 1986 Statistical Abstract of the United States 34 (listing 44 ancestry groups and noting that many individual reported themselves to belong to multiple ancestry groups).

We also have recognized that the ethnic composition of the Nation is ever-shifting. *Crawford v. Board of Ed.*, 458 U. S. 527 (1982) illustrates demographic facts that we increasingly find in our country, namely, that populations change in composition, and may do so in relatively short time spans. We noted: "In 1968 when the case went to trial, the [Los Angeles] District was 53.6% white, 22.6% black, 20% Hispanic, and 3.8% Asian and other. By October 1980, the demographic composition had altered radically: 23.7% white, 23.3% black, 45.3% Hispanic, and 7.7% Asian and other." *Id.*, at 530, n. 1. Increasingly whites are becoming a minority in many of the larger American cities. There appears to be no reason why a white defendant in such a city could not make a claim similar to McCleskey's if racial disparities in sentencing arguably are shown by a statistical study.

Finally, in our heterogeneous society the lower courts have found the boundaries of race and ethnicity increasingly difficult to determine. See

Also, there is no logical reason that such a claim need be limited to racial or sexual bias. If arbitrary and capricious punishment is the touchstone under the Eighth Amendment, such a claim could—at least in theory—be based upon any arbitrary variable, such as the defendant's facial characteristics,⁴² or the physical attractiveness of the defendant or the victim,⁴³ that some statistical study indicates may be influen-

Shaare Tefila Congregation v. Cobb, 785 F. 2d 523 (CA4 1986), cert. granted, No. 85-2156, — U. S. — (1986), and *St. Francis College v. Al-Khazraji*, 784 F. 2d 505 (CA3 1986), cert. granted, No. 85-2169, — U. S. — (1986) (argued February 25, 1987) (presenting the questions of whether Jews and Arabs, respectively, are "races" covered by 42 U. S. C. §§ 1981 and 1982).

⁴² See Chamblin, *The Effect of Sex on the Imposition of the Death Penalty* (paper presented at a symposium of the Amer. Psych. Assn., entitled "Extra-legal Attributes Affecting Death Penalty Sentencing," New York City, Sept., 1979); Steffensmeier, *Effects of Judge's and Defendant's Sex on the Sentencing of Offenders*, 14 *Psychology* 3 (1977).

⁴³ See Johnson, *Black Innocence and the White Jury*, 83 *Mich. L. Rev.* 1611, 1625-1640, and n. 115 (1985) (citing Cohen & Peterson, *Bias in the Courtroom: Race and Sex Effects of Attorneys on Juror Verdicts*, 9 *Social Behavior & Personality* 81 (1981)); Hodgson & Pryor, *Sex Discrimination in the Courtroom: Attorney's Gender and Credibility*, 55 *Psychological Rep.* 483 (1984).

⁴⁴ See Steffensmeier, *supra*, n. 31.

⁴⁵ See Kerr, Bull, MacCoun, & Rathborn, *Effects of victim attractiveness, care and disfigurement on the judgements of American and British mock jurors*, 24 *Brit. J. Social Psych.* 47 (1985); Johnson, *supra*, 1638, n. 128 (citing Shoemaker, South, & Lowe, *Facial Stereotypes of Deviants and Judgments of Guilt or Innocence*, 51 *Social Forces* 427 (1973)).

⁴⁶ Some studies indicate that physically attractive defendants receive greater leniency in sentencing than unattractive defendants, and that offenders whose victims are physically attractive receive harsher sentences than defendants with less attractive victims. Smith & Hed, *Effects of Offenders' Age and Attractiveness on Sentencing by Mock Juries*, 44 *Psychological R.* 691 (1979); Kerr, *Beautiful and Blameless: Effects of Victim Attractiveness and Responsibility on Mock Jurors' Verdicts*, 4 *Personality and Social Psych. Bull.* 479 (1978). But see Baumeister & Darley, *Reducing the Biasing Effect of Perpetrator Attractiveness in Jury Simulation*, 8 *Personality and Social Psych. Bull.* 286 (1982); Schwibbe & Schwibbe, *Judgment and Treatment of People of Varied Attractiveness*, 48 *Psycho-*

tial in jury decisionmaking. As these examples illustrate, there is no limiting principle to the type of challenge brought by McCleskey.⁴ The Constitution does not require that a State eliminate any demonstrable disparity that correlates

logical R. 11 (1981); Weiten, The Attraction-Leniency Effect in Jury Research: An Examination of External Validity, 10 J. Applied Social Psych. 340 (1980).

"JUSTICE STEVENS, who would not overrule *Gregg*, suggests in his dissent that the infirmities alleged by McCleskey could be remedied by narrowing the class of death-eligible defendants to categories identified by the Baldus study where "prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender." *Post*, at —. This proposed solution is unconvincing. First, "consistently" is a relative term, and narrowing the category of death-eligible defendants would simply shift the borderline between those defendants who received the death penalty and those who did not. A borderline area would continue to exist and vary in its boundaries. Moreover, because the discrepancy between borderline cases would be difficult to explain, the system would likely remain open to challenge on the basis that the lack of explanation rendered the sentencing decisions constitutionally arbitrary.

Second, even assuming that a category with theoretically consistent results could be identified, it is difficult to imagine how JUSTICE STEVENS' proposal would or could operate on a case-by-case basis. Whenever a victim is white and the defendant is a member of a different race, what steps would a prosecutor be required to take—in addition to weighing the customary prosecutorial considerations—before concluding in the particular case that he lawfully could prosecute? In the absence of a current, Baldus-type study focused particularly on the community in which the crime was committed, where would he find a standard? Would the prosecutor have to review the prior decisions of community prosecutors and determine the types of cases in which juries in his jurisdiction "consistently" had imposed the death penalty when the victim was white and the defendant was of a different race? And must he rely solely on statistics? Even if such a study were feasible, would it be unlawful for the prosecutor, in making his final decision in a particular case, to consider the evidence of guilt and the presence of aggravating and mitigating factors? However conscientiously a prosecutor might attempt to identify death-eligible defendants under the dissent's suggestion, it would be a wholly speculative task at best, likely to result in less rather than more fairness and consistency in the imposition of the death penalty.

with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment. As we have stated specifically in the context of capital punishment, the Constitution does not "plac[e] totally unrealistic conditions on its use." *Gregg v. Georgia*, 428 U. S., at 199, n. 50.

Second, McCleskey's arguments are best presented to the legislative bodies. It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are "constituted to respond to the will and consequently the moral values of the people." *Furman v. Georgia*, 408 U. S., at 383 (Burger, C. J., dissenting). Legislatures also are better qualified to weigh and "evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts," *Gregg v. Georgia*, *supra*, at 186. Capital punishment is now the law in more than two thirds of our States. It is the ultimate duty of courts to determine on a case-by-case basis whether these laws are applied consistently with the Constitution. We agree with the District Court and the Court of Appeals for the Eleventh Circuit that this was carefully and correctly done in this case.

VI

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

It is so ordered.