FURMAN'S PHOENIX IN *MCCLESKEY*'S FLAW

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This Note will analyze how the Court's refusal to acknowledge the realities of human emotion has problematized their own death penalty jurisprudence. This refusal led the Court, in *McCleskey v. Kemp*, to act dramatically inconsistent with their own legal logic when faced with the worst of human impulses, racial discrimination. This Note will focus on the slippery slope argument employed in *McCleskey* that articulated how a decision on the death penalty's discretion would endanger discretion throughout the criminal legal system. This conflation of capital and non-capital discretion reversed course on the Court's grounding logic that the death penalty is unique. It is that flaw in *McCleskey*'s logic that this Note will explore and will outline how rectifying this inconsistency forces the Court to go down a new path rather than continuing to stay frozen in *McCleskey*'s amber where the death penalty is constitutional and discriminatory.

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INTRODUCTION

The death penalty is "cruel and unusual much like getting struck by lightning is cruel and unusual."[1] Justice Stewart's quote about American death sentences from the landmark death penalty case *Furman v. Georgia* conjures the image of a collection of ions and energy in the sky, bundled then released as lighting. Instead, imagine the Greek mythological character Zeus, lord of the sky, notorious for releasing his volatile emotions as lightning—passion, not logic, dictating the direction that the lightning strikes. Today, even in the wake of *Furman*, the death penalty emerges from the skies to strike a criminal defendant based on the passions of the jury.[2] Like Zeus on Olympus, juries in courtrooms decide when and on whom lightning should strike. A godlike choice in the hands of humans.

This Note analyzes how the Supreme Court's refusal to acknowledge the realities of human emotion involved in capital cases has problematized its own attempt to tame discretion into a constitutional beast. This Note highlights how the Court's contradictory death penalty jurisprudence led the Court to act inconsistently with its own legal logic when faced with the worst of human impulses—racial discrimination. This Note then concludes that the Court must take one of two paths to treat the death penalty with the certainty and clarity such a grave punishment demands. This Note demands judicial consistency in the Court's "death is different" doctrine, as opposed to the inconsistent stance the Court has adopted in order to inoculate the death penalty from challenges of racial discrimination.

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1. Furman v. Georgia, 408 U.S. 238, 309 (1972) (abolishing all existing death penalty statutes as unconstitutionally cruel and unusual because of their arbitrary nature). What will be referred to throughout this piece as "*Furman*'s mandate" is the task the Courts have assigned to state legislatures to create a death penalty that is not arbitrarily applied.

2. Juries have the discretion to choose when to sentence someone to death. It is commonly understood that the emotions (i.e., passions) of the jury influence their exercise of discretion. *See* Susan A. Bandes, *Repellant Crimes and Rational Deliberation: Emotion and the Death Penalty*, 33 VT. L. REV. 489, 493 (2008) ("When asked to determine what sort of punishment heinous murderers deserve, people consult their moral, ethical, and religious beliefs. They consult their emotional reactions…their understanding of how the world works…[and] what ought to happen to those whose behavior transgresses moral boundaries.").

Observers both praise and criticize the role of human subjectivity in the American criminal legal system.[3] Both views recognize that the legal system is a sum of human parts exercising their humanity, rather than a formulaic process of inputs and outputs.[4] As an effective litigation strategy, prosecutors rely on amplifying a victim's humanity.[5] At every turn, defense attorneys fight to remind the jury and appellate judges of the defendant's humanity.[6] Trial judges, in ruling on evidentiary and other matters, and appellate judges, in overseeing the process, author opinions influenced by all of their internal biases and experiences.[7] Jurors are mere humans full of their own unique emotions, opinions, and backgrounds. These people are called upon in some way to represent the emotions, opinions, and backgrounds of the public at large and decide a defendant's fate.[8] The

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3. *See* Charles L. Black Jr., CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 46–78 (2d ed. augmented 1981) (arguing that the various human actors involved in death sentences are bound to make mistakes); *see also* Warren Cormack, *Reassessing the Judicial Empathy Debate: How Empathy Can Distort and Impact and Improve Criminal Sentencing*, 47 MITCHELL HAMLINE L. REV. 81, 84–85 (2021) (articulating the viewpoints of scholars who support the role of judicial empathy, a human emotion, in achieving justice).

4. *Public Policy Brief: Ensuring Justice Through Juror Discretion,* LIBERTAS INSTITUTE 2–6, https://libertas.org/policy-papers/juror_discretion.pdf [https://perma.cc/9ZQ5-DWLG] (articulating all of the opportunities where the various actors in the criminal justice system make choices of mercy, strictness, inaction, etc.).

5. Jessica M. Salerno & Bette L. Bottoms, *Unintended Consequences of Toying with Jurors' Emotions: The Impact of Disturbing Emotional Evidence on Jurors' Verdicts*, THE JURY EXPERT (Mar. 1, 2010), https://www.thejuryexpert.com/2010/03/unintended-consequences-of-toying-with-jurors-emotions-the-impact-of-disturbing-emotional-evidence-on-jurors-verdicts/ [https://perma.cc/5UP7-2SNL].

6. *Id.*

7. Adam Benfarado, *Flawed Humans, Flawed Justice*, N.Y. TIMES (June 13, 2015), https://www.nytimes.com/2015/06/14/opinion/flawed-humans-flawed-justice.html (on file with the *Columbia Human Rights Law Review*) ("But the truth is that all judges are swayed by countless forces beyond their conscious awareness or control."); Allison P. Harris & Maya Sen, *Bias and Judging*, ANN. REV. POL. SCI. (Aug. 30, 2018), https://scholar.harvard.edu/files/msen/files/bias-judging-arps.pdf [https://perma.cc/3GHA-78KN]; *See generally* Stephen J. Choi & Mitu Gulati, *Bias in Judicial Citations: A Window into the Behavior of Judges?*, 37 J. LEGAL STUD. 87 (2008) (explaining how judges' citations give insights into the narratives the judges ascribe to and want to perpetuate); Jeffrey J. Rachlinksi et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1195 (2009) ("We find that judges harbor the same kinds of implicit biases as others; that these biases can influence their judgment.").

8. Letter from the Federal Farmer (Jan. 18, 1788) ("The jury trial, especially politically considered, is by far the most important feature in the judicial

discretion afforded to juries allows for subjectivity and bias to invade the process.[9]

The Eighth Amendment forbids cruel and unusual punishment.[10] The fractured Supreme Court could not muster a majority in *Furman* to find the death penalty per se unconstitutional under the Eighth Amendment.[11] Four years later in *Gregg v. Georgia*, the Court again declined to do so.[12] However, a majority of Justices in *Furman* (and again in *Gregg*) agreed that an arbitrarily administered death penalty does amount to cruel and unusual punishment.[13] The various opinions in *Furman* formulated a combined notion of arbitrariness: one where there was no constitutionally recognizable reason for some to receive the death penalty and not others.[14] Some Justices found that the only explanations for those who received the death penalty and those who did not were invidious and

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department in a free country. . . . The body of the people, principally, bear the burdens of the community; they of right ought to have a control in its important concerns."); Meredith Martin Rountree & Mary R. Rose, *The Complexities of Conscience: Reconciling Death Penalty Law with Capital Jurors' Concerns*, 69 BUFF. L. REV. 1237, 1242 (2021); Bandes, *supra* note 2 (discussing how juries are asked to use their emotions but funneled through laws that conceive of them as emotionless).

9. Chaka M. Patterson, Race and the Death Penalty: The Tension Between Individualized Justice and Racially Neutral Standards, 2 TEX. WESLEYAN L. REV. 45, 45 (1995).

10. U.S. Const. amend. VIII.

11. James S. Liebman, Slow Dancing with Death: The Supreme Court and Capital Punishment, 107 COLUM. L. REV. 1, 8 (2007).

12. *Id*. at 33.

13. Furman v. Georgia, 408 U.S. 238 (1972). The term "arbitrary" is used frequently in scholarship on the death penalty. Oxford English Dictionary defines "arbitrary" as "based on random choice or personal whim, rather than any reason or system." *Arbitrary*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/arbitrary_adj?tl=true [https://perma.cc/6LEV-KGHB] (last visited Mar. 1, 2024). As it will be used throughout this piece, arbitrariness will be used to denote actions by the jury that are without a clear permissible reason. This definition precludes racial discrimination as a permissible reason, so therefore decisions based on race are not random and are within a system; they are arbitrary once race is taken out of the equation. See also Chad Flanders, *What Makes the Death Penalty Arbitrary? (And Does It Matter If It Is?)*, 2019 WIS. L. REV. 55, 107 (2019) for another way to conceive of racial discrimination as arbitrary ("A jury may fail to weigh adequately a set of mitigators because…they let a defendant's race weigh in the balance…against the mitigating factors. The result would be a punishment that the defendant did not deserve, and all because a morally irrelevant factor guided the jury in its decision-making process.").

14. *Furman*, 408 U.S. at 309–10.

unconstitutional, such as race and class.[15] Justice White's concurrence criticized the modern use of the death penalty because of its infrequent administration, concluding that the rarity with which jurors hand down a death sentence renders it ineffective in serving the only solidly legal basis for the punishment—deterrence.[16] At their single, unifying core, all the opinions declaring unconstitutionality in *Furman* scrutinized the way humans—judges and juries—administer the death penalty.[17] Thus, *Furman* created a new tension in the Court's death penalty jurisprudence.[18] It called into question the ability of juries to administer the death penalty, without providing an answer as to what limits on a juror's discretion would bring that discretion back into constitutional limits.[19] In determining violations of the Eighth Amendment in capital cases, the Supreme Court attempts to walk a tightrope: maintaining some just-right balance between discretion and law, that both allows for individualization and achieves predictability based on something other than invidious discrimination.[20]

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15. *Id*. at 249–51 (Douglas, J., concurring), 366 (Marshall, J., concurring).

16. *Id.,* at 311 (White, J., concurring).

17. Even the dissenters in *Furman* acknowledged the potential for randomness within the jury's discretion. *Id*. at 389. However, the dissenters focused on two factors that stopped them from joining the majority. The first was that it is a job for the legislature to manage the existence of the death penalty. *Id*. at 384 (Burger, J., dissenting). The second was that the subjectivity of jury discretion does not mean it is inherently flawed. *Id*. at 387–91 (Powell, J., dissenting) (citing the opinion in *McGautha v. California* 402 U.S. 183, 226 (1971) from just the year prior).

18. Prior to *Furman*, the Court affirmed unfettered jury discretion as the best way to ensure justice. Justice Harlan's opinion articulated the messiness of trying to parse through the correct forms of jury discretion. McGautha v. California, 402 U.S. 183, 204 (1971) ("To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.").

19. As will be discussed later in this Note, the Court reversed course from complete faith in juror discretion to abolishing all the current death penalty schemes based on how that discretion was being deployed. *See infra* notes 66–75. However, the Court repeatedly rejected the use of mandatory death penalty schemes because of the need for individualization to achieve justice. *See infra* notes 76–87. The Court's hope was to find ways to create jury instructions and court proceedings that would help the jury create a "reasoned moral judgement." California v. Brown, 479 U.S. 538, 544 (1987) (O'Connor, J., concurring). This pursuit resulted in the Court's affirmation of guided discretion schemes. *See infra* notes 88–115.

20. California v. Brown, 479 U.S. 538, 544 (O'Connor, J., concurring); Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV.

In and following *Furman*, the Court gave itself the near impossible task of drawing the line between where discretion ends and arbitrariness, caprice, and discrimination begin.[21] The Supreme Court continually grants certiorari to capital cases, continually analyzes the defendant's claims, and yet continually "dances" around its role in constitutionalizing capital cases.[22] But given the rights at stake in a death penalty case, the Court must have a role.[23] The life and death stakes of capital cases are such that the Court cannot get away with a hands off "we'll know it when we see it" approach to defining arbitrariness.[24] Following *Furman*, a long line of cases ensued in which the Court found itself continually having to define the line of arbitrariness and craft a framework that would allow the death penalty to persist with the necessary and appropriate amount of discretion.[25] The Court's continued involvement in capital cases—while it has failed to result in sharp lines delineating an ideal death penalty statute—has created an inconsistent and contradictory jurisprudence.[26]

1147, 1161–64 (1991); Kathryn E. Miller, *The Eighth Amendment Power to Discriminate*, 95 WASH. L. REV. 809 (2020).

21. Flanders, *supra* note 13, at 70–75.

22. *See* Liebman, supra note 11 (summarizing the Supreme Court's jurisprudence that avoids creating clear guidance to states on how to create a constitutional death penalty).

23. Furman v. Georgia, 408 U.S. 238, 289–90 (1972) (Brennan, J., concurring) (Brennan's discussion that an executed defendant has lost the right to have rights as a way to substantiate the Court's important role in determining the constitutionality of the death penalty).

24. *See* Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980) (arguing for what the author calls "super due process" as result of the Court's holding in *Lockett v. Ohio* to protect heightened rights for those at risk of the death penalty compared to other criminal defendants. This represents the sentiments that clear rights of capital defendants must be articulated. Radin takes the Court's "death is different" sentiment even further to demand higher standards for the death penalty explicitly articulated. Compare this to the famous quote from Justice Stewart about obscenity and the indescribable line-drawing that goes into determining when speech becomes vulgar. Jacobellis v. Ohio, 378 U.S. 184 (1964) (Stewart, J., concurring)); However, the Court has tried to continually pass the buck to the legislature to create the constitutionally perfect death penalty or abolish it entirely. Liebman, *supra* note 11, at 84 ("tell it to the legislature"); *Furman,* 408 U.S. 238 (the collective dissents); McCleskey v. Kemp, 481 U.S. 279, 319 (1987).

25. Flanders, *supra* note 13, at 57.

26. Liebman, *supra* note 11, at 4 ("Among the unhappy results of the Court's compulsion to be, and not be, responsible for the legality of capital punishment is glaring doctrinal incoherence which many modern commentators on the death penalty have decried, but whose persistence none have explained.").

From this fractured Supreme Court death penalty jurisprudence emerged the "death is different" doctrine.[27] The Court articulated that the severity, irreversibility, and emotionality of the death penalty led it to warrant different treatment than other aspects of the criminal justice system.[28] The doctrine expanded beyond a mere articulation of the death penalty's sentimental difference.[29] "Death is different" translated to tangible distinctions between capital cases and other proceedings, including bifurcated trials with both a guilt determination and sentencing portion, different admissibility rules for evidence, and different standards of review on appeal.[30] These tangible differences were meant to curb the wayward discretion that *Furman* criticized, while maintaining a level of discretion that still allowed the jury and the defendant their humanity.[31]

Now, we have arrived at the complicated sticking point that the previously described jurisprudence created. The Court acknowledges the heightened emotions of capital cases and the uniqueness of death as a form of punishment within the criminal legal

27. "[C]apital offenses are sui generis." Griffin v. Illinois, 351 U.S. 12, 21 (1956) (Frankfurter, J., concurring). *See also*, Furman v. Georgia, 408 U.S. 238, 286 (1972) ("Death is a unique punishment in the United States. In a society that so strongly affirms the sanctity of life, not surprisingly the common view is that death is the ultimate sanction."); *Id*. at 287 ("The only explanation for the uniqueness of death is its extreme severity. Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering."); *Id*. at 289 ("The unusual severity of death is manifested most clearly in its finality and enormity. Death, in these respects, is in a class by itself."); *Id.* at 290 ("Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. The contrast with the plight of a person punished by imprisonment is evident."); *Id*. at 305 ("Today death is a uniquely and unusually severe punishment.").

28. *Furman,* 408 U.S. at 287 (Brennan, J., concurring) ("Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering.").

29. *See, e.g.*, *The Rhetoric of Difference and the Legitimacy of Capital Punishment*, 114 HARV. L. REV. 1599, 1602–10 (2001) (discussing the Court's formulation of more stringent guidelines for death penalty cases in *Furman* and *Gregg*).

30. Gregg v. Georgia, 428 U.S. 153, 158 (1976). The Court in *Gregg* validated the guided discretion scheme where Georgia and other states put in place unique procedures for capital cases to create a permissible range of discretion that rooted out arbitrariness and provided for individualization.

31. *Id*. *See also*, Justice O'Connor's concurrence in California v. Brown discussing *Gregg's* role in rectifying this tension. 479 U.S. 538, 544 (1987).

system.[32] In other words, "death is different," both emotionally and, now, legally. In these cases, we see the Court continually trying to navigate death's difference to create a death penalty with enough emotion that it sustains justice, while also limiting emotion's ability to create injustice.[33] However, the Court all but admitted defeat in its ability to manage these concurrent tasks in *McCleskey v. Kemp*.[34]

McCleskey, a Black man convicted of killing a white police officer, introduced statistical studies from Professor David Baldus—collectively referred to as the "Baldus Study"—that showed consistent trends of racial discrimination in the administration of the death penalty.[35] These studies showed that the arbitrariness of the death penalty continued despite the Court's efforts.[36] Instead of acknowledging the limitations of the law's ability to wrangle the emotions involved in a capital case[37], the Court decided to go against the two things it seemed so sure of in *Furman*. In *McCleskey*, the Court held that the studies presenting evidence of racial discrimination did not support an Eighth Amendment violation. Through this decision, it decided to permit arbitrariness in decisions, and ultimately determined that death is not different.[38]

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32. Douglas A. Berman & Stephanos Bibas, *Engaging Capital Emotions*, 102 NW. UNIV. L. REV. COLLOQUY 355 (2008).

33. Callins v. Collins, 510 U.S. 1141, 1143–44 (Blackmun, J., dissenting).

34. McCleskey v. Kemp, 481 U.S. 279, 314–15 (1987); *Callins,* 510 U.S. at 1145.

35. *35 Years After McCleskey v. Kemp: A Legacy of Racial Injustice in the Administration of the Death Penalty,* DEATH PENALTY INFORMATION CENTER (Apr. 21, 2022), https://deathpenaltyinfo.org/news/35-years-after-mccleskey-v-kemp-a-legacy-of-racial-injustice-in-the-administration-of-the-death-penalty [https://perma.cc/2SEM-6WK9].

36. Scott Sundby, *The Loss of Constitutional Faith: McCleskey v. Kemp and the Dark Side of Procedure*, 10 OHIO ST. J. OF CRIM. L. 5, 22–24 (2012) (Sundby draws on many of the behind-the-scenes memos where Powell laid out all the ways *Gregg*'s guided discretion schemes were unique and went above and beyond typical due process to ensure justice).

37. *Id*. at 24 ("[A]ll of the safeguards that [Justice Powell] identifies rely upon human actors implementing them…. [T]he most elegant procedural scheme in the world matters little if those charged with carrying it out are incapable…of fulfilling their roles.").

38. As discussed *supra* note 13, the term "arbitrary" was used more expansively in *Furman* to include discrimination but was not a perfect synonym. However, the description of the death penalty as continually arbitrary because racial discrimination still existed uses the definition articulated in *supra* note 13.

In *McCleskey*, Justice Powell laid out a slippery slope argument in order to bypass much of the Court's prior jurisprudence.[39] His opinion stated that finding the death penalty arbitrary based on statistical demonstration of racial discrimination would open the door to an endless onslaught of race-based challenges to the criminal legal system.[40] Powell postulated that such challenges could not be confined to the death penalty on a "death is different" rationale, and that they inevitably would weaken the foundation of the criminal legal system and pigeonhole future sentencing to an extreme degree.[41] This reasoning inherently treats the death penalty as similar to all other criminal proceedings, and therefore contradicts the long-established assumption of the Court that "death is different". This Note argues that this divergence from the Court's "death is different" doctrine was the Court's admission of defeat to the ineffectiveness of its jurisprudential mandates.

McCleskey praised jury discretion in a way reminiscent of the pre-*Furman* era.[42] It placed jury discretion in an almost impenetrable bubble of adoration, such that the opinion ignored legally viable concerns around the racial discrimination that McCleskey's legal team had presented.[43] Instead, Justice Powell crafted an argument about the

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39. The "slippery slope" referred to throughout this piece and in similar scholarship refers to Justice Powell's argument that holding in favor of McCleskey would have implications so great it could cause the entire legal system to crumble. Josh Bowers, *MCCLESKEY ACCUSED Justice Powell and The Moral Price of Institutional Pride*, 2 AM. J. OF L. AND EQUAL. 122, 131–36 (2022).

40. McCleskey v. Kemp, 481 U.S. 279, 314–15 (1987).

41. Sundby, *supra* note 36 ("This memo [from a clerk] triggered a handwritten question from Powell that was to later become one of the major foundations for his opinion: 'What if one accepts the study as reflecting sound statistical analysis? Would this require that no blacks be sentenced to death where victim was white?'"); *McCleskey,* U.S. 281 at 289–91 (citing the decision from the Eleventh Circuit articulating the importance of discretion and how discretion leads to different judgments because they are not fixed calculations but rather individualized conclusions).

42. McGautha v. California, 402 U.S. 183, 203, 205, 207 (1971) (the opinion in *McGautha* talked about the importance of discretion to the system and how unbridled jury discretion did not affront the Constitution. *McCleskey* did not go that far, but in a similar fashion placed the premium on jury discretion and assumed that human fallibility was an essential and unavoidable aspect of discretion).

43. *McCleskey,* 481 U.S. at 322 (Brennan, J., dissenting); *Id*. at 321–24 (accounting the past treatment of race and potential racial discrimination in various Supreme Court cases and how the strict standard articulated by Powell asking for individual proof of discrimination was never used before); *Id*. at 341 ("We have expressed a moral commitment, as embodied in our fundamental law, that

importance of discretion in *all* criminal cases, to navigate out of the corner in which the Court's jurisprudence on confining discretion had left him.[44]

As seemingly articulated by Powell, if our country's framework of justice depends on human actors to carry it out, and humans depend on a myriad of emotional experiences to inform their discretion, and discretion unavoidably produces discrimination[45] based on race, the Court can permit some racial discrimination for the purpose of upholding our framework of justice.[46] However, the only way Powell was able to reach this conclusion was by making death similar, rather than different than other forms of criminal punishment. That choice will be at the core of this Note's analysis.

Advocates have tried without much success to raise *Furman*-style arguments from the ashes, challenging the modern-day death penalty as arbitrary because of racial discrimination.[47] However, as long as *McCleskey* stands tall, these challenges will continue to fail. *McCleskey*'s legacy has become one of closing the door to challenges of statistically-proven systemic racial discrimination in all aspects of the criminal legal system because, in *McCleskey*, Powell did not treat death as different.[48] Other authors have pointed out the flawed reasoning of

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this specific characteristic [race] should not be the basis for allotting burdens and benefits.").

44. Bowers, *supra* note 39, at 126 ("Thus, in *McCleskey* v. *Kemp*, he reflexively deferred to institutional stakeholders and largely ignored persuasive statistical evidence that capital practice was, at every stage, systemically and systematically skewed against Black murder victims. He refused to countenance the reality that his own justice system could countenance so much injustice."); *Id.* at 130 (The Section entitled "Elevation of the Stakes" articulates how Justice Powell raised the stakes of the argument in order to avoid the impacts of validating the proof that the studies showed).

45. *McCleskey,* 481 U.S. at 312 ("The power to be lenient is [also] the power to discriminate[.]") (quoting K. Davis, DISCRETIONARY JUSTICE 170 (1973)).

46. This piece refers to "justice" as both the ephemeral idea of a system that operates rationally and fairly towards everyone, but also encapsulates the sentiment that the system works the way it purports to work: within the bounds of the Constitution.

47. Princeton Wilson, *McCleskey's Enduring Impact on Capital Punishment and Race*, L. J. FOR SOC. JUST. (Feb. 11, 2022) https://lawjournalforsocialjustice.com/2022/02/11/mccleskeys-enduring-impact-on-capital-punishment-and-race/.

48. Bowers, *supra* note 39 at 122 ("In *McCleskey* v. *Kemp*, the Supreme Court effectively 'closed the courthouse doors' to constitutional claims of systemic racism in the criminal-legal system."); McCleskey v. Kemp, 481 U.S. 279, 342 (1987) (Brennan, J., dissenting) ("The Court's projection of apocalyptic consequences for criminal sentencing is thus greatly exaggerated. The Court can indulge in such

Powell's slippery slope argument in *McCleskey,* but no other author has suggested solutions based on focusing the attention on the implications of the slippery slope.[49] This Note tackles that task. It explores the ways litigants can give new wind to *Furman* without being shackled by *McCleskey*, based on Powell's diversion from the Court's "death is different" doctrine.

Part I of this Note outlines the modern death penalty jurisprudence's attempt to define discretion's proper role in handling heightened emotionality in capital cases. This Part highlights the conflicting mandates the Court has issued and explains how the Court's own jurisprudence ultimately backed it into a corner. Within these cases, the Court solidified both the notion and the reality that the death penalty is unlike any other punishment. After discussing the mess that the Court made for itself, Part II dives into *McCleskey*'s opinion, exploring why the Court seemingly gave up on walking the tightrope between its various jurisprudential mandates. This Part shows how the doctrine explained in Part I trapped Powell with few options but focuses on the option he did take: reversing the Court's "death is different" rationale. Finally, Part III of this Note concludes that, because Powell's slippery slope argument created an inconsistency where the Court treats death as "different" only some of the time, the Court must decide if the death penalty is truly different from other criminal legal consequences or not. This Note contends that there is no option to remain in the judicially inconsistent status quo. To find that death is actually different, the Court must narrowly apply *McCleskey*'s holding to aspects of capital cases that are similar to aspects of other criminal proceedings. Or, the Court can find that death is not different and that the procedural differences between capital and other criminal cases must be erased, allowing for increased due process for all criminal defendants. Either way, addressing this inconsistency between treating death as different only when convenient to the Court will breathe new life into *Furman*-style challenges to arbitrariness and discrimination in how the death penalty is administered.

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speculation only by ignoring its own jurisprudence demanding the highest scrutiny on issues of death and race.").

49. See generally, Bowers, *supra* note 39; Sundby, *supra* note 36 (these scholars' discussion of Powell's slippery slope is emblematic of the scholarly criticisms).

PART I) GOLDILOCKS JURISPRUDENCE: FINDING THE DEATH PENALTY THAT IS JUST RIGHT

The death penalty's history in the United States originates in the country's earliest days, a holdover from Colonial rule.[50] However, unlike in England's penal system, the Founding Fathers glorified the American jury and its discretion as the best means to achieve justice.[51] Starting as early as the 1700s, juries rebuffed the common law mandatory death penalty scheme that had been carried over to the Colonies.[52] If juries were key to freedom, then they needed the flexibility to grant mercy or pursue vengeance in capital cases.[53] Thus, discretion's unique importance to America's death penalty stretches back centuries.[54]

However, in capital cases, the relationship between discretion and justice is a fraught one.[55] Over the last half century, the modern era of death penalty jurisprudence has grappled with the reality that discretion allows for both justice and injustice.[56] Increased capacity for discretion allows more room for emotion and, therefore,

50. *The History of the Death Penalty: A Timeline*, DEATH PENALTY INFORMATION CENTER (last visited Dec. 30, 2022) https://deathpenaltyinfo.org/stories/history-of-the-death-penalty-timeline.

51. John Adams: "Representative government and trial by jury are the heart and lungs of liberty."; Thomas Jefferson: "I consider the trial by jury as the only anchor ever yet imagined by man by which a government can be held to the principles of its constitution." Jack Zouhary, *Jury Duty: A Founding Principle of American Democracy*, CIV. JURY PROJECT AT N.Y.U. SCH. OF L. (last visited Feb. 3, 2023) https://civiljuryproject.law.nyu.edu/jury-duty-a-founding-principal-of-americandemocracy [https://perma.cc/J2ML-85B6].

52. Woodson v. North Carolina, 428 U.S. 280, 289–291 (1976).

53. Rountree & Rose, *supra* note 8, at 1246.

54. *Id.* at 1241–42.

55. The "fraught" relationship stems from the ability for discretion to create inconsistent outcomes where questions of "deservedness" come in. *See, e.g.*, Sheri Seidman Diamond, *Instructing on Death*, 48 AM. PSYCH. 423 (1993); Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 L. AND CONTEMP. PROBS. 125 (1998). Additional scholarship focuses on the misunderstandings of capital jurors in their role and the amount of discretion they hold in capital cases. James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L. J. 1161, 1167 (1995); John Blume, *An Overview of Significant Findings from the Capital Jury Project And Other Empirical Studies of the Death Penalty Relevant to Jury Selection, Presentation of Evidence And Jury Instructions In Capital Cases*, S.W. L. SCH. (2008) https://www.swlaw.edu/sites/default/files/2021-02/Williams%2C%20Kenneth%20-%20Empirical%20Studies%20Summaries.pdf [https://perma.cc/KR4A-WTBP].

56. *See infra* Part I (summarizing the jurisprudence that grappled with the need for discretion (Woodson), but the dangers of discretion (Furman)).

discrimination.[57] This amplifies the already heightened emotional state of capital cases.[58]

Since *Furman* in 1972, the Court has wrestled with the question of how much and in what manner the jury's discretion in capital cases prevented and/or created Eighth Amendment violations.[59] Within its jurisprudence emerged a complicated and conflicting treatment of jury discretion.[60] The Court wanted to restrict jury discretion enough to prevent arbitrary and discriminatory outcomes— such as in *Furman*—but because of the uniqueness of a death sentence also wanted to preserve room for hyper-individualized considerations—as in *Woodson-Lockett*.[61] The Court set forth two conflicting tasks for capital statutes and juries: consistency and individualization.[62] Legislatures attempted to turn the Court's "death is different" into a reality by creating unique procedures that would channel messy emotions into constitutional cleanliness.[63] The Court thought these procedural mechanisms guiding discretion met the mandates of both *Furman* and *Woodson*.[64] However, these procedural mechanisms, meant to funnel discretion and jury emotion in constitutionally appropriate ways, ultimately led to more room for emotion and discrimination beyond the Court's initial goals.[65] The continued existence of arbitrariness was laid bare in *McCleskey v. Kemp*, which is fully explored *infra*, in Part II. The remainder of this Part outlines the cases that created the flawed framework that formed the doctrine of death's "difference" and led to the Court's conflicting constitutional provisions.

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57. Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 121–25 (1993).

58. Bandes, *supra* note 2, at 490–91.

59. Sundby, *supra* note 20, at 1153–54 ("[B]y making the question of whether discretion was adequately controlled an eighth amendment issue…").

60. Steven Semararo, *Responsibility in Capital Sentencing*, 39 SAN DIEGO L. REV. 79, 89–96 (2002).

61. Sundby, *supra* note 20 at 1161.

62. This dual mandate from the Court appears countless times in judicial opinions and scholarship and is not limited to the citations included. *See id.*; California v. Brown, 479 U.S. 538, 544 (O'Connor, J., concurring); Callins v. Collins, 510 U.S 1141, 1144 (Blackmun, J., dissenting).

63. *Rhetoric of Difference*, *supra* note 29.

64. Gregg v. Georgia, 428 U.S. 153, 207 (1976).

65. *Rhetoric of Difference*, *supra* note 29, at 1600 ("[T]he legal consequences of difference: namely, the advent of procedures that purport to improve the reliability of capital sentences, but actually preserve opportunities for arbitrariness and capriciousness.").

A) Abolishing Arbitrariness

In just one year, the Supreme Court went from upholding the death penalty to striking down every death penalty statute in the country.[66] In 1971, the Court looked at the role of jury discretion in *McGautha v. California*.[67] At the time, the norm for capital trials was unbridled discretion, which the Court in *McGautha* upheld by rejecting new procedural mechanisms to curb that discretion or to inform the jurors of evidence beyond what would otherwise help them determine guilt.[68] The opinion held that no human mind could create a comprehensive statute that articulated every consideration for what should trigger a death sentence, and that the humanity of the jury would do more to ensure justice than any legal constraints could.[69] The death penalty, as then constructed and as administered with unbridled jury discretion, lived to kill another day.

In 1972, just a year after *McGautha*, the Court granted certiorari to *Furman v. Georgia*.[70] The unified holding in *Furman*, gleaned from disparate logics and reasonings, found that the current administration of the death penalty violated the Eighth Amendment because of its arbitrary administration.[71] The opinions in *Furman* focused their scrutiny on the role of jury discretion in creating arbitrary outcomes.[72] Juries were sentencing some defendants to death and allowing others to live without a constitutionally justifiable reason that

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66. Sundby, *supra* note 36, at 7.

67. *See* Woodson v. North Carolina, 428 U.S. 280, 289–292 (1976). Except for four states that abolished capital punishment in the mid-1800s, every American jurisdiction has at some time provided for unguided jury sentencing in capital cases. McGautha v. California, 402 U.S. 183, 200 n.11 (1971).

68. *McGautha*, 402 U.S. at 205.

69. *Id.* at 204.

70. In many ways, the opinions in *Furman* were shocking given that jury discretion was upheld in *McGautha*. *Furman* was not another chink in the armor, but rather turned death penalty jurisprudence in a completely different direction, focusing on the negatives of jury discretion when just the year before the Court had extolled the virtues of such discretion. Lindsay Vann, *History Repeating Itself: The Post-Furman Return to Arbitrariness*, 45 U. RICHMOND L. REV. 1255, 1257 (2011).

71. *See generally* Daniel Polsby, *The Death of Capital Punishment? Furman v. Georgia*, 1972 SUP. CT. REV. 1 (1972) (piecing together the big picture takeaways from *Furman*).

72. Kathleen Lahey & Lewis Sang, *Constitutional Law—The Remains of the Death Penalty: Furman v. Georgia*, 22 DEPAUL L. REV. 481, 490 (1973); *Id.* at 495 ("Thus, these two cases [*McGautha* and then *Furman*] illustrate the distinction the Court made between the input to the jury and the output from the jury.").

the Court could identify or condone.[73] With something as powerful and certain as death, the Court wanted to be powerfully certain as to why some defendants received the death penalty and others did not.[74] The Court demanded that going forward, states create death penalty statutes that would prevent juries from administering the death penalty in arbitrary ways.[75]

B) Mandatory Individualization

Furman abolished the 1970s scheme of ultimate jury discretion, and sent the states back to the drawing board.[76] Thirty-nine states redrafted some form of the death penalty statute to replace the ones *Furman* had struck down.[77] Some states tried to eliminate discretion entirely by adopting mandatory death penalty statutes.[78] A subset of these states did so by substantially narrowing the set of "worst of the worst" crimes for which death would be the mandatory punishment.[79] The goal of these statutes was definitional equality: everyone convicted of these most serious crimes would receive the most serious of punishment.[80] If *Furman* required clarity as to what distinguished those who receive the death penalty from those who do not, the mandatory death penalty scheme provided it: your crime and conviction alone would dictate your punishment.

However, the Supreme Court in *Woodson v. North Carolina* decided that accuracy and equality in sentencing have to do with more than just the statutory elements of the crime committed: the individual facts and circumstances of the offense and the offender matter.[81] The *Woodson* opinion accordingly called for individualization—reserving

73. Justices Douglas, Brennan, and Marshall focused on the discriminatory aspect of arbitrariness whereas Justices White and Stewart focused on the inconsistency aspect of arbitrariness. *See* Furman v. Georgia, 408 U.S. 238 (1972) (the collective concurrences).

74. Sundby, *supra* note 36, at 8 ("The key question, of course, was whether these schemes could now provide a 'meaningful basis' to distinguish who received the death penalty from those who did not.").

75. Gregg v. Georgia, 428 U.S. 153, 189 (1976).

76. *Id.* at 179–81.

77. Id.

78. *A History of the Death Penalty in America*, CONST. RTS. FOUND. 3 (2012) https://www.crf-usa.org/images/pdf/HistoryoftheDeathPenaltyinAmerica.pdf [https://perma.cc/LM2N-LNPB].

79. Woodson v. North Carolina, 428 U.S 280, 286 (1976).

80. Williams v. New York, 337 U.S. 241, 247 (1949).

81. *Woodson,* 428 U.S. at 304.

the death penalty for the "worst of the worst."[82] This calculation takes into account not only the statutory elements of the crime, but also the subjective, individualized aggravating and mitigating factors at play.[83] In subsequent cases, the Court doubled down on the need for individualization in capital sentencing. For example, in *Lockett v. Ohio*, the Court held that capital defendants must be allowed to introduce mitigating evidence in order to allow for individualized sentencing.[84] Both *Woodson* and *Lockett* reaffirmed that the death penalty is unlike other punishments, necessitating heightened reliability to ensure that there is a justifiable difference between those who receive the death penalty and those who do not.[85]

Thus, an inherent tension in death penalty review was created.[86] The Court demanded individualization while at the same time condemning arbitrariness. It wanted to create something objective out of the subjective.[87] This would prove to be a herculean task.

C) Guided Discretion as Goldilocks' "Just Right"

1) Creating Guided Discretion

After *Furman* and *Woodson*, state legislatures searched for a middle ground between an arbitrary and a mandatory death penalty.[88] In order to effectively meet both mandates, states took the sentiment that the death penalty is sufficiently different as to warrant distinct protections and turned that sentiment into a procedural reality.[89] These post-*Furman* procedural protections would become synonymous with the court's "death is different" doctrine.[90]

82. *Id.* at 303–04.
83. *Id.* at 303–05.
84. Lockett v. Ohio, 438 U.S. 586 (1978).
85. Liebman, *supra* note 11, at 34–37; Gregg v. Georgia*,* 428 U.S 153, 188 (1976); *Lockett,* 438 U.S. at 604 ("We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.").
86. Liebman, *supra* note 11, at 5.
87. *Id*.
88. Eddings v. Oklahoma, 455 U.S. 104, 110 (1982).
89. *Rhetoric of Difference*, *supra* note 29.
90. Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 116, 118 (2004).

Many of the procedural standards resulting from the Court's "death is different" doctrine deal with death's heightened emotional stakes and heightened severity.[91] The taking of a life, both of the victim and potentially of the defendant, awakens our most raw human instincts.[92] Yet, members of the jury must wade through their own emotions of outrage, retribution, redemption, and fairness to reach a legally calibrated decision of who deserves to die.[93] This choice between vengeance and mercy is an emotional one—a human one.[94] A human choice leaves tremendous room for human fallibility.[95] This explains the Court's recognition that a death sentence, due to its difference, requires legal and procedural distinctions to be properly administered.[96]

As a result of the mandates from *Furman* and *Woodson,* capital cases take place in two stages, unlike most criminal trials, which are unitary. The bifurcated capital trial, a consequence of the Court's "death is different" doctrine, includes a guilt stage and a penalty stage.[97] In the first phase, the jury serves its traditional role as factfinder in determining whether the defendant is guilty and of what charges.[98] If the jury finds the defendant guilty of a death-eligible crime and the prosecutor chooses to ask for the death penalty, a separate set of jurors in the second phase decide whether to sentence the defendant to the death penalty or (typically) to life without parole.[99]

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91. *Id*.

92. Bandes, *supra* note 2, at 490.

93. Bandes, *supra* note 2, at 491 ("The community shares in the horror of the crime . . . the agony of the victims' family and friends, the outrage at the accused, and the desire to see justice done . . . . Yet somehow the legal system . . . is expected to float free of this emotional intensity—an island of pure deliberative reason.").

94. *See generally* Stephen P. Garvey, *The Emotional Economy of Capital Sentencing,* 75 N.Y.U. L. REV. 26 (2000) (discussing the various emotions jurors feel towards capital defendants).

95. Abramson, *supra* note 90, at 117 (discussing of the difficulty of reaching moral consistency while allowing for the subjectivity of human inputs).

96. These procedural differences often get categorized as procedures to ensure "heightened reliability." *Rhetoric of Difference*, *supra* note 29; *Heightened Reliability*, HABEAS ASSISTANCE AND TRAINING, https://hat.capdefnet.org/8th-amendment/heightened-reliability [https://perma.cc/QJ67-7EA5].

97. David McCord, *Is Death "Different" for Purposes of Harmless Error Analysis? Should It Be?: An Assessment of United States and Louisiana Supreme Court Case Law*, 59 LA. L. REV. 1105, 1106–1114 (1999).

98. *Rhetoric of Difference, supra* note 27, at 248–50.

99. *Definition of Key Terms*, CAPITAL PUNISHMENT IN CONTEXT, https://capitalpunishmentincontext.org/resources/definitions [https://perma.cc/EDB6-2UTE].

In the sentencing phase, capital trials become even more distinct from typical criminal ones.[100] The sentencing phase constitutes the central, emotional choice between life and death.[101] In order to limit the discretion in that choice, many states, post-*Woodson,* created a sort of math problem to help jurors effectively distinguish between those who deserved the death penalty and those who did not.[102] These statutes ask jurors to conduct a balancing test for defendants already found guilty of first-degree murder.[103] On one side of the scale are aggravating factors, those that lead to the categorization of "worst of the worst."[104] These are the things that make death penalty cases different from other murder cases. Aggravating factors can include things like: murder of a child, murder of a police officer, murder that involved torture, and other circumstances that raise the intensity and revolting nature of the crime.[105]

On the other side of the scale are mitigating factors. Mitigating factors are the circumstances of the crime or the characteristics of the defendant that open the door for the jury's empathy and potential mercy.[106] Defense attorneys will introduce familial background, character evidence, exhibits of the defendant's remorse, and other evidence to remind the jury of the defendant's humanity.[107] The jury then weighs the aggravating factors against the mitigating factors to determine if the holistic circumstances warrant a death sentence. To conduct this balancing test according to the *Woodson-Lockett* line of cases, jurors need more information than is typically admissible in other criminal proceedings.

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100. Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1151 (2009).

101. Abrams, *supra* note 90, at 156-157.

102. Sundby, *supra* note 36, at 8 (discussing the calculus of aggravating and mitigating factors).

103. Charles Montlado, *Aggravating and Mitigating Factors,* THOUGHTCO. (Feb. 12, 2019) https://www.thoughtco.com/aggravating-and-mitigating-factors-971177 [https://perma.cc/WVF2-S4E8].

104. Christopher M. Bellas, I Feel Your Pain: How Juror Empathy Effects Death Penalty Verdicts at 11–19 (Aug. 2010) (Ph.D. Dissertation, Kent State University), https://etd.ohiolink.edu/apexprod/rws_etd/send_file/send?accession=kent1276566375&disposition=inline [https://perma.cc/8FX9-FK3J].

105. *Id.*

106. *Id.* at 9–10.

107. *Id.*

Different states have employed various forms of guided discretion beyond the bifurcated trial and mitigating evidence balancing test articulated above. Many states also employ a robust judicial proportionality review as an additional check on jury discretion.[108] However, despite all the wariness surrounding jury discretion and its potential to violate *Furman*, the Court has continued to vest this life or death choice in juries rather than judges.[109] The throughline of the Court's jurisprudence and state statutes has been to find ways to preserve the legitimacy of jury discretion while also finding ways to strengthen its reliability.

2) Celebrating Guided Discretion

In *Gregg v. Georgia*, the Court validated the procedural mechanisms put in place to guide discretion. Following *Furman*, Georgia enacted a new capital statute with proportionality review where trials were bifurcated and defendants could introduce comprehensive mitigating evidence.[110] In *Gregg*, the Court celebrated these procedures as successfully meeting *Furman* and *Woodson*'s mandates.[111] The Court found that the Georgia statute effectively prevented jury discretion from running amok and creating arbitrary outcomes without squelching the vital role of the jury's humanity.[112]

Less than a decade later, the Court would defend Georgia's scheme of guided discretion yet again,[113] this time in the face of statistical proof that racial discrimination was inherent in the death penalty's administration. In 1986, in *McCleskey v. Kemp*, the Court was presented with statistical evidence that the death penalty's

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108. Barkow, *supra* note 100 at 1155.

109. *See, e.g*, Ring v. Arizona, 536 U.S. 584 (2002) (holding the right to a jury is especially important in capital cases); Spaziano v. Florida, 468 U.S. 447, 484 (juries are instrumental to ensure sentencing aligns with the evolving standards of decency rather than judges) (1984).

110. Gregg v. Georgia, 428 U.S. 153 (1976); *Criminal Procedure*, CORNELL L. SCH. LEGAL INFO. INST. https://www.law.cornell.edu/wex/criminal_procedure#:~:text=Although%20every%20state%20has%20its,guaranteed%20by%20the%20U.S.%20Constitution [https://perma.cc/X5MX-MDJC] (showing that states determine their own criminal procedures within federal guideposts).

111. *Gregg,* 428 U.S. 206–07.

112. *Id*.

113. Sundby, *supra* note 36, at 9 ("Having identified the guided discretion scheme as the cure for the *Furman* deficiencies, the Court labored in the ensuing decade to keep the system constitutionally afloat through a number of decisions.").

administration followed racialized patterns.[114] McCleskey, a Black man accused of killing a white police officer, presented the Baldus study to show that the race of the defendant and the race of the victim played a determinative role in capital sentencing.[115] The Baldus study held a mirror up to the Court's jurisprudence. It provided proof that guided discretion was still insufficient to root out discrimination in the administration of the death penalty.[116] It provided proof that even when allowing for the individualization and emotion mandated by *Woodson*, there was still enough room for discrimination to pervade.[117] McCleskey offered the Court the opportunity to look in the mirror and reckon with its conflicting jurisprudence, to realize that it had backed itself into a corner. However, the Court instead chose to look away.[118] Part II of this Note explores the desperate maneuvers the Court employed in *McCleskey* to escape its own mess.

PART II) BACKED INTO A CORNER: MCCLESKEY'S SLIPPERY SLOPE

In *McCleskey v. Kemp*, the Court reviewed proof of a racially discriminatory death penalty and found it constitutional.[119] The studies presented to the Court showed that Black defendants with white victims were more likely to receive the death penalty than any other group of defendant.[120] This was the fear of Justices Marshall,

114. Anthony Lewis, *Bowing to Racism*, N.Y. TIMES (April 28, 1987), http://www.nytimes.com/1987/04/28/opinion/abroad-at-home-bowing-toracism.html [on file with the *Columbia Human Rights Law Review*].

115. The studies done by Professor Baldus concluded that when the defendant is Black and the victim is white, the defendant has the largest chance of receiving the death penalty. McCleskey v. Kemp, 481 U.S. 279, 286–87 (1987).

116. *McCleskey*, 481 U.S. at 286–87.

117. Bowers, *supra* note 39, at 128.

118. *Id*. at 130 ("More to the point, Powell presumed all apples were good apples, absent demonstrable individualized evidence of specific rot. And the Court followed his lead."); Liebman, *supra* note 11 at 84.

119. The Court in *McCleskey* held that the statistical evidence that showed trends of racial discrimination did not create an Eighth Amendment claim in McCleskey's specific case. 481 U.S. at 306; *See generally* Samuel Gross, *David Baldus and the Legacy of* McCleskey v. Kemp, 97 IOWA L. REV. 1906, 1907, 1912 (2012); *Landmark:* McCleskey v. Kemp, LEGAL DEF. FUND, https://www.naacpldf.org/case-issue/landmark-mccleskey-v-kemp/ [https://perma.cc/Y3S2-U5CB].

120. Bowers, *supra* note 39, at 127 ("The Baldus study crunched data in several ways . . . with one model concluding that, even after controlling for thirty-nine nonracial variables, defendants charged with killing white victims were more than four times as likely to receive death as defendants charged with killing Black victims."); Sundby, *supra* note 36, at 9–10 ("After controlling for 230 variables that

Brennan, and Douglas in *Furman* brought to life.[121] Despite the 15 years of "tinker[ing]" with the death penalty, arbitrariness still existed.[122] Not only did arbitrariness still exist, but the Court's own mandate for individualization allowed more room for emotion in jury deliberations, which studies have shown allows for increased racial bias when given free rein in criminal proceedings.[123] McCleskey argued that the patterns of racial discrimination, so apparent in the Baldus study, showed that the death penalty continued to be administered arbitrarily and had still not met *Furman*'s mandate even with the guided discretion provisions praised in *Gregg*.[124]

The Justices were in a precarious position.[125] They'd backed themselves into a corner with the contradictory jurisprudence articulated earlier.[126] Their proffered solution, guided discretion, was not up to the task of both preventing emotion's role in discrimination and preserving emotion's role in individualized judgements.[127] However, instead of admitting this defeat as grounds for ruling Georgia's statute unconstitutional, the opinion in *McCleskey* changed

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might influence a death sentence, Baldus found that a defendant who killed a white victim was 4.3 times more likely to be sentenced to death than a defendant who killed a black victim."); *McCleskey*, 481 U.S. at 286–87.

121. Furman v. Georgia, 408 U.S. 238, 242 (1972) (Douglas, J., concurring) ("It 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 if it is imposed under a procedure that gives room for the play of such prejudices."); Brief for the Petitioner at 23–24, McCleskey v. Kemp, 481 U.S. 279 (1987) (No. 84-6811), 1986 WL 727359; Sundby, *supra* note 36, at 7–8.

122. Justice Blackmun used the word "tinker" to describe the Supreme Court's continued attempts to make the death penalty conform to its own jurisprudence. Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

123. Bandes, *supra* note 2, at 515–18; Mona Lynch & Craig Haney, *Emotion, Authority, and Death: (Raced) Negotiations in Mock Capital Jury Deliberations*, 40 L. & SOC. INQUIRY 377, 383–84, 403–4 (2015); Douglas O. Linder, *Juror Empathy and Race*, 63 TENN. L. REV. 887, 908–10 (1996); *Callins*, 510 U.S. at 1153 ("The arbitrariness inherent in the sentencer's discretion to afford mercy is exacerbated by the problem of race.").

124. Brief for the Petitioner at 26, McCleskey v. Kemp, 481 U.S. 279 (1987) (No. 84-6811), 1986 WL 727359. ("Petitioner McCleskey has now presented comprehensive evidence to the lower courts that Georgia's post-*Furman* experiment has failed, and that its capital sentencing system continues to be haunted by widespread and substantial racial bias.").

125. Liebman, *supra* note 11 at 86.

126. *See supra* Part I (describing the post-Furman mandates of the Court for both individualization and consistency).

127. Justice Blackmun reframes the majority's opinion in *McCleskey* as an admission that the Court could not meet the mandates of both consistency and individualization. *Callins*, 510 U.S. at 1155; Sundby, *supra* note 36, at 25.

the lens of the argument.[128] Instead of making it about continuing to find new ways to handle discretion in light of the persistent discrimination, Justice Powell, writing for the Court, made it about protecting discretion—as a conduit for the Court's credibility—at all costs.[129] To protect discretion, Powell broke from the Court's "death is different" doctrine, and instead treated discretion in capital sentencing with same as discretion as other points in criminal legal proceedings.[130] This Part first explores how the opinion downplays racial discrimination to preserve jury discretion. Next, it discusses how Powell created a slippery slope grounded in the importance of discretion to all cases, not just capital ones. Then, this Part explains the motivating forces behind the judicial strategy in the opinion, and, finally, the consequences of the argument the Court chose.

A) Discretion's Continued Discrimination

After almost a decade of defending the guided discretion scheme, the Court confronted evidence that the scheme still allowed for systemic racial discrimination.[131] The Baldus study presented statistical evidence, gleaned from Georgia's sentencing practices following the decision in *Gregg*, that race played a determinative role in capital sentencing.[132] Within a specific range of similarly aggravated crimes, Black defendants with white victims were substantially more likely to receive the death penalty.[133] The jury's discretion had not been sufficiently guided to prevent racial bias from allowing the death penalty's lightning to strike some and not others for any reason besides race.

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128. Bowers, *supra* note 39, at 131.

129. Powell's slippery slope argument made protecting discretion's role in both capital and noncapital cases inherently linked despite the "death is different" doctrine. However, discretion operated as a placeholder for the ability of the Courts and the law to create just systems since the Court's death penalty jurisprudence had continually placed its face in discretion and its own ability to manage discretion. Sundby, *supra* note 36, at 30–32; Bowers, *supra* note 39, at 128–31, 139; Patterson, *supra* note 9, at 89.

130. Patterson, *supra* note 9, at 86–87; Bowers, *supra* note 39, at 131, 138 ("[T]hroughout the opinion, Powell emphasized the central role discretion plays, not only in death-penalty practice, but throughout our criminal-legal processes. . . .").

131. McCleskey v. Kemp, 481 U.S. 279, 297 (1987); *See generally supra* note 119 (supporting the claim of systemic racial discrimination).

132. *See generally supra* note 119 (supporting the claim of systemic racial discrimination and the holdings of the Baldus study as explained).

133. *See generally supra* note 119 (supporting the claim of systemic racial discrimination and the holdings of the Baldus study as explained).

Writing for the Court, Powell found a way to preserve *Gregg*'s scheme of guided discretion despite the evidence presented that racial discrimination persisted. First, Powell downplayed the role of race.[134] Powell described the racial discrimination shown in the Baldus study as the "unexplained" outcome that results from the humanity of the jury.[135] He reasoned that just because a correlation or discrepancy is unexplained, it is not necessarily invidious.[136] Powell kept his argument at the surface-level assertion that juries utilize a host of factors in making their decisions, and in choosing not to dive any deeper, he downplayed the clear role that race played in the juries' determinations.[137] This argument is reminiscent of Justice Harlan's opinion in *McGautha* that it would be impossible to get into the mind and decipher the motivations of every single juror.[138]

However, the racial discrimination found in the study was not unexplainable or unpredictable. The sentencing patterns found in the study correlated directly with the race of the defendant and the race of the victim.[139] In a memo, Justice Scalia all but stated that the study showed clear proof of race as a predominant sentencing factor.[140] Scalia voiced his disagreement with Powell's assertion that the Baldus study was insufficient in proving racism's invidious impact on the death penalty's administration.[141]

Despite his argument in *McCleskey*, Powell was not naive to racism's role in the criminal justice system.[142] Just a few years earlier,

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134. Bowers, *supra* note 39, at 131; Sundby, *supra* note 36, at 30 ("To raise these examples [facial characteristics or physical attractiveness] in a case about racial bias in the death penalty appears to suggest that we should downplay the risk of racial discrimination . . . .").

135. *McCleskey,* 481 U.S. at 311 ("Individual jurors bring to their deliberations 'qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.'") (quoting Peters v. Kiff, 407 U.S. 493, 503 (1972))); *McCleskey*, 481 U.S. at 307, n.28.

136. *McCleskey,* 481 U.S. at 313.

137. Bowers, *supra* note 39, at 131–33 (arguing that juries could be biased about any number of features including hair color or eye color); Patterson, *supra* note 9, at 85–86.

138. McGautha v. California, 402 U.S. 183 (1971); *see also* discussion *supra* note 17–18.

139. Sundby, *supra* note 36, at 10; Bowers, *supra* note 39, at 127; *see generally supra* note 119.

140. Gross, *supra* note 119, at 1921 (citing the memo written by Justice Scalia about his reservations for the holding in *McCleskey*).

141. *Id.*

142. Batson v. Kentucky, 476 U.S. 79, 87 (1986) ("The harm from discriminatory jury selection extends beyond that inflicted on the defendant and

in the jury selection case *Batson v. Kentucky*, Powell recognized that jury discretion could heighten the impact of racism in criminal proceedings.[143] It is confusing, then, why Powell would act so seemingly obtuse to the systemic racism presented to the Court once again, when he had addressed systemic racism before.[144] Yet he determined that the study was insufficient proof to invalidate jury discretion, given the overall importance of discretion to the entire legal system.[145]

B) The Slippery Slope: Discretion's Importance and Death's "Difference"

The second tactic the Court used to protect the holding of *Gregg* and guided discretion was to play up the importance of juror discretion.[146] Powell articulated the essential nature of discretion in ensuring justice in all criminal proceedings and protecting all criminal defendants.[147] He was then able to frame the discussion, arguing that to challenge the discretion that led to discrimination in the death penalty would be to challenge all discretion in all aspects of all cases.[148]

Powell feared that *McCleskey*'s claim "taken to its logical conclusion" would invalidate the entire notion of discretion.[149] However, this is more of a logical confusion than a logical conclusion, as it contradicts the Court's "death is different" doctrine.[150] The opinion argues that, because the Eighth Amendment applies to all criminal proceedings, and not just the death penalty, validating the Eighth

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the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.").

143. *Id.*

144. Gross, *supra* note 119, at 1923 ("The Court is perfectly capable of looking facts in the eye and denying their existence. In this case, only a minority of the Justices directly acknowledged the truth of the Baldus study, but none of them has ever tried to deny it. It would have been a losing battle.").

145. McCleskey v. Kemp, 481 U.S. 279, 311–13 (1987).

146. The first tactic, articulated in the preceding section, was downplaying the role of race. Bowers, *supra* note 39, at 130–34; *McCleskey,* 481 U.S. at 311, 315 ("Where the discretion . . . 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 . . . , and the benefits that discretion provides to criminal defendants . . ..").

147. *McCleskey*, 481 U.S. at 310–12.

148. Bowers, *supra* note 39, at 131.

149. *McCleskey,* 481 U.S. at 314–15.

150. Patterson, *supra* note 9, at 90 (discussing how *McCleskey* ignores the Court's death is different doctrine); Bowers, *supra* note 39, at 137; Sundby, *supra* note 36, at 30.

Amendment challenge in this case would open the floodgates to future challenges of systemic racial discrimination in all arenas of the criminal legal system.[151]

Powell's argument, by extrapolating the Eighth Amendment challenge in *McCleskey*, a death penalty case, to other aspects of the criminal legal system, inherently implies that the Eighth Amendment's treatment of the death penalty is the same as in other criminal trials. Yet, as articulated earlier in this Note, both the Court and state legislatures have consistently treated death as different.[152] If death is truly different, the Court would not be able to use this slippery slope argument to divert the analysis of what to do when discretion creates discrimination. However, without the slippery slope, the focus would be on the reality that the Baldus study forced the Court to confront: racial discrimination persisted even under *Gregg*'s scheme of guided discretion. This conundrum, to Powell's mind, necessitated the slippery slope as a diversion tactic.[153]

C) Why, Powell, Why?

As Justice Brennan pointed out in his *McCleskey* dissent, "discretion is a means, not an end."[154] This begs the question as to why Justice Powell was then determined to treat discretion as the goal of the criminal legal system. Critics of Powell's judicial logic in *McCleskey* cite his devotion to institutionalism[155] and his fear that continued scrutiny of discretion based on something as pervasive and hydra-

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151. *McCleskey,* 481 U.S. at 314–15; this Note will refrain from commenting on Powell's underlying fear of "too much justice," given the focus of this Note on the consequences, rather than the shaky foundation, of Powell's slippery slope argument. *Id*. at 339 (quoting Brennan, J, dissenting).

152. *Supra* notes Part I and accompanying text; Patterson, *supra* note 9, at 86 ("However, the Court historically asserted that because death is different, a capital sentencing system requires a heightened degree of reliability. Nonetheless, in *McCleskey*, the majority retreated from this insistence on optimum reliability by acknowledging that . . . any mode for determining guilt or punishment has . . . potential for misuse.").

153. "Necessitate" as used in this context alludes to the fears expressed by Powell in memos and implied by scholars that to validate the claim of racial discrimination, he would have to confront his beliefs on how the judiciary and the legal system work. Therefore, to avoid confronting the failures of the systems he believed in, this tactic was necessary. Sundby, *supra* note 36, at 31–32; Bowers, *supra* note 39, at 135.

154. *McCleskey,* 481 U.S. at 336 (Brennan, J., dissenting).

155. Bowers, *supra* note 39, at 137–39 (detailing Powell's "retreat to formalism").

headed as racism would call into question the ability of the judiciary to address its problems.[156] In other words, once Powell made discretion the cornerstone of the criminal legal system, he would only be able to criticize discretion by criticizing the system at large. Faced with the evidence that racial discrimination persisted, despite the system's efforts to eradicate it, Powell, seemingly, saw only two options: maintain a system prone to racism, or attack racism and take the system down.[157] He chose the former.

Powell's choices can be explained by the corner that the Court's own jurisprudence had backed him into. The Court's balancing act of guided discretion forced Powell onto a tightrope between having to affirm individualization and negate discrimination.[158] The Court was left with few other options. It had made a mess of conflicting standards that still failed to root out systemic racism in the death penalty's administration.[159] The Court had declared unbridled discretion unconstitutional.[160] The Court had declared no discretion unconstitutional.[161] The Court had mandated that the death penalty be administered in a nonarbitrary way.[162] The Court had mandated that the death penalty's imposition be determined based on

156. The problem referred to here is the problem of continued racial discrimination as a form of arbitrariness despite *Gregg*'s scheme of guided discretion. *Id.* In this section, Bowers articulated all the mental gymnastics that Powell had to conduct in order to ignore the systemic racism and the case law that would force him to give it greater consideration. *Id.* at 148–49.

157. Bowers, *supra* note 39, at 148; Patterson, *supra* note 9, at 93 ("The *McCleskey* majority correctly recognized no system is perfect." Patterson noted that, in death penalty cases just as in non-capital cases, "while discrimination may exist, the Court has done the *very best it can* to minimize discrimination. The cost to society of eliminating the criminal justice system is much greater than the cost of having a system in which discrimination may occur.").

158. *Supra* notes 84–111 and accompanying text.

159. *Supra* notes 84–111 and accompanying text.

160. Furman v. Georgia., 408 U.S. 238 (1972).

161. Woodson v. North Carolina, 428 U.S. 280 (1976).

162. *Furman,* 408 U.S. (the collective concurrences of Justices Marshall, Brennan, and Douglas).

individualized, subjective factors.[163] The Court wanted emotion.[164] The Court did not want discrimination.[165] The Court had hoped that the death penalty could exist without arbitrariness in the small permissible range of discretion sanctioned by *Furman*.[166] Yet, as the Baldus study showed, systemic racism persisted.[167] What was Powell to do besides abolish the death penalty outright?[168] If capital punishment were to remain, he would have to find a way to make sense out of this nonsensical jurisprudence.

The opinion in *McCleskey* shows that "the[] Court blinked."[169] Powell pulled out the oldest trick in the book: he deflected attention away from the statistical proof of racism and the failure to solve the problems that *Furman* raised by focusing attention on the slippery slope instead.[170] He dramatized the stakes of deciding in McCleskey's favor to avoid having to admit *Gregg*'s insufficiencies.[171] The high stakes dramatic opinion in *McCleskey* was out of character for the

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163. *Woodson,* 428 U.S. at 304 ("[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender . . . as a constitutionally indispensable part of the process of inflicting the penalty of death."); Gregg v. Georgia, 428 U.S. 153 (1976); Lockett v. Ohio, 438 U.S. 586, 605 (1978) ("Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases.").

164. The Court has affirmed what is called the "mercy option," suggesting that despite all the other calculations of aggravating and mitigating circumstances, the jury can always choose to grant mercy (if they are so inclined), allowing for the emotional desire for mercy to trump the balancing test. Lyle Denniston, *The Death Penalty and the Mercy Option*, SCOTUSBLOG (Dec. 7, 2005), https://www.scotusblog.com/2005/12/the-death-penalty-and-the-mercy-option/ [https://perma.cc/PZ7Y-LUCU].

165. *Furman*, 408 U.S. (the collective concurrences of Justices Marshall, Brennan, and Douglas).

166. McCleskey v. Kemp*,* 481 U.S. 279, 305 (1987).

167. *See generally* supra note 119.

168. Bowers, *supra* note 39, at 130 (arguing that Powell saw the evidence from the Baldus study and the arguments from Petitioners as "an attack on capital punishment itself."); Sundby, *supra* note 36, at 20.

169. Liebman, *supra* note 11, at 84.

170. Bowers, *supra* note 39, at 131; Liebman, *supra* note 1, at 84.

171. Sundby, *supra* note 36, at 32 (referring to Powell's slippery slope as a "'the sky will fall' argument"); Bowers, *supra* note 39, at 133 (describing the slippery slope argument as "a dubious and insulting set of analogies that elevated the stakes still further and sent the decision spiraling down artistical slippery slopes with an almost farcical abandon"); Liebman, *supra* note 11, at 84 (describing the argument as "irresponsibly shirking responsibility for the relief its substantive review required.").

"moderate" brand that Powell had curated.[172] Powell seemed to find this necessary, or else discretion would continue to come under scrutiny, and ultimately the Court's efforts to tame the death penalty would be deemed a failure.[173]

In other words, to preserve the death penalty, the role of race in capital sentencing was regarded as a secondary concern as compared to the importance of discretion.[174] Later in his life, Powell ultimately came to regret his decision in *McCleskey* more than any other case, but the lid could not be closed on Pandora's box.[175]

However, validating the guided discretion scheme in *Gregg* was not the Court's only option to preserve its jurisprudence in light of the Baldus study.[176] The Court could have invalidated the scheme as a failure to meet *Woodson*'s mandate for individualization.[177] Sentencing patterns based on something as general as race are counterintuitive to the individualized approach that the Court sought to employ following the *Woodson-Lockett* line of cases.[178] The patterns shown by the Baldus study do not result from individual circumstances; rather, they derive from the general characteristics of the race of the defendant and the race of the victim. A reliance on such general characteristics is reminiscent of the schemes struck down in *Woodson*.[179] There, the Court invalidated mandatory death penalty schemes that sentenced some people to death based solely on the conviction.[180] In *McCleskey*, the Court upheld a death penalty that sentences some people to death based solely on their race and the race of the victim.[181] Neither scheme takes into account the actual individual characteristics of the offense

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172. William Cohen, *Review: Justice in the Balance*, 81 VA. L. REV. 927, 935 (1995) (reviewing John C. Jeffries, Jr., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY (1994)); Bowers, *supra* note 39, at 127.

173. *See supra* note 149 and accompanying text.

174. Sundby, *supra* note 36, at 31–32.

175. Cohen, *supra* note 172, at 935.

176. Bowers, *supra* note 39, at 134; Sundby, *supra* note 36, at 30.

177. Woodson v. N.C., 428 U.S. 280, 303–04 (1976).

178. Lockett v. Ohio, 438 U.S. 586, 605–06 (1978); Woodson, 438 U.S. at 303–04; Bowers, *supra* note 39, at 128 ("In reaching that conclusion, Powell highlighted the individualized nature of capital charging and sentencing decisions. As he wrote in a *McCleskey* memorandum, 'sentencing judges and juries are constitutionally required to consider a host of individual-specific circumstances in deciding whether to impose capital punishment.").

179. *See supra* notes 72–83 and accompanying text (articulating the Court's insistence on subjective, individualized factors contributing to case outcomes).

180. *See supra* notes 72–83 and accompanying text (articulating the holding and ramifications of *Woodson*).

181. *Supra* notes 119–1120 and accompanying text.

or the offender. Ultimately, the opinion in *McCleskey* upholds a scheme that meets neither *Furman's* mandate against arbitrariness nor *Woodson's* mandate against mandatory non-individualized sentencing.[182]

Not only does Powell fail in his goal to show that the death penalty resides within the constitutional framework of earlier cases, but he also creates new problems for the Court by contradicting the "death is different" doctrine. Part III of this Note will articulate the ways the Court must now rectify their contradicting doctrine of death's difference.

D.) The Stakes of Judicial Confusion

Why does it matter that the Court wants to treat death as different only some of the time? What consequences does Powell's slippery slope characterization carry? This Note concludes that *McCleskey* can be interpreted as overturning both *Furman* and the "death is different" doctrine, without explicitly putting words to either.[183] Powell would say that his affirmation of the procedural mechanisms sanctioned in *Gregg* is testament to his devotion to the "death is different" doctrine.[184] However, by refusing to admit that the guided discretion scheme did not successfully rein in discretion, Powell's slippery slope taints any fidelity to the "death is different" doctrine that he might have intended to convey in other parts of the opinion.[185]

Powell's opinion turned the procedures sanctioned in *Gregg* into a "Trojan horse" for continued arbitrariness.[186] Instead of

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182. Gross, *supra* note 119, at 1917 ("In other words, Justice Powell seems to say, 'It does look like there's a real problem here. We don't deny it. But we're not equipped to help you. Ask elsewhere.'"); Patterson, *supra* note 9, at 93 ("What was unconstitutional under Furman was characterized in McCleskey as acceptable, if not desirable, discretion.").

183. Patterson, *supra* note 9, at 80–93 (reaffirming that both Furman and the "death is different" doctrine were relevant in the McCleskey decision).

184. Sundby, *supra* note 36, at 22.

185. Justice Blackmun in his dissent described the last part of the majority opinion, where Powell maps out the slippery slope, as "the most disturbing." Blackmun refers to Powell's fear that to grant McCleskey's claim would raise more constitutional claims. Blackmun concludes that this would strengthen rather than weaken the system as Powell fears. McCleskey v. Kemp*,* 481 U.S. 279, 365 (1987).

186. Sundby, *supra* note 36, at 6 ("Indeed, one of the lessons that our examination of *McCleskey* will teach is that procedure, despite its many benefits, can also have a dark side if it becomes a veneer behind which injustice is obscured"); *Id*. at 23.

preventing arbitrariness, it provided judicial cover for the very issues the Court had sought to eradicate.[187] *McCleskey* overturns core principles of *Furman*'s opinions without explicitly stating so, and instead claims to be acting in accordance with *Furman*.[188]

The "death as different" doctrine has been utilized in capital Eighth Amendment jurisprudence to emphasize the emotional differences in the stakes of capital cases and to justify the numerous procedures put in place to ensure that discretion is guided and does not run amok of *Furman's* mandate.[189] Yet *McCleskey* disregards this doctrine.[190] This muddies the water for future capital defenses. If the procedures in *Gregg* that Powell praised are a result of death's difference, but the outcome of jury discretion in capital cases is the same for death and other criminal trials, the Court is then treating procedures and outcomes differently.[191] Given that the stakes for capital defense cases are life and death, the Court's doctrine must be clear for future defendants to navigate. This Note contends that the Court must decide whether "death is different" or not. Otherwise, the doctrinal landscape itself could be attributed as a source of the death penalty's arbitrary administration.

PART III) IS DEATH DIFFERENT OR NOT?

McCleskey's problematic treatment of the death penalty as both different and not different must be corrected.[192] This Note offers two options to rectify the situation.[193] The Supreme Court could decide that the magnitude, irreversibility, and gravity of a death sentence makes the death penalty unique in the criminal legal system.[194] Or, the Court could decide that because the death penalty relies on the same human factors as other criminal proceedings, such as jury discretion,

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187. *Id*. at 26–27.
188. *Id*. at 28 ("Coming immediately on the heels of Powell's extensive protestations that all is well on the post-Furman front, this sounds like a warning not to pull back the curtain concealing the Wizard lest we see that the rule of law is not so magical after all.").
189. *See supra* notes 68–71 and accompanying text.
190. Sundby, *supra* note 36, at 30.
191. Lahey & Sang, *supra* note 72, at 495.
192. *See supra* Section II.D (describing judicial confusion on how to consider death in such cases).
193. This Note assumes the Court will not blanketly overturn *McCleskey*.
194. *See supra* note 27 (quoting the Court's description of the death sentence in *Griffin* and *Furman*).

it is not so different from other cases.[195] This Part outlines each of these options and their corresponding consequences. It concludes that although the first option is preferable for the ultimate goal of abolition, both options result in progress and more justice for criminal defendants. Ultimately, this Note's conclusion is that the status quo—where the Court treats the death penalty both differently and not when it serves them to do so—is untenable, and that one of the two proposed options must be taken up.

A) Death is Different

The death penalty allows ordinary people—legislators, lawyers, jurors, judges—to make an extraordinary decision: the choice between life and death.[196] The Court acknowledges that the death penalty is unique as compared to other punishments in many ways: the gravity of the decision, the potency of the underlying emotions that inform the decision, and the irrevocability of the decision.[197] These differences have underscored the judicial reasoning that allows different standards and procedures to distinguish between capital and other criminal trials.[198] However, as articulated in the previous section of this Note, Justice Powell crafted a slippery slope in *McCleskey* that conflated discretion in capital trials with discretion in all criminal trials.[199] This does not comport with the Court's "death is different" jurisprudence.[200] In order to align *McCleskey's* logic with the consistent sentiment that "death is different", the Court should narrowly apply *McCleskey*'s logic to aspects of capital trials that are similar to those of all criminal trials, and not to those that are different.

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195. This affirms Powell's point that the Eighth Amendment applies to all criminal cases and punishments and that there is discretion involved in all criminal trials. McCleskey v. Kemp, 481 U.S. 279, 311–15 (1987).

196. *See supra* notes 4–8 (describing the role and the responsibility of the jury in capital cases).

197. *See supra* note 27 (citing the opinions in which various Justices declared death's difference).

198. *See supra* Section I.C.1–2 (recounting the procedures that came to be used to treat death differently. The procedural mechanisms articulated earlier in this piece are not exhaustive and not constitutionally mandatory, but as articulated in *Gregg* are one way of meeting *Furman*'s mandate).

199. *See supra* Part II.

200. *McCleskey* v. *Kemp,* 481 U.S. 279, 346–48 (1987) (Blackmun, J., dissenting).

Regardless of whether a crime is death eligible, all criminal procedures contain certain hallmark elements.[201] These include procedural components at every step of the process where an actor can exercise discretion.[202] Every criminal trial involves an arrest by police, a charge from the prosecutor, the formation of a jury, and then a trial to determine whether the defendant is guilty and of what. As Powell capitulated in his opinion, racism remains pervasive throughout the criminal legal system.[203] Statistical evidence of such systemic racism can likely be found at each point where discretion is allowed. Powell is concerned that if discretion is undermined at every point where it could result in racial discrimination, then every aspect of the criminal legal system would be under such a weight of scrutiny that it would crumble.[204] A more modest—and more consistent—application of *McCleskey* that actually treats death as different would cabin Powell's argument to only the areas in which capital and non-capital cases are similar. *McCleskey*'s argument would then protect those aspects of capital trials that are similar—arrest, prosecution, determinations of guilt—from accusations of arbitrariness based on statistical evidence of racial discrimination. However, this would still leave future litigants the opportunity to attack the aspects of a capital case that are unique, and therefore left outside of this narrowed form of *McCleskey*.

Specifically, the sentencing portion of a capital trial is unique relative to other criminal trials.[205] As discussed previously in this Note, the sentencing portion of a capital trial has been equipped with unique protections and procedures to reflect the "death is different" doctrine.[206] These differences, such as a bifurcated trial and different admissibility rules for evidence, were created by state legislatures in

201. *See* Criminal Procedure, *supra* note 110 (describing elements of criminal procedure).

202. *Id*.

203. *McCleskey,* 481 U.S. at 309–10.

204. Bowers, *supra* note 39, at 30–31. This Note will refrain from commenting on whether this is a worthwhile objection, but instead will assume the Court will preserve Powell's underlying goal to prioritize the credibility of the American legal system over rooting out every whisper of racial discrimination in the system.

205. *See* Barkow, *supra* note 100 (arguing that the Court continually has treated capital sentencing as unique and separate from other areas of criminal law and procedure).

206. *See supra* notes 76–111 and accompanying text (describing the differences in capital versus non-capital cases).

order to meet the dual mandate by the Court to create a death penalty that is not arbitrary and also is highly individualized.[207]

Capital sentencing is unique as it is truly a life or death decision.[208] Because it involves heightened emotions, the discretion exercised is uniquely influenced by those emotions.[209] Yet, Powell conflated the discretion in capital sentencing with all forms of discretion in the criminal legal system.[210] In a world where *McCleskey* is narrowed to exclude capital sentencing, litigants could argue, as the dissenters in *McCleskey* did, that racial disparities in capital sentencing should receive heightened scrutiny rather than diminished scrutiny.[211] In other words, Powell could maintain his view that we cannot question discretion in capital cases because it would question discretion everywhere, but that logic would not extend to capital sentencing, where that discretion is unique. This preserves the Court's "death is different" doctrine while also preserving some of Powell's rationale about the slippery slope of consequences.

This reframing opens the door for future litigants. This course of action asks the Court to re-examine the reality that systemic racism still persists in capital sentencing despite the efforts of guided discretion. In other words, the Court would be forced to confront the fact that the solution they saw as victorious in *Gregg* had not succeeded.[212] If future litigants were to bring forth proof of systemic racism in capital sentencing similar to the Baldus study, the Court would be forced to acknowledge that the individualization mandate that necessitates jury discretion also inherently allows for discrimination. Powell attempted to escape from this corner with his slippery slope, by saying that the Court could not give weight to this argument for fear of the implications to the whole system.[213] However,

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207. *See supra* notes 76–111 and accompanying text (discussing the needs for additional procedural elements in capital cases).

208. It is unique as compared to non-capital cases, where jurors make a sentencing decision within a statutory range. Nancy King, *How Different is Death? Jury Sentencing in Capital and Non-Capital Cases Compared*, 2 OHIO STATE J. OF CRIM. L. 195, 197 (2004).

209. Callins v. Collins, 510 U.S. 1141, 1152–53 (1994) (Blackmun, J., dissenting).

210. *See supra* Part II (discussing Powell's conflation of all discretion).

211. McCleskey v. Kemp, 481 U.S. 279, 320–25 (1987) (Brennan, J., dissenting).

212. Success here is defined as effectively removing the racial discrimination that caused three of the justices in *Furman* to find the death penalty unconstitutional.

213. *See supra* Part II (referencing Powell's slippery slope on discretion).

once those fears are removed by virtue of a narrowed holding and application, the Court is forced back into the corner. It is still left with a racist death penalty.

With *McCleskey* narrowed, death penalty abolitionist litigants could impale the Court on its own sword.[214] By re-introducing the evidence of systemic racism without Powell's escape hatch, litigants would give the Court two options: admit that it cannot root out racism and fulfill the Fourteenth Amendment, or admit that no version of the death penalty falls within the bounds of the Constitution.

B) Death Is Not Different

Constitutional Eighth Amendment protections apply to every criminal punishment in our legal system,[215] including capital and other criminal trials alike.[216] In light of *McCleskey's* inconsistent treatment of the Court's "death is different" doctrine, the Court can decide to follow Powell's lead and agree that death is not different. Justice Powell did not treat death as different when he argued that a holding about systemic racism and jury discretion in capital cases would have far-reaching implications across every criminal trial where the Eighth Amendment could be invoked.[217] This treats the death penalty as similar to other criminal proceedings. However, if both types of proceedings are pronounced similar in this context, the Court must be consistent and consider them similar in all other contexts.

The Court used death's perceived difference to justify procedural changes and heightened protections compared to other criminal trials.[218] In a world where the Court decides to revoke this claim of difference, these procedural differences would no longer be warranted. If the death penalty is not different, why do only capital defendants get a much more robust proportionality review?[219] If the death penalty is not different, why do only capital jurors get to hear

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214. The "sword" here is discretion because discretion inherently allows for choice and choice allows for arbitrariness. However, the Court has said that discretion is constitutionally necessary. *Rhetoric of Difference*, *supra* note 29, at 1609–1610 (The "Court has attempted to strike a balance between unfettered discretion . . . and no discretion at all . . . The opportunity to grant mercy is also an opportunity to exercise spite, vengeance, or prejudice").

215. *McCleskey,* 481 U.S. at 312.

216. *Id*.

217. *Supra* Part II.

218. Barkow, *supra* note 100, at 1147.

219. *Id.* at 1155.

expansive mitigating evidence in order to individualize sentencing?[220] The Court created heightened protections for capital defendants and increased limitations on capital judges and juries.[221] However, these are all predicated on difference, without which these procedural disparities create two classes of criminal defendants: inequality without a justification.[222]

Based on this logic, litigants would have the opportunity to argue that other criminal trials are not afforded these protections.[223] Without the "death is different" doctrine, other criminal defendants could raise Fourteenth Amendment complaints that they are not receiving equal protection of the law when compared to capital defendants. Legislators would then need to step in and effectively rewrite their criminal codes in order to ensure that all criminal defendants, capital or otherwise, received the same protections. However, this does not leave legislators with too much leeway.

The Court tasked legislators with creating a non-arbitrarily administered death penalty.[224] This led legislators to devise the procedures articulated before, such as automatic appellate review, individualization, and expansive mitigating evidence, in order to confine the death penalty within the parameters set forth by the Court.[225] The Court approved of these procedural mechanisms as a means to meet *Furman's* mandate.[226] However, these procedural mechanisms are what differentiate capital trials and capital defendants.[227] Consequently, this means that legislatures are not able to lift up their arms and do away with these safeguards.[228] Since they cannot lower the protections in capital cases without violating *Furman*

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220. *Id*. at 1154.
221. *See supra* notes 76–111.
222. Barkow, *supra* note 100, at 1149–1150.
223. This is the entire thrust of Barkow's argument, *Id*. at 1171. ("Once the Court recognizes a constitutional right, it should recognize the right for all, not just for those who might need the protection the most.").
224. Furman v. Georgia., 408 U.S. 238, 255–57 (1972).
225. *See supra* Part I (explaining the legislative changes made post-Furman).
226. *Id*.
227. *Id*.
228. Safeguards refers to the procedural mechanisms enacted post-Furman to guide discretion, *see supra* notes 76–111.

and its progeny,[229] legislators would have to allow for these same protections and procedures in all capital cases.[230]

The fact that legislators cannot remove the currently established heightened protections for capital cases means that, without "death is different", every criminal defendant would be entitled to the protections of a capital defendant. The consequences would be far-reaching and cannot be fully articulated in this Note, but mandatory minimum sentencing schemes can serve as an example:[231] If we apply the holdings of *Woodson*, which demand a level of individualization that any sort of mandatory scheme contradicts, then mandatory sentencing schemes across the board would be under attack. Every criminal defendant would have a right to proportionality review, so long as that protection existed for capital defendants in the state. Every criminal jury would be allowed to hear expansive mitigating factors to sway them in favor of mercy. Eradicating death's difference could set forth a domino effect throughout the entire criminal justice system. This would be the only option if the Court decides to uphold the sweeping slippery slope in *McCleskey* where death was not treated as different.

C) Going Forward: Rising Tides Raise All Boats

The Supreme Court currently faces with a problem of its own making: how to create a constitutional death penalty within its own jurisprudential framework.[232] Ultimately, the Court wanted enough discretion to make the administration of the death penalty humane in its view, but did not want the baggage of having to find a way to domesticate human emotions into a consistent and calculated formula.[233] This forced Justice Powell into a corner in *McCleskey*.[234] Instead of admitting that *Furman*'s mandate had still not been achieved, Powell crafted a slippery slope argument to divert the

229. Overturning *Furman* would require the Court to state that an arbitrary death penalty is constitutional. This Note assumes that the Court would not and ultimately could not do this.

230. See Barkow, *supra* note 100, at 1197–1205 (advocating for the merging of constitutional protections for capital and non-capital defendants).

231. *Id*. at 1177 (discussing how the Court failed to apply *Woodson* to noncapital mandatory sentencing schemes).

232. Liebman, *supra* note 11, at 14–15.

233. *See supra* Part I (summarizing the Court's dance with discretion from *McGautha* to *McCleskey*).

234. *Id*.

problem.[235] However, his argument rested on treating the death penalty as the same as other aspects of the criminal legal system, thereby contradicting the "death is different" doctrine.[236]

In order to address this problem, the Court must take one of the two paths articulated above. The Court can decide that "death is different" and narrowly apply *McCleskey*, leaving future litigants the opportunity to push for abolition by arguing that the sentencing portion of capital trials is still arbitrary and violates *Furman*. This is ultimately the harder of the two options. If the procedures validated in *Gregg* could not adequately address racial discrimination, it is unlikely that the Court could conjure up a new statutory scheme that would. Additionally, the Court's jurisprudence shows that, although the Court is willing to strike down statutory schemes as insufficiently meeting *Furman*'s mandate, it has been unwilling to directly articulate what sort of scheme would.[237]

The Court's unwillingness to articulate a solution can be read as an admission that there is none. The Court made the jury's emotion both the problem and the solution. By deciding that "death is different", the Court would need to openly grapple with emotion's role in the law, rather than naively believing that the law is entirely capable of containing emotions.[238] It would require the Court to recognize that the heightened emotions in capital cases, which form the basis for the "death is different" doctrine, are outside the bounds of the law's ability to contort human emotions into justice.[239] By recognizing the unique emotions inherent in capital cases, the Court can save face and admit that the law can handle most emotions in criminal trials, but cannot handle capital emotions.[240] It is unlikely that the Court will pursue this option for two reasons: one, the continued political desire to retain the

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235. *Id.*

236. *See supra* Part II (explaining the mechanics of Powell's slippery slope).

237. Liebman, *supra* note 11, at 12 n.37.

238. *Rhetoric of Difference*, *supra* note 29, at 1614 ("The uniquely individualized vengeance permitted by capital sentencing serves a slightly different function. Capital punishment becomes an outlet not only for outrage but also for otherwise impermissible biases and animosity.").

239. *Id.* at 1607 ("The moral determination involved in this choice may render impossible a rational and precise description of the types of defendants who should be put to death.").

240. It is Justice Scalia that is most willing (of those who affirm the death penalty as not per se unconstitutional) to acknowledge the illogic of the Court's death penalty jurisprudence: "our jurisprudence and logic have long since parted ways." Walton v. Az., 497 U.S. 639, 656 (1990) (Scalia, J., concurring in part and concurring in the judgment).

death penalty,[241] and two, that this option would admit that there are things the law just cannot handle—a hard pill for devotees of the law to swallow.

In the alternative, the Court can decide that death is not different, but then would have to grant additional protections to other criminal defendants. It is more likely that the Court will pursue this second option of granting greater protections across the board. Although this still allows the death penalty to exist, it creates stronger protections for defendants throughout the criminal legal system. However, as articulated earlier, this will require litigants to push on every front where the Court has carved out unique protections for capital defendants based on death's difference. This will create "super due process" for every criminal defendant.[242] Instead of worrying about "too much justice,"[243] *McCleskey*'s holding that death is not different could ultimately be used by criminal justice advocates to ensure that there is more justice throughout the legal system.

CONCLUSION

"These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual."[244] Except now, imagine that based on the race of both defendant and victim, some capital defendants are walking around outside with metal rods during a thunderstorm. Black defendants with white victims are more likely to get the death penalty than those cases with similar facts, but a different racial pairing.[245] The arbitrariness evident in the current state of the American death penalty is not random, but it is arbitrary nonetheless.

The Court and state legislatures have attempted to make only the "worst of the worst" crimes and criminals death-eligible.[246] However, it is not up to legislatures or Supreme Court Justices to say

241. California, a self-identified liberal state, voted to keep the death penalty in 2016. Alexei Koseff, *Is There Another Way to Abolish the Death Penalty?*, CAL MATTERS (Feb. 9, 2022) https://calmatters.org/politics/2022/02/california-death-penalty-end/ [https://perma.cc/5B3Q-4DCD].

242. See Radin, *supra* note 24 (articulating the additional procedural protections in capital cases and defining them as "super due process").

243. McCleskey v. Kemp, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

244. Furman v. Georgia, 408 U.S. 238, 309 (1972).

245. *McCleskey*, 481 U.S. at 321.

246. Woodson v. N.C., 428 U.S 280, 286 (1976). *See supra* notes 76–111 and accompanying text (explaining the origins of this phrase).

who receives a death sentence. It is a question, first and foremost, for the jury.

The jury is given the ultimate form of discretion: the choice of life or death. However, with such great power has come great reservations. The Supreme Court's jurisprudence with regards to jury discretion has moved from unfettered jury discretion to no discretion, until landing at a scheme that allows for guided discretion. Yet, the guided discretion did not root out the systemic racism that continues to mark the death penalty's administration. It is still arbitrarily applied disproportionately to Black defendants where the victims are white.[247]

When presented with statistical proof of such disproportionate application, the Supreme Court realized its conflicting jurisprudence left it with few options. This led to Powell's slippery slope which swallowed the "death is different" doctrine. The argument stated that discretion is essential to capital cases, and because of its essential nature and role in every criminal proceeding, to question discretion in the death penalty context would be to question it in every context.[248]

By virtue of this extrapolation, the Court refused to treat death as unique from or different than punishments found in the rest of the criminal legal system.[249] In this way, the Court said that "death is different" enough to warrant special procedures—such as the bifurcated trial, different evidence rules, and proportionality review—but not so different that an argument made against the death penalty cannot be made against other criminal trials and punishments.[250]

This Note concludes that the Court cannot have its cake and eat it too. The Court must decide if it will treat death as different or not. If future litigants force their hand to decide, and the Court chooses to reinforce that "death is different", future defense attorneys have the opportunity to argue that since capital sentencing stages are unique, racial discrimination in sentencing should be analyzed under *Furman* rather than *McCleskey*. This would allow for a renewed argument that systemic racial discrimination makes the death penalty unconstitutionally arbitrary. If the Court decides that death's discretion is not so different, future litigants should raise the argument

247. *McCleskey*, 481 U.S. at 333–34.

248. *See supra* Part II (rearticulating Powell's slippery slope).

249. *See supra* Part II (reflecting the inconsistent treatment of the death is different doctrine in *McCleskey*).

250. *See supra* Part III (summarizing this Note's view of the death is different inconsistencies).

that every criminal defendant is entitled to the protections afforded to capital defendants. Ultimately, in the future, there is an opportunity for renewed strength in *Furman*-style arguments as the Court cleans up *McCleskey*'s mess.