Truth, Justice, and the American Dilemma

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In Harold Robbins's quintessentially trashy 1961 novel *The Carpetbaggers*,[1] a minor character, having sculpted a two-thirds life-size female nude, reveals it to an admiring throng at an orgiastic Parisian party.[2] But one partygoer, an influential art dealer, refuses to join in the admiration for this "perfect Woman," whose features the sculptor selected from a host of models—most of whom are guests at the party.[3] The dealer's reticence quickly undermines the confidence of the drunken sculptor. Doubting first the perfection of the figure's nose, and then more and more of its features, the sculptor finally smashes his creation repeatedly with a mallet, leaving only shards of marble.[4] As the party guests gape, the sculptor then rummages through the fragments until he finds the piece he seeks, exclaiming, "Thank God! . . . Thank the good Lord that I did not destroy the sole thing of beauty in the stupidity of my disappointment! . . . The soul itself of a woman's beauty."[5] On the spot he sells the shard—modeled on the pubis of Rina Marlowe,[6] one of the novel's central characters—for the outrageous price of twenty-five

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1. HAROLD ROBBINS, THE CARPETBAGGERS (1961).
2. *Id.* at 264.
3. *Id.* at 266.
4. *Id.* at 265–66.
5. *Id.*
6. *Id.* at 260.

hundred francs. Ironically, the purchaser is the now-impressed art dealer, who also commissions a statue of Rina.[7]

In the spirit of that drunken sculptor, I would like to seize on one fragment from a Supreme Court decision, particularly a few sentences from the majority opinion in *McCleskey v. Kemp*, that seem to capture the twisted racial soul of American criminal justice.[8] Of course, this focus is a modification of the assigned topic—*McCleskey* is certainly not an "underrated" case. Rather, these sentences are among the most illuminating ever to appear in the *United States Reports*, and to fail to emphasize their significance is to seriously underrate them.

McCleskey v. Kemp is without doubt a memorable case. Professor David C. Baldus and his colleagues, Charles A. Pulaski and George Woodworth, had produced a detailed statistical study of the operation of the death penalty in Georgia[9] showing, in the words of the Supreme Court, that "black defendants, such as McCleskey, who kill white victims have the greatest likelihood of receiving the death penalty."[10] McCleskey used this study to challenge his capital sentence under both the Equal Protection and Cruel and Unusual Punishment Clauses.[11] Like any statistical proof, the Baldus study had been challenged on methodological grounds.[12] The Supreme Court assumed its validity,[13] but still rejected all of McCleskey's constitutional claims. In a five-to-four decision, Justice Powell first held that although the Baldus study may have established a racially discriminatory effect, it did not prove the racially discriminatory purpose necessary for an equal protection violation.[14] Powell also rejected McCleskey's allegation that the Baldus study showed Georgia's imposition of the death penalty was arbitrary and capricious and thus unconstitutionally cruel and unusual.[15]

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7. *Id.* at 266.

8. 481 U.S. 279 (1987).

9. The study was ultimately published in DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990).

10. *McCleskey*, 481 U.S. at 287. Baldus subsequently conducted studies in New Jersey, Colorado, and Philadelphia that confirmed this conclusion. *See* Samuel R. Gross, *Race, Peremptories, and Capital Jury Deliberations*, 3 U. PA. J. CONST. L. 283, 288 (2001).

11. *McCleskey*, 481 U.S. at 286.

12. *See* McCleskey v. Zant, 580 F. Supp. 338, 379–80 (N.D. Ga. 1984), *aff'd in part, rev'd in part sub nom*. McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985), *aff'd*, 481 U.S. 279 (1987).

13. *McCleskey*, 481 U.S. at 291 n.7.

14. *See id.* at 291–99. *See generally* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (discussing when discriminatory effect can be used to infer discriminatory purpose). The *McCleskey* holding seems quite ironic in light of rules like Federal Rule of Evidence 606(b), which disallows asking former jurors questions that might disclose a discriminatory purpose.

15. *See McCleskey*, 481 U.S. at 299–313. Georgia executed McCleskey in 1991. Death Penalty Information Center, *Executions in the U.S. in 1991*, www.deathpenalty info.org/article.php?scid=8&did=467 (last visited July 22, 2007).

Justice Powell added a final section to his majority opinion, indicating that "[t]wo additional concerns inform [the Court's] decision in this case."[16] The latter factor—that "McCleskey's arguments are best presented to the legislative bodies"[17]—seems decidedly odd when discussing the rights of insular minorities.[18] It is Powell's first concern, however, that is of particular note:

> McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties. Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.[19]

Powell thus invokes the specter of the slippery slope,[20] and the remainder of his discussion addressing his first concern slips down that slope as he mentions other races, gender bias, and even discrimination based on physical deformity or attractiveness.[21]

Powell must surely have thought this to be an effective argument, but the bottom of his slippery slope does not have nearly the impact of the sentence at its top: "McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system."[22] To this, Mumia Abu-Jamal, former journalist and current death row inmate, responded in the pages of *The Yale Law Journal*: "Precisely."[23] As Abu-Jamal noted, Powell had recognized that McCleskey was "question[ing] the fundamental fairness of the entire system."[24] In other words, in this single sentence Powell acknowledged the possibility—in fact, the probability—that American criminal justice is racist through and through.[25]

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16. *McCleskey*, 481 U.S. at 314.
17. *Id.* at 319.
18. *See generally* J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1987) (discussing why protection of insular minorities is a judicial rather than legislative duty).
19. *McCleskey*, 481 U.S. at 314–15 (citations omitted); *see also id.* at 315 n.38.
20. ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 213–16 (2000).
21. *See McCleskey*, 481 U.S. at 315–18 & nn.39–44.
22. *Id.* at 314–15.
23. Mumia Abu-Jamal, *Teetering on the Brink: Between Death and Life*, 100 YALE L.J. 993, 1000 (1991).
24. *Id.*; *see also* Joan W. Howarth, *Feminism, Lawyering, and Death Row*, 2 S. CAL. REV. L. & WOMEN'S STUD. 401, 420–21 (1992).
25. *See generally* MICHAEL K. BROWN ET AL., WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY ch. 4 (2003); RICHARD DELGADO, THE RODRIGO CHRONICLES:

Powell's next two sentences only reinforced the point. He stated, "The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties. Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty."[26] Of course, such assertions are routinely made with regard to sentences of imprisonment, most of which start with the appalling disparities in the rates of African American and Caucasian incarceration,[27] and many of which end with specific policies having a racially discriminatory impact, such as the federal system's one-hundred-to-one sentencing disparity for crack and powder cocaine offenses.[28] And beyond sentencing, claims of racial bias arise in virtually every other facet of American criminal justice, from initial police contacts,[29] through charging[30] and jury selection,[31] to incarceration.[32]

Rather than ignoring all of the evidence of racism in the administration of criminal justice in the United States, Justice Powell looks it full in the face for three sentences—but then he blinks. He blots the evidence out because it proves to be more than he can bear. To the four dissenters in the case, this failure is "the most disturbing aspect"[33] of the majority

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CONVERSATIONS ABOUT AMERICA AND RACE ch. 8 (1995); ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL chs. 11–12 (1995); MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA (1995). For the claim that American criminal justice is also sexist, see generally CYNTHIA LEE, MURDER AND THE REASONABLE MAN (2003). For analogous claims regarding "looksism," see generally Sherry F. Colb, *Confronting the Ugliness of Appearance-Based Discrimination: DePauw University and the Delta Zeta Sorority Purge* (Mar. 21, 2007), http://writ.lp.findlaw.com/colb/20070321.html; Abigail C. Saguy & Kevin W. Riley, *Weighing Both Sides: Morality, Mortality, and Framing Contests over Obesity*, 30 J. HEALTH POL. POL'Y & L. 869 (2005).

26. *McCleskey*, 481 U.S. at 315 (citation omitted).

27. *See* NORA V. DEMLEITNER ET AL., SENTENCING LAW AND POLICY 589 (2004). S*ee generally* TONRY, *supra* note 25.

28. *See generally* David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995).

29. *See* DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 99–100 (2002).

30. *See, e.g.*, United States v. Armstrong, 517 U.S. 456 (1996) (racially discriminatory pattern in "federalizing" drug charges does not justify discovery of prosecutor's motives in making charging decisions). *See generally* Drew S. Days III, *Race and the Federal Criminal Justice System: A Look at the Issue of Selective Prosecution*, 48 ME. L. REV. 180, 186–93 (1996) (examining how harsh sentences for crack cocaine offenses have a disparate impact on African-Americans).

31. *See generally* Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005) (discussing how unintentional racial bias affects jury selection).

32. *See, e.g.*, Johnson v. California, 543 U.S. 499, 515 (2005) (finding strict scrutiny is the proper standard of review of racial segregation in initial cell assignments). In a remarkable move (even for them), Justices Scalia and Thomas dissented. *Id.* at 524.

33. McCleskey v. Kemp, 481 U.S. 279, 365 (1987) (Blackmun, J., dissenting).

opinion, a "complete abdication of [the Court's] judicial role."[34] Commentators have seen it that way as well.[35]

When I read these sentences in *McCleskey v. Kemp*, I always think of that moment in *The Wizard of Oz*[36] when Toto pulls back the curtain to reveal the "Wizard," who is frantically working the levers of the machine that makes him seem all-wise and all-knowing. The Wizard is exposed as just another frail human being.[37] In *McCleskey*, Powell represents both the Wizard and the dog who reveals him. The Justice, attempting to persuade us with a rhetorical device, instead forces us to glimpse the racial realities of the criminal justice system. He invites us to blink at those realities along with him, to let the curtain fall and pretend once again that he is the Wizard. But he also makes it possible for us to continue to keep our eyes open.

Perhaps Powell was unconsciously driven to reveal the weakness of his own argument. The Justice's biographer details Powell's tribulations regarding the death penalty,[38] ending with the astonishing revelation:

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34. *Id.* at 339 (Brennan, J., dissenting). To Brennan, Powell's statement "seems to suggest a fear of too much justice." *Id.*

35. *See, e.g.*, Randall L. Kennedy, McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1413–16 (1988); s*ee also* Derrick Bell, *Xerces and the Affirmative Action Mystique*, 57 GEO. WASH. L. REV. 1595, 1609 (1989); Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 463 (1995); Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1795 (1987); David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 609 (1991); Daniel M. Filler, *Silence and the Racial Dimension of Megan's Law*, 89 IOWA L. REV. 1535, 1577–78 (2004); Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1159 (1998); Phyllis Goldfarb, *Pedagogy of the Suppressed: A Class on Race and the Death Penalty* (Boston College Law School Legal Studies Research Paper Series, Research Paper 129, 2007), *available at* http://ssrn.com/abstract=977779 (forthcoming in the New York University Review of Law and Social Change); Tracey L. Meares, *Three Objections to the Use of Empiricism in Criminal Law and Procedure—And Three Answers*, 2002 U. ILL. L. REV. 851, 862; Charles J. Ogletree, Jr., *Black Man's Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 29–30 (2002); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1146 (1989).

36. THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

37. *See* The Internet Movie Script Database, http://www.imsdb.com/scripts/Wizard-of-Oz,-The.html (last visited July 22, 2007).

38. *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 434–54 (1994).

> [I]n the summer of 1991 [four years after his retirement], Powell was asked whether he would change his vote in any case: 'Yes, *McCleskey v. Kemp* . . . . I would vote the other way in any capital case . . . . I have come to think that capital punishment should be abolished.'[39]

Even in this recantation, Powell continued to blink, limiting his criticism of the criminal justice system to the death penalty without even emphasizing the racial bias in the administration of that penalty. Rather, according to his biographer, Powell stressed that "the haggling and delay and seemingly endless litigation in every capital case brought the law itself into disrepute."[40]

Whatever were Powell's blinders—I recall a waggish comment about him that there ought to be a special place in hell for judges who change their minds on major legal issues after they no longer can do anything about them—we do not have to wear those blinders. We can recognize the pervasiveness of race in the American criminal justice system, and hold up a three-sentence shard (from an opinion otherwise worthy of being smashed) as the one moment when that reality broke through, one chink in the usually seamless hypocrisy with which the pages of the *United States Reports* assert the race-neutrality of criminal justice in the United States.

Perhaps Powell, in his retirement, subconsciously rued what might have been. Instead of blandly denying McCleskey's claims,[41] he might have used the insight of those three sentences as the heart of a stirring contrary opinion,[42] one that could have been as significant to American

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39. *Id*. at 451.

40. *Id*. at 452.

41. For a detailed rhetorical analysis of the entire opinion, see generally AMSTERDAM & BRUNER, *supra* note 20, at 194–216.

42. Such an opinion could have begun:

> Though scientists doubt its biological validity, the concept of race has profoundly scarred our history as Americans. Differences in skin color allowed our forefathers to enslave millions of Africans and their descendants, treating them as chattels, as less than human. After hundreds of thousands of Americans died in the struggle to end slavery in the United States, blacks gained constitutional personhood and the "equal protection of the laws," but white Americans continued to deny them equality in countless ways, both legal and social. Racism—allowing consciousness of skin color to affect one's dealings with another human being—was and is an undeniable fact of American life. Its taint is everywhere, including our criminal courtrooms. Though the United States may never be able to eradicate that taint, we should at the very least prevent the legal taking of a human life when we find, as we do today, that race consciousness has significantly contributed to the decision to execute.

This hypothetical decision could have been analogized to Powell's opinions for the Court in *Batson v. Kentucky*, 476 U.S. 79 (1986) (rendering it easier to demonstrate prosecutorial discrimination in the exercise of peremptory challenges), and might also have drawn support from the unacknowledged suspicion of racial discrimination that motivated *Coker v. Georgia*, 433 U.S. 584 (1977) (disallowing the death penalty for the

criminal justice as *Brown v. Board of Education*[43] was to American education. If Powell had possessed the vision and persuasion of Earl Warren, he might have convinced a broad majority[44] to acknowledge that Gunnar Myrdal's *American Dilemma* extends into the nation's criminal courts.[45] Powell was, however, neither Earl Warren nor Superman in judicial robes,[46] and the opportunity he wasted in *McCleskey v. Kemp* was a loss not just for an old man at the end of his life, but also for America.

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rape of an adult woman), in which Powell concurred. *See generally* James R. Acker, *Social Science in Supreme Court Death Penalty Cases: Citation Practices and Their Implications*, 8 JUST. Q. 421, 431 (1991); Dennis D. Dorin, *Two Different Worlds: Criminologists, Justices and Racial Discrimination in the Imposition of Capital Punishment in Rape Cases*, 72 J. CRIM. L. & CRIMINOLOGY 1667 (1981) (discussing the role of race in *Coker*).

Though Powell had dissented in *Turner v. Murray*, 476 U.S. 28 (1986) (holding that an African-American defendant in a capital case has the right to voir dire prospective jurors on racial bias), he could have used its precursors, *Ham v. South Carolina*, 409 U.S. 524 (1973) (finding racial voir dire necessary because of the case's particular facts), and *Ristaino v. Ross*, 424 U.S. 589, 597 n.9 (1976) (concluding that even when racial voir dire is not constitutionally required, allowing it is "the wiser course")—the first of which he joined, the second of which he authored, and both of which he cited with approval in his *Turner* dissent, 476 U.S. at 46 (Powell, J., dissenting)—to undergird a decision in McCleskey's favor.

43. 347 U.S. 483 (1954).

44. In addition to Powell and the four dissenters in *McCleskey*, a Justice as politically skillful as Warren could probably have persuaded Justices White and O'Connor to agree with him. *See generally* G. EDWARD WHITE, EARL WARREN, A PUBLIC LIFE (1982). Whether such a Justice could have then obtained reluctant acquiescence from Chief Justice Rehnquist and Justice Scalia is more questionable, but perhaps no more of a stretch than Warren's achievement of unanimity in *Brown*, 347 U.S. 483. *See* Dennis D. Dorin, *Far Right of the Mainstream: Racism, Rights, and Remedies from the Perspective of Justice Antonin Scalia's* McCleskey *Memorandum*, 45 MERCER L. REV. 1035 (1994) (analyzing Justice Scalia's role in the *McCleskey* decision).

45. GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944). This work was instrumental in bringing awareness to pervasive racial prejudice in America. *See Brown*, 347 U.S. at 494 n.11 (1954) (citing MYRDAL, *supra*).

Justice Brennan's *McCleskey* dissent comes close to sounding this theme in the clarion fashion it deserves, but it is only a dissent. Further, it is written, as dissents so frequently are, to suggest that following a view contrary to the majority's will work no great change in prevailing law. *See, e.g.*, *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.").

46. "For those who served with him, Earl Warren will always be the Super Chief." BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY vii (1983) (quoting William J. Brennan, Jr.).

On the day *McCleskey* was decided, there was a performance of *The Fantasticks* in New York City.[47] In the musical's second act, a man and a woman confront shocking realities—a human set afire, another beaten, a third impaled on a bed of nails—but repeatedly cry out for "The mask! The mask!"[48] This "plastic mask of a laughing-hollow face that is frozen forever into unutterable joy . . . blocks out any little tell-tale traces of compassion or of horror."[49] Thus, the mask prettifies what the couple sees and allows them to dance away, singing as they go.[50] Similarly, *McCleskey v. Kemp* shows us just a flash of the reality of American criminal justice but then raises, once again, the mask of legalisms that allows us to go on, blithely ignoring the system's pervasive racism.

Minorities play either stereotypical or nonexistent roles in the artifacts of twentieth-century popular culture invoked in this essay: *The Carpetbaggers* features a black manservant named "Robair" and a raped squaw.[51] The only nonwhites I can recall in *The Wizard of Oz* or the pages of *Superman* are animals, munchkins, or extraterrestrials;[52] one character in *The Fantasticks*, an actor, plays a stock company Indian, complete with headdress.[53] The Supreme Court's twentieth century criminal jurisprudence similarly relegates African Americans and other racial groups to subservience. Is there any reason to imagine that this will change in the twenty-first century?

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47. The play ran from May 3, 1960, to January 13, 2002. The Fantasticks Official Website, http://www.thefantasticks.com/webpages/home.html (last visited July 22, 2007).

48. TOM JONES & HARVEY SCHMIDT, THE FANTASTICKS 97–104 (30th anniversary ed. 1990).

49. *Id*. at 98.

50. *Id.* at 98–104.

51. *See* ROBBINS, *supra* note 1, at 26, 80–81.

52. It should be no surprise, however, to find at least one academic opining that the *Oz* books "anticipate[] current multicultural theories" and embrace "cultural pluralism." Andrew Karp, *Utopian Tension in L. Frank Baum's Oz*, 9 UTOPIAN STUD. 103, 118 (1998), *available at* http://www.halcyon.com/piglet/books8-Karp.htm (last visited Aug. 2, 2007). No doubt there is a similar claim regarding Superman.

53. *See* JONES & SCHMIDT, *supra* note 48, at 59.