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After McCleskey

Robert L. Tsai

AFTER *McCLESKEY*

ROBERT L. TSAI*

ABSTRACT

In the 1987 decision, McCleskey v. Kemp, *the Supreme Court rejected a black death row inmate's argument that significant racial disparities in the administration of Georgia's capital punishment laws violated the Fourteenth Amendment's Equal Protection Clause. In brushing aside the most sophisticated empirical study of a state's capital practices to date, that ruling seemingly slammed the door on structural inequality claims against the criminal justice system. Most accounts of the case end after noting the ruling's incompatibility with more robust theories of equality and meditating on the deep sense of demoralization felt by social justice advocates. One might be forgiven for assuming that defense lawyers abandoned structural inequality claims and the use of quantitative evidence in capital cases altogether.*

But that would be wrong and incomplete. For the first time, this Article recounts an unusual chapter of the fallout from the McCleskey *litigation, focusing on the litigation and social activism in the wake of that decision. It draws on interviews with anti-death penalty lawyers working for or allied with the Southern Center for Human Rights in Georgia, including Stephen Bright, Ruth Friedman, Bryan Stevenson, and Clive Stafford Smith. It is also based on archival research into their case files. Drawing from these*

* Professor of Law and Law Alumni Scholar, Boston University School of Law. I am grateful for the help of Mary Sidney Harbert in locating old case files at the Southern Center for Human Rights, and to Nathan Jordan, Archives Specialist for the National Archives. Earlier versions of this Article were presented at workshops at Boston University's School of Law, University of Colorado School of Law, University of Connecticut Law School, Fordham Law School, New York Law School, and the University of Utah Law School, which brought me out to Salt Lake City as the 2022 Howard Rolapp Distinguished Visitor. Generous support from Dean Angela Onwuachi-Willig and Boston University School of Law allowed me to complete this project. I deeply appreciate the feedback on previous drafts from Bethany Berger, Stephen Bright, Debby Denno, Jonathan Feingold, Brandon Garrett, Erika George, Aya Gruber, Aziz Huq, Gary Lawson, Benjamin Levin, Justin Murray, Sachin Pandya, David Seipp, Matt Tokson, and Mark Tushnet. Invaluable research assistance was provided by Victoria Gallerani, Greg Margida, Colin Wagner, Allie Wainwright, and Catherine MacCarthy. Finally, thanks to Jessica Block, Diana Chung, and the staff of the *Southern California Law Review* for their fine editorial assistance.

resources, this Article shows how a subset of cause lawyers in the late 1980's and early 90's had a remarkable reaction to that demoralizing ruling: they engaged in a distinctive form of "rebellious localism." Instead of forsaking structural equality claims, they doubled down on them. Rather than make peace with what they believed to be an unjust ruling, they sought to subvert it. They also scrambled to formulate reliable quantitative evidence of intentional discrimination. Instead of accepting existing racial disparities in the criminal justice system, they went after prosecutors and state court judges to expose how racial minorities and poor people wound up on death row more often than their white, wealthier counterparts.

Understanding this untold episode of legal history teaches us about the limits of judicial control over constitutional lawmaking, the unanticipated consequences of trying to insulate the legal order from accountability, and the possibilities for keeping clients alive and earning pro-equality victories when political conditions are inhospitable. For those who pay attention, there are lessons that might humble the most ideologically committed judges and inspire reformers who confront challenging legal circumstances.

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INTRODUCTION

We lost McCleskey because these folks don't understand racial discrimination . . . . They're trying to see something from too high an altitude. You've got to get closer to the ground.

—Bryan Stevenson[1]

Stephen B. Bright[2] and his staff at the Southern Prisoners' Defense Committee,[3] later renamed the Southern Center for Human Rights ("SCHR"), let out a collective sigh upon learning about the U.S. Supreme Court's ruling in *McCleskey v. Kemp*.[4] For months, a team of experts led by the NAACP Legal Defense and Educational Fund had gathered and analyzed data on death penalty proceedings throughout the State of Georgia. David Baldus, a University of Iowa law professor, had run sophisticated regression analyses on over 2,000 murders since the reinstatement of capital punishment in 1976. After taking account of 230 nonracial variables, racial disparities remained. The Baldus study revealed, among other things, that defendants accused of killing white victims were 4.3 times more likely to receive a death sentence than defendants charged with killing black victims.[5]

McCleskey's attorneys offered two theories of what was happening during the administration of capital punishment in the state, either of which would violate the Equal Protection Clause. First, they claimed that state officials were valuing white lives at the expense of black lives. Prosecutors did this by seeking the death penalty when white victims were killed but not when black victims were killed. Second, they argued that black defendants

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1. Interview with Bryan Stevenson, Exec. Dir., Equal Justice Initiative (Sept. 14, 2020) [hereinafter Stevenson Interview].

2. For nearly 40 years, Bright served as President of SCHR. He began teaching at Yale Law School in 1993 as the second Skelly J. Wright Fellow and continues to teach there as the Harvey L. Karp Visiting Lecturer in Law. Over the years, he has also taught at Harvard Law School, University of Chicago, Georgetown University Law Center, and a number of other law schools.

3. Founded in 1976 by ministers active in the civil rights movement, SCHR was created to aid incarcerated persons in the early decades of mass incarceration. Over the years, staff lawyers brought lawsuits to improve prison conditions and represented individuals facing the death penalty in the Deep South.

4. McCleskey v. Kemp, 481 U.S. 279 (1987).

5. *Id.* at 287. As Bhagwat and Lee note, "if the death penalty in fact has any deterrent value, then the disinclination to impose the penalty in black-victim cases would tend to increase the murder rate against blacks, and thus systematically provide blacks less protection." Evan Tsen Lee & Ashutosh Bhagwat, *The* McCleskey *Puzzle: Remedying Prosecutorial Discrimination Against Black Victims in Capital Sentencing*, 1998 SUP. CT. REV. 145, 149 (1998). Additionally, this form of unequal protection "imposes intangible but important harms on black victims' families." *Id.*

were being consistently disfavored when compared with similarly situated white defendants.[6] The NAACP saw McCleskey's case as a vessel for shutting down the death penalty for good, a reprise of its successful cause lawyering in *Furman v. Georgia*[7] that demonstrated that capital punishment was being inflicted in arbitrary fashion.

Writing for a 5-4 Court, Justice Lewis Powell's opinion dashed those hopes. The Court rejected McCleskey's equality claims across the board, finding no violation of the Fourteenth Amendment. Without identifying any flaws in the study, the majority nevertheless seized the opportunity to make constitutional policies that tried to insulate the criminal justice system from future racial discrimination claims based on statistical evidence. "At most," Justice Powell wrote, "the Baldus study indicates a discrepancy that appears to correlate with race."[8]

Most accounts of *McCleskey* disparage the ruling for turning a blind eye to racism in the criminal justice system, giving plenty of attention to Justice Brennan's dissenting view that the majority opinion exhibited "a fear of too much justice."[9] Anthony Lewis, writing in the pages of the *New York Times*, called the Court's decision "cynical," creating a legal standard that "would be almost impossible" to meet.[10] Others said that the decision brought to a close the big-case phase of legal liberalism when advocates looked to the Supreme Court as the vehicle for social change.[11] For instance, Hugo Bedau said that the ruling "effectively ends the strategy in anti-death-penalty

6. Since Baldus's study, some studies have found even greater disparities in treatment based on the race of the murder victim, particularly when execution rates are factored into the equation. *See, e.g.*, Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L. L. REV. 585, 606 (2020) (finding that defendants who killed white victims were executed at a rate 17 times greater than those convicted of killing black victims); Lee Kovarsky, *The American Execution Queue*, 71 STAN. L. REV. 1163 (2019); Adam Liptak, *A Vast Racial Gap in Death Penalty Cases, New Study Finds*, N.Y. TIMES, Aug. 3, 2020, https://www.nytimes.com/2020/08/03/us/racial-gap-death-penalty.html [https://web.archive.org/web/20230207174159/https://www.nytimes.com/2020/08/03/us/racial-gap-death-penalty.html?searchResultPosition=1].

7. Furman v. Georgia, 408 U.S. 238, 239–40 (1972). In *Furman*, a divided Court struck down death penalty statutes around the country on the grounds that they constituted cruel and unusual punishment in violation of the Eighth Amendment, though the justices could not rally behind a single opinion beyond a curt *per curiam* statement. As Justice Douglas put it in his concurring opinion, that provision requires "legislatures to write penal laws that are even-handed, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups." *Id.* at 256 (Douglas, J., concurring). *See generally* Michael Meltsner, *Litigating Against the Death Penalty: The Strategy Behind* Furman, 82 YALE L.J. 1111 (1973).

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

9. *McCleskey*, 481 U.S. at 339 (Brennan, J., dissenting); *see* David G. Savage, *Justices' Use of Statistics Baffles Experts*, L.A. TIMES, Apr. 24, 1987, at 19; *Excerpts from Court Opinions on Death Penalty*, N.Y. TIMES, Apr. 23, 1987, at B12.

10. Anthony Lewis, *Bowing to Racism*, N.Y. TIMES, Apr. 28, 1987, at A31.

11. *See* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

litigation that has dominated the thinking of civil-rights and civil-liberties activists for the past generation."[12] It may be "that in the present climate of opinion no abolitionist strategy can make much headway," he lamented.[13]

The Supreme Court's backing away from *Furman* meant there was only room for incremental judicial solutions to problems with death penalty administration rather than large-scale court-led reforms. Centrists and conservatives joined forces to permit executions so long as state law guided a jury's discretion as to whether to impose a death sentence and a defendant was allowed the opportunity to introduce all relevant evidence bearing on the sentencing decision.[14] And in the wake of *McCleskey*, defendants were left with the possibility of mounting extraordinarily difficult equality-based challenges grounded in evidence of malfeasance by specific bad actors in a defendant's case. That hardly seemed worth it to try from the perspective of the average person charged with a serious crime, represented by an overworked lawyer and no access to the black box of decision making by prosecutors or jurors. "Smoking gun" evidence was the stuff of movies, not the daily reality in criminal courts across the nation. For these and other reasons, the *McCleskey* decision exacerbated the crisis of legal liberalism, which for decades had depended on courts to correct structural problems in society. But those prospects dimmed as the necessary conditions for legal liberalism collapsed. The appointment of conservative jurists, a major shift within the Democratic Party to accommodate resistance to the legacy of legal liberalism, and mounting doctrine hostile to a progressive vision of legal change emerged as structural obstacles to abolitionists.[15]

Drawing on interviews with key players as well as archival research, this Article shows how a group of abolitionists based in the Deep South tried

12. Hugo Adam Bedau, *Someday* McCleskey *Will Be Death Penalty's* Dred Scott, L.A. TIMES (May 1, 1987), https://www.latimes.com/archives/la-xpm-1987-05-01-me-1592-story.html [perma.cc/E39Y-2C86]. Randall Kennedy has leveled a different critique of *McCleskey*, which is "community-oriented"; he says that the Baldus study shows the devaluation of black lives but notes that the state's failure to protect black victims of violent crimes might be handled by more death sentences imposed for black-on-black crimes and white-on-black crimes. Randall L. Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1391–93 (1988).

13. Bedau, *supra* note 12.

14. *See, e.g.*, Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

15. For some accounts of cause lawyering and its role in legal liberal theories, see LAW AND SOCIAL MOVEMENTS (Michael McCann ed., 2016); 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION (2014); KENNETH W. MACK, REPRESENTING THE RACE (2012); TOMIKO BROWN-NAGIN, COURAGE TO DISSENT (2011); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS (2004); MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987); William N. Eskridge Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275 (2013); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1046 (2002). For more mixed or negative views that stress backlash, see GERALD N. ROSENBERG, THE HOLLOW HOPE (1991).

to exploit the *McCleskey* decision. They did so by subverting the Court's intentions and assumptions, challenging a host of local practices and allegedly racist state actors. These advocates created favorable outcomes in subsequent capital cases, and then portrayed their discoveries in ways that shook the *McCleskey* Court's tidy presentation of the legal system as well-functioning, rational, structurally sound, and non-racist.[16]

Part I revisits the *McCleskey* decision, emphasizing what the Justices tried to accomplish as well as the law of unintended consequences that often characterizes constitutional politics. Judges write opinions to decide constitutional questions, believing they will be able to persuade people beyond the specific litigants before them, but in reality, judges have little control over how others will receive their rulings or what they will do with them. In this instance, a subset of abolitionists responded by engaging in what I call "rebellious localism," a strategy of marshaling available resources and deploying them at county and city officials in the service of transformative ends.[17] They made these adjustments to public law advocacy so they could continue raising racial bias claims without giving up on their structural critiques. Besides trying to save their clients' lives, their goal was to undermine the presumption of fairness and neutrality contained in the Supreme Court's rulings. Chipping away at the parsimonious vision of racial equality in case after case might then lay a foundation for the eventual repudiation of *McCleskey*.

Typically, advocates who want to erode a Supreme Court precedent criticize it across the board to try to deny social acceptance of its vision of the law. In this instance, however, death penalty abolitionists denounced the ruling outside of the legal system but tried to exploit assumptions contained in the ruling for a broader vision of equality in their own cases. This adaptation was necessitated by not only the perception of hostility toward the ideal of equal justice, but also the asymmetrical obstacles encountered by defendants who raise fact-intensive constitutional issues. This newfound

16. The methodological approach employed in this study is explicitly socio-legal in nature, one that focuses on the law as a set of institutions and ideas perpetually in contest, where litigants (strong and weak) strive to highlight contradictions between ideals and material reality, but elites and social groups have their own agendas. *See, e.g.*, Susan S. Silbey, *Ideology, Power, and Justice*, *in* JUSTICE AND POWER IN SOCIOLEGAL STUDIES 272, 289 (Bryant G. Garth & Austin Sarat eds., 1998) (describing an approach to the study of law that "push[es] the justice critique beyond the condemnation of inequality to an examination of the possibilities for resistance and transformation").

17. Their approach was "rebellious" in the sense that advocates resisted key Supreme Court interpretations of the Fourteenth Amendment. It was "localist" in the sense that they accepted that systems of criminal justice were organized on largely localist terms and reoriented their strategies accordingly. These adjustments did not entail a commitment to localism as an ideal form of social organization; rather, the localist dimension of their advocacy was purely strategic in nature, primarily in selecting the targets of obloquy and reform. They *were* committed to constitutional ideals expressed at the state and national level.

approach contained three key facets: *intensifying issues*, *subverting doctrine*, and *scaling downward*.

Part II focuses on specific cases in the wake of *McCleskey* in which SCHR lawyers or their allies escalated their tactics in capital cases. These cause lawyers aggressively asked for hearings (often getting them), put prosecutors and judges under oath, and moved to recuse prosecutors who engaged in misconduct or judges who tolerated racist trial practices. They pioneered creative strategies for gaining access to state records and quantitative evidence to challenge everything from jury venire practices to peremptory strikes by prosecutors. Rebellious localism in this context not only kept their clients alive and raised the costs of litigation for the state, but it also yielded valuable precedent for future cases.

Using two case studies, Part III shows how the strategy of rebellious localism paid off by closely examining how abolitionists' use of these strategies unfolded in *Horton v. Zant* and *State v. Brooks*.[18] Special attention is paid to the synergies between litigation and out-of-court advocacy, as well as the management of tensions between the primary goal of harm reduction and secondary goal of legal reform.

For those who engage in the politics of repudiation, the ultimate objective is to eventually persuade an apex court to overrule a despised precedent, or water it down with exceptions, or to stop using that case to justify policies.[19] Abolitionists and racial justice advocates have not yet achieved that, but other kinds of progress are worth noting, such as the rejection of *McCleskey* by state legislators and state courts. The conclusion considers how to evaluate success in ongoing efforts to resist a hated decision and render it infamous in the public mind. It also considers what this episode teaches us about judicially driven efforts to insulate the criminal justice system, as well as prospects for rebellious localism in the future.

I. IN THE SHADOW OF AN INFAMOUS RULING

A. A DIFFERENCE OF OPINION AT THE GRASSROOTS

Although discretion lies in the hands of several different actors within the criminal justice system, a great deal of responsibility for the disparities probably could be laid at the feet of prosecutors. Formally, in exercising executive power, they act as gate keepers: capital punishment can never be

18. Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991); State v. Brooks, 385 S.E.2d 81 (Ga. 1989).

19. On the processes of infamy, see Robert L. Tsai, *Supreme Court Precedent and the Politics of Repudiation*, *in* LAW'S INFAMY: UNDERSTANDING THE CANON OF BAD LAW (Austin Sarat et al. eds., 2021); Robert L. Tsai, *Reconsidering* Gobitis, 86 WASH. U. L. REV. 363 (2008).

imposed unless a prosecutor files notice to seek it.[20] In practice, most prosecutors never seek the death penalty, while a handful opt for it every chance they get. When they do pursue death as a punishment, they also sometimes change their minds.

Some district attorneys operate under strict policies, while others do not even consult an office policy beyond what the state law says.[21] For instance, in Fulton County, where Warren McCleskey was tried for shooting a white police officer in 1978, the District Attorney at the time "had no written or oral policies or guidelines to determine whether a capital case would be plea-bargained or brought to trial."[22] The absence of consistent policies raised the specter of unbridled discretion, exacerbating any racially biased decisions by individual actors.

At the time, the *McCleskey* litigation split the abolitionist community along generational lines, but no steps were taken to interfere with an effort driven by advocates who had been in the trenches the longest. While the older guard—represented by the brilliant Anthony Amsterdam—retained their faith that the Justices would once again use their Article III authority to enact broad changes to criminal policy like structural reform cases in the mold of *Brown v. Board*,[23] the younger advocates were wary of what the increasingly conservative Supreme Court might do with the case.[24] Some of them turned out to possess the unique skillset for the next phase of grinding, a case-by-case form of grassroots advocacy necessitated by the high court's rightward tilt.

Stephen Bright had taken over the reins of SCHR after running D.C. Law Students in Court. From the start, Bright had his doubts about whether the *McCleskey* litigation would pay off in getting judges to declare the death penalty unconstitutional. "I don't think it's going to work like that," he told Bryan Stevenson, then just two years out of law school and a staff attorney at SCHR.[25] Bright did not believe that the Court would allow capital

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20. *See generally* PAUL GOWDER, THE RULE OF LAW IN THE UNITED STATES: AN UNFINISHED PROJECT OF BLACK LIBERATION 110 (2021); ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007).

21. On the need for reform of prosecutorial decision making, see RACHEL ELISE BARKOW, PRISONERS OF POLITICS 144–64 (2019).

22. ROBERT L. TSAI, PRACTICAL EQUALITY 86–91 (2019); Brief for Petitioner at 58–59, McCleskey v. Kemp, 481 U.S. 279 (1987) (No. 84-6811), 1986 WL 727359.

23. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

24. *See* RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 253 (2007) ("When lawyers sought guidance about the best strategies for the continued development of civil rights law . . . they drew on *Brown* as both a doctrinal and a cultural resource.").

25. Stevenson would later move to Montgomery, Alabama, to start a death penalty resource center, relying on freshly available federal funds. Those funds would dry up, and he would turn that organization into the Equal Justice Initiative ("EJI"), which he leads to this day. Since 1998, Stevenson has also taught

punishment to resume nationwide in *Gregg v. Georgia*,[26] only to shut it back down so soon based on a broad equality rationale. He knew that Justice Lewis Powell, a centrist, had already objected to abolition "by judicial fiat" and expressed hostility to systemic inequality claims in *Furman*, saying that the penalty's disproportionate impact on the poor and racial minorities was "tragic," but ultimately irremediable, and that past intentional discrimination "is no justification for holding today that capital punishment is invalid in all cases."[27] In fact, Justice Powell optimistically believed that the "discriminatory imposition of capital punishment is far less likely today than in the past."[28]

Neither Bright nor Stevenson played an active role in the *McCleskey* litigation. They feared a bad outcome, even though they agreed that discrimination remained a serious problem. In fact, Bright had even told Baldus at the time, "I see even more racism than what you show!"[29]

On April 22, 1987, by a 5-4 vote, a bitterly divided Court in *McCleskey* refused to enforce the principle of equality in an opinion by Justice Powell, who had been on the losing side in *Furman*. In doing so, the Justices made it harder for defendants nationwide to prove racial discrimination within the criminal justice system, especially based on statistical evidence alone. Setting the constitutional bar high, the Justices were not satisfied by a showing of alarming racial disparities; they simply would not act unless someone could demonstrate exactly who was responsible for the inequities in a complex system with many moving parts. When a criminal law was race neutral, the mere risk of racially discriminatory enforcement was insufficient to make out an equal protection violation.

To justify this position, Justice Powell stated that "disparities in sentencing are an inevitable part of our criminal justice system" due to the discretionary roles afforded to prosecutors, judges, and jurors.[30] In fact, his interpretation of the Equal Protection Clause treated discrimination as the price of mercy. A jury can decline to impose the death penalty, Justice Powell wrote, but "[w]hereas decisions against a defendant's interest may be reversed by the trial judge or on appeal, these discretionary exercises of leniency are final and unreviewable."[31] From this point on, in order to protect

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at NYU School of Law. Stevenson Interview, *supra* note 1.

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

27. Furman v. Georgia, 408 U.S. 238, 421, 447, 450 (1972) (Powell, J., dissenting).

28. *Id.* at 450.

29. Interview with Stephen Bright, President, S. Ctr. for Hum. Rts. (Feb. 29, 2020) [hereinafter Bright Interview].

30. McCleskey v. Kemp, 481 U.S. 279, 312 (1987).

31. *Id.* at 311.

a prosecutor's "traditionally 'wide discretion' " in making charging decisions, "we would demand exceptionally clear proof before we would infer that the discretion has been abused."[32]

This amounted to a major retreat from precedents like *Furman*, where the Justices had worried about irrationality and racial discrimination infecting the administration of criminal laws, and even *Gregg*, where they had allowed the death penalty to be resumed but warned that "the penalty of death is different in kind from any other punishment" and could not be inflicted when there existed "a substantial risk" of depriving someone's rights.[33] The *McCleskey* Court worried that the defendant's equality argument would open the door to consideration of other disparities in the legal system—perhaps even leading to a kind of affirmative action for death sentences.

Justice Powell in particular had become convinced that a win for McCleskey would "throw[] into serious question the principles that underlie our entire criminal justice system."[34] He heartily endorsed the view of prosecutors, who insisted that the defendant's racial equality claim strikes at "the heart of the judicial system."[35] Absurdly, Powell feared a kind affirmative action that flowed naturally from accepting statistics as evidence of intentional discrimination: "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?"[36] He also wished to deter further attacks on the criminal justice system through the use of statistics, troubled that accepting the form of proof represented in the Baldus Study would "invit[e] a system of 'statistical jurisprudence'—unprecedented in civilized history."[37] There seemed to him "no limiting principle to judgments in criminal cases based solely on *statistics*."[38] Years later, Powell would express regret for his role in pushing his colleagues to this outcome. But far too late—the damage had been done.[39]

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32. *Id.* at 296–97.

33. Gregg v. Georgia, 428 U.S. 153, 188 (1976); STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 267–75 (2003).

34. *McCleskey*, 481 U.S. at 315.

35. *Id.* at 297.

36. Scott E. Sundby, *The Loss of Constitutional Faith:* McCleskey v. Kemp *and the Dark Side of Procedure*, 10 OHIO ST. J. CRIM. L. 1, 12 (2012).

37. *Id.* at 31–32. But as Aya Gruber points out, Powell was not consistently opposed to the use of statistics to prove racist intentions, and he was not inalterably opposed to equal protection claims in the capital context, for he wrote the opinion for Batson v. Kentucky, 476 U.S. 79 (1986). *See* Aya Gruber, *Race-of-Victim Disparities and the 'Level Up' Problem*, 55 HARV. C.R.-C.L. L. REV. 657, 659 (2020).

38. BANNER, *supra* note 33, at 290.

39. Gregg v. Georgia, 428 U.S. 153, 188 (1976); JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451 (1994).

B. REBELLIOUS LOCALISM

Constitutional actors must calibrate their strategies to deal with shifting political and cultural conditions. Arguments and approaches that work in one historical moment may not work in a different moment. How would social actors in the field of action react at a moment of crisis for legal liberalism? For decades, liberals had turned to the courts as a vehicle for reforming society's key institutions. The fact that the criminal justice system was among the least affected by the Civil Rights movement did not dampen legal liberals' ardor for court-centered projects. To the contrary, that fact simply reminded them of how much further judges needed to go. And yet the conservative revolution made most visible through Nixon's war-on-crime politics, though propelled by elites of both major parties, put legal liberals on their heels.[40] Public officials elected after complaining of the Warren Court's excesses secured the appointment of judges hostile to the further expansion of many rights—especially those of criminal defendants.

On a Court reshaped by Republican presidents, Justices Powell, Rehnquist, Scalia, and O'Connor were most skeptical of the Warren Court's legacy and its approach to legal liberalism. They would work hardest to protect the state's crime-fighting prerogative by making it more difficult for defendants to bring constitutional challenges and insulating the decisions of police officers, prosecutors, and judges from civil lawsuits. In response to changing institutional conditions, would activists abandon legal liberalism or find some way to rekindle their commitment to the enterprise?

Among racial justice advocates, the immediate reaction to *McCleskey* was disenchantment. Anthony Amsterdam, who argued *Furman* in the Supreme Court, called *McCleskey* "the *Dred Scott* decision of our time," one that declares that "African-American life has no value which white men are bound to respect."[41] Bryan Stevenson felt shattered and never fully escaped the feeling of demoralization. "Most of us were just devastated, most of us were just unbelievably heartbroken," he said years later.[42] "I thought about *Brown* the day *McCleskey* was decided. I couldn't make sense of how the United States Supreme Court . . . could be talking about the inevitability of racial bias in the administration of the death penalty."[43]

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40. *See generally* AYA GRUBER, THE FEMINIST WAR ON CRIME (2020); JAMES FORMAN, JR., LOCKING UP OUR OWN (2017).

41. Anthony G. Amsterdam, *Race and the Death Penalty Before and After* McCleskey, 39 COLUM. HUM. RTS. L. REV. 34, 47 (2007); Kennedy, *supra* note 12, at 1389.

42. Southern Center for Human Rights, *EJI's Bryan Stevenson Pays Tribute to SCHR's Steve Bright*, YOUTUBE (July 25, 2013), https://www.youtube.com/watch?v=3HmU0t68vE0 [https://perma.cc/JT8U-LJWP].

43. *Id.*

Stevenson denounced *McCleskey* for enabling unequal application of capital punishment, but in truth, the extinguishment of large-scale equality claims was part of a broader pattern of judicial entrenchment of War-on-Crime policies that fanned out in different directions. These policies included rulings that preserved police discretion on the streets and created doctrines restricting the availability of habeas corpus.[44] Eventually, *McCleskey* would form a part of a losing pattern as litigation aimed at making the U.S. Supreme Court's death penalty jurisprudence more equitable or humane went sideways, reflected in such cases as *Stanford v. Kentucky*, which refused to stop the execution of juvenile offenders, and *Penry v. Lynaugh*, a case that permitted the execution of a man with the mental age of a 6-year-old child.[45] "By the end of the 80's, all of that stuff *had failed*," Stevenson summed up.[46]

Bright similarly believed *McCleskey* to be "an everlasting blight on the Supreme Court and a badge of shame for the state of Georgia."[47] He put *McCleskey* in the company of not only *Dred Scott*, but also *Plessy v. Ferguson*, the notorious ruling that upheld a Louisiana law requiring "separate but equal" passenger coaches and emboldened segregationists for generations.[48] Thus, for many, disaffection was as predictable as an overall reduction of system-wide legal challenges. That's where most analyses of *McCleskey* have stopped.[49]

But for some of the most committed abolitionists in the Deep South, disenchantment about the rule of law did not lead to the wholesale abandonment of equality claims, much less structural ones. As their work necessarily became grittier and more pragmatic—a form of legal trench warfare—these cause lawyers not only continued to emphasize racial inequality claims, but they also broadened their critiques to encompass poverty, a related ground that did some of the work of centering race but also had the benefit of moving to different terrain that might pick up new

44. *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361 (1989); Penry v. Lynaugh, 492 U.S. 302 (1989); Whren v. United States, 517 U.S. 806 (1996); Teague v. Lane, 489 U.S. 288 (1989); Wainwright v. Sykes, 433 U.S. 72 (1977); Larry Yackle, *The New Habeas Corpus in Death Penalty Cases*, 63 AM. U. L. REV. 1791 (2014); James S. Liebman, *More than 'Slightly Retro:' The Rehnquist Court's Rout of Habeas Corpus in* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 537 (1990). *See generally* LARRY W. YACKLE, RECLAIMING THE FEDERAL COURTS (1994).

45. *See generally Stanford*, 492 U.S. at 361; *Penry*, 492 U.S. at 302.

46. Stevenson Interview, *supra* note 1.

47. David G. Stout, *The Lawyers of Death Row*, N.Y. TIMES MAG., Feb. 14, 1988, at 52.

48. Stephen B. Bright, *Political Attacks on the Judiciary*, 80 JUDICATURE 165, 165 (1997); Interview by Trey Ellis, Kunhardt Film Found., with Stephen Bright, President, S. Ctr. for Hum. Rts. (May 25, 2018) (transcript on file with the Southern California Law Review).

49. Note, for instance, that Paul Butler, for one, has stated the strategy of "using social science to win equal protection claims" is "doomed if the premise is that the problem is that there is not enough evidence of discrimination or not the right kind of evidence." Paul Butler, *Equal Protection and White Supremacy*, 112 NW. U. L. REV. 1457, 1461 (2018).

segments of the community.

In this sense, the Supreme Court's ruling produced the first of many ironic effects: deepening the resolve of activists to redouble their efforts to prove systemic racism. Opponents of *McCleskey* would have to outmaneuver their counterparts, ratchet up their tactics against carefully curated targets, delay the worst harms arising from unjust policies, and persuade lower court judges to reshape doctrine to their preferred contours.[50] Outside the courthouses, they would shame local public servants and citizens into seeing their clients as victims of unequal justice and do something about it.

Of course, rebellious localism in the capital context was not the same as the strategy might appear in other contexts. It remained court-focused because the short-term goal of harm reduction in this high-stakes context—namely, keeping a client alive for as long as possible—remained paramount. But as practiced by SCHR lawyers, the method retained a structural critique as well as a commitment to long-term transformation, with an eye towards grassroots mobilization and construction of a counter-vision of equal justice. All of this was directed at contesting the perception that the Constitution no longer served the interests of the poor or racial minorities.

I call this aspect of their reaction to unfavorable law "issue intensification." Instead of giving up on equality claims in this domain, which would have been a perfectly natural response to an increasingly hostile political and cultural climate, some social actors instead doubled down on equality. In certain situations where anti-death penalty lawyers might have passed over an equality claim, they lodged one anyway to preserve the issue and in the hope that more evidence to support it might materialize years later. Harsh procedural changes already pushed advocates toward such an adaptation in strategy as they tried to prolong litigation to save lives, but *McCleskey* reinforced their darkening expectation that problems of proof and procedure would be held against an individual on appeal and during collateral review.

Besides manipulating doctrine on substance and procedure in ways that disfavored progressive liberal legal projects, high-profile judges also advocated legislative reform to close the courthouse doors further, citing abusive litigation. A year after the *McCleskey* decision, Justice Powell agreed to serve on an ad hoc committee established by Chief Justice Rehnquist to propose restrictions on habeas corpus petitions by death-row

50. Of course, death penalty abolitionists were not the first to embrace strategies of delay as part of resisting inequality. *See* Daniel Farbman, *Resistance Lawyering*, 107 CAL. L. REV. 1877, 1880 (2019) (describing a "resistance lawyer" as someone who "seeks both to mitigate the worst injustices of that system and to resist, obstruct, and dismantle the system itself").

inmates. Justice Powell's leading role in *McCleskey*, followed by his subsequent call for additional restrictions on the Great Writ, deepened abolitionist suspicions that the Supreme Court was biased against racial minorities and wanted to speed up executions regardless of the costs. The growing judicial-legislative initiative, which would attract the support of War-on-Crime state attorney generals, heightened their awareness that every possible trick would be used to prevent structural injustice from being seen or addressed.[51] As a result, advocates would at times raise more allegations of discrimination than they likely would have before *McCleskey*. Although they rejected nearly every word of the *McCleskey* ruling in their hearts, they managed any sense of dissonance by citing the case in court and treating it as good law, while denouncing it in other domains.

Bright was a realist, as well as a close and creative reader of judicial decisions. After "pulling the decision apart," he urged fellow abolitionists to take the Justices at their word.[52] The key was Justice Powell's insistence that a defendant had to prove that decisionmakers in his own case acted with a discriminatory purpose. Bright told Stevenson and other allies: "There's language in here we can do something with."[53] The best response, he said, was to identify every single situation where a judge or prosecutor might have acted out of bias and "to litigate the hell out of it."[54]

Bright's move to turn a shield fashioned for prosecutors into a sword to be wielded by defendants should be considered a form of "doctrinal subversion." Instead of acceding to the Court's plan to insulate the criminal justice system, SCHR and its allies redeployed the precedent to go after some of the system's most prominent guardians: prosecutors and judges. This amounted to ignoring the system-insulating motives in *McCleskey* itself, and seeing just how far they could take the Court's insistence that a defendant could still advance a claim if he offered evidence "that would support an inference that racial considerations played a part in *his* sentence."[55]

These abolitionists even called their filings "*McCleskey* motions" to reclaim that precedent on behalf of a more robust vision of equality. The Supreme Court's ruling in *McCleskey* was well on its way to becoming an infamous decision in the legal academy and among the public interest lawyers at large, but in these Southern courtrooms, Bright and others treated

51. *See* ROBERT L. TSAI, DEMAND THE IMPOSSIBLE: ONE LAWYER'S PURSUIT OF EQUAL JUSTICE FOR ALL (forthcoming 2024).

52. Stevenson Interview, *supra* note 1.

53. Southern Center for Human Rights, *supra* note 42.

54. Stevenson Interview, *supra* note 1.

55. McCleskey v. Kemp, 481 U.S. 279, 292–93 (1987) (emphasis added).

the decision as if it represented good law in demanding discovery and hearings.

One of the things *McCleskey* questioned was "whether any consistent policy can be derived by studying the decisions of prosecutors" across several different counties since so many variables were involved in charging decisions.[56] In other words, Justice Powell thought the inference of intentional discrimination was greatly weakened—he said the disparities were not "stark" enough—because of the sheer spatial expanse from which the data was derived as well as the large number of human actors making decisions based on "innumerable factors."[57]

Bright proposed a solution to this problem: identifying situations where a particular prosecutor, judge, or local jurisdiction had a reputation for engaging in discriminatory behavior. I call this aspect of SCHR's effort to make equality claims more palatable to skeptical judges the *scaling down* of relevant constitutional theories and the targets of enforcement. By focusing on specific bad actors and simplifying the causal stories of discrimination, advocates hoped they would not trigger the slippery slope problem Justice Powell found so daunting.[58] The goal was to go hard after unethical prosecutors and "hanging judges" (judges elected based on their record as tough-on-crime prosecutors) who appeared to treat black defendants, black jurors, or black victims more harshly. So long as the evidence was compelling, offering a judicial remedy could be isolated to particular actors or local jurisdictions and therefore would not bring the entire justice system to its knees, as Justice Powell feared.

All three adjustments—intensifying their emphasis on issues of equality, subverting doctrine, and scaling down—comprised a response to negative developments in constitutional law. Together, these tactical choices helped resuscitate belief in legal liberalism at a time that Mike Seidman has incisively described as "an environment marked by liberal collapse and conservative hibernation,"[59] before even more muscular forms of judicial conservatism appeared.

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56. *Id.* at 295 n.14.

57. *Id.* at 293–94.

58. Justice Powell was sold on the prosecutors' argument that McCleskey's equality claim "strikes at the heart of the judicial system." TSAI, *supra* note 22, at 82. As Justice Powell wrote in his memo to colleagues, "petitioner's challenge is no less than to our entire criminal justice system." He wondered aloud: "What if one accepts the study as reflecting sound statistical analysis? Would this require that no black be sentenced to death where victim was white?" *Id.* at 82–83. *See also* Sundby, *supra* note 36.

59. Louis Michael Seidman, *Critical Constitutionalism Now*, 75 FORDHAM L. REV. 575, 582 (2006).

These shifts in strategy entailed making tradeoffs: how to continue engaging in advocacy that might produce measurable gains through harm reduction as well as doctrinal improvement, while managing scarce resources in a time of cultural fatigue over racial equality claims. By making these adjustments, Bright and his allies developed a distinctive form of rebellious localism. This major shift in strategy can be understood as an example of what Mark Tushnet has termed "defensive crouch liberalism"[60]—adaptations by progressives to the fact that federal courts became dominated by conservatives. But these adjustments lacked the "nervous" form of advocacy Tushnet suggests is emblematic of liberalism seen in so many quarters for fear of retaliation by conservatives.[61] Rather, presuming a national conservative backlash was already underway, the trick became finding moments, spaces, and places far away from national elites where conceptions of rights could be pushed openly and fearlessly. In doing so, SCHR and its allies began to construct a counter-narrative that post-racial America had not yet arrived, and that the criminal justice system had never been successfully reconstructed.

C. POST-MCCLESKEY SURPRISES

A fruitful point of entry into the historical record is to consider these strategic adaptations in the wake of seemingly unjust Supreme Court precedent as a species of unintended consequences. Sociologist Robert Merton has called the unanticipated consequences of purposive action "those elements which would not have occurred had the action not taken place"; such effects "result from the interplay of the action and the objective situation."[62] Most of the time we act "not on the basis of scientific knowledge, but opinion and estimate," Merton writes. This is especially true when it comes to law as a species of social activity: judges create doctrine hoping that certain consequences will happen. They tinker with doctrine, often overestimating their own ability to shape the behavior of others. Even so, this is unavoidable: judges make constitutional law predicting that relevant social actors will internalize their pronouncements and behave in certain ways, but in truth judges have wholly inadequate information about other social actors' motivations, commitments, and resources.

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60. Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKINIZATION, (May 6, 2016), https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html [perma.cc/UR2D-3SSB].

61. *Id.*

62. Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOCIO. REV. 894, 895, 900 (1936).

Merton identifies the situation where "[p]ublic predictions of future social developments" can themselves "become a new element in the concrete situation" and thereby "change the initial course of developments."[63] Just as Marx's prediction of progressive concentration of wealth and increased misery of the masses helped lead to the rise of organized labor, thereby slowing developments predicted by Marx, so too it might be said that popular awareness of the Supreme Court's desire to insulate the criminal justice system from fundamental challenge and thereby wish a post-racist society into being *itself* became a factor in confounding those original expectations. As Merton points out, "[t]his contingency may often account for social movements developing in utterly unanticipated directions."[64] A case like *McCleskey* can become so imbued with social meaning that it becomes part of a broader struggle over legal principles, thereby facilitating surprising shifts in organizational behavior and to the law itself.

Consider several unintended consequences. First, Justice Powell did not expect that his decision would be used as Exhibit A in teaching a generation of lawyers and activists about poor constitutional reasoning and the problem of judicial callousness. Within the criminal defense bar, and among the smaller, tight-knit community of cause lawyers, *McCleskey* became a rallying cry to reject the Court's seeming command to abandon efforts to prove systemic racism. The ruling itself began to play a role in identity formation: more criminal defense lawyers began to see themselves as cause lawyers taking on a thoroughly unjust legal system—at least part of the time.

In fact, the ruling spawned political efforts to repudiate the ruling's tolerance of racial inequities in the criminal justice system. Legislation was introduced in Congress to permit defendants to introduce statistical evidence to demonstrate that the death penalty is enforced in a discriminatory manner. Efforts to undermine *McCleskey*'s logic also emerged at the state level. Although the Racial Justice Act has never been enacted by the U.S. Senate (it has passed in the House), grassroots activism led to the enactment of state analogues in North Carolina, Kentucky, and—in the most far-reaching form—California.[65]

Second, the Court underestimated the possibility of a differentiated response to the ruling due to the variety of criminal defense lawyers. It's one

63. *Id.* at 903–04.

64. *Id.* at 904.

65. Federal Racial Justice Act, H.R. 4442, 100th Cong. (1998); California Racial Justice Act of 2020, Assemb. Bill 2542, Chapter 317, 2019-2020 Regular Sess. (Cal. 2020), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB2542 [https://perma.cc/H8EF-H4ZC]; Kentucky Racial Justice Act of 1988, KRS § 532.300; North Carolina Racial Justice Act of 2009, Senate Bill 461, Gen. Assemb. N.C., 2009 Sess. (N.C. 2009) (repealed 2013).

thing to expect court-appointed lawyers heavily dependent on judicial favor or already overburdened public defenders to shy away from making equality claims after a doctrinal test is made harder to satisfy. It's quite another to expect abolitionist organizations to renounce equality claims without a fight. Groups with the capacity to draw upon out-of-jurisdiction manpower and donations could still choose to invest in the heavy lifting necessary to pursue allegations disfavored by the Supreme Court and do so in venues beyond that institution's capacity to control.

Nor did the Justices foresee that success in a single case could be leveraged successfully to throw other death sentences, and even some convictions, into serious doubt—and even spawn more structural equality claims. When a judge found a prosecutor or judge engaged in unconstitutional actions, especially a violation of the principle of equality, SCHR lawyers exploited that decision for all it was worth, arguing in other cases involving that person or the entire office was hopelessly tainted by racism.

To these advocates, *McCleskey* had ripped the mask off an unjust system. If they continued to behave like business as usual and gave such figures the benefit of the doubt, they would be complicit in perpetuating cruelty and inequality. Instead of propping up that illusion of neutrality, they vowed to break norms of civility and insist that judges and prosecutors step aside—another unanticipated byproduct of the ruling.

Third, in constructing *McCleskey*, Powell believed he was protecting faith in the rule of law by shutting down all but the rarest system-wide constitutional challenges. Instead, the ruling would end up inspiring a fresh round of even more intensive equality-based challenges at the local level. Worried about the need to document all the ways that race and poverty shaped capital outcomes and educate fellow citizens as well as jurists, some advocates filed more pre-trial motions than they ever did before, challenging everything from jury selection processes to prosecutorial charging decisions. During post-collateral proceedings and retrials, SCHR lawyers also demanded transparency, seeking access to a prosecutor's notes to bolster their claim that charging decisions were racially discriminatory or that prosecutors had tried to manufacture all-white juries.

A subset of cause lawyers thus engaged in more high-risk, high-reward moves to target bad actors involved in administering the justice system. Individual judges and prosecutors were swept up in these efforts to expose the inner machinery of the death penalty system, which blackened not only their reputations, but also that of state attorney generals who chose to defend local practices. That unintended development arguably undermined faith in

the rule of law far more than endorsing McCleskey's challenge would have done, especially if the Court could have envisioned a path to a narrow remedy in that dispute.[66]

Fourth, with the exception of Justice Scalia, who objected privately to any suggestion that the Baldus Study was inherently unsound (he was simply more forthright in his willingness to tolerate persistent inequities),[67] the Justices were uneasy with quantitative analysis. The majority hoped to dissuade structural advocacy that relied upon these kinds of statistics. Justice Powell warned his colleagues that if the Baldus study were accepted as sufficient proof of an equality violation, it would "invit[e] a system of 'statistical jurisprudence'—unprecedented in civilized history."[68] The irony, of course, is that by expressing such a distaste for numbers and a strong preference for direct evidence of racial hostility, the *McCleskey* decision may have encouraged advocates to become more aggressive and comprehensive in introducing evidence of actions, sentiments, and associations that at times could actually be less reliable in demonstrating racial bias. Simpler evidence is not always better evidence. In retrospect, it may have been suboptimal to funnel such complicated evidence of structural bias into state courts, which might have less expertise with such evidence.

Acquiring direct as well as quantitative evidence of bias, and then arguing about its merits openly in court, would also inevitably prolong trial proceedings and threaten to turn them into communal spectacles. Such consequences, too, would not have been optimal from the standpoint of the Supreme Court, which had increasingly prized efficiency and finality in capital cases. The justices' failure to consider this possibility was anticipated by Merton, who describes "the 'imperious immediacy of interest' . . . where the actor's paramount concern with the foreseen immediate consequences excludes the consideration of further or other consequences of the same act."[69]

In short, Justice Powell wanted fewer structural equality claims, not more, and reduced conflicts over race, rather than more intense ones. He hoped to dissuade use of statistical proof to undermine criminal judgments and promote belief in the rule of law. As we shall also see, the *McCleskey* decision certainly did not put an end to a battle of experts. It did not even

66. I have suggested narrower constitutional violations and remedies, particularly if the Court had perceived the primary problem in terms of fairness rather than equality. *See* TSAI, *supra* note 22.

67. John Charles Boger, McCleskey v. Kemp*: Field Notes from 1977-1991*, 112 NW. U. L. REV. 1637 (2018).

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

69. Merton, *supra* note 62, at 901.

stem allegations of racism in death penalty cases. It just shifted the theater of conflict.

II. SHAMING THE SYSTEM

Litigating in the shadow of *McCleskey* "was a time of transition," recalled Stevenson; "[t]hinking more creatively about how to expose these problems became a higher priority."[70] It's important to see that rebellious localism was not just about adjusting litigation strategy; it also became about grounding these new courtroom tactics in grassroots mobilization. The *McCleskey* decision felt like a historical break to these activists. They saw it as the moment they realized "a new model would be needed."[71] Others observed a decisive rhetorical shift in Bright, who from that moment on "talked more proactively about issues of race, and class, and power."[72]

Instead of giving up on equality claims, Bright encouraged his staff to double down on proving inequality. *McCleskey* required a person to prove that specific individuals "in *his* case acted with discriminatory purpose," and that's exactly what they would do.[73] With Bright leading the charge, they vowed to go county by county, prosecutor by prosecutor, and judge by judge if necessary to ensure their clients got a fair trial. But they would not let go of their sense that the problem of inequality was not that of a few individuals, but entire offices and even jurisdictions.

"No one was prepared before *McCleskey* to go into some place like Swainsboro, Georgia, and use the language of intentional discrimination in a proactive way for an individual client," said Stevenson. "But that's what we did after *McCleskey*."[74]

A. EXPANDING THE SCOPE AND TARGETS OF EQUALITY CLAIMS

McCleskey had emboldened death penalty enthusiasts. For instance, Georgia Attorney General Michael Bowers confidently stated, "I do not see any racial discrimination in motive or effect in the imposition of the death penalty."[75] Bright believed that most members of the Supreme Court simply had no idea who was involved in keeping the machinery of death humming.[76] As a result, his staff had to build a persuasive record of bias in each case they

70. Stevenson Interview, *supra* note 1.
71. *Id.*
72. *Id.*
73. *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987).
74. Stevenson Interview, *supra* note 1.
75. Kathryn Kahler, *Racism Charged in Death Penalty Cases*, TIMES-PICAYUNE, Dec. 23, 1990, at A8.
76. Bright Interview, *supra* note 29.

handled. This meant two things: (1) intensifying challenges to suspected bad actors and getting more deeply into the background of prosecutors and judges to discern their racial attitudes; and (2) continuing to make structural inequality claims by experimenting with creative and aggressive ways to bring such claims in capital cases. Publicly expressed sentiments and actions, office practices, family histories, and even personal associations all became fair game.

In the view of SCHR lawyers, citizens and jurors became cogs in a killing machine that policymakers tried to make more efficient; the accused, dehumanized through the legal process. Through rebellious localism, Bright and his staff vowed to not only show the inherent brutality of this form of punishment, but also record and dramatize its racial effects in each case in which they played a role. They believed that citizens would be more hesitant to impose it in specific cases, and that the community as a whole would eventually turn away from the practice once stories of unfair and unequal administration spread.

Scaling down thus also meant bringing novel legal challenges to older forms of racial power that many people had just accepted long ago as part of the fabric of social life in the Deep South: Confederate battle flags in official state flags,[77] a judge's membership in an exclusive club or voting record as a former legislator, a relative's membership in the Ku Klux Klan or participation in a lynching. Their goal was to show just how much death penalty trials were permeated by racial bias in ways that went well beyond what the *McCleskey* Court had assumed.

Moving to recuse judges and prosecutors with a reputation for racial discrimination became part of the arsenal. SCHR lawyers also began filing motion after motion demanding that judges disclose how often they used the "N" word, whether they had ever hired African Americans as clerks and staff, and whether they sent their kids to segregated schools.

When a judge or prosecutor would resist making such disclosures, as expected, insisting that "you can't put me on trial here," Bright converted the *McCleskey* decision from a shield into a sword.[78] "Yes, I can," he told skeptical trial judges.[79] "*McCleskey v. Kemp* says I have to show whether

77. In a pre-trial hearing during Carzell Moore's capital trial, Bright called to the stand historian William McFeely in a bid to demonstrate that the Confederate battle flag, incorporated into Georgia's state flag in 1956 during widespread resistance to racial integration and *Brown v. Board of Education*, sent a message in courtrooms that black citizens are still not equal before the law. WILLIAM S. MCFEELY, PROXIMITY TO DEATH 25, 31 (2000).

78. Southern Center for Human Rights, *supra* note 42.

79. *Id.*

you are prepared to give fair and just treatment to my minority client."[80] This was "the kind of litigation most people ran from," Stevenson explained, "but Steve embraced it."[81]

More so than in its early years, SCHR treated this new era of "hand-to-hand combat" as a chance to get local communities involved. Before *McCleskey*, they worked mostly with the criminal defense bar and a smattering of cause lawyers. But afterward, "the connections with the traditional civil rights community started to take shape."[82] When SCHR lawyers went into a community to defend a person against the death penalty, they would bring a famous civil rights leader such as C.T. Vivian, who had been close to Martin Luther King, Jr., or Dr. Joseph Lowery, president of the Southern Christian Leadership Conference.

By spending time in these local communities, they met families who had experienced first-hand neglect and mistreatment by police and later, prosecutors and judges. "It became apparent that civil rights were going to have to be at the heart of what we do," Stevenson explained.[83] For instance, during one pre-trial hearing, SCHR lawyers put on black witnesses who had been victims of violent crime but had not heard much from the district attorney's office. Such evidence, in Bright's view, showed that "black lives are not valued in the same way as white people's lives," and bolstered the defense's empirical evidence indicating that the prosecutor's office sought the death penalty far less frequently when similarly situated defendants had allegedly killed black people. Discriminatory charging decisions, they argued, denied one such black defendant on trial for killing a white person, William Brooks, equal protection of the law. In fleshing out this claim, the defense sharply contrasted how a District Attorney's office would maintain close relationships with white victims of murder—even sometimes giving families a voice before major decisions in a case were made—with the frosty relationships with black victims. This amounted to not only evidence of official bias, but also what Monica Bell has called "legal estrangement" on the part of black residents.[84]

Additionally, because black citizens were not responding to jury summonses at the same rate as white citizens, SCHR began holding events

80. *Id.*
81. *Id.*
82. Stevenson Interview, *supra* note 1.
83. *Id.*
84. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017). As Bell warns, though, procedural justice—here in the form of testifying at a capital hearing about being mistreated by the police and prosecutors on the basis of race—can only serve as an incomplete response to that sense of disenchantment and powerlessness. *Id.* at 2104.

at black churches where a prominent civil rights leader would give a rousing speech "creating a consciousness that there was an obligation to serve."[85] Stevenson or Bright would warm up the crowd by talking about a case they had in that county. Then a famous civil rights figure like C.T. Vivian would take the stage and tell stories of how he was beaten when he marched but had gotten back up for their right to vote and to serve on a jury. "Now when you get summoned for jury service, I want you to walk to the courthouse like we walked to the courthouse in 1963, like we walked across the bridge. Don't wait until it's *your son* sitting in a courtroom filled with white people and an all-white jury."[86]

Community organizing went hand-in-glove with litigation strategy. In the retrial of William Brooks, for instance, Bright filed a creative motion to deal with the fact that the poor response rate by black citizens to jury summonses had made it easier for prosecutors to manufacture an all-white jury during his first trial. In trying to deal with the pervasive problem of legal estrangement in their own case, they pointed out that "only eight of 160 summoned jurors were black" and that "a representative venire would have contained 50 black citizens."[87] They told the judge that "to protect the constitutional rights of the accused," he could not be passive but instead "should direct the service of summons to jurors be accomplished in a way that ensures a fair cross-section of the community actually appears for jury service."[88]

Bright and his staff asked the judge presiding over the retrial to provide specific relief: (1) that a "special venire of at least three hundred person be drawn with the initial selection process taking place in open court"; (2) that the Clerk issue summonses to those jurors selected and commanding them to appear "without making mention of the name of the case to be tried"; (3) that personal service be made upon any jurors who fail to respond; (4) that the clerk, sheriff, and other court personnel be directed not to disclose the case or name of the defendant prior to the jurors appearing in the courtroom; and (5) that any and all other steps be taken to ensure the venire represent a fair cross-section of the community.[89] These motions sent a powerful message to the prosecutor, the judge, and local citizens that trials of black defendants by all-white juries would be perceived as illegitimate

85. Stevenson Interview, *supra* note 1.

86. *Id.*

87. Motion for a Special Venire That Represents a Cross-Section of the Community, for Personal Service on Those Who Do Not Respond to Summons, and for Court to Determine All Excusals at 1–2, State v. Brooks, Nos. 38888, 54606 (Muscogee Cnty. Super. Ct.).

88. *Id.*

89. *Id.*

even though the Supreme Court has never held that a defendant has a constitutional right to a diverse jury.[90]

To ensure that poorer citizens would be able to participate, Bright also filed pre-trial motions asking that jurors be paid "their current wage and to compensate primary caregivers for day care costs."[91] They argued that "[d]aily wage earners and primary caregivers for young children are cognizable groups for Sixth Amendment purposes" and that their underrepresentation in Brooks' trial and others would violate the Constitution.[92]

Black citizens began appearing for hearings in SCHR's cases, especially when they sought to recuse judges or prosecutors or get the state flag, which contained the Confederate flag, removed from the courtroom for the trial. Instead of an empty courtroom, the place would be packed with black people concerned about the quality of justice, who transformed a mundane legal proceeding into a communal event.

That happened for the retrial of Brooks. In a letter dated September 5, 1990, Bright and George Kendall discussed several themes that Dr. Joseph Lowery might work into an upcoming community presentation in Columbus.[93] The first theme was to explain that "discrimination is worse in the criminal justice system than anywhere else, that everyone has looked the other way for too long, and that it is urgent that something be done about it."[94] Second, citizens could "learn more about discrimination in the justice system by going to our hearing in the William Anthony Brooks case on discrimination."[95] Third, concerned citizens could sign postcards SCHR prepared to urge members of Congress to enact the Racial Justice Act. They could also organize to deny the current district attorney a judgeship "if he continues his practice of discrimination in seeking the death penalty."[96] As Bright explained to Dr. Lowery: "The last two District Attorneys both are judges now and both used the death penalty to get there."[97] According to Bright and Kendall, "[b]oth Whisnant and Smith were famous for lynch-mob type closing arguments at the sentencing phase where they would ask for the

90. *Id.* at 3.

91. *See, e.g.*, Motion for Compensation of Jurors at Current Wages and Reimbursement to Primary Caregivers for Day Care Costs at 6, State v. Moore, Indictment No. 8676 (Monroe Cnty. Super. Ct.).

92. *Id.* at 2.

93. Letter from George Kendall and Stephen B. Bright, Dir., S. Prisoners' Def. Comm., to Dr. Joseph Lowery (Sept. 5, 1990).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

death penalty."[98]

Most critically, Bright and his staff came up with imaginative ways of developing their own evidence against the worst prosecutors and complicit trial judges. They did so, for example, by taking advantage of a state's "sunshine laws" to inspect state records. In Georgia, those records extended to a prosecutor's files once an appeal had been decided. SCHR lawyers also began putting historians, statisticians, and other experts on the stand during pre-trial hearings to document the state of local justice. They would litigate pre-trial motions—including any *McCleskey* motions—vigorously.

"We really focused hard on this," Stevenson recalled. It was a concerted "reaction to *McCleskey* and the new world we were in. We had to more carefully articulate the nature of racial bias."[99]

And so they did—by cataloging and exposing inequality and unfairness wherever they could, in every setting in which an issue about the quality of justice could be credibly raised. To Stevenson, this major shift in strategy was "really exciting because we all knew the truth about how these people thought. We had experienced it."[100] He could see that it was also "empowering" for Bright because "you observe bias time and time again, and the conventions of the law require you to stay silent. To now be able to use the law in service of saying something was very, very energizing."[101]

Paradoxically, SCHR was well placed to engage in rebellious localism precisely because they were not part of the local power structure. They were based in the region, but not insiders. The organization's funding did not come only from court-appointed cases. The overall strategy thus played to SCHR's strengths. Staff could do the things that court-appointed lawyers, whose livelihood depended on good relations with local judges and prosecutors, simply could not do and for self-interested reasons, would not do. Bright also believed that requiring attorneys to take criminal cases for such low pay meant that lawyers often did not care about their non-paying clients. How many times had a court-appointed lawyer not bothered to make a constitutional claim, investigate something a client said or contact a possible witness, or lodge an objection simply because doing so would drag out the case or annoy members of the local power structure?

This point was not about comparative or absolute resources as much as it was about relative independence. This strategy was deployed in the early decades of the era of mass incarceration, when SCHR had only a shoestring

98. *Id.*
99. Stevenson Interview, *supra* note 1.
100. *Id.*
101. *Id.*

budget and relied heavily on small donations, a few grants, and fee awards from prisoner's rights lawsuits. Yet, freed from the financial and political conditions that structured how everyday criminal cases were handled, the organization found itself in a position to demand more of the legal system. Bright and his staff would still insist upon being paid by the state for criminal defense work just like local lawyers who had to eke out a living by taking court-appointed cases, even if they ended up working longer hours that would go unreimbursed, because the principle of equality for indigent representation mattered. At times, they would even file separate lawsuits to lift existing restrictions on how much court-appointed defense lawyers could earn, believing that fee caps led to less thorough investigations and less competent representation of the poor.[102]

During these years, Bright began developing his critique that people were sentenced to death not so much for the crimes they commit but rather for having an inadequate lawyer.[103] He realized that the absence of a public defender system in many places made unfairness a built-in feature of the justice system. The already asymmetrical criminal process left the quality of counsel for the poor completely controlled by local judges. This often led to shoddy representation by court-appointed lawyers who often wanted to close cases as quickly as possible and get back to paid work. Funds for experts were hard to come by; many lawyers representing the poor never bothered to ask.

Rebellious localism yielded other benefits beyond spotlighting racial inequities. A certain synergy arose between legal challenges to the practices of certain prosecutors and judges on behalf of clients facing the death penalty and SCHR's civil challenges brought against local indigent defense systems, plea bargaining practices, and bail rules. More than once, focusing on a particular judge's practices alerted the organization and others to pervasive problems that could then be challenged separately. Eventually, rebellious localism acquired a civil dimension to supplement its criminal law focus, as the Center added a variety of civil litigation strategies to try to halt death penalty proceedings or gain access to evidence that might bear on their claims. In showcasing the various deficiencies of the justice system, rebellious localism also helped revive the public defender movement within

102. *See, e.g.*, Bailey v. State, 424 S.E.2d 503, 507–08 (S.C. 1992) (holding that attorneys appointed to capital cases must be reasonably compensated rather than limited by $1,000 statutory cap).

103. On the history of the public defender movement, see SARA MAYEUX, FREE JUSTICE (2020); Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After* Gideon v. Wainwright, 122 YALE L.J. 2150 (2013); Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty are at Stake*, 1997 ANN. SURV. AM. L. 783 (1997); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

the state.[104] Overall, the approach proved highly effective in attracting media coverage of the nested problems within the criminal justice system.

B. UNRIGGING JURIES

Because "that's where we had the best law,"[105] that is, precedent vindicating the importance of the right to a jury of one's peers stretching back to the post-Reconstruction Supreme Court case, *Strauder v. West Virginia*,[106] one area of intensive focus became about challenging a jury's composition. *Strauder* had struck down a state law that barred black men from serving on juries. Over a hundred years later, it was still the case in many death penalty jurisdictions that "there were no black prosecutors, no black decision makers, and the only opportunity for a black person to play a role was on the jury," Stevenson observed.[107] A good illustration was Columbus, Georgia, whose 10-person prosecutor's office were all white men until the mid 1980's, when the first black prosecutor in that county's history was hired.[108] But, of course, in case after case Bright and others noticed "elaborate efforts being made to exclude black people." Through their cases, they decided to "elevate how exclusionary the juries had been."[109]

In *Amadeo v. Zant*, Bright's first case before the U.S. Supreme Court, Justice Thurgood Marshall invalidated Amadeo's death sentence because of Putnam County's scheme to systematically underrepresent black people and women in its jury pools.[110] The Court singled out District Attorney Joe Briley's memo to jury commissioners instructing them on how to permit just enough women and blacks into the pool without making it look too suspicious. A lawyer bringing an unrelated civil rights lawsuit against the county had discovered the "smoking gun" evidence. Based on this new evidence, a federal district judge had granted a writ of habeas corpus, but the Eleventh Circuit reversed, saying the claim was time-barred. Justice Marshall's decision disagreed with the Eleventh Circuit's handling of the procedural default issue and restored the federal judge's order granting relief.

When the case was returned to Putnam County, Briley promptly had Amadeo reindicted for murder. A secondary legal battle then ensued when

104. For a historical account of the creation of the first statewide public defender system in Georgia, see Robert L. Tsai, *The Public Defender Movement in the Age of Mass Incarceration: Georgia's Experience*, 1 J. AM. CONST. HIST. 85 (2023).

105. Stevenson Interview, *supra* note 1.

106. Strauder v. West Virginia, 100 U.S. 303 (1880).

107. Stevenson Interview, *supra* note 1.

108. *See* Pre-Trial Hearing Transcript at 7–13, State v. Brooks, Nos. 38888, 54606 (Muscogee Cnty. Super. Ct. Sept. 12, 1990).

109. Stevenson Interview, *supra* note 1.

110. Amadeo v. Zant, 486 U.S. 214 (1988).

the trial judge refused to appoint Bright and his staff as attorneys of record until the Georgia Supreme Court ordered him to do so. Instead, the judge had tried to stick Amadeo with a different set of lawyers who knew nothing about the case.

SCHR had to battle the trial judge, the district attorney, and the state attorney general's office to vindicate Amadeo's right to the counsel of his choosing. Ultimately, the Georgia Supreme Court issued a landmark decision reversing the trial judge for interfering with Amadeo's "relationship of trust and confidence with prior counsel."[111]

Back on the case, Bright and William Warner filed a slew of pre-trial motions. One motion sought to quash the indictment on the ground that the grand and traverse jury master lists "do not reflect a fair cross-section of the community."[112] Referring to Amadeo's earlier win in the U.S. Supreme Court, they insisted that he could not be tried unless additional "precautions be taken to assure that this time," his rights were protected.[113] Besides pointing out that the county's past jury selection methods excluded women and black people, they added a new Equal Protection claim based on class. "The selection system utilized in this county is not class-neutral," they argued, "and does not assure the inclusion of persons who are not registered to vote, persons who have recently moved to the county, and low income persons."[114] Because Amadeo was not a resident of Putnam County but an indigent "outsider" charged with serious crimes against "a highly respected member of the community," they objected to a system that generated juries that lacked important "experiences, opinions, and perspectives."[115]

In addition, Amadeo's team filed an *ex parte* motion seeking funds for an expert to help them determine whether the county's jury pools were, in fact, underrepresenting "recent migrants, unemployed persons, daily wage earners, [and] persons who are not registered to vote."[116]

In an even more daring effort, Amadeo's attorneys moved to disqualify all judges from the Ocmulgee Judicial District, made up of eight counties, including Putnam, based on a violation of the Voting Rights Act. They

111. Amadeo v. State, 384 S.E.2d 181, 182–83 (Ga. 1989) (holding that trial judge abused his discretion by refusing to appoint Bright and SCHR as capital counsel for the retrial because "the considerations favoring the appointment of Amadeo's previous counsel clearly outweighed any opposing consideration, including the desirability of involving local lawyers").

112. Motion to Quash Grand and Traverse Juries Due to Underrepresentation of Cognizable Groups at 1, 3, State v. Amadeo, No. 88-CR-257-11 (Putnam Cnty. Super. Ct.).

113. *Id.*

114. *Id.*

115. *Id.* at 3–5.

116. Ex Parte Motion for Funds for Expert Assistance to Investigate Grand and Petit Jury Venires at 2, State v. Amadeo, No. 88-CR-257-11 (Putnam Cnty. Super. Ct.).

argued that the judges of the Ocmulgee Judicial District were elected as a result of unconstitutional procedures. The use of at-large election procedures for superior court judges had never produced a single black judge in the circuit, they noted, even though the population of the counties were between 37.42% and 78.24% black.[117]

This last motion revealed SCHR's resolve in thinking structurally. Amadeo's team demanded an evidentiary hearing so they could show "total or seriously disproportionate exclusion of black citizens from the Georgia judicial system, disproportionate impact of the decision made in the election and judicial systems of Georgia, the opportunity for discrimination, as well as other circumstantial and direct evidence of intent to discriminate as may be available."[118]

On a couple of occasions, Bright put Stevenson on the stand as an expert witness to testify as to the difference between comparative disparities and absolute disparities. Stevenson had received a degree in public policy at the Harvard Kennedy School to go along with his law degree from Harvard. That made him conversant in quantitative analysis when the SCHR brought legal challenges to the underrepresentation of black jurors.

"The way the law is, we'd have to show an absolute disparity of over 10% before a court will see that as significant," Stevenson said.[119] "We'd routinely go to these counties where the county was 30% black, the jury pool would be 20%, if the county was 20% black, the jury pool would be 10%"[120] In any given jurisdiction, the disparity was not big enough for a defendant to mount a successful challenge, and yet it kept the absolute number of black citizens in the jury pool low enough that it was not hard for a prosecutor to eliminate the few black jurors using peremptory strikes.

Preserving the legal issue would also make the verdict of an all-white jury more vulnerable to reversal on appeal. Indeed, this frenzy of pre-trial activity created a general awareness among trial judges and prosecutors that legal errors might unsettle a conviction. This sensitivity improved advocates' ability to "increase the numbers a little bit."[121] And that's what they always wanted: a fighting chance in front of a mixed-race jury.

They also litigated jury demographic issues hard in Michael Berryhill's case in Bartow County. Stevenson recalled that the jury commissioner had

117. Memorandum in Support of Motion to Disqualify Unconstitutionally Elected Judge at 2, State v. Amadeo, No. 88CR-25711 (Putnam Cnty. Super. Ct.).
118. *Id.* at 11.
119. Stevenson Interview, *supra* note 1.
120. *Id.*
121. *Id.*

testified "they couldn't get enough women on the jury because they had to be 'upright and intelligent citizens,' and we don't have any of those or any black people."[122] However, the Georgia Supreme Court ruled on appeal that an 11% disparity between women in the county and in the jury pool was not "significant" enough absent evidence of "purposeful discrimination or systematic exclusion."[123]

They did not give up and introduced the same evidence as part of Berryhill's federal habeas proceedings. This time, the Eleventh Circuit found that including only "intelligent and upright" women to the master jury lists was "highly subjective," leading to severe underrepresentation.[124] A new trial was ordered because Berryhill had been denied a jury drawn from a fair cross section of the community.[125]

C. DOCUMENTING RACE-BASED JURY STRIKES

SCHR invested more and more resources into uncovering a related problem: proving that some Georgia prosecutors systematically used peremptory challenges to exclude black citizens from jury pools. Bright and his staff noticed that overzealous prosecutors would try to eliminate all, or nearly all black citizens from juries, even well into the 1980s and 1990s—especially when they wanted a death sentence against a black defendant. The way juries were composed, and the way prosecutors were using their largely unregulated strikes against black citizens in capital cases, seemed to be pillars holding up a system of unequal justice.

SCHR would eventually pile up victories on this front, not only in federal but state courts. Two of Bright's later wins in the U.S. Supreme Court—*Snyder v. Louisiana*[126] and *Foster v. Chatman*[127]—would involve reversals of death penalty convictions tainted by a prosecutor's race-based peremptory strikes.

For now, though, they still had to deal with shifting legal standards. Until the Supreme Court made it easier to prove racial bias in peremptory challenges in *Batson v. Kentucky*,[128] the governing case was *Swain v. Alabama*,[129] which had established a standard that almost no defendant could

122. *Id.*
123. Berryhill v. State, 291 S.E.2d 685, 690–91 (Ga. 1982).
124. Berryhill v. Zant, 858 F.2d 633, 636, 639 (11th Cir. 1988).
125. *Id.* at 639.
126. Snyder v. Louisiana, 552 U.S. 472 (2008).
127. Foster v. Chatman, 578 U.S. 488 (2016).
128. Batson v. Kentucky, 476 U.S. 79 (1986) (holding that removing a single juror based on race violated the principle of equality and creating a three-step process for ferreting out such violations).
129. Swain v. Alabama, 380 U.S. 202 (1965).

overcome. In *Swain*, the justices rejected an Equal Protection claim even though no black citizen had served on a jury in a criminal trial for at least the prior 15 years. The only way for a defendant to prevail was to present proof that "the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners."[130]

The battle over peremptory strikes played out in Georgia's courts. Bright and Stevenson had gotten involved in another case that raised the jury composition issues—that of James Ford.[131] Ford, a black man, was sentenced to die by a jury that contained only one black citizen. The prosecution used nine out of ten peremptory strikes to remove black jurors. At trial, the prosecutor had asked the trial judge whether he needed to explain his troubling pattern of strikes, but the judge said no, *Swain* did not require that, and simply overruled Ford's objection. *Swain* itself had confirmed that "[t]he essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control."[132]

The wrinkle presented in Ford's case was a highly technical one: whether a defendant had lodged an objection in a timely fashion so that he could later raise the issue on appeal. In general, a failure to object barred a person from complaining about a trial-related error later. What made this case complicated was when the substantive law itself was in flux. What should be expected of lawyers during such a period of transition?

In Ford's case, his lawyers had preemptively raised the equality issue by filing a pre-trial motion "to restrict racial use of peremptory challenges."[133] They alleged that the county prosecutor had "over a long period of time" removed black jurors when a case involved a white victim.[134] After losing the motion, and receiving a death sentence, Ford again raised the issue, insisting that his Sixth Amendment rights had been violated.

While Ford's cert petition was pending, the Supreme Court handed down *Batson*. If a defendant objected contemporaneously and could make out a strong enough showing of discriminatory conduct, a prosecutor would now have to give race-neutral reasons for exercising each peremptory challenge, and the judge had a duty to make a finding on the record as to

130. *Id.* at 223.
131. Ford v. Georgia, 498 U.S. 411 (1991).
132. *Swain*, 380 U.S. at 220. *See* Katie Wood, *Bowers Called Hypocrite on Jury-Strike Issue*, FULTON CNTY. DAILY REP., Mar. 4, 1992.
133. *Ford*, 498 U.S. at 411, 413.
134. *Id.* at 414.

whether to accept the explanations.[135] The new constitutional rule was far from perfect, for it was still hard to prove a nefarious motive on the fly, but it represented an improvement upon the earlier protocol.

The U.S. Supreme Court vacated Ford's conviction and instructed the Georgia Supreme Court to review what happened under the new *Batson* test. But that court again upheld Ford's death sentence, without conducting an evidentiary hearing or otherwise demanding that the prosecutor give explanations for his strikes as *Batson* required. In a Kafkaesque ruling, the Georgia Supreme Court simply ruled that Ford properly raised the *Swain* issue, which he had lost, but not *Batson*, which he was barred from raising now on appeal, deeming it too late.

Bright convinced Charles Ogletree of Harvard Law School to plead Ford's cause before the U.S. Supreme Court on the return engagement. At oral argument, Ogletree hammered the inherent unfairness of the Georgia Supreme Court splitting hairs: "It is only after *this* Court's remand, and without hearing from the parties, that the Georgia Supreme Court for the first time says that counsel has failed to make a record of this to survive a *Batson* claim."[136] There were "no clear rules in existence" in the state courts governing when such an objection should be raised and "[t]o the extent that they were, counsel complied with them."[137]

Ford's ordeal illustrated another facet of the legal system that could undermine the Constitution's assurance of equality: the role of appellate judges. Whether out of indifference to rights or in defiance of a Supreme Court ruling, a state supreme court could exploit federalism to frustrate enforcement of constitutional guarantees. It could do so by applying state law broadly or by giving federal law a cramped reading. When that happened, a state court was basically daring a federal court to do something about it.

Indeed, one of the most egregious acts of state court defiance took place in 1955. That controversy also involved the Georgia Supreme Court asserting its prerogative to execute a black man despite an order by the U.S. Supreme Court to reconsider his constitutional rights.[138] Like *Ford*, the case also raised the problem of jury manipulation. Aubry Williams, condemned for killing a white liquor store clerk, appealed his case to the U.S. Supreme Court. Williams was tried by a Fulton County jury at a time when judges monitored the races of jurors by marking citizens' names on different colored

135. Batson v. Kentucky, 476 U.S. 79, 100 (1986).
136. Transcript of Oral Argument at 12, Ford v. Georgia, 498 U.S. 411 (1991) (No. 87-6796).
137. *Id.* at 18.
138. Williams v. State, 88 S.E.2d 376 (Ga. 1954), *cert denied*, 350 U.S. 950 (1956).

pieces of paper. In another case out of Fulton County called *Avery v. Georgia*,[139] decided just two months after Williams' trial, the U.S. Supreme Court held that the county's practice violated the Fourteenth Amendment. The problem for Williams was that his lawyers did not object at the time of his trial. His lawyers raised the issue for the first time in an extraordinary motion for new trial, but the state supreme court deemed the issue waived.[140] Under the "adequate and independent state ground" doctrine, a state's ruling that an issue had been procedurally forfeited meant that a federal court had no jurisdiction to review it.[141]

When Williams sought certiorari, the Justices struggled with the possibility of letting a man die because of a racist jury selection procedure. On the other hand, rules were rules and federalism mattered. In an opinion by Justice Frankfurter, the Court vacated Williams' conviction and invited the members of the Georgia Supreme Court to reconsider, appealing to their consciences that surely they would not "allow this man to go to his death as the result of a conviction secured from a jury which the State admits was unconstitutionally impaneled."[142]

Williams's fate, as Ford's would be a generation later, was trapped between evolving law and warring courts. In an angry opinion, the Chief Justice of the Georgia Supreme Court refused to give Williams a new trial and said that the U.S. Supreme Court lacked jurisdiction.[143] When Williams filed an emergency appeal, the Supreme Court backed down and refused to hear the matter a second time. That cleared the way for his execution.[144]

Political scientist Del Dickson, who has studied that episode closely, believes that William's rights were sacrificed on the altar of the Warren Court's project to desegregate schools.[145] The Court was busy battling resistance to *Brown* across the country and did not want to open another front on race matters. Forty years later, when the same court applied state rules to frustrate consideration of a constitutional right in *Ford*, the Supreme Court did not look the other way.

On February 19, 1991, Justice Souter wrote a unanimous opinion that repelled the Georgia court's seeming defiance of Supreme Court

139. Avery v. Georgia, 345 U.S. 559 (1953).

140. *Williams*, 88 S.E.2d at 376–77.

141. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION (1989); Kermit Roosevelt III, *Light from Dead Stars: The Procedural Adequate and Independent State Ground Reconsidered*, 103 COLUM. L. REV. 1888 (2003).

142. Williams v. Georgia, 349 U.S. 375, 391 (1955).

143. *Williams*, 88 S.E.2d at 376–77.

144. *Williams*, 349 U.S. at 391; *Id.*

145. Del Dickson, *State Court Defiance and the Limits of Supreme Court Authority:* Williams v. Georgia *Revisited*, 103 YALE L.J. 1423, 1481 (1994).

precedent.[146] Ford's attorneys had clearly raised a *Swain* claim. But in trying to draw a difference between these two cases, "the State assumes a distinction between the holdings in those two cases that does not exist," he explained. "Both *Swain* and *Batson* recognized that a purposeful exclusion of members of the defendant's race from the jury selected to try him would work a denial of equal protection."[147]

Georgia's refusal to entertain Ford's claim under the new standard amounted to a perverse form of logic, Justice Souter explained, because "*Batson* did not change the nature of the violation recognized in *Swain*, but merely the quantum of proof necessary to substantiate a particular claim."[148] As a result, raising the peremptory strike issue was sufficient to preserve it, and the state court's application of a new procedural rule announced two years later was not an "adequate and independent state ground" to prevent federal review.

To Bright, the lesson from handling Ford's appeal was that they would have to battle appellate judges as much as prosecutors to ensure that basic rights would be enforced. Even so, their intensification of trial tactics proved to be worth it. Ford's lawyers had earned him the right to a hearing. Once a hearing was finally held in state court, the original prosecutor was forced to testify as to his reasons for striking so many of the eligible black jurors. The trial judge summarily accepted those reasons, but on appeal, the Georgia Supreme Court reversed, building on *Gamble v. State*, another SCHR case and the very first time a *Batson* violation had been found by the state supreme court.[149]

Chief Justice Norman Fletcher ruled that the district attorney's explanations offered after the fact were not sufficiently "concrete" and "race-neutral" so as to overcome the "strong" pattern of discrimination in Ford's case.[150] As he pointed out, "of the 42 persons on the panel from which the trial jury was chosen, ten, or 24%, were black."[151] In other words, the prosecutor "exercised 90% of his strikes to strike 90% of the blacks from the venire, while exercising 10% of his strikes to exclude a mere 3% of the whites on the venire."[152] Quoting Ford's brief, Justice Fletcher said that " 'it

146. Ford v. Georgia, 498 U.S. 411 (1991).

147. *Id.* at 420.

148. *Id.*

149. Gamble v. State, 357 S.E.2d 792 (Ga. 1987). In *Gamble*, the Georgia Supreme Court applied *Batson* and overturned a death sentence against a black defendant where the prosecutor used all ten of his peremptory strikes against ten black jurors to rig an all-white jury.

150. Ford v. State, 423 S.E.2d 245, 247 (Ga. 1992).

151. *Id.* at 248.

152. *Id.* at 246.

does not require a statistician … to recognize' the very high probability that this racial disparity did not occur strictly as a matter of chance."[153] Against the weight of this pattern, the prosecutor's explanations "fall short of proving that this disparity was the incidental result of neutral selection procedures."[154]

After losing in the U.S. Supreme Court and seeing the Georgia Supreme Court's about-face, prosecutors folded and offered Ford a life sentence. Indeed, perhaps more than any other constitutional issue, a prosecutor's use of peremptory strikes to prevent black citizens from participating in criminal trials had the potential to bring together judicial liberals and conservatives.[155] Not only did the rationale appeal to those who wished to preserve the democratic legitimacy of criminal judgments, it also appealed to those who might be open to upsetting a single criminal conviction without necessarily embracing structural critiques. For conservatives, deciding a case on this ground meant protecting the integrity of the legal system and dealing with "bad apples."[156] Of course, judges could not completely control how advocates would characterize the violations that were discovered, and abolitionists tended to declare such misconduct evidence of structural flaws in the justice system.

D. HOLDING PROSECUTORS ACCOUNTABLE

After prevailing in the Georgia Supreme Court and being reinstated as counsel for Amadeo's retrial, Bright and his co-counsel filed a giant pile of motions. The most important one sought to recuse Briley from leading the state's case a second time.[157] This, too, became a part of SCHR's arsenal whenever there was reason that a prosecutor had been involved in an equality violation. Rarely had there ever been any kind of consequences for such constitutional wrongdoing, whether professional, financial, or otherwise. Bright and his staff pitched their effort to block constitutional violators from (ab)using their power against the same defendants as a modest demand. But embedded in the move was a radical logic that state discretion was founded upon trust and good faith—notions that were fundamentally breached when

153. *Id.*

154. *Id.*

155. For a selection of cases where even conservative jurists were willing to overturn death sentences on this ground, see *Batson v. Kentucky*, 476 U.S. 79 (1986), *Miller-El v. Dretke*, 545 U.S. 231 (2005), *Snyder v. Louisiana*, 552 U.S. 472 (2007), and *Foster v. Chatman*, 578 U.S. 488 (2016).

156. Paul Butler critiques jurists' rhetoric that makes overly broad claims about *Batson* for ending racial discrimination, calling it "racial justice rhetoric without racial justice." Paul Butler, *Mississippi Goddamn:* Flowers v. Mississippi*'s Cheap Racial Justice*, 2019 SUP. CT. REV. 73, 83 (2019).

157. Memorandum in Support of Motion to Disqualify District Attorney Joseph Briley, State v. Amadeo, No. 88CR-25711 (Putnam Cnty. Super. Ct.).

a prosecutor acts in unequal and antidemocratic fashion by suppressing minority representation on juries.

Amadeo's team also arranged for legal ethics experts to file a brief in support of the recusal motion. The signatories came from each of the state's accredited law schools, including Mercer Law School, where Briley had gotten his J.D. In their brief, these experts argued that Briley's "misconduct is shocking to the conscience" and violated his duty to ensure that "all citizens" in the community "stand on an equal footing before the law."[158] Friends of the court cited Blackstone for the proposition that "special vigilance is required to keep our system of trial by jury 'sacred and inviolate, not only from all open attacks, . . . but also from all secret machinations, which may sap and undermine it.'"[159] Invoking ethical standards created by the National District Attorneys Association as well as *ABA Standards on the Prosecution Function*, they observed that "the duty of the prosecutor is to seek justice, not merely to convict."[160]

Amici thus supported SCHR's position that qualification of Briley was "required to protect the integrity of the adversary system, to assure public confidence in the administration of justice, to assure that the past misconduct does not interfere" with Amadeo's retrial.[161] The prosecutor's misconduct presented "that most rare case," they argued, "where there is a factual determination upheld unanimously by the United States Supreme Court that a prosecuting attorney intentionally tampered with the jury pools in an effort to subvert the constitutional rights both of the black jurors, and of Tony Amadeo, the litigant."[162] Additionally, the manipulation of jury demographics required legal expertise as part of the "intent to deceive" so that "a prima facie case of discrimination could not be established."[163] Such misconduct also violated bar standards that prohibit "illegal professional conduct involving moral turpitude," "dishonesty, fraud, deceit, or misrepresentation," or behavior "prejudicial to the administration of justice."[164]

On the day of the hearing, witnesses were prepared to testify that Briley's continued participation in Amadeo's case would taint the

158. Brief of Amicus Curiae Ad Hoc Committee of Lawyers in Support of Motion to Disqualify Prosecuting Attorney at 7–8, State v. Amadeo, No. 88CR-25-11 (Putnam Cnty. Super. Ct.) [hereinafter Brief of Amicus Curiae].

159. *Id.* at 4 n.1.

160. *Id.* at 7; AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION 3-1.1(a) (4th ed. 2017).

161. Brief of Amicus Curiae, *supra* note 158, at 8.

162. *Id.* at 9.

163. *Id.*

164. *Id.* at 10 (quoting *ABA Code of Professional Responsibility*).

outcome.[165] Bright had assembled Tom Johnson, county attorney for Hennipen County, Minnesota, Stephen H. Sachs, the former Attorney General of Maryland, and Professor Bennett L. Gershman, a leading expert on prosecutorial ethics. In the glare of such tactics, the state blinked. Rather than go through with a full evidentiary hearing, Briley offered a plea deal. He would withdraw the death penalty if Amadeo pleaded guilty to murder and promised not to seek parole for at least 25 years.[166]

SCHR would continue to try to recuse prosecutors whenever they had proof someone was involved in a Fourteenth Amendment violation, particularly on the basis of race or poverty. And in the retrial of Brooks, they stepped up this tactic by enlarging their recusal motion against an entire District Attorney's office, attacking its death penalty charging decisions and use of peremptory strikes over time as racially discriminatory.

E. BOUNCING JUDGES

The first time Bright and his staff went hard after a trial judge believed to be "a hanging judge" was in the case of George Dungee, a Black man who had an IQ of 65-69. Dungee was one of three men who escaped from a Maryland prison and went on a crime spree. Seminole County juries tried Carl Isaacs, Wayne Coleman, and Dungee separately and sentenced them to death for the horrific slaying of a family.[167]

Hanging judges were those known as tough-on-crime figures who might look the other way as prosecutors cut corners, including by manufacturing all-white juries in capital cases. Typically, they were former prosecutors themselves, elected or appointed after securing death sentences for notorious crimes. Having ridden to glory for their pursuit of Old Testament-style justice, they often looked with favor on other prosecutors who wanted a similar career arc.[168] Walter C. McMillan had a reputation as a hanging judge.

After Dungee's conviction was overturned due to the trial judge's failure to deal with prejudicial pre-trial publicity, McMillan was assigned to oversee the retrial.[169] In 1987, when Dungee's case returned to Seminole

165. Interview with Clive Stafford Smith (May 5, 2020) [hereinafter Stafford Smith Interview]; TSAI, *supra* note 51, at Part I.

166. MCFEELY, *supra* note 77, at 141; Bright Interview, *supra* note 29.

167. Elliott Minor, *Man Pleads Guilty in Slayings of Farm Family*, ASSOCIATED PRESS, July 14, 1988.

168. *See* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995).

169. Isaacs v. Kemp, 778 F.2d 1482 (11th Cir. 1985); Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1986).

County, Bright and his team moved to prevent Judge McMillan from presiding over the case, alleging "invid[i]ous discrimination against poor people and black people."[170] Although the issues were "somewhat painful" and "delicate," it was necessary to probe the judge's beliefs and past actions. Because this was "a racially sensitive" death penalty trial, they argued that it was "inappropriate for him to sit on this case."[171] Bright alleged that "George Dungee was called a 'n*gger' in Open Court in his last trial" and that nothing had been done about it.[172]

Dungee's lawyers also pointed to Judge McMillan's membership in an all-white country club, which they insisted violated the canons of judicial conduct, as well as his past political support for Ernest Vandiver, who ran for governor in 1959 on a platform of "No, Not One"—meaning not one black child in white schools, which they believed showed the judge was prejudiced. As Bright also noted during the recusal hearing, McMillan had never appointed a non-white jury commissioner for the counties he oversaw, "not a single time," in over twenty years on the bench. These commissioners exploited discretionary state law to underrepresent black people on juries, despite the fact that two counties within his jurisdiction were majority-black.[173] As a result, Bright argued, Judge McMillan was "very much a part of that system of white dominance."[174] Indeed, to bolster structural arguments of bias, Bright insisted that the judge had helped perpetrate "systematic [mis]treatment of indigent defendants" and black people, and not merely isolated acts of discrimination.[175]

During the hearing, Bright called Judge McMillan himself to the stand and asked about his use of racial epithets—which the judge acknowledged under oath.[176] Questioned about his views about *Brown v. Board*, Judge McMillan testified that "he [has] no quarrel with it" now, but "don't recall what I thought then," though "it was controversial."[177] On the stand, he acknowledged that he supported Vandiver for governor, and that the candidate "was espousing a racial segregation in the schools."[178] Dungee's

170. A Hearing on a Motion to Recuse Before the Honorable A. Blenn Taylor, Judge, Brunswick Judicial Circuit, and Sitting By Appointment for this Hearing at 12–17, State v. Dungee, Nos. 439, 444, 449, (Oct. 6–8, 1986) [hereinafter McMillan recusal hearing].

171. *Id.* at 16.

172. *Id.* at 14.

173. Email from Stephen Bright to Robert L. Tsai, Professor of L., B.U. Sch. of L. (Oct. 14, 2021) (on file with author).

174. McMillan recusal hearing, *supra* note 170, at 15.

175. *Id.* at 16–17. Bright further described McMillan as an "arch segregationist" who had abused defendant's constitutional rights in part because of his "ambition for higher office." *Id.* at 17–18.

176. *Id.* at 596–97.

177. *Id.* at 601–02.

178. *Id.* at 613.

lawyers also alleged that McMillan had withdrawn his daughter from public school out of opposition to integration, but could not get him to admit this in court.

Despite a somewhat mixed hearing record, a surprising thing did take place that altered Dungee's fortunes. Bright's aggressive tactics baited the judge into committing a misstep. Judge McMillan became so enraged at his impartiality being questioned that he retained his own lawyer for the hearing on the motion to recuse (heard by a different judge). Through this lawyer, he tried to intervene in the proceeding, monitor what was going on, and influence its outcome by conferring with attorneys for the state. McMillan claimed that he was "a participant" to the proceedings because "it's my duty and responsibility to defend the propriety of my office."[179]

That gambit ultimately failed when the Georgia Supreme Court decided the interlocutory appeal on the recusal motion in Dungee's favor. Without ruling on the ultimate issue of bias, and without mentioning "race" or "discrimination" a single time in the opinion, the justices seized on McMillan's aggressive efforts to protect his own reputation as evidence that his "impartiality might reasonably be questioned."[180]

Once Judge McMillan was off the case, a deal was reached to take the death penalty off the table. Dungee pleaded guilty to three consecutive life terms.[181]

SCHR pulled the same move in the retrial of Willie Gamble. Judge McMillan had presided over Gamble's original murder trial, where prosecutors used all ten of their peremptory strikes against black jurors to create an all-white jury. That jury sentenced Gamble to die, but the Georgia Supreme Court, citing *Batson*, reversed.[182]

Bright, Bryan Stevenson, and Clive Stafford Smith[183] did not want McMillan anywhere near the retrial. They moved to recuse him from overseeing Gamble's case too, arguing that his previous convictions were reversed "due to violations of his constitutional rights, resulting from intentional, flagrant discrimination by the district attorney, which was routinely approved by Judge McMillan."[184] In the very first paragraph of their motion, they invoked *McCleskey* as a command that "the person on trial

179. *Id.* at 575.
180. Isaacs v. State, 355 S.E.2d 644, 645 (Ga. 1987).
181. Minor, *supra* note 167.
182. Gamble v. State, 357 S.E.2d 792 (Ga. 1987).
183. Stafford left SCHR in 1993 to establish a death penalty resource center in Louisiana. He went on to found Reprieve and represent individuals detained in Guantanamo Bay, Cuba, as part of the War on Terror.
184. Motion to Recuse Judge at 3, State v. Gamble, No. 26 (Emanuel Cnty. Super. Ct. Jan. 5, 1988).

must show racial discrimination in the locality and the court in which he was tried."[185] Judge McMillan was just such a "decision maker" within the meaning of that case, they wrote, whose "racially discriminatory acts and encouragement and support of the racially discriminatory acts" of others already violated Gamble's rights and would likely do so again.[186] The unequal imposition of the death penalty "is the result of discrimination by the District Attorney in deciding in which cases he will seek the death penalty," they insisted.[187]

Gamble's lawyers turned up the rhetoric further, calling Judge McMillan a "rubber stamp racist,"[188] and recited a litany of facts documented earlier in the *Dungee* case. This time, they also argued that Judge McMillan had demonstrated lingering "antipathy" toward Bright's staff because of "his public humiliation in the *Dungee* case" at the hands of SCHR lawyers.[189] Judge McMillan initially refused to appoint Stafford Smith to Gamble's case for the retrial, and instead came up with a plan to solicit bids to handle the defense and appoint the lowest bidder. SCHR accused McMillan of creating "a scheme to sell off justice to the lowest bidder," and called it further proof of his bias.[190] The judge had even called up two lawyers and begged them to take the case, which Bright believed was an effort to "preclude Mr. Gamble from raising the issues of judicial racism at the retrial" and block him from "moving to recuse Judge McMillan for bias."[191]

Remarkably, Gamble's defense team also researched Rule 11 sanctions to see how far they might go in federal court before they landed in hot water. According to Stafford Smith, what prompted this concern was that the team had drafted a civil RICO lawsuit against the judge, where violations of civil rights laws would serve as the predicate offenses. In the end, they wisely opted not to file it.[192]

At all events, the full-court press via state court proceedings turned out to be enough. Judge McMillan eventually stepped off the Gamble case. The prosecutor, seeing that Judge McMillan would not oversee the retrial, eventually resolved the case with a plea deal guaranteeing a life sentence.

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185. *Id.* at 2.
186. *Id.*
187. *Id.* at 3.
188. *Id.* at 4.
189. *Id.* at 9–10.
190. *Id.* at 11.
191. *Id.* at 12.
192. Stafford Smith Interview, *supra* note 165.

III. MCCLESKEY AS A SWORD

Although they publicly sought to deny *McCleskey* moral legitimacy and constitutional validity outside of the courtroom, inside the courtroom SCHR lawyers deployed the decision as a sword. They did so in several ways: (1) to justify their efforts to build a record of discrimination by the local power structure on the basis of race and poverty of the defendant and social worth of the victim; (2) to expand their structural critique of unequal justice to entire criminal legal systems on a county and/or judicial circuit basis; (3) to piggyback on those bias claims and request evidentiary hearings and documents so as to counteract the position of information disadvantage experienced by criminal defendants; and (4) to justify recusal of any judges and prosecutors found responsible for unconstitutional or unethical behavior.

Uncertain of their chances of success or when their window of opportunity would close, SCHR lawyers pushed their "*McCleskey* motions" as hard and as far as they could to maximize the probability of judicial consideration of their motion, pressure the state's lawyers to rethink their choice to pursue a death sentence, and to draw attention to issues of race and poverty.

A. HORTON V. ZANT

After Amadeo's case, SCHR lawyers learned to build on findings of prosecutorial misconduct to go after DA Joe Briley's other cases. They decided to represent Jimmy Lee Horton, a black man under a death sentence who was also prosecuted by Briley. This time, Bright and his staff found an ingenious way to go after Briley's use of peremptory challenges to remove prospective black jurors.[193]

Horton and his co-defendant, Pless Brown, Jr., had been arrested for burglarizing an apartment and killing the companion of the homeowner during a shootout when the two came home and surprised them. The dead man turned out to be Don Thompson, the District Attorney of Macon Judicial District, Georgia.

Joe Briley was brought down specially from Okmulgee Judicial District to secure death sentences against the perpetrators. Brown, who wound up with a mixed-race jury, received a life sentence. By contrast, Horton was sentenced to die by an all-white jury. His court-appointed lawyers did no investigation and presented no mitigating evidence during the sentencing phase. In closing remarks to the jury, one of his attorneys stated that his own client was "a worthless, despicable human being" and praised the

193. Horton v. State, 295 S.E.2d 281 (Ga. 1982).

prosecutor's argument.[194]

Because Briley had such a long track record of aggressively seeking death sentences and scoffed at charges that capital punishment practices were racist, SCHR brainstormed ways to dig more deeply into his jury strikes over the course of his career. Their success in doing so created a template for action in subsequent cases.[195]

1. A Mini-*McCleskey* Hearing

Judge Wilbur Owens of the Northern District of Georgia was assigned to review Horton's habeas petition—the same judge who had granted relief in Amadeo's case based on the jury-rigging violation. Judge Owens scheduled an evidentiary hearing on Horton's petition and ordered the state to engage in "expeditious discovery."[196] At that time, before enactment of the AEDPA,[197] it was still possible to get evidentiary hearings on habeas petitions. Only later would federal judges increasingly deny claims based on the papers alone.

On October 18, 1989, Bright handled the live hearing.[198] He called Briley to the stand to authenticate the jury-rigging memo. The memo, which had led to Amadeo's conviction being overturned in the U.S. Supreme Court for jury manipulation,[199] now became evidence in Horton's case, as Bright argued that the document ought to be treated as proof that the prosecutor had a history of racially discriminatory behavior. Bright wanted the judge to infer that Horton's case, too, was tainted by Briley's participation.

McCleskey v. Kemp hung over every facet of this pre-trial hearing. "The issue is who is the person behind this discrimination?" Bright reminded.[200] He was concerned about Justice Powell's insistence in *McCleskey* that legal theories of inequality must be traced to specific perpetrators. If the proof of discrimination was not in the record, if the judge did not find that someone

194. Brief of Appellant at 12, Horton v. Zant, 941 F.2d 1449 (11th Cir. 1990) (No. 90-8522).

195. *See* Sonji Jacobs, *Where Cases Diverge*, ATLANTA J.-CONST., Sept. 24, 2007, at A8; Maura Dolan, *Executions: The South—Nation's Death Belt*, L.A. TIMES, Aug. 25, 1985; KATYA LEZIN, FINDING LIFE ON DEATH ROW 139–40 (1999).

196. Horton v. Zant, 687 F. Supp. 594, 595 (Dist. Ct. M.D. Ga. 1988).

197. The Anti-Terrorism and Effective Death Penalty Act of 1996, which amended 28 U.S.C. Sec. 2254, imposes a statute of limitations on writs of habeas corpus for the first time and prevents federal judges from granting relief to prisoners under a state conviction unless person could show that a judgment was "contrary to, or involved an unreasonable application of, clearly established Federal law."

198. Interview with Andy Lipps (Mar. 5, 2020) [hereinafter Lipps Interview]. "Did you prepare that document, Mr. Briley?" Bright asked. "I believe I did," Briley replied. Q: "Is it in your handwriting?" A: "I would say that it is." *Id.*

199. Amadeo v. Zant, 486 U.S. 214 (1988).

200. Transcript of Hearing Before Honorable Wilbur D. Owens, Jr. at 61–62, Horton v. Zant, 941 F.2d 1449 (11th Cir. 1993) (Civil No. 88-46-1-MAC) [hereinafter Horton Hearing Transcript].

in particular was responsible for purposeful discrimination that occurred in his client's case, then Horton could not benefit even if there were racial disparities.

The prosecutor's past misconduct was also useful for attacking his credibililty in other settings. "Your Honor, Mr. Briley in case after case was resisting jury challenges, taking advantage of the fact that people weren't prepared for jury challenges," Bright argued.[201] "[A]ll of that flies in the face of this testimony that in this one particular case he was advising the judge that he ought to put the full number of blacks and women in the pool."[202]

"You're not going to win or lose based upon that one incident," Judge Owens said. "The pattern of years, all these cases" was what mattered.[203]

Bright turned to a study compiled by SCHR staff on Briley's juror strikes over his career. In the months leading up to the hearing, the staff hunted down old case files, trying to reconstruct the twists and turns of jury selection in the cases tried by Briley across eight different counties since 1974. Three of the counties did not retain the records, but they successfully charted 25 capital and 159 non-capital cases of Briley's. They then had to cross-reference that information with county voter registration lists to identify each juror's race.[204]

Displaying the document in his hand, Bright asked Briley: "In 1977 you also tried the Walker case in Jasper Country . . . And in that case you used seven of your peremptory strikes against seven black people; is that correct?"

"If that's what the record shows," Briley shrugged.

"You're not able to recall any reasons why you struck those people?"

"No sir," Briley responded.

Bright said to Briley: "[I]t is your testimony that the fact that all seven happened to be black people is just coincidental?"

"Yes sir."

"In the Finney case in Jones County you used seven of your strikes against black people?" Bright inquired. "Are you able to recall any of the reasons for that?"

"No sir," Briley testified.[205] His strategy as a witness was to deny any

201. *Id.* at 63.
202. *Id.*
203. *Id.* at 64.
204. Interview with Mary Sinclair (Mar. 17, 2020); LEZIN, *supra* note 195, at 149–50.
205. Horton Hearing Transcript, *supra* note 200, at 64–65.

memory of why he rejected so many black citizens as prospective jurors and hope that the silence in the record would be enough to satisfy tolerant judges.

After leading him through the exhibit and getting Briley to admit to the disturbing pattern of decisions to excuse black jurors from his trials over many years, Bright got Briley to admit that he used nine out of ten strikes against black jurors in Brown's case. And in Mr. Horton's case, he also used nine out of ten strikes against black jurors.

On cross-examination, the state's lawyer, Paula Smith, asked Briley to describe the process of jury selection in Georgia. He explained that "[y]ou've got to have all twelve jurors to vote for the death penalty because if one of them votes against the death penalty . . . [i]t is a life sentence. So it takes a perfect score to get a death penalty."[206] But his response seemed only to underscore the connection between the jury's demographics and his prediction of trial outcomes rather than rebut the strong pattern of apparent discrimination to achieve a desirable jury composition.

On redirect, Bright tried to underline the racial patterns. "You used ninety-six of your hundred and three strikes, ninety-four percent of your strikes, against black people. Do you know why these reasons you have tend to fall so heavily upon black people?" Briley could not provide an explanation.[207]

When Briley had a case with a black defendant and black victim, he exercised seventy-three of eighty-six jury strikes against black jurors. Yet when it came to cases involving white defendants, the prosecutor did not exhibit the same enthusiasm for excluding black jurors. In such cases, Bright pointed out, "you only used a third of your strikes against blacks."

Next, Horton's lawyers called Gary Liberson, a PhD in mathematical statistics to the stand.[208] Liberson testified that he examined Briley's juror strikes over many years on a county-by-county basis to see whether they were "consistent with the ratio or percentage of blacks in the population for that particular county." What was the probability that Briley's decisions reflected "just the random selection of jurors" who "just happened to be black?" He answered that "there was about one chance in a hundred thousand that that would have been so."[209]

As to Briley's comparatively less vigorous use of juror strikes in cases with white defendants, it was also roughly "one chance in a hundred

206. *Id.* at 80.
207. *Id.* at 87.
208. *Id.* at 95; Lipps Interview, *supra* note 198.
209. Horton Hearing Transcript, *supra* note 200, at 108–09.

thousand" that the pattern was a random one. On cross-examination, the state's attorney got Liberson to admit that "the most your analysis would reveal is that the numbers do not show what one would expect if the prosecutor struck at random." She tried to suggest that any number of subjective factors not considered by the expert could explain the disparity. In response, Liberson said that even if there were some other set of components that were strongly associated with race, "they would dampen the results" but not "make the results non-significant."[210]

The state's lawyers called to the stand Joseph Katz, the very statistician Georgia had used in the *McCleskey* case to rebut the Baldus study. Katz disputed Liberson's conclusions but did not offer any alternative study or explanation, saying "some things don't easily reduce to numbers." Under cross-examination, he conceded that Liberson's methods were "appropriate" and that he did not try to replicate Liberson's findings. He also acknowledged the probability of Briley's pattern of strikes being random was "very low." In fact, he agreed that Liberson's finding of racial disparity to be "statistically significant" because "[i]f you were a black defendant Mr. Briley was more likely" to strike black jurors.[211]

After all the witnesses and exhibits were entered into the record, Bright addressed Judge Owens. What the evidence showed was that "Mr. Briley has a remarkable history of striking black people from juries." In capital cases "[N]inety percent of the time he used his strikes against black jurors." The "only time he changes," Bright argued, "is when he has white people on trial."[212] Summing up, Bright urged Judge Owens to find that when he picked his client's jury, he "deprived members of Mr. Horton's race of participation in the judicial process."[213]

During her remarks, Smith acknowledged that Horton had shown that the state "has struck a higher proportion of black jurors than white jurors," but said that still did not violate the Constitution. The petitioner's burden under *Swain* was to prove "historic systemic exclusion," she insisted.[214]

On April 12, 1990, Judge Owens denied the writ. On the most promising claim, Judge Owens concluded that Horton did "not show that the prosecuting attorney has historically and systematically excluded blacks from serving on trial juries." He made quick work of Horton's remaining

210. *Id.* at 121–22.
211. *Id.* at 153, 157, 159, 167.
212. *Id.* at 205–14.
213. *Id.* at 214.
214. *Id.* at 214–15.

claims, leaving his conviction undisturbed.[215]

2. The Eleventh Circuit Validates Rebellious Localism

Horton's Eleventh Circuit brief put the jury issue front and center. "*Swain* does not require a defendant who has been victimized by the prosecutor's racially motivated abuse of peremptory challenges to show . . . that the prosecutor had always successfully obtained all-white juries in the past," his legal team argued. Instead, "the central question is purposeful discrimination." And on that issue, the actual "history of Mr. Briley's practices reveals his intent and strips his anti-black peremptory challenges at Mr. Horton's trial of any presumption of propriety."[216]

On September 3, 1991, the Eleventh Circuit issued a unanimous ruling reversing Judge Owens.[217] Judge Frank Johnson first took up the issue of peremptory challenges. Although the Supreme Court in *Batson* made it easier for a defendant to challenge jury strikes, Horton could not rely on that decision because his trial took place before that case was decided. Instead, he was bound by *Swain*, in which a black man was convicted of rape by an all-white jury after a prosecutor used his peremptory challenges to remove all the black citizens from the pool.[218] *Swain* also showed that there had never been a single black person allowed to serve on a criminal trial in Talladega County, Alabama since 1950, even though the county was 26% black.[219] Yet the fact that the jury panels were consistently underrepresented at 10–15% was deemed by the *Swain* Court not enough to make out a violation of the Equal Protection Clause. No one is entitled "to demand a proportionate number of his race on the jury which tries him," Justice Byron White wrote.[220] A defendant is entitled only to a trial free of intentional discrimination.

Justice White ruled in *Swain* that the fact that in a single trial "all Negroes were removed from the jury" was not enough to overcome the presumption that a prosecutor is doing so "to obtain a fair and impartial jury." The only way to strip a public servant of the presumption of good faith was to present proof that "the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been

215. Order of the Court at 36, Horton v. Zant, No. 88-46-1-MAC (WDO), Apr. 12, 1990.
216. Brief of Appellant at 11, 13–30, Horton v. Zant, No. 90-8522 (Nov. 16. 1990).
217. Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991).
218. Swain v. Alabama, 380 U.S. 202 (1964).
219. *Id.* at 205.
220. *Id.* at 202.

selected as qualified jurors by the jury commissioners."[221]

Over the years, Eleventh Circuit applied *Swain*, already a demanding standard, in exacting fashion. As Judge Johnson pointed out in Horton's case, the court had in the past rejected claims even when a prosecutor struck every black juror in six trials during a single week.[222] Luckily, Horton's lawyers had met that high burden. "Mr. Briley's hardball tactics clearly do not comport with the prosecutor's obligation to 'do justice,'" Judge Johnson admonished. It was the first time the Eleventh Circuit had ever found a *Swain* violation in a Georgia case.[223]

Citing *Amadeo*, Judge Johnson also emphasized Briley's role as "author of a now infamous memo designed to underrepresent blacks, women and all individuals 18-24 years old" in Putnam County's juries. As for Briley's new tale "that he should not be morally culpable" because a now-deceased judge had instructed him to manipulate the jury pool, "even if we were to assume Mr. Briley's version of the story was true, we cannot condone his behavior." The "mere fact that a judge orders a prosecutor to engage in unconstitutional discrimination on the basis of race and sex does not make the behavior right." He added: "A prosecutor has a duty to 'do justice' and . . . not engage in the subsequent cover up."[224]

After pointing to evidence of Briley's past misconduct, the Eleventh Circuit rejected the state's argument that *Swain*'s strong presumption of regularity could not be defeated absent smoking-gun evidence in the prosecutor's notes or damning testimony. The panel then turned to the pattern of Briley's jury strikes over time uncovered by SCHR investigators. Judge Johnson embraced the weight of their findings: "[B]etween 1974 and 1981, Mr. Briley exercised 1,580 peremptory strikes" across three counties, 70% of them against black jurors. In capital cases that percentage ticked even higher: 79% to remove black jurors without explanation (184/234 strikes). When a murder trial involved a black person charged with killing a white person, Briley exercised 96 out of 103 strikes against black jurors. The panel was impressed with Dr. Liberson, twice citing his findings that the likelihood Mr. Briley exercised his peremptory challenges for race neutral reasons "was less than 1 chance in 100,000."[225] The panel made no mention of the state's expert, rejecting his testimony implicitly.

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221. *Id.* at 222–23.

222. In *Allen v. Hardy*, 478 U.S. 255, 258 (1986), the Supreme Court held that *Batson* would not be applied retroactively because it announced "a new constitutional rule of criminal procedure."

223. Horton v. Zant, 941 F.2d 1449, 1455 (11th Cir. 1991).

224. *Id.* at 1455–57.

225. *Id.* at 1457.

Judge Johnson dismissed the state's explanation for these racial patterns: "courts cannot make a blind leap of faith that there exists some set of legitimate factors which correlates one-to-one with the race of the venire members." But even a prosecutor who acts with a "mixed motive"—where race is one among other factors in striking black jurors—is violating the Constitution.[226] "From Horton's statistics," the judges said, "we cannot help but conclude that race was a very significant factor in Mr. Briley's decision-making process."[227] Racial discrimination was believable in this context in part because, as the panel observed, "in our society interracial crime is treated differently than other crimes."[228]

A prosecutor's past violation of the Equal Protection Clause in one case finally had actual consequences in subsequent cases. Moreover, the mini-*McCleskey* strategy *had worked*. Despite *McCleskey*, or ironically perhaps because of it, the Eleventh Circuit embraced statistical evidence presented on a smaller scale. It's not obvious that the statistical evidence was more scientifically sound than the Baldus study, but the bite-sized sample, involving one person in power across time, appealed to judges' desire for simpler stories about causation and evidence about racial discrimination that could be attributed to specific individuals. Doubling down on equality, subverting doctrine, and scaling down cause lawyers' targets had paid off.

This was a resounding legal victory that exposed prosecutorial misconduct, racial inequality, and the subpar quality of justice for poor Southerners. The media called it "yet another rebuke" of Briley "for keeping blacks off juries."[229]

Faced with the prospect of having to retry the case after all these years, Briley agreed to a plea deal that assured a life sentence for Horton. Success in *Amadeo* had created legal precedent on trial fairness and racial equality, and that precedent, in turn, had been successfully leveraged for Horton. Additionally, the Eleventh Circuit's surprising ruling now gave cause lawyers a useful weapon. In theory, Putnam County's jury-rigging practices could be leveraged to force a second look at other cases—if the issue had been preserved or else new evidence can overcome procedural obstacles.

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226. *Id.* at 1458–59.

227. *Id.* at 1459. Additionally, the panel found that the legal representation afforded Horton to be constitutionally deficient "under prevailing professional norms," and therefore a violation of the Sixth Amendment. Horton's original court-appointed lawyers put on absolutely no mitigating evidence and "performed hardly any investigation." *Id.* at 1460–61.

228. *Horton*, 941 F.2d at 1458 n.22.

229. Katie Wood, *Briley Handpicks Another Defeat*, FULTON CNTY. DAILY REP., Sept. 5, 1991, at 1; David Goldberg, *Verdict in D.A.'s Slaying Voided; Court Finds Minorities Excluded from Juries*, ATLANTA J.-CONST., Sept. 4, 1991.

B. STATE V. BROOKS

William Anthony Brooks, an African American man, was charged with the abduction, rape, and murder of a white woman, Carol Jeannine Galloway. The victim's mother saw her climb into Brooks' car in front of her home, and her body was later discovered behind an elementary school. An all-white jury in Columbus, Georgia sentenced Brooks to die in the electric chair after Mullins Whisnant, Pullen's predecessor, told jurors that Georgia's crime rate had risen since 1964, the date of the last execution, and that "[w]e didn't have this kind of murder . . . when we had capital punishment."[230]

At sentencing, Whisnant invoked "the war on crime" as a reason to deal with Brooks harshly and told jurors that it would be more expensive for taxpayers to imprison Brooks than kill him. Whisnant urged jurors to think of themselves as "soldiers" in the battle against a crime wave: "[Y]ou can tell William Brooks, and you can tell every other criminal like him, that if you come to Columbus and Muscogee County, and you commit a crime . . . you are going to get the electric chair."[231]

The Eleventh Circuit found these tactics disturbing. A panel called out the prosecutor for inviting the jurors to "forego an individualized consideration of Brooks' case and instead choose execution merely because he was part of the broad 'criminal element' terrorizing American society."[232] Bright and Kendall, who took on Brooks' appeal, emphasized Whisnant's improper political rhetoric inside the courtroom, but the Eleventh Circuit ultimately found these remarks amounted to "harmless error" because of the overwhelming evidence of guilt. Nonetheless, the panel overturned Brooks' conviction for a different reason: the trial court mistakenly instructed jury members that they could presume every murder to be "malicious." Doing so improperly shifted the state's burden of proof to the defendant.[233]

Brooks had been tried in 1977 before an all-white jury and sentenced to death even though black people made up 30% of the community. Bright believed that race had played a significant role in Brooks' case—and not just because of Whisnant's conduct. He felt that John Henry Land, the judge who presided over Brooks' trial, gave him two uncaring lawyers who did little to protect him from the state. Land's father, Aaron Brewster Land, had also participated in two lynchings in the area when John Henry was just a boy. First elected in 1964, Judge Land himself publicly acknowledged long-held segregationist views. He had even belonged to the States' Rights Council of

230. Brooks v. Kemp, 762 F.2d 1383, 1394–95 (11th Cir. 1985).
231. *Id.* at 1396–97.
232. *Id.* at 1414–15.
233. *Id.* at 1393, 1414–15.

Georgia, Inc., organized to preserve "the traditional establishment of segregation in both public and private places" and oppose *Brown v. Board*, which the group derided as "the Thurgood Marshall Plan,"[234] though Land later renounced his past support for segregation.

His conduct as a proud "hanging judge," particularly in high-profile criminal trials, suggested something different. The more that Bright learned about Judge Land's handling of the first trial, the more he became convinced that Judge Land had helped carry out a "legal lynching" of Brooks.[235] Over the objections of the jurors, Land had permitted cameras in the courtroom for the sensational cross-racial murder trial—a first in Georgia's history.[236] Just by reading the transcripts of jury selection, Bright could guess the race of the jurors. "I could tell by the way they treated those eight people which ones were the blacks because they would lead them into answering the questions in a way that got them excluded from the jury," Bright recalled.[237]

During voir dire, prospective jurors who acknowledged hearing about the high-profile killing in the news were asked follow-up questions. Judge Land and the prosecutors would lead the white prospective jurors into saying that they could put aside detailed facts they already knew about the case and decide the case based on the evidence. With black jurors, they would lead them into saying they had already formed an opinion about the case, even when what they remembered from pre-trial coverage was vague. Judge Land's supervision of jury selection in Brooks' original trial left few black jurors in the pool, who were easily removed by prosecutors through peremptory challenges.[238]

1. Recusing All the Judges and Prosecutors of a Circuit

Bright and Kendall remained counsel for Brooks' retrial, adding recent Yale Law School graduate Ruth Friedman[239] as well as Columbus attorney and state senator Gary Parker. Because Columbus had the "dubious distinction" of being an outlier—having "condemned more people to death since 1973 than any other place in Georgia,"[240] Bright felt that they would

234. MCFEELY, *supra* note 77, at 123; Brochure, The Aims and Purposes of the States' Rights Council of Georgia; *200 Political Leaders Form Racial Group*, MACON NEWS, Sept. 24, 1955, at 1.

235. Tim Chitwood, *Powerful Judge John Henry Land Dies at Age 93*, LEDGER-INQUIRER, Dec. 2, 2011.

236. *Columbus Sees First TV Trial*, Associated Press, MACON NEWS, Nov. 17, 1977, at 1.

237. Interview by Myron A. Farber with Stephen B. Bright, at 14 (May 24 & 26, 2009) (transcript available at the Rule of Law Oral History Project, Reminisces of Stephen B. Bright).

238. *Id.*

239. Friedman later became a Senior Attorney at EJI. She argued *Harris v. Alabama*, 513 U.S. 504 (1995) in the Supreme Court. In 2006, she became Director of the Federal Capital Habeas Project.

240. Unpublished editorial by Stephen B. Bright sent to *Columbus Ledger-Enquirer*, June 6, 1991, at 2.

have to escalate their tactics to match county officials' strong push for the death penalty. When the case returned to Muscogee County, they filed a 23-page motion to recuse Judge Land because of his "intentional racial discrimination" and requested that the case be assigned to a judge outside of the Chattahoochee Circuit.[241] Brooks' lawyers added a claim about "bias[] against poor persons," citing the judge's own public comments calling indigent people in his courtroom who needed counsel "freeloaders."[242]

Although he claimed it had nothing to do with the substance of the motion, Judge Land eventually stepped aside, saying that "the fact that I did try it before might give an appeals court something to hang their hat on."[243] On March 24, 1988, Bright then moved to recuse Judge Rufe Edwards McCombs, the next judge assigned to Brooks' case, and renewed the defense request that the case be moved outside the circuit entirely.[244] In that same motion, they insisted that none of the judges in the circuit could be impartial given that under *McCleskey v. Kemp* their client "must show the discriminatory intent of all key 'decision makers' " and that the key figures "in this case are friends, colleagues and associates who are a part of the Court and judicial circuit" on which Judge McCombs and others serve.[245] Judge Land, the chief judge of the circuit, "both participated in discrimination against Mr. Brooks and allowed it to take place before him in the previous prosecution of this case."[246] Furthermore, all of these judges regularly conferred with Judge Whisnant, who originally prosecuted the case against Brooks. Bright insisted "that as district attorney Mullins Whisnant discriminated against black people in his decisions to seek the death penalty and that he sought the death penalty against William Brooks as part of those discriminatory practices."[247] Now that Whisnant was a judge on the circuit, his colleagues could not be trusted to handle accusations of racial bias against him impartially. The trial should be moved or Brooks should be given an out-of-circuit judge.

The defense also signaled that they would attempt to show that the current District Attorney William Smith, who happened to be "a candidate to join Judge McCombs on the bench," had merely "continued the

241. *Judge Will Leave Case After Racial Bias Alleged*, ASSOCIATED PRESS, *reprinted in* ATLANTA CONST., Jan. 28, 1988, at 43.

242. Motion to Recuse Judge John Land, State v. Brooks, Nos. 38888 & 54606 (Muskogee Cnty. Super. Ct. Jan. 15, 1988), at 15, 17.

243. ASSOCIATED PRESS, *supra* note 241, at 43.

244. Motion for Judicial Disqualification and Reassignment to Judge Outside of Chattahoochee Circuit, *Brooks*, Nos. 38888, 54606 (Mar. 24, 1988).

245. *Id.* at 3–4.

246. *Id.* at 4.

247. *Id.*

discriminatory practices of his predecessor," as assistant district attorneys "have sought to exploit these discriminatory practices to get the white vote in the current and past elections."[248] Whoever ultimately presided over the trial would also have to evaluate evidence that other officials and employees of Muscogee County "have conspired to deny black people full-fledged participation on jury commissions, on the master jury lists, on grand and traverse juries, and in positions of employment in the clerk's office, the offices of the judges . . . resulting in discrimination against black defendants who come before the Court."[249] Bright argued that "[t]he appearance of a conflict of interest will be created" when Judge McCombs—or frankly any other judge who worked closely with Judge Land in the circuit—is called upon to determine Mr. Brooks' *McCleskey* claim."[250]

Brooks' lawyers added another motion demanding a public hearing on their recusal motion, as well as discovery of any evidence in the possession of the District Attorney as well as any judge or court personnel.[251] Bright repeatedly deployed *McCleskey* offensively: "Where the state seeks to utilize society's ultimate sanction, it has an overriding obligation to provide a fair forum. In the vernacular of *McCleskey*, its decisionmakers must stand beyond repute. Mr. Brooks has filed a motion claiming that Muscogee county decisionmakers fail this test."[252]

The next step involved trying to hold the district attorney's office responsible for past discrimination by blocking their participation in subsequent cases. Seeking maximum media coverage of their racial bias claims, Bright followed up with a motion to disqualify the entire Muscogee County District Attorney's office.[253] "The current occupant of that office is one whose political identity is based almost exclusively on the death penalty," the motion stated. "The death penalty was the major issue in his campaign for District Attorney."[254] That public posture meant that prosecutors were violating the "due process and other fair trial rights" of the accused by failing to consider legal reasons for whether to seek the death penalty—that is, "the unique circumstances of the offender and the crime."[255] In fact, whether out of improper "personal or political" interests or "loyalty"

248. *Id.* at 5.
249. *Id.*
250. *Id.* at 5–6.
251. Omnibus Motion for Discovery and Notice to Produce Information Necessary for Hearing on Motion for Judicial Disqualification, *Brooks*, Nos. 38888, 54606 (Apr. 13, 1988).
252. *Id.* at 6.
253. Motion to Disqualify the District Attorney of the Chattahoochee Judicial Circuit, *Brooks*, Nos. 38888, 54606 (Apr. 16, 1990).
254. *Id.* at 3.
255. *Id.* at 5, 7.

to one part of the community over another, the district attorney "has refused even to consider a sentence of less than death in this case."[256]

It was a long shot, but Judge Whisnant, who handled the case when he was a prosecutor, ultimately decided to recuse himself. Eventually, Brooks' team got what they wanted: the case was assigned to Judge Hugh Lawson from the Oconee Judicial Circuit.[257] That key switch in judicial personnel opened the possibility for the defense to ratchet up rebellious localism even further.

Bright and his staff immediately moved to quash the original indictment against Brooks from 1977, arguing that it was still tainted by the constitutional defect identified in the *Amadeo* litigation. The district attorney wisely chose not to contest that motion. Instead, he resubmitted the case to a grand jury in 1987 and received another indictment. Brooks' lawyers then objected to the new grand jury proceeding as "fundamentally unfair" because District Attorney Doug Pullen gave a campaign-style speech during his presentation.[258] This motion was denied.[259]

2. Structural Racism Claims

Before a new judge, Brooks' team filed multiple motions to block the death penalty, making a variety of equality arguments. All told, Bright explained to Judge Lawson, "we come out with about fifteen issues approximately that are worthy of the Supreme Court of Georgia looking at."[260] In late September 1990, Judge Lawson wavered, asking Pullen whether he "feel[s] so absolutely certain about the State's legal position on

256. *Id.* at 3, 7.

257. Brooks' team also moved to recuse Judge Lawson for a different reason than bias: that his judgeship was created in violation of the Voting Rights Act of 1965 and that the method electing superior court judges in Oconee Judicial Circuit via "majority-vote, designated-post, and circuit-wide elections . . . dilute the voting strength of African Americans." *See* Motion that All Further Proceedings Be Before a Judge Selected in Compliance With the Voting Rights Act and the Constitution at 5, *Brooks*, Nos. 38888, 54606 (Apr. 16, 1990). Not only did Brooks' lawyers cite relevant voting rights cases, but they also threw in *McCleskey v. Kemp* with the statement: "Fourteenth Amendment is violated when defendant in a capital case shows a direct link between racial discrimination and 'the decision makers in *his* case.'" *Id.* at 7. Lawson rejected the motion as untimely, but also ruled that recusal was not warranted on June 5, 1990. The rest of the pre-trial motions were heard and the trial commenced.

258. Pre-Trial Hearing Transcript at 163, *Brooks*, Nos. 38888, 54606 (Aug. 15, 1990) [hereinafter Pre-Trial Hearing from Aug. 15].

259. *Id.*; Pre-Trial Hearing Transcript at 8, *Brooks*, Nos. 38888, 54606 (Sept. 11, 1990) [hereinafter Pre-Trial Hearing from Sept. 11].

260. Pre-Trial Hearing Transcript at 46, *Brooks*, Nos. 3888, 54606 (Sept. 25, 1990) [hereinafter Pre-Trial Hearing from Sept. 25]. One interesting pre-trial motion challenged the state practice of having motions for the funding of experts handled in adversary proceedings. SCHR successfully won the right to apply *ex parte* to a trial judge for experts and investigative assistance so as to not disclose trial strategy, work product, and privileged communications to the prosecution. Brooks v. State, 385 S.E.2d 81 (Ga. 1989).

all of these issues that you are prepared to spend the time and the money to have the trial and run the risk that any of these could make the train jump the track when the trial is over?"[261]

One defense motion sought "to bar the death penalty because of racial discrimination."[262] A second sought to "bar the death penalty because of victim-impact evidence." A third motion tried to stop capital punishment from being inflicted because it "is sought based on worth and status of victim." A fourth asked for a preliminary ruling to "bar any prosecutorial misconduct . . . that has been sort of a hallmark of capital cases in the Chattahoochee Circuit."[263] This last motion did not just try to stop certain kinds of racist litigation practices during Brooks' retrial, but also sought to bar all future capital prosecutions in the jurisdiction. According to Bright, the constitutional violations ran deep:

> [Y]ou can take the first capital case that Judge Whisnant tried when he was district attorney and you can look at the closing argument in that case, which was basically the kind of argument you would make on the courthouse stairs at a lynch mob, not the kind you make in a courtroom to a jury. And you can look [at] an argument Mr. Pullen made the last time he argued a case and you'll find all those elements. They go right through Whisnant's arguments to Judge Smith's arguments and to the arguments this present day, and we suggest that the Court has to take action to stop it.[264]

Bright alleged that the District Attorney's office had a practice of racial discrimination that encompassed not just jury selection tactics but also abuse of charging discretion and racially inflammatory oral advocacy. He wanted Brooks' trial to become a vehicle for documenting these overlapping practices that infected all capital cases handled by the office. "Racial discrimination in Muscogee County in its criminal justice system, and in the practices of the District Attorney's office, is so deep-rooted and pervasive that it is impossible to ensure that such discrimination will not play a determinative and unconstitutional role in the outcome of Mr. Brooks' trial," they argued in their memorandum of law.[265] "Thus, under *McCleskey*, this Court must prohibit the State from seeking a sentence of death against Mr.

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261. Pre-Trial Hearing from Sept. 25, *supra* note 260, at 48.

262. Pre-Trial Hearing from Sept. 11, *supra* note 259, at 38.

263. *Id.*

264. *Id.* at 39.

265. Memorandum of Law in Support of Defendant's Motion to Bar the Death Penalty Because it is Arbitrarily and Discriminatorily Sought and Imposed in the Chattahoochee Judicial Circuit on Impermissible Racial Grounds at 2, *Brooks*, Nos. 38888, 54604 (Apr. 16, 1990) [hereinafter Memorandum in Support of Defendant's Motion].

Brooks."[266] Quoting Justice Powell's own words, they insisted that "any evidence which suggests that the 'risk [of racial discrimination is] constitutionally acceptable,' *McCleskey* . . . is valuable and probative" on the question of whether a prosecutor has abused his prosecutorial discretion.[267] Recounting the history of racism in the state and county, the legal memorandum also invited judges to subvert the original *McCleskey* decision by linking Justice Brennan's dissent in that case to other cases that documented discrimination against black residents of Georgia.

Once the proof was tendered and the patterns shown, Bright demanded an injunction against the prosecutor's office and anyone who might be involved in carrying out a death sentence:

> We will show that, first, when Judge Whisnant, then District Attorney Whisnant, was district attorney for a number of years here, his right-hand person was Bill Smith. During that time Mr. Pullen came into the office. Judge Whisnant, only three months after getting the death penalty for William Brooks in the first televised trial in Georgia history, went on to become a judge. Judge Smith took over as district attorney. Mr. Pullen moved up to being the chief assistant. . . . Judge Smith tried the Carlton Gary case, the silk-stocking stranglings. He went on to his judgeship. Mr. Pullen moved into the district attorney's office . . . it's been a history with a lot of racial discrimination.[268]

The decision whether to seek the death penalty has "been made primarily by three white men over the last 17 years: Judge Whisnant, Judge Smith, and Mr. Pullen . . . those three people have really decided which 24 people would be subject to capital cases or not."[269] During argument on the motion, Bright argued that their evidence of racial bias would be stronger and more direct than that laid out in *McCleskey* itself. "I want to make it clear that this is not an elaborate multiple-regression analysis that we're going to be putting on." Rather, "[i]t's a very straight-forward" set of exhibits demonstrating the prosecutor office's biased charging decisions.[270]

As for the motion seeking to replicate *McCleskey*'s findings on a smaller scale, Bright argued that the District Attorney's office improperly considered race in deciding whether to seek death. He noted that "the three

266. *Id.* at 3. *See also* Supplemental Memorandum of Law in Support of Motion to Bar Death Penalty Because of Race and Victim Status Grounds at 2 n.2, *Brooks*, Nos. 38888, 54604 (June 4, 1990) (citation omitted) ("The Supreme Court held in *McCleskey v. Kemp* . . . that a sentencing decision based on unconstitutional distinctions among crime victims violates the rights of the person so sentenced to equal protection and to freedom from arbitrary government action.").

267. Memorandum in Support of Defendant's Motion, *supra* note 265, at 47.

268. Pre-Trial Hearing from Sept. 11, *supra* note 259, at 44.

269. *Id.* at 46.

270. *Id.* at 49.

capital cases pending in this court," including that of Brooks, "all involve black people charged with murders of white people."[271]

In advance of a public hearing on these motions, Parker and Rev. Lowery held an anti-death penalty event at the Fourth Street Baptist Church in Columbus. The two men told the citizens assembled that race, not the nature of the offense, was "the most significant criteria" for the death penalty in the area.[272] "It's *wrong* to teach our children to be vindictive rather than preventive" Rev. Lowery told the crowd. "It's *wrong* to teach . . . that white life is more valuable than black life."[273] After the event, the two men paid a visit to Brooks' jail cell to highlight popular complaints of local injustice. Their explicit goal was to marry harm reduction in court and abolition outside the courtroom: "to make people (in Columbus) aware of the inequities and tremendous cost inherent in this system" of killing their own.[274] The media marveled at SCHR's strategy of rebellious localism, noting that it involved a "dramatic" turning of the tables to focus "on the prosecution's motives" because of *McCleskey v. Kemp*.[275]

Pullen denied racism in the district attorney's office and bristled at being called "nasty, nasty names in front of the courthouse."[276] In response to the motions, he demanded access to any raw data, any "information that went into this computer that led to this so-called study."[277] He lashed out at abolitionist lawyers, saying "they will do any deed, tell any lie, hurt any cause, nation or individual in order to achieve the end to capital punishment in this country."[278] Otherwise, Pullen said in court, "Let the games begin."[279]

At one point, Bright and his staff questioned Pullen and two other former prosecutors, including Judge Whisnant, under oath. Asked about their charging decisions, the prosecutors recited exactly the same race-neutral criteria, that is, whether there were aggravating factors to justify a death

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271. *Id.* at 42. A separate motion for discovery demanded "any and all records in the possession of the District Attorney regarding each and every homicide case prosecuted in the Chattahoochee Judicial Circuit since January 1, 1973." Motion for Discovery and Notice to Produce Information Necessary for Hearing on Motion to Bar the Death Penalty Because it is Arbitrarily and Discriminatorily Sought and Imposed in the Chattahoochee Judicial Circuit on Impermissible Racial Grounds at 1, *Brooks*, Nos. 38888, 54604 (Apr. 16, 1990).

272. Ken Edelstein, *Civil Rights Leaders Campaign Locally Against Death Penalty*, COLUMBUS LEDGER-ENQUIRER, Sept. 9, 1990, at A-1.

273. *Id.* at A-11.

274. *Id.*

275. Katie Wood, *Proffering the Prosecution*, FULTON CNTY, DAILY REP., Sept. 14, 1990, at 1, 4–6.

276. Pre-Trial Hearing from Sept. 11, *supra* note 259, at 55.

277. *Id.* at 56.

278. Kimball Perry, *Brooks' Defense Raises Race as Issue in Death Case*, COLUMBUS LEDGER-ENQUIRER, Aug. 15, 1990, at D-1.

279. Pre-Trial Hearing from Sept. 11, *supra* note 259, at 60.

sentence. Yet Brooks' team tried to rebut their testimony as to their charging decisions by putting on relatives of black homicide victims who testified that the investigation and prosecution of their cases were not pursued with the same kind of diligence as crimes against white victims. While black citizens were the victims of 65% of homicides in the county, "almost all of the death penalty cases that have been tried have involved white victims, 20 out of 24."[280] These family members, "their voices quavering with emotion, described the district attorneys' callous disregard for their cases."[281] They said that the district attorney's office often did not even stay in close contact with them before resolving cases. One African American woman learned that her daughter's killer had already been sentenced when she called the police to see when the trial would be. Another witness, also black, testified that the district attorney's office allowed her husband's killer to plead guilty without consulting with her beforehand. By contrast, when Brooks offered to plead guilty and accept life without parole, Pullen consulted the victim's family before deferring to them and refusing a deal.[282]

At one point, Pullen tried to stop the testimony from the family of black murder victims. He stood up and conceded that victims' families "had been treated callously in the past" and that as the new district attorney, he was trying to make amends.[283] But the judge permitted the defense to proceed.

During a remarkable courtroom exchange, Bright objected to the judge's initial ruling that admissible evidence as to racism within the county's legal system would be restricted "to the last 18 months"—only the period that Pullen had been district attorney.[284] But Bright replied that so sharply limiting the historical proof would be tantamount to doing "what we have done for years in the South," which is to "wear blinders to sort of avoid really focusing and dealing with the problem of race and racial discrimination in the society."[285] It would be "like saying that if there's a change in leadership of the Ku Klux Klan we can't assume that that organization is a racist organization because we can't look back at the church bombings and all that because that was when J.B. Stoner headed up the organization but now someone new has taken over."[286] Instead, Bright advocated a holistic test: looking at "the totality of the facts to see to what extent the history influences the present."[287] The evidence introduced by

280. *Id.* at 49–50.
281. Wood, *supra* note 275, at 1.
282. Interview with George Kendall (Mar. 23, 2020).
283. Wood, *supra* note 275, at 6.
284. Pre-Trial Hearing from Sept. 11, *supra* note 259, at 40.
285. *Id.*
286. *Id.*
287. *Id.* at 43.

SCHR sought to portray "a larger historical context of discrimination against African-Americans in Georgia and Muscogee County" and urged that the trial of Brooks "be viewed in the context of racial violence against black people in Muscogee county and in Columbus," what Bright called "cradle-to-grave discrimination . . . that includes and is most pernicious, in fact, in the criminal justice system."[288]

Judge Lawson shrewdly allowed Brooks' defense a wide berth to introduce what they wished into the record, but not everything could be live testimony. At one point, Bright was permitted to proffer the testimony of a Columbus native on the history of local racial violence, although Judge Lawson ultimately decided the testimony was not directly relevant to the motions. As Bright explained, Bill Winn, who wrote for the *Columbus Ledger-Inquirer*, would explain "the lack of trust of the criminal justice system" among black citizens as a result of "the uninterrupted history of racial violence inside and outside the criminal justice system in this community." He would have spoken about the 1912 lynching of a 14-year-old "on the front steps of the courthouse here in Columbus," as well as the lynching of a white proponent of racial equality that "caused so much racial unrest that black people in the community threatened to burn Columbus down."[289]

Bright then turned to specific evidence of historic and systematic underrepresentation of minorities on Muscogee County juries. Bright asked Judge Lawson to take judicial notice of several decisions: a 1966 Fifth Circuit ruling called *Vanleeward v. Rutledge*[290] "that the jury pools in Muscogee county discriminated on the basis of race";[291] as well as *Peters v. Kiff*,[292] a 1972 ruling in which the U.S. Supreme Court reversed a sentence from Muscogee County, agreeing that even white defendants are harmed

288. *Id.* at 41.

289. *Id.* at 78, 80 (proffer of testimony of Bill Winn, Columbus native and senior writer for *Columbus Ledger-Enquirer*).

290. Vanleeward v. Rutledge, 369 F.2d 584 (5th Cir. 1966). The Fifth Circuit reversed a death sentence against a black defendant where the county's jury selection process failed to guarantee a fair cross-section of the community. The panel noted that before 1960, not a single black person had been called for jury service in Muscogee County. And although Muscogee County was 30% black, out of 3470 names in the traverse jury list at the time of trial, only 25 people were black because the all-white jury commissioners would "put on the list only the names of those persons known to them or to some of them" in their effort to comply with a state law to form juries comprised of "upright and intelligent citizens." *Id.* at 586–87.

291. Pre-Trial Hearing from Sept 11, *supra* note 259, at 45.

292. Peters v. Kiff, 407 U.S. 493 (1972). After discussing *Strauder*, the Court reaffirmed the importance that jury pools reflect a fair cross-section of the community. "Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process," wrote Justice Thurgood Marshall. "They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well." *Id.* at 502–03.

when a county excludes black citizens on a systematic basis.

"An all-white country club is a terrible thing," Bright argued, "but an all-white jury is worse because it denies people participation in the judicial process." He hammered the democratic deficits uncovered through the legal process.[293] Over half the capital cases in the county, including that of Brooks, "have been tried with all white juries."[294] Bright introduced "the entire record from the first trial"[295] against Brooks and told Judge Lawson that what happened was "a legal lynching," which he defined as a "perfunctory criminal trial[]" that accomplishes the "same result" as an extralegal act of justice "without the unseemly way of doing it by just simply taking a person out and hanging him up."[296] According to Bright, who laid out how one racist practice exacerbated another,

> The outcome of this case was a foregone conclusion. All the publicity; . . . the all-white jury; the exclusion of jurors on the basis of race; the closing argument, which . . . appealed to passion and racial prejudice; . . . a perfunctory trial broadcast to the community; and Brooks was off to the electric chair; and, of course, Judge Whisnant was off to the bench.[297]

3. Race-Based Jury Strikes Over Time

Brooks' team lost the bulk of their pre-trial motions, but Bright persuaded Judge Lawson to order discovery on the racial discrimination claims. This momentous turn of events gave them time to develop a record and the opportunity to show that since the death penalty was reinstated in *Gregg*, prosecutors for the Chattahoochee Judicial District had tried 27 capital cases, with 21 involving white victims. The sample size was not large, but it also was not paltry. Nineteen people wound up with a death sentence.

Even more damning were the patterns in the office's juror strikes over the years. In capital cases, prosecutors exercised peremptory challenges 59 times (85.5%) against black jurors, and only 10 times (14.5%) against white jurors. SCHR proved that these tactics led to eight black defendants tried for capital crimes in front of all-white juries: Joseph Mulligan, Jerome Bowden, Jamie Lee Graves, Johnny Lee Gates, William Brooks, and William Lewis.[298] All eight cases involved black defendants, with seven of the eight cases involving black defendants and white victims.

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293. Pre-Trial Hearing from Sept 11, *supra* note 259, at 42.
294. *Id.* at 43.
295. *Id.* at 48.
296. *Id.*
297. *Id.*
298. Capital Cases Involving African American Defendants Tried in the Chattahoochee (GA.) Judicial District Since 1973, State v. Brooks, Nos. 38888, 54606, Defendant Exhibit 2A.

Ruth Friedman, Mary Eastland, and several investigators and interns spent the months leading up to Brooks' retrial going through the case files of the District Attorney. "We went through every file, coding them" for every factor that could conceivably be relevant to understanding prosecutorial practices such as prior offenses, the number of victims, and so on.[299] This amounted to some 10,000 pages of documents in the county's files. Denying racial bias, Pullen had said he sought a death sentence only when aggravating factors existed, and so they went about testing whether this was true or whether, instead, the race of the defendant or victim could be isolated as a motivating factor in a prosecutor's decisions.

Just as with the Horton case, SCHR hired an expert to examine the data and try "to show that race was the constant."[300] But this time, they broadened their net to encompass all the prosecutors from the office. After examining the data, Dr. Michael Radelet testified that "those who kill whites are 5.9 times more likely than those who kill blacks[s]" to have the death penalty sought against them by the district attorney's office.[301] But Pullen's explanations, such as that some homicides are accompanied by an additional felony such as robbery, simply "does not explain this racial disparity."[302] Neither did the degree of relationship between perpetrator and victim (even though more people who kill strangers have the death penalty sought against them).[303] Other details supported Brooks' motion: "given a female victim, those who kill whites are 5.1 times more likely to have the death penalty sought than those who kill a black female."[304] The pattern held when comparing black male victim versus white male victim: "those who kill white males are 11 and half times more likely to have the death penalty sought than those who kill black males."[305]

As for the state's jury strikes over time, Radelet testified that there was less than 1 in 1,000 chance that Pullen's office was striking black jurors at such a high rate randomly. Pullen admitted being out of his depth, saying he was "not familiar with statistics."[306] During cross-examination of Radelet, Pullen tried to suggest that the expert was compromised because he appeared at defense lawyers' press conference and handed out sheets with details of his research, but Radelet insisted that he was not morally opposed to the death penalty and merely had an "academic" interest in how it was

299. Interview with Ruth Friedman (Mar. 10, 2020).
300. *Id.*
301. Pre-Trial Hearing from Sept. 11, *supra* note 259, at 119.
302. *Id.* at 122.
303. *Id.* at 127.
304. *Id.* at 130–31.
305. *Id.* at 131.
306. *Id.* at 87.

enforced.[307] Pullen strongly implied that Radelet did not include all factors that went into their charging decisions, such as the ages of perpetrators and victims, but Radelet replied that he took into account the most likely ones. When Pullen tried to get Radelet to say that the Baldus study had been rejected by judges, he retorted: "Not my reading of *McCleskey*. I think the Supreme Court made it quite clear that they accepted that study" and "[t]hat study has received some very prestigious awards."[308]

At one point, Pullen lost his cool: "[Y]ou're calling me and my two predecessors racists."[309] Parker objected, saying that "he has never said that the evidence indicates that he is a racist. He says the evidence raises a strong suggestion of racial discrimination in the application of the death penalty in this circuit." Judge Lawson sustained the objection.[310]

Pullen moved on to inquire why Radelet chose not to focus on the race of defendants, and Radelet explained that Bright asked him "to focus on race of victim."[311] This amounted to an effort to focus on one aspect of the Baldus study (racial disparities in cross-racial killings), and to try to replicate it on a more intimate scale. Radelet acknowledged that the raw numbers showed that of the 45 capital cases they were discussing, 23 defendants were white and 22 were black.[312] Radelet pushed back, saying that "the lesson that we have learned from this research project and from many others done over the last decade is that if we look at defendant's race alone, that creates a totally misleading picture of the effect of racial variables on the imposition of the death penalty."[313] Other factors either could not be quantified or were not for purposes of Radelet's study, such as strength of a case, criminal history, whether there was provocation, degrees of premeditation, and defendant's state of mind.[314]

After this hearing, the NAACP called a press conference to attract media attention to the hearing. The NAACP hailed SCHR's aggressive approach in Brooks' trial as "a model of new defense strategies" to satisfy the more stringent standard of proof for discrimination demanded by *McCleskey*.[315] Earl Shinholster, the NAACP's southern regional director, said that the evidence of racial bias tendered during the hearing proved once

307. *Id.* at 140–41
308. *Id.* at 153.
309. *Id.* at 154–55.
310. *Id.* at 155.
311. *Id.* at 156.
312. *Id.*
313. *Id.* at 160.
314. *Id.* at 171–74.
315. Wade Lambert & Martha Brannigan, *Death Penalty Case Challenged on Grounds of Racial Discrimination*, WALL ST. J., Aug. 14, 1990, at B8.

again that the answer is to "abolish the death penalty."[316]

Ultimately, Judge Lawson refused to bar the death penalty at the pre-trial stage. It was always highly unlikely that a single elected judge was going to stop a capital trial on the basis of past discrimination by prosecutors, much less issue a blanket order preventing the entire office from seeking death sentences in the future. Nevertheless, rebellious localism served several objectives. First, SCHR's holistic approach to advocacy disrupted the status quo, where a defendant in cross-racial killing was often briskly tried and sentenced to death. This more aggressive pre-trial posture litigating equality issues raised the costs of litigation for the government, forcing prosecutors to ask themselves repeatedly whether insisting upon a death sentence was worth it when the entire case might be more expeditiously and securely resolved through a plea deal. Not only would a district attorney's office have to defend against several pre-trial motions and prepare for lengthy hearings, but they would also have to invest in experts and build a separate case in favor of death even if they secured a conviction. The costs would continue to escalate if other issues emerged, such as challenges to the possible method of execution, especially if a trial were delayed so a defendant could pursue an interlocutory appeal.

Second, such litigation tactics served an educative function by surfacing the often-subterranean racial dimensions of legal justice. They heightened public awareness of the case and led affected segments of the community to pay closer attention and even participate in the proceedings. While Bright and his staff never lost sight of the primary goal of harm reduction (here, saving their client's life), rebellious localism ensured that constitutional issues of equality and fairness would be debated more broadly, whatever fate befell their client in the end.

Third, by hammering the issues of race and poverty in the administration of capital punishment so relentlessly, Brooks' team increased the participants' sensitivity to a greater possibility of a reversal on appeal or during a subsequent post-conviction proceeding. The new judge, no doubt wanting above all as clean a trial as possible on the second go-round, had given defense lawyers plenty of leeway to raise their concerns and preserve issues for appeal. Exploiting that desire helped them to overcome the usual obstacles to building a robust record of discrimination during a criminal trial. If their client was convicted, that record would be before an appellate body should judges be in the mood to engage in constitutional policymaking.

316. Perry, *supra* note 278, at D-1.

During jury selection, Pullen still used all his peremptory strikes against black jurors. Even so, aggressive defense lawyering led to a jury seated with nine black citizens and three white citizens—a far cry from what happened the first time around.[317]

Fighting so hard for racial equality now gave Brooks' team another chance to battle for human dignity in front of a mixed-race jury. Their change of venue motion was granted, and the trial took place in Morgan County. This time, the state's case did not feature overtly racist appeals.[318] After Brooks was convicted of murder, Bright pleaded with the jury to spare his client from the electric chair. "We get down now to the ultimate issue here: Do we kill William Brooks?" Bright said to the jurors. "An issue about as stark and about as great a moral decision as a human being could ever be called upon to make."[319] He proceeded to give a textbook closing argument weaving together themes of residual doubt and the possibility of redemption, as well as a deep dive into the aspects of Brooks' troubled upbringing, including childhood abuse, that favored a merciful outcome.

After deliberating for less than an hour, the jury decided to impose a life sentence. Once again, rebellious localism had made the difference. This time, unlike in the *Horton* case, rebellious localism had yielded a life sentence without necessitating an appeal and collateral litigation.

Brooks' ordeal illustrated another aspect of abolitionists' harm reduction goals: using the legal process to keep a client alive long enough for political conditions to shift back in their direction. As Rachel Barkow has explained, "[p]opulist fears and impulses among the electorate create pressure on prosecutors to make ill-advised short-term decisions that end up compromising public safety"[320] and violating rights. High-profile, cross-racial murder cases during the War on Crime years tempted prosecutors into breaking constitutional rules and engaging in unethical conduct. But as Bright's strategies illustrated, extending a life beyond a particular historical moment might lead a different prosecutor to agree to a plea deal or, as in Brooks' case, secure a jury with sufficient distance from highly racialized politics to consider mercy.[321]

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317. MCFEELY, *supra* note 77, at 155.

318. Austin Sarat, who observed Brooks' retrial, believes that the prosecutors' pleas for conviction and a death sentence nevertheless capitalized upon older stock stories about "racial danger" and "racial victimization." Austin Sarat, *Speaking of Death: Narratives of Violence in Capital Trials*, 27 LAW & SOC'Y REV. 19, 28–29 (1993).

319. Bright Closing Argument During Penalty Phase, *as reprinted in* Stephen B. Bright, Closing Argument Example: Presenting a Theory of Defense Throughout the Case (on file with the author).

320. BARKOW, *supra* note 21, at 143.

321. Lee Kovarsky has offered a normative defense of giving prosecutors more back-end mercy power. Whatever the merits of this proposal, which must include some evaluation of whether inequality

As for the cause lawyer's goal of achieving an authoritative repudiation of *McCleskey*, that would take more time.[322] More lasting policy transformation, too, would require building on legal errors and structural injustice uncovered in SCHR's cases. Whether the issue involved abolishing capital punishment, reforming how jury lists were constituted, reducing or eliminating peremptory strikes, or constraining how prosecutors made charging decisions—reform would require political action, not merely favorable judicial decisions.

Even so, what happened in Johnny Lee Gates' case in 2018 should offer abolitionists hope that rebellious localism can do some good for long-term goals. Citing SCHR's win in *Foster v. Chatman*, lawyers for Gates gained access to the prosecutors' notes during his original 1977 murder trial. Gates, a black man who has always maintained his innocence, was convicted of rape and murder of a white woman by an all-white jury. The notes showed that prosecutors closely tracked the race of prospective jurors, marking white jurors with "W" and black jurors as "N."[323] Additionally, prosecutors described black jurors as "slow," "old + ignorant," "cocky," "con artist," "hostile," and "fat."[324]

Because the prosecutors were Doug Pullen and William Smith, from the same office that had prosecuted Brooks, SCHR lawyers Patrick Mulvaney and Katherine Moss introduced the study they had compiled based on that earlier case. They argued that Gates was entitled to a new trial based on the "newly discovered notes" plus "the pattern of strikes across cases establish systematic race discrimination."[325] From 1975 to 1979, the state brought seven capital cases against black defendants in Muscogee County and struck 41 black jurors—in 6 of those cases, every single black juror was eliminated to secure all-white juries. Pullen was involved in 5 of the 7 cases, striking 27 of 27 black jurors. Smith was involved in four of those cases. According to the affidavit of Dr. Michael Lacey, "the probability that they

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is ameliorated or worsened, Kovarsky is correct that the prosecutor's office is often the local entity with "the best information and expertise" to make calls about the possibility of redemption. Lee Kovarsky, *Prosecutor Mercy*, 24 NEW CRIM. L. REV. 326, 341 (2021). Indeed, deals like the one Bright and other abolitionists seek on behalf of their clients try to capitalize on local prosecutors' better comparative capacity to grant mercy, at least relative to the possibility of post-conviction relief by other political actors.

322. Brandon Garrett has detected "a defense-lawyering effect" from "improved defense lawyering and greater resources," which has produced "real differences between state death sentence rates." BRANDON L. GARRETT, END OF ITS ROPE 109, 111 (2017).

323. Supplement to Motion for New Trial Regarding the Prosecutors' Jury Selection Notes at 1–2, State v. Gates, No. SU-75-CR-38335 (Muscogee Cnty. Super. Ct. Mar. 19, 2018); Interview with Patrick Mulvaney (Aug. 27, 2021).

324. Supplement to Motion for New Trial, *Gates*, No. SU-75-CR-38335, at 2.

325. *Id.* Mulvaney and Moss were joined by Clare Gilbert of the Georgia Innocence Project.

exercised those strikes without considering race is 0.00000000000000000000000000004."[326]

On January 10, 2019, a state court granted Gates' extraordinary motion for a new trial on a separate ground: that DNA testing of evidence from the crime site did not contain Gates' DNA. But in the stunning opening pages of his order, the judge also accepted the evidence of racial discrimination presented by SCHR, finding the evidence of bias "overwhelming."[327] At last, abolitionists could point to formal recognition of historical evidence of structural racism. Not only did the judge find that the prosecutor's office had a practice of race-based peremptory challenges, but he also connected that jury selection strategy to outrageous rhetorical appeals made by prosecutors during capital trials. He noted that arguments in front of all-white juries were more explicitly racist and deplored the "racially charged arguments [that] spanned across multiple cases, including Gates's case."[328]

The Georgia Supreme Court upheld the lower court order granting relief based on the DNA evidence. Yet the justices, too, like the local judge, went out of their way to note the "troubling findings" of prosecutorial misconduct in capital cases "held in the Chattahoochee Judicial Circuit between 1975 and 1979."[329] Even if it was not the explicit rationale for relief, the structural racism claim—with its focus on highlighting intentional racism in particular counties and circuits—almost certainly shaped how these judges perceived the rest of the defendant's arguments.

This victory mattered because in recent years, successful arguments to end capital punishment have not sounded in religious or other abstract rationales, such as the efficacy of deterrence, but rather concerns about actual innocence, unequal administration on the basis of race and poverty, and excessive costs. For instance, when the Washington State Supreme Court halted the death penalty on state constitutional grounds in 2018, it did so because capital punishment "is unequally applied—sometimes by where the crime took place, or the county of residence, or the available budgetary resources at any given point in time, or the race of the defendant."[330] With *Gates*, abolitionists acquired another crowbar with which to pry open the machinery of death.

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326. *Id.* at 7–8.

327. Order on Defendant's Extraordinary Motion for New Trial at 11, *Gates*, No. SU-75-CR-38335 (Jan. 10, 2019).

328. *Id.* at 10.

329. State v. Gates, 840 S.E.2d 437, 457 n.22 (Ga. 2020).

330. State v. Gregory, 427 P.3d 621, 627 (Wash. 2018). Likewise, Governor Jay Inslee, who imposed a moratorium on the death penalty in 2014, said at the time that the system "falls short of equal justice under the law." Governor Jay Inslee, Governor Inslee's Remarks Announcing a Capital Punishment Moratorium (Feb. 11, 2014).

CONCLUSION

Rebellious localism is a strategy of legal resistance that is most effective during tough political times, when legal doctrine is in the process of becoming more complex and less humanitarian in orientation, when public servants are becoming less interested in vindicating robust theories of equality and fairness and instead focused on maximizing other objectives. Its practitioners search for spaces within doctrine to subvert the ideological and policymaking intentions of judges and exploit opportunities to turn the tables on public servants who fall short of ideals. In part to correct for the waning of trust in legal institutions, they continue to appeal to broader, intuitive notions of what is just and fair given the immense stakes involved in capital cases.

When those stakes were the highest—a client's life hung in the balance—and national political conditions were least favorable for maximalist progressive constitutional projects, Bright and his staff were willing to do what it took to implement this approach. For them, it meant not giving up on wider reform goals, such as abolishing the death penalty and improving the quality of indigent defense systems, but rather entailed shifting the emphasis to harm reduction and incremental advancement of structural claims. From the standpoint of harm reduction, success would be measured according to lives saved or extended. Capital cases were slowed down, executions were put off time and again. In Georgia, a state supreme court that began the post-*Gregg* era generally unwilling to review capital trials closely eventually became alarmed by the inequities on display and, as in cases like *Ford* and *Gamble*, started to send appalling trials back to be done over. On that score, rebellious localism accomplished more than one might have dreamed at the outset.

If doctrine is in part a method of empowering allies and weakening adversaries, then rebellious localism also advanced this agenda. In terms of advancing principles of racial equality and fundamental fairness in criminal trials and resisting the impoverished vision of justice exemplified in *McCleskey*, rebellious localism created fresh templates for action and legal precedents such as *Horton* and *Gates* to build upon—often, in situations far removed from the influence of the U.S. Supreme Court. These victories, which included pre-trial rulings forcing the disclosure of evidence in the hands of prosecutors or forcing public servants to testify, went the farthest. Equally useful were rulings that excoriated the underrepresentation of jury pools or practices that denied eligible black citizens a chance to participate in the criminal process. These rulings showed the lengths to which some public officials were willing to go to kill fellow citizens—mostly black people charged with serious crimes against white people. By insisting that

the misconduct uncovered was not just evidence of isolated bad actors but rather proof of a system gone awry, SCHR's work advanced abolitionist aims. At this broader level, rebellious localism shamed elites by exposing the inequitable aspects of the criminal justice system.

Nevertheless, rebellious localism was an extremely time-intensive endeavor. Given the unavoidability of court-centered and litigation-focused tactics, in-court progress would be limited by the nature of the adjudicative process unless out-of-court mobilization could capitalize on momentum created during legal proceedings. Putting local systems on trial entailed front-loading and multiplying colorable constitutional claims, as well as escalating legal rhetoric about fundamental values at stake. That meant consciously creating more work for themselves and their adversaries by converting the pre-trial process into an engine for public law-style litigation. It also meant that advocates could not serve quite as many clients as they might otherwise, for the maximalist model of representation meant fewer cases they would be able to add to their plate.

This technique involved destroying the possibility of maximally efficient capital trials and generating friction between the cause lawyers themselves and other legal actors who were repeat players. Another drawback, at least in court, was that abolitionists often chose to play to existing stock stories about racial hostility rather than delve more deeply into what was likely a more complicated truth. As Randall Kennedy puts it, cross-racial disparities often have to do more with "racially selective empathy rather than racially selective hostility" because white prosecutors, judges, and jurors "relate more fully to the suffering of white victims" who can be readily "imagined as family or friends."[331] Some of this account emerged through pre-trial hearings, but not enough to inform specific proposals to reduce the distorting effects of selective empathy throughout the criminal justice system.

An advocacy group can only hope to pull off rebellious localism of this sort if it has sufficient ties to the community and is capable of tapping the people's sense of history, their long-held grievances, and their own dreams of justice. It must also have the right personnel: people who would rather be feared as adversaries than loved, willing to battle every legal point.

SCHR could not save every client, nor did they win every motion. Yet the organization's successes over time—and its staff and cooperating attorneys—enjoyed several legal victories after beating significant odds—suggest that a sharp theoretical dichotomy between radicalism and

331. Kennedy, *supra* note 12, at 1420.

gradualism is too simplistic. Rather, historians and theorists should be looking for forms of gradualism that can co-exist with radical aims, striving to better understand when hybrid approaches to legal reform might work and when the tensions are too great to manage.

To be sure, SCHR did not accomplish these goals alone. Others were engaged in local battles against the death penalty systems in their states, exposing inequities in terms of race, wealth, and geography. Nevertheless, SCHR's efforts contributed to the burgeoning discourse that capital punishment was unjust because it was administered unequally and unfairly. The organization's work represents only one part of that broader story of abolition that continues to unfold.[332]

From the standpoint of judges making constitutional law at the highest levels, the lessons should be more sobering. Efforts to portray the law in terms that privilege order over justice are not only likely to fail, but could wind up horrifying the law's subjects and causing counterproductive effects. Such projects will engender furious resistance, even when the winds appear to be blowing in the very direction that Justices might wish to go. An overweening desire for legal efficiency can in fact produce its opposite: a flurry of legal texts and orations that call into doubt the prospects for equal justice and the legitimacy of the very institutions that order-preserving jurists hope to bolster. Deep worries about whitewashing inequality may prompt accusations of racism that taint outcomes, practices, and judicial personnel—whether or not they are satisfactorily proven.

Concerns about the value of statistical evidence had played a role in Justice Powell's desire to insulate the criminal justice system in *McCleskey*. But he had not done much, if anything, to call into question the integrity of the Baldus study, or to explain convincingly why that evidence was any less reliable than in other settings. His solution—to neither seriously question it but to suggest statistical evidence was less useful on a state-wide scale—did not end advocates' efforts to quantify racism.

As SCHR's experience demonstrates, it remained possible to use expert testimony and quantitative evidence to shed light on prosecutorial motives in charging decisions and peremptory strikes. It is true that their studies involved fewer state actors, but it is not obvious that the evidence was significantly more reliable than the Baldus study. While replicating similar cross-racial patterns, the local studies had a smaller sample size and

332. The most dramatic localist effort to bring the death penalty system to a standstill occurred in the Commonwealth of Virginia, which then legislatively abolished the punishment. *See* Corinna Barrett Lain & Douglas A. Ramseur, *Disrupting Death: How Specialized Capital Defenders Ground Virginia's Machinery of Death to a Halt*, 56 U. RICH. L. REV. 183 (2021).

considered fewer non-racial variables. The mini-*McCleskey* hearings did give prosecutors a chance to explain their apparently race-based conduct, something that Justice Powell went to some length to say did not happen with the Baldus study. The failure by prosecutors such as Briley and Pullen to rebut the evidence of racial discrimination was then held against them.

Another factor seems important: In SCHR's cases, statistical evidence of bias was not the only evidence offered. Instead, such evidence of unequal administration of the law bolstered other evidence of discrimination by a particular bad actor or practices of a discrete jurisdiction. For this reason, the narratives of unconstitutional behavior were simpler, more familiar. They resonated with beliefs about the quality of local justice and pricked the consciences of people to reflect more deeply on how much more might still need to be done.

At the end of the day, the basic point remains: *McCleskey* did not end constitutional debate or solve problems of proof once and for all. To the contrary, the ruling opened a more intense and grueling chapter of the debate over the meaning of equal justice. On this question, as well as with the ultimate scope and significance of that precedent, elites would not have the last word.