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MCCLESKEY ACCUSED
Justice Powell and The Moral Price of Institutional Pride

Josh Bowers*

In *McCleskey v. Kemp*,[1] the Supreme Court effectively "closed the courthouse doors" to constitutional claims of systemic racism in the criminal-legal system.[2] The defendant, Warren McCleskey, had offered a sophisticated academic study demonstrating pronounced racial skews in the administration of capital punishment in Georgia. Consistent with social science before and since, the study showed that the race of the victim was the most significant variable in determining whether a murder defendant faced or received a sentence of death. Remarkably, the Court credited the study's robust findings; yet in an opinion authored by Justice Lewis F. Powell, a five-Justice majority held the study largely irrelevant, concluding that its statistics could demonstrate neither "exceptionally clear proof" of purposeful discrimination to establish an equal protection claim nor a "substantial risk" of "arbitrary and capricious" punishment to establish a claim of cruel and unusual punishment.[3]

*F.D.G. Ribble Professor of Law, University of Virginia School of Law. Many thanks to Elana Oser and Bria Smith for their exceptional research assistance. Thanks also to Charles Barzun, Anne Coughlin, Brandon Hasbrouck, Richard Re, and Fred Schauer. I received constructive comments and questions at the Neighborhood Criminal Justice Roundtable and the Hebrew University Criminal Justice Workshop.

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

2 Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 139 (anniversary ed. 2020); *see also* Cassandra Stubbs, *The* Dred Scott *of Our Times*, ACLU (Apr. 16, 2012) ("[T]he Court . . . effectively shut the door to anything short of 'smoking gun' evidence of intentional discrimination."); *infra* notes 50–55, 81–86, 129, 189–96, 220 and accompanying text.

3 *McCleskey*, 481 U.S. at 297; *id.* at 322 (Brennan, J., dissenting); *infra* notes 40–44 and accompanying text.

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Commentators have dubbed Powell's decision a modern-day *Dred Scott*.[4] But a better point of antebellum comparison might be *Miller v. McQuerry*,[5] one of the opinions Robert Cover examined in his groundbreaking work of legal history, *Justice Accused: Antislavery and the Judicial Process*, a searing portrait of judicial timidity in the face of the horrors of the fugitive slave acts.[6] The judges upon whom Cover focused were ostensibly abolitionists. They knew better but refused to do better. Facing a "difficult choice"—a "moral-formal dilemma"—between their personal opposition to slavery and their positive obligations to perceived legal commands, they prioritized "role fidelity" and "rule fidelity" and "marched to the music."[7] These were bad decisions not only because they constituted "almost universal judicial acquiescence"[8] to racialized state violence but also because they entailed shabby forms of legal reasoning. As Cover explained, these judges made awful outcomes appear legally inevitable by unnecessarily resorting to a cheap set of jurisprudential techniques: (1) "elevation of the stakes," (2) a "retreat to formalism," and (3) "ascription of responsibility elsewhere."[9]

In *McCleskey*, Justice Powell made the same moves. He exaggerated the dangers of pursuing an alternative moral course; he read positive law narrowly, pretending the case was easy; and he accepted no accountability for the problematic results.[10] More to the point, Powell apparently shared with his antislavery predecessors an abolitionist sensibility. When asked, in retirement, by his biographer, John Jeffries, whether he regretted any of his previous votes, Powell responded: "Yes, *McCleskey v. Kemp*."[11] When Jeffries pressed Powell on whether he meant that he was now open to statistically based, constitutional claims of systemic inequality, Powell declared categorically, "No, I would vote the other way in any capital case. . . . I have come to think that capital punishment should be abolished."[12]

In other ways, however, Justice Powell does not fit neatly within the Cover mold. Cover rooted the cowardice of his antislavery judges, at least partially, in the

4 Dred Scott v. Sandford, 60 U.S. 393 (1856); Annika Neklason, *The 'Death Penalty's Dred Scott' Lives On*, Atlantic, June 14, 2019; Scott E. Sundby, *The Loss of Constitutional Faith:* McCleskey v. Kemp *and the Dark Side of Procedure*, 10 Ohio St. L.J. 5 (2012) (noting comparisons between *McCleskey* and other "infamous decisions like *Dred Scott*, *Korematsu*, and *Plessy*[,] . . . shorthand for 'cases in which the Supreme Court failed the Constitution's most basic values"); Stubbs, *supra* note 2; Hugo Adam Bedau, *Someday* McCleskey *Will Be Death Penalty's* Dred Scott, L.A. Times, May 1, 1987.

5 Miller v. McQuerry, 17 F. Cas. 332, 339 (C.C.D. Ohio 1853).

6 Robert M. Cover, Justice Accused: Antislavery and the Judicial Process (1975).

7 *Id.* at 5–7, 229, 235, 252 (describing how these cases "produced an almost uniform response of role fidelity").

8 *Id.* at 236.

9 *Id.* at 229.

10 *Infra* Part I.

11 John C. Jeffries, Jr., Justice Lewis F. Powell, Jr.: A Biography 451 (1994).

12 *Id.*

"thoroughgoing positivism" of the era.[13] But Powell was neither a positivist nor a formalist. Indeed, he was not even a death-penalty abolitionist—at least not in the way one would normally understand that concept.[14] What, then, accounted for Powell pursuing such a remarkably similar—and similarly shoddy[15]—moral, prudential, and jurisprudential course? In this essay, I dissect *McCleskey v. Kemp*. I conclude that amoral positivism cannot explain Powell's *McCleskey* decision. To understand the decision, we must dig deeply into Powell's psychology. There we discover Powell's abiding principled commitment to a particular brand of anti-positive institutionalism—a moral orientation toward the rule of law and, more to the point, its systems and stakeholders.[16]

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It is impossible to separate *Powell the person* from *Powell the professional*. More so than with most judges, Powell's two lives were bound up. Powell made plain, for instance, in *Bowers v. Hardwick* that his vote to uphold Georgia's sodomy law was informed by his subjective (and obtuse and "puzzling") belief that he "had [n]ever met a homosexual."[17] Likewise, personal experience framed Powell's moderate support for reproductive rights. Powell came to appreciate the dangers of illegal abortion only after discussing the risks with his daughter and learning of the death of a pregnant woman connected to his former law firm.[18] This was a recurring theme throughout Powell's career. Familiarity mattered to him; it was

13 Cover, *supra* note 6, at 1, 34, 258 (describing a nineteenth century "thoroughgoing positivism . . . concerning the origin of 'law'" that rejected the earlier influence of natural law); *see also* Robert M. Cover, *Book Review*, 68 Colum. L. Rev. 1003, 1005 (1968) (reviewing Richard Hildreth, Atrocious Judges: Lives of Judges Infamous as Tools of Tyrants and Instruments of Oppression (1856) ("We do not generally seek moral guidance from our judges. Their role is 'legal' and our age is singularly unreceptive to natural law theories which could have any real weight in decision making."); *infra* notes 229–236 and accompanying text (discussing Cover's conception of positivism as it related to his antislavery judges). To be fair, Cover identified "thoroughgoing legal positivism []as [only] one of the many factors that determined the complicity of the antislavery judge in the system of law that he himself considered immoral." Cover, *supra* note 6, at 1. Still, it is a principal focus of his book, and it is a theme that many commentators have drawn from the book since its publication. *Infra* notes 229–236 and accompanying text (discussing Cover's influence on contemporary conceptions of positivism).

14 *Infra* Part II.C.

15 Randall Kennedy, Race, Crime, and the Law 335 (1998) (discussing *McCleskey* and noting that "none of the justices' opinions is altogether satisfactory," but "[t]he worst of the lot is also the one backed by the most power: Justice Powell's opinion for the Court"); *infra* Part I.

16 *Infra* Part II.A-B.

17 Jeffries, *supra* note 11, at 521, 526 (quoting Powell: "I don't believe I've ever met a homosexual."). *See generally* Bowers v. Hardwick, 478 U.S. 186 (1986).

18 Jeffries, *supra* note 11, at 347; Mark Tushnet, *Justice Lewis F. Powell and the Jurisprudence of Centrism*, 93 Mich. L. Rev. 1854, 1877–88 (1995) ("To the extent that restrictive abortion laws adversely affected people like him and his family, he found them unconstitutional; to the extent that they adversely affected women who were not part of his social vision . . . he found them constitutional.").

the foundation for his sympathies—the basis for his implicit biases. Without that personal connection, Powell's "essential humanity" more often remained "hidden from view."[19]

By most accounts, Powell was an ideologically and temperamentally even-keeled individual—a "hard-line moderate," as John Jeffries titled a chapter of his biography.[20] There is some evidence, to be sure, that Powell did not wholly deserve this jurisprudential and dispositional reputation. When Powell was chair of the Richmond School Board, for instance, "he never really identified himself with the needs and aspirations of Virginia's black schoolchildren."[21] And, particularly in the years before he rose to the bench, Powell sometimes proved willing to adopt the role of reactionary firebrand. Powell once insisted, in a "hard-edged" editorial, that America was "not a repressive society" and had no "system of countenanced oppression."[22] Likewise, in response to Martin Luther King Jr.'s *Letter from a Birmingham Jail*, Powell gave an angry speech denouncing civil disobedience as antecedent to "organized lawlessness and even rebellion" and attacking King, unfairly, as one who would "preach, practice and condone lawlessness."[23] And, of course, Powell prepared a now-public (then-secret) document—since dubbed the "Powell Memorandum" or "Powell Manifesto"—that critics have called the blueprint for contemporary movement conservatism.[24] Still, for the purposes of this essay, I plan to treat Powell charitably—to accept the prevailing perspective that Powell was a profoundly decent person and jurist. Indeed, I hope to reveal that these are the precise qualities that led Powell to stumble so badly in *McCleskey v. Kemp*.[25]

Powell was, first and foremost, an institutionally proud man—a man who prioritized the interests of the institutionalists closest to him. Powell saw the best in these privileged professionals, and, in that way, he failed to perceive them at their worst. Ironically, then, it was his implicit institutional biases that led him to undervalue the implicit racial biases at work in the criminal-legal system. More to the point, Powell's institutional biases *were themselves forms of structural racism in action*. His preferences for his own cherished

19 Jeffries, *supra* note 11, at 527 (commenting on *Bowers*).

20 *Id.* at 131.

21 *Id.* at 163–64, 172; Tushnet, *supra* note 18, at 1876 ("Virginia was the home of 'massive resistance' to desegregation, and Powell did nothing in public [as chair of the Richmond School Board] and little in private to oppose such resistance.").

22 Lewis F. Powell, Jr., *Civil Liberties Repression: Fact or Fiction?*, Richmond Times Dispatch (June 28, 1971); Jeffries, *supra* note 11, at 239 (describing the editorial as "a hard-edged reaction" to social unrest).

23 Jeffries, *supra* note 11, at 238 (quoting Powell).

24 Brandon Hasbrouck, *Democratizing Abolition*, __ UCLA L. Rev. __ (forthcoming) (manuscript on file with author) (tracing the origins of the Heritage Foundation and the American Legislative Exchange Council to the Powell Memorandum and observing that "[m]ovement conservatism largely owes its present shape to the Powell Memorandum"); Jerry Landay, *The Powell Manifesto: How A Prominent Lawyer's Attack Memo Changed America*, Media Transparency (Aug. 20, 2002).

25 *Infra* Part II.

systems and systemic insiders were mechanisms by which he legitimized and perpetuated the criminal-legal system's ongoing subordination of outsiders.[26]

It may seem odd to call into question character traits like geniality and gentility. These are often admirable human qualities. But there is, particularly among moderate legal professionals, something of a "cult of civility" that, in some settings, has great capacity to cause (or, at least, tolerate) real harm.[27] Its initiates accept instinctively the idea that moderation is an intrinsic moral virtue. To my thinking, however, it seems obvious that the normative worth of moderation can only ever be contingent. And, in extreme cases—like Chamberlain treating Hitler with kid gloves—moderation may translate to the appeasement of morally horrible actors.[28] Even in more banal circumstances, civility's cult may countenance oppression by commanding kindness and respect toward friends and neighbors—peers and colleagues—even as they apathetically disregard (or even aggressively abuse) the moral interests of marginalized groups. On this reading, Justice Powell was undone by his own myopic decency—by his lack of a robust peripheral moral vision. Thus, in *McCleskey v. Kemp*, he reflexively deferred to institutional stakeholders and largely ignored persuasive statistical evidence that capital practice was, at every stage, systemically and systematically skewed against Black murder victims.[29] He refused to countenance the reality that his own justice system could countenance so much injustice.[30]

Powell made *McCleskey* personal—just as he had made *Bowers* personal a year earlier. His jurisprudential approach to both cases was regrettable in the basic sense that Powell would come, in retirement, to regret the "ugly" rulings.[31] But, more to the point, his approach was regrettable because it entailed a "willful blindness" or "willed ignorance" of social conditions and consequences.[32] On the subject of *Bowers*, Jeffries explained: "Powell had never known a homosexual because he did not want to. In his world, . . . homosexuality did not fit, and Powell therefore did not see it."[33] Likewise, in Powell's world, systemic racism in criminal-legal institutions did not fit, and Powell therefore did not see it. In each case, Powell lacked exposure to the most affected populations and therefore exhibited a "failure of . . . moral imagination."[34] This is what Mark Tushnet

26 *Id.*

27 Chad Denton, *The Cult of Civility and Depoliticization of Politics*, Medium (Apr. 21, 2020) https://medium.com/@csdenton/the-cult-of-civility-and-the-depersonalization-of-politics-4eaed305df1d.

28 Tim Bouverie, Appeasement: Chamberlain, Hitler, Churchill, and the Road to War (2019).

29 *Infra* Part II.B; *cf.* Mike Laws, *Why We Capitalize "Black" (and not "white")*, Colum. Journalism Rev. (Jun. 16, 2020) ("For many people, *Black* reflects a shared sense of identity and community. White carries a different set of meanings; capitalizing the word in this context risks following the lead of white supremacists.").

30 *McCleskey*, 481 U.S. at 339 (Brennan J., dissenting) (labeling Powell's timid approach "a fear of too much justice").

31 Jeffries, *supra* note 11, at 530 (referring to *Bowers* as an "ugly opinion" and quoting Powell, post-retirement, in response to a question about the case: "I think I probably made a mistake in that one."); *infra* Part II.E.

32 Jeffries, *supra* note 11, at 528 (describing *Bowers*); Sundby, *supra* note 4, at 27, 30 (describing *McCleskey*).

33 Jeffries, *supra* note 11, at 529.

34 Tushnet, *supra* note 18, at 1881; *see also* Jeffries, *supra* note 11, at 527 (explaining that, in *Bowers*, Powell "failed" to bring to bear his characteristic "wisdom and reflection").

referred to as Powell's "limited social vision."[35] This is how a judge who fashioned himself a moral, moderate, incremental, and sensitive pragmatist could author an opinion that was immoral, immoderate, maximalist, and even callous.[36]

In the first part of this essay, I examine Powell's *McCleskey* opinion, discussing its moral and jurisprudential shortcomings and the ways in which its reasoning tracks Cover's fugitive-slave cases. In the second part, I provide a biographical and psychological profile of Powell, and I reveal the influence that his anti-positive, institutional pride had on his decision and, likewise, his ultimate repudiation of it. In the third part, I sketch a portrait of the kind of judge who is likelier to prove willing to reject immoral law and legal outcome. Perhaps surprisingly, that judge is a type of positivist—a *skeptical positivist*. Finally, I offer some thoughts about the promise of a jurisprudence of skeptical positivism, and I set the stage for a subsequent essay, examining the unfortunate reasons why most judges reject skepticism in favor of similar (but perhaps less extreme) jurisprudential versions of Powell's professional hubris.[37]

I. *MCCLESKEY V. KEMP*

Warren McCleskey, a Black man, was convicted in Fulton County, Georgia, of capital murder and armed robbery for killing a white police officer during the robbery of a furniture store. The jury sentenced him to death. After exhausting his state appeals, he filed a writ of *habeas corpus*, challenging his sentence on the ground that the capital charging and sentencing process in Georgia violated equal protection and the prohibition against cruel and unusual punishment.[38] In support of his claims, McCleskey's lawyers offered two sophisticated academic studies, led by David Baldus (collectively, the "Baldus study"), of well over two thousand murder cases handled by Georgia courts during the 1970s. The Baldus study crunched the data in several ways, demonstrating consistent, pronounced charging and sentencing skews based on the race of the murder victim, with one model concluding that, even after controlling for thirty-nine nonracial variables, defendants charged with killing white victims were more than four times as likely to receive death as defendants charged with killing Black victims.[39]

35 Tushnet, *supra* note 18, at 1878.

36 Jeffries, *supra* note 11, at 131; Sundby, *supra* note 4, at 5–6 ("If one were to have wagered prior to *McCleskey* which Justice would write an opinion that would generate such a backlash, the genteel Justice Powell who often sought to thread the needle of compromise would have commanded very long odds indeed.").

37 Josh Bowers, *The Skeptical Unicorn* (manuscript on file with author) (arguing that the moral timidity of Robert Cover's antislavery judges can best be explained by reference to an anti-positive institutional pride analogous to that exhibited by Justice Powell).

38 McCleskey v. Kemp, 481 U.S. 279, 285–86 (1987).

39 *Id*. at 286–87.

Writing for the majority, Powell ostensibly accepted the Baldus study's clear-cut findings and conceded that it "demonstrate[d] a risk that the factor of race entered into some capital sentencing decisions."[40] But he insisted that this statistically founded, systemic skew could not support an inference "that race entered into any particular sentencing decision."[41] The study spoke only to "the effect on the average," not "the experience of a single individual."[42] All that mattered, constitutionally, was the decision-making and action in *this* case, with *this* prosecutor, *this* trial judge, *this* defendant, and *this* victim.[43] Thus, Powell concluded, the Baldus study was insufficient to establish a discriminatory purpose for an equal protection claim or a sufficiently substantial risk of arbitrary punishment for a claim of cruel and unusual punishment.[44]

In reaching that conclusion, Powell highlighted the individualized nature of capital charging and sentencing decisions. As he wrote in a *McCleskey* memorandum, "sentencing judges and juries are constitutionally *required* to consider a host of individual-specific circumstances in deciding whether to impose capital punishment. No study can take all of these individual circumstances into account, precisely because they are fact-specific as to each defendant."[45] In this way, Powell drew upon a special constitutional protection enjoyed by capital defendants as a basis to undermine McCleskey's constitutional claims.[46] Powell used constitutionally mandated discretion to downplay that concept's precise danger—to wit, that the "the power to be lenient is the power to discriminate."[47] In dissent, Justice Blackmun described the illogic: "Rather than requiring a correspondingly greater degree of scrutiny of the capital sentencing determination, the Court relies on the very fact that this is a case involving capital punishment to apply a *lesser* standard of scrutiny."[48] And Justice Brennan, in his own dissent, likewise noted the almost-tautological shortcoming of invoking the practice of discretion to legitimize potentially problematic exercises of

40 *Id*. at 291 n.7.

41 *Id.*

42 *Id.* at 293 n.11; *id.* at 308 ("Even Professor Baldus does not contend that his statistics *prove* that race enters into any capital sentencing decisions, or that race was a factor in McCleskey's particular case. Statistics at most may show only a likelihood that a particular factor entered into some decisions.").

43 *Id.* at 294 ("[E]ach particular decision to impose the death penalty is made by a petit jury selected from a properly constituted venire. Each jury is unique in its composition, and the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense.").

44 *Id.* at 311.

45 Jeffries, *supra* note 11, at 439.

46 *McCleskey*, 481 U.S. at 311; Gregg v. Georgia, 428 U.S. 153, 199, 203 (1976) (requiring an individualized sentencing process as a means to permit leniency).

47 *McCleskey*, 481 U.S. at 312 (quoting Kenneth Culp Davis, Discretionary Justice 170 (1973)).

48 *Id.* at 347–48 (Blackmun, J., dissenting); *see also* Kennedy, *supra* note 15, at 338; *infra* notes 82–83, 105–106 and accompanying text (discussing the jurisprudential concept that "death is different").

discretion: "[T]he Court cannot rely on . . . safeguards in discounting McCleskey's evidence, for it is the very effectiveness of those safeguards that such evidence calls into question."[49]

Arguably, Powell did not announce a categorical ban against statistical claims of systemic racism in the criminal-legal system. But it is hard to imagine a party presenting more sophisticated empirical evidence than the Baldus study.[50] In any event, defendants typically lack the ability to access the kind of actor-specific evidence of discrimination Powell suggested they would need to rebut the Court's powerful presumptions of propriety.[51] Unsurprisingly, then, "not a single successful challenge has ever been made to racial bias in sentencing under *McCleskey v. Kemp*."[52] The case marked the end of the road—at least, as a matter of positive constitutional law—for claims of systemic racism in criminal-legal charging and sentencing.[53] Today, any aggregate statistical challenge to charging and sentencing (capital or otherwise) is subject to *McCleskey*'s practically insurmountable equal-protection standard of "exceptionally clear proof."[54] As Michelle Alexander explained, "the case was about much more than the death penalty. The real issue at hand

49 *Id.* at 338 (Brennan, J., dissenting).

50 Kennedy, *supra* note 15, at 329–31 (describing the Baldus study as one of the "'most complete and thorough analys[e]s of sentencing that had ever been done,'" which showed that "the race of the victim . . . [w]as the most consistent and powerful factor") (quoting Richard Berk of the National Academy of Sciences' Committee on Sentencing Research).

51 Sundby, *supra* note 4, at 19; Alexander, *supra* note 2, at 139; David Cole, No Equal Justice: Race and Class in the American Criminal Justice System 135 (1999) (noting that the Court's required showing is "nearly impossible" because defendants are barred from the requisite discovery about prosecutors' charging decisions or juries' sentencing deliberations).

52 Alexander, *supra* note 2, at 137–39, 14 (2010). To my knowledge, the closest a defendant has come is *United States v. Clary*, where a district court held that the crack sentencing guidelines violated equal protection. However, as a matter of positive law, *Clary* involved a forced and overly expansive reading of discriminatory purpose, which led promptly to reversal. United States v. Clary, 846 F. Supp. 768 (E.D. Mo. 1994) (reasoning that "unconscious racism" may "affect and infiltrate" state action and that a "failure to account for a foreseeable disparate impact which would effect [*sic*] black Americans in grossly disproportionate numbers" may be sufficient to establish a discriminatory purpose, violating "the spirit and letter of equal protection"); United States v. Clary, 34 F.3d 709 (8th Cir. 1994) (reversing). *See generally* Cole, *supra* note 51, at 136 ("In other areas of the law, such as the rules governing . . . criminal liability . . . , engaging in conduct with knowledge of its foreseeable consequences is sufficient to establish 'intent.' The Court, however, defined intentional discrimination for equal protection much more narrowly, as action taken to harm blacks 'because of, not in spite of' their race.").

53 Cole, *supra* note 51, at 134 (describing *McCleskey* as "the last systemic challenge to capital punishment in America").

54 Kennedy, *supra* note 15, at 340 (concluding that "defendants rarely, verging on never, succeed in challenging punishments using arguments of the sort voiced by Warren McCleskey's attorneys").

was whether—and to what extent—the Supreme Court would tolerate racial bias in the criminal justice system as a whole. The Court's answer was that racial bias would be tolerated—virtually to any degree—so long as no one admitted it."[55] Justice Powell's concern was with bad apples rather than institutional rot. More to the point, Powell presumed all apples were good apples, absent demonstrable individualized evidence of specific rot. And the Court followed his lead.

A. Elevation of the Stakes

In several ways, Justice Powell's reasoning resembled that of antislavery judges, who, as explored by Robert Cover, declined to obey their consciences, choosing instead to enforce the evil fugitive slave acts. According to Cover, the first trick of the trade was "elevation of the stakes"—that is, exaggerating the benefits of perceived "rule fidelity" and "role fidelity" and the comparative costs of the moral alternative.[56] In *McCleskey*, Powell emphasized repeatedly the institutional advantages of rejecting a "statistical jurisprudence," and he minimized the moral importance of constitutionally regulating systemic racism.[57] To be fair, Powell did seem to have a sense of the scope of the problem of systemic racism, but not the *right* sense—not an empathetic or affective sense. In a *McCleskey* memorandum, he expressed a concern that the defendant's constitutional claims amounted to "an attack on capital punishment itself."[58] And, in the body of the opinion, Powell explained that McCleskey's argument extended "to every actor in the Georgia capital sentencing process, from the prosecutor who sought the death penalty and the jury that imposed the sentence to the State itself that enacted the capital punishment statute and allow[ed] it to remain in

55 ALEXANDER, *supra* note 2, at 137–39; *see also* COLE, *supra* note 51, at 132, 134 ("*McCleskey* may be the single most important decision the Court has ever issued on the subject of race and crime. The case's significance extends . . . beyond the criminal justice system itself. Ultimately, it provides an important lesson in the limits of obtaining judicial relief for racial inequality."); KENNEDY, *supra* note 15, at 336–37 (explaining that *McCleskey* "resolutely shut the door to any statistics-driven, class-based challenge to the administration of punishment"). For example, in Stephens v. State, 456 S.E.2d 560 (Ga. 1995), the Georgia Supreme Court, relying "almost exclusively on *McCleskey v. Kemp*," refused to force the state to explain why prosecutors had charged sixteen percent of eligible Black defendants with a habitual-offender statute but only one percent of eligible white defendants. ALEXANDER, *supra* note 2, at 143–44 (discussing case). Consequently, 98.4% of defendants sentenced to life in prison under the provision were Black. *Id.*

56 COVER, *supra* note 6, at 5–7, 199, 229, 235, 252 ("By 'elevation of the formal stakes,' I mean the tendency to choose the highest of possible justifications for the principle of formalism relied upon. By minimization of the moral stakes, I mean the failure to raise the moral issue to the same level of principle as the formal practice.").

57 *Infra* notes 189–196 and accompanying text (discussing Powell's articulation and rejection of the notion of a "statistical jurisprudence").

58 Sundby, *supra* note 4, at 19; *see also* McCleskey v. Kemp, 481 U.S. 279, 313 n.37 (1987) ("[T]he dissent's call for greater rationality is no less than a claim that a capital punishment system cannot be administered in accord with the Constitution."); *id.* at 367 (Brennan J., dissenting) ("The Court's decision appears to be based on a fear that the acceptance of McCleskey's claim would sound the death knell for capital punishment in Georgia."); COLE, *supra* note 51, at 134 (agreeing that a holding for McCleskey would "for all practical purposes end (or at least greatly impede the imposition of) the death penalty in Georgia, and . . . perhaps across the country").

effect despite its allegedly discriminatory application."[59] He worried that permitting a statistical claim today about undervalued Black victims might lead to claims tomorrow about "statistical disparities that correlate with the race or sex of other actors in the criminal justice system, such as defense attorneys or judges."[60]

He likewise repeatedly extended the institutional implications of a ruling for McCleskey beyond the capital context. For instance, he cited studies demonstrating racial disparities in prison terms and explained that "if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty."[61] Even more pointedly, he announced that "McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system."[62] And, throughout the opinion, Powell emphasized the central role discretion plays, not only in death-penalty practice, but throughout our criminal-legal processes—for example, that discretion is intrinsic to "our notions of criminal justice," that a holding for McCleskey would be "antithetical" to the "essential" and "fundamental role of discretion in our criminal justice system," that prosecutors have enjoyed "traditionally wide discretion" in all charging contexts, that prosecutors' discretionary decisions are "at the heart of the State's criminal justice system," and that the "capacity of prosecutorial discretion to provide individualized justice . . . is firmly entrenched in American law."[63]

Powell was right about one thing: if discretion and discrimination do pervade criminal-legal institutions (and they do), then opening the courthouse doors to empirically demonstrable racial imbalances genuinely could produce a cascade of litigation. The logic is that the Baldus study was no anomaly; if McCleskey won, other studies would show (and have shown[64]) comparable racial imbalances in capital charging and sentencing, generating a raft of additional, successful challenges. For a moderate like Powell, this was a truth too uncomfortable to articulate too forcefully.[65] Thus, Powell painted himself into a corner of contradictions. He was trying to do two things at once: downplaying systemic racism while playing up the systemic costs of rooting it out. He emphasized the scope of the institutional threat posed by statistical claims even as he twisted his decision in knots to wave away the immoral significance of those statistical claims. He amplified the value and virtue of discretion but discounted discretion's predictable relationship to racial discrimination, instead insisting that we cannot "assume that what is *unexplained* is invidious."[66]

59 *McCleskey*, 481 U.S. at 292.

60 *Id.* at 317.

61 *Id.* at 315.

62 *Id.* at 314–15.

63 *Id.* at 296–97, 311–12, 315.

64 *Infra* notes 70–71, 97–101 and accompanying text (discussing studies and cases about the influence of race on capital charging and sentencing, before and after *McCleskey*).

65 *Infra* Part II (discussing Powell's moderate sensibilities).

66 *McCleskey*, 481 U.S. at 311–13 (emphasis added).

Notice Powell's use of the term "unexplained." Powell claimed to credit the Baldus study, but, for him, its racial skews seemed to be something of a curiosity, unlikely to be replicated or anticipated. Per Powell: "Individual jurors bring to their deliberations qualities of human nature and varieties of human experience" that are "perhaps *unknowable*."[67] Likewise, Powell wrote that there is an "inherent *lack of predictability*" to these "uniquely human judgments," which he thought made them undeserving of constitutional condemnation.[68] But the lesson of the Baldus study is that racial skews are entirely foreseeable. This was not an instance of an "inherent lack of predictability" about which systemic actors must be given the benefit of the doubt, absent evidence to the contrary.[69] The Baldus study *was* (some of) the powerful evidence to the contrary—as were studies before and since.[70] And, of course, there is ample historical and sociological evidence beyond the Baldus study—contextual evidence that informs its findings.[71]

More to the point, if Powell were right that the influence of race is only irregular, then there should have been little reason to worry about statistical claims undermining criminal-legal institutions. Courts could readily deal with the occasional and unexpected persuasive empirical case as it arose. And, with respect to capital practice, if constitutional safeguards genuinely worked as well as Powell contended, then a "statistical jurisprudence" would produce only a trickle of challenges, not a flood.[72] But, of course, constitutional safeguards were not working well, as the Baldus study demonstrated. Leniency was (and is), in fact, animated by at least unconscious racial discrimination. These were the genuinely elevated stakes, and they invite the question: why was the Court so unconcerned

67 *Id.* at 311 (emphasis added).

68 *Id.* at 308, 311.

69 KENNEDY, *supra* note 15, at 336–37 ("The petitioner . . . was not asking the Court to make an[] . . . assumption. Rather, McCleskey's attorneys offered into evidence a comprehensive study showing that certain patterns in capital sentencing cannot plausibly be explained by any variable other than race.").

70 *Id.* at 329–31 (citing research and explaining that "[e]ven commentators who generally deride allegations of racial discrimination in the administration of criminal law concede that in the context of capital punishment the race of the victim consistently influences sentencing decisions"); COLE, *supra* note 51, at 132, 134 (discussing studies and explaining that "[v]irtually every study of race and the death penalty has concluded that, all other things being equal, defendants who kill white victims are much more likely to receive the death penalty"); Sundby, *supra* note 4, at 35 ("A long line of subsequent studies in a number of states have repeatedly confirmed the Baldus study's findings, further cementing *McCleskey*'s reputation as a case that chose illusion over reality.").

71 *Infra* notes 75–78, 115–128 and accompanying text (discussing the racialized history of criminal-legal enforcement and adjudication).

72 Sundby, *supra* note 4, at 27 ("Coming immediately on the heels of Powell's extensive protestations that all is well [with capital punishment], this [fear of a cascade of statistical claims] sounds like a warning not to pull back the curtain concealing the Wizard lest we see that the rule of law is not so magical after all . . . thus jarringly cast[ing] doubt into the sincerity of the preceding pages that assured the reader that the system is functioning well."); *infra* notes 189–196 and accompanying text (discussing Powell's articulation and rejection of the notion of a "statistical jurisprudence").

with getting down to the business of trying to tackle institutional racism and promote equal justice?[73]

Rather than address this question, Powell drew a dubious and insulting set of analogies that elevated the stakes still further and sent the decision spiraling down artificial slippery slopes with an almost farcical abandon. Specifically, in the last part of the decision, Powell reasoned that race is no different than other physical features—like good looks or hair color—that might also correlate with higher rates of leniency.[74] The absurdity, here, is twofold. First, and most obviously, race is qualitatively different—historically, sociologically, and constitutionally—from attractiveness or charisma. To say otherwise crosses the line from "naivete" to "completely tone deaf . . . willful blindness."[75] According to Brennan's dissent, "[o]ne could hardly contend that this Nation has on the basis of hair color inflicted upon persons deprivation comparable to that imposed on the basis of race."[76] Second, McCleskey's claim was "not speculative or theoretical" but "empirical"—not a question of "how a system *might* operate, but . . . empirical documentation of how it *does* operate."[77] In such circumstances, it was offensive and off-base for Powell to dream up "Cary Grant" correlations to systemic racism, "one of the nation's core struggles since its inception and over which a Civil War was waged."[78]

Nor did Powell stop there. His insensitivity to the realities of race was, likewise, on display with his observation that "[t]here appears to be no reason why a white defendant in a [majority-minority] city could not make a claim similar to McCleskey's if racial

73 Sundby, *supra* note 4, at 23 ("[A]fter Powell has listed safeguard after safeguard, one is still left asking, 'but *what* explains why someone who kills a white victim is 4.3 times more likely to be sentenced to death than if they kill a black victim?' Astonishingly, given that they at least give lip service to accepting the Baldus study as statistically valid, the majority never even attempts to answer the question."); *cf. McCleskey*, 481 U.S. at 367 (Brennan J., dissenting) ("If society were indeed forced to choose between a racially discriminatory death penalty (one that provides heightened protection against murder 'for whites only') and no death penalty at all, the choice mandated by the Constitution would be plain.").

74 *McCleskey*, 481 U.S. at 317–18 ("If arbitrary and capricious punishment is the touchstone under the Eighth Amendment, such a claim could—at least in theory—be based upon any arbitrary variable, such as the defendant's facial characteristics, or the physical attractiveness of the defendant or the victim, that some statistical study indicates may be influential in jury decisionmaking.").

75 Sundby, *supra* note 4, at 27, 30 (describing the reasoning in the last part of the *McCleskey* decision as crossing a line from "naivete" to "willful blindness").

76 *McCleskey*, 481 U.S. at 341 (Brennan J., dissenting); Sundby, *supra* note 4, at 30. *See generally* Schuette v. Coalition to Defend Affirmative Action, 572 U.S. 291, 380–81 (2014) (Sotomayor, J. dissenting) ("Race matters in part because of the long history of racial minorities' being denied access to the political process. . . . Race also matters because of persistent racial inequality in society. . . . Th[e] refusal to accept the stark reality that race matters is regrettable. . . . [W]e ought not sit back and wish away, rather than confront, the racial inequality that exists in our society.").

77 *McCleskey*, 418 U.S. at 324 (Brennan J., dissenting).

78 Sundby, *supra* note 4, at 30, 32 (characterizing Powell's analogy to physical attractiveness as "Cary Grant claims").

disparities in sentencing arguably are shown by a statistical study."[79] We can put to one side the fact that such discrimination against white defendants rarely (never?) exists. Here, Powell was appealing to an anti-classification conception of equal protection (as opposed to anti-subordination).[80] Personally, I do not agree with colorblind constitutionalism, but Powell at least had a coherent theoretical basis for analogizing between Black and white people. But, on that logic, why was Powell not committed to remedying racism against *both* Blacks *and* whites? Is that not what equal protection is all about for the colorblind constitutionalist?

In any event, all slippery slopes (real or imagined) are, ultimately, only as slick as the Court permits them to be. The *McCleskey* Court had at least two "doctrinal exit ramps" to avoid the slide (or to keep from fabricating slopes in the first instance).[81] A frank but credible option would have been to lower the stakes by limiting statistical claims to death-penalty practice.[82] Likewise, Powell should and could have confined constitutional analysis to race and other suspect classifications. Brennan wrote:

> The Court's projection of apocalyptic consequences for criminal sentencing is . . . greatly exaggerated. The Court can indulge in such speculation only by ignoring its own jurisprudence demanding the highest scrutiny on issues of death and race. As a result, it fails to do justice to a claim in which both those elements are intertwined—an occasion calling for the most sensitive inquiry a court can conduct.[83]

But Powell made no serious effort to cabin his decision. He insisted speciously that he could find "no limiting principle to the type of challenge by McCleskey," even as several were obviously available.[84] He thereby unduly recast statistical claims as an existential institutional threat.

This was not just sloppy judicial craftsmanship but, according to Randall Kennedy, a "demagogic assertion" that any other conclusion "would necessarily open a Pandora's box from which limitless disruption would ensue."[85] Powell had abandoned his claimed characteristic "cautious" approach in favor of a "somewhat shocking" assertion that "the-sky-will-fall"—a contention that "simply does not ring true on either a constitutional

79 *McCleskey*, 481 U.S. at 316 n.39.

80 On the debate between anti-classification and anti-subordination approaches, see generally Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 Harv. L. Rev. 1470 (2003).

81 Sundby, *supra* note 4, at 30.

82 *Supra* notes 47–49; *infra* notes 83, 105–106, and accompanying text.

83 *McCleskey*, 481 U.S. at 342 (Brennan J., dissenting).

84 *Id.* at 317 (majority opinion).

85 Kennedy, *supra* note 15, at 337; *infra* notes 189–196 and accompanying text (discussing Powell's fears that a "statistical jurisprudence" would undermine traditional judicial processes).

or emotional level."[86] The reader is left with the impression that an honest reckoning with race was just too daunting for Powell. In modern parlance, Powell believed that systemic racism was "too big to fail."[87] So, he chose an "illusion of the rule of law" over reality, which is precisely what Brennan had in mind when he dubbed Powell's approach "a fear of too much justice."[88] By hiding the ball—or, rather, rolling it down fantastical slippery slopes—Powell ignored the fact that pervasive racial bias in the administration of the death penalty ought to be "precisely the type of situation that the Eighth Amendment and Equal Protection Clause should be patrolling."[89]

The irony is that Powell did not need to elevate the stakes: the struggle for racial equality and against subordination is the defining feature of the Black experience in America. According to Brennan,

> [t]he prospect that there may be more widespread abuse than McCleskey documents may be dismaying, but it does not justify complete abdication of our judicial role. The Constitution was framed fundamentally as a bulwark against governmental power, and preventing the arbitrary administration of punishment is a basic ideal of any society that purports to be governed by the rule of law.

To be sure, dismantling institutional racism would be a colossal and probably impossible undertaking, constitutionally or otherwise. But there were ways, jurisprudentially, for the Court to move matters forward—even if incrementally only.[90] What Powell lacked was the moral courage—"the will" to try.[91] Instead, he deflected from and ultimately abandoned the constitutional project before it could even start.

B. Retreat to Formalism

Shortly after Justice Powell's death, Gerald Gunther praised him as a judge who "never disguised the difficulties, as lazy judges do who win the game by sweeping all the chessmen off the table."[92] In *McCleskey*, however, Powell did just that. He retreated to a hollow

86 Sundby, *supra* note 4, at 28.

87 *Infra* note 136 and accompanying text. *See generally* Philip E. Strahan, *Too Big to Fail: Causes, Consequences, and Policy Responses*, 5 ANN. REV. FIN. ECON. 43 (2013).

88 *McCleskey*, 481 U.S. at 339 (Brennan J., dissenting); Sundby, *supra* note 4, at 28–29 ("Powell is saying that we have a choice—we either can protect the illusion of the rule of law or we can acknowledge that racial bias is indeed infecting the system—and we choose to maintain illusion over confronting reality.").

89 Sundby, *supra* note 4, at 29.

90 *Infra* notes 102–110 and accompanying text (detailing the alternative jurisprudential options available to the *McCleskey* Court pursuant to positive constitutional law).

91 KENNEDY, *supra* note 15, at 340; COLE, *supra* note 51, at 139; *infra* notes 282–287 and accompanying text (distinguishing between *ability* and *will*).

92 Gerald Gunther, *Lewis F. Powell, Jr.—A Fine Judge, A Remarkable Human Being*, 99 COLUM. L. REV. 547, 551 (1999) (quoting Learned Hand).

conception of formalism that allowed him to convey the "false impression that the case [wa]s easy."[93] In that sense, he behaved like Cover's antislavery judges, who reached decisions "as if they were acting under the inexorable force of crystal clear commands, even when they weren't."[94] This is not to say that the *McCleskey* decision lacked a constitutional foundation. The holding fell "well within the ambit of expectations reasonably derived from prior rulings."[95] Still, it was not preordained; "reasonable people could disagree" about what positive law demanded.[96]

On the one hand, Powell had precedential support for the proposition that a statistical study could not establish a constitutional claim.[97] Courts had taken up the question before—albeit when presented with less sophisticated empirics. For instance, in *Hampton v. Commonwealth* (the "Martinsville Seven" case),[98] the Virginia Supreme Court rejected social science demonstrating that capital punishment for rape had been applied almost exclusively to Black men and boys convicted of crimes against white women."[99] Likewise, in *State ex rel. Copeland v. Mayo*, the Florida Supreme Court refused to infer anything about the defendant's individual case from aggregate statistics about the influence of race on capital punishment for rape: "The facts in none of these cases are shown to be remotely relevant to the case at bar. . . . To a sociologist or psychologist in some fields of research they would no doubt have value, but in a court of law as presented they are devoid of force or effect."[100] Even Justice Blackmun, who dissented in *McCleskey*, echoed the same sentiment during his time as an Eighth Circuit judge: "What we are concerned with here is [the defendant's] case and only [the defendant's] case. . . . We are not yet ready to condemn and upset the result reached in every case of a negro rape defendant in the State of Arkansas on the basis of broad theories of social and statistical justice."[101]

93 Kennedy, *supra* note 15, at 335; *see also* Cover, *supra* note 6, at 3 (noting that his antislavery judges applied purported rules mechanically and behaved as if "the law is embodied in a readily identifiable source," even when its application was not obvious).

94 Cover, *supra* note 6, at 232.

95 Kennedy, *supra* note 15, at 340.

96 Cole, *supra* note 51, at 137 ("There was nothing in the text of the Constitution, the history of its framing, or the Court's prior doctrine which required the Court to resolve either [equal protection or cruel and unusual punishment] for or against McCleskey."); Kennedy, *supra* note 15, at 340; *but cf.* McCleskey v. Kemp, 481 U.S. 279, 345 (1987) (Blackmun, J., dissenting) (describing the majority's holding as a "departure from . . . well-developed constitutional jurisprudence").

97 Kennedy, *supra* note 15, at 340.

98 Hampton v. Commonwealth, 58 S.E.2d 288 (Va. 1950).

99 Kennedy, *supra* note 15, at 312–16 ("The statistics offered by the defendants should have been deemed sufficiently arresting to require explanation."); Eric W. Rise, The Martinsville Seven (1995).

100 State *ex rel.* Copeland v. Mayo, 87 So. 2d 501, 503 (Fla. 1956).

101 Maxwell v. Bishop, 398 F.2d 138, 147 (8th Cir. 1968); Hugo Adam Bedau, The Death Penalty in America: Current Controversies 250 (1997) ("The argument advanced by McCleskey's attorneys was essentially a vastly more elaborate version of the argument that inaugurated the constitutional attack on the death penalty two decades earlier in *Maxwell v. Bishop*.").

On the other hand, only one year before *McCleskey*, Justice Powell himself had authored the Court's opinion in *Batson v. Kentucky*, which held, in the narrow context of jury selection, that statistical patterns could be used to make out a *prima facie* claim of a discriminatory purpose, compelling the government thereafter to articulate race-neutral reasons for its apparently race-based exercise of peremptory strikes of prospective jurors.[102] And Powell had even suggested, in dissent in *Furman v. Georgia*, that future defendants might offer an equal protection argument, "not presented by any of the petitioners today," that there existed, by race, "substantial statistical evidence . . . to show a pronounced [systemic] disproportion" in administration of the death penalty.[103] In *McCleskey*, Powell could have invoked his *Furman* dicta to extend his *Batson* approach to statewide and countywide charging and sentencing patterns, at least in the capital context, on the well-developed constitutional theory that "death is different."[104] As Brennan explained, there is "a qualitative difference between death and any other permissible form of punishment," and hence "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."[105] Nevertheless, without much explanation, Powell "g[a]ve new meaning" to the term "death is different" by imposing a greater burden on the defendant, requiring a showing of "exceptionally clear proof" of a discriminatory purpose to make out an equal protection claim.[106]

A bigger surprise, perhaps, is how summarily Powell rejected McCleskey's claim of cruel and unusual punishment. In a move that, at once, elevated the stakes and retreated

102 Batson v. Kentucky, 476 U.S. 79, 93 (1986) ("Total or seriously disproportionate exclusion . . . is itself such an unequal application of the law as to show intentional discrimination."); COLE, *supra* note 51, at 136 ("In other areas of the criminal law, such as the selection of jury venires and the use of peremptory strikes, the Court has permitted such inferences to be drawn from statistical patterns.").

103 Furman v. Georgia, 408 U.S. 238, 449 (1972) (Powell, J., dissenting).

104 *See*, *e.g.*, Turner v. Murray, 476 U.S. 28, 35 (1986) ("The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence."); Woodson v. North Carolina, 428 U.S. 280, 303–04 (1976) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."); *see also* COLE, *supra* note 51, at 138 (explaining that the Court "had long recognized that 'death is different,' requiring heightened safeguards"); McCleskey v. Kemp, 481 U.S. 279, 340, 364 (1987) (Brennan, J., dissenting) (citing *Batson* for the proposition that McCleskey's statistical evidence "demands an inquiry into the prosecutor's actions" and noting that "this Court has consistently acknowledged the uniqueness of the punishment of death").

105 *McCleskey*, 481 U.S. at 340 (Brennan J., dissenting).

106 *Id.* at 297 ("Implementation of these laws necessarily requires discretionary judgments. Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused."); KENNEDY, *supra* note 15 at 332–33 (describing *McCleskey*'s heightened standard); *supra* note 54 and accompanying text.

to formalism, Powell insisted that the Court should be cautious to exercise judicial restraint because "the Eighth Amendment is not limited in application to capital punishment, but applies to all penalties."[107] But Eighth Amendment case law (more so than any other constitutional doctrine) has drawn a sharp line between noncapital and capital cases.[108] And not only does the Eighth Amendment treat the death penalty with greater scrutiny, but, contrary to equal protection doctrine, it also demands no proof of a discriminatory purpose; a defendant need only demonstrate a "constitutionally unacceptable risk" of "arbitrary and capricious" punishment.[109] Because the Court has never quantified what counts as a "constitutionally unacceptable risk," it could have readily held that the Baldus study sailed over that bar.[110]

With respect to both constitutional claims, the question of whether and to what degree Powell retreated to formalism turns on our definition of that term—a debate that is largely, but not completely, beyond the scope of this essay. If formalism is, in its most basic form, a decision "logically deduced from . . . the rules and the facts . . . alone,"[111] then Powell's opinion unquestionably trended toward the formal. Formal decisions tend to be informed by a more "limited set of materials . . . considered as relevant,"[112] and, along this dimension, Powell was positively stingy, almost to the point of obtuseness. The facts that Powell considered relevant were quite narrow. Powell insisted that McCleskey had "relie[d] *solely* on the Baldus study."[113] And, even with respect to the study, Powell discounted the statewide and countywide statistics because they did not resolve whether "the decisionmakers in *his* case acted with discriminatory purpose."[114] But, perhaps more importantly, Powell uncoupled the Baldus study from its political, social, cultural, and

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

108 *See*, *e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976). *See generally* William W. Berry III, *Cruel and Unusual Non-Capital Punishments*, 58 Am. Crim. L. Rev. 1627 (2021); Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. Davis L. Rev. 111, 116, 151–53 (2007).

109 Booth v. Maryland, 482 U.S. 496, 503 (1987); Caldwell v. Mississippi, 472 U.S. 320 (1985); *McCleskey*, 481 U.S. at 324 (Brennan, J., dissenting) ("Defendants challenging their death sentences . . . never have had to prove that impermissible considerations have actually infected sentencing decisions. We have required instead that they establish that the system under which they were sentenced posed a significant risk of such an occurrence."); Cole, *supra* note 51, at 136 ("Unlike his equal protection claim, McCleskey's Eighth Amendment claim did not require a finding of invidious intent. Arbitrary punishment is 'cruel and unusual' regardless of intent.").

110 Cole, *supra* note 51, at 138 ("The question of what amounts to a 'constitutionally unacceptable risk' [in particular] has no determinate answer.").

111 Michael S. Moore, *The Semantics of Judging*, 54 S. Cal. L. Rev. 151, 155–60 (1981) ("[A] formalist judge has an extremely limited set of materials to consider as relevant to his decision in a particular case.").

112 *Id.*

113 *McCleskey*, 481 U.S. at 292–93 (emphasis added).

114 *Id.* ("McCleskey . . . offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence.").

historical backdrop. He disregarded the well-established qualitative narrative behind the Baldus study's quantitative findings. That narrative is, of course, the story of racial subordination in America and its criminal-legal systems.

Powell did not need a critical race theorist to educate him on what he was missing, though there were (and are) plenty who could have done so.[115] He could simply have turned to the *McCleskey* dissents. Brennan, for his part, reasoned that "the evaluation of evidence suggesting . . . a correlation must be informed not merely by statistics, but by history and experience."[116] And, in much of his dissent, he detailed the ugly and ongoing history of racial subordination that informed the Baldus study. Brennan noted, for instance, that Georgia once had a de jure "dual system" of criminal punishment with a "lineage traced back to the time of slavery," which continued through the Jim Crow era and "is still effectively in place."[117] Randall Kennedy wrote:

> The Court's suggestion that the legacy of Georgia's history shines *no* light on the Baldus statistics is both laughable and tragic. . . . [Powell did not] want to concede facts that indicate[d] that the Court was knowingly willing to countenance a regime of capital punishment in which race significantly influenced decisions as to who would be spared and who would be killed. So Powell acted as if the Baldus study uncovered a minor discrepancy.[118]

To all of this, Powell reasoned only that "the history of racial discrimination in this country" must be "reasonably contemporaneous with the challenged decision" to have "probative value."[119] The Court "cannot accept," Powell concluded baldly, "official actions

115 *See*, *e.g.*, ALEXANDER, *supra* note 2; Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 106 (2019) ("[T]oday's carceral punishment system can be traced back to slavery and the racial capitalist regime it relied on and sustained."); Angela Y. Davis, *From the Prison of Slavery to the Slavery of Prison: Frederick Douglass and the Convict Lease System, in* THE ANGELA Y. DAVIS READER 76 (Joy James ed. 1998).

116 *McCleskey*, 481 U.S. at 341 (Brennan J., dissenting). *See generally* Charles L. Barzun, *The Genetic Fallacy and a Living Constitution* (manuscript on file with author) ("[H]istorical explanations do, or should, matter. . . . [T]he historical explanation of a practice is relevant to an assessment of its present value.").

117 *McCleskey*, 481 U.S. at 329–30, 332–33 (Brennan J., dissenting) (describing nineteenth-century Georgia law that provided for mandatory capital punishment for Black murderers and Black men who raped white women, while rapes of Black women were punishable "by fine and imprisonment, at the discretion of the court"); *cf.* United States v. Clary, 34 F.3d 709 (1994) ("That black people have been punished more severely for violating the same law as whites is not a new phenomenon. A dual system of criminal punishment based on racial discrimination can be traced back to the time of slavery."); Roberts, *supra* note 115, at 105–06 (tracing unequal punishment practices from slavery through the Jim Crow era through the present day).

118 KENNEDY, *supra* note 15, at 336–38. I am reminded, here, of Justice Marshall's observation that sometimes, when one cannot account for the reasons for racially skewed state action, the explanation is "less likely to be *inarticulable* than *unspeakable*." Florida v. Bostick, 501 U.S. 429, 441 n.1 (1991) (Marshall, J., dissenting).

119 *McCleskey*, 481 U.S. at 298 n.20.

taken long ago as evidence of current intent."[120] In this way, Powell minimized the significance not only of history but also the Baldus study. He refused to recognize how the history informed the statistics and, likewise, how the statistics were evidence that the history was not ancient but rather ongoing.

By divorcing the Baldus study from its context, Powell rendered its findings not only irrelevant but somewhat nonsensical.[121] This marked something of a shift for Powell. He typically aspired to bring to his jurisprudence a kind of commonsense reasonableness. As Mark Tushnet explained, "Powell's centrism amounted to taking the Constitution to mean what any person as reasonable as Powell thought it to mean."[122] This is, in its own right, a somewhat problematic account. Our subjective notions of reasonableness and common sense are colored heavily by our experiences or lack thereof.[123] When Justice Stewart wrote of obscenity that "I know it when I see it," he was declaring dispositive his own narrow (that is to say, privileged and male) experiences and perspective on a contested moral question that affects more directly systemic outsiders with comparatively less political power and with different experiences and perspectives that traditionally have been (and continue to be) jurisprudentially underappreciated.[124] This is precisely why it is so critical that state and federal benches include a diversity of judges whose breadth of backgrounds mirrors society more broadly—something Justice Sotomayor was expressing, however clumsily, with her comment: "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."[125] But no matter a judge's distinct experiences or perspective,

120 *Id.*

121 *Supra* notes 66–68 and accompanying text (describing Powell's efforts to paint the Baldus study's finding as "unexplained" and "unknowable").

122 Tushnet, *supra* note 18, at 1861, 1873–75.

123 *Supra* notes 17–19, 26–36; *infra* notes 203–205, 209–220, 242–259 and accompanying text (describing Powell's "limited social vision" and its influence on his jurisprudence); *see also* Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 852 (2009) (discussing the theory of "cultural cognition," which posits that normative beliefs are products of experience).

124 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it."); Catharine A. MacKinnon, *Not A Moral Issue*, in APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES: SEX, VIOLENCE, WORK, AND REPRODUCTION 38 (D. Kelly Weisberg & Ronnie Steinberg eds., 1996) ("If I ask, from the point of view of women's experience, does he know what I know when I see what I see, I find that I doubt it, given what's on the newsstands. . . . To me, his statement is precisely descriptively accurate. . . . That is, the obscenity standard—in this it is not unique—is built on what the male standpoint sees.").

125 Ta-Nehesi Coates, *About That "Wise Latina" Statement*, ATL. (May 27, 2009) (criticizing but also contextualizing Sotomayor's comment). *See generally* Brandon Hasbrouck, *Movement Judges*, 97 N.Y.U. L. REV. 631 (2022).

there are circumstances where the social meaning and import of a particular cultural phenomenon or legal practice ought to be obvious to anyone exercising even a modicum of moral imagination and good-faith common sense. Still, there is great virtue and value in our commonsense efforts to uncover the social meaning of a given cultural or legal practice.

Consider, on this score, Charles Black's discussion of the *obviousness* of the insidious and invidious nature of de jure discrimination:

> That a practice, on massive historical evidence and common sense, has the designed and generally apprehended effect of putting its victims at a disadvantage, is enough for law. At least it always has been. . . . The Court that refused to see inequality . . . would be making the only kind of law that can be warranted outrageous in advance—law based on self-induced blindness, or flagrant contradiction of known fact.[126]

Black was articulating a commonsense conception of systemic racism—a folk conception shared by Justice Harlan, who, in his *Plessy v. Ferguson* dissent, said of systemic racism that "[e]very one knows" the significance of race in America and that "[n]o one would be so wanting in candor" as to ignore the social fact that the "arbitrary separation of citizens, on the basis of race" is a means to brand the subordinated group with "a badge of servitude."[127] And Justice Brennan, in his *McCleskey* dissent, likewise recognized what ought to have been plain to Powell—specifically, that "[t]he conclusions drawn from McCleskey's statistical evidence are . . . *consistent with the lessons of social experience* . . . [a] determination . . . [that] is at its core *an exercise in human moral judgment, not a mechanical statistical analysis*."[128]

In *McCleskey*, however, either Powell abandoned his professed common sense, or common sense abandoned Powell. He disregarded race and racism as *functional* and *meaningful* social facts. And he discarded his conventional reputation for incrementalism in favor of a formal (practically rule-bound) rejection of systemic statistical claims. This, then, is how Powell retreated to formalism—by forsaking what his most-ardent champions have claimed were his most characteristic and attractive jurisprudential qualities.[129]

126 Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 426, 428 (1960) (discussing Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

127 Plessy v. Ferguson, 163 U.S. 537, 557, 562 (1896) (Harlan, J., dissenting).

128 McCleskey v. Kemp, 481 U.S. 279, 328, 334–35 (1987) (Brennan, J., dissenting) (emphasis added).

129 *Infra* notes 146–147 and accompanying text and Part II (examining in more detail Powell's jurisprudential and dispositional qualities).

C. *Ascription of Responsibility Elsewhere*

Justice Powell's biographer, John Jeffries, wrote that Powell bore an "uneasiness about personal responsibility" and would "attempt to distance himself from the consequences of his own acts."[130] That trait was on full display in *McCleskey*. To the extent Powell even acknowledged systemic racism, he framed it as a political question:

> McCleskey's arguments are best presented to the legislative bodies. It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are constituted to respond to the will and consequently the moral values of the people.[131]

Such efforts to ascribe responsibility to the populace and its representatives come straight from the playbook of Robert Cover's antislavery judges, who washed their hands of the immoral stain of the fugitive slave acts by pinning the evil elsewhere.[132] Consider, by way of example, *Miller v. McQuerry*, where Justice John McLean announced:

> With *abstract principles of slavery*, courts called to administer this law have nothing to do. It is for the people who are sovereign and their representatives. . . . [T]he hardship and injustice supposed arises out of the institution of slavery, over which we have no control. Under such circumstances, we cannot be held answerable.[133]

But, of course, there was nothing morally "abstract" about the "principles of slavery," just as there was nothing "unexplained" about the Baldus study.[134] This hands-off approach—this feigned incomprehension of evidence of highly disturbing, racist institutions and practices—translated to what Cover called "a broad and almost universal judicial acquiescence to [political] power."[135] Or, as David Cole said of *McCleskey*, "In the face of a problem much bigger than it felt it could handle, the Court . . . defined the problem away by declaring it not constitutional in nature and deferred to the legislature."[136] And

130 Jeffries, *supra* note 11, at 429.

131 *McCleskey*, 481 U.S. at 319 (internal quotation marks and citations omitted).

132 Cover, *supra* note 6, at 3, 229, 235–36 (noting that his antislavery judges operated according to the view that "the will behind the law is . . . *clearly not* that of the judges" but is rather the "imperial will," and that the judge "is a mechanical instrument of the will of others" and "is not responsible for the content of the law but [only] for its straightforward application.").

133 Miller v. McQuerry, 17 F. Cas. 332, 339, 340 (C.C.D. Ohio 1853) (emphasis added).

134 *Supra* notes 66–68 and accompanying text.

135 Cover, *supra* note 6, at 236.

136 Cole, *supra* note 51, at 139; *see also supra* note 87 and accompanying text (discussing the perception that systemic racism might be "too big to fail").

Powell's deferential conception of separation of powers extended likewise to the executive—namely, charging prosecutors who he noted enjoy "traditionally wide discretion."[137] On Powell's reasoning, it would risk "impropriety" to ask prosecutors "to defend their decisions to seek death penalties, often years after they were made."[138]

"The judicial conscience is an artful dodger," wrote Robert Cover. "Before it will concede that a case is one that presents a moral dilemma, it will hide in the nooks and crannies of the professional ethics, run to the caves of role limits, seek the shelter of separation of powers."[139] Notice how Powell subtly dodged accountability in *McCleskey*. On first pass, the opinion strikes the reader as a judicial command to particularize justice. After all, the Baldus study was insufficient precisely because its aggregate statistics "could not say anything in particular about . . . the circumstances of his conviction but only about the general pattern of capital sentencing in Georgia and Fulton County."[140]

However, the *McCleskey* Court made no move to constitutionally guarantee an individualized approach to charging and sentencing; rather, the Court abandoned oversight, ascribing responsibility for individualization to institutional stakeholders' *notions* of individualized justice (notwithstanding persuasive statistical evidence that these notions skewed systemically and systematically by race). According to Cole,

> [d]iscretion is constitutionally required in order to provide individualized justice. In *McCleskey*, however, the Court confronted evidence that discretion was being used not to make individualized judgments, but to discriminate on group-based grounds. *Race discrimination is the very antithesis of individualized judgment*; it judges an individual not on the basis of his personal traits, but on the basis of group identity. Yet the majority determined that this was an inevitable cost of discretion.[141]

This is what Brennan meant when he accused Powell of getting matters backward: "Discretion is a means, not an end."[142] Powell gave prosecutors and juries free reign to indulge their implicit and explicit (but quiet) biases, to engage in unbalanced groupthink, and to act on these impulses in a manner that made it highly predictable that the wages of

137 McCleskey v. Kemp, 481 U.S. 279, 296 (1987) (internal quotation marks omitted).

138 *Id.*

139 Cover, *supra* note 6, at 201.

140 Jeffries, *supra* note 11, at 438; *see also supra* notes 40–44 and accompanying text.

141 Cole, *supra* note 51, at 137 (emphasis supplied); *see also McCleskey*, 481 U.S. at 336 (Brennan, J., dissenting) ("Decisions influenced by race rest in part on a categorical assessment of the worth of human beings according to color, insensitive to whatever qualities the individuals in question may possess.").

142 *McCleskey*, 481 U.S. at 336 (Brennan J., dissenting) (explaining that when courts fail to constitutionally regulate discretion appropriately, "the very end that discretion is designed to serve is being undermined").

victimizing the wrong (or right) race of a person would be death (or life or better). Meanwhile, Powell imposed on the ostensibly constitutionally protected party—*the defendant*—the burden to particularize the constitutional claim—to show that "the decisionmakers in *his* case acted with discriminatory purpose" or substantially risked arbitrary or capricious punishment.[143]

Institutional stakeholders deserved no such deference. The Baldus study revealed, predictably, that the Georgia capital sentencing process was less a dice throw than a weighted roulette wheel with a consistent bias against black. Justice Brennan explained, "At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. . . . [T]here was a significant chance that race would play a prominent role in determining if he lived or died."[144] But no matter, for Powell. This was "a political, not a legal question."[145] He left individualization to other actors and pinned on them the moral (but not legal) blame for failing to deliver it.

Powell once insisted that he was opposed to "immutable line drawing."[146] Yet, in *McCleskey*, he engaged in just that: he drew a practically immutable line against statistical constitutional claims of systemic racism in the criminal-legal system. He took a "doubly disfavored minority" defendant—a Black man convicted of capital murder—and abandoned constitutional review in favor of majoritarian political processes, thereby outsourcing decisions to individualize (or, alternatively, to lump and stereotype).[147] By doing so, he lost sight of the fact that constitutional equal protection is the judiciary's responsibility; it cannot be ascribed elsewhere.

II. A LOVE OF LAW

There is no set definition of judicial pragmatism, but it entails, at least, an effort to "do the best . . . for the future, in the circumstances, unchecked by any need to respect or secure consistency in principle."[148] On that definition, Justice Powell probably qualified. Throughout his career he sought to "balance" competing interests with a flexible

143 *Id.* at 292–93 (emphasis added).

144 *Id.* at 321 (Brennan, J., dissenting).

145 Cole, *supra* note 51, at 138–39.

146 Argersinger v. Hamlin, 407 U.S. 25, 49 (1972) (Powell, J., concurring).

147 Cole, *supra* note 51, at 138–39 ("To tell a member of a doubly disfavored minority such as Warren McCleskey to seek his remedy through the majoritarian process is to relegate him to no remedy at all.").

148 Ronald Dworkin, Law's Empire 161 (1986) (offering this definition of pragmatic judging).

"open-mindedness, non-dogmatic even handedness, and incessant probing."[149] Jeffries explained that

> he thought it necessary that law should change, that it should fit the facts and respond to the lessons of experience. He was too practical to think otherwise. Never much interested in ideological abstractions, Powell readily accepted the idea that the ultimate test of law was how it worked. . . . If the law did not work, if it failed its objectives and imposed unintended costs, then it should change. . . . [T]he only external standard for evaluating legal rules was to look at the results . . . judged pragmatically.[150]

In a fashion that presaged the minimalism of Justice Sandra Day O'Connor, Powell took "one case at a time" and resisted the idea that "precedent was sacrosanct or that law could be isolated from social concerns."[151] Powell took pride—as a lawyer and judge—in "doing justice case by case," even if it meant "zigzagging back and forth . . . based on his personal sense of justice without adhering to a clear, logically consistent constitutional philosophy."[152] In Powell's own estimation: "I never think of myself as having a judicial philosophy. . . . I have in mind that each one of these cases is enormously important to the parties, particularly to the defendant in a criminal case. I try to be careful, to do justice to the particular case."[153] This was an all-things-considered style he brought even to other capital cases where, John Jeffries noted, he was sometimes "at his most particularistic," drawing "hair-splitting distinctions" about "the rare case . . . so outrageous and so serious . . . as to justify society's ultimate penalty."[154] By this undertheorized approach to constitutional law, Powell situated himself squarely at the Supreme Court's "center of gravity" as its "guiding spirit" and "most characteristic voice."[155]

149 Jeffries, *supra* note 11, at 12, 43, 561; Gunther, *supra* note 92, at 547–48; Tushnet, *supra* note 18, at 1873–74 (describing Powell's "balancing" as "his bulwark against a rule-based formalism").

150 Jeffries, *supra* note 11, at 41–43, 561 (describing Powell as capable of distinguishing "flexibility from weakness and fanaticism from belief").

151 *Id.* at 43; *see also* Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (2001).

152 Jeffries, *supra* note 11, at 403, 470, 558 (explaining that Powell's opinions were a "mosaic of accommodation, highly differentiated and strongly variegated," and once describing Powell as perhaps "trying to draw too fine a line"); Tushnet, *supra* note 18, at 1855; Stuart Taylor, Jr., *Powell on His Approach: Doing Justice Case by Case*, N.Y. Times (July 12, 1987), https://www.nytimes.com/1987/07/12/us/powell-on-his-approach-doing-justice-case-by-case.html.

153 Taylor, *supra* note 152.

154 Jeffries, *supra* note 11, at 436 (discussing Coker v. Georgia, 433 U.S. 584 (1977)); Taylor, *supra* note 152.

155 Jeffries, *supra* note 11, at 12, 404–05 (explaining that Powell was in the majority more than any of his contemporaries and noting that "[i]n nearly five hundred decisions involving the criminal law, Powell disagreed with the outcome fewer than one time in ten").

Powell's pragmatism was a product of his upbringing and training. In law school, he rejected "rule-bound formalism" in favor of a "sociological jurisprudence."[156] Under the tutelage of legal realists, such as Roscoe Pound and Felix Frankfurter, he took seriously "the idea that legal rules and decisions could be looked at practically, as they were applied, according to the effects they produced on society."[157] He was not, however, a thorough-going legal realist, much less a radical.[158] He believed that legal rules were eminently decipherable; he distrusted "the wide-open spaces of constitutional law" and "came to the Court with a simple faith in the clarity and integrity of constitutional law."[159] He "embraced law chiefly as a tradition rather than as an instrument of change."[160] In this way, he was "predisposed toward the status quo" and "instinctively recoiled from extreme positions."[161]

Powell, likewise, had a reputation as a decent person of "great modesty" who was "soft-spoken" and "deeply rooted in Virginia culture" and its gentility.[162] His former clerk and longtime mentee and friend, Judge J. Harvie Wilkinson III, described him as "a very kind man with very high standards," who "was like a second father" and "never once snapped at me or raised his voice."[163] But Powell also exhibited a formality and propriety that extended even to family dinners that Wilkinson recalled attending as a child—evenings where the seating arrangement was orchestrated carefully to reflect a "sense of hierarchy."[164] Wilkinson recounted that, notwithstanding his lifelong relationship to the man, "Justice Powell never once asked that I call him by his first name."[165] In other words, Powell possessed a patrician temperament, but it was tempered, in turn, by a degree of civility, geniality, affection, equanimity, grace, and charitability.[166]

A. Powell's Pride

Justice Powell was ambitious, but he remained always "ineradicably unsure" of his own talent and worth.[167] Plagued by "genuine self-doubt," he even tried several times to

156 *Id.* at 41–43.

157 *Id.*

158 *Id.* at 41–42 (noting that although Powell was influenced by legal realism, "he did not share Frankfurter's impulse for reform").

159 *Id.* at 409–10.

160 *Id.* at 42.

161 *Id.* at 42, 170; Tushnet, *supra* note 18, at 1854.

162 Gunther, *supra* note 92, at 547–48.

163 J. Harvie Wilkinson III, *Lewis F. Powell—A Personal View*, 65 Wash. & Lee L. Rev. 3–6 (2008).

164 *Id.* at 3–4.

165 *Id.* at 6–7.

166 Jeffries, *supra* note 11, at 562 (quoting Wilkinson's description of Powell as a judge "leavened by decency, conscientious in detail and magnanimous in spirit, [and] solicitous of personal dignity").

167 *Id.* at 8, 534 (describing Powell as "quiet" and "self-deprecating" and noting that "[h]is long string of achievements were not the fruits of easy confidence, but of ceaseless struggle against self-doubt").

remove himself from consideration for the Supreme Court nomination.[168] Still, there were beliefs about which he was never in doubt, never unsure—*to wit*, his "faith in legal institutions" and his conviction that the legal profession was "the greatest of them all."[169] As a young man, Powell recognized that these were the people who got things done—"the people at the center of the stage."[170] And his faith in the profession and its people only "grew stronger as the years went by."[171] This translated to "a strong sense of judicial obligation."[172] As Jeffries put it, "'Duty' was the magic word. If there was one constant in Powell's life, it was his sense of duty."[173]

This is a topic explored at some length by Judge Wilkinson, who could fairly be described as Powell's dispositional, jurisprudential, and ideological doppelgänger.[174] Wilkinson saw the Constitution as, "above all, a tribute to process on a grand scale—a sacred commitment that we as a society will settle differences a certain way."[175] For Wilkinson, "law remains the best hope we have."[176] As he explained, "law draws its life . . . from citizens who carry an allegiance to the legal order in their hearts. And as much as I love the law, I would love it even more if every citizen who left my courtroom would have just a tiny bit more faith in . . . [the principles of] liberty, justice, freedom, equality.[177] Powell shared with Wilkinson this love and faith—this awe-inspired desire—to preserve and protect the majesty of *all things law*. In this way, Powell and Wilkinson resembled Anthony Kronman's archetype of the "lawyer-statesman": the legal professional who charts the "middle course" and seeks the hidden wisdom behind the apparent "quirks and absurdities of the *status quo*."[178] Kronman explained that this figure embodies "an ancient form of conservatism" grounded in "character-virtues" and "dispositional attitudes," such as

168 *Id.* at 1–2, 4, 8 ("Few knew Powell well enough to detect the anxiety beneath his self-control . . . .").

169 Wilkinson, *supra* note 163, at 8 (detailing Powell's "faith in the possibilities of law").

170 Taylor, *supra* note 152 (relaying Powell's memory that, as a teenager, he wanted to become a lawyer because "the people at the center of the stage were mostly lawyers and military men").

171 Jeffries, *supra* note 11, at 5.

172 Gunther, *supra* note 92, at 548.

173 Jeffries, *supra* note 11, at 6.

174 J. Harvie Wilkinson III, All Fallen Faiths: Reflections on the Promise and Failure of the 1960s (2017); *see also* Jeffries, *supra* note 11, at 293–94 (describing the "special relationship" between Wilkinson and Powell, and noting that Wilkinson "was very like Powell, not only in his southern origin and privileged background, but also in attitude and temperament"); Wilkinson, *supra* note 163, at 3–4 (2008) ("[O]ur lives . . . were so closely intertwined. . . . He and my father were best friends . . . . It was Justice Powell who introduced my mother and father to each other.").

175 Wilkinson, *supra* note 174, at 91.

176 Univ. of Va. Sch. of L., *"All Falling Faiths," with Judge J. Harvey Wilkinson III '72*, YouTube (Apr. 17, 2018), https://www.youtube.com/watch?v=ioSDd7pVR-4.

177 Wilkinson, *supra* note 174, at 91.

178 Anthony T. Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession 118, 154–55, 161–62 (2001).

"public-spirited stoicism," a penchant for "pragmatic gradualism," the pursuit of "excellence," the exercise of "practical wisdom," and "civic-mindedness."[179] Most of all, the lawyer-statesman retains a "reverence" for law and approaches it with an "aristocratic" bearing, which entails more than just a resistance to "every rapid change in the legal order"; it is, rather, the posture of a person who disdains "unruly proceedings" and delights in the "ceremonial trappings of the law" and its "requirements of orderliness and precision."[180]

Powell was, in a nutshell, a *proud institutionalist*. His moral identity was defined by a *reverence*—his personal conception of what Lon Fuller called the "inner morality of law."[181] Indeed, themes of "reverence" and "faith" recur throughout John Jeffries's biography—for example: "Powell approached the Court with a kind of reverence. The Supreme Court was the temple of his belief in reason, in moderation, in the worth and progress of the search for a perfect balance of order and liberty. He had this faith long before he became a Justice, and he never lost it afterward."[182] Powell was convinced of the majesty of his profession and "never became cynical about the process of judging."[183] For Powell, then, "rule fidelity" and "role fidelity" were moral terms.[184] This made Powell an anti-positivist, even if his anti-positivism was more attitudinal than theoretically developed.[185] He may have resisted the notion of an overarching judicial philosophy,[186] but he still displayed one—a principled, pragmatic institutionalism. The law was his thing, and its ministers were his people.[187] He focused, principally and in principle, on what was good for it and them. In this sense, Robert Cover's notion of a "moral-formal dilemma" is simply inapplicable to Powell. Powell's anti-positivist choices tended, instead, to be trade-offs between two moral commitments—a commitment to an extralegal moral course and a commitment to the rule of law as a moral virtue. Any pretense, on Powell's part, toward positivism was just that—a pretense or, at most, a gesture or expedient to underscore

179 *Id.* (discussing Alexis de Tocqueville).

180 *Id.* at 118, 154–55, 161–62 (describing the "'aristocratic' sentiment" of the lawyer-statesman).

181 Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 650 (1958).

182 JEFFRIES, *supra* note 11, at 305, 452 (describing Powell's "reverence for the law").

183 *Id.* at 305.

184 *Supra* notes 7, 56 and accompanying text (discussing Robert Cover's notions of "rule fidelity" and "role fidelity").

185 By "anti-positivism," I have in mind an umbrella term that captures any conception of law or legalism that is morally inflected intrinsically. *See, e.g.*, Emad H. Atiq, *There Are No Easy Counter-Examples to Legal Anti-Positivism* 17 J. ETHICS & SOC. PHIL. 1, 2 (2020) ("Anti-positivism is the view that a rule's moral features ground its legality fundamentally."); *see also infra* note 252 and accompanying text.

186 *Supra* notes 149–161 and accompanying text.

187 *Infra* Part II.B.

forcefully his foundational beliefs in the moral importance of the rule of law and his corresponding fidelity to its agents and implements.[188]

On this reading, Powell's *McCleskey* decision was animated not by "formal legal doctrine" but by moral apprehension—principled pragmatic concerns—over the Baldus study's threat to "the judiciary's role."[189] Powell was paralyzed with fear that a "statistical jurisprudence" would constitute "nothing less than a fundamental challenge to the criminal-legal system."[190] In the first instance, Powell perceived institutional peril in the Baldus study's underlying implication—that is, that systemic racism was (and is) pervasive. In this sense, his decision was a matter of shooting the messenger: "[I]f one hears such a message, . . . that black life is being valued less than white life . . . it is going to bring about a crisis in one's constitutional faith . . . destined to bring about disappointment, disillusionment, and anger."[191]

Likewise, Powell was uncomfortable with mathematics. During the drafting of his *McCleskey* opinion, he confided in a memorandum that "[m]y understanding of statistical analysis ranges from limited to zero."[192] But, significantly, this was not a situation where Powell's difficulties could have been solved by a class in econometric methods; Powell's concerns were normative in nature. He was convinced that "numerology"—as he once derisively referred to data—did not belong in courtrooms.[193] As Scott Sundby explained, "his belief in the legal process and its actors"—his belief in legal argumentation and adjudication as a *human* enterprise—was the root of "his distrust of 'statistical

188 It seems that something like this possibility was not entirely lost on Cover. To the contrary, at one point in JUSTICE ACCUSED, he reframed the antislavery judge's "moral-formal dilemma" as, potentially, "a moral-moral decision" between a moral concern for the "liberty" of the enslaved human being and moral anxiety over "the viability of the social compact." COVER, *supra* note 6, at 197–98. Here, Cover seemed to concede that, sometimes, positivism *qua* positivism does not do the real work of resolving moral-formal dilemmas; instead, positivism might operate only as a legal hook for an underlying *moral allegiance* to positive legality.

189 COLE, *supra* note 51, at 138 ("What drove the majority to reach its result was not formal legal doctrine but pragmatic concerns about the judiciary's role."

190 *Id.* at 138–39 (discussing Powell's concern that crediting statistical constitutional claims would "throw[] into serious question the principles that underlie our entire criminal justice system"); Sundby, *supra* note 4, at 6 (using the term "statistical jurisprudence").

191 *Id.* at 29.

192 JEFFRIES, *supra* note 11, at 439.

193 Ballew v. Georgia, 435 U.S. 223, 246 (1978) (Powell, J., concurring). Powell's very use of the term "numerology" suggests that he perceived rigorous social science to fall into a category of quackery with pseudosciences, like astrology. *See* WIKIPEDIA, *Numerology* ("Numerology is the pseudoscientific belief in a divine or mystical relationship between a number and one or more coinciding events. . . . This colloquial use of the term is quite common within the scientific community and it is mostly used to dismiss a theory as questionable science."); *see, e.g.*, HOROSCOPE, https://www.horoscope.com/us/horoscopes/numerology/index-horoscope-numerology.aspx ("Discover how numerology will impact your love life, relationships, finances and health this year!").

jurisprudence.'"[194] Thus, Powell wrote in a *McCleskey* memorandum: "Apart from the fact that they may be statistically sound, this Court should not undertake—*in this or other cases*—to determine constitutional cases based on statistics."[195] To do so would be to "invite a system of 'statistical jurisprudence'—unprecedented in civilized history."[196] For Powell, debating social science just was not what lawyers conventionally did or normatively ought to do. As Jeffries explained, Powell believed that "law was always something different from—and better than" other enterprises. "It was . . . more high-minded."[197] This was Powell's core commitment—his *love of law*—and it was an uncompromising moral commitment. "Powell . . . never lost . . . his reverence for the law as an institution."[198]

Powell's institutional pride was more than just the conceit of a man who genuinely treasured his work. Like Cover's judges, he saw law as the only bulwark against "perfect anarchy"—the only foundation upon which civilization can exist.[199] We see something of the same high-minded notion of the moral stakes of legal practice and processes in Henry Hart and Albert Sacks's "principle of institutional settlement"—a principle that claims that only a legal order has the capacity for "establishing, maintaining, and perfecting the conditions necessary for community life," that only a legal order can ensure "the complete development of man."[200] Judges and lawyers who subscribe to such a view are likelier to see the "is" of positive law as "a special kind of 'ought'" and their own positive craft as means by which "social living" is made possible.[201] These lawyers and judges tend to believe themselves to be, in Judge Wilkinson's terms, "architects of a stable society."[202]

194 Sundby, *supra* note 4, at 6.

195 *Id.* at 14 (emphasis added); *see also Ballew*, 435 U.S. at 246 (Powell, J., concurring) ("I have reservations as to the wisdom—as well as the necessity—of . . . heavy reliance on numerology derived from statistical studies."). Likewise, in retirement, Powell told an interviewer that outcomes in the criminal-legal system should turn on the consciences of jurors, not on statistics. Taylor, *supra* note 152. One can only imagine what Powell would have thought about recent debates over algorithmic justice. *See generally* Sandra G. Mayson, *Bias In, Bias Out*, 128 Yale L.J. 2218 (examining the judicial use of algorithmic risk assessment tools).

196 Sundby, *supra* note 4, at 31–32 (quoting Powell's annotation on a draft of Brennan's *McCleskey* dissent).

197 Jeffries, *supra* note 11, at 43.

198 *Id.*

199 Cover, *supra* note 6, at 230, 244; *see also* Derrick A. Bell, Jr., *Book Review,* 76 Colum. L. Rev. 350, 353 (1976) (reviewing Robert M. Cover, Justice Accused: Antislavery and the Judicial Process (1975)) (noting that Cover's antislavery judges portrayed their efforts as necessary for the "preservation of the union"). *See generally* Josh Bowers, *The Skeptical Unicorn* (forthcoming) (reexamining what motivated Cover's antislavery judges).

200 Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 5–6, 102 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1996).

201 *Id.*

202 Wilkinson, *supra* note 174, at 74; *see also* Jeffries, *supra* note 11, at 470 (noting that Powell "dreaded chaos and upheaval" and thought that "[l]aw should serve the cause of social stability").

There is a nobility to this worldview. But the risk is making too much of the law and reacting too rashly to perceived threats to it.[203] In *McCleskey*, Powell's righteous professional faith translated to a moral bias for the institutional status quo. It led Powell to overvalue systemic interests and, in the process, to maintain the systematic, immoral practice of undervaluing Black murder victims. For a pragmatist, with an eye toward balancing competing interests, this is especially dangerous territory. Mark Tushnet explained:

> If a judge adheres to a jurisprudence of balancing, as Powell did, it would be desirable for that judge to have a capacious social vision. Judges who lack such a vision may not do a good job in balancing competing interests because they do not fully appreciate the range of interests at stake. Perhaps a judge like Powell would have done better as a formalist.[204]

If nothing else, Powell might have benefited from a healthy dose of skepticism about the moral importance of the law and legal and judicial craft.[205] Instead, he exhibited a kind of hubris. Perhaps it is unfair to hang such a pejorative term on a man as seemingly humble as Powell. But his hubris was a matter of professional pride, not personal deportment. It was the hubris of a judge absolutely convinced that law's domain is so morally vital that we must humble ourselves, uncritically, before it.

B. Powell's People

Justice Powell tended to see the best in those around him. His clerks admired him greatly.[206] And he largely reciprocated, treating them with familiarity and warmth—albeit formal in fashion.[207] He filled his chambers with their photos; he sang their praises for all to hear.[208] These are, of course, highly commendable qualities in a person and an employer. But, for a judge, they create a potential pitfall—the lack of *will* to reflect critically on the decisions and actions of favored familiars or to appreciate how these decisions and actions could affect others negatively. By charitably reading good intentions into the conduct of those insiders who worked *for* his noble institution, he unconsciously

203 Wilkinson, *supra* note 163, at 95–96.

204 Tushnet, *supra* note 18, at 1883–84.

205 *Infra* Part III.

206 *See*, *e.g.*, JEFFRIES, *supra* note 11; Wilkinson, *supra* note 163.

207 *Supra* notes 162–166 and accompanying text.

208 JEFFRIES, *supra* note 11, at 528–29 ("His recollections of those who worked for him always focused on their abilities and achievements, not on their shortcomings. . . . [H]is description of someone often approximated a resume. . . . No doubt this habit of tolerance and respect for others accounted for the great affection he often inspired."); *see also* Taylor, *supra* note 152.

minimized, on balance, the concerns of those outsiders that his sometimes-ignoble institution worked *upon*.[209]

In *McCleskey*, this penchant translated to a practically insurmountable presumption against "impropriety" in institutional stakeholders."[210] Just as he assumed his clerks would do the right thing, Powell assumed professional prosecutors and judges (and, by extension, lay jurors professionally selected and instructed by them) would do the right thing. He largely conceded as much in a *McCleskey* memorandum when he explained that it would "not be easy for me to accept th[e] view," advanced by McCleskey's lawyers and amici, that "lawfully qualified" judges and juries were unequipped "to decide capital cases fairly."[211] And Powell seemed to find it even harder to second-guess prosecutors—institutional stakeholders who traditionally have enjoyed a "wide" charging discretion that Powell only widened further by requiring "exceptionally clear proof" of discriminatory motivation to demonstrate an equal protection claim of selective prosecution.[212] There is a conventional view of prosecutors, to which Powell apparently subscribed, that they are a special breed of lawyer—custodians of the rule of law and embodiments of a "professional ideal" that, according to Bruce Green, makes them more like judges than ordinary attorneys; more like colleagues, that is, for a man like Powell.[213] In Powell's estimation, these were the good people who worked in *his* shop; they could be trusted to handle their responsibilities with the same level of diligence and decency that Powell brought to his own life and labor.

209 *Cf. infra* notes 282–287 and accompanying text (distinguishing between judicial *ability* and *will*). *See generally* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. Rev. 911, 911 (2006) ("A great gulf divides insiders and outsiders in the criminal justice system. The insiders who run the criminal justice system—judges, police, and especially prosecutors . . . [and the o]utsiders—crime victims, bystanders, and most of the general public.").

210 McCleskey v. Kemp, 481 U.S. 279, 296 (1987).

211 Sundby, *supra* note 4, at 19–20.

212 *McCleskey*, 481 U.S. at 296 ("[T]he policy considerations behind a prosecutor's traditionally wide discretion suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties, often years after they were made." (internal quotation marks omitted)). Of course, his deference—even to prosecutors—had its constitutional limits, as revealed by his decision in *Batson v. Kentucky*, where Powell made it comparatively easy for defendants to establish a prima facie equal protection claim in the narrow context of jury selection. Batson v. Kentucky, 476 U.S. 79, 93 (1986). But *Batson* was, to a degree, the exception that proves the rule. To demonstrate a *Batson* violation, the defendant had to offer evidence—statistical or otherwise—that *this* prosecutor possessed a discriminatory purpose in the exercise of peremptory strikes in *this* case. *Id.* The holding in *Batson* did not disrupt the underlying presumption that, absent case-specific proof, the American criminal-legal system operated evenhandedly.

213 Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 Fordham Urb. L.J. 607, 613 (1999); *see also* Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 Geo. J. Legal Ethics 355, 356 (2001) (describing the conventional view that prosecutors are "noble" agents of the state who seek not only to "stand up for the victims and would-be victims" but also to "seek truth, justice, and the American way").

I do not mean to suggest that the scope of Powell's capacity for concern extended no further than his Rolodex. But Powell was a product of his environment. Even his litigation career was corporate-dominated, sheltering him from "the wide range of human experiences that might have expanded his social vision . . . [beyond] people . . . drawn from a relatively narrow range."[214] He was carried forward by a faith in the moral goodness and professional excellence of the people who occupied his world—the world of elite practice. He considered himself an upright person who was part of an upright enterprise. As Mark Tushnet observed, "Reviewing Powell's career as a whole, one can see a pattern in which Powell could appreciate claims made by those with whom he could readily identify, but he could not fully appreciate claims made by those who seemed different from him."[215] This was the "underside" to Powell's institutional "jurisprudence of centrism"—to his idiosyncratic pragmatism.[216] Tushnet concluded that

> when one seeks to balance interests, the result is likely to be distorted to the extent that one systematically undervalues the interests on one side of the balance while giving full weight to the interests on the other side. . . . Powell's desire to achieve balance meant that the law he articulated reflected the balance he struck, not a balance accessible to any fair reader of the cases.[217]

Powell may have tried hard to resist the "temptation to read personal preference into the Constitution," as he insisted judges must strive to do.[218] But, in *McCleskey*, he gave in to his subjective impulses by minimizing reflexively the inconvenient "realities" of the Baldus study and by "placing too much confidence in the rule of law and in the abilities of the human actors involved in the death penalty."[219] A judge who, by his own estimation, sought to "try to be careful, to do justice to the particular case," issued a ruling that was categorical, rather than careful, and did justice neither to the particular defendant nor to his case.[220]

C. Powell's Regret

In retirement, Justice Powell disavowed his decision in *McCleskey v. Kemp*, explaining, "I have come to think that the death penalty should be abolished."[221] He had evolved, it

214 Tushnet, *supra* note 18, at 1883.

215 *Id.* at 1875.

216 Tushnet, *supra* note 18, at 1879.

217 *Id.* at 1854–55, 1872, 1883–85.

218 Furman v. Georgia, 408 U.S. 238, 431 (1972) (Powell, J., dissenting).

219 Sundby, *supra* note 4, at 27, 35.

220 Taylor, *supra* note 152.

221 Jeffries, *supra* note 11, at 451 (quoting Powell).

seemed, from a "fervent partisan" for the constitutional "permissibility" of capital punishment into a man who absolutely opposed it.[222] Still, Powell was not an abolitionist in the traditional—or moral—sense of the word. To the contrary, he remained somewhat untroubled by the barbarity of the punishment. It is not even obvious that he had grown more anxious about racial skews in its aggregate administration. His reasons for turning against the sanction were entirely institutional: "death-penalty litigation was marred by unnecessary repetition and delay," thereby undercutting the criminal-legal system's public image and, by extension, its moral force.[223] He explained to Jeffries, "It brings discredit on the whole legal system, that the sentence upheld by the Supreme Court and adopted by more than thirty states can't be or isn't carried out."[224]

Powell grew convinced that the punishment could not, constitutionally, be administered expeditiously, because judges—Powell included—were uncomfortable moving faster or more categorically. According to Jeffries, "Powell knew firsthand the[] deadly hold on the judge's peace of mind. He knew how hard it was not to take a second, third, or fourth look at rejected claims. . . . Powell came to believe that the system as a whole would always be plagued by doubt and that doubting itself, it would inspire resentment and contempt."[225] Thus, Powell did experience some genuine moral queasiness about state-sanctioned killing, but this sentiment played only a second-order role in his newfound abolitionism. His opposition to the death penalty was, first and foremost, animated by his anti-positivist, moral commitment to the legal order. As Jeffries explained,

> for Powell, . . . [t]he death penalty should be barred, not because it was intrinsically wrong but because it could not be fairly and expeditiously enforced. The endless waiting, merry-go-round litigation, last-minute stays, and midnight executions *offended Powell's sense of dignity and his conception of the majesty of the law*. . . . Better to have done with the whole ugly mess than to continue an indecent, embarrassing, wasteful charade.[226]

As such, Powell's abolitionism was "not a change of heart, but a change of mind" based principally on the belief that "[a]s actually enforced, capital punishment brings the law

222 *Id.* at 409. To appreciate just how far Powell had evolved, consider that, early in his judicial career, he believed that capital punishment was largely beyond constitutional purview: "If there were defects in the administration of the death penalty . . . the remedy lay in legislation . . . and confidence in the democratic process." *Id.* at 411.

223 *Id.* at 446; Tushnet, *supra* note 18, at 1880 (noting that Powell "got impatient with the difficulty in actually carrying out executions").

224 Jeffries, *supra* note 11, at 446, 451 (quoting Powell).

225 *Id.* at 427, 429, 453 (noting Powell's concern that too-quickly clearing the judicial backlog would produce an unseemly "bloodbath").

226 *Id.* at 452 (emphasis added).

itself into disrepute."[227] The problem with *McCleskey* was not that the Court had condoned an unequally enforced final punishment; the problem was that, in operation, the death penalty *looked bad* and contributed to a public "loss of faith" in the very structures to which Powell had dedicated unwavering fidelity.[228] By this logic, the same moral and professional biases that prompted him to ignore profound racial skews in capital charging and sentencing led him, ultimately, to reject the punishment altogether. For his majestic vision of the law to live, the death penalty had to die.

III. NO LOVE OF LAW

Robert Cover never thoroughly defined his understanding of "the tradition of positivism," but he seemed to have in mind a strong form of "rule fidelity" and "role fidelity"—the notion that "the judge ought to be will-less."[229] Cover concluded that antislavery judges who enforced the fugitive slave acts reconciled their moral "discomfort" by highlighting "the formal structure of the law" and framing it in its "gravest and highest terms."[230] They allowed themselves to become "mechanical instrument[s] of the will of others" rather than moral actors on a legal stage.[231] They endorsed the belief that "there are certain rules defining the office and that, whatever those rules may be, the judge should obey them."[232] They may have "lamented harsh results" and "really squirmed," but, ultimately, they "did the job."[233]

It is not obvious that Cover was correct about his antislavery judges. In a forthcoming essay, I intend to complicate his narrative with evidence that the jurisprudence of these

227 John C. Jeffries, *A Change of Mind That Came Too Late*, N.Y. TIMES, June 23, 1994, at A23.

228 Sundby, *supra* note 4, at 33.

229 COVER, *supra* note 6, at 7, 29–30, 50–54, 124, 197, 257 ("By formal principles I mean [inter alia] . . . those governing the role of the judge, his place vis-à-vis other lawmaking bodies, [and] his subordination to precedent, statute, and Constitution."). On Cover's reading, antislavery judges operated according to the idea that "[i]t is a uniform, not nature, that defines obligation," and that "law is distinguished from both the transcendent and the personal sources of obligation." *Id.* at 3.

230 *Id.* at 229, 231.

231 *Id.* at 229, 235 ("The discomfort incidental to a difficult choice . . . will be reduced insofar as he can view himself as a mechanical instrument of the will of others. Therefore, he will choose from among available models of the judicial process that model that will most closely approximate the mechanical-impersonal formalism.").

232 *Id.* at 7, 29–30, 50–54, 124, 257; *see also* Anthony J. Sebok, *Judging the Fugitive Slave Acts*, 100 YALE L. J. 1835, 1836 n.9, 1838 (1991) ("Cover's American positivism aspires to a legal system built on rules whose interpretation require the minimum of normative judgment by their interpreters."); Robert Cover, *Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 37 (1983) (arguing that Justice Taney's "positivist interpretation . . . assumed a principle justifying obedience" to the manifestly immoral rule announced in *Dred Scott*).

233 COVER, *supra* note 6, at 6–7, 228 ("[T]here was a general, pervasive disparity between the individual's image of himself as a moral human being, opposed to slavery as part of his moral code, and his image of himself as a faithful judge, applying legal rules impersonally.").

judges was, in fact, closer to Powell's institutional brand of anti-positivism.[234] Regardless, however, of whether Cover was right about his judges, he was wrong about positivism. Cover subscribed to a pejorative "caricature" of the positivist as just any judge who reaches a "morally impoverished" result.[235] Indeed, Fred Schauer identified Cover as a source of this "distorted version" of the philosophy:

> Many legal scholars . . . [p]erhaps originally inspired [*inter alia*] by Robert Cover . . . maintain that legal positivism . . . encourages (causally) blind obedience . . . [and] excess acquiescence . . . [and] just is (definitionally) the attitude of blind obedience to law. . . . [A] generation of (mostly) American legal theorists has claimed that legal positivism is the appropriate label for what judges do when they understand their job as one of following and enforcing the law just because it is the law, or enforcing a morally thin conception of the law even in the face of morally richer interpretive alternatives. . . . This is precisely the position I wish to challenge.[236]

Although positivism "insists on a sharp separation between law and morality,"[237] it does not follow that law must trump.[238] To the contrary, "legal positivism . . . is best seen not as a cause of the problem of excess compliance but as a potential solution to it."[239] As H.L.A. Hart made plain, positivists have long understood that "the time might come in any society

234 Josh Bowers, *The Skeptical Unicorn* (forthcoming).

235 Fred Schauer, *Positivism as Pariah*, *in* The Autonomy of Law 29, 33, 46 (Robert P. George ed., 1996).

236 *Id.* at 29, 31–33, 35 (observing that "the existing caricature of positivism as an amoral mandate to unquestioning obedience dominates much of contemporary American legal thought," even though there is "scant historical or philosophical provenance" for it); *see also* Leslie John Green & Thomas Adams, *Legal Positivism*, *in* Stanford Encyclopedia of Philosophy (2003) ("Lawyers often use "positivist" abusively, to condemn a formalistic doctrine . . . [that,] however pointless or wrong, is to be rigorously applied by officials and obeyed by subjects. . . . [T]his view . . . has nothing to do with legal positivism."). Examples of the caricature that Schauer criticized include Gurney Pearsall, *Revisiting Antigone's Dilemma: Why the Model Rules of Professional Conduct Need to Become Model Presumptions That Can be Rebutted by Acts of Ethical Discretion*, 67 S.C. L. Rev. 163 (2015) ("[L]egal positivism is a commitment to law. . . . [T]he interpreters of a law must set aside their roles as independent moral agents and act as impartial functionaries within our legal institutions. . . . [T]he separation between law and morality necessarily means that an individual's disagreement with the morality of a law would not excuse that person from the duty to obey it."); J.C. Oleson, *The Antigone Dilemma: When the Paths of Law and Morality Diverge*, 29 Cardozo L. Rev. 669, 684 (2007) ("[W]hen individual judges do struggle to open their eyes to moral questions, and to admit moral considerations into their adjudicative processes, the positivist hierarchy of the judiciary seeks to tape their eyes shut again.").

237 Jeffrie G. Murphy & Jules L. Coleman, The Philosophy of Law: An Introduction to Jurisprudence 29 (1984); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 620–21 (1957) (defending a "separation of law as it is and law as it ought to be").

238 Schauer, *supra* note 235, at 29, 33 ("This caricature [of positivism] is . . . inaccurate.").

239 *Id.* at 31–32.

when the law's commands [a]re so evil that the question of resistance had to be faced."[240] Anti-positivists, Hart thought, might not be able to identify adequately when law crosses that line, because they are too busy trying to identify what law is in the first instance.[241]

The complication is that judges do not operate in a vacuum; they work within what Fred Schauer called a "law-soaked" world.[242] Positive law and its institutions are their "experiential base."[243] Its structures, substance, and procedures surround them. Everywhere judges turn, "there are directives emanating from authority."[244] To borrow a metaphor from David Foster Wallace, it is the water in which they swim.[245] And certain types of institutionally proud, anti-positivist judges just tend to have a fondness (in Powell's case, a *love*) for the water's temperature.[246] As Judge Dennis Jacobs explained, "[i]n our courts, judges are lawyers. . . . The result is the incremental preference for the lawyered solution, . . . and the confidence and faith that these things produce the best results. . . . [J]udges have a bias in favor of legalism and the legal profession. . . . It is a matter of like calling unto like."[247] This implicit bias is a product of moralized "legal training . . . and judicial acculturation," which grounds the proud institutionalist's unexamined normative presumptions that positive law *must be law* (and law, in turn, *must be moral*).[248] "[T]he danger," in

240 Hart, *supra* note 237, at 597 (discussing Jeremy Bentham); *see also id.* at 616–17 ("Austin and, of course, Bentham . . . [subscribed to] the conviction that if laws reached a certain degree of iniquity then there would be a plain moral obligation to resist them and to withhold obedience"); Schauer, *supra* note 235, at 44–45 ("'[P]ositivism' is a now widely used label for the view that officials by virtue of their role should enforce the law as written, . . . [but] this conception of positivism and the positivism of Bentham, Austin, Kelsen, Hart, and Raz is not much closer than the relationship between the banks in which we deposit our money and the banks that lie beside our rivers."). *See generally* Jeffrey Brand-Ballard, Limits of Legality: The Ethics of Lawless Judging 56 (2010) ("That the law requires certain results does not logically entail that any particular individual has a legal duty to decide cases accordingly. It might seem that the concept of *judge* entails a legal duty to apply the law, but this is incorrect.").

241 Hart, *supra* note 237, at 597, 620–21; *cf.*, Lon L. Fuller, The Morality of Law 39 (1964) (making the anti-positivist claim that a moral "failure" of a purported legal system is not "a bad system of law"; it is "not properly called a legal system at all").

242 Schauer, *supra* note 235, at 45.

243 *Id.*

244 *Id.*

245 David Foster Wallace, This Is Water: Some Thoughts, Delivered on a Significant Occasion, About Living a Compassionate Life (2009).

246 *Supra* Part II (describing Powell's jurisprudential approach and worldview).

247 Dennis Jacobs, *The John F. Sonnett Memorial Lecture: The Secret Life of Judges*, 75 Fordham L. Rev. 2855, 2856–59 (2007) (emphasis added). Institutional bias is a topic I have examined elsewhere. Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 Colum. L. Rev. 1655 (2010) (discussing prosecutors' charging biases); Josh Bowers, *Punishing the Innocent*, 156 U. Pa. L. Rev. 1117 (2008) (discussing judges and lawyers' bargaining biases).

248 Schauer, *supra* note 235, at 31–33, 47; *see also* Duncan Kennedy, *Legal Education as Training for Hierarchy*, *in* The Politics of Law: A Progressive Critique 43 (David Kairys ed., 1982) (describing legal education as "surrender . . . to a passive attitude toward the content of the legal system").

Hart's terms, is "that the existing law may supplant morality as a final test of conduct and so escape criticism."[249] Or as Schauer explained,

> it is the rejection . . . of positivism that appears conservative, in the sense of taking the existence of an institution of long-standing status as a reason for treating it kindly and respecting its products. To take law and morality as necessarily conjoined is to run the risk of minimizing the moral space between the products that legality has given us until today and the goals we might wish an ideal legal system to accomplish.[250]

Justice Powell is a paradigmatic example of the kind of institutionally proud, anti-positivist judge that Hart and Schauer warned against, especially prone to "an enormous overvaluation of the importance of the bare fact that a rule may be said to be a valid rule of law, as if this, once declared was conclusive of the final moral question."[251] Indeed, Hart seemed to anticipate a judge just like Powell when he wrote about "the *romantic optimism* that all *values we cherish* ultimately will fit into a single system" and about how the impossible belief in that ideal may "cloak the true nature of the problems with which we are faced."[252] Hart elaborated:

> Wicked men will enact wicked rules which others will enforce. What surely is most needed in order to make men clear-sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive on the question of obedience, and that, *however great the aura and majesty of authority which the official system may have*, its demands must in the end be submitted to a moral scrutiny.[253]

Hart recognized that institutionally proud judges lack the appropriate distance to evaluate positive law with a sufficiently critical gaze. They are too deeply enmeshed—and too

249 Hart, *supra* note 237, at 598.

250 Schauer, *supra* note 235, at 45–47 ("[I]f the evaluator has had sufficient positive experiences with legal norms and legal institutions . . . the presumption of moral desirability facilitated by a moral test of legality is consistent with that evaluator's presumptions about law in general."). As Leslie John Green and Thomas Adams explained, "[i]t is a curious fact that almost all theories that insist on the essentially moral character of law take law's character to be essentially good." Green & Adams, *supra* note 236 ("The gravamen of Fuller's philosophy is that law is essentially a moral enterprise, made possible only by a robust adherence to its own inner morality. The thought that the law might have an inner *immorality* never occurred to him.").

251 Hart, *supra* note 237, at 618.

252 *Id.* at 620 (emphasis added).

253 H.L.A. Hart, The Concept of Law 210 (2d ed. 1994) (emphasis added); Schauer, *supra* note 235, at 31 ("There are many bad laws. . . . [O]ne good way of avoiding bad results is for legal officials (primarily but not exclusively judges) to refuse to serve as instruments of morally bad results.").

comfortable within—existing legal boxes. From that myopic vantage point, the "is and the ought" have a propensity to become "one and indivisible."[254] Or, as Fred Schauer put it, "a chooser trapped inside the legal system . . . seek[s] moral enrichment for the job she necessarily must do . . . and in doing so may wind up providing more endorsement for existing law and legal systems than some laws and some legal systems deserve."[255] It is for this very reason that Jeremy Bentham exhibited such a "profound distrust of both lawyers and judges," who operate always "within the system."[256]

Ultimately, the very attributes that made Justice Powell such a seeming pleasure to work for and with—his apparent geniality, civility, and kindness—were byproducts of the same moderate temperament and corresponding moral perspective that informed his opinion in *McCleskey v. Kemp*. Powell was sometimes genuinely sympathetic and empathetic, but he identified best with the people he interacted with most—especially, the lawyers and judges who were doing what he perceived to be majestic work.[257] For a judge with a "limited social vision" and a pragmatic streak (in the sense that he was committed to a balancing of the moral interests), he ended up making a "parody of pragmatism" in *McCleskey*.[258] He presumed virtuousness in his own people—to wit, charging prosecutors, trial judges, and sentencing juries. Put differently, because Powell was situated squarely *within* a *status quo* to which he was committed, he failed adequately to recognize outsider groups as sufficiently worthy, on balance, of moral consideration, notwithstanding persuasive statistical and historical evidence that his cherished institutions continued to treat these groups unequally and thereby immorally.[259]

It is positivism, by contrast, that best allows observers to step "outside the system" and, from there, call its morally problematic norms and forms into question.[260] Because positivist judges have no necessary love of law, they can more easily avoid "confusion of what law is with what law ought to be."[261] As Schauer explained, "[n]o position other than positivism allows such a sceptical attitude towards legal institutions that have been developing for millennia, and towards the equally aged assumptions that existing laws and their accompanying or generating institutions are desirable."[262] By this reasoning, a "morally thin view" of the meaning and concept of the rule of law does not necessarily translate to a

254 Hart, *supra* note 237, at 598 (quoting Bentham).

255 Schauer, *supra* note 235, at 47.

256 *Id.* at 46–47.

257 *Supra* notes 19, 26, 29–30, 181–188, 197–204, 206–215 and accompanying text.

258 Tushnet, *supra* note 18, (describing Powell's "narrow social vision"); Ronald Dworkin, *Introduction*: A Badly Flawed Election: Debating Bush v. Gore, The Supreme Court, and American Democracy 41 (2001) (using the term "parody of pragmatism" to discuss Judge Richard Posner's analysis of the *Bush v. Gore* decision).

259 *Supra* notes 19–26, 32–36, 115–128, 144 and accompanying text.

260 Schauer, *supra* note 235, at 47.

261 Hart, *supra* note 237, at 599.

262 Schauer, *supra* note 235, at 42–43.

"thin view of morality" but may be wholly compatible, instead, with its opposite.[263] Positivism is potentially "morally valuable" because it provides "the conceptual resources" to "identify and evaluate a legal system," focusing the moral mind on the "distinction between the *is* and the *ought* that lies at the heart of the traditional positivist project."[264] By keeping constant "the fact of legality" as "a morally neutral social fact," skeptical positivists more readily see past—or never develop—professional biases.[265] In turn, they more readily understand that law *qua* law is of no moral merit.

Here, I am reminded of a quip from the radical lawyer William Kuntsler:

> Lenin . . . was informed that the person operating the mimeograph machine was a tsarist spy. "Well, how is he at mimeographing?" Lenin asked. "He's excellent," was the answer. "Well," Lenin said, "watch him and keep him working." I feel that way now, that *a lawyer is just another worker who serves a function*—no more, no less[] important than that of the Russian at the mimeograph machine.[266]

Perhaps Kuntsler was wrong. Depending upon the positive substance and procedures of a particular legal system, the professions within it may acquire a contingent kind of nobility.[267] We may hope, in this way, that our positive law will not be bad law—that the legal systems in our "law-soaked" world will do good enough work for us to come to love them conditionally. And, in a well-functioning (or, more to the point, good-functioning) legal system, we should expect a "frequent coincidence of positive law and morality."[268] But positivism recognizes that coincidences are just that—extrinsic by nature. To be sure, there may be moral goods that can be produced only by law, but, as Joseph Raz taught, that fact does not represent a "moral credit to the law" but rather reflects only the kind of device the law is.[269] Here, Raz used the metaphor of a knife. A knife (and a knife handler) may achieve "a particular excellence," but it is the excellence of a fine tool (and a fine technician): "A good knife is, among other things, a sharp knife" with "the virtue of efficiency; the virtue of the instrument as an instrument."[270] There is nothing *majestic* or *grand* about a sharp knife. "[C]onformity" to law may make law "a good instrument

263 *Id.* at 46–47.

264 *Id.* at 45, 47.

265 *Id.* at 46–47.

266 William M. Kuntsler with Sheila Isenberg, My Life as a Radical Lawyer 189 (1994) (emphasis added).

267 Brand-Ballard, *supra* note 240, at 15, 183–84 (doubting whether such "all-things-considered" conditions "are satisfied today in realistic legal systems such as the United States").

268 Hart, *supra* note 237, at 599; Hart, *supra* note 253, at 185–86.

269 Joseph Raz, The Authority of Law: Essays on Law & Morality 224 (2d ed. 2009); Joseph Raz, *The Law's Own Virtue*, 39 Oxford J. Legal Stud. 1, 13 (2019) ("While conformity to the rule of law has clear moral benefits . . . the rule of law . . . does not guarantee that the law is good, or just.").

270 Raz, *supra* note 269, at 225–226.

for achieving certain goals," but "conformity . . . is not itself an ultimate goal."[271] Put simply, capable implements are not moral ends. In any event, sharp knives cut both ways, and, sometimes, we should resist slicing.[272]

The positivist recognizes that law is a means, not an end, because the positivist likewise recognizes that law is not everything. According to Raz's thin conception of the meaning and the rule of law, positive law is not necessarily commensurate with our fundamental "social goals," such as "democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man."[273] Indeed, Raz singled out "racial, religious, and all manner of discrimination" as wholly consistent with positive law and legal institutions, notwithstanding our moral objections and our anti-racist objectives.[274] To understand this is to begin to shake free from the implicit institutional biases that plagued Powell. Powell mistook the instrumental means of official discretion for the normative ends of individualized justice precisely because he mistook the legal officials who exercised discretion for intrinsically moral beings.[275] In the process, his implicit institutional biases caused him to undervalue the immoral import of institutionalists' implicit racial biases.

Powell presumed that the rule of law is "the rule of good law," and he developed, without noticing, the corresponding view that nothing more was needed—that substantive law and its procedures and professionals "propound a complete social philosophy."[276] In other words, Powell saw all he needed to see in the people around him. These were the individuals whom Powell thought deserved jurisprudential protection—not subordinated groups. Powell failed thereby to appreciate how these people had been using their discretion, like Raz's knife, to cut both ways.

CONCLUSION

Robert Cover identified four options available to a judge confronting a moral-formal dilemma: "[1] He may apply the law against his conscience. [2] He may apply conscience and be faithless to the law. [3] He may resign. [4] Or he may cheat."[277] Alternatively, the

271 *Id.* at 229.

272 Raz, *supra* note 269, at 13 ("[W]hile the law can be used to achieve much that is good, its existence also creates opportunities for much evil. . . . The law is a powerful structure, and those who control it have power, which, like all power, can be abused.").

273 *Id.* at 13 ("[T]he rule of law . . . does not guarantee that the law is good, or just. . . . While conformity to the rule of law has clear moral benefits it does not guarantee that justice, democracy and respect for human rights prevail."); RAZ, *supra* note 269, at 211.

274 *Id.* at 216.

275 *Supra* notes 45–49, 63, 141–142, 210–213 and accompanying text (detailing Brennan's *McCleskey* dissent criticizing Powell's opinion for treating discretion, rather than individualized justice, as the end).

276 RAZ, *supra* note 269, at 211.

277 COVER, *supra* note 6, at 6.

judge may sidestep the dilemma altogether by appealing to moral principle to interpret the law capaciously—a "reconciliation strategy" that "transforms . . . seemingly illegal acts into ones that are not unlawful at all."[278] This last jurisprudential move—"relying on a capacious conception of law in order to convert the unlawful into the lawful"—is an approach with a decidedly "anti-positivist flavor."[279] Indeed, Ronald Dworkin proposed that judges should have done precisely this with the fugitive slave acts by holding that "what law is" cannot include "the particular and transitory policies of the slavery compromise."[280] And Cover seemed to endorse the same idea.[281]

Of course, at some point, an anti-positivist appeal to principle may be sufficiently outcome-driven that it constitutes a form of jurisprudential deceit. And, in such circumstances, the anti-positivist judge still may remain better situated to articulate a "forced reading of positive law" that gets around what the judge actually believes the law to be.[282] That is to say, the anti-positivist judge has a greater *ability* to avoid or reconcile a moral-formal dilemma by sidestepping or cheating—to rely upon interpretive methods or ploys to "preserve an appearance (to others) of conformity of law and morality."[283] But there is a point at which the tricks of the judicial trade run out, and a moral-formal dilemma must, thereafter, be confronted squarely. As Jeffrey Brand-Ballard observed, "[i]f principles are part of the law, then so be it. I am interested in the conditions under which judges are morally permitted to deviate from the law *simpliciter*, however we define *law*."[284] At that juncture, anti-positivist judges have no comparative advantage. They are no better at, say, resigning or applying conscience against law in an "act of naked

278 Frederick Schauer, *Official Obedience and the Politics of Defining "Law,"* 86. So. Cal. L. Rev. 1165, 1168–69, 1172, 1186 (2013) ("Faced with an inconsistency between law and morality, or law and the best policy, reconciliation strategies seek an understanding of law that reconciles the two and, thus, dissolves the inconsistency.").

279 *Id.*

280 Ronald Dworkin, *The Law of the Slave-Catchers*, Times Lit. Supp. (Dec. 5, 1975) (arguing that Cover's antislavery judges "abandoned a theory of law" whereby "the law of the community consists not simply in the discrete statutes and rules . . . but in the general principles of justice and fairness that these statutes and rules, taken together, presuppose by way of implicit justification"); see also Dworkin, *supra* note 148, at 411 (endorsing legal theories that "make the community's legal record the best it can be from the point of view of political morality").

281 Cover, *supra* note 6, at 232–33; Paul Butler, *When Judges Lie (And When They Should)*, 91 Minn. L. Rev. 1785, 1812, 1814 (2007) ("In Cover's view, judges could have both followed the law and refused to enforce the fugitive slave acts. Rather than ignoring the law of slavery, judges simply should have 'interpreted' it in a very progressive fashion . . . [and] ma[de] it just.").

282 Cover, *supra* note 6, at 6, 158.

283 *Id.* at 6; *see also* Schauer, *supra* note 278 at 1182 (noting that the anti-positivist judge may claim that "the demands of reasonableness and common sense were themselves part of the law, contrary indications of specific legal rules notwithstanding").

284 Brand-Ballard, *supra* note 240, at 44.

power."[285] To the contrary, they may very well be less *able* to discern the sociological conditions that call for such radical steps. More to the point, they may prove substantially less *willing* to take the leap. In any event, because the interpretive tools of anti-positivism are not lost on positivist judges, they may—once they find the *will* to pursue equitable paths—even cheat with equal *ability* by hiding their personal positivist priors.[286]

The conclusion is somewhat inescapable: "[I]f one were a sceptic, then one would want to be a positivist."[287] As Schauer explained, "leaders of law-reform movements, even quite radical ones," are often positivists, because "there is no inconsistency between their progressivism and their positivism."[288] Rather, their positivism has the virtue of "freeing them from any normative commitment to existing laws or legal systems."[289] The radical abolitionist William Lloyd Garrison was a positivist.[290] The philosophical anarchist A. John Simmons is a positivist.[291] For these skeptics, positivism has provided the jurisprudential foundation for their allegiance to the belief "that there is *no* moral obligation to obey law."[292]

Personally, I am not quite there. I am deeply skeptical of the aims and projects of positive law. But I still prefer a morally inflected jurisprudence of balancing.[293] This may be wrongheaded. Perhaps, like Powell, I am just too sentimental about the judicial craft. Or, perhaps, skeptical positivism is wholly compatible with a thoroughgoing form of

285 Cover, *supra* note 6, at 158; *see also* Michael Stokes Paulsen, *Accusing Justice: Some Variations of the Themes of Robert M. Cover's Justice Accused*, 7 J.L. & Religion 33–34, 38, 86 (1989) (discussing the concept of "judicial vigilantism" and exercises of "raw judicial power").

286 Butler, *supra* note 281, at 1808, 1814–18, 1823 (arguing that "subversive judges," who "tend to be more formalist," should take care to write disingenuous decisions that "will survive appellate review" in order to succeed at "'ethical subversion' of laws that would create 'extreme injustice,'" and noting that, even if "judicial candor is a hallmark of civil society, . . . it is not a categorical imperative").

287 Schauer, *supra* note 235, at 46–47. That said, there are highly skeptical anti-positivists, including scholars working within the critical legal studies movement. *See*, *e.g.*, Roberts, *supra* note 115; Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. Rev. 87 (2022).

288 Schauer, *supra* note 235, at 46–47.

289 *Id.*

290 William Lloyd Garrison, *On the Dissolution of the Union*, Liberator (June 15, 1855), https://fair-use.org/the-liberator/1855/06/15/on-the-dissolution-of-the-union ("The Constitution is the supreme law of the land; . . . nothing is to stand before it. . . . Therefore, I put my foot on it, as I would upon a reptile. . . . Away with the Constitution—it smells of blood!").

291 A. John Simmons, Moral Principles and Political Obligations 23 (1979) ("[C]ertainly we do not feel that perverse legal systems or tyrannical governments deserve our support; yet they are not 'unreal' for this reason.").

292 Schauer, *supra* note 235, at 46–47, 52 ("For all we know from Hart's theory of law he may be a radical anarchist who regards any attitude of normative allegiance as thoroughly immoral.").

293 *See*, *e.g.*, Josh Bowers, *Annoy No Cop*, 166 U. Pa. L. Rev. 129 (2017) (endorsing conceptions of the rule of law and the Fourth Amendment that promote autonomy); Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a "Pointless Indignity,"* 66 Stan. L. Rev. 987 (2014) (endorsing conceptions of the Fourth Amendment that promote dignity).

pragmatism of the kind I prefer—a "holistic pragmatism" that takes seriously all relevant moral and prudential claims, legal and extralegal.[294] Such a pragmatic *balancing act* comprehends, if nothing else, that we ought to place at the center of the beam the interests of those individuals who, historically, have been subordinated or disregarded by our institutions, as opposed to the interests of the institutionalists themselves. For the antislavery judge, this would have meant thinking first about persons held in bondage. For Powell, this would have meant thinking first about historically underappreciated Black victims and historically over-punished Black defendants. This is what it means to possess a comprehensive moral imagination as compared to a moral imagination that extends principally to one's own workplace and colleagues.

A different kind of judge—a more skeptical judge—could have discovered *the will* (and perhaps also *the way*) to find a more moral and less blinkered course through *McCleskey v. Kemp*. The fact that Powell did not do so and lived to regret it makes him something of a tragic figure—a purported man of principle whose institutional pride (or hubris) was matched only by his personal humility and civility. But, in this context, the word *tragedy* probably ought to be reserved for the people of color who continue to be valued and treated unequally by our often-immoral criminal-legal system.

294 Barzun, *supra* note 116.