

# RESTORING EMPIRICAL EVIDENCE TO THE PURSUIT OF EVENHANDED CAPITAL SENTENCING

Joseph J. Perkovich\*

## ABSTRACT

In the denial of certiorari review in *Hidalgo v. Arizona*, 138 S. Ct. 1054 (2018), a four-Justice statement commented on the petition and the underlying litigation challenging, on the basis of empirical evidence, whether the Arizona capital sentencing statute sufficiently narrows the pool of defendants eligible to receive the death penalty. The *Hidalgo* Statement observes that the Arizona Supreme Court erred in its application of the Federal law and the petition raised an “important Eighth Amendment question” based on research into the operation of the sentencing statute. In declining the case, the four Justices encouraged similar future challenges and urged the development of trial court records examining any such statistical proof of alleged constitutional deficiencies.

Since the landmark decision *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Supreme Court has essentially sidelined empirically developed challenges to criminal statutes. *Hidalgo* offers noteworthy guidance to the potential restoration, after three decades, of a former avenue for constitutional redress premised upon statistical and historical analyses.

This article addresses the present implications of the Burger and Rehnquist Courts’ foreclosure of this means to constitutional scrutiny and suggests steps to restoring the evidentiary salience of empirical proof reflecting the actual operation of the death penalty.

---

\* Joseph J. Perkovich is a founding Principal Attorney of Phillips Black, Inc., a nonprofit public interest law practice providing direct representation in capital habeas corpus litigation, and Adjunct Associate Professor of Law, Washington University School of Law, where he co-convenes the capital post-conviction experiential learning practicum. The author thanks Will Wilder and the editorial team of this journal for their unsurpassed guidance in bringing this to publication.

## TABLE OF CONTENTS

Introduction .....	1125
I. Federal Constitutional Challenges of Capital Sentencing .....	1126
A. <i>Lockhart</i> and <i>McCleskey</i> : Progenitors of Superficial Review. ....	1127
1. <i>Lockhart v. McCree</i> .....	1128
2. <i>McCleskey v. Kemp</i> .....	1129
3. <i>State v. Hidalgo</i> .....	1134
II. Conditions for the Return of Empirical Evidence to the Courts	1137
A. Inchoate Role of Institutional History in Constitutional Challenges .....	1137
1. <i>McCleskey</i> 's Treatment of Contemporary Historical Evidence.....	1138
2. <i>Ramos</i> 's Treatment of Reconstruction's Enduring Legacy. ....	1140
B. Empirical Evidence in State Constitutional Adjudication.....	1142
1. Washington Supreme Court Invalidates Arbitrary, Racially Biased Scheme .....	1144
2. Washington Precedent Suggests Potential State and Federal Court Inquiries.....	1146
III. Evenhandedness and "Irrational Sympathies and Antipathies" .....	1148

## INTRODUCTION

In *Hidalgo v. Arizona*, the Supreme Court took the ordinary step—one that it takes thousands of times each term—of denying review from a state court affirmance of a criminal judgment.<sup>1</sup> But *Hidalgo* is out of the ordinary for the statement of Justice Breyer respecting that denial on petition for certiorari to the Arizona Supreme Court.<sup>2</sup>

Statements on certiorari denials are a small part of the Court's routine business. Such writings are posited for any number of reasons—indeed, technically no reason is even needed and no rule governs their issuance. The *Hidalgo* Statement is striking, however, not only because Justice Breyer wrote with respect to the constitutionality of a state's entire capital sentencing scheme.<sup>3</sup> The Statement also deserves attention because three Justices (Ginsburg, Sotomayor, and Kagan, JJ.) joined it.<sup>4</sup>

A statement on denial of certiorari to which four justices ascribe is a rarity.<sup>5</sup> After all, only four votes are needed to grant certiorari.<sup>6</sup> Yet the *Hidalgo* Statement is all the more remarkable upon considering its substance. After explaining the state court's analysis in rejecting Mr. Hidalgo's constitutional challenge, Justice Breyer opined that the Arizona Supreme Court "misapplied" his Court's precedent.<sup>7</sup>

Adding to the perhaps singular quality of the *Hidalgo* Statement, it explicitly agreed with the Court's decision to deny certiorari,<sup>8</sup> but not because the question presented had lacked gravity or for another commonplace factor for declining a case. To the contrary, the Statement offers that *Hidalgo* presented an "important Eighth Amendment question" for review: "Whether Arizona's capital sentencing scheme, which includes so many aggravating circumstances that virtually every defendant convicted of first-degree

---

1. 138 S. Ct. 1054 (2018).

2. *Id.* [hereinafter *Hidalgo* Statement].

3. *Id.*

4. *Id.*

5. See generally, John Charles Boger, *The Future of the Death Penalty: The Seeds of Time*, 51 TEX. TECH L. REV 75, 83 (2018) (noting "[t]he highly unusual, eight-page statement").

6. Joan Maisel Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975 (1957).

7. 138 S. Ct. at 1057.

8. *Id.* A dissent from the denial of certiorari differs from a mere statement. Cf. *Rudolph v. Alabama*, 375 U.S. 889 (1963) (Goldberg, J., joined by Douglas & Brennan, JJ., dissenting from denial of certiorari).

murder is eligible for death, violates the Eighth Amendment.”<sup>9</sup> At stake in that question is whether Arizona’s capital sentencing is, in fact, excessive or, as contemplated under the rationale of *Gregg v. Georgia*,<sup>10</sup> its divination of death-eligible defendants is evenhanded by virtue of the “statutory aggravating circumstances . . . designate[d] to identify those murder cases for which death is a permissible sanction.”<sup>11</sup>

#### I. FEDERAL CONSTITUTIONAL CHALLENGES OF CAPITAL SENTENCING

*Hidalgo* invoked *Zant v. Stephens*,<sup>12</sup> which held that capital sentencing legislation must “genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.”<sup>13</sup> Further, a capital sentencing scheme’s failure to narrow violates *Furman*’s “insisten[ce] that the channeling and limiting of the sentencer’s discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.”<sup>14</sup>

---

9. *Hidalgo*, 138 S. Ct. at 1054.

10. 428 U.S. 153 (1976).

11. DAVID C. BALDUS, GEORGE G. WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 409 (1990). Throughout this work, the authors present their empirical findings through the framework of “excessiveness” and “evenhandedness,” see, e.g., *id.* at 84, 116, 241. An endnote spanning several pages explains the excessiveness/evenhandedness paradigm for their empirical work on Georgia’s scheme. *Id.* at 60 n.50 (endnote at 74–77). See also David C. Baldus, Charles A. Pulaski, Jr., George Woodworth, & Frederick D. Kyle, *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach*, 33 Stan. L. Rev. 1 (1980) (applying a similar framework in an earlier, pre-*McCleskey* analysis). The discussion does rely, substantially, upon the emphasis the *Gregg* plurality gave Georgia’s post-*Furman* proportionality review. *Id.* at 14. While in the wake of *Pulley v. Harris*, 465 U.S. 37 (1984), that element of judicial review was eviscerated (in effect if not by the letter), the premise that sentences can be comparatively excessive is as valid today as it was then. See *Weems v. United States*, 217 U.S. 349, 386 (1910).

12. *Hidalgo*, 138 S. Ct. at 1054.

13. *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)).

14. *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988) (invalidating for vagueness Oklahoma statute’s “especially heinous, atrocious, or cruel” aggravating circumstance); see also *Godfrey v. Georgia*, 446 U.S. 420, 428–29 (1980)

Against this backdrop, *Hidalgo* raised whether Arizona's legislation failed to sufficiently narrow death eligibility.<sup>15</sup> In the Maricopa County Superior Court, Mr. Hidalgo adduced that approximately 98% of that county's first-degree murder cases prosecuted between 2002 and 2012, which numbered nearly 900, met at least one statutory aggravating circumstance.<sup>16</sup> Historically, Maricopa County is one of the country's most active capital prosecutors.<sup>17</sup>

On direct appellate review, the Arizona Supreme Court's disposal of this empirically-based statutory challenge preempted engagement with the foregoing federal constitutional authorities on capital narrowing. In mimicry of the United States Supreme Court's suffocation, three decades prior, of similarly research-predicated death penalty challenges, the state supreme court discarded this evidence by assuming its truth but denying its legal pertinence.<sup>18</sup> In contrast, the *Hidalgo* Statement faulted the lower court for its lack of engagement with the statistical proof and expresses a renewed interest in reviewing challenges premised on such evidence.

#### A. *Lockhart* and *McCleskey*: Progenitors of Superficial Review

The Arizona Supreme Court's approach borrowed heavily from the scripts in *Lockhart v. McCree*<sup>19</sup> and *McCleskey v. Kemp*.<sup>20</sup> In consecutive terms, the Burger and Rehnquist Courts dispatched of those empirical data-laden litigations in a manner that would essentially banish such research from the Court's capital docket for the ensuing decades.<sup>21</sup>

---

(invalidating "outrageously or wantonly vile, horrible and inhuman" aggravating circumstance).

15. 138 S. Ct. at 1054; see Ariz. Rev. Stat. Ann. §§ 13-751(A), 13-752(C).

16. *Id.* at 1056.

17. As of March 2007, roughly the midway point of the *Hidalgo* study's ten-year span, 140 capital cases were pending in the Maricopa County Superior Court—with fifteen of those defendants lacking any counsel of record. Christopher Dupont & Larry Hammond, *Capital Case Crisis in Maricopa County, Arizona: A Response from the Defense*, 95 JUDICATURE 216, 216 (2012).

18. 138 S. Ct. at 1056–57.

19. 476 U.S. 162 (1986).

20. 481 U.S. 279 (1987).

21. Since the mid-1960s, such empirical research played a vital role in a range of constitutional challenges to capital punishment. See, e.g., Marvin E. Wolfgang, *The Social Scientist in Court*, 65 J. CRIM. L. & CRIMINOLOGY 239, 240 (1974) (discussing role of empirical study from data collected between 1945 and 1965 from "over 3000 rape convictions in 230 counties in eleven states," litigated,

### 1. Lockhart v. McCree

In *Lockhart*, the Court addressed a question that had remained open for 18 years since *Witherspoon v. Illinois*.<sup>22</sup> *Witherspoon* held that the Sixth Amendment precludes the removal for cause of a prospective juror merely on the basis of “conscientious scruples” against the death penalty.<sup>23</sup> The open question that *Lockhart* took up concerned so-called “*Witherspoon*-excludables”—those venire members who went beyond espousing “death scruples,” and averred that they could not, under any circumstance, vote for the imposition of the death penalty.<sup>24</sup> Such a viewpoint has supplied cause for striking the prospective juror from the venire.<sup>25</sup> In *Witherspoon*, Justice Stevens posed the question that Justice Rehnquist (as he then was), would later deracinate in *Lockhart*: “Does the exclusion of jurors opposed to capital punishment result in an unrepresentative jury on the issue of guilt or substantially increase the risk of conviction?”<sup>26</sup>

Mr. McCree’s federal habeas corpus litigation succeeded in the district court.<sup>27</sup> Writing for the Eighth Circuit majority affirming the district court’s conclusion that barring *Witherspoon*-excludables *did* violate the Constitution, Chief Judge Lay stated:

In upholding the district court’s finding based upon the evidentiary record we must note: (1) the record here is exhaustive; it is difficult to perceive how any petitioner could make a record and an objection to death-qualified juries, as constituting an improper jury for the determination of guilt-innocence, more complete than that presented here; and (2) there are no studies which contradict the studies submitted; in other words, all the documented studies support the district court’s findings.<sup>28</sup>

---

*inter alia*, in *Maxwell v. Bishop*, 257 F. Supp. 710 (E.D. Ark. 1966). See also *McCleskey*, 481 U.S. at 354 n.7 (Blackmun, J., dissenting) (discussing the justice’s role, when on the Eighth Circuit Court of Appeals, in writing for the panel in *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir. 1968), rejecting “a challenge to the constitutionality of a State’s capital sentencing system based on allegations of racial discrimination supported by statistical evidence” relating to capital-rape prosecutions).

22. 476 U.S. at 165, *citing* *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

23. *Witherspoon*, 391 U.S. at 522–23.

24. *Id.* at 520 n.18; *Bumper v. North Carolina*, 391 U.S. 543, 545 (1968).

25. *Witherspoon*, 391 U.S. at 520.

26. *Id.* at 518.

27. *Grigsby v. Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983).

28. *Grigsby v. Mabry*, 758 F.2d 226 (8th Cir. 1985) (en banc).

In reversing the court of appeals, Justice Rehnquist wrote for five of his brethren, “expressing barely concealed contempt for the evidence . . . as [h]e worked his way through each scientific study, finding flaws everywhere.”<sup>29</sup> After expending such effort to discredit studies that, as the Eighth Circuit had underscored, were beyond reproach,<sup>30</sup> the Court then signaled it would “assume for purposes of this opinion that the studies are both methodologically valid and adequate to establish that ‘death qualification’ in fact produces juries somewhat more ‘conviction-prone’ than ‘non-death-qualified’ juries.”<sup>31</sup> That minimizing language belied the findings of the numerous studies, which creditably evidenced that death qualification materially shifts the pool of potential jurors toward guilt proneness and lodges a disproportionate number of African-Americans and women in the excludable class of venire members.<sup>32</sup> *Lockhart* thus jettisoned the very question it had granted certiorari on, the question that Justice Stevens had squarely put forth in *Witherspoon*.<sup>33</sup> Indeed, the Court swept away Respondent McCree’s empirical proof of the conviction-inclined biasing of capital juries from *Witherspoon*’s residuum,<sup>34</sup> bluntly holding “nonetheless, that the Constitution does not prohibit the States from ‘death qualifying’ juries in capital cases.”<sup>35</sup>

## 2. McCleskey v. Kemp

In *McCleskey*,<sup>36</sup> the Court marked crucial turning points for both its equal protection and cruel and unusual punishments jurisprudence, as well as for its receptivity to empirical proof in the

---

29. John Charles Boger, *McCleskey v. Kemp: Field Notes from 1977-1991*, 112 NW. U. L. REV. 1637, 1672 (2018).

30. *Lockhart* had made it “clear that even the most unassailable and methodologically perfect evidence would not have convinced the majority” of that Court. Donald N. Bersoff, *Social Science Data and the Supreme Court: Lockhart as a Case in Point*, 42 AM. PSYCHOLOGIST 52, 57 (1987).

31. *Lockhart*, 476 U.S. at 173.

32. *Id.* at 187 (Marshall, J., dissenting). Justice Marshall pointed to various studies reflecting that the death-excludable “group have been shown to be significantly more concerned with the constitutional rights of criminal defendants and more likely to doubt the strength of the prosecution’s case.” *Id.* at 199–200.

33. See *supra* note 25 and accompanying text.

34. As Justice Marshall put it: “With a glib nonchalance ill-suited to the gravity of the issue presented and the power of respondent’s claims, the Court upholds a practice that allows the State a special advantage in those prosecutions where the charges are the most serious and the possible punishments, the most severe.” *Lockhart*, 476 U.S. at 185 (Marshall, J., dissenting).

35. *Id.* at 173.

36. 481 U.S. 270 (1987).

administration of criminal justice. Since the day it was handed down, a host of observers have considered it not merely wrongly decided, but anathema to the aspiration of racial justice.<sup>37</sup> Mr. McCleskey challenged the constitutionality of Georgia's post-*Furman* sentencing statute based on the data and findings from extensive empirical studies lead by Professor David C. Baldus.<sup>38</sup>

The Baldus team's statewide research evidenced serious racial disparities in several dimensions of Georgia's post-*Furman* sentencing scheme, which lead to findings that "relatively few" Georgia death sentences "would qualify as presumptively evenhanded."<sup>39</sup> Warren McCleskey's individual case placed some of these features in focus. He was convicted in the 1978 murder of a police officer who responded to a silent alarm from the Dixie Furniture store in Atlanta during an attempted robbery by four armed men.<sup>40</sup> Mr. McCleskey's post-conviction attorneys determined that between 1973 and 1980 in the Superior Court of Fulton County, sixteen defendants convicted of killing law enforcement officers were prosecuted non-capitally and sentenced to prison terms.<sup>41</sup> In one additional case during that span, a Fulton County jury returned a life verdict for a capitally prosecuted black defendant convicted of murdering a black officer.<sup>42</sup> Mr. McCleskey's victim was white and he alone out of that group of eighteen Fulton County cases received death.<sup>43</sup> These features were the foreground for the broader systemic evidence the Baldus team's statewide charging and sentencing research ultimately reflected.<sup>44</sup> In sum, the studies revealed various profound racial disparities in the operation of Georgia's death penalty.

---

37. It is widely acknowledged as an ignominious landmark in the Nation's constitutional history. See Lee Kovarsky, *Muscle Memory and the Local Concentration of Capital Punishment*, 66 DUKE L. J. 259, 321–22 (2016); John H. Blume & Sheri Lynn Johnson, *Unholy Parallels Between McCleskey v. Kemp and Plessy v. Ferguson: Why McCleskey (Still) Matters*, 10 OHIO ST. J. CRIM. L. 37, (2012); Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988).

38. See David C. Baldus, Charles Pulaski, & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983).

39. *Id.* at 728.

40. *McCleskey v. Zant*, 580 F. Supp. 338, 345 (N.D. Ga. 1984).

41. ANTHONY G. AMSTERDAM & JEROME BRUNER, *Rhetorics of Death: McCleskey v. Kemp*, in *MINDING THE LAW* 194–216 (2002); *McCleskey*, 580 F. Supp. at 356–57.

42. *McCleskey*, 580 F. Supp. at 357.

43. *Id.*

44. *Id.* at 356.

The Northern District of Georgia initially granted Mr. McCleskey relief—but under entirely separate grounds from those concerning the empirical research-based statutory challenge.<sup>45</sup> Specifically, due to the Fulton County District Attorney’s failure to disclose inducements to a state witness, relief was granted under *Giglio v. United States*.<sup>46</sup> In the same opinion, the district court rejected Mr. McCleskey’s empirical evidence-based claims on “methodological grounds.”<sup>47</sup>

The Eleventh Circuit, taking the case directly en banc, reversed the district court’s *Giglio* relief,<sup>48</sup> before turning to the empirically-based constitutional challenges. In much the same way Justice Rehnquist had done in *Lockhart*, Justice Powell set forth that the Court would “assume the study is valid statistically without reviewing the factual findings of the District Court.”<sup>49</sup> In a further parallel with *Lockhart*, *McCleskey* undermined this assumption of the study’s validity by levying extensive criticism and dismissiveness

---

45. *McCleskey*, 580 F. Supp. at 384.

46. 405 U.S. 150 (1972).

47. BALDUS ET AL., *supra* note 11.

48. *McCleskey*, 753 F.2d 877, 885 (11th Cir. 1985). The reversal of relief from the *Giglio* claim would not be the end of that aspect of the litigation, as chronicled in an extensive footnote in Boger, *supra* note 29, at 1686-87 n.126. Dean Boger recounts a tragic and, at certain points, farcical story culminating in a claim under *Massiah v. United States*, 377 U.S. 201 (1964), involving the jailhouse snitch at the center of the *Giglio* claim and leading once again to the Supreme Court. The *Massiah* claim concerned the emergence many years after the fact of a 21-page statement from the jailhouse snitch evidencing his agency with the state in attempting to elicit from Mr. McCleskey incriminating statements without the assistance of counsel and thus in violation of the Sixth Amendment. The Supreme Court affirmed the Eleventh Circuit’s reversal of relief from District Judge Forrester on the *Massiah* claim. *McCleskey v. Zant*, 499 U.S. 467, 475 (1991). In so doing, Justice Kennedy is said to have founded the Court’s opinion “upon a novel reinterpretation that radically tightened the ‘abuse of the writ’ standard” governing successor habeas petitions. *Id.* at 1687. The story’s epilogue, as captured in the footnote, concerns a “Detective Dorsey, who arranged the secret interrogation of McCleskey, [and who] was later elected Sheriff of DeKalb County in metropolitan Atlanta. Sheriff Dorsey lost reelection after one term and immediately directed several of his senior officers to assassinate his successful opponent, apparently to cover up widespread corruption and abuse by his office. Ironically, for his role in this brazen murder, Detective Dorsey was himself sentenced to life imprisonment.” *Id.* at 1637 (citation omitted).

49. *McCleskey*, 481 U.S. at 291 n.7. This repeated the tack taken in the Eleventh Circuit, which also had assumed that the empirical study substantiated petitioner’s allegations. *McCleskey*, 753 F.2d at 895.

concerning its findings.<sup>50</sup> Plainly, the Eleventh Circuit handled the constitutional issue quite differently from District Judge Forrester's direct rejection.<sup>51</sup> In their respective choices to assume the validity of the research rather than squarely engage with it, both the Eleventh Circuit and the Supreme Court "merely facilitated the disposition of the case."<sup>52</sup> Paradoxically, simply assuming that the research proved the infection of racial bias throughout the operation of the statutory scheme enabled those courts to evade any methodical reckoning with that empirical proof's implications.

Before *McCleskey*, the Court recognized that ascertaining discriminatory intent under the Equal Protection Clause was "a sensitive inquiry into such circumstantial and direct evidence . . . as may be available."<sup>53</sup> *McCleskey* transfigured the empirical evidence of legislative facts,<sup>54</sup> which deeply adduced such discrimination in Georgia's capital sentencing statute—the legislation that was the subject of petitioner's challenge—into adjudicative facts,<sup>55</sup> which were to be considered as between the immediate parties—Petitioner Warren McCleskey and Respondent Superintendent Ralph Kemp—and to concern only individual participants in Mr. McCleskey's prosecution and trial proceedings.<sup>56</sup>

---

50. See *McCleskey*, 481 U.S. at 308, 312–13. But the Court's opinion possesses far more troubling features than merely its rhetorical approach to masking, *viz.*, to "concealing unstated convictions" about the constitutional consequences flowing from the bias against defendants prosecuted for homicides of white victims. AMSTERDAM & BRUNER, *supra* note 41.

51. *McCleskey*, 580 F. Supp. at 350.

52. Kennedy, *supra* note 37, at 1398.

53. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

54. Professor Kenneth Culp Davis coined these terms "legislative fact" and "adjudicative fact" in the influential work, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–03 (1942). A legislative fact transcends the particular legal controversy but may bear upon the judiciary's reasoning and enunciation of legal rules. *Id.* at 402 (facts informing a court's "legislative judgment may conveniently be denominated legislative facts").

55. An adjudicative fact, simply, is one belonging to a particular dispute, concerning immediate parties, and to be determined by that proceeding's trier of fact. See Fed. R. Evid. 201(a), Judicial Notice of Adjudicative Facts.

56. "McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence." *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987). Rejecting "prior case law which interpreted the Eighth Amendment as concerned with the *risk* of arbitrary and capricious decisions in the system as a whole," the *McCleskey* Court "rendered the statistical proof irrelevant" by introducing the capital defendant's evidentiary

The empirical facts regarding the operation of Georgia's capital sentencing legislation from 1973 through 1979 were plainly not adjudicative facts directly between the *McCleskey* parties.<sup>57</sup> In the face of empirical proof of Georgia's failure systemically to materialize the evenhanded application of sentencing called for under the Eighth Amendment at least dating back to *Weems v. United States*,<sup>58</sup> and enunciated in the modern capital context since *Gregg*, the *McCleskey* Court altered the *nature* of both the proof to establish an equal protection violation *and* the required proof under the Cruel and Unusual Punishments Clause. The opinion thereby effectively ended the Court's entertaining of capital cases founded upon empirical evidence of legislative facts.<sup>59</sup> Manufacturing the requirement of direct proof of racial discrimination—of essentially explicit, conscious bigotry<sup>60</sup>—and then faulting the prisoner, by the time he reached the Supreme Court, for not presenting such evidence, avoided constitutional consequences for Georgia's post-*Furman* scheme and preempted similar fates befalling legislation in other capital jurisdictions.<sup>61</sup>

---

burden of showing “that the discretion invested in the prosecutor or jury in his particular case resulted in an arbitrary or capricious decision, not that such discretion in the system permits such results.” David Faigman “*Normative Constitutional Fact-Finding: Exploring the Empirical Component of Constitutional Interpretation*,” 139 U. PA. L. REV. 541, 599–600 (1991) [hereinafter Faigman, *Normative Constitutional Fact-Finding*], (citing *McCleskey*, 481 U.S. at 306–08).

57. *McCleskey*, 481 U.S. at 338 (Brennan, J., dissenting); BALDUS ET AL., *supra* note 11, at 67 n.10.

58. 217 U.S. 349, 386 (1910).

59. With thirty years' hindsight, Mr. McCleskey's counsel, Jack Boger, emeritus professor and former dean of the University of North Carolina School of Law, explained that beyond Justice Powell's “dismissal of the facts and their significance in Georgia, his opinion distorted the legal standards so fiercely that . . . *McCleskey* effectively closed the book, not only on further racial challenges in capital sentencing but, far more broadly, on empirical racial challenges in other kinds of criminal cases.” Boger, *supra* note 29, at 1678. Yet Dean Boger's panoramic assessment does not plumb deep enough; *McCleskey* had also closed the book on empirical evidence in relation to *any* challenge to capital sentencing.

60. Another of Mr. McCleskey's attorneys, Professor Amsterdam, has observed that the Court's decision stems from—and can only be justified by—a “supposi[tion] that conscious racial bigotry on the part of public officials [was] the sole significant form of government-supported racial inequality in this country today.” Anthony G. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After McCleskey*, 39 COLUM. HUM. RTS. L. REV. 34, 55 (2007).

61. “In both [*Lockhart* and *McCleskey*], the Court shifted the precedent's system-wide perspective, which encouraged scientific research, to a particularized perspective that rendered the research conducted irrelevant.” Faigman, *supra* note 56 at 600.

### 3. State v. Hidalgo

On Mr. Hidalgo's automatic direct appeal, the Arizona Supreme Court's treatment of the empirical case against the statute echoed the approaches of *Lockhart* and *McCleskey* that, for decades, had effectively closed the Federal courthouses to challenges founded upon such evidence. The state supreme court assumed Mr. Hidalgo had established "that nearly every charged first-degree murder could support at least one aggravating circumstance,"<sup>62</sup> but swept aside the legal significance of those legislative facts.

The state court sidestepped the prescribed narrowing analysis under the Federal constitutional authorities, offering instead a mélange of Arizona's capital scheme that simply did not bear upon the eligibility question Mr. Hidalgo presented.<sup>63</sup> Despite the profound effects of *McCleskey*, or perhaps because of them, Mr. Hidalgo's persistence in the face of the calcified disinterest with empirical evidence managed to garner the attention of four Justices and, in the process, restore at least serious consideration of a role for empirical proof in adjudicating constitutional questions in the administration of criminal justice.

A signature feature of the state court record, and thus Mr. Hidalgo's certiorari petition, was that its challenge to Arizona's sentencing statute derived from the legislation's categorical overbreadth in determining death-eligibility, *viz.*, its enumerated aggravating circumstances.<sup>64</sup> As such, the *Hidalgo* narrowing challenge did not expressly concern race. Within the vacuum of the straight-forward eligibility/narrowing claim, the *Hidalgo* Statement underscored the lack of evidentiary development afforded at the capital trial and thus the inadequacy of the record for purposes of constitutional review.<sup>65</sup> It emphasized the importance of affording "[c]apital defendants . . . the opportunity to fully develop a record with the kind of empirical evidence that the petitioner points to here."<sup>66</sup>

Future challenges in this vein premised upon sound empirical research on narrowing or other critical sentencing junctures would capture race data and robustly factor the implications. Of course, different vantage points on the data from Maricopa County in

---

62. *Hidalgo*, 138 S. Ct. 1054, 1056 (2018).

63. *Id.* at 1056–57.

64. Ariz. Rev. Stat. Ann. § 13-751(F) (2018).

65. *Hidalgo*, 138 S. Ct. at 1057.

66. *Id.*

*Hidalgo*,<sup>67</sup> or any other data set, could produce questions on the improper effects of race. A malign such influence could appear—and in many studies *has appeared*—at, *e.g.*, the indictment and death notice stage.<sup>68</sup>

The aforementioned approach in *Hidalgo* (to focus categorically on statutory narrowing), subsumes the function of the prosecutor under Arizona’s sentencing scheme and thereby may obscure additional problematic influence upon the assembling of death-eligible individuals. For instance, the formulation of the distinction between first-degree and second-degree murder and the breadth of the former in Arizona’s scheme affords the prosecutor considerable latitude at the indictment stage. *Hidalgo* did not concern the charging decisions between, *inter alia*, second- and first-degree murder, which serve as the initial threshold for death eligibility under the scheme.

In this context, empirical data is likely to illuminate serious questions concerning *who* is indicted for first-degree murder (as opposed to lesser intentional homicides), and therefore who does, and who does not, end up in the pool of first-degree cases that *Hidalgo* generally problematized.<sup>69</sup> Felony murder and premeditation separate death eligible intentional homicides from those cases that permit only a lesser punishment.<sup>70</sup> As is true in many jurisdictions,<sup>71</sup> Arizona’s categories inherently leave a great deal to prosecutorial interpretation, let alone trial judge and juror confusion.<sup>72</sup>

---

67. *Hidalgo*, 138 S. Ct. at 1056 (identifying study’s span as from 2002–2012).

68. See Katherine Barnes, David Sloss, & Stephen Thaman, *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 ARIZ. L. REV. 305 (2009); Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: The Case of Victim-Based Discrimination*, 18 L. & SOC’Y REV. 437 (1984). Interwoven with this juncture is the prosecutorial discretion in resolving capitally charged cases with a lesser sentence. See Sherod Thaxton, *Leveraging Death*, 103 J. CRIM. L. & CRIMINOLOGY 475 (2013); Ilyana Kuziemko, *Does the Threat of the Death Penalty Affect Plea Bargaining in Murder Cases? Evidence from New York’s 1995 Reinstatement of Capital Punishment*, 8 AM. L. & ECON. REV. 116 (2006).

69. Ariz. Rev. Stat. Ann. § 13-105 (2018).

70. Ariz. Rev. Stat. Ann. § 13-104 (2018).

71. See Robert Weisberg, *Impulsive Intent/Impassioned Design*, 47 TEX. TECH L. REV. 61, 72 (2014).

72. See, *e.g.*, *State v. Thompson*, 65 P.3d 420, 424 (Ariz. 2003). Thompson challenged the vagueness of the statutory definitions of first-degree and second-degree murder, arguing that “premeditation” ostensibly distinguishes the classifications, but its statutory definition hinges on the clause “[p]roof of actual reflection is not required”—a phrase not known to be present in any other state’s definition of premeditation and only added to the statute by amendment following

However, the evidentiary record was seriously constrained due to the trial court's denial of a hearing on Mr. Hidalgo's challenge. As the *Hidalgo* Statement underscored, "the record as it has come to [the Supreme Court] is limited and largely unexamined by experts and the courts below in the first instance."<sup>73</sup> The Statement comments further on the vehicle's limitations: "Nor has it been fully explained whether and to what extent an empirical study would be relevant to resolving the constitutional question presented."<sup>74</sup> The Statement concludes with encouragement to future capital defendants to develop a trial record "with the kind of empirical evidence that the petitioner points to here," and by noting that "such a record" thereby "will be better suited for certiorari."<sup>75</sup>

Explicit guidance of this sort, from a four-Justice bloc, soliciting future Eighth Amendment challenges of capital sentencing legislative schemes is notable.<sup>76</sup> Further, and of considerable importance in its own right, that bloc has encouraged empirical evidence's return in adducing such challenges. The Statement thus reopens a long-shuttered enterprise, potentially restoring to some degree the evidentiary salience of rigorous, statistically-driven social science research on the operation of capital legislation.

The *Hidalgo* Statement's renewed interest in the relevance of empirical research for capital sentencing is thus particularly significant both given *McCleskey*'s long foreclosure, in effect, of any such role for empirical evidence and, further, given the lengthy dissent, also penned by Justice Breyer (and joined by Justice Ginsburg), in *Glossip v. Gross*.<sup>77</sup> The *Glossip* dissent raises whether the Court should revisit the Eighth Amendment question in *Furman*, drawing, in part, upon the line of research, emanating from the Baldus studies, which have "concluded that individuals accused of murdering white victims, as opposed to black or other minority victims, are more likely to receive the death penalty."<sup>78</sup>

---

an intermediate appellate decision construing the prior statutory definition as requiring actual reflection. *Id.* at 426.

73. 138 S. Ct. at 1057.

74. *Id.*

75. *Id.*

76. See Arthur J. Goldberg, *Memorandum to the Conference Re: Capital Punishment, October Term, 1963*, 27 S. TEX. L. REV. 493, 493 (1986).

77. 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting).

78. *Id.* at 2760–61, citing, e.g., Justin Marceau, Sam Kamin & Wanda Foglia, *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 U. COLO. L. REV. 1069 (2013).

## II. CONDITIONS FOR THE RETURN OF EMPIRICAL EVIDENCE TO THE COURTS

As the Burger Court wound to a close, it developed a distaste for evidence of legislative facts substantiating criminal justice's actual workings.<sup>79</sup> For its part, the Rehnquist Court seemed to metabolize this statistical dimension of constitutional litigation.<sup>80</sup> Whatever the reasons, at the moment when society and industry began to enter a digital, data-driven age, the Court's orientation to data-evidenced social facts, at least in relation to criminal justice, did not stay apace with the radical change in society's access and orientation to information.

### A. Inchoate Role of Institutional History in Constitutional Challenges

The *Hidalgo* Statement's minor departure from the Supreme Courts' curious disinterest with empirically-evincing challenges leaves the question: When will courts with jurisdiction over the most active capital punishment states meaningfully entertain empirical evidence on capital sentencing?<sup>81</sup> That day's arrival is likely to follow a more substantial historical reckoning. This is due to the inherently historical nature of empirical research, which analyzes data collected to manifest a bounded timeframe of interest, coupled with historical narrative's intrinsic significance in ascertaining the presence of discrimination or broader dysfunction (e.g., arbitrariness). Indeed, *McCleskey* itself suggests this imperative of a more profound historical treatment.

The United States Supreme Court (one such court indeed presiding over the most active death penalty states), recently decided

---

79. See EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT 189 (1998) (reporting the Chief Justice as saying in conference that he was "not going to be 'bossed around' by social scientists.").

80. *Lockhart* (*supra* note 29 and related text) was one of Justice Rehnquist's last majority opinions before becoming the chief.

81. "Active" means jurisdictions that, from year-to-year, tend to obtain new death verdicts and/or that set execution dates. This is more or less as precise as Justice Stewart's famed First Amendment-related definition in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). For examples, Texas is active and Oregon, which has not executed someone since 1997 and has maintained a moratorium on executions since 2011, is not.

*Ramos v. Louisiana*,<sup>82</sup> which overturned law dating to the late nineteenth century in a decision reflecting the legal significance of historical discrimination. It is far from clear what *Ramos* portends for the embrace of such history's relevance to the Eighth and Fourteenth Amendments.<sup>83</sup> In any event, it diverges markedly from *McCleskey* in relation to its treatment of historical vestiges and the persistence of racial bias.<sup>84</sup> *Ramos*, strictly speaking, simply questioned "[w]hether the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous guilty verdict to convict."<sup>85</sup> Yet in answering in the affirmative, the Court confronted the constitutional effects of institutional racism.<sup>86</sup> Periodically, the Roberts Court has vanquished *explicit* racism stemming from adjudicative facts as between the parties.<sup>87</sup> But it has generally refrained from recognizing constitutional significance in racism's structural or institutional dimensions found in legislative facts (*i.e.*, the historical record).<sup>88</sup>

### 1. *McCleskey's* Treatment of Contemporary Historical Evidence

The majority and two concurring opinions in *Ramos* are a far cry from *McCleskey*. Relegating Mr. McCleskey's "historical evidence"

---

82. 140 S. Ct. 1390 (2020) (overturning statute permitting non-unanimous (10–2) guilty verdicts in serious criminal prosecutions, holding that Sixth Amendment entitles defendant to requirement of unanimous verdict).

83. Justice Kavanaugh's opinion in *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019), also contributes to an elevation of history in identifying current racial discrimination. While *Flowers* "simply enforces and reinforces *Batson* [*v. Kentucky*, (1986),] by applying it to the extraordinary facts of this case," the Court extensively rehearsed Reconstruction history and the long course from, *inter alia*, *Strauder v. West Virginia*, 100 U.S. 303 (1880), to *Batson*. 139 S. Ct. at 2239.

84. See Kennedy, *supra* note 37, at 1412.

85. *Ramos v. Louisiana*, No. 18-5924, Merits Brief for Petitioner, 2019 WL 2451204, \*i (2019).

86. Only Oregon and Louisiana permitted non-unanimous guilty verdicts for serious criminal felonies.

87. See, *e.g.*, *Buck v. Davis*, 137 S. Ct. 759 (2017) (holding trial counsel was ineffective for calling expert to testify to the view that defendant's race predisposed him to violent conduct); *Foster v. Chatman*, 136 S. Ct. 1737 (2015) (finding that evidence of racial denotations on the State's venire list established purposeful discrimination in its exercise of peremptory strikes against prospective black jurors).

88. The touchstone decision reflecting this point may be *Shelby County v. Holder*, 570 U.S. 529 (2013) (invalidating Section 4 of the Voting Rights Act of 1965, finding it imposed current burdens no longer responsive to conditions within the voting districts at issue).

to a footnote (quotation marks in original),<sup>89</sup> Justice Powell's opinion discredited the historical "support [for] his claim of purposeful discrimination by the State,"<sup>90</sup> by mischaracterizing it:

This evidence focuses on Georgia laws in force during and just after the Civil War. Of course, the "historical background of the decision is one evidentiary source" for proof of intentional discrimination. But unless historical evidence is reasonably contemporaneous with the challenged decision, it has little probative value. Although the history of racial discrimination in this country is undeniable, we cannot accept official actions taken long ago as evidence of current intent.<sup>91</sup>

Mr. McCleskey in fact did not focus upon the Reconstruction Era exclusively. The petition did supply evidence of the continuity extending from the facially discriminatory laws and policies before and after the Reconstruction Amendments, well into the modern period, including years immediately before Mr. McCleskey's petition for certiorari.<sup>92</sup> Mr. McCleskey was not relying upon only "official actions taken long ago." He was pointing to, among other things, numerous Supreme Court cases addressing racial discrimination *from Georgia* throughout the decades leading up to his case. These amply documented indicia of discrimination not only corroborated the empirical research at the heart of the litigation, they underscored the contingent quality of the guided-discretion paradigm established by *Gregg*. As Mr. McCleskey argued in the Supreme Court, *Gregg's* facial validation of Georgia's post-*Furman* statute contemplated verification of the scheme's actual operation, which was to be ascertained not in a

---

89. *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987) (internal citations omitted).

90. *Id.*

91. *Id.*

92. In petitioner's merits brief, he expressly incorporated "the abundant history of racial discrimination that has plagued Georgia's past" set forth in his petition for certiorari, which "supplemented his strong statistical case." Brief for Petitioner, *McCleskey v. Kemp*, No. 84-6811, 1986 WL 727359, \*60 (1986). In that certiorari petition, Mr. McCleskey highlighted the "distorting effects of racial prejudice [that] continued well into the present area," invoking numerous post-war cases, including *Screws v. United States*, 325 U.S. 91 (1945); *Avery v. Georgia*, 345 U.S. 559 (1953); *Whitus v. Georgia*, 385 U.S. 545 (1967); and *Turner v. Fouche*, 396 U.S. 346 (1970). See Petition for Writ of Certiorari, 1985 U.S. S. Ct. Briefs LEXIS 1538, \*22 (parenthetical descriptions omitted). For obvious reasons, the Supreme Court's leading Georgia death penalty precedents were also singled out. See *Furman v. Georgia*, 408 U.S. 238, 249 (1972) (Douglas, J., concurring), *id.* at 309-10 (Stewart, J., concurring).

vacuum but with respect to recent experience and the broader historical context.<sup>93</sup>

## 2. *Ramos's* Treatment of Reconstruction's Enduring Legacy

Justice Powell's mischaracterization of historical racial antipathy in Georgia's administration of justice is a far cry from the approach in Justice Gorsuch's opinion for the Court in *Ramos*.<sup>94</sup> From the outset, *Ramos* emphasized that Louisiana's endorsement of non-unanimous verdicts for serious crimes occurred at a constitutional convention in 1898, "the avowed purpose of [which] was to 'establish the supremacy of the white race,' and the resulting document included many of the trappings of the Jim Crow era . . ."<sup>95</sup> The *Ramos* majority continued, finding that "[w]ith a careful eye on racial demographics, the convention delegates sculpted a 'facially race-neutral' rule permitting 10-to-2 verdicts in order 'to ensure that African-American juror service would be meaningless.'"<sup>96</sup> The Court chronicled a similarly odious history for Oregon, the only other state to maintain non-unanimous verdicts, which adopted its rule in the 1930s at the urging of the Ku Klux Klan in order "to dilute the influence of racial, ethnic, and religious minorities on Oregon juries."<sup>97</sup>

In concurrence, Justice Sotomayor also emphasized the importance of Louisiana's discriminatory history for the constitutional evaluation of its legislation,<sup>98</sup> "not simply because that legacy existed in the first place—unfortunately, many laws and policies in this country have had some history of racial animus—but also because the States' legislatures never truly grappled with the laws' sordid history in reenacting them." Citing *United States v. Fordice*,<sup>99</sup> a leading equal

---

93. Mr. McCleskey also discussed additional capital authorities, including, *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) ("Georgia has 'a constitutional responsibility to tailor *and apply* its law in a manner that avoids the arbitrary and capricious infliction of the death penalty") (emphasis in original). *Petition for Writ of Certiorari*, 1985 U.S. at \*26–27.

94. *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).

95. 140 S. Ct. at 1394, *citing* Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana 374 (H. Hearsey ed. 1898).

96. *Ramos*, 140 S. Ct. at 1394, quoting *State v. Maxie*, No. 13-CR-72522 (La. 11th Jud. Dist., Oct. 11, 2018). See Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593 (2018).

97. *Ramos*, 140 S. Ct. at 1394 (quotation omitted).

98. *Id.* at 1410 (Sotomayor, J., concurring).

99. 505 U.S. 717, 729 (1992) ("policies that are 'traceable' to a State's *de jure* racial segregation and that still 'have discriminatory effects' offend the Equal Protection Clause").

protection decision (while noting that *Ramos* did not present such a challenge), Justice Sotomayor praised “the majority” for “vividly describe[ing] the legacy of racism that generated Louisiana’s and Oregon’s laws.”<sup>100</sup>

Further, in Justice Kavanaugh’s concurring opinion written “to explain [his] view of how *stare decisis* applies to this case,”<sup>101</sup> he expressed that “the origins and effects of the non-unanimous jury rule strongly support overruling *Apodoca v. Oregon*, 406 U.S. 404 (1972).”<sup>102</sup> He underscored that “[c]oming on the heels of the State’s 1896 victory in *Plessy v. Ferguson*, 163 U.S. 537, the 1898 constitutional convention expressly sought to establish the supremacy of the white race.”<sup>103</sup> This concurrence is another instance, in his short time on the Court, of Justice Kavanaugh’s recognition of history’s role in assessing discriminatory effects.<sup>104</sup>

*Ramos*’s historical orientation to current questions of discrimination adds perspective to the legislative histories in the wake of *Furman*. By the time the Supreme Court was able to evaluate the wave of legislative responses just four years after *Furman* had struck down the capital statutes of “no less than 39 States and the District of Columbia,”<sup>105</sup> the legislatures of 35 of those states had enacted new legislation to restore the punishment.<sup>106</sup> The record, state-by-state, is generally bereft of any reckoning with the discriminatory effects and

100. *Id.*

101. *Ramos*, 140 S. Ct. at 1410 (Kavanaugh, J., concurring).

102. *Id.* at 1417.

103. *Id.* (quotation omitted).

104. See *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019) (Justice Kavanaugh’s first majority opinion for the Court).

105. *Furman v. Georgia*, 408 U.S. 238, 417 (1972) (Powell, J., dissenting) (opining that Rhode Island’s only capital crime was mandatory (murder by a life-term prisoner), and *Furman* left it intact).

106. *Gregg v. Georgia*, 428 U.S. 153, 179 n.23 (1976). North Dakota offered a perhaps singular response to *Furman*, setting itself apart from the revanchism of the 35 new statutes nationwide. When *Furman* came down, North Dakota’s death penalty barely remained in its law and it had last carried out an execution in 1930. 408 U.S. at 298 n.52 (Brennan, J., concurring). On March 15, 1973, the North Dakota legislature left nothing to the constitutional imagination and approved a Criminal Law Revision Bill, N.D. S.L. 1973, ch. 116, § 31, clearing the death penalty from the state’s code. N.D. St. § 12.1-32-09 (effective July 1, 1975). See Rodney S. Webb, *A Prosecutor Looks at the Criminal Code*, 50 N.D. L. REV. 631, 631, 633 (1974). For sixty years prior to abolition, only two offenses had remained punishable by death (treason, N.D. St. § 12-0701, and first-degree murder by an inmate already convicted of first-degree murder and serving a life sentence, § 12-2713). See North Dakota Revised Code of 1943, Title 12, Crimes and Punishments.

intentions in capital sentencing statutes.<sup>107</sup> That record, writ large, is essentially devoid of recognition of the deleterious consequences, let alone the racialized impetuses, for the death penalty historically.<sup>108</sup> In contrast, in states that have legislatively abolished capital punishment since *Gregg*, the legislative record has reflected modern constitutional infirmities, including those stemming from racial discrimination.<sup>109</sup>

## B. Empirical Evidence in State Constitutional Adjudication

As various state governments have, in recent years, weighed empirical evidence in evaluating the prudence, propriety, and lawfulness of their capital sentencing schemes,<sup>110</sup> so too have some

---

107. Connecticut possesses one of the few traces of a legislative record addressing the racially discriminatory history of capital punishment. Rev. Irv Joyner, United Church of Christ, under the auspices of its Commission for Racial Justice, testified as follows:

Capital punishment has been designed for Blacks, other minorities and the poor. And statistics bear this out from across the country. . . . Capital punishment has been used only against the weak, the defenseless and the Black and there is no reason to believe that this will change in the future.

Conn. Public Act No. 73-137, S.B. 8297, tr. of Judiciary Committee Hrg. (Feb. 15, 1973), at 126.

108. For instance, Georgia's legislative record for H.B. 12 (enacted, Georgia Laws, 1973, Act No. 74), appears to reflect a single comment alluding to bias, from the state senator from the 39<sup>th</sup> District (consisting of Fulton County, in part): "History has pointed out for all to see that the death sentence laws have not been fairly administered and applied. There is considerable evidence which demonstrates arbitrary action and racial and economic bias in the enforcement of these laws." 1973 Ga. J. of Senate 506 (1973) (Statement of Senator Horace T. Ward, Feb. 22, 1973).

109. See, e.g., Conn. Comm. Tr. Judiciary Committee, Senate Bill 280: "In a study of Connecticut death penalty cases over a 34-year period ending in 2007, Stanford Law Professor John Donohue found virtually no difference between the severity of crimes committed by defendants on Connecticut's death row compared to other violent offenders sentenced to life in prison or lesser terms." (Testimony of Sen. Donald Williams, Mar. 14, 2012); see also John J. Donohue, *Capital Punishment in Connecticut, 1973-2007: A Comprehensive Evaluation from 4686 Murders to One Execution*, BEPRESS (2013), [http://works.bepress.com/john\\_donohue/87/](http://works.bepress.com/john_donohue/87/) [<https://perma.cc/GN3H-HVRC>].

110. See, e.g., Colo. Sen. Bill 20-100 (signed Mar. 23, 2020) (repealing death penalty prospectively); see also Gov. Jared Polis, Executive Order C 2020, Commutation of Sentence (Mar. 23, 2020) (commuting sentences of the state's three death-sentenced prisoners to life without parole, "consistent with the recognition that the death penalty cannot be, and never has been, administered equitably in the State of Colorado"); see also Raymond Paternoster, Robert Brame, Sarah Bacon, & Andrew Ditchfield, *Justice By Geography and Race: The Administration of the*

state judiciaries probed their capital experiences and found them wanting.<sup>111</sup> Returning to the question submitted above—*viz.*, when will active capital punishment dockets meaningfully entertain empirical evidence?<sup>112</sup>—these scrutinizing legislatures and high courts have not belonged to jurisdictions at the upper end of the “active” distribution. Indeed, unlike Mr. Hidalgo’s Arizona (and Mr. Ramos’s Louisiana,<sup>113</sup> for that matter), Washington State, with five executions since *Gregg* (the last of these occurring almost ten years ago),<sup>114</sup> has not been an active executioner historically. Its high court’s handling of empirical analysis on its death penalty nonetheless offers much to consider about the role of such evidence in understanding its operation. High on the list of things to consider is the extent to which the experience reflected in *State v. Gregory*,<sup>115</sup> supports the undertaking of similar inquiries in states with more pronounced historical records of facially discriminatory laws and policies, and enduring vestiges of same, than Washington State’s.

---

*Death Penalty in Maryland, 1978-1999*, 4 MARGINS: MD. L.J. RACE, RELIG. GENDER & CLASS 1, (2004) (noting that governor “commissioned the current empirical study of the death penalty, and subsequently imposed a moratorium on all executions in the state until the study’s completion”); 2013 Md. Laws, Ch. 156, S.B. No. 276, eff. Oct. 1, 2013 (repealing death penalty prospectively).

111. See, e.g., *Fry v. Lopez*, 447 P.3d 1086, 1092 (N.M. 2019) (observing that 2009 legislative prospective abolition left two death sentenced prisoners in the state (Fry and Allen), applying proportionality review under N.M. S.A. § 31-20A-4(C)(4), finding “no meaningful basis for distinguishing Fry and Allen from the many similar cases in which the death penalty was not imposed”); *State v. Santiago*, 122 A.3d 1 (Conn. 2015) (recognizing prospective abolition of death penalty, applying state constitutional ban on excessive and disproportionate punishment under Conn. Const. art. first, §§ 8 and 9, to invalidating the death penalty for retrospective application); *People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004) (invalidating capital statute due to its jury deadlock instruction’s violation of state constitution’s due process clause, under N.Y. Const. art. 1, § 6).

112. See *supra* note 81 and accompanying text.

113. See, e.g., *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (ruling, inter alia, that a second attempt to execute the teenage prisoner by electric chair was not, inter alia, cruel and unusual punishment following a botched first attempt wherein the responsible corrections officer (executioner) and a seconded inmate, both of whom were reportedly drunk at the time, improperly setup the device and subjected subjected Mr. Francis to electric current sufficient to cause violent convulsing but not kill him).

114. Washington executed Cal Brown in September 2010. Jennifer Sullivan, *Killer on death row 16½ years is executed*, SEATTLE TIMES, (Sep. 10, 2010).

115. 427 P.3d 621 (2018 Wash.) (Fairhurst, C.J.) (unanimous).

### 1. Washington Supreme Court Invalidates Arbitrary, Racially Biased Scheme

In *Gregory*, the Washington Supreme Court, relying chiefly upon “analysis and conclusions” from empirical research<sup>116</sup> and the court’s “judicial notice of implicit and overt racial bias against black defendants in the state,”<sup>117</sup> held that Washington’s “death penalty is invalid because it is imposed in an arbitrary and racially biased manner.”<sup>118</sup> *Gregory* so decided the matter “on adequate and independent state constitutional principles,”<sup>119</sup> under the state constitution’s “cruel punishment” prohibition.<sup>120</sup> The court “afford[ed] great weight” to the “analysis and conclusions” from the expert’s review of regression analyses.<sup>121</sup> This empirical work derived from trial court reports mandatorily supplied to the supreme court for all aggravated first-degree murders, including cases in which a death sentence was not imposed,<sup>122</sup> for the sake of the proportionality review statutorily required in each capital case.<sup>123</sup> *Gregory* held that “[w]hile this particular case provides an opportunity to specifically address racial disproportionality, the underlying issues that underpin our holding are rooted in the arbitrary manner in which the death penalty is generally administered.”<sup>124</sup>

---

116. *Id.* at 633.

117. *Id.* at 635.

118. *Id.* at 627.

119. *Gregory*, 427 P.3d at 632 (citing *Michigan v. Long*, 463 U.S. 1032, 1041–42 (1983)).

120. Wash. Const. art. 1, § 14.

121. *Id.* See Katherine Beckett & Heather Evans, *The Role of Race in Washington State Capital Sentencing, 1981-2014*, BECKETT REPORT (Oct. 13, 2014), <https://perma.cc/3THJ-989W>.

122. Seven states limit statutory proportionality review to comparison among cases that obtained death sentences. See generally Barry Latzer, *The Failure of Comparative Proportionality Review of Capital Cases (with Lessons from New Jersey)*, 64 ALB. L. REV. 1161, 1212 n.246 (2001) (enumerating Alabama, see Ala. Code § 13-A-5-53(b)(3); Kentucky, see Ky. Rev. Stat. Ann § 532.0075(3)(c); Mississippi, see Miss. Code Ann. § 99-19-105; Nebraska, see Neb. Rev. Stat. § 29-2521.03; see Ohio, Ohio Rev. Code Ann. § 2929.05(A); South Carolina, see S.C. Code Ann. § 16-3-25(C)(3); and Tennessee, see Tenn. Code Ann. § 39-13-206(c)(1)(D)).

123. Wash. Rev. Code § 10.95.130(1) (direct appellate and proportionality reviews are “consolidated for consideration”); *State v. Davis*, 290 P.3d 43, 70 (Wash. 2012).

124. *Gregory*, 427 P.3d at 627.

The court reviewed the statistical evidence “by way of legal analysis, not pure science,”<sup>125</sup> and determined that “[t]he most important consideration is whether the evidence shows that race has a meaningful impact on the imposition of the death penalty.”<sup>126</sup> Due to the aforementioned evidence before the court and judicial notice “of implicit and overt racial bias against black defendants,” it was “confident that the association between race and the death penalty is *not* attributed to random chance.”<sup>127</sup> Specifically, the court found that from 1981 to 2014, Washington’s capital sentencing “involving Black defendants were between 3.5 and 4.6 times as likely to result in a death sentence as proceedings involving non-Black defendants after the impact of the other variables included in the model has been taken into account.”<sup>128</sup>

*Gregory*’s direct treatment of empirical evidence is an outgrowth of the court’s prior, incipient engagement with statistical material under its proportionality review. Two dissenting opinions in *State v. Davis*,<sup>129</sup> a case that upheld a death sentence on collateral challenge, extensively considered the state’s aforementioned trial court reports, wrestling with the *Davis* majority about “which factors were relevant and to what degree statistical evidence could be relied on” in conducting proportionality review.<sup>130</sup> Further, the *Davis* dissenters explicitly “called on competent experts to present evidence on the ‘statistical significance of the racial patterns that emerge from the aggravated-murder trial reports.’”<sup>131</sup> In light of these dissenting opinions in *Davis*, Mr. *Gregory*’s counsel commissioned the above-mentioned empirical study in anticipation of his proportionality review. *Gregory* thus based its state constitutional conclusions

---

125. *Id.* at 634 (citing *Davis*, 290 P.3d at 98 (Wiggins, J., concurring in dissent by Fairhurst, C.J.) (“We acknowledge that ‘we are not statisticians.’”)).

126. *Gregory*, 427 P.3d at 634.

127. *Id.* at 635 (emphasis in original).

128. *Id.* at 633. Noting that “[a]t the very most, there is an 11 percent chance that the observed association between race and the death penalty in Beckett’s regression analysis is attributed to random chance rather than true association,” the court explained that “[j]ust as we declined to require ‘precise uniformity’ under our proportionality review, we decline to require indisputably true social science to prove that our death penalty is impermissibly imposed based on race.” *Id.* at 634, citing *State v. Lord*, 822 P.2d 177 (Wash. 1991).

129. *Davis*, 290 P.3d at 43.

130. *Gregory*, 427 P.3d at 629.

131. *Id.* at 630 (quoting *Davis*, 290 P.3d at 98) (Wiggins, J., concurring in dissent).

condemning its sentencing statute on the statistical results scrutinized in the course of the proportionality analysis.<sup>132</sup>

In reviewing the resulting empirical evidence, *Gregory* “decline[d] to require indisputably true social science” as the standard of proof in its inquiry, looking, instead, to the Connecticut Supreme Court’s example in *State v. Santiago*,<sup>133</sup> which adopted a “more likely [true] than not true” standard.<sup>134</sup>

Ultimately, the Washington Supreme Court found that the “analysis and conclusions” from the empirical proof “demonstrate that there is ‘no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.’”<sup>135</sup> *Gregory* continued: “To the extent that race distinguishes the cases, it is clearly impermissible and unconstitutional.”<sup>136</sup>

Further, Washington statute’s proportionality review could not salvage the state’s, at best, arbitrary, and, at worst, racially biased, death penalty scheme.<sup>137</sup> This is because such a review cannot meaningfully compare decisional outcomes from a systemically arbitrary or biased scheme. The proportionality review, as a matter of Washington law, could not be severed from the statute and thus it resulted in a separate basis for the court’s invalidation of the statute.<sup>138</sup>

## 2. Washington Precedent Suggests Potential State and Federal Court Inquiries

The conclusion that Washington’s system suffered from arbitrariness and racial bias raises whether similar empirical scrutiny could present similar conclusions under the state constitutional authorities governing the death penalty in other jurisdictions. The potential significance of proportionality review within the post-*Gregg* schemes of many capital states is one clear observation from *Gregory*.

---

132. *Gregory* explained, “[a]s a result of the State’s challenge and [the supreme court commissioner’s] fact finding process, [expert] Beckett’s analysis became only more refined, more accurate, and ultimately, more reliable.” *Id.* at 633.

133. *State v. Santiago*, 122 A.3d 1 (Conn. 2015).

134. *Gregory*, 427 P.3d at 635 (internal quotations omitted) (quoting 2 MCCORMICK ON EVIDENCE § 331 at 612–13 (Kenneth S. Broun ed., 7th ed. 2013)).

135. *Id.* at 636 (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (White, J., concurring)).

136. *Id.*

137. *Id.* at 637.

138. *Id.* (“proportionality review cannot be functionally severed because there is no authority to carry out capital punishment without proportionality review”).

Beginning in 1984, after *Pulley v. Harris*,<sup>139</sup> many jurisdictions (including some with a deeper historical record of facially discriminatory laws and institutional racial bias than, for instance, Washington), abandoned proportionality review on the basis that California's scheme had been upheld despite lacking any such review.<sup>140</sup>

However, many states have nonetheless continued to require this review.<sup>141</sup> In addition to the foregoing seven states that carry out the review only among other death sentenced cases,<sup>142</sup> another seven current death penalty states conduct it from among all cases that have obtained *any* penalty verdict.<sup>143</sup> Commentary suggests here is a range among these states with respect to how assiduously the review is conducted.<sup>144</sup>

---

139. 465 U.S. 37 (1984).

140. Latzer, *supra* note 122, at 1168 n.31 (specifying nine states as having repealed proportionality review after *Pulley*: Connecticut, Idaho, Maryland, Nevada, Oklahoma, Pennsylvania, Tennessee, Virginia, and Wyoming. After *Pulley*, four states established or, in the case of Tennessee, re-established this review (New Hampshire, New York, and Florida)).

141. See generally Jeffrey Fagan & Mukul Bakhshi, *New Frameworks for Racial Equality in the Criminal Law*, 39 COLUM. HUM. R. L. REV 1, 13 n.53 (2007) (identifying "at least 19 states" requiring such review).

142. Latzer, *supra* note 122. However, Prof. Baldus problematized this practice in the early days of Georgia's scheme. *Supra* note 38 ("the Georgia Supreme Court invariably fails to vacate death sentences as excessive or disproportionate for a very simple reason: when identifying other cases as 'similar' to the death sentence case under review for comparative purposes, the court almost exclusively chooses cases that resulted in death sentences").

143. Statutes dictate this review in six of the states: Louisiana, see La. Code Crim. Proc. Ann. art. 905.9; Missouri, see Mo. Ann. Stat. § 565.035; Montana, see Mont. Code Ann. § 46-18-310; Nevada, see Nev. Rev. Stat. Ann. 177.055(2)(d); North Carolina, see N.C. Gen. Stat. § 15A-2000(d)(2); and South Dakota, see S.D. Codified Laws § 23A-27A-12. The Florida Supreme Court undertakes this review notwithstanding the absence of a statutory provision to that effect. See *Sinclair v. State*, 657 So.2d 1138, 1142 (Fla. 1995) (overturning death verdict on proportionality grounds). Four former capital states (including Washington) had conducted such review before abolition. The other three states are Delaware, Maryland, and New Mexico. See Latzer, *supra* note 122, at 1213; see also Fry v. Lopez, 447 P.3d 1086, 1092 (N.M. 2019) (applying proportionality review to commute state's remaining two death sentences after legislative prospective abolition).

144. See generally Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only "The Appearance of Justice"?* 87 J. CRIM. L. & CRIMINOLOGY 130, 133 (1996) (observing that after *Pulley*, most states rendered their statutory proportionality review "perfunctory").

However, for those states that include this review as an element of their statutory scheme, the rigor with which proportionality evidence is addressed may remain a question, in the first place, of at least *state* constitutional import—as it plainly did in Washington, in *Gregory*. In the second place, failings in the state court adjudication of its statutory review raise the specter of material Federal Due Process Clause problems emanating from a breach of the capital defendant's most basic liberty interest, arising “from an expectation or interest created by state laws or policies.”<sup>145</sup>

More broadly, *Gregory* reflects an arc from a judicial critique, in dissent, of *McCleskey*'s consequences,<sup>146</sup> to a unanimous invalidation of capital punishment on the basis, chiefly, of the court's judicial notice of criminal justice history and its embrace of empirical evidence of legislative facts.<sup>147</sup>

### III. EVENHANDEDNESS AND “IRRATIONAL SYMPATHIES AND ANTIPATHIES”

Resigned to the “[a]pparent disparities in sentencing [being] an inevitable part of our criminal justice system,”<sup>148</sup> the *McCleskey* Court can be said to have embraced the unpublished view of Justice Scalia on the matter, which he memorialized and circulated to his peers prior to the decision. He wrote:

Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof.<sup>149</sup>

---

145. See *Pierce v. Thaler*, 604 F.3d 197, 220 (5th Cir. 2010) (Dennis, J., dissenting in part) (finding violation of capital habeas petitioner's right to procedural due process in receiving an evidentiary hearing on intellectual disability claim); *Vitek v. Jones*, 445 U.S. 480, 493–94 (1980); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (distinguishing petitioner's liberty interest as “aris[ing] directly from the Constitution itself, and not from an expectation or interest created by state laws or policies”); *Mathews v. Eldridge*, 424 U.S. 319 (1976).

146. *Davis*, 290 P.3d at 97–98 (Wiggins, J., concurring in dissent).

147. *Gregory*, 427 P.3d at 635.

148. *McCleskey v. Kemp*, 481 U.S. 279, 311–12.

149. Memorandum from Antonin Scalia, Justice, United States Supreme Court, to the Conference of the Justices, United States Supreme Court (Jan. 6, 1987), quoted in David C. Baldus, George Woodworth, & Charles A. Pulaski, Jr., *Reflections on the “Inevitability” of Racial Discrimination in Capital Sentencing and*

Justice Scalia's candid view on the statistical evidence itself, however, was not expressed in the majority's opinion. The rhetorical trappings of Justice Powell's argument departed from Justice Scalia's recognition of the study's robustness: "I disagree with the argument that the inferences that can be drawn from the Baldus study are weakened by the fact that each jury and each trial is unique, or by the large number of variables at issue."<sup>150</sup>

Although behind closed conference doors and not in open court or the pages of any reporter, Justice Scalia actually recognized the validity of the data in *McCleskey* but as a matter of perspective or, perhaps it could be said, principle, rejected the notion that it had any constitutional implications. It remains an open question whether, if accompanied with historical context, that perspective, embraced at the time of *McCleskey*, would still hold sway.

With the *Hidalgo* bloc's concern about the evenhandedness of capital sentencing and stated interest in revisiting the relevance of empirical research in that vein, the time may have come for litigants to demonstrate the failings of capital sentencing statutes under Federal and state constitutions. Empirical research can contribute greatly to such challenges concerning any of the discrete junctures comprising the capital sentencing process, such as narrowing, and also to challenges beyond "one component of the [given] scheme," contemplating whether, for example, "the various components" in "their end result satisf[y] the Eighth Amendment's commands."<sup>151</sup> In any case, as long as the state continues to hold the power to execute, the importance of research as a means to exploring the evenhandedness and thereby legitimacy of capital punishment independent from—or external to—adjudication is unquestionable.<sup>152</sup>

---

the "Impossibility of its Prevention, Detection, and Correction, 51 WASH. & LEE L. REV. 359, 371 n.46 (1994).

150. *Id.*

151. *Tuliaepa v. California*, 512 U.S. 967, 994 (1994), (Blackmun, J., dissenting) (criticizing the majority's affirmance "of a small slice of one component of the California scheme," opining that it

says nothing about the interaction of the various components—the statutory definition of first-degree murder, the special circumstances, the relevant factors, the statutorily required weighing of aggravating and mitigating factors, and the availability of judicial review, but not appellate proportionality review—and whether their end result satisfies the Eighth Amendment's commands).

152. *See generally* Faigman, *supra* note 56 ("The Court's efficacy depends on the public being persuaded by its judgments. . . . The Court retains legitimacy only

---

so long as it remains within accepted bounds when exercising its discretion. Empirical research assists in the definition and enforcement of those boundaries.”); Paul Butler, *Equal Protection and White Supremacy*, 112 NW. U. L. REV. 1457, 1463 (2018) (“In the end, we do not need social science to prove discrimination. We need it more to help us understand how to move people to resist”).