HANDOUT FIVE: **DEEP DIVE, *MCCLESKEY v. KEMP***

Directions: Using the outline of the case and the Baldus study, together with excerpts from Justice Powell's majority decision and Justice Brennan's dissent, create a document that summarizes McCleskey v. Kemp and its relevance to the essential question of this lesson: How has the U.S. Supreme Court been complicit in sustaining racial inequality?

SUPREME COURT CASE MCCLESKEY v. KEMP

Facts of the case from https://www.oyez.org/cases/1850-1900/60us393:

McCleskey, a black man, was convicted of murdering a police officer in Georgia and sentenced to death. In a writ of habeas corpus,[30] McCleskey argued that a statistical study proved that the imposition of the death penalty in Georgia depended to some extent on the race of the victim and the accused. The study found that black defendants who kill white victims are the most likely to receive death sentences in the state.

Question

Did the statistical (Baldus) study prove that McCleskey's sentence violated the Eighth and Fourteenth Amendments?

Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Most commonly mentioned in relation to the death penalty.[31]

Fourteenth Amendment: Ratified on July 8, 1868, the Fourteenth Amendment is often referenced as granting citizenship to "all persons born or naturalized in the United States" with the most commonly used phrase for litigation is "equal protection under the law."[32]

Conclusion

- 5-4 Decision
- Majority Opinion by Lewis F. Powell, Jr.

The Court held that since McCleskey could not prove that purposeful discrimination which had a discriminatory effect on him existed in this particular trial, there was no constitutional violation. Justice Powell refused to apply the statistical study in this case given the unique circumstances and nature of decisions that face all juries in capital cases. He argued that the data McCleskey produced is best presented to legislative bodies and not to the courts.

Listen to the oral arguments of the case, and the announcement of the court decision at:
https://www.oyez.org/cases/1986/84-6811

Full text of the Baldus Study is available at: https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=6378&context=jclc

The full text of all of the Justice's opinions are available at:
https://www.law.cornell.edu/supremecourt/text/481/279#writing-USSC_CR_0481_0279_ZD

30 A writ, or order issued by a legal authority with administrative or juridicial powers, typically a court, of habeas corpus is used to bring a prisoner or other detainee (e.g. institutionalized mental patient) before the court to determine if the person's imprisonment or detention is lawful. https://www.law.cornell.edu/wex/habeas_corpus
31 https://www.law.cornell.edu/constitution/eighth_amendme
32 https://www.law.cornell.edu/constitution/amendment

Excerpt from Powell's Decision:

To evaluate McCleskey's challenge, we must examine exactly what the Baldus study may show. 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. There is, of course, some risk of racial prejudice influencing a jury's decision in a criminal case. There are similar risks that other kinds of prejudice will influence other criminal trials. McCleskey asks us to accept the likelihood allegedly shown by the Baldus study as the constitutional measure of an unacceptable risk of racial prejudice influencing capital sentencing decisions. This we decline to do.

Because of the risk that the factor of race may enter the criminal justice process, we have engaged in "unceasing efforts" to eradicate racial prejudice from our criminal justice system. Our efforts have been guided by our recognition that "the inestimable privilege of trial by jury . . . is a vital principle, underlying the whole administration of criminal justice." Specifically, a capital sentencing jury representative of a criminal defendant's community assures a "'diffused impartiality.'"

Individual jurors bring to their deliberations "qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." The capital sentencing decision requires the individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant. It is not surprising that such collective judgments often are difficult to explain. But the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that "buil[d] discretion, equity, and flexibility into a legal system."

McCleskey's argument that the Constitution condemns the discretion allowed decisionmakers in the Georgia capital sentencing system is antithetical to the fundamental role of discretion in our criminal justice system. Discretion in the criminal justice system offers substantial benefits to the criminal defendant. Not only can a jury decline to impose the death sentence, it can decline to convict or choose to convict of a lesser offense. Whereas decisions against a defendant's interest may be reversed by the trial judge or on appeal, these discretionary exercises of leniency are final and unreviewable. Of course, "the power to be lenient [also] is the power to discriminate," but a capital punishment system that did not allow for discretionary acts of leniency "would be totally alien to our notions of criminal justice."

At most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system. The discrepancy indicated by the Baldus study is "a far cry from the major systemic defects identified in Furman." As this Court has recognized, any mode for determining guilt or punishment "has its weaknesses and the potential for misuse." Specifically, "there can be `no perfect procedure for deciding in which cases governmental authority should be used to impose death.'" Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious. In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.

Text from Brennan's dissent:

At the time our Constitution was framed 200 years ago this year, blacks had, for more than a century before, been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect.

Dred Scott v. Sandford, 19 How. 393, 407 (1857). Only 130 years ago, this Court relied on these observations to deny American citizenship to blacks. Ibid. A mere three generations ago, this Court sanctioned racial segregation, stating that "[i]f one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane." Plessy v. Ferguson, 163 U.S. 537, 552 (1896).

In more recent times, we have sought to free ourselves from the burden of this history. Yet it has been scarcely a generation since this Court's first decision striking down racial segregation, and barely two decades since the legislative prohibition of racial discrimination in major domains of national life. These have been honorable steps, but we cannot pretend that, in three decades, we have completely escaped the grip of a historical legacy

spanning centuries. Warren McCleskey's evidence confronts us with the subtle and persistent influence of the past. His message is a disturbing one to a society that has formally repudiated racism, and a frustrating one to a Nation accustomed to regarding its destiny as the product of its own will. Nonetheless, we ignore him at our peril, for we remain imprisoned by the past as long as we deny its influence in the present.

It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined. "The destinies of the two races in this country are indissolubly linked together," id. at 560 (Harlan, J., dissenting), and the way in which we choose those who will die reveals the depth of moral commitment among the living.

The Court's decision today will not change what attorneys in Georgia tell other Warren McCleskeys about their chances of execution. Nothing will soften the harsh message they must convey, nor alter the prospect that race undoubtedly will continue to be a topic of discussion. McCleskey's evidence will not have obtained judicial acceptance, but that will not affect what is said on death row. However many criticisms of today's decision may be rendered, these painful conversations will serve as the most eloquent dissents of all.