McCleskey at 25: Reexamining the "Fear of Too Much Justice"

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The Supreme Court's 1987 ruling in *McCleskey v. Kemp*[1] was widely condemned when first handed down, and the passage of time has hardly softened the critical appraisal. As Scott Sundby notes in this symposium, "*McCleskey* has become firmly entrenched as a resident in the exclusive but not so desirable neighborhood of Notorious Cases" and "a legal scholar can invoke *McCleskey* . . . as shorthand for 'cases in which the Supreme Court failed the Constitution's most basic values.'"[2] Still, with the hope that often much can be learned from the infamous as well as the famous, this symposium explores the *McCleskey* ruling and its aftermath a quarter century later. This brief introduction cannot summarize the many important themes and ideas developed in the pages that follow; I will simply let our contributors own words speak for themselves. But I do want to explain briefly why I thought it important to bring together leading voices to discuss their perspectives on *McCleskey* 25 year later.

I have long found revealing and haunting the slippery slope concerns set out at the end of the *McCleskey* opinion. According to the Court, "McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system" because his arguments concerning racial bias impermissibly tainting capital sentencing decisions could be extended to "other types of penalty" and to "other minority groups, . . . to gender" and even to "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" to sentencing decision-making.[3] Justice William Brennan, writing the lead dissent in *McCleskey*, provided a spot-on response to the stated concern that "McCleskey's claim would open the door to widespread challenges to all aspects of criminal sentencing": "on its face, such a statement seems to suggest a fear of too much justice."[4] Given that, circa 2012, few would assert that our modern sentencing systems—capital or non-capital—struggle with

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1 481 U.S. 279 (1987).

2 Scott E. Sundby, *The Loss of Constitutional Faith:* McCleskey v. Kemp *and the Dark Side of Procedure*, 10 OHIO ST. J. CRIM. L. 5, 5 (2012).

3 McCleskey v. Kemp, 481 U.S. 279, 315–18 (1987) (internal citations omitted).

4 *Id.* at 339 (Brennan, J., dissenting).

"too much justice," I was eager to hear what leading academics, researchers, and practitioners would have to say about *McCleskey* a quarter century later.

Though one finds little praise for the *McCleskey* ruling in this symposium, there are a few significant silver linings that should not be overlooked in this backhanded celebration of *McCleskey*'s silver anniversary. In his detailed review of empirical research on race and the death penalty, Kent Scheidegger concludes that "the most 'robust' result, the one that comes up again and again, study after study, jurisdiction after jurisdiction, is the absence of any significant evidence of racial bias against minority defendants."[5] What the empirical evidence really shows, according to Scheidegger, is that "death penalty is sought and imposed less often in jurisdictions with high black populations" and thus skewed racial outcomes in capital cases are "not the result of discrimination against black people but rather the result of empowerment of black people" because these outcomes ultimately reflect the exercise of "clout by the only demographic segment of America with a majority opposed to the death penalty."[6]

Even if one resists Scheidegger's assertion that the extant data is "worthy of celebration" because of the absence of any "indication that people are on death row who would not be there if they were a different race,"[7] one can still celebrate a ground-breaking legislative response to *McCleskey* which Robert Mosteller chronicles in his contribution to this symposium.[8] As he explains, when North Carolina enacted its Racial Justice Act (RJA) in 2009, it not only "responded to the invitation [in] *McCleskey* that [legislatures could best devise remedies when defendants use] statistical evidence to prove racial discrimination in criminal cases," but it also "addressed the practical failings of *Batson*" concerning the import and impact of racialized jury selection procedures.[9] Read together, the Mosteller and Scheidegger pieces provide a profound reminder that the intersection of race, politics, and the practicalities of administering criminal justice outcomes remains so complex and dynamic that perhaps we should all have an enduring fear that our criminal system will never realistically hope or ever expect to actually achieve "too much justice."

Further, the other contributions to this symposium ensure that no reader gets blinded by any silver linings one might seek to embrace on *McCleskey*'s silver anniversary: whether documenting *McCleskey*'s "unholy parallels" to prior

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[5] Kent Scheidegger, *Rebutting the Myths About Race and the Death Penalty*, 10 OHIO ST. J. CRIM. L. 147, 164 (2012).

[6] *Id.* at 164–65.

[7] *Id.* at 164.

[8] Robert P. Mosteller, *Responding to* McCleskey *and* Batson*: The North Carolina Racial Justice Act Confronts Racial Peremptory Challenges in Death Cases*, 10 OHIO ST. J. CRIM. L. 103, 127 (2012).

[9] *Id.* at 104.

disgraced opinions,[10] or reviewing how its "underlying messages" trigger a "loss of constitutional faith,"[11] or exploring the still-troubling linkage of race, geography and retribution overlooked in the opinion,[12] the other symposium pieces in this issue provide a fresh reminder of the enduring social and symbolic stains that *McCleskey* will always represent. Collectively, these pieces provide not only important new critical perspectives on the *McCleskey* decision, but also ironically confirm the *McCleskey* majority's perspective that litigation concerning racial disparities in the application of Georgia's capital punishment system concerns a whole lot more than just race and the death penalty.

Though they provide dynamically different perspectives on what *McCleskey* still means and how we should respond to the opinion a quarter century later, all the contributions to this symposium highlight that it may not have been merely a "fear of too much justice" that explains the *McCleskey* outcome. Rather, the articles in this symposium suggest that the *McCleskey* litigation and its aftermath reflect a more fundamental and more daunting fear of racial and social equality – a fear which may still influence America's criminal justice systems more than we would care to admit or even acknowledge. If, as I sincerely believe and hope, fear is often the product of ignorance more than antipathy, perhaps this symposium can play some role in reducing not only the fear of "too much justice," but also broader fears concerning America's slow but steady experience in achieving greater racial and social equality.

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[10] 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).

[11] Sundby, *supra* note 2, at 2.

[12] G. Ben Cohen, McCleskey*'s Omission: The Racial Geography of Retribution*, 10 OHIO ST. J. CRIM. L. 65 (2012).