

# PROBABILITY AND THE LAW

MARCELLO DI BELLO – STANFORD UNIVERSITY

READING GUIDE – WEEK #10

**Bazemore (1986).** You can skim the first pages. Read carefully Justice Brennan’s opinion (pp. 3–7).

*PART I* (pp. 3,4). Summary of what the lower courts said.

*PART II* (pp. 4-6). Discussion of the main issue—i.e. discrimination under title VII and whether the Court of Appeals erred in concluding that petitioner’s statistical evidence did not establish wage discrimination. What is the standard of proof used here? Why does the Supreme Court think that the Appellate Court was mistaken? Read very carefully part II.B which discusses the relevance of statistical evidence to establish discrimination.

*PART III* (p.7). Discussion of class action certification. Skim.

**McCleskey (1987).** Begin by reading the majority opinion by Powell (pp. 1–10):

*PART I* (pp. 1–3). Baldus’ statistical study. What does the study show?

*PART II* (pp. 3-5). Read this part with care. Discussion of the main issue—i.e. whether there was equal protection violation (discrimination) in the application of the death penalty. The Court thinks that statistical evidence alone is not enough to establish discrimination. The Court cites *Bazemore* and other cases in which statistical evidence is regarded as adequate evidence to prove discrimination. Why is the McCleskey case different?

*PART III* (pp. 5–7). Discussion of possible 8th Amendment violation (i.e. whether punishment was cruel and unusual). You can skip this part; it does not contain any explicit discussion of statistical evidence.

*PART IV* (pp. 7–9). Have a look at sections B and C; both mention statistical evidence. How does the Court use the word ‘risk’?

*PART V* (pp. 9,10) Two last points are discussed: first, that McCleskey’s claim could open a dangerous “pandora’s box;” and second, that McCleskey’s argument are best presented to the legislature, not the judiciary.

Next, read the dissenting opinion by Brennan (pp. 10–19). You should read, in particular, Part III, section A and B (pp. 11-13). The key word here is ‘risk.’ The dissenting opinion cites *Bazemore* but it disagrees with the majority of opinion. Make sure you understand what the disagreement is.

**Response paper.** In *Bazemore* (1986) the Sup. Court held that

it is clear that a regression analysis that includes less than “all measurable variables” may serve to prove a plaintiff case. A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by preponderance of the evidence. (Brennan’s opinion, II.B.1)

However, in *McCleskey* (1987) the Sup. Court seemed to think that the statistics should consider “all” variables/factors, for it wrote:

Every 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. (Powell’s opinion, II.A)

Are the two decisions contradictory? Recall that the statistics in *Bazemore* included only a few variables, while the statistics in *McCleskey* includes hundreds of variables. Why did the Court reach opposite conclusions regarding the use of statistics to prove discrimination in the two cases? How did the Court justify its decision in *McCleskey*? Is the justification acceptable for you? Write a response paper in which you address these questions.