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SUPREME COURT REVIEW

FOREWORD: HOW TO CRITICIZE THE DEATH PENALTY

DAVID DOLINKO*

The arguments put forward by opponents of the death penalty—"abolitionists"—fall into two categories, procedural and substantive. Procedural arguments claim that there are irremediable flaws in the processes used to select the small subset of killers¹ who will actually be executed.² That is, even assuming certain killers "deserve to die," no procedural system can possibly identify all and only those persons. Substantive arguments attempt to prove that execution as a form of punishment is morally wrong regardless of the procedures used to pick out those to be executed. That is, no killers "deserve to die"—or, at least, none deserve to have death deliberately inflicted on them by the state.

Most contemporary opponents of the death penalty emphasize procedural arguments.³ Particularly prevalent are the contentions that the administration of capital punishment is arbitrary and

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¹ As of Dec. 31, 1985, all outstanding death sentences in the United States were imposed for murder. N.Y. Times, Nov. 3, 1986, § 1, at 11, col. 2 (national ed.). Whether death is even a constitutionally permissible punishment for any crime not involving a killing is doubtful given the Supreme Court's reasoning in *Coker v. Georgia*, 433 U.S. 584 (1977). *Coker* held death unconstitutional for rape of an adult woman not resulting in death, emphasizing the disproportion between death and even rape, the "ultimate violation of self" short of homicide. *Id.* at 597.

² Figures for the years 1930 through 1967 reveal that "only a tiny fraction of [all] homicides resulted in executions—only between 1 and 2 in 100 before 1950 and less than 1 in 100 thereafter." W. BOWERS, *LEGAL HOMICIDE* 28 (1984). Even with the sample class limited to *capital* homicides, research suggests that "executions have been imposed for, at most, about 10 to 15 percent of the capital homicides in recent times." *Id.*

³ [D]uring recent decades the attack on the death penalty has been less frequently buttressed than it once was with abstract moralistic or religious principles—for example, the individual's right to life, or the sanctity of human life. Instead, abolition-

standardless, racially discriminatory, and prone to error. Appeal to procedural arguments is partly a tactical reaction to the Supreme Court's refusal to declare the death penalty per se "cruel and unusual."⁴ But the procedural focus also reflects frustration over the notorious intractability of substantive arguments. These arguments often seem doomed to deteriorate into a simple, stark clash of irreconcilable fundamental "subjective" values.⁵ Thus the suggestion is made that it would be more profitable—more likely to allow reasoned argument, formation of a consensus, and so forth—to focus on questions of procedure.⁶

I shall argue that this hope of achieving greater "objectivity" via procedural arguments is illusory. These arguments raise just the same sort of intractable value-weighting issues as the substantive ones, but do so in a *disguised* fashion which, if anything, hampers genuine discussion. To make my case, I shall examine in turn the three principal procedural arguments against the death penalty. First, however, I shall quickly survey the current impact of procedural arguments on the Supreme Court's treatment of capital punishment.

I. CAPITAL PUNISHMENT IN THE 1985 TERM

The Supreme Court's 1985 Term was the tenth since the Court permitted the resumption of capital punishment in the United States after a decade-long moratorium. Suspended by legal challenges since 1967,⁷ that practice had been called into question in wholesale

ists have stressed practical tendencies and characteristics of the way criminal justice is actually administered

H.A. BEDAU, *THE DEATH PENALTY IN AMERICA* 342 (3d ed. 1982).

⁴ See *infra* notes 14-19 and accompanying text.

⁵ Charles Black, a prominent and skillful exponent of procedural attacks on capital punishment, claims that

on the principal and final issue itself—the inherent and intrinsic wrongness of the death penalty—neither we nor our adversaries can, strictly speaking, adduce rational arguments. The most we can do is to expose the penalty to view, in all its compound horror as we perceive it, and invite others, informed by this view, to agree.

C. BLACK, *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* 162 (2d ed. 1981).

⁶ Margaret Radin, for example, advocates procedural arguments because: "It seems difficult to go very far with reasoned argument about whether execution as punishment fails to treat a person with respect, such that a first-order retributivist justification cannot be made out." Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1182 (1980). "Most abolitionists simply stop here and state their intuitive conviction." *Id.* at 1182 n.124.

⁷ These challenges are described in M. MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* (1973).

fashion by *Furman v. Georgia*⁸ in 1972, which at a minimum⁹ implied the invalidity of almost all then-existing death penalty statutes.¹⁰ While only Justices Brennan and Marshall concluded that execution was inherently "cruel and unusual punishment," the other concurring Justices had not foreclosed that conclusion,¹¹ and commentators speculated that *Furman* might lead to complete abolition of capital punishment.¹² That possibility evaporated when the Court in 1976 decided *Gregg v. Georgia*¹³ and four companion cases.¹⁴ In *Gregg* a majority of the Court rejected the claim that capital punishment was per se unconstitutional and read *Furman* as holding only that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner."¹⁵ So long as the death penalty

⁸ 408 U.S. 238 (1972).

⁹ *Furman's* scope was difficult to assess because the Court was unusually splintered. There was no opinion of the Court. Five justices concurred in a brief *per curiam* reversing the death sentences in the three consolidated cases, and each justice wrote a separate opinion concurring or dissenting in the judgment. No member of the majority joined in any other justice's opinion. See *id. passim*.

¹⁰ *Furman* invalidated capital punishment schemes that gave juries unlimited discretion to decide between life imprisonment and death. H.A. BEDAU, *supra* note 3, at 249. But virtually all death penalty laws on the books in 1972 were of that form. The exceptions were "a handful of obscure statutes scattered among the penal codes in various States that required an automatic death sentence upon conviction of a specified offense." *Woodson v. North Carolina*, 428 U.S. 280, 292 n.25 (1976). Only five of the more than 550 prisoners under sentence of death in 1970 had been sentenced under such laws—all of them under a California statute concerning assaults by life-term prisoners. *Id.*

¹¹ Justices Douglas, Stewart, and White each explicitly left open the question whether capital punishment was *per se* unconstitutional. See *Furman*, 408 U.S. at 241-42 (Douglas, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 311 (White, J., concurring).

¹² See M. MELTSNER, *supra* note 7, at 309-16; *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 50, 85 (1972). The Legal Advisory Staff to the Florida Governor's Committee to Study Capital Punishment submitted a memorandum "express[ing] serious doubts whether any capital punishment statute could possibly withstand constitutional challenge" in the wake of *Furman*. Ehrhardt, Hubbard, Levinson, Smiley & Wills, *The Future of Capital Punishment in Florida: Analysis and Recommendations*, 64 J. CRIM. L. & CRIMINOLOGY 2, 10 (1973).

¹³ 428 U.S. 153 (1976).

¹⁴ *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); and *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976).

¹⁵ *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion). Although only three justices joined the opinion containing the quoted language, three others adopted an essentially identical view: *Furman* "held that as a result of giving the sentencer unguided discretion to impose or not to impose the death penalty for murder, the penalty was being imposed discriminatorily, wantonly and freakishly, and so infrequently that any given death sentence was cruel and unusual." *Id.* at 220-21 (White, J., concurring in the judgment) (footnotes omitted).

was meted out by procedures that suitably limited the sentencer's discretion, its use was constitutional.¹⁶

Post-*Gregg* challenges to capital punishment have concentrated almost wholly on issues of procedure, with foes of the death penalty seeking to convince the Court that its application is arbitrary, capricious, or discriminatory.¹⁷ This procedural focus is scarcely surprising as a litigation strategy.¹⁸ Nor is it surprising that in the wake of this strategy, much academic discussion of the death penalty has echoed this procedural emphasis.¹⁹ I will shortly consider the defects of this procedural emphasis as a way of approaching the ultimate moral issue—whether execution can ever be justified as a method of punishing *any* offenders, regardless of the procedures by which they are selected. But the death penalty cases decided last Term²⁰ suggest that procedural argumentation is losing even its ca-

¹⁶ Limiting discretion by making the death penalty mandatory, however, is—with one possible exception—not constitutionally permissible. *Woodson v. North Carolina*, 428 U.S. 280 (1976). The possible exception concerns “an extremely narrow category of homicide, such as murder by a prisoner serving a life sentence, defined in large part in terms of the character or record of the offender.” *Id.* at 287 n.7. Subsequent opinions continued to hold open the possibility that death could constitutionally be mandated for murder by a life-term prisoner. *Lockett v. Ohio*, 438 U.S. 586, 604 n.11 (1978); *Roberts (Harry) v. Louisiana*, 431 U.S. 633, 637 n.5 (1977) (*per curiam*). The Ninth Circuit, however, noting the Supreme Court's failure to reserve this question in its most recent opinions, has held that even such a narrow mandatory death penalty is unconstitutional. *Shuman v. Wolff*, 791 F.2d 788 (9th Cir.), *cert. granted sub nom. Sumner v. Shuman*, 107 S. Ct. 431 (1986).

¹⁷ *Gillers, The Quality of Mercy: Constitutional Accuracy at the Selection Stage of Capital Sentencing*, 18 U.C. DAVIS L. REV. 1037, 1038 n.2 (1985). The exceptions—death penalty cases that addressed non-procedural issues—are: *Ford v. Wainwright*, 106 S. Ct. 2595 (1986) (unconstitutional to execute insane person); *Enmund v. Florida*, 458 U.S. 782 (1982) (unconstitutional to execute one who aids and abets a felony resulting in death without himself killing, attempting to kill, or intending that a killing occur or that lethal force be employed); and *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty unconstitutional for rape of an adult woman not resulting in death).

¹⁸ Lawyers are practical people, and *Gregg v. Georgia*, together with its progeny, have, at least for the moment, resolved the fundamental eighth amendment issue. Death as a penalty is not per se cruel and unusual, and there is no chance that the current Supreme Court or the Congress is going to overrule *Gregg* and say that it is. *Lempert, Capital Punishment in the 80's: Reflections on the Symposium*, 74 J. CRIM. L. & CRIMINOLOGY 1101, 1102 (1983).

¹⁹ *See, e.g., C. BLACK, supra note 5; Bowers, The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067 (1983); *Gillers, Deciding Who Dies*, 129 U. PA. L. REV. 1 (1980); *Greenberg, Capital Punishment as a System*, 91 YALE L.J. 908 (1982); *Gross & Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984); *Kaplan, Administering Capital Punishment*, 36 U. FLA. L. REV. 177 (1984); *Paternoster, Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 L. & Soc'y REV. 437 (1984); *Radin, supra note 6*.

²⁰ *Smith v. Murray*, 106 S. Ct. 2661 (1986); *Ford v. Wainwright*, 106 S. Ct. 2595 (1986); *Darden v. Wainwright*, 106 S. Ct. 2464 (1986); *Lockhart v. McCree*, 106 S. Ct. 1758 (1986); *Poland v. Arizona*, 106 S. Ct. 1749 (1986); *Turner v. Murray*, 106 S. Ct.

capacity to persuade the Court to impose additional restrictions on capital punishment.

To be sure, procedural issues continued to monopolize the Court's death-penalty docket. Only one of last Term's death penalty cases, *Ford v. Wainwright*,²¹ broke new substantive ground, as a bare majority held that execution of the insane was "cruel and unusual punishment" forbidden by the eighth amendment.²² And even that case centered on a procedural matter—the process states must afford Death Row inmates whose sanity is questioned.²³ The substantive holding had little practical significance since neither Florida (whose procedures were challenged) nor any other state permits the execution of persons found insane.²⁴ The treatment given the substantive issue does, however, reveal the Court's lack of a satisfactory basis for deciding whether capital punishment of certain persons should be morally impermissible regardless of the procedures used in their selection.²⁵

1683 (1986); *Skipper v. South Carolina*, 106 S. Ct. 1669 (1986); *Cabana v. Bullock*, 106 S. Ct. 689 (1986). One of these cases—*Lockhart v. McCree*—involved a defendant who, though tried on a capital charge, had not received a death sentence. It is included here because it presented a challenge to jury selection procedures widely employed in capital cases (and in no others). See *infra* notes 127-60 and accompanying text.

²¹ 106 S. Ct. 2595 (1986).

²² Justices Brennan, Blackmun, Powell, and Stevens joined the portion of Justice Marshall's opinion holding it unconstitutional to execute an insane person. *Id.* at 2599-2602. The remaining justices disagreed. *Id.* at 2611 (O'Connor, J., concurring in the result in part and dissenting in part); *id.* at 2613 (Rehnquist, J., dissenting). (Justice White joined Justice O'Connor; the Chief Justice joined Justice Rehnquist.)

²³ Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, would impose a number of adversarial features on the sanity determination, including a neutral factfinder and an opportunity for the prisoner or his counsel to present relevant evidence and to challenge or impeach the state psychiatrists' opinions. *Id.* at 2604-05 (plurality opinion). Justice Powell wrote separately to urge less formal, less trial-like procedures (and to suggest a criterion for "insanity" in this context). *Id.* at 2606 (Powell, J., concurring in part and concurring in the judgment). Justice O'Connor concluded that Florida's failure to allow the prisoner to present relevant evidence violated even the minimal procedural safeguards that due process required to protect defendant's state-created liberty interest in avoiding execution while insane. *Id.* at 2611 (O'Connor, J., concurring in the result in part and dissenting in part). Justice Rehnquist's dissent found neither a federal constitutional barrier to executing the insane nor any due process violation in Ford's case. *Id.* at 2613 (Rehnquist, J., dissenting).

²⁴ *Id.* at 2601 n.2.

²⁵ Whether there are classes of offenders for whom capital punishment is improper regardless of selection procedures was the issue underlying the *Coker* and *Enmund* cases. See *supra* note 17. The Court is currently confronting this substantive question in a case that challenges the execution of minors. *Thompson v. Oklahoma, cert. granted*, 55 U.S.L.W. 3569 (U.S. Feb. 23, 1987)(No. 86-6169). Thirty-six persons currently await execution for crimes committed as minors, including an Indiana girl sentenced for a brutal murder committed when she was fifteen. N.Y. Times, Nov. 2, 1986, § 1, at 11 (national ed.).

The majority's chief argument is that the common law uniformly prohibited executing a prisoner who had lost his sanity,²⁶ and that the eighth amendment forbids, "at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time" it was adopted.²⁷ Bare reliance on seventeenth and eighteenth century practice does nothing, however, to explain *what* is improper about the execution of the insane. If "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV,"²⁸ it is little better to appeal instead to the time of George III! Moreover, the notion that it is "cruel and unusual" to execute the insane, but not the sane,²⁹ creates a rather glaring paradox. Apparently, what disqualifies the insane for execution is principally their inability to understand what will happen to them and why.³⁰ But why should killing a person be made *crueler* by his ignorance or incomprehension of his fate?³¹

The majority in *Ford* does note some of the objections traditionally levelled against executions of the insane, including Blackstone's concern with the defendant's ability to assist in his defense³² and Coke's belief that such executions "'can be no example to others.'"³³ These are weak arguments, however, as the majority it-

²⁶ *Ford*, 106 S. Ct. at 2600-01.

²⁷ *Id.* at 2600.

²⁸ Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

²⁹ Recall that the Supreme Court has held that capital punishment is not *in general* cruel and unusual punishment. See *supra* notes 13-16 and accompanying text.

³⁰ For Justice Powell, this feature is decisive; he "would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Ford*, 106 S. Ct. at 2609 (Powell, J., concurring in part and concurring in the judgment). Justice Marshall's opinion nowhere explicitly defines the "insanity" that makes execution unconstitutional, but speaks in summary of the abhorrence of "exact[ing] in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications." *Id.* at 2606.

³¹ Justice Marshall suggests that executing the insane would produce "fear and pain without comfort of understanding." *Id.* at 2602. But surely it is odd to suppose that awareness of one's impending death would *alleviate*, and not arouse, one's fear. Indeed, opponents of capital punishment have argued that it is precisely the condemned man's awareness of what awaits him that gives capital punishment its special horror. See A. CAMUS, REFLECTIONS ON THE GUILLOTINE 25-27 (R. Howard trans. 1959); Amsterdam, *Capital Punishment*, in H.A. BEDAU, *supra* note 3, at 347-48. Equally odd, in this context, is Justice Powell's assertion that "most men and women value the opportunity to prepare, mentally and spiritually, for their death." *Ford*, 106 S. Ct. at 2608 (Powell, J., concurring in part and concurring in the judgment). Would Justice Powell regard a slow death from cancer as a blessing and a sudden death during sleep as a misfortune?

³² *Ford*, 106 S. Ct. at 2600-01.

³³ *Id.* at 2601 (quoting E. COKE, THIRD INSTITUTE 6 (6th ed. 1680)).

self recognizes.³⁴ As Justice Powell observes, the extensive review afforded contemporary capital cases has largely vitiated Blackstone's concern.³⁵ As for Coke's point, deterrence requires awareness that one who does what the defendant did risks the same punishment; it does *not* require a full empathetic identification with the defendant.³⁶ Executing the insane could indeed bolster deterrence by preventing potential killers from hoping that, if all else failed, they might escape execution by feigning insanity.³⁷

To the extent the analysis in *Ford* goes beyond sheer reliance on precedent, the majority ultimately advances three reasons for its holding: (1) executing the insane "simply offends humanity"; (2) it is cruel to execute someone with "no capacity to come to grips with his own conscience or deity"; and (3) the execution of someone who does not know why he is being executed has no retributive value.³⁸ The first of these reasons, of course, merely restates the conclusion to be proved. The second needs considerable elaboration. Why is it so "cruel" to put to death a person who cannot "come to grips with his own conscience"? Since we execute sane prisoners regardless of whether they in fact *have* come to grips with their conscience, we need some explanation of the importance of ensuring that the prisoner has the *capacity* to do so. A condemned prisoner who has become insane and as a result is unaware of any wrongdoing may well suffer *less* than if he were sane and conscience-stricken. Why then is it cruel to put him to death in this condition, but not to keep him alive in the hope he will someday be "cured," experience pangs of remorse, and *then* be executed? Moreover, if we take this second assertion seriously, it may suggest that *all* capital punishment is "cruel" because it deprives a person of the opportunity to come to grips with his deeds and change his moral character.³⁹

³⁴ "As is often true of common-law principles, . . . the reasons for the rule are less sure and less uniform than the rule itself." *Id.*

³⁵ *Id.* at 2607-08 (Powell, J., concurring in part and concurring in the judgment). It has also been noted that a defendant who is sane at the time of trial is very unlikely to recall some fact in stay of execution for the first time after a subsequent period of insanity, and that if this remote possibility suffices to invalidate execution of the presently insane, *any* execution should be impermissible, since it is always possible that after defendant is put to death a new witness will turn up or some other new evidence will come to light. *Phyle v. Duffy*, 34 Cal. 2d 144, 158-59, 208 P.2d 668, 676 (1949) (Traynor, J., concurring).

³⁶ Otherwise deterrence theorists ought to recommend the most lenient punishment for precisely those killers whose crimes are most brutal and senseless, since presumably few people can "identify" with them.

³⁷ *Cf.* the similar point Hart makes in attacking utilitarian justifications for the insanity defense. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 43 (1968).

³⁸ *Id.* at 2602. Justice Powell echoes these points in his separate opinion. *Id.* at 2608.

³⁹ *See* J. MURPHY & J. COLEMAN, THE PHILOSOPHY OF LAW 155-57 (1984).

Finally, the claim that the retributive value of an execution depends on the condemned person's understanding why he is being executed seems simply mistaken.⁴⁰ Retribution is a notoriously difficult notion to pin down,⁴¹ but in one standard use it involves basing punishment on what the offender *deserves* or what it is *just* to inflict upon him.⁴² There is no obvious reason why an offender cannot deserve certain punishment unless he understands that he deserves it. In particular, if capital punishment is ever permissible, it can be just to execute an offender—execution can be what he deserves—whether or not he shares the belief that his sentence is just or understands our grounds for that belief. The justice of hanging Nazi war criminals at Nuremberg, for example, might be questioned on various grounds; but one factor that does *not* seem relevant is whether the Nazis understood why they deserved to die.⁴³

In short, the *Ford* majority fails to offer a single convincing basis for its holding that execution of the insane, unlike execution of the sane, is cruel and unusual punishment. The Court evidently lacks any coherent substantive account of the circumstances under which it regards capital punishment as morally tolerable. It is not surprising, then, that every other death penalty decision in the 1985 Term addressed purely procedural challenges to capital punishment. Abolitionists, however, may be running out of these challenges.

As the Court rejects claims that large categories of capital cases exhibit general procedural flaws,⁴⁴ it has become increasingly diffi-

⁴⁰ It is also an odd argument to come from the pen of a Justice who believes that "retribution for its own sake is improper" under the eighth amendment. *Furman v. Georgia*, 408 U.S. 238, 345 (1972)(Marshall, J., concurring).

⁴¹ We will later explore in detail some of the difficulties involved. See *infra* notes 240-66 and accompanying text.

⁴² See J. MURPHY & J. COLEMAN, *supra* note 39, at 126-27.

⁴³ At least some may well not have understood it. A psychiatrist who examined Gestapo chief Ernst Kaltenbrunner prior to trial reported that "[h]is general attitude is one of bitterness as he feels completely justified in his actions in that he was fighting Bolshevism. Some day (he says) the world will recognise this." B. ANDRUS, *THE INFAMOUS OF NUREMBERG* 97 (1969). Immediately before he was hanged, Kaltenbrunner stated that he had "done his duty" and regretted only "that crimes were committed of which I have no knowledge." *Id.* at 196. Julius Streicher, the leading anti-Semite among the Nazi leadership, "fe[lt] he has made a great contribution to world welfare," according to another psychiatrist. *Id.* at 104. Streicher went to his death sneering that this was the "Purim feast of 1946" and threatening the hangman "The Bolsheviks will hang you one day!" *Id.* at 197.

⁴⁴ Robert Weisberg has contended that four decisions at the end of the 1982 Term signalled the end of the Court's willingness to impose meaningful procedural limitations on state capital proceedings. Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305. Certainly the Court has since that time proven unreceptive to potentially sweeping challenges to death penalty procedures. In *Pulley v. Harris*, 465 U.S. 37 (1984), the Court refused to require state reviewing courts to conduct "proportionality reviews" in capital

cult to devise new, broadly-applicable procedural arguments, as opposed to narrow objections to the procedures employed in particular capital cases. Several of last Term's cases, reflecting this difficulty, focused on efforts to "fine-tune" procedural protections already imposed or implied by earlier decisions. These efforts met with mixed results.

The "fine-tuning" approach won reversals of death sentences in *Skipper v. South Carolina*⁴⁵ and *Turner v. Murray*.⁴⁶ Skipper had been barred from presenting to the jury at the sentencing hearing evidence of his good behavior in jail while awaiting trial.⁴⁷ Turner, a black man charged with murdering a white victim, had unsuccessfully requested that prospective jurors be questioned about possible racial prejudice. In each case the Court accepted the defendant's argument that the trial court's ruling violated existing procedural protections, over the objections of Justices who would have read those protections more narrowly.

Skipper argued that excluding his good-behavior evidence violated the constitutional requirement, recognized in *Lockett v. Ohio*,⁴⁸ that the sentencer in a capital proceeding "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the

cases—i.e., to compare each death sentence with the sentences imposed in similar previous cases to see if it is disproportionate. The Court thereby avoided invalidating the capital procedures not only of California, the state directly involved in *Harris*, but of Texas as well. (These two states account for more than one of every five death row inmates in the United States—431 out of 1838 as of December 20, 1986. NAACP Legal Def. & Educ. Fund, Inc., *Death Row U.S.A.* (Dec. 20, 1986)(unpublished compilation).) In *Spaziano v. Florida*, 468 U.S. 447 (1984), the Court rejected the claim that death sentences must be imposed by juries, not judges—a claim potentially significant in six states besides Florida, the leader in death sentences. (Florida had 253 death row inmates as of December 20, 1986. *Death Row, U.S.A.*, *supra*.) And in *Barefoot v. Estelle*, 463 U.S. 880 (1983), the Court permitted the use of psychiatric predictions to establish the potential "future dangerousness" of a capital defendant in a sentencing proceeding, despite the demonstrable unreliability of such predictions. A finding of "a probability" that defendant would be dangerous in the future is a prerequisite for a death sentence in Texas and Virginia. TEX. CRIM. PROC. CODE ANN. § 37.071(b)(2) (Vernon Supp. 1986); VA. CODE § 19.2-264.2 (1983). Similar findings can qualify a defendant for a death sentence in Idaho, Oklahoma, and Washington. IDAHO CODE § 19-2515 (g)(8) (Supp. 1986); OKLA. STAT. ANN. tit. 21, § 701.12 (7) (West 1983); WASH. REV. CODE ANN. § 10.95.070 (8) (Supp. 1987).

⁴⁵ 106 S. Ct. 1669 (1986).

⁴⁶ 106 S. Ct. 1683 (1986).

⁴⁷ He and his former wife had both testified briefly that his jail conduct had been good, but the trial court refused to allow similar testimony by two jailers and one "regular visitor" to the jail. *Skipper v. South Carolina*, 106 S. Ct. 1669, 1670 (1986). Because jurors could easily dismiss Skipper's own testimony and that of his ex-wife as self-serving, the Court refused to treat the excluded evidence as merely cumulative. *Id.* at 1673.

⁴⁸ 438 U.S. 586 (1978).

defendant proffers as a basis for a sentence less than death.”⁴⁹ Six Justices agreed, reasoning that a defendant’s good pre-trial jail conduct could suggest similar conduct if his life were spared, and thus establish an aspect of his character that “might serve ‘as a basis for a sentence less than death.’ ”⁵⁰ The remaining Justices, though concurring in the judgment on other grounds,⁵¹ interpreted “character” under *Lockett* more narrowly as including only traits relevant to “the defendant’s culpability for the crime,”⁵² rather than all traits that might evoke mercy from the sentencer.

Turner relied on earlier decisions recognizing a defendant’s right to have prospective jurors questioned about racial prejudice when there are special circumstances which create a significant risk that, absent such questioning, the jurors would be biased.⁵³ A majority of the Court agreed that that right was properly invoked in this case but disagreed as to the reason. Justices Brennan and Marshall contended that any defendant accused of a violent interracial crime should enjoy that right.⁵⁴ The Chief Justice concurred in the judgment without opinion.⁵⁵ The decisive plurality opinion, while reiterating that only “special circumstances” will entitle a defendant charged with an interracial crime to inquire on voir dire about possible racial bias, found that the unique features of a capital sentencing proceeding automatically constituted such circumstances. The highly subjective, individualized, discretionary nature of the judgment as to whether to inflict the most final and irrevocable of punishments created, in the plurality’s view, an unacceptable risk that

⁴⁹ *Id.* at 604 (footnote omitted)(plurality opinion). This rule was explicitly adopted by a majority of the Court in *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982).

⁵⁰ *Skipper v. South Carolina*, 106 S. Ct. 1669, 1671 (1986)(quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)).

⁵¹ The prosecutor had urged a death sentence partly by arguing that the defendant was likely to commit violent crimes in prison if allowed to live, and the concurring justices agreed that preventing *any* defendant from contesting this argument violated due process. *Id.* at 1673-74 (Powell, J., concurring in the judgment). The majority cited this as an alternative basis for its judgment. *Id.* at 1671 n.1.

⁵² *Id.* at 1675.

⁵³ *Ham v. South Carolina*, 409 U.S. 524 (1973), required such questioning at the marijuana-possession trial of a locally prominent black civil rights activist in a Southern community. In *Ristaino v. Ross*, 424 U.S. 589 (1976), the Court refused to expand *Ham* into a per se rule entitling *any* defendant charged with an interracial crime to have prospective jurors questioned on race bias. Rather, the entitlement exists only if “special factors” exist that “suggest a significant likelihood that racial prejudice might infect [defendant’s] trial.” *Id.* at 597, 598.

⁵⁴ *Turner v. Murray*, 106 S. Ct. 1683, 1689 (Brennan, J., concurring in part and dissenting in part); *id.* at 1692 (Marshall, J., concurring in the judgment in part and dissenting in part).

⁵⁵ *Id.* at 1689 (Burger, C.J., concurring in the judgment).

racial prejudice could operate undetected if not screened out.⁵⁶ The plurality therefore rejected the case-by-case approach urged in Justice Powell's dissent⁵⁷ and gave effect instead to the frequently reiterated principle that the unique nature of the death penalty requires especially stringent safeguards against error, caprice, or bias.⁵⁸

That principle had little force, however, in several decisions rejecting efforts to "fine-tune" or adjust existing procedural rules to overturn capital convictions or sentences. The uniqueness of capital punishment imparted no extra bite to due process protections in *Darden v. Wainwright*,⁵⁹ nor did it persuade the Court to overlook a procedural default in *Smith v. Murray*⁶⁰ or to broaden the application of double jeopardy rules in *Poland v. Arizona*.⁶¹ And in *Cabana v. Bullock*⁶² the Court allowed appellate courts, rather than sentencing juries or judges, to make a factual determination crucial to capital sentencing of felony murderers.

The defendant in *Darden v. Wainwright*⁶³ was a black man convicted of murdering a white store-owner's husband in particularly brutal circumstances.⁶⁴ His habeas corpus petition raised three arguments, the strongest of which alleged flagrant prosecutorial misconduct during closing argument in the guilt phase of his trial.⁶⁵

⁵⁶ *Id.* at 1687-88 (plurality opinion).

⁵⁷ *Id.* at 1693 (Powell, J., dissenting). Justice Rehnquist joined this dissent. Justice Powell seems particularly given to "case-by-case" adjudication in both capital and non-capital contexts. *See, e.g.*, *Coker v. Georgia*, 433 U.S. 584, 601 (1977) (Powell, J., concurring in the judgment in part and dissenting in part) (proportionality of death as punishment for rape should be assessed on case-by-case basis); *Argersinger v. Hamlin*, 407 U.S. 25, 63 (Powell, J., concurring in the result) (right to counsel in petty cases should be determined on case-by-case basis).

⁵⁸ *E.g.*, *Caldwell v. Mississippi*, 472 U.S. 320, 327-29 (1985); *Spaziano v. Florida*, 468 U.S. 447, 458-59 (1984); *California v. Ramos*, 463 U.S. 992, 998-99 (1983); *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980).

⁵⁹ 106 S. Ct. 2464 (1986).

⁶⁰ 106 S. Ct. 2661 (1986).

⁶¹ 106 S. Ct. 1749 (1986).

⁶² 106 S. Ct. 689 (1986).

⁶³ 106 S. Ct. 2464 (1986).

⁶⁴ After looting the cash register at gunpoint, the killer attempted sexual assault on the store-owner a few feet from her dying husband, then fired three bullets into a teenage neighbor who came by to see what the trouble was. *Darden v. Wainwright*, 106 S. Ct. 2464, 2467-68 (1986).

⁶⁵ *Darden* also contended that one prospective juror was improperly excluded for scruples against capital punishment, and that he was denied effective assistance of counsel at the sentencing phase of his trial. The ineffective assistance claim—that counsel had not adequately prepared to present mitigating evidence—was very weak, *see id.* at 2474-75, and was not endorsed even by the dissent. Venireman Murphy's exclusion was allegedly improper because Murphy had indicated not that he would actually refuse to vote for the death penalty regardless of the evidence, but only that he could not vote for

The prosecutors had called Darden an “animal”⁶⁶ who “shouldn’t be out of his cell unless he has a leash on him”⁶⁷ and expressed their personal conviction of his guilt.⁶⁸ They attempted to blame prison authorities for the crime (Darden had been on weekend furlough from prison when the murder took place)⁶⁹ and to insinuate that a death sentence was “the only way anybody can be sure” no such crime would occur in the future.⁷⁰ Most strikingly, one prosecutor had repeatedly expressed his wish that the murder victim had “blown his [Darden’s] face off”: “I wish I could see him sitting here with no face, blown off by a shotgun.”⁷¹

Despite the egregiousness of the prosecutors’ misconduct, the Court in a 5-4 decision refused to find that it met the criterion for reversal laid down in a 1974 case, *Donnelly v. DeChristoforo*:⁷² whether the remarks “so infected the trial with unfairness as to make the resulting conviction a denial of due process.”⁷³ The majority’s reasons for this refusal fully deserved the dissenters’ derisive characterization: “an entirely unpersuasive one-page laundry list.”⁷⁴ But the truly noteworthy aspect of the majority opinion is its failure to pay any attention to the capital nature of the proceedings and the sentence. Far from imposing a particularly rigorous scrutiny,⁷⁵ the majority indulged every presumption that jurors would disregard blatantly inflammatory emotional appeals.⁷⁶ The major-

it “without violating [his] own principles.” *Id.* at 2469. The majority’s response was that the judge had previously propounded the correct question repeatedly in Murphy’s presence and thus “made the purpose and meaning of the . . . inquiry absolutely clear” to him. *Id.* at 2470. Given this, defense counsel’s failure to object, and the trial court’s ability to assess Murphy’s demeanor, the majority refused to find the exclusion erroneous. *Id.* at 2470-71. Though the dissent disputed this reasoning and stressed that erroneous exclusion of even one juror automatically invalidates a death sentence, *id.* at 2482-84 (Blackmun, J., dissenting), it is hard to treat this alleged defect as seriously as the blatant prosecutorial misconduct discussed *infra*—especially since the jury’s role in death sentencing is purely advisory in Florida.

⁶⁶ *Id.* at 2471.

⁶⁷ *Id.* at 2471 n.12.

⁶⁸ *Id.* at 2477 (Blackmun, J., dissenting).

⁶⁹ *Id.* at 2471.

⁷⁰ *Id.* at 2471 n.10.

⁷¹ *Id.* at 2471-72 n.12. This prosecutor also expressed his regret that Darden had not shot himself, died in the car crash that followed the crime, or cut his own throat. *Id.*

⁷² 416 U.S. 637 (1974).

⁷³ *Id.* at 643.

⁷⁴ *Darden v. Wainwright*, 106 S. Ct. 2464, 2479 (1986) (Blackmun, J., dissenting).

⁷⁵ See *supra* note 58 and accompanying text.

⁷⁶ Displaying touching faith in the efficacy of curative instructions, the majority noted that the judge told the jurors that counsel’s arguments were not evidence. *Darden*, 106 S. Ct. at 2472. The majority also observed that the prosecutors “did not manipulate or misstate the evidence,” *id.*—as though jurors would necessarily ignore anything outside the legally-defined evidence.

ity's invocation of *DeChristoforo*—where “prosecutorial misconduct” consisted of one ambiguous (and immediately disapproved) remark in an extended trial⁷⁷—signalled an unwillingness to take seriously the Court's self-proclaimed mission of “insur[ing] that the death penalty is . . . imposed on the basis of ‘reason rather than caprice or emotion.’ ”⁷⁸

The Court was even less receptive to the notion of heightened procedural safeguards for capital prosecutions in *Smith v. Murray*,⁷⁹ a habeas corpus action brought by a man sentenced to death for murdering a woman he had raped. Smith had what should have been a strong claim that damaging testimony had been unconstitutionally admitted at the sentencing phase of his trial.⁸⁰ Though objecting to this testimony at trial, however, Smith's attorney abandoned the objection on appeal in the face of controlling state precedent that was squarely against him.⁸¹ After his conviction was final—and after the state precedent had been repudiated⁸²—Smith

⁷⁷ DeChristoforo's co-defendant in a first-degree murder trial pleaded guilty to second-degree murder at the close of evidence, and the jury was so informed. In closing argument the prosecutor expressed personal conviction of the defendant's guilt, and told the jury he thought the defendant and his lawyer “hope that you find him guilty of something a little less than first-degree murder.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 640 (1974). The defense objected and later sought a curative instruction; the jury was told to disregard the remark. The Court of Appeals granted defendant's habeas petition on the basis of that remark, but the Supreme Court reversed, emphasizing the curative instruction, the isolated nature of the misconduct, and its ambiguity—the jury might not have taken it as implying that DeChristoforo, like his co-defendant, had offered to plead to a lesser offense.

⁷⁸ *Beck v. Alabama*, 447 U.S. 625, 638 (1980).

⁷⁹ 106 S. Ct. 2661 (1986).

⁸⁰ Smith's lawyer, exploring possible defenses, had him examined before trial by a court-appointed psychiatrist. The psychiatrist asked Smith about the murder and about previous sexual incidents, without warning him that his statements could be used against him or that he was entitled to remain silent and to have a lawyer present. At the penalty phase the prosecution called the psychiatrist to testify to an earlier sexual assault that Smith had described to him. Four years after Smith's trial, the Supreme Court held that such prosecutorial use in a capital sentencing proceeding of evidence from a psychiatric interrogation not preceded by appropriate warnings violates the privilege against self-incrimination. *Estelle v. Smith*, 451 U.S. 454 (1981).

⁸¹ The Virginia Supreme Court had rejected the argument that the privilege against self-incrimination prohibited the prosecution from introducing into evidence defendant's incriminating statements during a court-ordered pretrial competency examination in *Gibson v. Commonwealth*, 216 Va. 412, 219 S.E.2d 845 (1975), *cert. denied*, 425 U.S. 994 (1976). At a post-conviction hearing, Smith's trial counsel explained that he had consciously decided not to pursue the argument on appeal. 106 S. Ct. at 2664. Objections to the testimony were raised, however, in an amicus brief—but a Virginia Supreme Court rule precluded considering arguments of an amicus concerning errors not assigned by defendant himself. *Id.*

⁸² In *Gibson v. Zahradnick*, 581 F.2d 75 (4th Cir.), *cert. denied*, 439 U.S. 996 (1978), the Court of Appeals found the analysis of *Gibson v. Commonwealth*, *supra* note 81, unconstitutional and granted the habeas petition.

raised his objection to the testimony in state habeas proceedings, only to be told that the objection had been forfeited by his failure to press it on direct appeal.⁸³ The district and circuit courts rejected Smith's petition for federal habeas relief without reaching the merits of his claim.⁸⁴ And the Supreme Court, in another 5-4 decision, did likewise, holding that Smith's state procedural default waived his constitutional claim under the principles of *Wainwright v. Sykes*.⁸⁵

Sykes held that noncompliance with a state requirement of contemporaneous objection to the admission of evidence at trial will ordinarily bar federal habeas review of the admission of that evidence absent a showing of "cause" for the noncompliance and "actual prejudice" from the admission of the evidence. The same rule applies to procedural defaults on appeal.⁸⁶ The rule is not absolute, however; federal courts retain the *power* to entertain a habeas petition despite a state procedural default even absent "cause" and "prejudice."⁸⁷ A court genuinely convinced that "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination"⁸⁸ could accordingly have recognized an exception to the "cause and prejudice" rule that would have permitted it to reach the merits of Smith's constitutional claim.⁸⁹ But "the qualitative difference of death" made no impression on the majority: "We reject the suggestion that the principles of *Wainwright v. Sykes* apply differently depending on the nature of the penalty a State imposes for the violation of its criminal laws."⁹⁰ Executing Smith on the basis of unconstitutionally obtained evidence was simply not, in the majority's eyes, a "fundamental miscarriage of justice."⁹¹

⁸³ 106 S. Ct. at 2665.

⁸⁴ The district court denied the petition on the ground ultimately adopted by the Supreme Court—a state procedural default barring federal habeas under *Wainwright v. Sykes*, 433 U.S. 72 (1977). The Court of Appeals relied instead on *Zant v. Stephens*, 462 U.S. 862 (1983), to conclude that any constitutional error in admitting the psychiatrist's testimony was irrelevant to the overall validity of the death sentence because it bore on only one of the two distinct aggravating factors on which the jury based its death-penalty recommendation. 106 S. Ct. at 2665.

⁸⁵ 433 U.S. 72 (1977).

⁸⁶ *Murray v. Carrier*, 106 S. Ct. 2639 (1986).

⁸⁷ See *Reed v. Ross*, 468 U.S. 1, 9-11 (1984); *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977); *Francis v. Henderson*, 425 U.S. 536, 538-39 (1976).

⁸⁸ *California v. Ramos*, 463 U.S. 992, 998-99 (1983).

⁸⁹ Indeed, a fairly narrow exception would have sufficed. Not only was Smith's constitutional error potentially a life-or-death matter, but it was asserted at trial, was abandoned on appeal only because of a very recent contrary state precedent, and had nonetheless been presented to the Virginia Supreme Court in an amicus brief.

⁹⁰ *Smith v. Murray*, 106 S. Ct. 2661, 2668 (1986).

⁹¹ The majority conceded that a federal habeas court should grant the writ to avert

*Poland v. Arizona*⁹² and *Cabana v. Bullock*⁹³ confirm the Court's reluctance to subject the capital sentencing process to stringent scrutiny. They suggest, indeed, that the Court will not hesitate to alter its model of that process as necessary to avoid such scrutiny. Thus while *Poland* rested on a picture of the penalty determination as a "trial" on the issue of the appropriateness of the death penalty, *Bullock* permitted an appellate court, rather than the sentencer, to make a factual finding necessary to resolve that issue.

Patrick and Michael Poland had originally been sentenced to death on the basis of one of the two statutory aggravating circumstances (an "especially heinous, cruel, or depraved" killing) for which the prosecution had argued.⁹⁴ The sentencing judge found the other circumstance (killing for pecuniary gain) lacking because he interpreted it as covering only contract killings.⁹⁵ On appeal, the

such a miscarriage, even absent a showing of "cause" for a state procedural default. *Id.* But it found no such miscarriage in Smith's case because there was no "claim that the alleged error undermined the accuracy of the guilt or sentencing determination." *Id.* As the dissent noted, this reasoning invokes a singularly crabbed view of what counts as a "miscarriage of justice." *Id.* at 2670-72 (Stevens, J., dissenting). The use of coerced confessions, for example, has long been treated as an injustice grave enough to require reversal of a criminal conviction no matter how much independent evidence of defendant's guilt exists. *Mincey v. Arizona*, 437 U.S. 385, 398 (1978); *Chapman v. California*, 386 U.S. 18, 23 & n.8 (1967).

More interestingly, the majority's reasoning fails to take account of the peculiar nature of a capital sentencing proceeding. If a defendant complains that probative evidence against him on the issue of *guilt* was unconstitutionally admitted, one can easily feel that so long as the defendant is actually guilty, he has suffered no "fundamental miscarriage of justice." After all, admission of the tainted evidence, if it affects the trial at all, merely results in defendant's being convicted—which, objectively, is what he *deserves*. In a capital sentencing proceeding, however, where the sentencer "mak[es] what is largely a moral judgment of the defendant's desert," *Caldwell v. Mississippi*, 472 U.S. 320, 340-41 n.7 (1985), the Court's own view has been that there is *no* objectively "correct" result. "Accuracy" in this context has meant "not accuracy in the conventional sense of an objectively right sentence" but merely a selection process without constitutional defects. *Gillers*, *supra* note 17, at 1043. Indeed, the author of the *Smith* opinion, Justice O'Connor, had earlier declared for the Court that the Constitution permits juries to be given "unbridled discretion" to determine whether to impose death on a defendant once he is found to be statutorily eligible for that penalty. *California v. Ramos*, 463 U.S. 992, 1008 n.22 (1983). Against this background, if a defendant complains that truthful evidence against him in the *penalty* phase has been unconstitutionally admitted, one cannot reason that defendant has suffered no injustice as long as he "actually deserved death," or that its admission merely caused the defendant to receive the sentence he objectively deserves.

⁹² 106 S. Ct. 1749 (1986).

⁹³ 106 S. Ct. 689 (1986).

⁹⁴ Under Arizona law, a convicted capital defendant can receive a death sentence only if the sentencing judge finds at least one statutory aggravating circumstance to be present. ARIZ. REV. STAT. ANN. § 13-703E (SUPP. 1986).

⁹⁵ *Poland v. Arizona*, 106 S. Ct. 1749, 1752 (1986). He stated that if this interpretation were incorrect, the "pecuniary gain" circumstance would exist. *Id.*

Arizona Supreme Court held that there was insufficient evidence to support the "heinous, cruel, or depraved" circumstance but also stated that the "pecuniary gain" circumstance extended to any murder motivated by "expectation of financial gain."⁹⁶ Convicted again on remand,⁹⁷ the Polands were resentenced to death, this time on the basis of both of the original aggravating circumstances.⁹⁸ The Arizona Supreme Court once again found the evidence insufficient to support the latter circumstance, but rejected the defendants' double-jeopardy argument and affirmed the death sentences.⁹⁹

On certiorari, the Supreme Court agreed. The Polands sought to bring their case within the rule of *Bullington v. Missouri*,¹⁰⁰ which treated a sentencing jury's choice of life imprisonment after defendant's first conviction as an "acquittal" of the death penalty for double jeopardy purposes, barring a death sentence after retrial.¹⁰¹ Unlike *Bullington*, however, the Polands had never been "acquitted" of the death penalty but had been sentenced to death after their first conviction. In the majority's view, double jeopardy could bar the second pair of death sentences only if it applied not merely to an overall "acquittal" of the death penalty but to each separate "acquittal" of a statutory aggravating circumstance.¹⁰² Under this fine-grained analysis, the trial court's original "acquittal" of the "pecuniary gain" circumstance, coupled with the Arizona Supreme Court's initial holding of insufficient evidence to support the "hei-

⁹⁶ *State v. Poland*, 132 Ariz. 269, 286, 645 P.2d 784, 801 (1982).

⁹⁷ The Arizona Supreme Court had reversed the Polands' convictions because of a jury-room discussion of evidence not admitted at trial. *Poland*, 106 S. Ct. at 1752.

⁹⁸ A third aggravating circumstance was found as to Patrick Poland—previous conviction of a violent felony. *Id.* This was based on events occurring after the first sentencing proceeding. *Id.* at 1757 n.* (Marshall, J., dissenting).

⁹⁹ *State v. Poland (Patrick)*, 144 Ariz. 388, 698 P.2d 183 (1985); *State v. Poland (Michael)*, 144 Ariz. 412, 698 P.2d 207 (1985).

¹⁰⁰ 451 U.S. 430 (1981).

¹⁰¹ When a defendant successfully appeals a conviction, double jeopardy ordinarily does *not* bar imposition of a greater sentence after retrial than was originally imposed. *North Carolina v. Pearce*, 395 U.S. 711, 719-21 (1969). *Bullington* recognized an exception to this rule because Missouri's capital sentencing procedures, unlike sentencing in noncapital cases, amounted to "a trial on the issue of punishment" at which the jury must "determine whether the prosecution has 'proved its case'" for the death penalty. *Bullington v. Missouri*, 451 U.S. 430, 438, 444 (1981). A life sentence, accordingly, amounted to an acquittal on the issue of appropriateness of the death penalty that merited preclusive effect. ("Trial-like" features similar to those that marked Missouri's capital sentencing procedures—a choice limited to two alternatives, made at a separate sentencing hearing and guided by standards requiring, *inter alia*, that the state prove certain facts as a precondition to a sentence of death—are virtually certain to characterize any capital sentencing procedure that can pass constitutional muster.)

¹⁰² *Poland v. Arizona*, 106 S. Ct. 1749, 1755 (1986).

nous, cruel, or depraved” circumstance,¹⁰³ would preclude a subsequent “conviction” of either circumstance.¹⁰⁴ The majority, however, refused to “view the capital sentencing hearing as a set of mini-trials on the existence of each aggravating circumstance.”¹⁰⁵

By treating the sentencing hearing as analogous to a trial on the single issue of appropriateness of the death penalty, the *Poland* Court was able to affirm the defendants’ death sentences despite a curious anomaly. Had the sentencing judge initially made only *one* error—misinterpretation of the “pecuniary gain” circumstance—the Polands could not have been sentenced to death, but because he had committed a *second* error as well—finding a circumstance not in fact supported by the evidence—they could be put to death.¹⁰⁶ This seemingly capricious result did not shake the majority’s confidence in its “trial” model of the penalty hearing. But in *Cabana v. Bullock*,¹⁰⁷ where an inference from that model would have benefitted a capital defendant, a majority almost identical to that in *Poland* refused to draw that inference.¹⁰⁸

Bullock was sentenced to death for his participation with an accomplice in a robbery and murder in which the accomplice struck the fatal blows.¹⁰⁹ The instructions given at his trial could reasonably be interpreted as permitting a conviction of capital murder if Bullock had aided his accomplice at some point in the assault that led to the killing, without regard to his intent.¹¹⁰ The Fifth Circuit granted Bullock’s habeas corpus petition on the basis of *Enmund v. Florida*,¹¹¹ which held that the eighth amendment prohibited imposing the death penalty on one “who aids and abets a felony in the

¹⁰³ An appellate court’s reversal of a conviction on the ground of insufficient evidence bars retrial on the same charge. *Burks v. United States*, 437 U.S. 1 (1978).

¹⁰⁴ Even this analysis might have permitted Patrick Poland to be resentenced to death on the “previous violent felony” circumstance, which had not been raised in the first trial. See *supra* note 98.

¹⁰⁵ 106 S. Ct. at 1755.

¹⁰⁶ Had the judge made only the “pecuniary gain” error he would have found *no* statutory aggravating circumstances present and could not have sentenced the Polands to death. On remand, therefore, the *Bullington* rule would have precluded imposition of the death sentence. Indeed, the Supreme Court had previously applied *Bullington* to precisely that situation. *Arizona v. Rumsey*, 467 U.S. 203 (1984).

¹⁰⁷ 106 S. Ct. 689 (1986).

¹⁰⁸ Of the six justices who formed the majority in *Poland*—Chief Justice Burger and Justices White, Powell, Stevens, Rehnquist, and O’Connor—all but Justice Stevens joined the majority opinion in *Bullock*. Both opinions were written by Justice White. The five-justice majority in *Bullock* was identical to that in *Darden* and *Smith*, discussed *supra* notes 63-91 and accompanying text.

¹⁰⁹ *Cabana v. Bullock*, 106 S. Ct. at 693.

¹¹⁰ *Id.* at 695.

¹¹¹ 458 U.S. 782 (1982).

course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed.”¹¹² Since neither the instructions at the guilt phase nor those at the penalty phase required any findings that Bullock met the *Enmund* criteria, the Fifth Circuit vacated his death sentence, though permitting it to be reimposed if the proper findings were made at a new sentencing hearing.¹¹³

The Supreme Court agreed that Bullock’s death sentence should be vacated, but it did not agree that it could be reimposed only after a new sentencing hearing before a jury. The Court required only that “the requisite findings [be] made in an adequate proceeding before some appropriate tribunal—be it an appellate court, a trial judge, or a jury.”¹¹⁴ Permitting the *Enmund* findings to be made in the first instance by appellate courts¹¹⁵ meant rejecting, in this context, the “penalty phase as trial” model that shaped the Court’s reasoning in *Poland*. For if the penalty phase is “a trial on the issue of punishment,”¹¹⁶ then satisfaction of the *Enmund* criteria is a factual element that must be established to “prove the case” for the appropriateness of the death penalty, and failure to instruct the jury on that element cannot be cured by a trial or appellate court’s subsequent findings.¹¹⁷ The majority made its disregard of the trial model of the penalty phase clear when it argued that rules concerning failure to instruct juries on an element of the crime charged were irrelevant in Bullock’s case because “*Enmund* does not concern the guilt or innocence of the defendant” and “establishes no new elements of the crime of murder.”¹¹⁸ The idea that *Enmund* con-

¹¹² *Id.* at 797. *Enmund* was decided while Bullock’s habeas petition was pending in federal district court.

¹¹³ *Bullock v. Lucas*, 743 F.2d 244, 248 (5th Cir. 1984), *modified sub nom. Cabana v. Bullock*, 106 S. Ct. 689 (1986).

¹¹⁴ *Bullock*, 106 S. Ct. at 700. The Court did concede that there might be instances in which an appellate court could not determine the *Enmund* issue—e.g., if that issue turned on “credibility determinations that could not be accurately made . . . on the basis of a paper record.” *Id.* at 698 n.5.

¹¹⁵ *Bullock* did not hold merely that an *Enmund* violation committed inadvertently at the trial level could be cured on appeal. Rather, states are free to deliberately structure their capital proceedings so that *Enmund* findings are reserved for the appellate courts. “At what precise point in its criminal process a State chooses to make the *Enmund* determination is of little concern from the standpoint of the Constitution.” *Id.* at 697.

¹¹⁶ *Bullington v. Missouri*, 451 U.S. 430, 438 (1981).

¹¹⁷ This result follows by analogy with the corresponding rule for ordinary trials: “Findings made by a judge cannot cure deficiencies in the jury’s finding as to the guilt or innocence of a defendant resulting from the court’s failure to instruct it to find an element of the crime.” *Bullock*, 106 S. Ct. at 696.

¹¹⁸ *Id.*

cerns defendant's "guilt" of deserving death, and establishes a new element of the *penalty* issue, was simply ignored.

Bullock and *Poland* are not strictly inconsistent. There is no logical barrier to treating the capital sentencing hearing as a "trial" for double jeopardy purposes but not for the purpose of allocating decision-making authority.¹¹⁹ What is troubling, however, is the majority's failure to explain, or even acknowledge, its shift in position in these cases, and the resulting suspicion that *no* coherent view of the role of the penalty proceeding underlies the particular results reached.¹²⁰

This suspicion is strengthened by the inconsistencies in the Court's view of how significantly the subjective, discretionary features of the penalty proceeding distinguish it from the ordinary guilt-or-innocence trial. *Turner*¹²¹ emphasized those features in concluding that the capital sentencing hearing automatically presents "special circumstances" entitling defendants charged with interracial crimes to probe potential jurors' racial views on voir dire.¹²² Yet *Darden*¹²³ ignored the unique aspects of the sentencing hearing in gauging the impact of flagrantly improper prosecution tactics,¹²⁴ as did *Smith*¹²⁵ in assessing when a state procedural default should be overlooked to forestall a "fundamental miscarriage of justice" in a capital sentencing proceeding.¹²⁶ Ironically, however, the Court relied crucially on the "uniqueness" of the penalty proceeding in rejecting what was potentially the most sweeping pro-

¹¹⁹ Indeed, the Court's refusal to equate the penalty proceeding with a trial in allocating decision-making authority was already clear in *Spaziano v. Florida*, 468 U.S. 447 (1984), where the Court held that a capital defendant has no constitutional right to be sentenced by a jury.

¹²⁰ There is also a disingenuous flavor to the *Bullock* Court's suggestion that the *Enmund* issue is the sort of question routinely committed to judges:

[T]he decision whether a sentence is so disproportionate as to violate the Eighth Amendment in any particular case, *like other questions bearing on whether a criminal defendant's constitutional rights have been violated*, has long been viewed as one that a trial judge or an appellate court is fully competent to make.

Bullock, 106 S. Ct. at 697 (emphasis added). The emphasized language conveys the impression that what is involved is a question of law, which one would expect courts, not juries, to determine. But *Enmund* calls for *factual* determinations—normally the province of the jury—as the majority itself recognizes elsewhere (e.g. when it states that *Bullock* cannot be resentenced to death absent "a determination from [the state's] own courts of the factual question whether [he] killed, attempted to kill, intended to kill, or intended that lethal force would be used"). *Id.* at 700.

¹²¹ *Turner v. Murray*, 106 S. Ct. 1683 (1986).

¹²² See *supra* notes 53-58 and accompanying text.

¹²³ *Darden v. Wainwright*, 106 S. Ct. 2464 (1986).

¹²⁴ See *supra* notes 63-78 and accompanying text.

¹²⁵ *Smith v. Murray*, 106 S. Ct. 2661 (1986).

¹²⁶ See *supra* notes 79-91 and accompanying text.

cedural challenge to capital punishment of the 1985 Term—the attack on the “death-qualified” jury made in *Lockhart v. McCree*.¹²⁷

During voir dire in a capital case, any prospective juror whose views on the death penalty would “‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath’”¹²⁸ may be removed for cause.¹²⁹ The exclusion of those prospective jurors is called “death qualification,” and its potential for yielding unduly “conviction-prone” juries has been debated for a quarter of a century.¹³⁰ The debate began with the intuitively plausible argument that a jury purged of anyone expressing qualms about capital punishment “will necessarily have been culled of the most humane of its prospective members” and hence of those most “prone to resolve the many doubts as to guilt or innocence in the defendant’s favor.”¹³¹ The initial force of this argument was blunted once the Supreme Court limited for-cause challenges to jurors irrevocably opposed to capital punishment rather than those with any scruples at all.¹³² But proliferating social-science studies have produced increasing empirical support for

¹²⁷ A holding that “death-qualified” juries could not constitutionally decide guilt or innocence could have forced new trials for almost all Death Row inmates. Questioning jurors at voir dire about their views on capital punishment, and eliminating those who could never return a death sentence, is standard practice in almost every capital trial. Schnapper, *Taking Witherspoon Seriously: The Search for Death-Qualified Jurors*, 62 TEX. L. REV. 977, 979 (1984). One would expect prosecutors to forego this practice only in the handful of states in which sentencing power in capital cases is left completely to the judge—Arizona, Idaho, Montana, and Nebraska. See ARIZ. REV. STAT. ANN. § 13-703 (Supp. 1986); IDAHO CODE § 19-2515 (Supp. 1986); MONT. CODE ANN. § 46-18-301 (1985); NEB. REV. STAT. § 29-2520 (1985). Even those states, however, may permit “death qualification.” See, e.g., *State v. Clark*, 126 Ariz. 428, 431, 616 P.2d 888, 891 (1980); *State v. Hallam*, 575 P.2d 55, 61 (Mont. 1978). Finally, a ruling against “death qualification” could also have required retrials for persons who, like McCree himself, had been convicted of capital offenses but *not* sentenced to death.

¹²⁸ *Wainwright v. Witt*, 469 U.S. 412, 423-25 (1985).

¹²⁹ Exclusion of a prospective juror because of his views on capital punishment on any broader basis than that laid down in the quoted language, however, is a constitutional violation invalidating a resulting death penalty. *Adams v. Texas*, 448 U.S. 38, 48 (1980). The Supreme Court first formulated a constitutional limitation on the state’s right to exclude for cause veniremembers opposed to the death penalty in *Witherspoon v. Illinois*, 391 U.S. 510 (1968). *Witherspoon* suggested a more stringent limitation—that such exclusions were permissible only if the prospective juror made it “unmistakably clear” that he would either “*automatically* vote against the imposition of capital punishment without regard to any evidence . . . at the trial” or be unable to “mak[e] an impartial decision as to the defendant’s *guilt*.” *Id.* at 522-23 n.21 (emphasis in original). Subsequent decisions of the Supreme Court as well as lower courts treated this as the applicable standard until *Wainwright v. Witt*, 469 U.S. 412 (1985). See *id.* at 424.

¹³⁰ The seminal article is Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?*, 39 TEX. L. REV. 545 (1961).

¹³¹ *Id.* at 549.

¹³² *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

the claim that death qualification, even under current constitutional limitations,¹³³ results in juries more likely to convict than those that would otherwise be obtained.¹³⁴

The Supreme Court first confronted this claim in 1968,¹³⁵ but found the evidence for it "too tentative and fragmentary"¹³⁶ to support a "constitutional rule requiring the reversal of every conviction returned by a [death-qualified] jury."¹³⁷ The Court left open the possibility that a future defendant could make an evidentiary showing sufficient to compel reversal.¹³⁸ Subsequently, as the empirical evidence accumulated, lower courts moved from reiterating that it was still too scanty¹³⁹ to criticizing it on methodological grounds¹⁴⁰ and then to asserting that death qualification was not unconstitutional even if it *did* render juries more "conviction-prone."¹⁴¹ When a sharply divided Eighth Circuit became the first appellate court to accept the "conviction-proneness" argument and hold that death-qualified juries could not be used at the guilt phase of a capital trial,¹⁴² the stage was set for Supreme Court resolution of the issue.¹⁴³

By six votes to three the Supreme Court squarely rejected the

¹³³ Those constitutional limitations have recently been relaxed. In *Wainwright v. Witt*, 469 U.S. 412 (1985), the Supreme Court not only diluted the substantive standard laid down in *Witherspoon* (see *supra* note 129), but abandoned the requirement that the potential juror's bias be "unmistakably clear," *id.* at 424, and held that a state trial court's determination of juror bias is a finding of fact to which federal habeas courts must defer. *Id.* at 426-35.

¹³⁴ See, for example, the symposium on death qualification in 8 L. & HUM. BEHAVIOR 1-195 (1984), as well as Bronson, *Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict? Some Evidence From California*, 3 WOODROW WILSON L.J. 11 (1980), and Finch & Ferraro, *The Empirical Challenge to Death-Qualified Juries: On Further Examination*, 65 NEB. L. REV. 21 (1986).

¹³⁵ *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

¹³⁶ *Id.* at 517.

¹³⁷ *Id.* at 518.

¹³⁸ *Id.* at 520 n.18.

¹³⁹ *United States ex rel. Clark v. Fike*, 538 F.2d 750, 761-62 (7th Cir. 1976), *cert. denied*, 429 U.S. 1064 (1977); *United States ex rel. Townsend v. Twomey*, 452 F.2d 350, 362-63 (7th Cir.), *cert. denied*, 409 U.S. 854 (1972).

¹⁴⁰ *Hovey v. Superior Court*, 28 Cal. 3d 1, 168 Cal. Rptr. 128, 616 P.2d 1301 (1980).

¹⁴¹ *Keeton v. Garrison*, 742 F.2d 129, 133-34 (4th Cir. 1984), *cert. denied*, 106 S. Ct. 2258 (1986); *Smith v. Balkcom*, 660 F.2d 573, 575-79 (5th Cir. 1981), *modified*, 671 F.2d 858 (5th Cir.), *cert. denied*, 459 U.S. 882 (1982); *Spinkellink v. Wainwright*, 578 F.2d 582, 593-96 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979).

¹⁴² *Grigsby v. Mabry*, 758 F.2d 226 (8th Cir. 1985)(en banc), *rev'd sub nom.* *Lockhart v. McCree*, 106 S. Ct. 1758 (1986). The vote in *Grigsby* was 5-4.

¹⁴³ As, indeed, the circuit court had hoped: "We are very much aware that our affirmation of the district court here creates a conflict among circuits . . . We are hopeful the Supreme Court will grant a writ of certiorari and resolve the issue." *Grigsby*, 758 F.2d at 238-39 (footnote omitted).

contention that death qualification increased the likelihood of a guilty verdict in an unconstitutional manner.¹⁴⁴ In an opinion written by Justice Rehnquist, the Court's most unwavering opponent of any judicial restrictions on the death penalty,¹⁴⁵ the majority combined the strategies previously employed by lower courts. Justice Rehnquist first questioned the strength of the empirical evidence that death qualification yielded juries more "conviction prone" than would otherwise be obtained.¹⁴⁶ He then reasoned that even assuming the evidence established such an effect, death qualification violated neither the defendant's right to an impartial jury¹⁴⁷ nor his right to a jury selected from a representative cross-section of the community.¹⁴⁸

The "fair cross-section" argument was the weaker of the defendant's contentions. The only state jury-selection procedures the Court had struck down on that basis were schemes that disproportionately excluded women¹⁴⁹—a group far larger and more integral to the representative nature of a "cross-section of the community" than the class of strong opponents of the death penalty.¹⁵⁰ Refuting

¹⁴⁴ Chief Justice Burger and Justices White, Powell, and O'Connor joined Justice Rehnquist's majority opinion. Justice Blackmun concurred in the judgment without opinion. Justice Marshall filed a dissent in which Justices Brennan and Stevens joined. *McCree*, 106 S. Ct. at 1770 (Marshall, J., dissenting).

¹⁴⁵ Stephen Gillers has compiled a list of 32 "significant" death penalty decisions since 1968, omitting both cases decided on grounds having nothing to do with capital punishment and routine applications of precedent. Gillers, *Proving the Prejudice of Death-Qualified Juries After Adams v. Texas*, 47 U. PITTSBURGH L. REV. 219, 254-55 (1985). Justice Rehnquist participated in 30 of those cases, and in all eight of the death penalty cases decided last Term (*see supra* note 20). He voted to grant the relief sought by the defendant in only three of those 38 cases, or 7.9%—a record not even approached by any other justice. (For the sake of comparison, the figures for the rest of the Court are: Burger 28.9%, White 31.6%, O'Connor 33.3% (out of 21 cases), Powell 47.4%, Blackmun 63.2%, Stevens 78.4% (out of 37 cases), Brennan and Marshall 100%. Overall, a majority sided with the defendant in 22, or 57.9%, of the 38 cases.)

¹⁴⁶ *McCree*, 106 S. Ct. at 1762-64.

¹⁴⁷ *Id.* at 1766-70. The district court had held that death qualification did violate the right to an impartial jury. *Grigsby v. Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983).

¹⁴⁸ *Id.* at 1764-66. Both the district court and the court of appeals had held that death qualification did violate the right to a jury chosen from a fair cross-section of the community. *Grigsby v. Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983); *Grigsby v. Mabry*, 758 F.2d 226 (8th Cir. 1985).

¹⁴⁹ *Duren v. Missouri*, 439 U.S. 357 (1979); *Taylor v. Louisiana*, 419 U.S. 522 (1975).

¹⁵⁰ Even so, Justice Rehnquist's efforts to dispose of the "fair cross-section" requirement are only superficially convincing. He first claimed that this requirement applies only to jury panels or venires, not to petit juries. *McCree*, 106 S. Ct. at 1764-65. He then argued that even if the requirement *did* extend to petit juries, "Witherspoon-excludables"—prospective jurors who may constitutionally be excluded for cause for their views on capital punishment—are not the kind of "distinctive group" whose exclusion violates the cross-section requirement.

The first point is simply misapplied here, since the defendant is asserting not that

the “impartiality” argument was the real challenge for the majority, and in meeting it Justice Rehnquist appealed to the notion that capital sentencing proceedings differ significantly from ordinary guilt-or-innocence trials. The far greater discretion accorded juries in sentencing proceedings aroused correspondingly “greater concern over the possible effects of an ‘imbalanced’ jury,”¹⁵¹ and the rules created to prevent such “imbalance” consequently had no application outside the special context of the sentencing hearing. Therefore, Justice Rehnquist concluded, prior decisions invalidating selection procedures that produced juries slanted in favor of imposing the death penalty¹⁵² could not be read as invalidating selection procedures that produced juries slanted in favor of conviction.¹⁵³

the jury ultimately chosen must be a “representative cross-section” but rather that *automatic* exclusion of a “distinctive group” from the jury is functionally equivalent to its exclusion *from the jury panel*. See *id.* at 1775 n.6 (Marshall, J., dissenting). The second point rests on the argument that “‘*Witherspoon*-excludables’ . . . may be excluded from jury service without contravening any of the basic objectives of the fair cross-section requirement.” *Id.* at 1766. Three such objectives are identified: (1) allowing common-sense community judgment to restrain overzealous or mistaken prosecutors; (2) preserving public confidence in the fairness of the criminal justice system; and (3) guaranteeing citizens their right to share in the administration of justice. *Id.* at 1765.

(1) Justice Rehnquist stated that death qualification does no violence to the first objective because it serves a legitimate state interest (obtaining a single jury able both to try and to sentence) and is thus unlikely to have been “instituted as a means for the State to arbitrarily skew the composition of capital-case juries.” *Id.* at 1766 (footnote omitted). This is clearly a *non sequitur*—whatever its original *purpose*, death qualification may have the *effect* of producing conviction-prone juries and thus impairing the jury’s ability to check overweening prosecutors. Indeed, when it has found violations of the fair cross-section requirement the Court has never suggested the procedures it condemned were *intended* to bias the jury. See *Duren* and *Taylor*, *supra* note 149.

(2) Justice Rehnquist asserted that because death qualification excludes jurors “on the basis of an attribute that is within the individual’s control” it “hardly can be said to create an ‘appearance of unfairness.’” *Id.* This is another *non sequitur*—surely excluding all Catholics or all Democrats from juries would create an appearance of unfairness!

(3) Justice Rehnquist claimed that since *Witherspoon*-excludables are free to serve as jurors in non-capital criminal cases, their exclusion from capital juries “leads to no substantial deprivation of their basic rights of citizenship.” *Id.* By that logic, excluding blacks from any case with a white defendant would work no “substantial deprivation” of blacks’ civil rights if they remain free to serve on juries when minority members are on trial.

All in all, the treatment accorded the “fair cross-section” argument is hardly a model of judicial craftsmanship.

¹⁵¹ *Id.* at 1769.

¹⁵² The decisions were *Adams v. Texas*, 448 U.S. 38 (1980) and *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

¹⁵³ *McCree*, 106 S. Ct. at 1767-70. In concluding that the rules governing jury impartiality in capital sentencing proceedings have no “broad applicability outside th[at] special context,” *id.* at 1770, Justice Rehnquist never noted that those rules were originally justified by analogy to principles assumed to govern the guilt-or-innocence trial:

It is, of course, settled that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal “organized to convict.” [Citations

The uniqueness of capital proceedings has often been emphasized to justify new procedural protections for capital defendants.¹⁵⁴ Stressing that uniqueness to *reject* an argument for heightened safeguards in capital trials is the kind of ironic reversal of his opponents' own reasoning at which Justice Rehnquist excels.¹⁵⁵ His ploy, however, will not withstand scrutiny.

Were there no firm evidence that death qualification has a prejudicial impact on the jury, but only intuitive, commonsense speculation that such an effect is likely,¹⁵⁶ Justice Rehnquist's argument would make sense. One could say that the greater discretion and subjectivity of the sentencing proceeding as compared to the trial on guilt or innocence affords a greater opportunity for bias to play a hidden and possibly unconscious role. One might therefore create a *presumption* that death qualification may "slant" the jury's sentencing determination without accepting a corresponding presumption that death qualification slants the guilt-or-innocence finding.¹⁵⁷ But *McCree* is not a case in which one is asked to *presume* a biasing effect. The defendant presented evidence that death qualification really does "slant" the guilt-or-innocence determination, and despite dicta

omitted.] It requires but a short step from that principle to hold, as we do today, that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a sentence of death.

Witherspoon v. Illinois, 391 U.S. 510, 521 (1968)(footnote omitted).

¹⁵⁴ See, e.g., *Turner v. Murray*, 106 S. Ct. 1683 (1986)(discussed *supra* notes 53-58 and accompanying text); *Lockett v. Ohio*, 438 U.S. 586 (1978)(plurality opinion)(defendant may not be precluded from presenting any mitigating evidence at sentencing proceeding); *Gardner v. Florida*, 430 U.S. 349 (1977)(plurality opinion)(judge may not impose death on basis of confidential information not disclosed to defendant or his counsel); *Woodson v. North Carolina*, 428 U.S. 280 (1976)(plurality opinion)(mandatory death sentence for first-degree murder unconstitutional because capital sentencing requires individualized consideration of the particular defendant's culpability).

¹⁵⁵ Perhaps the most notable example comes from fourth amendment law. A Warren Court decision, *Katz v. United States*, 389 U.S. 347 (1967), had shifted the amendment's focus from protecting property rights to protecting "reasonable expectations of privacy"—a move widely regarded as expanding the scope of search and seizure safeguards. See, e.g., Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 385 (1974); Note, *Protecting Privacy Under the Fourth Amendment*, 91 YALE L.J. 313, 316 (1981). Justice Rehnquist was able to exploit this shift to *narrow* the scope of the fourth amendment, however, by making it harder for criminal defendants to get standing to raise search-and-seizure claims. See *Rawlings v. Kentucky*, 448 U.S. 98 (1980); *United States v. Salvucci*, 448 U.S. 83 (1980); *Rakas v. Illinois*, 439 U.S. 128 (1978).

¹⁵⁶ This was the case when death qualification was first challenged. See *supra* note 131 and accompanying text.

¹⁵⁷ Indeed, the plurality opinion in *Turner v. Murray*, 106 S. Ct. 1683 (1986), adopts just this sort of reasoning, finding "an unacceptable risk of racial prejudice infecting the *capital sentencing determination*," *id.* at 1688, while distinguishing the guilt phase of the trial because "the jury had no greater discretion than it would have had" in a non-capital trial. *Id.* at 1689.

criticizing that evidence¹⁵⁸ Justice Rehnquist assumed it was persuasive: “[W]e will 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.”¹⁵⁹ What, then, is the relevance of observing that juries enjoy less discretion in guilt determination than in sentencing? We are never told.¹⁶⁰

The majority’s readiness to accept such illogical reasoning suggests not only confusion over the nature of the capital sentencing procedure¹⁶¹ but also a desire to avoid, at all costs, the potentially damaging impact on capital punishment of McCree’s assault on death qualification.¹⁶² The prospects are thus dim for the only remaining “live” procedural argument that poses a broad challenge to capital punishment (which is now before the Supreme Court)—the claim that it is imposed in a racially discriminatory fashion.¹⁶³ As procedural arguments become less successful, the time may be ripe to challenge the predominance of those arguments in the broader moral debate over the propriety of the death penalty.

¹⁵⁸ *McCree*, 106 S. Ct. at 1762-64.

¹⁵⁹ *Id.* at 1764.

¹⁶⁰ Justice Rehnquist advanced two additional objections to the “impartiality” argument. One is that the decisions requiring impartial capital sentencing juries rested on a belief that the state had “deliberately slanted” its system of picking capital jurors to “mak[e] the imposition of the death penalty more likely,” while no such improper motive operated in McCree’s case. But neither *Witherspoon v. Illinois*, 391 U.S. 510 (1968), nor *Adams v. Texas*, 448 U.S. 38 (1980), suggests that the state was deliberately seeking a “hanging jury” or that the constitutional restrictions on for-cause challenges were aimed only at such deliberate misconduct. The very passage Justice Rehnquist cited to support his reading of *Witherspoon* ascribes to the state *not* a deliberate effort to make a death sentence likely but only a “‘quest for a jury *capable* of imposing the death penalty.’” *McCree*, 106 S. Ct. at 1768, quoting *Witherspoon*, 391 U.S. at 520-21 (emphasis added).

Justice Rehnquist also attacked the notion of “impartiality” he believed McCree employed. An impartial jury, he insisted, is simply one composed of impartial individual jurors, not one exhibiting some appropriately balanced “mix of individual viewpoints.” *McCree*, 106 S. Ct. at 1767. This mischaracterizes McCree’s argument, which challenges the process by which jurors were selected and not the outcome of that process. Had the very same jury resulted from the “luck of the draw,” impartiality, as McCree conceived it, would not have been violated. In finding this notion of impartiality incomprehensible, *id.*, Justice Rehnquist undermined the constitutional basis of *Witherspoon* itself. The Court there found a constitutional violation “not because any member of [defendant’s] jury lacked the requisite constitutional impartiality, but because the manner in which that jury had been selected ‘stacked the deck’ against him.” *Id.* at 1775-76 (Marshall, J., dissenting). See *The Supreme Court, 1984 Term*, 99 HARV. L. REV. 4, 128-30 (1985) (arguing that similar reasoning in an earlier opinion threatened evisceration of *Witherspoon* and its progeny).

¹⁶¹ See *supra* notes 119-26 and accompanying text.

¹⁶² See *supra* note 127.

¹⁶³ *McCleskey v. Kemp*, No. 84-6811, *cert. granted*, 106 S. Ct. 3331 (1986).

II. THE ARBITRARINESS ARGUMENT

One procedural argument against capital punishment is the claim that the minority of murderers on whom it is inflicted cannot be distinguished in any rational, principled fashion from the far greater number of murderers who receive prison sentences. Charles Black has written the most forceful and detailed presentation of this argument.¹⁶⁴ Black sketches the series of decisions that must be made in the course of a criminal prosecution that ends with execution and argues that these decisions "are often made, and in the foreseeable future will continue often to be made, under no standards at all or under pseudo-standards without discoverable meaning."¹⁶⁵ No articulable standards control the prosecutor's initial decision to charge a capital offense, the subsequent decision to reject a plea to a lesser crime, or the governor's decision not to commute a death sentence. The guilty verdict and the sentencer's choice of the death penalty, on the other hand, are decisions purportedly controlled by rules, but Black argues that these are "pseudo-standards"—verbal formulae so empty of ascertainable meaning that they mark no genuine distinctions and do nothing to restrain the jury's or court's discretion.

As one example, Black cites the legal notion of "premeditation" commonly used to distinguish first-degree murder from murders not subject to capital punishment.¹⁶⁶ While one would think a murder would be "premeditated" only if the killer had given it at least *some* moments of thought *some* time before the deed, courts routinely state that "premeditation" need take no more than an instant and need occur no more than a moment before the killing. As another example, Black analyzes the Texas statutory sentencing guidelines for capital cases.¹⁶⁷ Stripped of superfluous provisions, he argues, these simply direct jurors to vote for life or death based on "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."¹⁶⁸ Because the key terms in this directive are left wholly undefined, it fails to impose any meaningful constraint on the jury's sentencing discretion.¹⁶⁹ "A probability" could mean a better than

¹⁶⁴ C. Black, *supra* note 5.

¹⁶⁵ *Id.* at 29.

¹⁶⁶ *Id.* at 57-58.

¹⁶⁷ *Id.* at 66-72.

¹⁶⁸ TEX. CRIM. PROC. CODE ANN. § 37.071(b)(2) (Vernon Supp. 1986).

¹⁶⁹ Another form of "arbitrariness," not discussed by Black, may infect the Texas statute. The jurors are required to base their choice of sentence on a prediction of defendant's future dangerousness. Yet such predictions are notoriously unreliable. Indeed, the American Psychiatric Association has claimed that psychiatric predictions of future

even chance or merely a substantial chance; "criminal acts of violence" might include fistfights or be limited to life-threatening aggression; and "a continuing threat to society" is so vague that jurors can only guess at the distinction among "criminal acts of violence" which this phrase is supposed to mark.¹⁷⁰ After spelling out this indictment of the capital-punishment system as a series of capricious, rationally inexplicable choices, Black invites us to conclude that the process contains "too much standardless 'discretion' for it to be decent for us to use it any longer as a means of choosing for death."¹⁷¹

Ernest Van Den Haag, the most prominent academic defender of the death penalty, rejects this invitation by insisting that the justice of executing any particular person depends solely upon whether he is being given his due—whether execution is what he deserves—and not upon whether others equally (or more) culpable are enjoying undeserved clemency. "The guilty do not become innocent or less deserving of punishment because others escaped it."¹⁷² To examples which show that we often intuitively find it unjust to punish one person while sparing others equally guilty, Van Den Haag's reply is that the injustice in such cases lies wholly in the undeserved and improper leniency accorded the latter, not in the merited punishment of the former. Getting what one deserves *cannot*, he thinks, constitute an injustice.¹⁷³

Though I too wish to reject the arbitrariness argument, I am unconvinced by Van Den Haag's way of doing so. For one thing,

dangerousness are wrong two-thirds of the time. *Barefoot v. Estelle*, 463 U.S. 880, 920 (1983) (Blackmun, J., dissenting). This did not prevent the *Barefoot* Court from rejecting a due-process challenge to the use of such predictions in capital sentencing proceedings. But the unreliability of these predictions suggests that life-or-death choices made on this basis are "arbitrary" in the same way choices made by flipping a coin would be—even if the jury's discretion is constrained, the outcomes only fortuitously correspond to what the defendant actually deserves.

¹⁷⁰ The Texas Court of Criminal Appeals has specifically rejected the argument that the term "a probability" in the sentencing guidelines is unconstitutionally vague. *Granviel v. State*, 552 S.W.2d 107, 117 (Tex. Crim. App. 1976), *cert. denied*, 431 U.S. 933 (1977). Its reasoning, however, borders on the absurd. The court suggested that, in this context, "probability" was synonymous with "likelihood," *id.*—a term obviously just as ambiguous—and also listed several other dictionary definitions for "probability" (e.g., "reasonable ground for presuming" and "true, real, or likely to occur") which do not all have the same meaning and some of which are not even arguably relevant in the statutory context. *Id.* at 117 n.6. The terms "criminal acts of violence" and "a continuing threat to society" appear never to have received even this much explication.

¹⁷¹ *Id.* at 103.

¹⁷² Van Den Haag, *In Defense of the Death Penalty: A Legal-Practical-Moral Analysis*, 14 CRIM. L. BULL. 51, 56 (1978).

¹⁷³ Van Den Haag, *Refuting Reiman and Nathanson*, 14 PHIL. & PUB. AFF. 165, 174-75 (1985).

Van Den Haag's claim that what is unjust about arbitrarily executing only certain murderers is that some murderers are *spared* presupposes the implausibly strong (though Kantian!) claim that it is *unjust*, and not merely unwise, to abolish the death penalty entirely.¹⁷⁴ Surely many proponents of capital punishment believe merely that the death penalty is morally *permissible*, not obligatory, and would concede that states are morally free to opt for less severe penalties if they so desire.¹⁷⁵ More seriously, Van Den Haag appears not to recognize that the concept of justice has a comparative as well as a noncomparative aspect. I think that this is a mistake.¹⁷⁶ But even were we to adopt Van Den Haag's notion of justice as simply "giving people what they deserve," and to distinguish justice sharply from equality, what reason would we have to accept the dogmatic, unsupported assertion that "Morally, justice must *always* be preferred to equality"?¹⁷⁷ Consider three hypothetical societies: one in which all murderers receive prison sentences, one in which black murderers are executed while white murderers are sent to prison, and one in which the choice of life or death is made by rolling dice. The first of these seems clearly preferable to the others, yet on Van Den Haag's view it is the *least* preferable: "It would surely be wrong to treat everybody with equal injustice in preference to meting out justice to some."¹⁷⁸ A theory according to which society *improves* by shifting from imprisoning all murderers to executing only blacks is a theory hard to take seriously.

Van Den Haag not only insists that justice is wholly noncomparative and must always be preferred to equality, but also assumes that failing to punish the guilty is as unjust as punishing the innocent.¹⁷⁹ Whether such symmetry exists, however, is dubious. Many

¹⁷⁴ Van Den Haag is quite explicit about this, depicting abolitionists as favoring "equal injustice—giving no murderer the punishment his crime deserves." *Id.* at 174. Kant was equally explicit, insisting that murderers "must die"; that "no substitute . . . will satisfy the requirements of legal justice"; and that even a society on the verge of dissolving itself must first execute "the last murderer remaining in prison." I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 102 (J. Ladd trans. 1965).

¹⁷⁵ Van Den Haag's claim also seems to entail support for *mandatory* capital punishment for certain crimes, although Van Den Haag explicitly endorses the Supreme Court's rejection of the mandatory death penalty.

¹⁷⁶ See Feinberg, *Noncomparative Justice*, 83 *PHIL. REV.* 297 (1974), for a discussion of the two varieties of justice.

¹⁷⁷ Van Den Haag, *supra* note 172, at 55.

¹⁷⁸ *Id.*

¹⁷⁹ He states, for example: "Justice cannot ever permit sparing some guilty persons, or punishing some innocent ones, for the sake of equality—because others have been unjustly spared or punished." *Id.* The implication is that failure to execute those murderers who deserve execution (thus giving them *less* punishment than they deserve) is as unjust as punishing innocent persons (giving them *more* punishment than they deserve).

features of our criminal justice system, notably the standard of proof beyond a reasonable doubt, reflect the contrary notion that punishing the innocent is far worse than not punishing the guilty—"better that ten guilty persons escape than that one innocent suffer," in Blackstone's words.¹⁸⁰ Moreover, the existence of the concept of *mercy* (and, in law, the executive's pardoning power) suggests a belief that it is at least sometimes morally permissible to impose less punishment on a person than he deserves. There are no symmetrical concepts or institutions to justify punishing someone *more* than he deserves.

Finally, Van Den Haag's response to Black is question-begging insofar as it asserts that, though others "equally deserving" of death may be unjustly spared, the execution of those who "deserve to die" is proper. For a large part of Black's argument is precisely that we do not have—and, Black insists, *cannot* have—a rational method for deciding which criminals deserve death and which do not.¹⁸¹

For all these reasons, Van Den Haag's claim that the alleged arbitrariness of capital punishment is simply irrelevant to the propriety of individual executions seems to me fundamentally misconceived. My own reason for rejecting the arbitrariness argument as an attack on capital punishment is quite different: *either* the picture Black paints of the criminal justice process as a sequence of wildly arbitrary decisions is a gross exaggeration, *or*—if it is accurate—it is an argument against *all* punishment of criminals, not one uniquely applicable to capital punishment. Let me consider these alternatives in turn.

There is reason to doubt whether the decisions made in prosecuting a capital offense are as wholly discretionary and standardless as Black contends. Black's argument focuses on whether particular decisions are bound by *explicit* rules, and if so whether those rules *as stated* can effectively restrain the decision-maker's discretion. Yet decisions not subject to any explicit standards may in fact be made in a principled, consistent manner. Moreover, rules whose verbal formulation and theoretical explication leave their meaning largely indeterminate may *in practice* be interpreted much more narrowly and thus effectively circumscribe seemingly unfettered discretion. Black does not address these possibilities. One might wonder, for example, to what extent the theoretically unlimited charging and plea-bargaining discretion enjoyed by prosecutors is actually exer-

¹⁸⁰ 4 W. BLACKSTONE COMMENTARIES *358.

¹⁸¹ This point is made in Nathanson, *Does It Matter If the Death Penalty is Arbitrarily Administered?*, 14 PHIL. & PUB. AFF. 149, 153-55 (1985).

cised in accordance with articulable, rationally defensible standards. One might also ask whether, for example, the notion of "premeditation," despite the broad construction courts place upon it, is in practice interpreted by jurors narrowly enough to set meaningful bounds to their ability to convict of capital murder. Several empirical studies suggest that the capital-punishment system is not nearly so arbitrary as Black depicts it; they indicate that sentencing behavior is fairly consistent and can be rather well predicted on the basis of a relatively small number of factors.¹⁸²

Assume, however, that the picture Black sketches is essentially accurate and does not exaggerate greatly, if at all, the extent to which standardless discretion permeates the criminal justice process. In that case, what Black has given us is not an argument against *capital* punishment, but an argument against imposing *any* serious form of punishment on convicted criminals, at least until and unless the procedure for convicting and sentencing them is drastically reformed. That is, Black's argument has nothing to do with any special features of death as a punishment, but rather condemns as hopelessly capricious and unjustifiable the mechanism by which people are found guilty of criminal offenses and subjected to one or another penalty.

The reply that Black and other proponents of the arbitrariness argument make at this point is that "death is different."¹⁸³ Undeniably death *is* different from other punishments our legal system employs; undeniably it is, as Black claims, the most severe punishment, and a uniquely irrevocable one.¹⁸⁴ Yet I cannot see how these differences limit the arbitrariness argument to capital punishment. I cannot see, that is, how it could be rational to respond to Black's picture of the criminal justice system by abolishing the death penalty but continuing to administer other punishments. The unique severity and irrevocability of death as a punishment may well demand that its targets be selected with greater precision and accuracy than is required in deciding among lesser punishments, but the degree of unbridled discretion Black depicts is already too great to tolerate even in allocating those lesser punishments.

To see this, suppose that Black's picture is accurate, and sup-

¹⁸² See in particular Barnett, *Some Distribution Patterns For the Georgia Death Sentence*, 18 U.C. DAVIS L. REV. 1327 (1985), where a three-factor classification of homicide cases reveals significant sentencing consistencies. See also Gross & Mauro, *supra* note 19, at 54-66, where three somewhat different factors are found to be strongly related to the probability of a death sentence.

¹⁸³ C. BLACK, *supra* note 5, at 39.

¹⁸⁴ *Id.* at 40-41.

pose further that we do abandon capital punishment and substitute life imprisonment without possibility of parole as the penalty for what is now capital murder. In the system as thus modified, one person could receive life without parole, another life *with* parole, a third a five-year term, and a fourth could go free of punishment altogether, all because of choices based either on no legal standards at all or on pseudo-standards “in truth furnishing no direction and leaving the actual choice quite arbitrary.”¹⁸⁵ Can such a system—where no rational principles differentiate people who go free of all punishment from those who spend the rest of their lives behind bars¹⁸⁶—truly be morally permissible? I think not; I think a system as arbitrary as Black contends ours is cannot morally be used to impose any serious punishments whatsoever.

One might argue that the claim that “lesser” punishments are nonetheless severe enough to make their arbitrary infliction impermissible neglects the most crucial difference between those punishments and the death penalty—the unique *irrevocability* of the latter.¹⁸⁷ But this feature of capital punishment cannot explain why the arbitrariness argument should count as a decisive objection to that punishment but not to lesser ones. Unlike the “mistake argu-

¹⁸⁵ *Id.* at 27.

¹⁸⁶ Black concedes that his claim of arbitrariness, if true, applies “when the decision . . . has in any way to do with the quantity and kind of punishment or indeed with the question whether punishment shall be imposed at all.” *Id.* at 38.

¹⁸⁷ Not everyone agrees that capital punishment is “irrevocable” in a sense that distinguishes it from “lesser” punishments. Jeffrie Murphy argues that we cannot and need not appeal to “irrevocability” to explain why death is a greater harm than loss of liberty. We cannot, because “Everything that is past is irrevocable”; we need not, because it’s sufficient that death “is (a) totally *incompensable* and (b) represents *lost opportunity* of a morally crucial kind”—loss of the opportunity for “development of a morally coherent personality.” J. MURPHY & J. COLEMAN, *THE PHILOSOPHY OF LAW* 153, 154, 156 (1984). I would suggest, however, that death is “incompensable” precisely because the dead person cannot be “brought back” to be compensated—that is, because his death is irrevocable. Similarly, death deprives a person of the opportunity to shape and develop his moral character only because it is irrevocable: the deceased will be *forever* unable “to accomplish certain things, to treat people differently, to become a new person.” *Id.* at 156. What Murphy sees as the special harmfulness of death thus depends on its irrevocability.

And this irrevocability is unique. True, whatever happens is “irrevocable” in the sense that it cannot literally be undone, but this is *not* what we ordinarily mean when we describe an event as “irrevocable.” (Otherwise the word would be useless, marking no distinction among events at all!) Rather, we commonly mean that the event had (or will have) effects that cannot be remedied, repaired, or eliminated. A historian, for example, who asserted that “By 1924 the breach between Stalin and Trotsky was irrevocable” would mean not that this breach, having occurred, could not magically be retroactively annulled, but that it could not be *healed* or *repaired*. In this sense death is irrevocable while imprisonment is not. We can at least partially remedy, repair, or eliminate the consequences to a person of imprisonment, but not those of execution.

ment" discussed later—the claim that capital punishment is immoral because of the likelihood of executing innocent persons—the arbitrariness argument does not trade on the irrevocability of death. The mistake argument derives much of its force from the idea that if we have mistakenly executed an innocent person, we cannot revoke the punishment and make compensation to the punished person. But the force of the arbitrariness argument does not depend upon the analogous notion that we might discover we have executed some individual arbitrarily and be unable to make amends. It is a *systemic* argument—a claim that in general no principled distinction separates murderers who are executed and those who are not—rather than a claim that *in particular cases* such a principled distinction might be lacking.¹⁸⁸

I have argued that either the criminal justice system is not as standardless as Black claims, or else all punishment, not only capital punishment, is immoral. A proponent of the arbitrariness argument might respond by asserting that Black *has* exaggerated the extent of standardless discretion in the prosecution and sentencing process. In reality, the proponent could say, there is much less arbitrariness—so much less that it is morally unproblematic to use our current procedures to pick out those individuals who are to receive punishments less than death. But there is, nevertheless, *some* arbitrariness in the decisions called for by the criminal justice system—enough to make it intolerable to mete out the death penalty on the basis of those decisions.¹⁸⁹

I suggest that this attempt to revivify the *procedural* arbitrariness argument actually derives such force as it possesses from a concealed *substantive* claim that execution is immoral no matter what procedures are used to impose it. We cannot quantify, and thus

¹⁸⁸ I am not denying that we might discover that a particular individual has been sentenced to death "arbitrarily"—i.e., without any principled basis for distinguishing him from other offenders receiving lesser penalties. See, e.g., *Godfrey v. Georgia*, 446 U.S. 420 (1980). When a particular sentence is "arbitrary" in this manner, what has happened is that the criteria for capital sentencing have been misapplied, and in principle this mistake can be identified and corrected (as in *Godfrey's* case, where the Supreme Court held that his crime did not fit the statutory description "outrageously or wantonly vile, horrible or inhuman"). Such particular instances of arbitrariness can be subsumed under the rubric of *mistake*, discussed below. The arbitrariness argument deployed by Black, however, purports to find capital punishment infected by a far more radical defect—not failure to apply standards correctly in isolated instances, but standards so amorphous that "correct" application is simply meaningless across the board.

¹⁸⁹ Black suggests this position when he acknowledges that "all human choices" are open to the objections he is making but argues "that the infliction of death by official choice ought to require a higher degree of clarity and precision in the governing standards than we can practicably require of all choices." C. BLACK, *supra* note 5, at 29-30.

compare numerically, the degree of arbitrariness in the system and the degree of arbitrariness that would be permissible in making life-or-death decisions. Even if we can obtain a nonquantitative "feel" for these magnitudes, what reason is there for concluding that the degree of arbitrariness in the system not only is the greater but must necessarily continue to be so no matter what additional procedural safeguards we incorporate into our capital punishment system?¹⁹⁰ That conclusion, I believe, actually rests on the premise that *any* degree of arbitrariness in the procedures leading to the infliction of the death penalty is impermissible.¹⁹¹ But, of course, any punishment system devised and operated by human beings is bound to have some amount of "standardless discretion"; it is humanly impossible to define crimes and assign penalties by rules anticipating all the unique variations in circumstances that might possibly arise in particular cases. Hence the demand that the death penalty be

¹⁹⁰ Talk of "additional procedural safeguards" is not empty rhetoric: at least some of the sources of arbitrariness that Black pinpoints can be alleviated. For example, "premeditation" can be defined more narrowly so as to limit the factfinder's discretion. See *People v. Anderson*, 70 Cal. 2d 15, 73 Cal. Rptr. 550 (1968); *State v. Bingham*, 40 Wash. App. 553, 699 P.2d 262 (1985). Or it can be eliminated altogether from the criteria for determining which homicides are punishable by death, as several states have done. See, e.g., GA. CODE ANN. §§ 26-1101, 26-3102, 27-2534.1; ILL. ANN. STAT. ch. 38, § 9-1 (Smith-Hurd Supp. 1986). Texas's emphasis on predictions of future dangerousness can be repudiated. Cf. *People v. Murtishaw*, 29 Cal. 3d 733, 767-75, 175 Cal. Rptr. 738, 758-63 (1981) (psychiatric testimony on defendant's future dangerousness held generally inadmissible at penalty phase of capital-murder trial). (Black himself acknowledges that the Texas statute offers the extreme example of "standards" without genuine content. C. BLACK, *supra* note 5, at 123.) Some controls could be imposed on those decisions currently unfettered by any standards at all, as the Supreme Court recently set minimum standards on the process for determining whether a death row inmate has become insane, *Ford v. Wainwright*, 106 S. Ct. 2595 (1986)—a determination formerly left largely to executive discretion. Note, *Insanity of the Condemned*, 88 YALE L.J. 533 (1979). States could be required to provide capital defendants with greater resources for their defense, much as they were recently made to provide psychiatric experts for indigent defendants planning insanity defenses. *Ake v. Oklahoma*, 470 U.S. 68 (1985). And appellate courts could be directed to provide meaningful "proportionality review" of death sentences—i.e., to determine whether such a sentence is disproportionate to penalties imposed in similar cases. See Baldus, Pulaski & Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 731-33 (1983) (contending that such review can be made to work effectively). (Most current death-penalty statutes require proportionality review, *Pulley v. Harris*, 465 U.S. 37, 71 (1984) (Brennan, J., dissenting), but it is not necessarily applied seriously. See Liebman, *Appellate Review of Death Sentences: A Critique of Proportionality Review*, 18 U.C. DAVIS L. REV. 1433 (1985), for a discussion of the dismal record of the Georgia Supreme Court in this regard.)

¹⁹¹ Black, for one, seems to accept this premise in endorsing the attitude of those Talmudic sages who "surround[ed] the punishment of death with nearly unsatisfiable procedural safeguards" to express their view that "Though the justice of God may indeed ordain that some should die, the justice of man is altogether and always insufficient for saying who these may be." C. BLACK, *supra* note 5, at 107.

administered by a completely discretionless, perfectly rational procedure is in reality a demand that it not be inflicted at all by human beings; and *that* demand must rest on an argument that the nature of death makes its deliberate infliction as a punishment morally improper—i.e., on what I have called a substantive argument.

III. THE DISCRIMINATION ARGUMENT

A second procedural argument against capital punishment is the claim that it is imposed in a racially discriminatory fashion. The particular form of discrimination which proponents of this argument most frequently allege is discrimination by *race of victim*. Many empirical studies, both before and after the *Furman* decision, have found killers of whites more likely to receive death sentences than killers of blacks.¹⁹² There is also evidence that blacks who kill whites are more likely to receive a death sentence than whites who kill whites.¹⁹³ Finally, a number of empirical studies indicate that these racial discrepancies are not simply the effects of non-racial factors: though diminished, the racial disparities persist even when one controls for felony circumstances, multiple victims, and other "legitimate" aggravating factors.¹⁹⁴

What is one to make of this argument? To its proponents, the statistics reveal that prosecutors, judges, and jurors value white lives more than black lives and are thus more apt to believe death the appropriate penalty for someone who takes a white life than for someone who kills a black.¹⁹⁵ To Ernest Van Den Haag, the discrimination argument is as irrelevant as the arbitrariness argument, and for the same reason: so long as the killers of whites who are executed deserve their fate, *their* executions are just, even if undue leniency is accorded to equally culpable killers of blacks.¹⁹⁶

¹⁹² See the summary of studies in Gross & Mauro, *supra* note 19, at 38-49. Evidence of discrimination by *race of defendant*—i.e., greater likelihood of death for black killers than white killers—is scanty, and indeed sometimes the opposite has been found. Gross and Mauro, for instance, report that "In Georgia and Florida, white homicide suspects were, on the whole, about twice as likely to get death sentences as black homicide suspects," and that "In Illinois, there was a similar but smaller difference." *Id.* at 55. They also report that earlier post-*Furman* studies had turned up conflicting evidence on this point. *Id.* at 48.

¹⁹³ See *id.* at 56 (Table 2); Bowers & Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563, 578 (Table 1).

¹⁹⁴ See sources cited in previous footnote; see also *McCleskey v. Kemp*, 753 F.2d 877, 896 (11th Cir. 1985)(en banc), *cert. granted*, 106 S. Ct. 3331 (1986)(describing study by Baldus which found racial disparity after controlling for 230 variables).

¹⁹⁵ E.g., H.A. BEDAU, *supra* note 3, at 189; Bowers & Pierce, *supra* note 193, at 601.

¹⁹⁶ Van Den Haag dismisses the claim of discrimination along with that of arbitrariness in Van Den Haag, *supra* note 172.

I think that Van Den Haag is wrong in his attack on the discrimination argument, for most of the reasons I think that he's wrong about the arbitrariness argument.¹⁹⁷ But I also think that the discrimination argument itself is flawed. Its defects largely parallel those that vitiate the arbitrariness argument. Let me set them out.

First, the discrimination argument (like the arbitrariness argument) rests on a dubious empirical claim. The many studies that have addressed the issue of racial bias in capital punishment do not always point in the same direction. For example, a study conducted by the Stanford Law Review prior to *Furman*, when sentencers enjoyed an unfettered discretion presumably even more conducive to discrimination than the current "guided discretion" systems, found no evidence of racial bias in California death sentencing.¹⁹⁸ Perhaps racial discrimination in capital sentencing was and is confined to southern states. It is suggestive that, of the eight post-*Furman* studies reviewed in the recent Gross and Mauro article, four were confined to Florida, two more to South Carolina, and a seventh, while including some data from Ohio, focused on Florida, Georgia, and Texas.¹⁹⁹

The persuasiveness of the empirical studies is also weakened by anomalies whose significance—if any—a non-statistician finds it difficult to assess. Gross and Mauro, for example, present figures indicating that in Georgia, among white-victim homicides, the probability of a death sentence is more than three times as great if the killer is black than if the killer is white.²⁰⁰ Yet when the white-victim homicides are grouped into four categories according to their "level of aggravation,"²⁰¹ the white killer is *more* likely than the black

¹⁹⁷ Of my objections to Van Den Haag's treatment of the arbitrariness argument, only the last—that his response to the argument begs the question—is inapplicable to the discrimination argument. Van Den Haag's assumption that we have criteria for deciding which killers "deserve to die" is directly challenged by the claim of arbitrariness, but *not* by the claim of discrimination, so he does not beg the question against the discrimination argument by relying on this assumption.

¹⁹⁸ *A Study of the California Penalty Jury in First-Degree—Murder Cases*, 22 STAN. L. REV. 1297, 1421 (1969).

¹⁹⁹ Gross and Mauro themselves report on eight states, only one of which (Illinois) is non-southern. The others include Oklahoma and six members of the old Confederacy. To be sure, the southern states account for the bulk of all death sentences—but statistical studies ought to be possible in states like California, Pennsylvania, and Arizona, which (as of Dec. 20, 1986) had 191, 89, and 63 persons, respectively, awaiting execution. Death Row, U.S.A., *supra* note 44.

²⁰⁰ Gross & Mauro, *supra* note 19, at 56 (Table 2).

²⁰¹ The authors consider three aggravating factors (felony circumstances, homicide by a stranger, and multiple victims) and classify homicides according to whether zero, one, two, or all three of these factors were present.

killer to be sentenced to death for *each* level of aggravation.²⁰² As another example, Gross and Mauro's data indicates that discrimination by race of victim is especially pronounced in the most aggravated homicides.²⁰³ Baldus, Woodworth, and Pulaski, however, report that "the race-of-victim disparities appear primarily in the mid-range of cases" and vanish completely in the most aggravated homicides.²⁰⁴ The discrepancy is not an outright contradiction, since the two studies employ somewhat different definitions of "aggravation," but it counsels caution in drawing significant moral conclusions from these empirical studies.

There is reason to doubt not only the strength of the statistical evidence but also the cogency of the inferences drawn from it. Even if killers of whites *are* more likely to receive death sentences than killers of blacks, the disparity may result from legitimate, nondiscriminatory factors rather than from a higher valuation of white lives. Hans Zeisel has suggested, for example, that because blacks are more hostile than whites to capital punishment, the community (and juror) support for seeking and employing the death penalty may be much lower in black-victim than in white-victim cases.²⁰⁵ Prosecutors fearful of an appearance of bias might be more hesitant to press capital charges against black defendants than against white defendants; since the vast majority of homicides are intraracial,²⁰⁶ the result would be a lesser chance of the death penalty in black-victim homicides.²⁰⁷

Finally, even if we accept both the statistical evidence and the

²⁰² Gross & Mauro, *supra* note 19, at 73 (Table 22). I am told by a statistically knowledgeable friend that this is an example of "Simpson's Paradox."

²⁰³ *Id.* at 80 (Table 25) reveals that in Georgia, a death sentence for a high-aggravation homicide is 26 times more likely if the victim is white than if the victim is black!

²⁰⁴ Baldus, Woodworth, & Pulaski, *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons From Georgia*, 18 U.C. DAVIS L. REV. 1375, 1401 (Table 3). Note that this data is drawn from the same state as Gross and Mauro's.

²⁰⁵ Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456, 467 (1981).

²⁰⁶ The FBI's Uniform Crime Reports for 1985 reveal that about 90% of the "murders and non-negligent manslaughters" reported that year were intraracial—94% of those with black victims and 88% of those with white victims. (These last two figures are given at page eight. The chart on page nine indicates that a total of 9,293 out of 10,264 homicides were intraracial, or just over 90%.)

²⁰⁷ It is interesting that one prominent defender of capital punishment, apparently ignorant of the findings of race-of-victim discrimination, viewed past (pre-*Furman*) discrimination against black defendants as a serious moral/constitutional objection to the death penalty and drew comfort from the fact that in the historically prejudiced state of Georgia, most post-*Furman* death sentences had gone to whites. W. BERNS, *FOR CAPITAL PUNISHMENT 184-87* (1979). If Georgia authorities shared this perspective, they might well find it bitterly ironic that their successful efforts to avoid prejudice against black defendants were now treated as prejudice against black victims.

inference of discrimination drawn from it, the discrimination argument requires a further step. We must agree that racial discrimination in capital punishment cannot be eradicated. Otherwise, the appropriate response to the demonstration that such bias exists would be "eliminate the discrimination," not "abolish capital punishment." Where is the proof that we cannot administer the death penalty in a racially neutral fashion? Abolitionists commonly rely on assertions that prejudice in capital punishment is "so deeply rooted that little can be done in practice" to eradicate it²⁰⁸—a counsel of despair not on its face unassailable.

Thus far I have claimed that the empirical premises of the discrimination argument are shaky—shakier, I think, than the empirical basis of the arbitrariness argument. The figures suggesting racial discrepancies in capital punishment come from studies focusing on a minority of death-penalty jurisdictions and occasionally conflicting with one another. Even if genuine, the discrepancies may not reflect racial bias. And even if they do, such bias may be eliminable without abandoning capital punishment altogether. Now I will claim that if the empirical premises of the discrimination argument *are* accurate, then that argument—like the arbitrariness argument if *it* is empirically sound—counsels alterations in the criminal-justice system much more profound than the mere elimination of capital punishment. Like the arbitrariness argument, the discrimination argument has nothing to do with any special features of death as a punishment.

This is true of the discrimination argument, however, for a reason different from that which applied to the arbitrariness argument. There, the problem was that if the criminal justice system is as arbitrary as the argument proclaims, then it is *already* arbitrary in dealing out lesser punishments, and it is thus wrong to use the system to mete out *any* serious punishment. The parallel reasoning does not apply to the discrimination argument. We cannot say that if capital punishment is being administered discriminatorily, the administration of lesser punishments must also be discriminatory. For it is possible (albeit perhaps unlikely) that discrimination enters the picture only when the question being pondered is "How much was the victim's life worth?"

What we can say, however, is this: If the picture painted by the discrimination argument is accurate, then killers of whites are more likely to receive death sentences than killers of blacks, because prosecutors, judges, and juries value white lives more highly than black

²⁰⁸ H.A. Bedau, *supra* note 3, at 186.

lives. If so, then abolishing capital punishment could not be expected to alter this prejudiced attitude. If death were replaced by a lesser penalty (such as life imprisonment without parole) as the sanction for the most aggravated murders, the actors in the criminal justice system would continue to react to a white-victim homicide as if the victim's race were an aggravating factor. They will therefore impose life without parole disproportionately on killers of whites as compared to killers of blacks. Thus the problem to which the discrimination argument points—undervaluing black lives, and consequently punishing killers of blacks less severely than killers of whites—will not be eliminated by abolishing capital punishment.

The proponent of the discrimination argument can be expected to reply as the proponent of the arbitrariness argument did to the corresponding attack: "death is different." And my response would be the same. First, though death is a uniquely irrevocable penalty, the discrimination argument does not appeal to this irrevocability. Like the arbitrariness argument, it is *systemic*: it claims that those who kill whites are *in general* more severely treated than those who kill blacks, not that there will be particular, identifiable cases in which killers of whites will be sentenced to die on racially biased grounds. Thus the argument's force does not stem from any notion that we might discover that we had executed some individual on racially biased grounds and be unable to revoke the punishment and make amends. Second, though death is the most severe penalty, *any* punishment likely to be imposed for the most aggravated murders will be severe enough to make racial prejudice in its application morally intolerable.

Finally, it might be claimed that the degree of racial discrimination in administering capital punishment is small enough to be tolerable in meting out any punishment less severe than death but great enough to make death sentences intolerable. That claim, however, weakens a central premise of the discrimination argument—its view of who is victimized by the discrimination for which it condemns capital punishment. If one takes the discrimination argument seriously, the primary victims of unfair discrimination are not the persons who are put to death for killing whites, but the class of black citizens, whose lives are being implicitly devalued. This devaluation exists so long as killers of whites are treated more harshly than killers of blacks, regardless of the precise form the extra harshness takes. Administering a "lesser" penalty in as discriminatory a manner as capital punishment is presently administered would thus, according to this view, still unacceptably denigrate the value of black lives.

Another, more fundamental point can be made regarding the claim that the degree of racial discrimination in the capital punishment system, though tolerable in administering lesser penalties, invalidates that system. Unlike arbitrariness, discrimination can be quantified. One can say, for example, that ten percent of white-victim homicides but only five percent of black-victim homicides result in death sentences. Yet proponents of the discrimination argument have never indicated that there is some "acceptable" degree of racial bias in making life-or-death sentencing choices.²⁰⁹ Their unspoken premise seems to be that *any* degree of bias in making such choices is impermissible. And they presumably would defend this premise with arguments concerning both racism and the special value of human life—arguing, for example, that racism is uniquely offensive to human dignity and that a life-or-death decision requires extraordinary respect for the dignity of the affected individual. Is any more "objectivity," or any greater likelihood of achieving consensus, to be found in these sorts of argument than in straightforward "substantive" attacks on the death penalty as inherently violative of human dignity?

One might think so, reasoning that we have a much firmer grip on the claim that decisions based on racism violate human dignity than on the abstract contention that capital punishment in itself violates human dignity. Recall, however, that the claim being defended is precisely that racially-tainted decisions *about capital punishment* are impermissible whereas equally "tainted" decisions concerning lesser punishments would be tolerable. To support this claim requires more than an appeal to an assertedly firm, widely-shared societal condemnation of racism; it requires that we grapple with just those intractable problems about the unique moral status of capital punishment that procedural arguments are supposed to avoid.²¹⁰ Absent a demonstration to the contrary, then, there seems to be little to be gained in shifting from a substantive anti-death-penalty argument to the racial discrimination argument.

²⁰⁹ If they *do* think some minimal level of discrimination would be acceptable, then they cannot rely in their argument on vague assertions that racial bias is too deep-rooted to eliminate, but must explain why it's too deep-rooted even to reduce below the "acceptable" level.

²¹⁰ A proponent of the discrimination argument might suggest that we need only agree that capital punishment infringes a more serious or stringent right than do lesser punishments. From this, he may claim, it follows that a lesser degree of racial discrimination is tolerable in making capital-punishment decisions than in making decisions on lesser penalties. What this move overlooks is that the discrimination argument seems tacitly to presuppose that capital-punishment decisions demand *no* racial bias, not merely *less* bias than other punishment decisions.

IV. THE MISTAKE ARGUMENT

A third procedural argument against capital punishment is the claim that mistakes in its application are inevitable. The unavoidable imperfections of all human factfinding and decision-making procedures ensure that if any crime is punishable by death, sooner or later some innocent people will be mistakenly convicted of that crime and executed.²¹¹ A recent study by Professors Hugo Bedau and Michael Radelet concluded that "a criminal justice system culminating in the death penalty is fallible, and the gravest errors in its administration are inevitable."²¹² Bedau and Radelet assert that since 1900, 343 persons were wrongly convicted of capital crimes in the United States, twenty-five of whom were actually executed.²¹³ Their study is the most recent and detailed expression of the abolitionist argument that the possibility—indeed, over enough time, the certainty—of erroneous executions makes capital punishment inherently immoral.²¹⁴

Unlike the arbitrariness and discrimination arguments, the mistake argument does appeal to the unique *irrevocability* of capital punishment. The argument derives its force from the distressing prospect of learning that a person had been erroneously executed and being unable to revoke or call off the punishment or offer compensation to the wrongfully punished individual.²¹⁵ With lesser

²¹¹ Speaking, here and throughout the following discussion, of *innocent* people as the victims of mistake is an oversimplification, though one I do not believe affects my argument. It is oversimple because there are mistakes other than convicting of a capital offense a person who had nothing to do with the crime—for example, finding a killing premeditated when in fact it was impulsive, convicting of murder a defendant who actually killed in legitimate self-defense, or erroneously rejecting a valid plea of insanity. To the extent that Charles Black is correct in claiming that the criteria for concepts like "premeditation" and "insanity" are really "pseudo-standards" masking unfettered discretion, there can actually be no mistakes in applying these concepts, for there is no "fact of the matter" which one could get wrong. But certainly mistakes about *some* of these matters are possible—for example, a jury might reject a self-defense claim because it believes, wrongly, that the victim had not pulled a knife on the defendant. However, the only effect on the mistake argument is to raise the total number of persons who are executed "by mistake"; the theoretical pros and cons of the argument remain the same (except where it becomes important to compare the number of mistaken executions with the number of lives saved by capital punishment's crime-reducing effects). I will therefore, as an abbreviation, speak of "innocent people" rather than "people wrongly found to merit execution."

²¹² N.Y. Times, Nov. 14, 1985, p.13, col.1-2 (national ed.).

²¹³ *Id.*

²¹⁴ *E.g.*, Albert Camus, in a classic abolitionist essay, stressed the risk of error and insisted that one such error is "enough to wipe out the value of capital punishment for ever." A. CAMUS, REFLECTIONS ON THE GUILLOTINE 36.

²¹⁵ One might object that the mistake argument derives its force largely from the *severity* of death as a punishment, not (or not chiefly) from its irrevocability. That is, since

punishments such as imprisonment, we *can* cut short the punishment if we discover the punished person's innocence, and we *can* offer at least some form of compensation.²¹⁶ The mistake argument thus seems initially to furnish what the previous arguments did not—an objection *specifically* to capital punishment, not to all punishments or to the criminal justice system in general.

Proponents of the death penalty have a ready rejoinder, however: the risk of wrongful executions is only one moral consideration relevant to the permissibility of capital punishment, and need not compel its abolition if outweighed or overridden by competing moral considerations. Capital punishment, on this view, is indistinguishable from a great variety of social practices that are permitted despite the statistical certainty that they will kill "innocent" (faultless) people. Ernest Van Den Haag explains:

Our government employs trucks. They run over innocent bystanders more frequently than courts sentence innocents to death. We do not give up trucks because the benefits they produce outweigh the harm, including the death of innocents. Many human activities, even quite trivial ones, foreseeably cause wrongful deaths. Courts may cause fewer wrongful deaths than golf. Whether one sees the benefit of doing justice by imposing capital punishment as moral, or as material, or both, it outweighs the loss of innocent lives through miscarriages, which are as unintended as traffic deaths.²¹⁷

Here, for once, I agree with Van Den Haag—though, as will emerge, the point on which we agree leaves a lot more that needs to be said. The risk of executing innocent people, in and of itself, is not a decisive objection to capital punishment, because we are fully

death is the most severe of punishments, inflicting it on an innocent person is a very great injustice, and a worse injustice than inflicting on him any lesser punishment. I think this position fails to account for the special relevance the mistake argument has to capital punishment. (It may also ignore the extent to which death is regarded as the most severe punishment precisely because it is irrevocable.) If all that is in question is the injustice of inflicting a very severe penalty on an undeserving person, the mistake argument ought to carry considerable weight as an objection to (say) life imprisonment, yet it seems much less persuasive in that context than as an objection to execution. (In fact, I have not heard of anyone who has argued that the possibility of mistake is a convincing reason for abolishing life imprisonment.)

²¹⁶ It is of course possible that in a particular case a person wrongly sent to prison will have died before the error is discovered, so that he cannot be released or compensated. This is a kind of "irrevocability" to which *any* human action is liable. But what is unique about capital punishment is its *inherent* irrevocability: infliction of the death penalty automatically makes it impossible to do anything to rectify a mistake. See *supra* note 186. And much of the force of the mistake argument derives from the belief that finite, fallible creatures ought not to "play God" by imposing a penalty guaranteed to be irrevocable rather than one which might, like any human action, be made "irrevocable" by adventitious supervening events. See Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1022 n.132 (1978).

²¹⁷ Van Den Haag, *The Death Penalty Once More*, 18 U.C. DAVIS L. REV. 957, 967 (1985).

prepared to accept social practices that foreseeably result in “innocent” deaths if we believe those practices have a sufficiently compelling justification. The use of automobiles is an excellent example. Based on detailed statistics, we know that in any given year several thousand Americans will be killed in traffic accidents; we could even predict this year’s toll of traffic fatalities fairly accurately. Many of these accident victims will not be entirely faultless; their accidents will be due in part to their own speeding, drunk driving, running stop signs, and so on. But many other victims will *not* be at fault in any way; they will simply have the bad luck to be hit by speeders, drunks, cars running stop signs, and the like. By permitting people to use autos we are thus ensuring the deaths of thousands of innocent people *each year*. Yet we do not even think of outlawing the automobile. We accept those thousands of “innocent” deaths as a “cost” of automobile use that is far outweighed by its benefits. By the same token, *if* there are sufficiently strong justifications for capital punishment, the inevitability of errors need not make it morally intolerable.

It is tempting to object that capital punishment is crucially different from using automobiles, or from sports, coal mining, or the other human activities we permit despite their statistically certain toll in human lives. In each of those examples, the fatalities we are prepared to tolerate are *accidental* deaths. With capital punishment, each “error” is a person *intentionally* put to death. Our willingness to accept accidental deaths as foreseen but undesired byproducts of activities not aimed at killing anyone does not imply a willingness to accept intentional killings of innocent people.

I am not persuaded by this objection. Its crux seems to be that a practice that inflicts intentional killings cannot be justified by any of its other morally relevant features. But why not? The objector may be reacting against the notion that intentional killings can be treated as mere “costs” to be weighed in a utilitarian cost-benefit analysis. But I am not presupposing that such an analysis can justify capital punishment or is even appropriate here. My claim is only that capital punishment might be justified, despite its toll in innocent lives, by “other morally relevant features.” Rejecting cost-benefit reasoning does not refute this claim, for the death penalty might possess non-consequentialist virtues (such as “doing justice”) sufficient to override the occasional sacrifice of the innocent.

Alternatively, the objector may believe that intentional killings can *never* be justified—at least, not state-inflicted intentional killings of the sort involved in capital punishment. But one who takes that view is tacitly relying on a *substantive argument* that execution is im-

moral no matter what procedures are used to impose it. Such a substantive argument goes quite beyond (and indeed makes superfluous) the mistake argument, which maintains that capital punishment is wrong because it will inevitably kill *innocent* people and not that it is wrong to kill even guilty people. If one is *not* prepared to produce such a substantive argument, then I think capital punishment is, after all, parallel to such practices as the use of automobiles. The inevitability of killing people does not make us reject the use of autos—a practice not intended to kill people, and whose cost in lives we believe overridden by other relevant considerations. By the same logic, the inevitability of killing *innocent people* should not compel rejection of capital punishment—a practice not intended to kill *innocent people*—if we believe its other morally relevant features override the cost in *innocent lives*.

Thus the mistake argument does not, in itself, require abolishing the death penalty. It *does* require, however, that that penalty be abolished unless it has morally relevant features that override its taking of innocent lives. Proponents of capital punishment generally claim that it has one or both of two such features: reducing the number of murders that would otherwise be committed, and satisfying the requirements of justice by inflicting on the most reprehensible murderers the punishment that their crimes deserve. Are these features substantial enough to outweigh the risk of mistake?

Executing (some) murderers is thought to reduce the number of murders in a variety of ways: by ensuring that *this* killer will never recidivate (incapacitation); by deterring other persons who would kill if there were no death penalty (general deterrence); and by expressing society's abhorrence of murder in a way that reinforces this value in most citizens (normative validation).²¹⁸ A large body of empirical studies, however, concludes almost unanimously that there is no evidence the death penalty prevents murders.²¹⁹ Capital-punish-

²¹⁸ "Normative validation" is sociologist Jack Gibbs's term for the phenomenon in which "an individual's condemnation of some type of criminal act is maintained as a consequence of prescribed legal punishments or their application to other individuals." Gibbs, *Preventive Effects of Capital Punishment Other Than Deterrence*, 14 CRIM. L. BULL. 34, 40 (1978). The notion is that the use of capital punishment, the most severe and awesome penalty, to punish murder may strengthen the individual's internalized condemnation of murder. This notion is also developed in Goldberg, *On Capital Punishment*, 85 ETHICS 67 (1974). (In addition to incapacitation, deterrence, and normative validation, Gibbs discusses seven other possible preventive effects of punishment, but finds none of them significant in the death-penalty context.)

²¹⁹ See Zeisel, *The Deterrent Effect of the Death Penalty: Fact v. Faith*, 1976 SUP. CT. REV. 317. As Zeisel explains, the economist Isaac Ehrlich, using sophisticated statistical techniques (regression analysis), claimed to have found evidence of a deterrent effect of capital punishment, but subsequent studies cast grave doubt on the validity of Ehrlich's

ment proponents often respond that "common sense" tells us that death *must* be a stronger deterrent²²⁰ than imprisonment,²²¹ but their arguments are weak.²²² In short, there seems to be very little basis for concluding that capital punishment prevents enough murders to save a significant number of innocent lives.²²³

Proponents of capital punishment can still assert that the innocent lives it *does* save outweigh the lives lost in erroneous executions. First, they can claim that it is quite rare for a genuinely *innocent* person to be executed.²²⁴ Second, as for the other kinds of "mistaken" executions—those of killers who should have been convicted of lesser forms of homicide, acquitted on self-defense grounds, or found insane—death-penalty proponents may argue that these too are rare. Jurors (or judges) with even slight qualms about a defendant's culpability, they may insist, are likely to choose a life rather than a death sentence. This reasoning is perhaps least convincing with regard to insane killers; many of the killers who seem most crazy (like Charles Manson or the Night Stalker) are precisely the ones who arouse the greatest popular fear, hatred, and vengefulness. But the capital-punishment proponents might contend that the life of such an insane killer should be given less weight than that

result. Even the zealous Van Den Haag concedes the lack of statistical evidence that executions prevent murders. E. VAN DEN HAAG & J. CONRAD, *THE DEATH PENALTY: A DEBATE* 64-65 (1983).

²²⁰ Incapacitation and normative validation tend to be overlooked in this debate. Undeniably, executing a murderer incapacitates him once and for all, but this is only a weak "benefit" of capital punishment. Few convicted murderers kill again if not executed (even in jurisdictions without capital punishment). See H.A. BEDAU, *supra* note 3, at 173-80. Thus the number of potential victims saved by executing rather than imprisoning murderers is likely to be low—lower, quite possibly, than the number of people mistakenly executed. (See *supra* note 211). As for normative validation: even if the crimes for which society reserves its harshest and most feared penalty are thereby rendered especially odious to most people, why should this effect be weaker in a society whose harshest and most feared penalty is (say) life without parole than in one that employs the death penalty? Moreover, the "common sense" argument that executing murderers sends a particularly powerful "message" that taking human life is wrong can be countered by the equally "common sense" argument that the message actually sent is that taking human life is *proper* as long as there is sufficient reason to do it.

²²¹ Stephen, *Capital Punishments*, 69 FRASER'S MAG. at 753 (1864), quoted in H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 86 (1968); Van Den Haag in *Debate, supra* note 219, at 68-69.

²²² See H.L.A. HART, *supra* note 221, at 86-88 (1968); Conrad in *Debate, supra* note 219, at 72-73; Conway, *Capital Punishment and Deterrence: Some Considerations in Dialogue Form*, 3 PHIL. & PUB. AFF. 431 (1974).

²²³ James Q. Wilson has argued that there is unlikely *ever* to be sufficient evidence to establish that capital punishment does or does not have a deterrent effect superior to imprisonment. See J.Q. WILSON, *THINKING ABOUT CRIME* 181-88 (rev. ed 1983).

²²⁴ The recent Bedau and Radelet study mentioned at the beginning of this section lists only 25 such instances since 1900.

of an innocent potential victim, so that when we balance the lives lost to capital-punishment errors against the innocent lives saved, the insane killers wrongly found sane will have little effect on the outcome.

These are dubious responses, however. Treating the lives of any class of people as somehow less worthwhile than "normal" lives is a questionable position, to say the least, and it is not made more palatable if people are put into the devalued class because of the commission of acts for which they are, by hypothesis, not culpable. The claim that jurors with even slight suspicions about a defendant's culpability will not impose a death sentence ignores the possibility that jurors in a mistake situation might simply not doubt a defendant's guilt. For example, where the defendant's word is the only support for his self-defense claim, the jury may dismiss this completely even though the defendant is in fact telling the truth. Moreover, the theory of "cognitive dissonance" suggests that even jurors who initially feel some qualms about a defendant's guilt may lose all doubt once they have voted to convict him of a capital offense.²²⁵ The conclusion thus seems inescapable that there is no basis for believing that capital punishment saves the lives of enough potential murder victims to outweigh its cost in mistaken executions.

Capital-punishment advocates must therefore rely on a retributivist response to the challenge of the mistake argument. They must contend that the evil of executing innocent people is overridden by the retributive good of "doing justice" to the most reprehensible murderers—giving them the punishment their crimes deserve rather than an unjustly lenient, lesser penalty. Is such an appeal to retributivism a satisfactory response to the problem of mistaken executions?

I will argue that the appeal to retributivism would defeat the mistake argument *if* a suitable form of retributivism existed—but that this condition is very unlikely to be true. The retributivist answer to the mistake argument—the "retributivist riposte"—runs as

²²⁵ Psychologists who subscribe to this theory postulate that "dissonance"—inconsistency among one's beliefs and attitudes—creates psychological discomfort that motivates one to reduce the dissonance by appropriate changes in beliefs, attitudes, or behavior. See generally L. FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957). In particular, a person deciding between alternatives will experience dissonance once the choice is made: the beliefs and attitudes supporting the alternative not chosen will be dissonant with his awareness of the actual decision. C. INSKO, *THEORIES OF ATTITUDE CHANGE* 200 (1967). The more important the decision, the greater this ensuing dissonance. L. FESTINGER, *supra*, at 37. The most direct and likely means to reduce the dissonance is to eliminate beliefs and attitudes that favor the rejected alternatives and/or adopt new beliefs and attitudes supporting the actual choice. *Id.* at 44-45.

follows:²²⁶ "Capital punishment *will* inevitably result in executions of innocent people, despite the many safeguards built into our system, and each such error is a gross injustice. But abolishing capital punishment would entail injustices too—for then not one of those murderers who deserve death for their crimes would receive the punishment he deserves. Because punishing a criminal *less* than he deserves is unjust, an abolitionist system would work a large number of injustices—more, I believe, than our present system, and so *many* more as to be less just, overall, than the capital-punishment system. Retaining capital punishment thus permits a closer approximation to the unattainable ideal of perfect justice."²²⁷

Richard Lempert has argued that although this argument may be logically consistent, modern retributivists cannot employ it without violating their own principles:

The retributivist must show that for the special case of murder or for a special subset of murders, death is a more just sanction than life imprisonment. In the retributivist literature this showing is typically made by reference to the awesomeness of the crime—that is, to the evil of intentionally taking an innocent life—and to the intuition that in a just world such a crime demands the ultimate punishment. However, if the system which imposes the ultimate punishment cannot proceed without inevitably replicating the momentous harm—the slaying of the innocent—that justifies such punishment, the basis for the system is undermined.²²⁸

The flaw in the retributivist riposte, Lempert says, is that its proponent *knows* that the capital-punishment system he advocates will inevitably take innocent lives; hence "If he intends to have a system of capital punishment, he intends to take innocent lives whether or not he wants to."²²⁹

²²⁶ For examples of this "riposte" in action, see Primorac, *On Capital Punishment*, 17 ISRAEL L. REV. 133, 145-46 (1982), and, more cryptically, Van Den Haag, *supra* note 217, at 967.

²²⁷ Larry Alexander has maintained that a retributivist theory that licenses this kind of reasoning entails the claim that punishing someone less than he deserves is *as unjust* as punishing someone more than he deserves. *Retributivism and the Inadvertent Punishment of the Innocent*, 2 LAW & PHIL. 233, 237-39, 241 (1983). (He suggests two versions of retributivism that would permit trading off over- and under-punishment, both of which entail this claim.) As discussed *supra* notes 179-80 and accompanying text, however, this claim is questionable. In any case, the reasoning exhibited in the text need *not* presuppose this claim. My retributivist might concede that executing an innocent person is much worse than failing to execute a person who deserves death. Nevertheless, he might argue, the number of the less serious injustices which an abolitionist system would entail would far exceed the number of graver injustices inflicted by a capital-punishment system, so that the latter would more closely approximate perfect justice.

²²⁸ Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177, 1225 (1981).

²²⁹ *Id.* at 1226.

Larry Alexander has correctly observed that were Lempert's argument sound, it would preclude a purely retributivist justification for *any* punishment, not merely for capital punishment.²³⁰ He claims, though, that Lempert's argument is *not* sound because there are versions of retributivism in which "the negative desert of criminals and the positive desert of the innocent can be . . . traded off in terms of a single currency called desert."²³¹ I am unpersuaded by this claim, but I believe there is a different and more convincing refutation of Lempert exists.

Alexander's objection is not convincing because it merely reiterates the retributivist riposte. Lempert explicitly concedes that one might construct a retributivism "that values justice above innocent lives" and would thus support that riposte; he argues that "such a position is inconsistent with certain positions [modern retributivists] do or would take as well as with some of the bases of their argument for the death penalty."²³² It is inconsistent, in particular, with principles most retributivists hold that "do not allow the intentional taking of the innocent life as a means to greater justice."²³³ It will not do, therefore, simply to reiterate that capital punishment allows a closer overall approximation to perfect justice, if it achieves that approximation only by intentionally sacrificing innocent lives.²³⁴

But *does* capital punishment involve intentionally taking innocent lives? I think not, and I think the flaw in Lempert's position lies in his treatment of "intentional."²³⁵ According to Lempert, since it

²³⁰ Alexander, *supra* note 227, at 234-36. The problem is that any kind of punishment will inevitably be mistakenly inflicted on some innocent people; knowing this, we cannot advocate punishment of any kind without—on Lempert's view—*intending* to punish innocents. Indeed, just such an argument has been put forward to show that retributivists must reject all forms of legal punishment. Schedler, *Can Retributivists Support Legal Punishment?*, 63 *THE MONIST* 185 (1980).

²³¹ Alexander, *supra* note 227, at 237.

²³² Lempert, *supra* note 228, at 1225.

²³³ *Id.* at 1226.

²³⁴ An analogy Lempert offers may clarify this point:

Assume a society in which, according to the tenets of retributivism, ninety-eight people deserve to die. Unfortunately the populace is not accustomed to executions and will not punish the convicted by more than life imprisonment. However, if two innocent but unpopular members of the community were killed first, it would overcome the public's aversion to blood, and justice would be done in the other ninety-eight cases. Are we acting morally if we execute the two innocent people? Most retributivists would answer "no."

Id. at 1227.

²³⁵ Here again I'm disagreeing with Alexander, who says Lempert's problem "is not the notorious ambiguity inherent in the notion of 'intentional.' Surely Lempert is well aware of the ambiguity and is not trading on it." Alexander, *supra* note 227, at 236. I'm not sure if the flaw in Lempert's treatment of "intentional" is the "ambiguity" that Alexander has in mind, but I do claim that that flaw is what vitiates Lempert's argument.

is known that any capital-punishment system will inevitably take innocent lives, one who intends (despite this) to employ capital punishment *must* intend to take innocent lives. This inference is unimpeachable, given the principle that whoever intends some course of action necessarily intends all of its foreseen consequences. That principle, however, is patently false. In *some* circumstances, a person who intends a course of action is treated as intending its foreseen consequences.²³⁶ But in many situations this is not done; here are three examples:

(1) Terrorists known never to bluff warn the American President: "Break relations with Israel or we'll kill the hostage we're holding." The President decides not to yield to the demand. We would *not* conclude that he *intends* that the hostage be slain.

(2) As discussed in the text following note 73 *supra*, traffic accidents kill thousands of innocents every year—yet we do *not* conclude that those who make and sell automobiles *intend* to kill innocent people.

(3) "[I]t is all right to raise the level of education in our country, though statistics allow us to predict that a rise in the suicide rate will follow."²³⁷

It is not at all clear to me what criteria we tacitly invoke in refusing to treat these examples as instances in which the agent *intends* the death or deaths he foresees as inevitable. All I am asserting is that, given the existence of such examples, Lempert must either distinguish them from the capital-punishment situation or abandon his claim that support for capital punishment entails the intention to take innocent lives.

Lempert does acknowledge one way in which we distinguish cases where foreseen consequences are treated as intended from cases where they are not. He appeals to Philippa Foot's notion that the obligation to avoid injury is far more stringent than the obligation to give aid.²³⁸ Hence an action whose foreseen side effect is positively to injure someone is far more dubious morally—far more likely to be thought just as bad as injuring the victim intentionally, and thus to be assimilated to intentional harm—than an action whose foreseen side effect is to deny aid to someone already in peril.²³⁹ Foot's distinction, however, does nothing to explain why the three examples listed above should not be treated as intentional

²³⁶ Philippa Foot gives the example of "wicked merchants selling, for cooking, oil they know to be poisonous and thereby killing a number of innocent people." They would be treated as intentional killers. P. FOOT, *VIRTUES AND VICES* 22 (1978).

²³⁷ *Id.* at 19.

²³⁸ *Id.* at 26-29.

²³⁹ Lempert, *supra* note 228, at 1229-30.

killings: in each of them (except perhaps the first, and that is debatable) the foreseen side effect of the action is a positive injury and not merely denial of aid to someone already endangered.

One might perhaps argue that in all of my examples, any deaths of innocents will be brought about by persons other than those whom we treat as not intentional killers. Yet the same is true in the capital punishment context. The proponent of capital punishment is not the person who inflicts death on innocents any more than the automobile executive personally kills accident victims.

In summary: Lempert's argument against the retributivist riposte fails because it depends on misuse of the concept of intention. Hence that riposte offers the retributivist a way of repelling the mistake argument—a way of supporting capital punishment despite its inevitable toll in innocent lives—*provided* that it can be supported by some credible form of retributivism. It is there, I want to argue, the retributivist riposte comes to grief.

The retributivist riposte depends on the premise that at least some murderers *deserve death* as their punishment, so that it would be an injustice to give them any lesser punishment. This premise, in turn, requires accepting some form of retributivism that relates the gravity of a particular offense directly to its punishment, permitting judgments of the form "Crime X deserves a punishment of such-and-such a magnitude" rather than merely "Crime X deserves a greater punishment than crime Y" (or "Crime X deserves twice as much punishment as crime Y"). Traditional retributivist theories were indeed of this form, prescribing that punishment for an offender must match, fit, or be equivalent to the moral gravity of the crime.²⁴⁰ But precisely this "proportionality"²⁴¹ tenet of traditional retributivism has drawn the strongest criticism.²⁴² Many of the theorists who sought to resuscitate retributivism earlier in this century,

²⁴⁰ See I. KANT, *supra* note 174, at 101; G.F.W. HEGEL, *PHILOSOPHY OF RIGHT* 66-73 (T.M. Knox trans. 1942) (arguing that punishment must equal crime "in respect of their implicit character" or "value", *id.* at 71, but not in "eye for eye" style).

²⁴¹ Terminology can be confusing here. "Punishments should be proportional to crimes" sometimes means only that the greater the seriousness of the crime, the more severely it should be punished—a purely comparative principle. So interpreted, the proportionality principle could perhaps prescribe that murder receive more severe punishment than other crimes (if we agree murder is the worst crime), but not what that punishment should be. I will use "proportionality" in what Margaret Radin has called its "absolute" sense—as requiring that the punishment for each specific crime should somehow fit or match the seriousness or the moral gravity of the crime. Radin, *supra* note 6, at 1167-68.

²⁴² Bedau, *Retributivism and the Theory of Punishment*, 75 *J. PHIL.* 601, 611 (1978); Benn, article on *Punishment* in 7 *THE ENCYCLOPEDIA OF PHILOSOPHY* 29, 32 (P. Edwards ed. 1967).

when it was widely viewed as hopelessly discredited,²⁴³ simply abandoned the proportionality principle.²⁴⁴ More recently, with retributivism once again fashionable,²⁴⁵ its proponents no longer shun the demand that punishment "fit" the crime. Yet even current retributivist theories do little to make the proportionality principle available to support the retributivist riposte.

Lex talionis—inflicting on the criminal whatever he inflicted on his victim—is the most natural way of making punishment "match" crime. As is well known, however, it is utterly unworkable.²⁴⁶ Instead, we need a method of deciding that the severity of a punishment is *equivalent* to the seriousness of the crime to which it is assigned, even though we have no evident way of measuring either seriousness of crimes or severity of punishments.

One suggestion is that we *can* develop such measurements, by looking to the *relative seriousness* of each crime and the *relative severity* of each punishment. The most severe punishment is to be assigned to the most serious crime, the next severest punishment to the next most serious crime, and so on until the least serious penalty is assigned to the least serious crime. Such a proposal has been advocated by John Kleinig²⁴⁷ and, in a more sophisticated form, by Michael Davis.²⁴⁸

²⁴³ J.D. Mabbott prefaced his 1939 defense of retributivism by ruefully observing that his contemporaries "must have felt that the retributive view is the only moral theory except perhaps psychological hedonism which has been definitely destroyed by criticism." Mabbott, *Punishment*, 48 MIND 152, 152 (1939).

²⁴⁴ C.W.K. Mundle, for example, defended a version of retributivism that requires the severity of punishment to increase with the moral gravity of the crime, but explicitly rejected any talk of *the just penalty* or *the fitting punishment* for a given offense. Mundle, *Punishment and Retribution*, 4 PHIL. Q. 216, 222-23 (1954). J.D. Mabbott likewise insisted that: "It is not that we can say how much imprisonment is right for [a particular crime]. But we can grade crimes in a rough scale and penalties in a rough scale, and keep our heaviest penalties for what are socially the most serious wrongs . . ." Mabbott, *supra* note 243, at 162. Other theorists claimed that retributivism set an upper bound to just punishment but denied that giving an offender less than the "deserved" penalty is an injustice. *E.g.*, Armstrong, *The Retributivist Hits Back*, 70 MIND 471, 487 (1961); McCloskey, *A Non-Utilitarian Approach to Punishment*, 8 INQUIRY 249, 260 (1965).

²⁴⁵ "[A]fter several decades as the poor relation in the family of theories of punishment, retributivism seems to be in the ascendant." Bedau, *supra* note 242, at 602.

²⁴⁶ *Lex talionis* would sometimes require repugnant punishments. We are not prepared to beat batterers, rape rapists, or torture torturers. In many other cases it fails even to suggest any penalty at all. How are we to "do the very same thing" to multiple killers, blackmailers, forgers, tax cheats, or childless child molesters?

²⁴⁷ J. Kleinig, *Punishment and Desert* 123-29 (1973).

²⁴⁸ Davis, *How To Make the Punishment Fit the Crime*, 93 ETHICS 726, 736-42 (1983). Unlike Kleinig, Davis does not assume that crimes and penalties can each be ranked in a single linear scale. He calls instead for dividing both crimes and punishments into distinct types and ranking them only within each type, then connecting the resulting complex, branching scales of crimes and punishments.

There is obviously room for debate as to the feasibility of this suggestion. But even if the kind of procedure Kleinig and Davis outline could be carried through in detail, the resulting scheme of "just punishments" could not possibly support the retributivist riposte. Recall that the riposte infers the propriety of capital punishment from the premise that there are crimes for which the only just punishment is death. The suggested method of assigning "just punishments" to the various crimes requires first determining "the most severe punishment."²⁴⁹ To ensure that this will not be some hideous barbarity plainly unacceptable for even the worst crimes, this must mean the most severe *of those we are willing to apply*.²⁵⁰ We must thus delete from our list of punishments any that we find unacceptable or inhumane before we can match crimes with punishments.²⁵¹ Hence we must *already* have decided whether capital punishment is morally permissible before we can use the Kleinig-Davis procedure to generate "just punishments" for specific crimes. The procedure will therefore validate the premise of the retributivist riposte (for some crimes, the just punishment is death) only if we have already independently accepted the riposte's conclusion (that capital punishment is morally proper).²⁵²

The attempt to interpret "equivalence" of crimes and punishments as their occupying corresponding positions in relative rankings of seriousness and severity thus fails to support the retributivist riposte. Other contemporary efforts to make sense of the proportionality principle seek to flesh out one of two seemingly opposite colloquial descriptions of punishment—making the criminal "pay his debt to society" and "paying the criminal back" for his misdeeds.²⁵³

²⁴⁹ Or, in Davis's version, the most severe of each type of punishment.

²⁵⁰ For Davis this means the most severe punishment of each type that we are willing to apply.

²⁵¹ Both authors acknowledge as much. Kleinig calls for determining the "limit to the severity of the punishment which can be humanely inflicted upon a wrongdoer" before correlating crimes and punishments. J. KLEINIG, *supra* note 247, at 123. Davis asks us to "[s]trike from the list [of punishments] all inhumane penalties" before ranking them and matching them with crimes. Davis, *supra* note 248, at 736.

²⁵² Davis, indeed, defines "inhumane penalties" in a way that trivializes the whole inquiry into the morality of capital punishment. A penalty is "inhumane" for Davis if "most members of the society object to it on principle (and independent of its utility within the criminal law)." *Id.* at 737. Using this criterion, we will retain death on our list of penalties—and thus end up concluding that death is the proper punishment for certain crimes—if (and only if) majority sentiment supports capital punishment. We will have no meaningful way of asking whether the death penalty might be excessive even if most Americans approve of it.

²⁵³ Both these ways of conceiving of punishment as "payment" have quite ancient roots. See D. DAUBE, *STUDIES IN BIBLICAL LAW* 146 (1969).

The first of these metaphors lies at the root of an influential version of retributivism whose principal exponent is Herbert Morris.²⁵⁴ For Morris, punishing criminals is a matter of eliminating the “unfair advantage” they gain from committing crimes:

[Laws defining crimes are rules] compliance with which provides benefits for all persons. These benefits consist in noninterference by others with what each person values, such matters as continuance of life and bodily security. The rules define a sphere for each person then, which is immune from interference by others. Making possible this mutual benefit is the assumption by individuals of a burden. The burden consists in the exercise of self-restraint by individuals over inclinations that would, if satisfied, directly interfere or create a substantial risk of interference with others in proscribed ways.²⁵⁵ . . . A person who violates the rules has something others have—the benefits of the system—but by renouncing what others have assumed, the burdens of self-restraint, he has acquired an unfair advantage. Matters are not even until this advantage is in some way erased. Another way of putting it is that he owes something to others, for he has something that does not rightfully belong to him. Justice—that is punishing such individuals—restores the equilibrium of benefits and burdens by taking from the individual what he owes, that is, exacting the debt.²⁵⁶

According to this theory, then, punishment means taking from the criminal the unfair advantage gained by his crime. To set a just or fitting penalty for a crime, then, we need to identify correctly the “unfair advantage” that it creates. Suppose, for example, that we take this “advantage” to consist in the criminal’s “indulging a (wrongful) self-preference,” “permitting himself an excessive freedom in choosing,” or “acting according to [his] tastes” instead of exercising self-restraint.²⁵⁷ Then it becomes difficult to understand why very serious crimes that most people feel little inclination to commit (e.g. rape) should be punished more harshly than those, like speeding or tax evasion, that test most people’s self-restraint much more severely.²⁵⁸

Suppose, more plausibly, that the “unfair advantage” to the criminal is his enjoying the particular sphere of noninterference created by general obedience to the law he violated.²⁵⁹ What does it

²⁵⁴ Morris, *Persons and Punishment*, 52 *THE MONIST* 475 (1968), reprinted in H. MORRIS, *ON GUILT AND INNOCENCE* 31 (1976). Much the same theory is defended in Murphy, *Three Mistakes About Retributivism*, 31 *ANALYSIS* 166 (1971).

²⁵⁵ H. MORRIS, *supra* note 252, at 33.

²⁵⁶ *Id.* at 34.

²⁵⁷ Finnis, *The Restoration of Retribution*, 32 *ANALYSIS* 131, 132 (1972).

²⁵⁸ See Wasserstrom, *Capital Punishment as Punishment: Some Theoretical Issues and Objections*, in 7 *MIDWEST STUDIES IN PHILOSOPHY* 473, 496-98 (P. French, T. Uehling, & H. Wettstein, ed. 1982).

²⁵⁹ Burgh, *Do the Guilty Deserve Punishment?*, 79 *J. PHIL.* 193, 203 (1982).

mean to take *this* “advantage” from the criminal? Are we to decree that it is now permissible to do to him what would otherwise have been a prohibited invasion of the relevant “sphere”? That would amount to a kind of *outlawry*—declaring the criminal fair game for everyone’s private “punishment”—far different from actual criminal penalties. Or is the state itself supposed to invade the “sphere”? That would simply be *lex talionis* all over again! Apparently we are not supposed to literally deprive the criminal of his sphere of noninterference, but rather to inflict on him some imposition sufficient to cancel out his unfair enjoyment of that sphere. Yet to direct us to do this is to leave wholly unexplained *how we decide* that a given imposition is sufficient to eliminate the “unfair advantage.” We have done no more than reword our initial problem of deciding when a punishment “fits” or “matches” or is “equivalent” to a crime. The unfair-advantage theory is useless, then, in deciding just what penalty is appropriate for any given crime. In particular, it does nothing to tell us that there are any crimes for which death is the fitting penalty.

We run into the same obstacle if we pursue the metaphor of “paying the criminal back”—how are we to decide what imposition constitutes adequate “payment”? Consider, for example, Claudia Card’s theory that an offender’s due, unless reduced by other features of her “Penalty Principle,” is the “Full Measure” of punishment—“a deprivation of rights exposing the offender to a hardship comparable in severity to the worst that anyone could reasonably be expected to suffer from the similar conduct of another if such conduct were to become general in the community.”²⁶⁰ Imagine trying to apply this precept to the crime of burglary. If this crime became general, what would be “the worst that anyone could reasonably be expected to suffer”? As badly as someone who feels a strong sense of violation when he returns home to find his dwelling ransacked? As badly as someone who becomes terrified of leaving the house, or who has to move to a new home? As badly as someone who finds irreplaceable family heirlooms or sentimental objects gone? As badly as someone who is present during the burglary?²⁶¹ Even if we somehow fixed on the appropriate degree of hardship a victim “could reasonably be expected to suffer,” how can we determine whether the punishment we propose to inflict on the burglar is “comparable in severity”?

²⁶⁰ Card, *Retributive Penal Liability*, 7 AM. PHIL. MONOGRAPHS 27 (1973).

²⁶¹ Bedau raises similar questions for Card’s theory, using rape as his example. Bedau, *supra* note 242, at 612-13.

Nevertheless, there is a reply the retributivist can make, and Card's call for punishment "comparable in severity" to the hardship worked by the crime points the way. The retributivist can say: "Granted, the notion of punishment as inflicting a hardship or deprivation of rights comparable in severity' to that inflicted by the crime is in many contexts nebulous. Still, it is not entirely without meaning. It makes sense, for example, to complain that terms of imprisonment in the United States are too long,²⁶² or that the penalties prescribed by Islamic law are overly harsh,²⁶³ or that the unduly lenient punishment Austrian tribunals imposed on Nazi war criminals failed to do justice to the depravity of their crimes.²⁶⁴ We may be unable to compare the gravity of the crime and the severity of the punishment with mathematical precision, but we can tell when the two are grossly out of proportion. In particular, we can see that the harm done by killing a person—the permanent and utter annihilation of that individual, the total annulment of all his rights—is so complete and so unique as to be wholly incommensurable with any imposition, no matter how severe, that yet leaves its

²⁶² Richard Singer, noting that "most offenders serve far more time in this country than do similar offenders in other countries," claims that this discrepancy "should at least suggest that our sentences are disproportionate." Singer, *Desert Sentencing and Prison Overcrowding: Some Doubts and Some Tentative Answers*, 12 N.Y.U. REV. L. & SOC. CHANGE 85, 97 (1983). Note that Singer is suggesting that American criminal penalties are disproportionate in the "absolute" sense, not merely in the "comparative" sense. (See *supra* note 241.) He is not suggesting merely that *some* American punishments are disproportionate compared to others, since he indicts the entire penalty structure, nor that American punishments are disproportionate to those of other countries, since that is the *evidence* for his suggestion and not the suggestion itself.

²⁶³ Islamic religious law (Sharia) prescribes amputation of the right hand as punishment for (a first) theft. J. SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 180 (1964; 1982 paperback ed.). It would seem possible to claim that this is too harsh a penalty for theft without intending the purely "comparative" point that it is out of line with how more severe crimes are punished. Indeed, could one not attack amputation as punishment for theft without knowing what penalties the Sharia prescribes for other offenses?

In fairness to Islamic law, it should be noted that amputation, like other severe "hudd" (Koranicly prescribed) penalties, is hedged about with restrictions that limit its applicability. J. Schacht, *supra*, at 176; Mansour, *Hudud Crimes*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 196 (M.C. Bassiouni ed. 1982). Nevertheless, it is more than a theoretical possibility: 16 such amputations took place in a recent quarter-century in Saudi Arabia. *Id.* at 201.

²⁶⁴ When the postwar Allied occupation of Austria was terminated by treaty in 1955, the Soviet government agreed to repatriate all Austrian prisoners of war, including convicted war criminals, and Austria agreed to try these criminals in its own courts. Simon Wiesenthal, investigating in 1960, found that of 200 repatriated prisoners only three—all high-ranking SS officers—had been tried. Two received life sentences, but one of them was freed after two years. The third drew a twenty-year sentence but actually served eighteen months. All other trials were quashed by presidential decree. J. WECHBERG, THE MURDERERS AMONG US: THE SIMON WIESENTHAL MEMOIRS 67-68 (1967). See also *id.* at 191-93.

victim a living, conscious, sentient subject of experiences and possessor of rights.²⁶⁵ We can see, that is, that any penalty less than death cannot possibly inflict on the fully culpable murderer a hardship or a deprivation of rights comparable' to what he inflicted on his victim, and thus that only death can be a fitting punishment for such a criminal."

Whether the retributivist can make this argument convincing is no easy question. Perhaps it will turn out to be unworkable.²⁶⁶ I am simply suggesting that our apparent inability to develop a notion of the "just" or "fitting" or "equivalent" punishment for crimes *in general* may not preclude the retributivist from establishing that for the particular crime of murder, at least in suitably aggravated cases, only the death penalty can possibly be "just," "fitting," or "equivalent." Notice, though, the path along which our consideration of the mistake argument has taken us. The issues we are led to grapple with are no different from those we would face if we directly addressed the substantive question of whether capital punishment is

²⁶⁵ Kant made just this claim:

If, however, he has committed a murder, he must die. In this case, there is no substitute that will satisfy the requirements of legal justice. There is no sameness of kind between death and remaining alive even under the most miserable conditions, and consequently there is also no equality between the crime and the retribution unless the criminal is judicially condemned and put to death.

I. KANT, *supra* note 174, at 102. For a contemporary defense of capital punishment on the same basis, see Primorac, *supra* note 226, at 136-38.

²⁶⁶ One problem for the retributivist, and one often neglected in the rather abstract discussions so common in this area, is posed by the sheer diversity of death-penalty statutes in the United States today. The retributivist I have imagined wants to insist that death is the only fitting penalty for "the fully culpable murderer." Yet murderers—even those "fully culpable" in lacking any legally recognized justification, excuse, or mitigation—differ widely in the heinousness of their crimes. Report of the Royal Commission on Capital Punishment, 1949-1953, 21 (1953). Supreme Court decisions require that capital-punishment statutes "circumscribe the class of persons eligible for the death penalty" to those murderers whose crimes are especially "aggravated." *Zant v. Stephens*, 462 U.S. 862, 878 (1983). The death-penalty laws currently in effect in American states reveal wide differences in judgments as to which murders are so heinous and aggravated as to deserve the supreme penalty. For example, the fact that the murderer was imprisoned at the time of his offense automatically makes him eligible for the death penalty in Arizona and Georgia, but not in California, and in Connecticut only if he was serving a life term. ARIZ. REV. STAT. § 13-703 (F)(7) (Supp. 1985); CAL. PENAL CODE § 190.2 (West Supp. 1986); CONN. GEN. STAT. ANN. § 53a-54b (West 1985); GA. CODE ANN. § 27-2534.1 (b)(9) (1983). Murder to prevent a witness from testifying is sufficient in itself to invoke the death penalty in California, Missouri, and Pennsylvania, but not in Arizona, Georgia, or Texas. ARIZ. REV. STAT. ANN. § 13-703 (F) (Supp. 1985); CAL. PENAL CODE § 190.2 (a)(10) (West Supp. 1986); GA. CODE ANN. § 27-2534.1 (1983); MO. REV. STAT. § 565.032(2)(12) (West Supp. 1986); PA. CONS. STAT. ANN. § 9711 (d)(5) (Purdon 1982); TEX. PENAL CODE ANN. § 19.03 (Vernon Supp. 1987). Confronted with such discrepancies, how plausible is the retributivist claim that there is an identifiable crime of "murder" for which any punishment less than death must be an injustice?

or is not morally permissible. Thus the mistake argument, like the procedural arguments discussed earlier, offers no genuine escape from the perplexities that surround substantive challenges to the death penalty.

CONCLUSION

Procedural arguments dominate contemporary challenges to capital punishment, both in litigation and in scholarly debate. The Supreme Court's record during its 1985 Term strongly suggests, however, a dwindling receptivity to procedural attacks on the death penalty.²⁶⁷ I have attempted to demonstrate that the focus on procedure is equally unlikely to be helpful in exploring the moral pros and cons of capital punishment. The arbitrariness argument either exaggerates the capriciousness of the criminal justice system or counts equally against *all* punishment, noncapital as well as capital.²⁶⁸ Its appeal quite likely depends on a tacit reliance on the substantive belief that the death penalty is wrong no matter what procedures are used to implement it.²⁶⁹ The discrimination argument likewise rests on a shaky empirical basis²⁷⁰ and either calls *all* punishment into question or rests on covert appeal to substantive arguments concerning human dignity and the respect it requires.²⁷¹ The mistake argument requires the death-penalty proponent to specify morally relevant features of capital punishment sufficient to override its toll in innocent lives.²⁷² The quest for such features leads to a retributivist theory of punishment,²⁷³ and the effort to find a workable form of retributivism raises the very issues sought to be avoided by attending to procedural arguments in the first place.²⁷⁴ There is no genuine alternative to confronting directly the substantive moral issue: no matter how flawless the procedures used to select candidates for execution, can the state's deliberate taking of human life ever be morally justified, and if so, under what conditions?

²⁶⁷ See *supra* notes 44-163 and accompanying text.

²⁶⁸ See *supra* notes 164-88 and accompanying text.

²⁶⁹ See *supra* notes 189-91 and accompanying text.

²⁷⁰ See *supra* notes 198-208 and accompanying text.

²⁷¹ See *supra* notes 208-10 and accompanying text.

²⁷² See *supra* notes 211-17 and accompanying text.

²⁷³ See *supra* notes 218-39 and accompanying text.

²⁷⁴ See *supra* notes 240-66 and accompanying text.