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The Constitution and Capital Sentencing: Pursuing Justice and Equality

Cover Page Footnote
I would like to thank my colleagues, Anne Goldstein, Arthur Leavens, and Barry Stern for their encouragement and comments on earlier drafts of this essay; Dean Howard I. Kalodner for providing assistance through a research grant; and Barbara Falvo for technical and secretarial support.

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Modern legal discussion about capital punishment has centered on questions of equality. Are we distributing the death penalty evenly, or capriciously and discriminatorily? This focus stems from the Supreme Court's decision in *Furman v. Georgia*, in which five Justices voted to invalidate standardless capital sentencing, effectively abolishing capital punishment as it then existed. Although relying on the eighth rather than the fourteenth amendment, all five Justices criticized the standardless systems because they encouraged arbitrary or discriminatory action. Only four years later, the Court authorized the resumption of capital sentencing under new "guided discretion" schemes. Legal debate continued, however, as to whether those systems satisfied *Furman*’s perceived promise of "reasonable consistency" in the distribution of death sentences.

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2. 408 U.S. at 251-57 (Douglas, J.); id. at 309-10 (Stewart, J.); id. at 312-14 (White, J.). Justices Brennan and Marshall also pointed out the arbitrary effects of the then-current statutes. See id. at 293-95 (Brennan, J.); id. at 364-66 (Marshall, J.). Their opinions, however, revealed that they would have struck down the death penalty whether it were administered equitably or not.


Equal Justice and the Death Penalty describes the most comprehensive of the empirical inquiries conducted to measure the consistency of a modern death penalty system. Beginning in the late 1970s, the authors, led by Professor David Baldus of the University of Iowa Law School, undertook several studies of Georgia's post-Furman capital sentencing scheme. Their conclusions probably thrilled few people on either side of the death penalty debate. They found more equality in decisionmaking than under the pre-Furman system. Nevertheless, they still identified a highly uneven distribution of death sentences among similar capital cases, suggesting the continuing influence of illegitimate factors. Specifically, the researchers sought to measure the extent to which racial variables influenced death penalty decisions. Although they found little evidence of systematic discrimination against black offenders as a whole, they identified a powerful tendency toward death sentences in white victim cases, especially those involving black defendants.

The basic story presented in this book will strike those familiar with capital sentencing law as old news. Several years ago, the authors' study became the subject of a much-publicized Supreme Court decision. In the early 1980s, lawyers for several inmates on Georgia's death-row had begun using the Baldus study to challenge their clients' sentences under the eighth and fourteenth amendments. One of those inmates was Warren McCleskey, an African-American who had killed a white policeman. In his case, styled McCleskey v. Kemp in the Supreme Court, a five-Justice majority denied that the very empirical evidence around which the book unfolds established any constitutional violation. Even assuming the validity of the researchers' conclusions, the Court said that no const-

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7. See infra notes 99-104 and accompanying text.


tutional basis existed for rejecting the Georgia death-penalty scheme.\textsuperscript{11} Despite the decision in \textit{McCleskey}, this book remains an important contribution to the literature on the death penalty. Most importantly, it aids judgment about the accuracy and meaning of the researchers’ conclusions. Doubts existed after \textit{McCleskey}. The Supreme Court purported to accept the results of the investigations, but suggested that the results did not reveal a risk of racially motivated decisionmaking.\textsuperscript{12} Moreover, the lower courts had criticized the studies. The federal district court disparaged the researchers’ methodologies, and the Eleventh Circuit doubted their conclusions.\textsuperscript{13} The book makes independent judgment about the validity of the findings possible by explaining the procedures and results of the investigations and by responding directly to the judicial criticisms.

Information about the reliability and the implications of the studies serves important functions, even after \textit{McCleskey}. First, it enhances understanding within the legal community of the meaning and propriety of the \textit{McCleskey} decision. Did the studies, indeed, reveal a risk of racially based decisionmaking? Was the methodology simply too complex for the Court to comprehend? How did these statistical studies differ from others that the Court had previously accepted as establishing a prima facie case of discrimination violative of the Constitution?\textsuperscript{14} The information is also valuable apart from its usefulness in judging the \textit{McCleskey} decision. If accepted, the research conclusions carry implications for legislatures\textsuperscript{15} seeking to minimize inequities in the distribution of death sentences. The study suggests that those bodies should restrict the use of capital punishment to categories of extraordinarily aggravated murder for which death sentences regularly will be imposed.\textsuperscript{16}

The authors have made their studies understandable to lawyers and law makers who know little about statistics or sociological research. This was not easy, because their methodologies were complex and “so-

\textsuperscript{11} See infra notes 110-14 and accompanying text.
\textsuperscript{12} See infra note 113 and accompanying text.
\textsuperscript{13} For discussion of the district court’s criticisms, see infra note 106. The Court of Appeals rejected the researchers’ conclusions that race played a causal role in death-penalty decisions because “[g]eneralized studies would appear to have little hope of excluding every possible factor that might make a difference between crimes and defendants, exclusive of race.” \textit{McCleskey}, 753 F.2d at 894.
\textsuperscript{14} The book also summarizes studies conducted by others and conducted in other states to measure the presence of racially based decisionmaking in death penalty selection systems. This information tended to confirm the conclusions the authors reached in their Georgia studies and was, thus, relevant to their presentation. A more limited summary of these studies also was included in S. Gross & R. Mauro, \textit{supra} note 9, at 17-105.
\textsuperscript{15} The authors note that Congress has the authority to enact legislation to promote equality in state capital sentencing systems. See D. Baldus, G. Woodward & C. Pulaski, \textit{Equal Justice and the Death Penalty: A Legal and Empirical Analysis} 417 (1990) [hereinafter “\textit{Equal Justice}”]. This authority comes from section 5 of the fourteenth amendment, which gives Congress the “power to enforce, by appropriate legislation, the provisions” of the fourteenth amendment. U.S. Const. amend. XIV, § 5.
\textsuperscript{16} See infra note 120 and accompanying text.
phisticated.” With few exceptions, however, the authors detail the assumptions, procedures, and vulnerabilities of the studies in simple terms. They wisely relegate discussions of unduly technical matters to the endnotes. They also present the results of the studies in comprehensible tables and graphs and explain their implications. Consequently, even the non-statistician can make educated judgments about the validity of their conclusions.

The authors also seek to describe the importance of their evidence from the perspective of constitutional analysis, but this is not the book’s strength. They include a short discussion of the fourteenth amendment argument for demanding statistical consistency in capital sentencing. Though the argument is more problematic than the authors suggest, at least it is appropriately grounded in the fourteenth amendment. Nevertheless, the central theme of the book builds on the view that the eighth amendment is the proper source of equality objectives. The authors imply that a concern for equality is the only explanation for Furman and its eighth amendment progeny. Yet this view is troublesome on both descriptive and normative levels. As a description of the promise embodied in the Court’s early capital sentencing decisions, it is overstated. There was always much more doubt than the authors suggest that a majority of the Court had settled on equality as the overriding aim of eighth amendment regulation. From a normative perspective, the authors also fail to explain why the Court should interpret the eighth amendment in this fashion. Indeed, by assuming that the function of the protection against cruel and unusual punishment is to promote consistency, the authors obscure the true eighth amendment goal of regulating capital sentencing, which is distinguishable from any fourteenth amendment objective.

This review aims to describe the difficulties with the authors’ view of how the Constitution regulates capital sentencing and to outline an alternative perspective. Part I summarizes the authors’ empirical evidence and their view of its constitutional significance. Part II develops two general criticisms of the authors’ legal analysis. First, they fail to address the major problems with the contention that the Constitution demands statistical consistency in the distribution of death sentences. I contend that pursuing statistical consistency as the overriding objective of constitutional regulation would carry high costs, especially from the abolitionist’s perspective. Second, the authors contend that equality is the overriding regulatory objective of both the eighth and the fourteenth amendments. I demonstrate that while the fourteenth amendment aims in some fashion to promote equality in the distribution of death sentences among the deserving, the eighth amendment’s regulatory goal is entirely different: to ensure in the first instance that death sentences are imposed only on those who deserve them. Finally, part III explores whether the

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18. For an exception, see infra note 213 and accompanying text.
Georgia death sentencing system fulfills this view of what the eighth amendment requires. I explain why, even without empirical evidence, we can conclude that the Georgia system, like virtually every other existing capital selection scheme, fails this eighth amendment objective.

I. THE AUTHORS' LEGAL AND EMPIRICAL ANALYSIS

If one assumes, as do the authors of Equal Justice and the Death Penalty, that death constitutes the “just deserts” of any capital offender, then the decision to strike down standardless capital sentencing schemes in Furman v. Georgia can only rest on concerns about consistency. This assumption forecloses a possible condemnation of capital-punishment schemes under the eighth amendment based on their failure to produce judgments about whether the offender “deserves” the death penalty. The authors would concede that the eighth amendment proscribes the imposition of the death penalty on one who does not deserve it. However, the capital offender deserves the death penalty, according to their assumption, simply because he committed the capital crime. Consequent
quently, the objection to the standardless system must rest elsewhere, and the best argument derives from notions of equality: the potential created by such systems "that those chosen for execution will be indistinguishable from the rest on any legally appropriate basis—or, worse, that they will be distinguishable only by legally improper criteria—poverty, powerlessness, or race."

Although their assumption forecloses the best alternative explanation for the result in Furman, the authors contend, reasonably, that the opinions supporting the decision reveal that it rested on equality concerns. While Justices Brennan and Marshall voted to strike down the death penalty altogether, three other Justices—Douglas, Stewart, and White—rested their conclusions purely on procedural grounds. It was perplexing that these three Justices relied on the eighth rather than the fourteenth amendment; the latter appeared the proper grounding for objections based on inequality. Further, the Court had only recently rejected allegations of undue arbitrariness brought in a fourteenth

Arizona, 481 U.S. 137 (1987), the Court narrowed the exemption by holding that felony murderers who otherwise meet the Enmund standard are subject to the death penalty if they were involved in a major way in the felony and if they displayed reckless indifference to human life. See 458 U.S. at 158.

23. A substantial disparity in the number of executions versus death sentences on a national level had existed for decades before Furman. In 1938, for example, only 190 persons were executed, a small figure compared to that year's 9,000 capital homicides. Nonetheless, 1938 represents the largest number of executions in America since the government began keeping statistics. Between 1960 and 1964, the nation again averaged about 9,000 capital homicides per year. See H. Bedau, The Death Penalty in America 47 (1982). But during that same period, an annual average of only 60 persons were executed. See U.S. Dept. of Justice, National Prisoner Statistics Report: Capital Punishment 1979, 17 (1980) [hereinafter "Capital Punishment 1979"]. As difficult as it was to explain, the disparity became even more pronounced in the late 1960s. Even a comparison of serious homicide convictions with death sentences pronounced revealed a major disproportion. In 1970, for example, the F.B.I. reported that 1,631 persons were convicted of murder and non-negligent homicide. See Federal Bureau of Investigations, Crime in the United States—1970, 114 (1971) (conviction figures for murder and non-negligent homicide). That same year, however, judges and juries pronounced a capital sanction less than 100 times. See Bureau of Justice Statistics, U.S. Dept. of Justice, Capital Punishment (1980-1986).


The arguments of Justices Douglas, Stewart, and White . . . prefer to emphasize the use of the eighth amendment as a tool for testing whether the penalty of death is evenhandedly applied. Why they should have done this is obscure in view of the fact that existing doctrines of equal protection (which was the emphasis of the Douglas opinion) or due process of law should have furnished more than adequate ground for striking down the death penalty, once the factual premises which these three Justices proffer (relating to the arbitrariness or irrationality of the penalty's use, or in Douglas's case, to its use on despised or dispossessed minorities) are accepted. To view the eighth amendment in those terms deprives it of a dimension which is latent in almost all of the previous cases, particularly in the Weems case and in the Warren opinion in Trop—as an independently potent moral force which is at the disposal of the least dangerous
amendment due process challenge to standardless capital schemes in *McGautha v. California.*

Nonetheless, each of the five majority Justices condemned the sentences in *Furman* in part on grounds that standardless sentencing systems produced discriminatory or arbitrary results. Moreover, none of the Justices suggested that the vice of standardless systems was their failure to resolve the "just deserts" of the capital offender. Consequently, *Furman* was, and still is, perceived as requiring reasonable consistency in capital sentencing, though, of course, that conclusion does not greatly clarify its meaning.

Although *Furman* abolished capital punishment as it then existed, a majority of states, including Georgia, promptly enacted new death penalty statutes. Georgia's new system, which became a paradigm for other states, contained two new features. First, it required the jury at the sentencing hearing to find the presence of at least one of ten "aggravating circumstances" as a prerequisite to imposing a death sentence.

branch of government and which may be used to make the most dangerous branch a little less so. *But see J. Ely, Democracy and Distrust* 173-74 (1980) (arguing that the word "unusual" in the relevant eighth amendment clause incorporates a concern for equal enforcement). *Cf.: Goldberg & Dershowitz, Declaring the Death Penalty Unconstitutional,* 83 Harv. L. Rev. 1773 (1970) (arguing that at least where death is widely authorized but rarely imposed, it becomes cruel and unusual).

28. See supra note 2 and accompanying text.
29. The four dissenters in *Furman* viewed the common objection of the five majority justices as one building on inequality concerns: "The decisive grievance of the opinions . . . is that the present system of discretionary sentencing in capital cases has failed to produce even handed justice; . . . that the selection process has followed no rational pattern." *Furman v. Georgia,* 408 U.S. at 398-99 (Burger, C.J., dissenting). For evidence that this view of *Furman* still prevails, see, e.g., W. White, supra note 5, at 135 ("*Furman* invalidated a system of capital punishment that produced arbitrary results.").
30. The three justices in *Furman* who outlawed standardless capital sentencing on procedural grounds reserved judgment on whether the death penalty might be unconstitutional in all circumstances. Consequently, they failed to specify whether standards were required at all phases of the selection process in capital cases or only at the sentencing trial. Further, they failed to clarify what kind of standards would be appropriate where standards were required, rendering the meaning of *Furman* uncertain. See Note, *A Reasoned Moral Response: Rethinking Texas' Capital Sentencing Statute After Penry v. Lynaugh,* 69 Tex. L. Rev. 407, 421 (1990).
31. Pursuant to Georgia's new statutory scheme, a person convicted of murder could either receive a sentence of death or of life imprisonment. *See Ga. Code Ann. § 26-1101* (1972). The sentence would be life imprisonment unless the jury at a separate evidentiary hearing following the guilty verdict concluded that certain standards were met and, ultimately, that death was the appropriate punishment. *See id.* § 26-3102 (Supp. 1975).
32. See Bentele, supra note 5, at 573.
33. Although the pre-*Furman* system of capital sentencing in Georgia required a separate sentencing hearing after the principal trial, the majority of states had not allowed for a separate sentencing inquiry. In *McGautha v. California,* 402 U.S. 183 (1971), the Court upheld this unitary trial system along with the failure to provide sentencing standards. *See id.* at 207-13. After *Furman,* however, states that had not sought to create mandatory death-penalty systems uniformly adopted the system of bifurcated trials.
34. The statutory aggravating factors were as follows:

(1) The offense . . . was committed by a person with a prior record of convic-
Second, it required the Georgia Supreme Court to compare each death sentence issued to the sentences issued in "similar cases" to ensure that it was not comparatively "disproportional." The Court upheld this new scheme in 1976, in Gregg v. Georgia,35 with only Justices Brennan and Marshall dissenting.

For the authors of the Baldus study, the opinions supporting the Gregg decision indicate that consistency36 is the central eighth amendment objective for regulating capital sentencing.37 That view is reasonable when

for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions; (2) The offense . . . was committed while the offender was engaged in the commission of [specified felonies] or aggravated battery or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree; (3) The offender, by his act of murder . . . knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person; (4) The offender committed the offense . . . for himself or another, for the purpose of receiving money or any other thing of monetary value; (5) The murder of a judicial officer, former judicial officer, district attorney or solicitor, or former district attorney or solicitor was committed during or because of the exercise of his official duty; (6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person; (7) The offense . . . was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim; (8) The offense of murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties; (9) The offense . . . was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or (10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.”


The present Georgia capital sentencing system employs essentially the same list of ten aggravating factors. However, in the original post-Furman statute, the death penalty applied to some crimes other than murder. See § 17-10-30(b)(1982). After the Supreme Court’s decision in Coker v. Georgia, 433 U.S. 584 (1977), see supra notes 184-90, the Georgia death penalty statute was revised to apply only to murder. Furthermore, the first aggravating factor was later reworded to apply “where the offense . . . was committed by a person with a prior record of conviction for [specified felonies].” Ga. Code Ann. § 17-10-30(b)(1).


36. See Equal Justice, supra note 15, at 26-27 (“If, in fact, [our] study concluded that the Georgia statute had failed to produce rational, consistent sentencing results, such a finding would threaten the central premise of the Court’s conclusion in Gregg that the Georgia statute was constitutional.”)

37. The authors contend that the Gregg opinions demanded consistency among those charged with capital murder. See id. at 28 (declaring that “Furman condemned the cumulative results of the entire death-sentencing process”). This view, however, does not
the opinions are read in isolation. 38 Gregg had argued that the reforms in the Georgia system would not prevent the same seemingly random pattern of death sentences that the pre-Furman system had produced. 39 He noted that the new sentencing scheme would “necessarily operate in a criminal justice system that was ‘honeycombed with discretion.’” 40 The prosecutor retained unregulated discretion in charging and plea-offer determinations and the choice whether or not to pursue the death penalty after conviction. 41 The executive branch also retained unregulated authority to grant requests for clemency. 42 The power to reprieve offenders from death eligibility at these stages meant that the sentencing reforms could not ensure consistency in the selection process. Further, the sentencing standards themselves only minimally confined sentencer choice. Even when the presence of one of the statutory aggravating factors had been identified—and at least one of them would apply to almost every murder case—the sentencer could still choose to withhold the death penalty without stating why. Despite the persuasiveness of these arguments, a majority of the Justices dismissed them, though in separate opinions. Justice White, writing for himself and two others, 43 asserted that prosecutors would virtually always pursue the death penalty as long as they had the evidence to establish the crime and one of the aggravating factors. 44 He also stated that jurors would regularly impose the death penalty where one of the factors was established. 45 Further, he suggested that the comparative review carried out by the Georgia Supreme Court would protect against any death sentences “imposed for discriminatory reasons or wantonly or freakishly.” 46 Justice Stewart, joined by Justices Powell and Stevens, disagreed that the discretion exercised before conviction or after sentencing raised any constitutional concern. 47 However, as

38. This interpretation is doubtful, however, when the opinions are read in conjunction with other opinions rendered that very same day. See infra notes 151-56 and accompanying text.

39. See 428 U.S. at 199 (Stewart, J., plurality opinion).

40. W. White, supra note 5, at 53.

41. There was some doubt about the prosecutor’s authority under the statute to decline to pursue the death penalty after conviction, but it soon became clear that this authority existed. See Equal Justice, supra note 15, at 29, 225 n.71.

42. See generally id. at 53-54. See also Bentele, supra note 5, at 621-38 (discussing discretion exercised in clemency decision in Georgia).

43. The two others were Chief Justice Burger and Justice Rehnquist. See Gregg, 428 U.S. at 207. Justice Blackmun wrote a separate opinion simply concurring in the judgment. See id. at 227. Justice Stewart also wrote an opinion supporting the judgment that was joined by Justices Powell and Stevens. See id. at 158.

44. See Gregg, 428 U.S. at 225 (White, J., concurring).

45. See id. at 222 (“it [is] reasonable to expect that juries—even given discretion not to impose the death penalty in a substantial portion of the cases so defined”).

46. Id. at 224.

47. See id. at 199 (Stewart, J., plurality opinion). Stewart opined that:

The existence of these discretionary stages is not determinative of the issues
for Gregg’s arguments that the new scheme would continue to foster arbitrariness at the sentencing proceeding, Justice Stewart responded in even more fervent terms than Justice White. He agreed with the Georgia Supreme Court that the new scheme actually “guid[ed]”\textsuperscript{48} and “con-trolled [sentencer discretion by providing] clear and objective lan-
guage,”\textsuperscript{49} and that it would, therefore, produce a “non-discriminatory” pattern of death sentences among those convicted of capital crimes.\textsuperscript{50}

Having thus read both \textit{Furman} and \textit{Gregg} as promises to ensure reasonable consistency\textsuperscript{51} in the capital selection process,\textsuperscript{52} the authors of the Baldus study set out to test the post-\textit{Furman} Georgia system to see whether that goal had been accomplished.\textsuperscript{53} Their original investigation, dubbed the \textit{Procedural Reform Study} (“PRS”), sought to test for arbitrariness and racial discrimination at only two stages of the capital selec-

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\textsuperscript{48} \textit{Id.} at 197.

\textsuperscript{49} \textit{Id.} at 197-98 (Stewart, J., plurality opinion) (quoting Coley v. State, 231 Ga. 829, 834, 204 S.E. 2d 612, 615 (1974)).

\textsuperscript{50} \textit{Id.} Justice Stewart also emphasized that the system of comparative review to be conducted by the Georgia Supreme Court should protect against the infliction of the death penalty “on a capriciously selected group of convicted defendants.” \textit{Id.} at 204.

\textsuperscript{51} \textit{See} Equal Justice, \textit{supra} note 15, at 26-27.

\textsuperscript{52} \textit{See id.} at 28. The authors fail to explain how a call for consistency in the overall process can be derived from Justice Stewart’s opinion in \textit{Gregg}. That opinion implied that only discretion at the sentencing phase is of any constitutional import. Of course, assuming the correctness of \textit{Gregg’s} argument, the purpose of limiting sentencing discre-
tion should be questioned since this practice would not tend to produce a distribution of death sentences among capital offenders in any rational or consistent pattern. Thus, Justice Stewart’s view was not sensible unless he was making the same assumptions, them-
selves quite questionable, made by Justice White.

\textsuperscript{53} The researchers defined two “impossibility” hypotheses, which posed similar questions. \textit{See} Equal Justice, \textit{supra} note 15, at 2. The first came from Justice Harlan’s opinion for the Court in McGautha v. California, 402 U.S. 183 (1971), rejecting a due process challenge to standardless capital sentencing and to the unitary trial system then in vogue. Justice Harlan had declared that the formulation of rules or standards that could rationally distinguish between those who should die and those who should live was “beyond present human ability,” \textit{id.} at 204, so that arbitrariness and discrimination in capital sentencing was inevitable. \textit{See Equal Justice, supra} note 15, at 2. \textit{See generally} C. Black, Capital Punishment: The Inevitability of Caprice and Mistake (1981).

Justice Rehnquist articulated the second “impossibility” hypothesis in his dissent in Woodson v. North Carolina, 428 U.S. 280, 316-21 (1976). He doubted that a state appel-
late court could effectively identify “similar” cases for purposes of conducting the com-
parative proportionality review promised by the new Georgia scheme:

\textit{All that such review of death sentences can provide is a comparison of fact
situations which must in their nature be highly particularized if not unique, and
the only relief which it can afford is to single out the occasional death sentence
which in the view of the reviewing court does not conform to the standards
established by the legislature.}\textit{Id.} at 316; \textit{see also} Equal Justice, \textit{supra} note 15, at 2.
tion process: the prosecutor's decision whether to pursue the death penalty after conviction and the jury's decision whether to impose that sanction at the sentencing trial. The authors also sought to determine whether the comparative proportionality review conducted by the Georgia Supreme Court remedied any of the problems identified at those stages. Ultimately, they sought to compare the results of the pre- and post-*Furman* systems to determine whether the reforms had reduced the level of arbitrariness and discrimination at these post-conviction stages.

The authors' method for defining and detecting arbitrariness and discrimination appears simple. After identifying a large group of cases involving capital convictions under both the pre- and post-*Furman* systems, the researchers amassed data regarding the details of each crime and offender. With this data, they could attempt to identify categories of "similar" cases on a scale graduated from those in which the death penalty was "least appropriate" to those in which it was "most appropriate." To measure "arbitrariness," they could then examine the death selection rate in each category to determine the consistency with which these similar cases were treated. The authors classified as presumptively "excessive" those death sentences that occurred in a category of "similar cases" at a rate of less than 35 percent; they classified as presumptively "evenhanded" death sentences in any category in which the death sentencing rate was more than 80 percent. They could also determine whether the figures conformed with the expectation of progressively greater rates of death selection at the end of the spectrum in which the death penalty was "most appropriate." Likewise, within each cate-

54. See *Equal Justice*, *supra* note 15, at 43. The data sets for the two groups were constructed differently. The post-*Furman* set included the first 594 offenders who were convicted of murder under the new statute through June, 1978. These cases were not a sample but rather the entire universe of Georgia defendants convicted of murder during the specified time period. The pre-*Furman* data set includes two groups of cases. The first group covered the last 131 defendants convicted of murder before *Furman*, working backward to September 1969. Because of the small number of death sentences occurring within this group, the researchers added 25 cases involving death sentences between 1966 and 1969 that were reported in the official opinions of the Georgia Supreme Court. See *id.*

55. *Id.* at 44. In the PRS, the researchers collected data regarding approximately 150 aggravating and mitigating factors. This information was obtained from the official records of the Georgia Supreme Court, the Georgia Department of Offender Rehabilitation, the Georgia Department of Pardons and Paroles, and Georgia's Bureau of Vital Statistics. See *id.* The authors include the instrument used to log this data in Appendix C of the book. See *id.* at 479-93. As is apparent from their method for gathering information, the evaluation of each case was not limited to what decision makers within the selection process knew at the time of their decision.

56. See *id.* at 84.

57. The authors also measured "arbitrariness" in other ways. For example, they measured and compared the median scores of the life sentence and death sentence cases using scales they designed for measuring the appropriateness of the death penalty, see *infra* notes 60-68 and accompanying text, and compared the differences. See generally *Equal Justice*, *supra* note 15, at 80-139 (discussing the authors study of arbitrariness and excessiveness in Georgia's capital sentencing system before and after *Furman*).
gory, the researchers could measure any disparities in the death selection rates depending upon the presence or absence of illegitimate factors such as race. Since each subgroup represented "similar" cases in terms of the propriety of the death penalty, any disparities were, by definition, attributable to illegitimate factors.58

While seemingly simple, this effort involved overcoming fundamental obstacles. The authors describe it as the "similar case problem,"59 but it really embodies two separate issues. First, the authors had to resolve what measure should be used to judge capital murder cases. They could not establish that prosecutors or juries were departing from a normative standard of decisionmaking without knowing what standard those decisionmakers were supposed to be applying. This issue might aptly be called the "normative standard" determination. The authors also had to resolve how to define subgroups of similar cases along the continuum defined by this standard from "least appropriate" to "most appropriate" for the death penalty. This question represents the "similar case" determination. The difficulty was that the Supreme Court had never defined a normative standard for judging capital cases or a method for grouping cases as "similar" along the continuum. The researchers addressed these obstacles by first concluding, essentially on their own, that the correct normative standard for distinguishing capital cases was the "moral culpability" or "blameworthiness" of the capital offender.60 That conclu-

58. The researchers also used other techniques to measure racial discrimination, see id. at 140-43, but describe this method as "particularly telling." Id. at 143.
59. Id. at 46.
60. See id. at 47. The authors contend that this factor should be the "principal concern." See id. at 68 n.17 (citing Furman v. Georgia, 408 U.S. 238, 311-13 (1972)(White, J., concurring), 309-10 (Stewart, J., concurring), 387-89 (Burger, C.J., dissenting), Godfrey v. Georgia, 446 U.S. 420, 433 (1980)). But, to say that "culpability" should be the "principal concern" is not the same thing as saying that it is the only concern. Moreover, even in support of this watered-down proposition, the citations provided turn out to be fairly ethereal.

Clearer, though still insufficient, support for the authors' proposition is found later in Chief Justice Burger's dissenting opinion in Furman in which he implied that culpability was the normative standard to be applied by the capital sentencer: "[T]he 19th century movement away from mandatory death sentences... recognized that individual culpability is not always measured by the category of the crime committed." Furman, 408 U.S. at 402 (Burger, C.J., dissenting). See also Lockett v. Ohio, 438 U.S. 586, 601 (1978)(plurality opinion of Burger, C.J.) (sentencing process must permit consideration of the "character and record of the individual offender").

In recent decisions, the Court has declared repeatedly and with great clarity that "culpability" or "blameworthiness" is the appropriate measure for distinguishing capital cases. See, e.g., Penry v. Lynaugh, 109 S. Ct. 2934, 2947 (1989)("punishment should be directly related to the personal culpability of the criminal defendant"); South Carolina v. Gathers, 109 S. Ct. 2207, 2210 (1989) ("our cases have consistently recognized that [f]or purposes of imposing the death penalty... [the defendant’s] punishment must be tailored to his personal responsibility an moral guilt."). Cf. Booth v. Maryland, 482 U.S. 496, 502 (1987)("personal responsibility and moral guilt" for the murder). See also California v. Brown, 479 U.S. 538, 545 (1987)(O'Conner, J., concurring)(a "moral response" to defendant's background, character and crime should determine the appropriate sentence); Skipper v. South Carolina, 476 U.S. 1, 12 (1982)(Powell, J., concurring)(conduct which
sion was important. It assumed that prosecutors and juries should not rely, for example, on utilitarian measures, like their estimates of the dangerousness of the offender or the deterrent effect of a death sentence. Further, as a measure of offender deserts, a “culpability” or “blameworthiness” standard is distinguishable from what we might call a “moral merit” standard, which would evaluate the offender’s “soul” based on all of his life’s works. Nonetheless, in the end, concluding that “culpability” was the appropriate normative standard, even if correct, did not solve the methodological problem; defining “culpability” or “blameworthiness” still involved highly subjective judgments.

Because of uncertainty as to how “culpability” should be defined, the researchers used two general approaches, each comprising several measures. The first, an a priori approach, requires identifying the criteria that one believes “should govern” the appropriate sentence. The authors explain that they developed one culpability index based on the number of case characteristics that made the offender death-eligible under the post-Furman statute. They also used a more refined a priori approach involving their own judgments about relevant non-statutory aggravating and mitigating factors for grading culpability levels among all armed-robbery murder cases. The second approach, described as empirical, attempts to identify those legitimate case characteristics that best explain observed sentencing outcomes. This method focuses on determining the legitimate explanations for actual results rather than on defining criteria that one believes should determine the verdicts. The

occurred after arrest should not be considered mitigating evidence). The Court, however, has not consistently pursued this objective. See infra notes 199-216 and accompanying text.

62. Id. at 47.

63. They concede that they could not appropriately deem cases to be “similar” based simply on the presence of any one of the particular aggravating factors listed in the Georgia statute. There would remain too many other factors that would likely influence the outcome of cases that could not be classified under the particular statutory factor. See id. at 48.

64. They do not clarify the list of aggravating and mitigating factors that they thought relevant or the weight they assigned to each factor. See id. at 49.

65. In the final analysis, the a priori method for grading the culpability level of cases is so dependent on subjective judgments as to render doubtful the value of the authors’ efforts to assess consistency under it. Professor Radin has described the conundrum:

There is a deep philosophical problem here, because it appears that the judgment of equality ultimately rests on a judgment of fit. The observer must fit the description/moral evaluation to each particular case in order to collect a set of particular cases under a single description. But if, as I [argue] . . . , we cannot accept the notion of ineluctable direct fit between a particular case and moral status, neither can we make an acceptable judgment about equal treatment as long as this is its basis.

Radin, supra note 5, at 1169 n.5.

I also argue later that the authors’ empirical approach to measuring culpability is thoroughly flawed principally because there is no basis to believe that Georgia prosecutors or capital jurors base their sentencing decisions purely on assessments of culpability. See infra notes 208-13 and accompanying text.
authors used two empirical measures. One involved a classification system that focused on three general dimensions: 1) the certainty that the defendant is a deliberate killer; 2) the existence of a close prior relationship between the defendant and the victim; and 3) the vileness or heinousness of the killing. The second method involved using statistical regression analysis to determine the importance of numerous factors in explaining the outcomes in the cases and then eliminating those factors the researchers deemed illegitimate. The remaining factors could be used to rate individual cases on a “culpability” index and to group cases together according to their scores on that index.

Using a variety of fairly arbitrary categories for subdividing groups of “similar” cases, the authors obtained what they deemed consistent outcomes when they measured variously for arbitrariness and racial discrimination. With regard to arbitrariness, they concluded generally that the post-Furman system showed improvements over the pre-Furman system, but still produced unacceptable results. They found that under both systems, death sentences were imposed in only a small fraction of cases involving a murder conviction, though the rate was somewhat higher in the post-Furman system after excluding those cases in which no statu-

66. This classification system was developed by Professor Arnold Barnett, who served as a consultant to the National Center for State Courts Proportionality Review Project. See Equal Justice, supra note 15, at 51. To create the system, Professor Barnett evaluated the facts and circumstances of each case in the PRS (using 100 to 300 word summaries prepared by others) in light of the sentence imposed. Professor Barnett categorized the cases on each of the three dimensions based on the presence or absence of thirty-five variables. See id. at 51-52, 575. Each case was given a score of “0,” “1,” or “2” as to each general dimension. This approach produced a total of eighteen categories of potentially “similar” cases, which could then be evaluated for evidence of arbitrariness or discrimination. See id. at 52. The details of this system of classification were previously explained in Barnett, Some Distribution Patterns for the Georgia Death Sentence, 18 U.C. Davis L. Rev. 1327 (1985).

67. The authors include the codebook used to collect the data for this analysis in Appendix C. See Equal Justice, supra note 15, at 479-93. They also list the variables derived from the original data in Appendix D. See id. at 494-511. The authors conducted a statistical analysis for each of the following outcomes:

(a) pre-Furman death-sentencing decisions among defendants convicted of murder at trial; (b) post-Furman death-sentencing decisions among defendants convicted of murder at trial; (c) post-Furman decisions by prosecutors to seek a death sentence for defendants convicted of murder at trial; and (d) post-Furman jury decisions to impose a death sentence in a penalty trial.

Id. at 56-57. The authors present the results of this analysis in Appendix J. See id. at 587-601.

68. Under this method, cases that involved quite different facts might end up with the same culpability score. For example, a case with both substantial aggravating and mitigating factors might end up with precisely the same culpability score as a case with no special aggravating or mitigating factors. See id. at 52-57.

69. For example, in one instance, the authors divided the cases into six categories; in another, they divided them into three categories; in another they divided them into 16 categories; and in another, they divided them into five categories. See id. at 84-97.

70. See generally id. at 80-139 (the data show “randomness, caprice, and excessiveness” in Georgia’s capital sentencing system).
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tory aggravating factor appeared. While not proving the absence of rational factors to explain who received death sentences, these statistics undermined the notion articulated in Gregg that prosecutors and juries would regularly impose the death penalty under the revised system where one of the statutory aggravating factors existed. Moreover, under all methods they employed for defining “similar” cases, the authors identified a large percentage of death sentences in both the pre- and post-Furman systems that were “presumptively excessive,” and only a small fraction that appeared “evenhanded.” At the same time, they found fewer problematic sentences and more acceptable sentences under the post-Furman system, though the extent of the improvement depended heavily on the culpability measure employed.

As for discrimination, the PRS revealed improvements from the pre-to post-Furman periods regarding race-of-defendant discrimination, but little change regarding race-of-victim discrimination. Analysis of the pre-Furman data using a variety of methods for identifying “similar” cases identified substantial state-wide discrimination against black defendants and against those defendants whose victims were white. This

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71. The death sentencing rate among cases involving a murder conviction under the pre-Furman system was .15 (44/294). See id. at 80. Under the post-Furman system, the rate was .19 (112/606) for all cases involving a conviction, but .23 (112/483) among those cases in which the researchers concluded that at least one of the statutory aggravating factors were present. See id. at 88-89. The requirement of an aggravating factor insulated a few more than 100 defendants from death eligibility. See id. at 89.

72. See supra notes 45-46 and accompanying text.

73. See supra note 56 and accompanying text.

74. See id.

75. On this point, the authors summarize their conclusions as follows:

From the perspective of the largely intuitive measure that we used to rank pre- and post-Furman armed-robbery-murder cases, there is a sharp decline in the percentage of clearly excessive sentences, from 100 percent to 24 percent. By this measure, however, there was only a slight increase in the proportion of presumptively evenhanded death sentences (from 0 percent to 15 percent). By contrast, when we evaluated the pre- and post-Furman systems using the empirical measures of case culpability, we found a sharp decline in the proportion of presumptively excessive sentences (from 43 percent to 13 percent) and a substantial increase in the proportion of presumptively evenhanded sentences (from 23 percent to 51 percent).

Equal Justice, supra note 15, at 97. Although not noted in this summary, the authors found that when they employed the Barnett classification system, see supra note 66, they identified “a higher proportion of presumptively excessive sentences, .33 (37/113), than the .13 (15/113) for cases matched by [their] regression-based case culpability index.” Equal Justice, supra note 15, at 95.

The authors also point out that even analyzing the post-Furman system under the statistically produced culpability index, nearly one-half (55/112) of the death sentences issued fell within groups of similar cases in which death sentences were not regularly imposed. See id. at 92.

76. See generally id. at 140-97 (showing decline of post-Furman race of defendant discrimination from the data, but no decline in race of victim discrimination).

77. The two racial factors each exerted a significant independent influence on the results of the pre-Furman system. See id. at 143. (The text of the book refers to this data as bearing on the “post-Furman” system, but the references to tabular material reveal
discrimination occurred almost exclusively in cases in the mid-range of culpability.\textsuperscript{78} Unexpectedly, there was little evidence of discrimination based on the socioeconomic status of the defendant and victim.\textsuperscript{79} By contrast, the post-\textit{Furman} data reflected no state-wide discrimination against black defendants.\textsuperscript{80} This conclusion is slightly misleading, however. Some discrimination against black defendants did appear in cases from rural areas,\textsuperscript{81} but, unexpectedly, was offset by newly appearing discrimination against white defendants in urban areas.\textsuperscript{82} Moreover, the race-of-victim discrimination continued to appear, especially among those cases in the mid-range of culpability.\textsuperscript{83} As the authors explain, "[d]efendants whose victims were white were nearly as disadvantaged after \textit{Furman} as they were before."\textsuperscript{84}

The researchers also found that the comparative proportionality review conducted by the Georgia Supreme Court was wholly ineffective in relieving the arbitrariness and discrimination that they had identified.\textsuperscript{85} The authors note that since 1973, the Georgia Supreme Court has only vacated two death sentences on grounds that they were "excessive or disproportionate." Moreover, in both cases, the court relied on a rationale other than the dissimilarity between the sentence and sentences imposed in other similar cases generally. In one, the defendant had received a life sentence in a previous trial; in the other, the offender's co-

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\textsuperscript{78} While the figures in the preceding note concern all cases, the authors demonstrate that both of these patterns of discrimination are not uniform across the cases, but arise principally in cases in the mid-aggravation range. See \textit{id.} at 144 table 27, 145, 146 table 28.

\textsuperscript{79} See \textit{id.} at 185.

\textsuperscript{80} See \textit{id.} at 149. The authors conclude: "the gap between the death-sentencing rates for the black-defendant/white-victim cases and white-defendant/white-victim cases dropped from 23 points (.31-.08) pre-\textit{Furman} to 13 points (.35-.22) post-\textit{Furman}; moreover, among the post-\textit{Furman} death-eligible cases, the disparity is only 5 points." \textit{Id.}

In reviewing the results of the PRS, the authors do not discuss whether, among the white victim cases, there is a disparity against black defendants. In the subsequent study that they conducted, however, they noted such a disparity. See infra note 103 and accompanying text.

\textsuperscript{81} The authors report that even this discrimination against black defendants in rural areas was not statistically significant. See \textit{id.} at 179. Although they identified significant discrimination against black defendants by rural prosecutors, this punitive attitude was substantially neutralized by the actions of rural juries. See \textit{Equal Justice, supra} note 15, at 183.

\textsuperscript{82} \textit{Id.} at 179.

\textsuperscript{83} \textit{Id.} at 154 table 32. See also \textit{id.} at 145 (noting that this pattern appears in both the pre- and post-\textit{Furman} cases).

\textsuperscript{84} \textit{Id.} at 150.

\textsuperscript{85} See generally \textit{id.} at 198-228 (examining the effects of the proportionality review process in Georgia).
The perpetrator received a life sentence although the defendant was the actual triggerperson. The authors note, as have others before them, that the Georgia court appears to have failed to pursue a workable approach for identifying a death sentence that is "comparatively excessive." The court has generally only asked whether there have been some minimum number of death sentences for a particular category of murder—such as "domestic slayings"—without regard to the number of life sentences imposed. Nonetheless, the researchers found that the Georgia Supreme Court is more likely to vacate a conviction or death sentence in cases in which the offender is not highly culpable than in one where he is highly culpable. Of course, this may be true in part because procedural errors in sentencing trials are more likely to result in a finding of harmless error where the crime appears highly aggravated. But the authors conclude that, while this de facto system of comparative sentence review eliminates some excessive death sentences, it leaves most intact.

After completing the PRS, the researchers decided to conduct a second study of the Georgia system focusing exclusively on discrimination, particularly based on racial factors. The idea of "arbitrariness" or "capriciousness" seemingly condemned by each of the majority Justices in Furman was never defined by the Court and, thus, difficult to know how to measure. But, the notion of "discrimination" based on a particular illegitimate factor such as race, connoted a much clearer problem. Moreover, if an even more thorough study of the Georgia system revealed systematic, racially based discrimination, those findings would appear to conflict with "much of what Furman has been understood to stand for over the past fifteen years." Members of the capital defense bar also persuaded the researchers that evidence from a more expansive study fo-

86. Id. at 203.
87. See, e.g., Dix, Appellate Review of the Decision to Impose Death, 68 Geo. L.J. 97 (1979) (criticizing the appellate review process in Georgia, Florida, and Texas and suggesting that a uniform system for individualized sentencing may be impossible to achieve).
89. Id. at 209.
90. The authors misstate the effect of harmless error doctrine, surely inadvertently. They state that "procedural errors in the more aggravated cases are less likely to result in a finding of harmless error." Id. at 214 (emphasis added).
91. Id. at 214-15. The authors note that subsequent federal habeas corpus review resulted in reversals of convictions or death sentences in many of the cases in the PRS. See id. at 215. Of course, the percentage of reversals in federal habeas is much lower now because of the doctrines developed by the Supreme Court that prevent federal habeas courts from reaching the merits of most claims by state court prisoners. See generally W. White, supra note 5, at 14-22 (discussing doctrines of retroactivity and procedural default).
93. The authors undertook this second study in 1980 at the request of the NAACP Legal Defense Fund, whose attorneys represented numerous death-row inmates, including several on Georgia's death row. The authors understood that the results of the study might be used to challenge the constitutionality of the Georgia capital punishment sys-
cused on discrimination might support a successful constitutional challenge to the Georgia capital sentencing system.

This second investigation, which the authors call the "Charging and Sentencing Study" ("CSS") focused only on post-Furman cases, but was more expansive than the PRS in two important ways. First, it measured for discrimination "in the flow of cases from the point of indictment up to and including the penalty-trial death-sentencing decision." Compared to the PRS, this focus expanded backward from the point of conviction to include the guilt-or-innocence trial and the plea-bargaining decision by the prosecutor. This expanded view would allow the researchers to measure inconsistency over a broader segment of the selection process, as they contend Furman warranted. Secondly, the CSS attempted even more thoroughly than the PRS to respond to the inevitable "omitted variable" contention—the notion that one or more unidentified, legitimate factors bearing on offender culpability could also correlate coincidentally with race and, thus, explain discrepancies seemingly based on race. To tackle this problem, the researchers collected

94. Id. at 45.
95. There was some doubt about whether Furman's perceived mandate of even-handedness extended this broadly or only applied to those defendants actually convicted of a capital offense. See discussion supra note 30. See generally Note, supra note 21, at 1713 (noting that Furman "can be read to support either a narrow or broad interpretation of the cruel and unusual punishment clause"). The authors of Equal Justice and the Death Penalty conclude unqualifiedly that Furman required even-handed treatment of capital defendants at all of these stages. See Equal Justice, supra note 15, at 28. However, the Furman opinions of Justices Stewart and White were less than clear on this point. See Note, supra note 21, at 1713. Moreover, Justice Stewart's opinion in Gregg, 428 U.S. at 188, certainly cast doubt on the authors' conclusions, though his remarks there were themselves qualified by his opinion issued the same day in Woodson v. North Carolina, 428 U.S. 280 (1976). In Woodson, Justice Stewart, in a plurality opinion, rejected statutes mandating the death penalty upon conviction in part because they encouraged "nullification" by juries in the guilt-or-innocence stages of capital proceedings. See id. at 302-03.
96. See supra note 95.
This expansion would also address the possible criticism that the PRS reflected "sample selection bias," creating an exaggerated appearance of discrimination at the post-conviction stages. See generally S. Gross & R. Mauro, supra note 9, at 24-26. This effect could have occurred, for example, if unexpected discrimination in favor of defendants in white victim cases at stages up to and including conviction produced a group of convictions in which defendants' culpability tended to be higher in white victim cases. However, even if such discrimination against killers of blacks had occurred at the pre-conviction stages, thus producing such a sample, because the PRS adjusted for culpability based on numerous factors and according to varying measures, the disparities in culpability levels should not have influenced the results. It is only if there were omitted variables that related both to the offender's culpability and to the racial factor that the sample selection bias would have distorted the PRS results. Moreover, the expected effect of sample selection bias in this context, of course, would be just the opposite: discrimination at early stages against defendants in white victim cases would tend to produce a group of conviction cases in which the defendant's culpability was lower in white victim cases. Adjusting for culpability levels among this group of cases before measuring for racial effects would then produce results that masked the discrimination that produced the sample. See id. at 25.
information on dozens of factors concerning each case and each defendant to control for even more variables than the already sizeable number covered in the PRS. 97

The suspicions of the average observer about racial discrimination in Georgia's capital selection process probably would be aroused merely by the unadjusted disparities in sentencing rates between different racial groupings. The following table reveals the rates for the universe of all persons indicted for murder in Georgia between 1973 and 1979, broken down by racial categories: 98

<table>
<thead>
<tr>
<th>Defendant/Victim Racial Composition</th>
<th>Death Sentencing Rates</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Black defendant/white victim (B/W)</td>
<td>.21 (50/233)</td>
</tr>
<tr>
<td>2. White defendant/white victim (W/W)</td>
<td>.08 (58/748)</td>
</tr>
<tr>
<td>3. Black defendant/black victim (B/B)</td>
<td>.01 (18/1443)</td>
</tr>
<tr>
<td>4. White defendant/black victim (W/B)</td>
<td>.03 (2/60)</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>.05 (128/2484)</strong></td>
</tr>
</tbody>
</table>

These tables demonstrate a strong disparity against defendants whose victims were white. There is no overall disparity against black defendants—indeed, the disparity is heavily in their favor. At the same time, the vast majority of the victims of black defendants were black. In the white-victim cases, black defendants received death sentences at a rate more than two and one-half times the rate of white defendants. Nonetheless, while cause for serious suspicion, these statistics do not prove racial discrimination, for the same reason that the "omitted variable" argument always plagues efforts to identify discrimination in capital sentencing: factors that bear on offender culpability but that correspond with the racial factors could conceivably explain the disparities.

The authors contend that the nature and number of the variables included in the CSS substantially enhance the probability that any racially disparate impacts identified result from racial discrimination. The core model employed in the CSS controlled for thirty-nine distinct, legitimate variables. The researchers report that statistical analysis demonstrated that this model best explained observed sentencing patterns. 99 However, the researchers also used other models to confirm the results of this core model, including one that controlled for 230 variables. 100

97. While the PRS had involved the collection of data regarding approximately 150 factors, see supra note 55, the CSS involved the collection of data concerning approximately 230 variables. See Equal Justice, supra note 15, at 46. The authors present the instrument used to log this data in Appendix E of the book. See id. at 512-48.

98. This table partially reproduces one presented by the authors. See id. at 315 table 50.

99. See id. at 316.

100. The authors explain that the 39-variable model was the most appropriate in their view because of the problem of "redundant" variables. This problem arises when so many variables are stated that it becomes impossible to prevent overlaps of information between them. If multiple variables include essentially similar information, the influence of the variables on outcomes can be misdiagnosed. See id. at 457-58.
The authors found substantial disparities based on racial factors consistent with the unadjusted results. They estimated that a defendant who killed a white person was, for that reason alone, 4.3 times more likely to receive a death sentence than a defendant whose victim was black.101 Regarding race-of-defendant discrimination, they estimated that black defendants had a slight advantage over white defendants when all cases were considered.102 However, they determined that among the white-victim cases, a black defendant was 2.4 times more likely to receive a death sentence than a white defendant.103 As with the PRS, the racial disparities measured in the CSS arose primarily among those cases in the mid-aggravation range of offender culpability.104

Assuming the statistical methodology of the study was sound, does the CSS tend to establish systematic discrimination based on racial factors? Different readers may have different reactions, but for me, the researchers' evidence greatly enhanced suspicions (based on the unadjusted findings) that the race of the victim influenced sentencer judgments. Granted, the capital sentencer's assessment is highly fact-specific and thus it is impossible to control all variables that might influence every sentencing decision. Nonetheless, it is difficult to conceive of any legitimate variable omitted from this study that regularly would bear on the defendant's culpability and correlate with the race of the victim. That the disparity against black defendants in white victim cases could be explained by an omitted-variable theory appears especially unlikely.

Experts for the State and ultimately the Federal District Court in McCleskey challenged the statistical methodology of the study.105 In Equal Justice and the Death Penalty, however, the authors respond at length to each of the methodological criticisms. The authors provide what struck me, a reader untrained in statistical research, as plausible rebuttals to each of the objections.106 However, judgments about the validity of the methodologies are most appropriately informed by the views of disinterested social scientists, as some of the discussion involves sophisticated problems in statistical technique.107

101. See id. at 316.
102. See id. at 328.
103. See id. The authors also note that in categories of highly aggravated, white-victim cases, black defendants were 3.1 times more likely to receive a death sentence than a white defendant. See id.
104. Of course, within that range, the disparities are much greater than the measured effects among all cases. See id. at 320-23.
105. The District Court concluded that even if valid, the evidence was insufficient to establish the necessary purposeful discrimination under the fourteenth amendment or a claim of arbitrariness under the eighth amendment. See McCleskey v. Zant, 580 F. Supp. 338, 379 (N.D. Ga. 1984). The District Court, however, also rejected McCleskey's claim on grounds that the database was flawed and that the statistical methodologies used to analyze the data were unreliable. See id.
107. See, e.g., id. at 459-60 (authors' contention that stepwise regression was not used
Assuming the validity of the CSS, however, its results certainly conflict with the view that *Furman* and *Gregg* mandated "reasonable consistency"\textsuperscript{108} in the distribution of death sentences among capital offenders. The high levels of racial disparities revealed simply do not allow for characterization of the post-*Furman* system as significantly protecting against reliance on illegitimate factors. Thus, the Supreme Court's indifference to the Baldus evidence in *McCleskey* calls for skepticism about whether promoting evenhandedness was a serious objective of the Court's effort to regulate capital sentencing.

Justice Powell's majority opinion in *McCleskey* also openly rejects the notion that the Constitution requires eradication of statistically established arbitrariness and discrimination from a capital selection process. *McCleskey* raised independent challenges to his death sentence under both the eighth amendment and the Equal Protection Clause of the fourteenth amendment. However, the inability of his statistics to demonstrate *purposeful* discrimination by his prosecutor or jury subverted his fourteenth amendment claim.\textsuperscript{109} His eighth amendment argument was

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in mechanical fashion in the studies); id. at 461-63 (authors' conclusion that severe multicollinearity did not exist in the studies).

A number of eminent social scientists have endorsed the methodological soundness of the Baldus study. *See* Brief *Amici Curiae* for Dr. Franklin M. Fisher, Dr. Richard O. Lempert, Dr. Peter W. Sperlich, Dr. Marvin E. Wolfgang, Professor Hans Zeisel & Professor Franklin E. Zimring in Support of Petitioner Warren McCleskey at 3, *McCleskey* (No. 84-6811).


109. The Court rejected *McCleskey*'s fourteenth amendment claim on grounds that the equal protection clause required proof "that the decisionmakers in his case acted with discriminatory purpose." *McCleskey*, 481 U.S. at 292 (emphasis in original). That conclusion would not foreclose the possibility of using statistical analysis of a particular prosecutor's dispositions of numerous previous capital cases to make out a prima facie case of *purposeful* discrimination in a case that he prosecuted. *Cf.* International Bhd. of Teamsters v. United States, 431 U.S. 324, 361 (1977) (statistical proof of class-wide discrimination by particular employer can make out prima facie case of purposeful discrimination under Title VII, though relief in individual cases must be conditioned on some additional case-specific showing of purposeful discrimination). The Court could easily reject the notion, however, that system-wide, statistical evidence like that in the Baldus studies tended to establish, even as a prima facie matter, an intent to discriminate on the part of the particular actors in *McCleskey*'s case. The prosecutor and jury in a death sentencing case can be viewed as disconnected decisionmakers, acting independently from the decisionmakers in other capital cases. The authors contend that the decision in *International Brotherhood of Teamsters* invites a different outcome in *McCleskey*, *see* Equal Justice, *supra* note 15, at 371-72, though I see the two decisions as reconcilable.

With the exception already noted, I agree with the authors' conclusion that, to make out an Equal Protection violation after *McCleskey*, capital defendants "must demonstrate the existence of purposeful discrimination based upon admissions by biased prosecutors or jurors or by circumstantial evidence of discriminatory intent affecting their individual cases, without reference to evidence of class-wide discrimination against their racial group." id. at 371. I also agree that "[b]y so limiting capital punishment equal-protection claims, the Court in *McCleskey* created a nearly insuperable barrier to proof." id. at 370.

For the view that *McCleskey* was consistent with earlier precedent concerning the Equal Protection clause, but that the theory embodied in that precedent was inadequate as a response to racial oppression, see Kennedy, *supra* note 8, at 1402-21. *Cf.* Lawrence,
perhaps more hopeful; certainly that is the theory for eradicating arbitrariness and discrimination upon which *Equal Justice and the Death Penalty* concentrates. Nonetheless, on this issue, the Court concluded that there was no eighth amendment problem even accepting the validity of the researchers' conclusions. Inexplicably, after assuming the validity of the studies, Justice Powell denied that they established a risk of racial discrimination in McCleskey's case. At one point, he declared that the study only demonstrated a "discrepancy that appears to correlate" with race, and that the Court would not "assume that what is unexplained is invidious." Yet, ultimately, he also rejected the very notion that the eighth amendment proscribed "arbitrariness" or "discrimination," at least as it was revealed by the Baldus research. After con-


For the view that the Court also erred by not recognizing that the primary "equal protection" problem presented in *McCleskey* was a failure to provide equal protection to blacks in their capacity as murder victims rather than a failure to provide equal treatment to McCleskey as a member of some cognizable group, see *Kennedy*, supra note 8, at 1421-28; *Carter, When Victims Happen to be Black*, 97 Yale L.J. 420, 423-24 (1988).


Justices Blackmun and Stevens concluded that the constitutional problems with the Georgia system could be satisfactorily remedied by narrowing the group of death-eligible offenders to highly aggravated murders in which death sentences are usually imposed. *See 481 U.S. at 365 (Blackmun, J., dissenting); id. at 367 (Stevens, J., dissenting). This approach has been termed the "worst-case-only" solution. *See, e.g., Kennedy, supra note 8, at 1430, n. 196 (existence of three categories of murder, with the murderers sentenced to death in only the most egregious cases). Of course, consistent with their views in *Furman*, Justices Brennan and Marshall concluded that the death penalty should be invalidated altogether under the eighth amendment. *See 481 U.S. at 320 (Brennan, J., dissenting).*

111. 481 U.S. at 312.

112. *Id.* at 313.

113. In dealing with McCleskey's Equal Protection claim, the Court alluded to the impossibility of even identifying "arbitrariness" under the eighth amendment. In distinguishing the capital selection process from jury venire-selection or Title VII cases, Justice Powell had declared that there is "no common standard" by which a court can "evaluate all defendants who have or have not received the death penalty." *McCleskey*, 481 U.S. at 293-95. This suggests that one of the basic assumptions employed by the researchers, *see supra* notes 59-68 and accompanying text, is simply incorrect: that offender "culpability" is the measure to be employed by decision makers in the death selection process. Justice Powell is correct that the holdings in the Court's capital-sentencing decisions do not correspond to that basic assumption. *See infra* notes 201-17 and accompanying text. Yet, this is truly the central failing in the Court's efforts to regulate capital sentencing standards: it has not required a judgment from the sentencer that the offender's culpability is such that he deserves the death penalty. That should be the central protection offered by the eighth amendment. *See infra* notes 214-15 and accompanying text. Of
cluding that the capital sanction did not appear excessive in McCleskey's case, Justice Powell declared that it was simply irrelevant under the Constitution that "other defendants who may be similarly situated did not receive the death penalty."114

The authors of Equal Justice and the Death Penalty imply that the Court in McCleskey wrongly decided the eighth amendment question. They conclude that the decision cannot be reconciled with Furman and Gregg.115 This conclusion coincides with their view that an assurance of "reasonable consistency" is the only explanation for regulating capital sentencing under the eighth amendment. Perhaps for this reason, they ultimately abandon legal analysis in their quest to explain McCleskey, suggesting instead simply that political expediencies probably account for the decision.116 However, the authors never attempt to justify their view of the eighth amendment from a normative perspective. Indeed, one arrives rather abruptly at the end of the book117 lacking answers to some fundamental questions. The Georgia death selection system discriminates based on improper factors. But what is the price of pursuing enhanced consistency as the overriding objective of constitutional regulation? Moreover, why should a prohibition on "cruel and unusual" punishment demand equality in the distribution of death sentences?

II. REEVALUATING THE OBJECTIVE OF EIGHTH AMENDMENT REGULATION

I find the authors' legal analysis of the McCleskey claim troubling in course, this is a more limited requirement than the one which the Baldus researchers assume for the eighth amendment—that capital offenders of relatively equal culpability should generally receive the same sentence.

As the authors point out, however, Justice Powell wants to have it both ways. At another point in his McCleskey opinion, he declares that the Baldus evidence supports the view that death sentences in Georgia generally do comport with notions of culpability, as if that were required. See 481 U.S. at 313, n. 36.

114. Id. at 307.

115. See Equal Justice, supra note 15, at 348:

When addressing the eighth amendment issues in McCleskey, Justice Powell did not explicitly overrule Furman, nor did he appear to have intended to do so. Nevertheless, his discussion of the meaning of excessiveness and disproportionality under the eighth amendment repudiates much of what Furman has been understood to stand for over the past fifteen years. The authors seem also to conclude that the rest of what Furman had been understood to stand for already had been repudiated. See id. at 406. See also id. at 414 (indicating that the Court "gave up" on the goal of ensuring "consistency" in capital sentencing).

116. One wonders, of course, why a majority of the Court gave up. . . . Some justices may also believe that, while the Court could improve the fairness of the system, doing so would require cumbersome, disruptive, and time-consuming procedures and would frustrate a perceived public demand for the resumption of routine executions. This latter hypothesis appears most plausible to us.

Id. at 414-15.

117. The authors end the book merely by asserting the ill effects of inequity in the distribution of death sentences and by noting the gloomy prospect that governmental bodies other than the federal judiciary will step in to cure the problem. See id. at 416-19.
two general respects. First, the authors fail to address the problems with adjudicating the continuing constitutional validity of a capital sentencing system based on its tendency to produce a statistically measured equity of outcomes. The view that the Constitution demands statistical consistency in the distribution of death sentences is much more problematic than the authors let on. Secondly, claims building on the need to enhance equality of treatment among those who deserve the death penalty are properly grounded on the fourteenth amendment. The arguments, commonly made after Furman, that equality was the eighth amendment objective for regulation were always incoherent. More importantly, these arguments tend to obscure the true eighth amendment objective for regulating capital sentencing: ensuring that death sentences are imposed only on those who deserve them.

A. The Problems With Statistical Measures of Equality as a Basis for Adjudicating the Validity of Capital Sentencing Systems

The authors' view that capital sentencing regulation under the Constitution aims to ensure statistical equality in the distribution of death sentences is troubling. First, pursuing equality through statistical measures of distribution disparities would make constitutional adjudication intractably difficult for the courts. Moreover, the authors fail to explain why they do not advocate doing away with the death penalty, since abolition is a simple resolution to the problem, and the only method available for ensuring perfect equality in the distribution of death sentences. They apparently assume, though it is unclear why, that equality is merely an aspiration to be balanced against a perceived need to allow some death sentences. Furthermore, the authors' approach to regulation arguably is theoretically unsound. I do not mean to suggest approbation of the Court's failure, after rejecting the abolitionist course, to take serious steps to protect against racial discrimination in capital sentencing. If the Court had demanded that states impose procedural protections against discrimination as a condition to the resumption of capital sentencing, the extreme racial disparities revealed in the Baldus studies probably could have been avoided. Nonetheless, it is worth acknowledging that, if our society is to use the death penalty, there are benefits to allowing decisionmakers wide discretion to grant reprieves; benefits that

118. I do not deny that a basis existed in some of the Justices' capital-sentencing opinions to support the authors' position, and, of course, that view was even endorsed by four dissenting Justices in McCleskey.

119. We continue to believe that the promise of Gregg v. Georgia may not be impossible to achieve, and that the disinclination of state appellate courts, thus far, to provide rational and evenhanded sentencing in capital cases is attributable not to inherent inability, but an understandable reluctance of state supreme courts to confront and remedy the difficult problems of arbitrariness and discrimination in capital sentencing in their jurisdictions when the United States Supreme Court does not specifically require them to do so. See Equal Justice, supra note 15, at 409.
are not necessarily outweighed by the benefits of promoting statistical consistency.

The authors do not clarify the contours of the proscription against arbitrariness and discrimination in capital sentencing that they perceive in the Constitution. At several points, they suggest in general terms how they think these problems could be remedied short of abolition. They suggest, for example, that Georgia could maintain its current approach of allowing prosecutors and sentencers unfettered discretion to grant reprieves, but restrict the possibility of the death penalty to murders involving certain "aggravating circumstances" that statistical evidence reveals will regularly result in that sanction. The authors also note that Georgia could require its appellate court to use comparative proportionality review, employing essentially the same analysis as the authors' studies, to weed out excessive death sentences. Yet the authors do not clarify what they believe the Constitution requires.

If seeking statistical consistency is the goal of constitutional regulation, as the authors contend, there is a need to know the minimal level of consistency that the Constitution demands. The authors conclude that the Constitution does not command consistency to the point of producing de facto abolition. Yet, no one doubts that inequities inevitably will occur in the use of the death penalty. Consequently, a fundamental line-drawing problem arises, but the authors offer no suggestions about how to resolve it. Although not fatal by itself to their theory, the difficulty of deciding just how much inconsistency the Constitution allows only begins to tell of the definitional problems that inhere in their theory.

Serious uncertainty also remains about how the existence of arbitrariness or discrimination ought to be statistically measured for constitutional purposes. Do we measure on a state-wide basis, by region or county, or based on a rural-versus-urban distinction? Should we include only cases in which the offender was convicted of a capital offense, all

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120. A ruling in McCleskey that limited death sentencing to only those cases in which death sentences are routinely sought and imposed would have imported a greater degree of rationality and consistency into state death-sentencing systems than any of the other procedural safeguards that the Supreme Court has heretofore endorsed.

Id. at 385.

121. See id.

122. See, e.g., Hubbard, supra note 5, at 1121 (asserting that any criminal justice system will inevitably produce results based at least in part on irrelevant factors).

123. The authors' proposal, see supra notes 120-21 and accompanying text, adopts the "worst-case-only" solution proposed by Justices Stevens and Blackmun in McCleskey, see supra note 110, to solve the inconsistency problem. However, as Professor Kennedy pointed out several years ago, this proposed remedy simply "replicates the intractable line-drawing problems that have beset the Court's post-Furman approach to capital punishment jurisprudence. . . . The notorious indeterminacy involved in applying statutory aggravating circumstances in the penalty phase of a capital trial or in applying proportionality review to death sentences would be compounded by the requirement that appellate courts distinguish worst-case murders from those in the so-called middle range." Kennedy, supra note 8, at 1431-32.
cases in which the offender was indicted for a capital offense, or all cases in which the person appeared chargeable with a capital crime? Over what minimum period, if any, should we measure the results of a capital selection system? Three years? Five years? Ten Years? The authors do not offer a definitive position on any of these questions. Of course, we cannot reject their view that the Constitution demands substantially more statistical consistency than the Georgia system provides merely because they do not resolve all of these issues. The authors surely would contend that the Georgia system contains far too much arbitrariness and discrimination under any combination of these variables. Nonetheless, manipulating the variables could have dispositive effects in the evaluation of capital sentencing systems in other states or in a revised system in Georgia, and the difficulty of choosing among them is cause for skepticism about the plausibility of a statistical consistency objective as a basis for judicial regulation.

Finally, for purposes of measuring “arbitrariness,” just what is the standard for distinguishing among capital cases and for deciding how we should group cases as “similar?” The authors do not provide a definitive answer.\footnote{124}

As for identifying discrimination, the authors also fail to clarify how to decide who should get relief within any class deemed to have borne death penalties with inappropriate disproportionality. They concede the validity of Justice Powell’s point in \textit{McCleskey}\footnote{125}—that the effect of allowing a strictly statistical model of proof would be to overturn many death sentences that were not in fact the product of prohibited discrimination.\footnote{126} The authors appear to concede that it would be inappropriate even to invalidate all death sentences imposed on blacks who killed whites in Georgia after \textit{Furman}.

They suggest a “hybrid approach,” which contemplates a “case-by-case inquiry into the specifics of each case as a basis for awarding relief.”\footnote{127} However, the authors’ proposal\footnote{128} creates...
brates unresolvable problems. It admits that although the "normative standard" and "similar case" issues\(^{129}\) can be avoided in identifying class disparities based on particular odious factors ("discrimination"), those issues inevitably resurface in the need to evaluate the propriety of the death penalty in individual cases. The authors fail, however, to proffer any workable "normative standard" or any theoretical basis for categorizing cases as "similar;" hence the central flaw in their efforts to evaluate individual cases to identify "arbitrariness" also undermines their effort, after identifying group disparities, to articulate a basis for individual relief.\(^{130}\) Indeed, as one critic has pointed out, this individualized approach to determining appropriate relief simply poses

"the intractable line-drawing problem[] that ha[s] beset the Court's post-Furman approach to capital punishment jurisprudence. The one thing upon which death penalty deregulators and death penalty opponents agree is that the task of selecting in some objective way those persons who should be condemned to die is one that remains beyond the capabilities of the criminal justice system."\(^ {131}\)

More fundamental problems also would arise because of the impossibility of translating the authors' goal of statistical consistency, even if it could be clarified, into a basis for procedural rule making. Courts would often have to pass on capital sentencing systems long before sufficient data would exist to measure statistically whether the systems were producing consistent outcomes. Also, once an existing system were deemed not to be producing sufficient consistency, the courts would soon have to confront whether a reformed system met the constitutional minimum, which again would force them to resolve the question without the benefit of statistical measures. Nor could the validity of a system at one point adequately resolve its propriety for all time. As even the authors concede, for example, it is impossible to measure just how much of the differences they identified in arbitrariness and discrimination between the pre- and post-Furman Georgia systems is attributable to legislative reform and how much simply to changing attitudes among Georgians.\(^ {132}\) Likewise, the measure of consistency produced under a particular approach whether there exists a purpose to discriminate. In the context of a death sentencing system in which decisionmakers are unique to each case, the finding of disparity based on a particular odious factor does not tend to show a purpose on the part of individual decisionmakers to discriminate. It thus makes out no prima facie case. The implications can be viewed differently where the decisionmaker is the same entity for all decisions, which describes the situation in the case on which the authors rely. See discussion supra note 9.

129. See supra notes 60-61.

130. For an explanation of the authors' approach to defining "culpability", which they use as the normative standard, see supra notes 61-68 and accompanying text. For criticism of the definitions employed, see infra note 65 and accompanying text. For an explanation of the authors' basis for categorizing cases as similar, see supra notes 69-75 and accompanying text.


132. See Equal Justice, supra note 15, at 183-84.
in one state would not necessarily resolve the propriety of its application in another. The same system employed in Georgia might produce very different results when applied in Colorado. Thus, a mandate of statistical consistency, even if it could be clarified, would not translate into a particular set of procedural protections.

Assuming the desirability of providing early and reliable rulings on the validity of death penalty systems, problems would surely accompany an adjudicatory approach that relied on statistical evidence about outcomes. Even the authors concede that when the Court upheld the Georgia system and several others in 1976, it could only act on its hunches that they would produce sufficient regularity in capital sentencing. Of course, the post-Furman Georgia system really instituted no meaningful new bulwarks against improper discrimination; the Court could have mandated more protection than the Georgia legislature provided. Nonetheless, in light of the necessity, conceded by the authors, for courts to rule on a system for a substantial period without benefit of the statistical studies, hinging the validity of the system on subsequently developed statistical evidence largely ignores interests in the finality of judicial decision-making.

These problems lead up to the more fundamental question of whether consistency is a required objective of efforts to regulate the distribution of death sentences under the Constitution. The authors fail ever to make the case for why either the eighth or the fourteenth amendment demands consistency in the treatment of capital offenders. Having conceded that all capital offenders justly deserve the death penalty, the authors face the time-worn argument that the capital selection process properly can be viewed as simply allowing the widespread extension of mercy. While

133. Cf. Hubbard, supra note 5, at 1136 (noting that using this approach, one would have to “wait years while new data is gathered and the patterns of sentencing under the reformed system are studied”).

134. In order to apply Furman prospectively and to develop workable rules for future cases, however, the Court necessarily shifted its focus to a procedural mode. Thus, in Gregg, the Court decided that Georgia’s revised capital-sentencing procedures were constitutional because of its assessment that, if properly applied, those procedures were capable of preventing death sentences that would offend Furman.

Equal Justice, supra note 15, at 27.

135. See, e.g., discussion infra notes 140, 245 (requiring juries to certify that they have not considered factors such as race, ethnicity, sexual preference or place of residence in reaching a sentencing decision).

136. The authors suggest at one point that statistical studies like those they conducted in Georgia would rarely be carried out due to the expense involved and the difficulty in obtaining funding. See Equal Justice, supra note 15, at 386. This contention appears highly questionable as a response to what would have happened if the Supreme Court had concluded that the authors’ studies in Georgia provided a valid ground for attacking the Georgia capital sentencing system. If that had occurred, it is reasonable to think that the interest of social scientists and of private foundations in pursuing similar studies in other death-penalty states would have increased dramatically.

137. See, e.g., Gregg v. Georgia, 428 U.S. 153, 199 (Stewart, J., concurring) (rejecting arguments against the unfettered discretion afforded decisionmakers outside the capital
mercy falls outside the realm of rational decisionmaking that produces justice, it is hardly obvious that opportunities for mercy in the capital selection process should be eliminated.\textsuperscript{138} Of course, there is no compelling reason why the fourteenth amendment should not provide protection against discrimination based on odious factors. The Court has recently taken steps in that direction by regulating more closely the process of jury voir dire and selection.\textsuperscript{139} It could have done more. It could have demanded, for example, that prosecutors and capital sentencers attest that, in deciding whether to reprieve capital offenders, they have avoided reliance on certain repugnant factors.\textsuperscript{140} Nonetheless, assuming we are to use the death penalty to punish murder, why shouldn't the Court at some point defer to a legislative judgment that the benefits of allowing extensions of mercy are more valuable than the benefits of securing consistency? This seems an appropriate question if we have assumed, as the authors do, that the Constitution does not demand the kind of perfect consistency that is unapproachable except through abolition— that it balances the demand for consistency against the benefits of allowing some executions.

If consistency is the overriding objective of constitutional regulation, one also must accept that reforms that reduce the opportunity for merciful reprieves could help solve the problem. One solution, for example, would be to allow the death penalty to be imposed mandatorily upon conviction for a valid capital offense.\textsuperscript{141} This approach would not ensure consistency among all persons who have committed capital crimes because some who are guilty are, for a variety of reasons, not convicted. However, states could also restrict prosecutorial discretion to reprieve capital offenders. This combination of reforms could reasonably be thought to produce more consistency than the pre-\textit{Furman} systems\textsuperscript{142} or

sentencing trial and noting that, “[n]othing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution”; \textit{id.} at 203 (declaring that “the isolated decision of a jury to afford mercy” to a particular offender does not render death sentences imposed on other offenders unconstitutional). \textit{Cf.} Kalven, \textit{The Supreme Court—Foreward}, 85 Harv. L. Rev. 1, 21-25 (1971)(characterizing the problem of how to confine capital sentencing discretion as a choice between the rule of law and the provision for extensions of “mercy”).


\textsuperscript{139} \textit{See infra} notes 247-48.

\textsuperscript{140} \textit{See infra} note 244 and accompanying text.

\textsuperscript{141} Regarding what I mean by a “valid capital offense,” \textit{see supra} note 22.

\textsuperscript{142} As Justice Scalia has stated: 

\textit{[The argument is made] . . . that mandatory capital sentencing schemes may suffer from the same defects that characterize absolutely discretionary schemes. In mandatory systems, the argument goes, juries frequently acquit offenders whom they find guilty but believe do not deserve the death penalty for their crime; and because this “jury nullification” occurs . . . without the benefit of any guidance or standards from the State, the result is the same “arbitrary and capricious imposition of death sentences” struck down in \textit{Furman}. [I]f juries will ignore their instructions in determining guilt in a mandatory capital sentencing
Georgia's current approach. Of course, the price includes fewer opportunities for merciful reprieves—more executions.\textsuperscript{143} The authors do not discuss the plausibility of this solution, perhaps because they dislike reforms that would reduce the number of reprieves from death sentences. However, the opportunity for merciful reprieves, more than the failure to limit narrowly the availability of the death penalty, may be thought to account for the inequity that the authors describe in the Georgia system. Moreover, the Constitution does not guarantee opportunities for merciful reprieves, so Georgia could simply eliminate them. Consequently, an increase in death sentences is a potential cost of seeking more consistency. Indeed, the only argument against allowing states to pursue this remedy fully—by mandating the death penalty upon conviction—comes from recognizing the true objective of eighth as distinct from fourteenth amendment regulation.\textsuperscript{144}

\textsuperscript{143} One of the Justices during the oral argument in \textit{McCleskey} noted: “[T]he claim being made here is a curious one, in the sense that in many death penalty cases, what the defendant comes forward asking for is more opportunities for the exercise of mercy, and to allow juries, for whatever reason, not to impose the death penalty. And yet [the petitioner] come[s] forward with a claim that says, in effect . . . the death penalty is not being imposed on enough people.” Transcript of Oral Argument at 17, \textit{quoted in Kennedy, supra}, note 8, at 1392 n.15.

\textsuperscript{144} For another approach that would produce more consistency, but also probably increase the number of death sentences, see \textit{infra} note 147.

\textsuperscript{145} The authors' discussion of the foundation for the \textit{Woodson/Lockett} doctrine, which is not raised in response to this problem, does not suggest any vision of why it might reveal an entirely different and more coherent eighth amendment objective for regulating capital sentencing than to promote consistency. Their textual discussion of \textit{Woodson v. North Carolina}, 428 U.S. 280 (1976), and \textit{Roberts v. Louisiana}, 428 U.S. 325 (1976), is limited to the following statement, which is essentially buried in a volume comprising 698 pages:

\textit{At the same time that the Court sustained the constitutionality of the Georgia, Florida, and Texas statutes, it invalidated on eighth amendment grounds, the mandatory death-sentencing procedures enacted after \textit{Furman} by the legislatures of Louisiana and North Carolina. The Court found these mandatory statutes unconstitutional either because they denied the sentencing juries sufficient discretion to individualize the sentencing decision or because they lacked sufficient guidelines or safeguards to ensure that the discretion that the Court believed juries would inevitably exercise at the guilt trial would produce rational, evenhanded sentencing results.}

B. The Problems with Basing Equality Goals on an Eighth Amendment Foundation

Whatever the proper procedural protections for promoting evenhandedness in capital sentencing under the fourteenth amendment, assuring consistency in the treatment of those who deserve the death penalty is not the objective of the eighth amendment. The argument for consistency would hold that the death penalty becomes less "cruel and unusual" when administered under a system demanding consistent harshness than under one allowing the sentencer uninhibited freedom to act leniently. Professor Polsby pointed out this "profound contradiction" shortly after Furman. The authors concede that "no one involved in the criminal justice process is going to argue that the eighth amendment requires the more frequent imposition of death sentences." Perhaps they believe that no one would dare contend that consistency should be achieved other than by narrowing the category of death-eligible offenders. Yet the problem with their position ultimately rests with their claim that the goal is consistency. For, as we have seen, there certainly is no logical impediment to an argument that enhanced consistency could best be achieved, not by narrowing the category of death-eligible offenders, but by methods that increase the frequency with which death sentences are inflicted.

I think the authors err in assuming that the goal of eighth amendment regulation should be consistency. They might respond that Furman must have some explanation unless it was wrongly decided, and I agree. Nonetheless, the best explanation for Furman is not a need to promote equality. A prohibition on cruel and unusual punishment does not demand consistency at a cost of fewer reprieves from the death penalty. The explanation for eighth amendment regulation instead lies in recognizing that not every capital murderer "justly deserves" the death penalty. The authors' unexamined assumption to the contrary makes unnecessarily difficult the explanation of why and how the eighth amendment should control capital sentencing.

145. See Polsby, supra note 26, at 27. Cf. Kalven, supra note 137, at 23 ("The standards challenged [in McGautha] contained a paradox. The state could meet the due process objection by being less merciful. That is, it could eliminate jury discretion and make death mandatory for a given class of offenses.").
146. Equal Justice, supra note 15, at 413.
147. There are alternatives to the mandatory method already mentioned. Professor Zeisel describes an informal effort by Florida prosecutors to employ affirmative action—seeking the death sanction for more killers of blacks. See Zeisel, supra note 5, at 465-66. For an argument that the inconsistency problem could be solved for purposes of equally protecting potential black murder victims by consciously increasing the number of death sentences imposed on murderers of blacks, see Kennedy, supra note 8, at 1436-39. For discussion regarding the moral propriety of this remedy, see Lempert, Capital Punishment in the 80's: Reflections on the Symposium, 74 J. Crim. L. & Criminology, 1101, 1111-14 (1983).
1. Reexamining the Supreme Court's Eighth Amendment Promises

The Court's eighth amendment decisions regulating capital sentencing simply do not support the promise of consistency that the authors have extracted from them. I do not mean to contend that no basis existed to think that some members of the Court viewed equality as an objective for eighth amendment regulation. However, there is a difference between noting that concerns about inequality have repeatedly surfaced in the Justices' death sentencing opinions and portraying it as the overriding problem that the Court has promised to remedy. The authors of *Equal Justice and the Death Penalty* convey the latter impression, but the former is more correct. It is unclear that a majority of the Justices ever settled on consistency as the goal of eighth amendment regulation. Indeed, the Court early on reached decisions suggesting that its purpose was entirely different.

Doubts even existed immediately after *Furman* that it revealed a consistency command. The problem was the impracticality of that interpretation. It would have forced courts to resolve the degree of consistency likely to occur under new schemes without the benefit of empirical evidence. A court could only act on hunches in deciding what kind of system produced "consistent" results. Further, it was entirely unclear from any of the three critical opinions in *Furman* just what variables should provide the basis for those hunches or for conducting empirical inquiries. Because of these very kinds of problems, one commentator shortly after *Furman* concluded that the decision was more appropriately read as merely condemning statutes that permitted sentencers unfettered discretion than as mandating equality.\(^{148}\) However, surely the most accurate view was that, beyond its proscription on wholly standardless sentencing schemes, the meaning of *Furman* could not be interpreted meaningfully without further clarification from the Court.\(^{149}\)

The Court's subsequent interpretations of *Furman* also do not support the overriding command of consistency that the authors ascribe to the case. The authors argue that the opinions underlying *Gregg v. Georgia*, in which the Court upheld Georgia's post-*Furman* statute, revealed a Court committed to pursuing "consistency."\(^{150}\) However, this contention simply ignores two other decisions the Court reached that same day: *Woodson v. North Carolina*\(^{151}\) and *(Stanislaus) Roberts v. Louisiana.*\(^{152}\) In those cases, the Court rejected statutes that mandated the death-penalty upon conviction for murder and aggravated murder.\(^{153}\) Admittedly,
for reasons already noted, mandatory death-penalty statutes would not produce consistent treatment of all those charged with capital crimes. Nonetheless, it was not plausible to reject mandatory death penalty statutes, especially for aggravated murders, out of a belief that they produced less consistency than schemes like Georgia’s, which merely provided some sentencing guidelines. The only sensible justification for rejecting these mandatory statutes on procedural grounds was that they excluded “the possibility of compassionate or mitigating factors” from consideration in fixing the punishment at death. Thus, the 1976 cases, far from supporting the notion that principles of “equality” could explain the Furman result, cast doubt on that proposition.

The Court’s decision only two years later in Lockett v. Ohio further weakened the notion that equality was the overriding objective of capital-sentencing regulation. In Lockett, the Court addressed an Ohio statute that mandated the death penalty for certain aggravated murders unless, after a sentencing hearing, the trial court found one or more of three mitigating circumstances:

“First degree murder is the killing of a human being:
“(1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery; or
“(2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties; or
“(3) Where the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or
“(4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; [or]
“(5) When the offender has [a] specific intent to commit murder and has been offered or has received anything of value for committing the murder.


154. See text supra note 142.
155. Woodson, 428 U.S. at 304.
156. The following year, the Court reiterated the command of Woodson and (Stanislaus) Roberts in (Harry) Roberts v. Louisiana, 431 U.S. 633 (1977). There, the Court invalidated a mandatory death sentence imposed under the “peace officer” provision of the Louisiana statute. See supra note 153 and accompanying text. In the earlier (Stanislaus) Roberts case, the defendant had been sentenced to death under the concurrent felony provision of the statute. In vacating that death sentence, the Court expressly had rejected all other provisions of the statute, with one exception: the provision regarding a murder by one already serving a life sentence. See 428 U.S. at 334 n.9. Shortly after the (Stanislaus) Roberts decision, in Washington v. Louisiana, 428 U.S. 906 (1976), the Court also had vacated a death sentence imposed under the peace officer provision. Nonetheless, a grant of certiorari requires only four votes, see, e.g., Hamilton v. Texas, ___ U.S. __, 110 S. Ct. 3262 (1990)(Brennan, J., dissenting from denial of application for stay), and certiorari apparently was granted in (Harry) Roberts based on the votes of the four dissenters in the Woodson and (Stanislaus) Roberts decisions. In vacating the death sentence in (Harry) Roberts, the Court again reserved judgment on the validity of the provision imposing a mandatory death sentence for an intentional murder by a life-term inmate. That Court later resolved the validity of that provision in Sumner v. Shuman, 483 U.S. 66 (1987). See infra note 174 and accompanying text.
The victim of the offense induced or facilitated it.

It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.\(^1\)

The Supreme Court found these inquiries insufficient to allow for consideration of all factors that should bear on the decision whether to impose death.\(^2\) Writing for a four-Justice plurality, with Justice Marshall concurring in the judgment, Chief Justice Burger declared that a capital sentencer must be allowed to give "independent mitigating weight" to "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."\(^3\) This rule was essential to protect against a death sentence imposed despite "factors which may call for a less severe penalty."\(^4\) Consequently, the Court struck down the Ohio sentencing statute. Yet, that statute had aimed to promote consistency in the use of the death penalty. Ohio had limited the capital sanction to certain aggravated murders and had guided the capital sentencer's discretion along narrow channels. It was not plausible to believe that the death penalty in Ohio was distributed less "consistently" than under the Georgia scheme upheld in \textit{Gregg}. For this very reason, \textit{Lockett} cast further doubt on the proposition that evenhandedness was the principal eighth amendment objective for regulating capital sentencing.\(^5\)

\(^{158}\) \textit{Id.} at 607 (quoting Ohio Rev. Code Ann. § 2929.04(b) (1975)).

\(^{159}\) In \textit{Lockett}'s case, for example, there were substantial mitigating factors present that were not relevant to any of the three narrow inquiries addressed to the sentencer. Perhaps the most compelling were encompassed by the facts of the crime itself: the killing had been committed accidentally by someone other than Lockett during the course of a robbery of a pawnshop for which Lockett was merely the getaway driver. Furthermore, Lockett had no serious record of criminal activity and was only twenty-one. \textit{See} 438 U.S. at 608.

\(^{160}\) \textit{Id.} at 604.

\(^{161}\) \textit{See} \textit{id.} at 606.

\(^{162}\) \textit{See}, e.g., \textit{Lockett} v. Ohio, 438 U.S. at 631 (Rehnquist, J., dissenting) ("By encouraging defendants in capital cases, and presumably sentencing judges and juries, to take into consideration anything under the sun as a "mitigating circumstance," it will not guide sentencing discretion but will totally unleash it."); \textit{id.} at 623 (White, J., dissenting) ("This [ruling] invites a return to the pre-\textit{Furman} days when the death penalty was generally reserved for those very few for whom society has least consideration."). \textit{See also} J. Ely, supra note 26, at 174 (noting that "the Court seemed to opt for maximum discretion by holding it unconstitutional to exclude from the consideration of the jury [sic] anything that might plausibly be thought to bear on whether the defendant should be executed"); Weisberg, \textit{Deregulating Death}, 1983 Sup. Ct. Rev. 305, 325 ("Lockett restores a large part of the jury discretion that the Court has purported to restrain."); Gillers, \textit{Deciding Who Dies}, 129 U. Pa. L. Rev. 1, 29 (1980)("Lockett shifted the inquiry from the avoidance of arbitrariness to what may be considered its opposite, the recognition of "uniqueness."); Hertz & Weisberg, \textit{In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances}, 69 Calif. L. Rev. 317, 374-76 (1981)(arguing that \textit{Lockett} reinforced the view already revealed in the 1976 cases
The Court's post-Lockett decisions rationalizing the approval of statutes like Georgia's also cast doubt on the proposition that the Court truly believed that they produced consistency. In Zant v. Stephens, the Court largely rewrote the rhetoric about consistency in Justice Stewart's Gregg opinion. The Stephens Court abandoned the notion proffered by Justice Stewart in Gregg that the Georgia statute "guided" capital-sentencing discretion. Now the Court upheld the Georgia statute while conceding that the Georgia sentencer's discretion, once narrowed, remained entirely "unbridled." Furthermore, Justice Stewart's Gregg opinion had touted the Georgia scheme for its inclusion of comparative proportionality review of death sentences by the Georgia Supreme Court. However, Professor Dix soon demonstrated that the Georgia court was not meaningfully carrying out this mandate. The Supreme Court could have reevaluated the Georgia court's efforts in that regard. Instead, in Pulley v. Harris, the Court simply abandoned the notion that comparative proportionality review was constitutionally required.

What objective other than consistency do the Court's post-Furman cases reveal about its eighth amendment regulatory efforts? In fact, the Court has not consistently pursued any coherent objective. The Court's aims in this area have always appeared uncertain, confused, or conflicted. However, there are points to be extracted from its decisions that are helpful in judging the perspective of the authors of this study.

164. Id. at 875.
165. See supra note 50 and accompanying text.
166. See Dix, supra note 87, at 110-23. The authors of the Baldus Study contend that comparative proportionality review by a statewide appellate court is an essential component of any meaningful effort to ensure consistency in a capital selection process. See, e.g., Equal Justice, supra note 15, at 409-10 ("if we have learned anything from our research, it is that fairness and consistency in capital sentencing is only possible with some effective system of posttrial oversight and review").
168. The Court in Harris was addressing the absence of comparative proportionality review in the California statute. See Pulley v. Harris, 465 U.S. 37, 40-41 (1984). While the Court suggested that comparative proportionality review might be required if a system did not provide alternative checks on arbitrariness, there appeared to be no meaningful alternative checks operating in the California system. See id. at 51. The California statute was the same in all important respects as the Georgia system upheld in Gregg. Consequently, the Harris decision strongly implied that the Georgia system was not invalid even if the Georgia Supreme Court was conducting no effective comparative proportionality review. The authors agree with this interpretation of Harris though they view it as apostasy. See Equal Justice, supra note 15, at 406 ("In an apparent retreat from several of its earlier pronouncements, the Court held in Pulley that the eighth amendment did not require state courts to conduct proportionality reviews, even in states with broad levels of jury discretion."); id at 280 ("Pulley v. Harris . . . ruled that a system of proportionality review is not constitutionally required.").
169. See Note, supra note 30, at 417-18 (describing the Court's modern capital sentencing jurisprudence as "a confusing array of ill-defined concepts, conflicting pronouncements, ipse dixits, and short-lived precedents").
First, contrary to the authors' interpretation, several of the Court's capital-sentencing opinions reject the view that it is concerned primarily with ensuring consistency,\textsuperscript{170} and no decision truly supports that proposition.\textsuperscript{171} At the same time, the Court has rejected the assumption that underlies the authors' view that the \textit{Furman} decision must rest on the need to ensure consistency: that the "just deserts" under the eighth amendment of those convicted of capital crimes are death sentences.\textsuperscript{172} The Court repeatedly has invalidated statutes mandating the death penalty upon conviction even for highly aggravated homicides.\textsuperscript{173} Most recently, it invalidated a statute that required death upon conviction for intentional murder by a person already serving a life sentence.\textsuperscript{174} Likewise, it repeatedly has rejected even statutory schemes that merely limit the sentencer's ability to consider evidence about the offender or his crime for what it says about the offender's deserts.\textsuperscript{175} Most recently, in \textit{Penry v. Lynaugh},\textsuperscript{176} the Court struck down the application of the Texas statute because the three factors that it provided to guide the sentencer\textsuperscript{177}

\textsuperscript{170}. In addition to the decisions discussed earlier, see Barclay v. Florida, 463 U.S. 939 (1983). There the Court reached a conclusion in the context of the Florida system that corresponded with its decision in \textit{Stephens}. \textit{Barclay} reinforced the conclusion that a statutory aggravating circumstance need not actually "guide" or "channel" sentencer discretion. \textit{See id.} at 950. \textit{Cf.} Lowenfield v. Phelps, 484 U.S. 231 (1988)(declaring that the capital sentencer need not be guided by any standards as long as an aggravating circumstance is incorporated into the definition of the murder offense).

\textsuperscript{171}. Elsewhere, I have described another view of capital sentencing regulation embodied in current doctrine as the "non-arbitrariness" theory. \textit{See Howe, supra} note 25, at — (forthcoming). This view is different than the "consistency" theory advocated by the authors in that it assumes that any system that confines sentencer choice at all will satisfy the eighth amendment. I have argued that this view of the function of capital sentencing regulation is illogical. \textit{See id.} at —.

\textsuperscript{172}. The authors note the decisions in \textit{Zant v. Stephens} and \textit{Pulley v. Harris}. However, they portray them as the first suggestions "that the Court was becoming less committed to special safeguards to ensure reliability and, ultimately, consistency." Equal Justice, \textit{supra} note 15, at 406. The authors do not ever intimate that the \textit{Woodson/Lockett} line of cases cast doubt on their view that consistency was the singular objective of eighth amendment regulation. They do not acknowledge that those decisions undermined the foundational assumption that forces their interpretation of \textit{Furman} and \textit{Gregg} as resting on equality principles. \textit{See supra} notes 151-52 and accompanying text.

\textsuperscript{173}. In addition to the \textit{Woodson} and (\textit{Stanislaus}) \textit{Roberts} decisions, see \textit{supra} note 156.


\textsuperscript{175}. \textit{See}, e.g., \textit{Eddings} v. Oklahoma, 455 U.S. 104, 110 (1982); \textit{Hitchcock} v. Dugger, 481 U.S. 383 (1987). For a case that goes beyond requiring the sentencer to consider evidence about the offender for what it says about his deserts, which the author criticizes, see Skipper v. South Carolina, 476 U.S. 1 (1986)(holding that the sentencer must be free to consider evidence of the offender's previous good behavior in jail for what it says about his "future dangerousness," a utilitarian concern).

\textsuperscript{176}. 109 S. Ct. 2934 (1989).

\textsuperscript{177}. Those questions read as follows:

\begin{itemize}
  \item[(1)] whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
  \item[(2)] whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
  \item[(3)] if raised by the evidence, whether the conduct of the defendant in killing
did not allow consideration of all evidence bearing on Penry's culpability. These decisions provide a strong hint as to the proper objective for regulating capital sentencing under the eighth amendment.

2. What the Eighth Amendment Requires: A Limitation on Death Sentences Based on Offender Deserts

The overriding aim of regulating capital sentencing under the eighth amendment is to ensure that only murderers who deserve death sentences receive them—not to ensure consistent treatment of all capital offenders. This alternative view has much to commend it. Unlike the consistency theory, this view builds on an accepted, traditional interpretation of the eighth amendment as proscribing "excessive" punishments. Likewise, this view is the only one available that can justify a ban on mandatory death sentences by explaining the need in all capital cases for a sentencing inquiry. It also is the only one that can easily explain why we focus regulation on the sentencer alone rather than on all the decision makers in the capital selection process, including prosecutors and appellate courts. Thus, at the same time that this theory is grounded in established eighth amendment doctrine, it comes closest to explaining the fundamental features of existing eighth amendment regulation. Finally, unlike the "consistency" theory, this alternative theory provides independent regulatory functions for the eighth and fourteenth amendments.

The explanation for this alternative view starts with the proposition that the authors implicitly concede: that the eighth amendment limits the use of the death penalty to those who "just[ly] deser[v]e" it. That proposition embodies two assumptions. First, it assumes that the eighth amendment does more than merely proscribe punishments deemed barbaric in an absolute sense. The eighth amendment must also measure punishments in proportional terms. Thus, death sentences may be justified sometimes, but not always. Likewise, it assumes that the proper measure of proportionality in the death-penalty context is rooted purely in retributive ideals. This means that the provision aims to ensure that the offender receives no more punishment than he "deserves," despite any utilitarian benefits of punishing him more severely.

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178. Penry had urged, in arguing for mitigation of his sentence, evidence of his mental retardation, brain damage, and abused background. See Penry, 109 S. Ct. at 2941-42. This evidence tended to suggest reduced moral culpability for the crime but enhanced future dangerousness. Under the Texas statute, see supra note 177, the evidence could have been considered against him on the second special question bearing on future dangerousness, but could not have been considered in his favor.

179. I have elaborated on this point elsewhere. See Howe, supra note 25, at ___.


181. The "retributive theory" of punishment, in its most general form, means that a punishment is warranted because the offender deserves it, apart from any utilitarian bene-
Both assumptions find support in existing interpretations of the eighth amendment. As early as 1910, in *Weems v. United States*, the Supreme Court recognized that the eighth amendment embodies a protection against punishments that are excessive in their application even though they are not proscribed *per se*. Moreover, in the capital context, though not for non-capital crimes, the Court has indicated that the measure of excessiveness is rooted in retributive ideals. In *Coker v. Georgia*, the Court held that death was categorically excessive punishment for rape. Justice White, for a four-Justice plurality, began by demonstrating that the death penalty for rape was not widely employed. Yet, ultimately, he acknowledged that the issue was one on which the Justices had to exercise their "own judgment." The decisive point was that the interests invaded by rape simply were not equal to the interests in life itself. This rationale implied that death was categorically excessive punishment for virtually all crimes that did not involve "the taking of human life." Because Justice White also did not discuss the utilitarian justifications for imposing the death penalty in these cases, the retributive basis for the conclusion was clear. Moreover, while the Court’s subsequent applications of the *Coker* doctrine have been predicated on determining that the death penalty is not widely used in a given circumstance, the fits that it produces. *See generally* N. Walker, Punishment, Danger and Stigma: The Morality of Criminal Justice 38-40 (1980).

182. 217 U.S. 349 (1910).
183. *Weems*, a public official, had been convicted under Philippine law for a small theft as a public official. He was sentenced to *cadena temporal*, which involved at least twelve years and a day at hard labor in chains, the loss of all civil rights, and perpetual parole. Writing for the Court, Justice McKenna referred not only to the severe and unusual character of the accessory punishments, but to the "excess of imprisonment" involved. *Id.* at 377. Other statements in the opinion implied that the Court was declaring the punishment impermissible for *Weems*’ particular offense, but not impermissible in all circumstances: "Such penalties for such offenses amaze those who . . . believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense." *Id.* at 366-67.

Seven members of the Supreme Court recently endorsed the view that *Weems* properly laid down an eighth amendment protection against excessive punishments. *See Harmelin v. Michigan*, ___ U.S. ___, 111 S. Ct. 2680 (1991). Some have questioned whether the *Weems* decision rested on the conclusion that the punishment imposed there was excessive or simply outlawed as a matter of mode, *see, e.g.*, Packer, *Making the Punishment Fit The Crime*, 77 Harv. L. Rev. 1071, 1074-76 (1964)(arguing that the decision may only have proscribed the mode of punishment imposed), and have rejected the notion that the eighth amendment articulates a protection against excessiveness. *See Harmelin v. Michigan*, ___ U.S. ___, 111 S. Ct. at 2684-2701 (Scalia, J., joined by Rehnquist, C.J.).

185. *See id.* at 592, 599.
186. Justices Marshall and Brennan each separately concurred in the judgment on grounds that the death penalty violated the eighth amendment in all circumstances. *See id.* at 600. Justice Powell also concurred in the judgment on grounds that, given the particular facts of Coker’s crime, the death penalty was excessive punishment. *See id.* at 601 (Powell, J., concurring).

187. *Id.* at 597.
188. *Id.* at 598.
ultimate proportionality judgment also appears to rest on a retributive measure.\textsuperscript{190}

This protection against punitive excess can explain why capital-sentencing regulation under the Eighth Amendment should focus on ensuring a judgment about whether the offender deserves the death penalty. First, the Court need only recognize that no matter how narrow and aggravated the capital offense, not every offender who falls within the category can be said to "deserve" death. Deserts cannot be clarified by the kind of objective standards that are incorporated into the definition of crimes. We cannot fairly judge deserts without considering the factual particularities of both the offense and the offender. Precisely what level of involvement did the offender have in the crime? To what extent was the crime attributable to others? What was the offender's mental state at the time? Was he retarded, emotionally disturbed, or under the influence of drugs? Further, we might also ask, in resolving his deserts on a more general level, what other good or bad deeds has the offender committed in his life and what do they suggest about his character? The conclusion that one is guilty, even of aggravated murder, does not by itself reveal his level of culpability for the crime or define the broader measure of his life that we might call his "moral merit."

This theory of regulation is also the only one that can justify certain fundamental attributes of existing capital-sentencing doctrine. First, as we saw, the "equality" or "consistency" paradigm cannot adequately explain a \textit{per se} prohibition on statutes mandating the death penalty upon conviction for a capital offense; mandatory death sentences, combined with restricted prosecutorial discretion to reprieve offenders, could reasonably be thought to promote consistent treatment of capital offenders.\textsuperscript{191} However, the theory based on notions of excessiveness outlaws mandatory or even overly restrictive sentencing approaches because it assumes that a broad sentencing inquiry must always precede a judgment that an offender "deserves" the death penalty. It rejects the assumption that forces the debate into the difficult arena of attempting to accommodate two conflicting objectives: consistency and the provision for mercy. Under this alternative view, the very function of the sentencing hearing is to resolve the foundational question regarding the "just deserts" of the capital offender.

Also, principles of punitive excess, unlike the consistency theory, can easily explain regulatory efforts focused exclusively on the sentencing decision. The goal of "consistency" in sentencing decisions seems only to make sense as an effort to produce an equitable distribution of death

\textsuperscript{190} See, \textit{e.g.}, Tison v. Arizona, 481 U.S. 137, 149 (1987)(stating that the criminal sentence must be directly related to the personal culpability of the offender); Penry v. Lynaugh, 109 S. Ct. 2934, 2955-58 (1989) (O'Connor, J. concurring)(concluding that the proportionality requires a connection between the punishment and the defendant's culpability).

\textsuperscript{191} See discussion \textit{supra} note 142.
sentences among all those who have committed capital crimes. However, if anything is clear about the administration of the death penalty, it is that most death-eligible offenders escape the death penalty through discretionary decisions made outside the sentencing proceeding. In Georgia, for example, prosecutors have unfettered discretion to charge or plea-bargain capital cases in a way that will reprieve death-eligible offenders. Prosecutors also have unfettered discretion over whether to abandon pursuit of the death penalty for those convicted of capital crimes. The Georgia executive branch also has unfettered discretion to extend executive clemency to those under death sentences. Consequently, even if Georgia imposed sentencing standards that actually channeled or guided the sentencer's decision—which it has not—the line separating capital offenders who received death sentences from those who were spared would continue to defy rational explanation; indeed, commentators have argued that decreasing sentencer discretion to extend reprieves may increase the number of standardless reprieves extended at the non-sentencing stages. The "consistency" theory cannot then provide an easy explanation for focusing regulations exclusively on the sentencer. By contrast, the punitive excess view is not undermined by a failure to regulate these non-sentencing stages because it does not claim to strive for the kind of consistency advocated by the authors. Ensuring that death sentences are only imposed on the deserving does not demand that all who deserve death sentences receive them.

Finally, the view that the eighth amendment protects against punitive excess provides independent roles for the eighth and the fourteenth amendments. The consistency view simply assumes that the eighth amendment shares the fourteenth amendment's function, rendering the eighth amendment's regulatory role "superfluous." Of course, correctly analyzing the legitimate source in the Constitution of equality de-

192. Shortly after Furman, commentators noted that this would be the reality of even the new statutes. See, e.g., Note, supra note 21, at 1712-13 (stating that the new statutes do not eliminate the arbitrariness of sentencing, but just alter the stages in the criminal process in which arbitrariness can arise). In his opinion supporting Gregg, Justice White cast doubt on whether this would be true, arguing that prosecutors would generally pursue the death penalty in any case in which they thought they could obtain it. See Gregg v. Georgia, 428 U.S. 153, 225-26 (White, J., concurring). This view was facially implausible, however, and the Baldus study demonstrates that the vast majority of death-eligible offenders in Georgia are spared other than through the decision of sentencing juries. See, e.g., Equal Justice, supra note 15, at 232-34. For example, among other points of "leakage," in more than two-thirds of the cases in which a capital conviction obtains, the prosecutor nonetheless declines to pursue the death penalty. Id. at 327.
193. Gregg, 428 U.S. at 199.
195. See, e.g., Bentele, supra note 5, at 621-38 (describing clemency structure in Georgia).
196. See, e.g., Note, supra note 21, at 1714-16 (stating that impulses to exercise discretion promoting leniency in capital cases become stronger when discretion in the sentencing stage has been restricted).
197. See Polsby, supra note 26, at 27.
mands does not help clarify how to enhance equality in the distribution of capital sentences. That question, while difficult, is unavoidable if society does not respond to the inevitability of some inequality by abolishing the death penalty. However, my point here is that by recognizing that this equality goal builds on the fourteenth amendment, we clarify that the eighth amendment must regulate capital sentencing, if at all, based on some independent objective. That conclusion, in turn, demands that we not obscure the true basis for assessing the Court's efforts to regulate capital sentencing under the eighth amendment by asking only whether it has pursued equality.

III. Pursuing Just Death Sentences as an Eighth Amendment Objective

Has the Court fulfilled the eighth amendment objective of limiting capital sentences according to retributive ideals? Evaluating the Court's efforts from this perspective can be separated into two inquiries. First, has the Court sought to ensure that capital sentencers only impose the death sentence on those deemed to deserve it? Secondly, has the Court sought to ensure that sentencer assessments of offender deserts are sufficiently accurate to vindicate the protection? The answer to the first issue is no, which highlights the central logical flaw in the Court's eighth amendment regulation of capital sentencing. However, the answer to the second question also is no, which underscores the need for certain special protections to ensure reasonable accuracy in the assessment of offender deserts.

A. Evaluating the Court's Efforts to Ensure Sentencer Judgments About Offender Deserts

The true eighth amendment problem with a statute like Georgia's is not difficult to detect. As we already have seen, the justification for a separate sentencing inquiry in every capital case builds on the broad, subjective nature of the desired desert assessment. We cannot adequately incorporate all the various facets of offender deserts in the definition of an offense. Of course, we must resolve the level(s) of generality at which the desert inquiry should proceed. I have argued elsewhere that we should ask the capital sentencer two questions. The first should call for a broad evaluation of the offender's "culpability" for the capital crime alone, and the second should aim to produce an assessment of

198. See discussion and authorities cited supra notes 136-44.
200. See supra note 190 and accompanying text.
201. See Howe, supra note 25, at ___
202. In the criminal law, "culpability" has a different meaning for sentencing purposes than for purposes of deciding guilt or innocence. As Professor Wise has explained:
his "moral merit" based on all of his life works. The offender should be found deserving of the death penalty under both inquiries to receive that punishment, though states could also impose additional inquiries as prerequisites to a death sentence. These also are the kinds of general inquiries that the Court has suggested should control the capital sentencer's decision.203

Statutes like Georgia's204 simply do not require that these kinds of desert judgments precede a death sentence. The jury's determination that one or more of the aggravating circumstances listed in the statute are present does not satisfy this need. Several of the aggravating factors in the statute arguably serve utilitarian more than retributive ends. For example, one who kills during the commission of a serious felony does not automatically deserve the death penalty more than other murderers who are not death-eligible such as one who kills his spouse to pursue his paramour. The argument for distinguishing these two situations is only that the death penalty may be a more effective deterrent to murder for those engaged in crimes for which they already are subject to long prison terms. Further, while some of the statutory circumstances may bear on offender deserts, they comprise only a few of a multitude of factors requiring consideration. For example, we cannot say, without considering a defendant's volitional capacity at the time of the offense, that because a

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Wise, The Concept of Desert, 33 Wayne L. Rev. 1343, 1352-53 (1987). I also am using "culpability" in a way that can account for any differences in the harm produced by the offender. See id. at 1352.

203. The required finding of sufficient "culpability" builds on two sources: first, declarations from the Court about the centrality of "culpability" judgments to the capital sentencing decision, see, e.g., Penry v. Lynaugh, 109 S. Ct. 2934, 2947 (1989); second, the Court's ruling in Coker v. Georgia that the defendant's prior record, which included a capital murder, did not affect the conclusion that death was an excessive punishment for rape, see Coker, 433 U.S. 584, 599 (1977). The required finding of sufficient "moral merit" builds on the ruling in Lockett and its progeny that any evidence bearing on the offender's background or character, regardless of whether it relates to his culpability, is relevant to the sentencer's inquiry. See Lockett v. Ohio, 438 U.S. 586, 604 (1978)(capital sentencer must be allowed to reject the death penalty based on "any aspect of a defendant's background or character, regardless of whether it relates to his culpability, is relevant to the sentencer's inquiry. See also Hitchcock v. Dugger, 481 U.S. 393, 397 (1987)(requiring that sentencer be allowed to reject the death penalty based on mitigating factors such as, the offender was "one of seven children . . . earned . . . [his] living by picking cotton . . . that his father had died of cancer and . . . that [he] had been a fond and affectionate uncle." Cf. Zant v. Stephens, 462 U.S. 862, 885-86 (indicating that prosecutor may introduce evidence of defendant's prior record at the sentencing hearing). 

204. See supra note 34.
killing was "outrageously or wantonly vile, horrible, or inhuman" the offender deserves the death penalty.

A Georgia jury's authority to exercise unfettered discretion after finding one or more of the aggravating circumstances also does not ensure that the jury will judge the offender's deserts before imposing a death sentence. The jury can find that the offender does not deserve death—perhaps because he is retarded or mentally ill or was inebriated when the crime occurred—but still impose a death sentence to incapacitate an apparently dangerous offender or to deter other potential murderers. The jury can employ any standard that it chooses at this ultimate stage of decisionmaking.

There is also reason to doubt that sentencers usually employ desert standards at this final discretionary stage although that might be their natural tendency. Even for sentencers who approach their task with this "usual" perspective, the aggravating circumstances themselves tend to influence sentencer judgments, which distorts the results, particularly if those factors are not entirely desert-oriented. Distortion also arises because prosecutors are not bound to argue within desert parameters. Especially where the offender's deserts are low, the prosecutor is likely to pitch the issue in some other direction. Given the unbounded nature of the sentencing inquiry that the Court approved in Gregg, lower courts have frequently declined to prevent prosecutors from arguing utilitarian justifications for the capital sanction.

If the goal of the sentencing inquiry is to ensure that a judgment of deserts precedes any death sentence, it makes sense to tell the jurors. We need not conduct an empirical investigation to see that the Georgia system is flawed. Yet, one aspect of the authors' empirical efforts bears out the problem at the same time that it undermines their efforts to measure "consistency" according to a desert measure. One of their methods for defining deserts was empirical: they used statistical techniques to identify case characteristics that correlated with jurors' actual sentencing de-

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206. See Equal Justice, supra note 15, at 596 app. J.

207. See, e.g., Brooks v. Kemp, 762 F.2d 1383, 1411-12 (11th Cir. 1985) (authorizing arguments for the death penalty on incapacitation grounds); Collins v. Francis, 728 F.2d 1322, 1340-41 (11th Cir. 1984) (authorizing prosecutors to argue for the death penalty on general deterrence grounds); Conner v. State, 251 Ga. 113, 303 S.E. 2d 266 (1983) (authorizing incapacitation argument for death penalty).

208. The authors declare that they are measuring "culpability." It is apparent, however, that they are not focusing solely on the offender's blameworthiness or level of responsibility for the capital crime, though they imply the contrary. See Equal Justice, supra note 15, at 68 n. 16. For example, they deem it appropriate in measuring "culpability" to consider the offender's prior record. This suggests that they are really speaking of what we might call the offender's "blameworthiness" or "personal responsibility" for a new crime.
cisions and then excluded the features they deemed illegitimate. But there were problems with this effort. First, some of the factors that were weeded out were not inherently "illegitimate" even if they did not appear to relate to deserts. Moreover, the factors and weights that the authors found proper implied a very questionable notion of deserts. For example, the analysis revealed that if an offender was in the military, he was eight times more likely to receive a death sentence than a civilian, all other factors held constant. Similarly, the authors accept that the odds that the defendant would receive the death penalty should be 38.36 times greater if he had an insurance-proceeds motive than if he did not, while the odds that a defendant would receive a death sentence should be only 8.73 times higher if the killing was especially gruesome or "bloody." Furthermore, the authors deem it appropriate to consider the odds of a death sentence 3.14 times higher if the offender had a prior conviction for a serious crime of violence such as murder, armed robbery, or rape. One might conclude that all of these various differences are explained more easily on utilitarian or other rationales than on common notions of desert. Indeed, all of these problems hint at a fairly major flaw with the authors' empirical efforts to define deserts: there is no reason to think that jurors are relying solely or even substantially on deserts to decide when to impose the death penalty.

209. The measures and their respective weights are reported in tables, see Equal Justice, supra note 15, at 587-601 app. J, both before and after the excision of "illegimates." See id. at 56-57 (explaining the meaning of the tables).

210. For example, the analysis indicated that cooperation by the defendant with the authorities, even after efforts to control all other pertinent factors, tended to increase, by sixteen times, the chances of a death sentence. See id. at 596-97. The authors concluded that this was a perverse characteristic and excluded it from the prediction model. See id. at 193 n. 44. Likewise, if there were one or more "minor aggravating circumstances" present, the chances of a death sentence significantly decreased compared to the case in which there were no such aggravating circumstances. See id. at 596-97. Finding this effect perverse, the authors also excluded it. See id.

211. See id. at 597.

212. See id.

213. The authors' other empirical method for defining deserts, which they call "culpability," also presents a highly distorted perspective of deserts. One of the three major factors found to greatly influence the likelihood of a death sentence, according to Professor Barnett, was whether the victim was a stranger to or an acquaintance of the defendant. If the victim was a stranger, the defendant was much more likely to receive the death sentence. See supra note 66 and accompanying text. It is unclear, however, why this factor should be thought to bear on the offender's deserts. Instead, it may suggest the extent to which jurors see the defendant as a threat to people like themselves, since, though they can largely control with whom they associate, they have much less control over being attacked by a stranger. This basis for judging the defendant builds on a utilitarian notion.

The authors also employ "a priori" measures of "culpability." One model, used to compare armed-robbery murder cases, rested on their own intuitions about what factors legitimately ought to bear on the sentencing decision. However, it is impossible to judge the validity of that model since the authors do not explain it in sufficient detail. See Equal Justice, supra note 15, at 49. The other involved measuring the number of statutory aggravating circumstances present in a case. However, the textual discussion, supra notes 204-07, demonstrates the flaws in this approach to measuring culpability.
Allowing the sentencer to rely on utilitarian rationales for death sentences not only abandons the notion that the eighth amendment seeks to protect the undeserving from the death penalty, but it also conflicts with the prohibition in existing doctrine on mandatory death sentences. While it is impossible to measure deserts according to objective rules that can be incorporated into the definition of the crime, that is not true of utilitarian measures. A legislature could rationally conclude that executing all aggravated murderers defined according to certain objective standards provides optimal societal benefits, including the greatest reduction in serious crimes. The only way for the Court to reject this conclusion, other than by simply rejecting utilitarianism, would be to fashion its own measure of optimal utility. There would be no reason to ask sentencers where the line should be drawn in individual cases, since that question does not turn on the facts and circumstances of each case. Consequently, assuming utilitarian justifications were appropriate, the Court could not easily justify a decision to reject the legislature's choices. This conclusion reconfirms that ensuring that a desert judgment precedes a death sentence must be the function of the mandated capital sentencing hearing.

In the end, then, it is the ability of Georgia jurors to impose the death penalty on utilitarian (or concededly improper) rationales, rather than their ability to act arbitrarily toward offenders who deserve death, that demonstrates why the Georgia system betrays eighth amendment values. It is hardly enough that the Georgia system allows capital

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214. The problems with this kind of system can be highlighted by considering the case of a retarded or mentally impaired offender. Though the malady may be seen as rendering the offender less deserving of death, execution still may be justified as deterring other potential murderers or as incapacitating the defendant. The defendant's malady may even be viewed as enhancing his likely future dangerousness since it could be thought likely to persist. Consequently, powerful mitigating evidence from a desert perspective becomes irrelevant, or worse, aggravating, when utilitarian objectives are pursued.

215. This point remains true even though some utilitarian measures, such as the defendant's future dangerousness, require individualized consideration. A legislature could rationally conclude that utilitarian benefits like crime reduction and cost savings that arise from a mandatory death penalty outweigh the benefits of sparing defendants deemed not to present great risks of future violence. While it is possible to understand why the eighth amendment would limit the use of the death penalty to those deemed deserving after individualized inquiry, there is no basis under the eighth amendment for allowing a legislature to pursue one utilitarian objective but not another.

216. The authors at one point appear to contradict themselves about the penological rationales that they believe capital sentencers should apply. They build the PRS on the assumption that "culpability" defines the normative standard for judging capital sentencing cases. However, one of their criticisms of the Georgia system in their conclusion contradicts this normative assumption:

Finally, the statutory guidelines and the typical jury instructions are also deficient in another respect: they make no reference to the goals of retribution or deterrence that the sentencing decision is supposed to implement. Such guidance would at a minimum ensure that different juries would approach the sentencing decision from a somewhat similar perspective when deciding how to evaluate the circumstances of particular cases. Equal Justice, supra note 15, at 410 (emphasis added).
sentencers to render desert judgments whenever they happen not to have been misled by the aggravating factors or by the arguments of the lawyers. The only Eighth Amendment theory that can coherently explain why we should allow sentencers to render desert assessments is one that logically demands such judgments before the imposition of a death sentence. The Court's failure to require systems to conform to that objective describes the overriding flaw in its Eighth Amendment decisions regulating capital sentencing.217

B. The Eighth Amendment Quest For Accuracy

Efforts to regulate capital sentencing assessments raise a second set of Eighth Amendment problems that implicate concerns about arbitrariness and discrimination. Ensuring that only offenders who deserve the death penalty receive that sanction demands reasonable accuracy in desert determinations. However, given the subjectivity of the desert inquiries, there is reason to question just how consistent the judgments would be. These problems raise questions about whether capital punishment should be invalidated altogether under the Eighth Amendment; at the very least, they augur for special protections to attempt to vindicate the central Eighth Amendment objective of ensuring that only the deserving receive the death penalty.

An overriding obstacle to producing accurate judgments about offender deserts stems from the sentencer's inability to resolve certain essential factual issues. First, we do not know enough about the functioning of the human mind to trace the root causes of a murderous act. We know little even about how diagnosable brain disorders or psychiatric syndromes actually influence decisions to kill.218 Moreover, we have very little understanding about what specific influences in an offender's environment that were beyond his control have affected his mental functioning. We also do not know how to weigh the more general claim that "slums or poverty or oppression of minority groups" contrib-

217. The Court has repeatedly upheld other systems that fail, like Georgia's, to require the capital sentencer to render judgments about whether the offender deserves death as a precondition to imposing the death penalty. See, e.g., Walton v. Arizona, ___ U.S. ___, 110 S. Ct. 3047, 3056 (1990)("[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence"); Blystone v. Pennsylvania, ___ U.S. ___, 110 S. Ct. 1078, 1083-84 (1990)(same); Boyde v. California, ___ U.S. ___, 110 S. Ct. 1190, 1196 (1990)(same); Lowenfield v. Phelps, 484 U.S. 231, 246 (1988)(same); Proffitt v. Florida, 428 U.S. 242, 258 (1976)(the requirements of Furman are satisfied when the sentencing authority's discretion is guided and channelled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition). Moreover, because virtually every capital-sentencing statute in the country is patterned on the statutes upheld in 1976, the problems that apply to the Georgia statute apply widely throughout the country. However, for a statute that appears to satisfy the Eighth Amendment, see 1952 Conn. Penal Code § 53a-46a(d).

ute to violent conduct.\textsuperscript{219} Further, even if we could identify the correct answers to these kinds of questions, no system exists for resolving which explanations or combinations thereof should suffice to relieve the murderer of "deserving" death. The determination becomes even more complex when one must factor in a lifetime of good and bad acts and the myriad of other aggravating and mitigating circumstances concerning the offender's crime.\textsuperscript{220} Nor can sentencers know how death by execution compares to life imprisonment in terms of the severity of the suffering produced. Even if a general consensus existed about the level of retribution associated with a life prison term, sentencers cannot know what will come after death. This kind of comparative evaluation is made all the more impossible by the jury's inability to assess the varying retributive effects of these sanctions on individual offenders. What may bring severe hardship to one offender may impose little suffering on another. Because we cannot fathom the "correct" answers to these various kinds of questions, sentencers' views on them will simply reflect individual guesses and may vary widely. Consequently, capital-sentencing decisions may hinge far more on the particular perspectives of the sentencer than on the particularities of the offender's background and crime.

We also should ask whether sentencer judgments about offender deserts inevitably will be distorted by improper influences. For example, sentencers may be swayed inappropriately toward imposing a death sentence by their perceptions that an offender poses a future danger to correctional workers or the general public. This concern about the incapacitating effects of the alternative sanction may cause sentencers to favor the death penalty even for an offender they would not otherwise judge to deserve death. That problem may be most acute where prosecutorial argument subtly or explicitly emphasizes the dangerousness of the offender.

In any state not providing the sentencer with the alternative penalty of life without possibility of parole, sentencers may also impose execution primarily to avoid the possibility that parole authorities will fail to ensure a sufficiently retributive sanction.\textsuperscript{221} To tell the sentencer of the possibility of parole from a life prison term surely invites sentencers to act on their fears that the offender may be inappropriately set free. Instructing

\textsuperscript{219} Id. at 183 (arguing that these are not significant causes of crime). \textit{But see} Goodpaster, \textit{The Trial For Life: Effective Assistance In Death Penalty Cases}, 58 N.Y.U. L. Rev. 299, 335 (1983)(arguing that the defense in a capital case should "attempt to show that the defendant's capital crimes are humanly understandable in light of his past history and the unique circumstances affecting his formative development.").

\textsuperscript{220} The notion that it is impossible accurately to proportion punishment to crime is not novel. The Italian criminologist, Raffaele Garofalo (1852-1934), spurned the idea decades ago: "There are too many elements to be taken into consideration. We have to deal with the gravity of the material harm, that of the intrinsic immortality of the act, that of the danger, and finally, that of the alarm." Wise, \textit{supra} note 202, at 1360 (quoting Garofalo).

\textsuperscript{221} \textit{See generally} Gillers, \textit{supra} note 199, at 1107-10 (jury's knowledge of review procedures may over-influence its imposition of the death penalty).
the sentencer not to consider the possibility of parole in reaching its decision also arguably provides insufficient protection. It highlights the existence of release options and thereby invites sentencers to act on misperceptions that the offender will be eligible promptly for release.

In reaching broad desert judgments, sentencers also may subconsciously consider inappropriate factors such as the race, ethnic background, state of residence, and sexual preference of the defendant and the victim. None of these factors bear on an offender's moral guilt for the capital crime or on his general moral worth. Of course, we cannot predict what effect these influences would have based on empirical studies of existing capital sentencing systems. Unless the system under investigation limited the sentencer to assessing deserts—which no current system does—it would be impossible to distinguish discrimination in the sentencing of those deemed deserving of the death penalty (arising from the sentencer's authority to extend mercy, for example) from inconsistency in the application of the desert standard itself. The difficulty is that we cannot define a priori what level of deserts warrants the death penalty or how to decide when that level of deserts has been established. Nonetheless, despite the impossibility of empirical proof, it surely is realistic to believe that many capital sentencers would be influenced by inappropriate factors. Indeed, some respected lawyers have argued that improper considerations would always predominate in determining who would be executed, regardless of the sentencing standards promulgated by the legislature.

Despite these various problems with obtaining meaningful desert judgments, serious obstacles confront any claim that the protection against cruel and unusual punishment outlaws capital punishment altogether. The language of the fifth amendment reveals that the framers did not foresee that the Constitution would proscribe capital punishment in all circumstances. The language of the fourteenth amendment suggests

222. The Supreme Court has recognized the reality that jurors in some instances may not be able to ignore certain evidence so that to merely instruct them to do so is an insufficient protection. See, e.g., Jackson v. Denno, 378 U.S. 368 (1964)(invalidating New York procedure in which jurors were allowed to determine whether a confession was "involuntary" and told to ignore any such confession).

223. One study revealed a common misperception among Georgians that one sentenced to life imprisonment was eligible for parole in only seven years, which substantially underestimated actual eligibility requirements. See Paduano & Smith, Deadly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty, 18 Colum. Hum. Rts. L. Rev. 211, 220-25 (1987).

224. See, e.g., A. Dershowitz, The Last Resort, in A Punishment in Search of a Crime 329, 331 (1989)("Legal rules do not determine who gets executed. What determines who gets executed is the race of the victim—that's the single most important factor—the quality of the lawyer and the wealth of the client. . . . There is another thing we haven't looked at systematically, yet, but that I am convinced has an effect. That is, the locale. That is, whether the defendant and victim comes from the town in which the trial is occurring.").

225. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . nor shall any person
that the same view was held by its promulgators.\textsuperscript{226} This suggests that for the abolitionist argument to prevail, the death penalty must have become unacceptable under some consensus of enlightened opinion about the deserts of criminal offenders.\textsuperscript{227} Of course, the notion that the eighth amendment should follow evolving notions of desert is not novel. That very principle provided the ultimate basis for outlawing capital punishment for offenses like rape in \textit{Coker},\textsuperscript{228} and, offered the only coherent explanation for individualized capital sentencing mandated in \textit{Woodson} and \textit{Lockett}.\textsuperscript{229} It is consistent with this underlying principle to conclude that the eighth amendment also should proscribe the use of the death penalty altogether if we cannot measure the deserts of capital offenders with sufficient accuracy. Nonetheless, the argument for \textit{per se} abolition, derived from societal standards of decency, collides with the strong public support for the death penalty as a permissible sanction for murder.\textsuperscript{230} Of course, the evidence of public support for the death penalty itself might be challenged as reflecting uninformed or illegitimate views. Indeed, Professor Amsterdam argued in \textit{Furman} that it was only because the death penalty was not evenhandedly applied that its use did not "pro-voke public revulsion."\textsuperscript{231} Yet Justices White and Stewart, who wrote the two opinions rejecting the abolitionist course in 1976, explicitly relied upon that evidence to bolster their decisions.\textsuperscript{232} Thus, in interpreting the eighth amendment the Court has been unwilling to reject as invalid the evidence of popular support for the death sentence as a penalty for murder.\textsuperscript{233}

\begin{itemize}
\item be subject for the same offence to be twice put in jeopardy of life or limb; \ldots \text{nor be deprived of life, liberty, or property, without due process of law.}
\end{itemize}

\textit{U.S. Const. amend.} V.

226. See \textit{U.S. Const. amend. XIV}, \S 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law").

227. See, e.g., Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion) ("The amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

228. See supra notes 184-89 and accompanying text.

229. See supra notes 151-62 and accompanying text.

230. Such evidence exists in the legislative reaction to \textit{Furman}, see, e.g., Note, supra note 21, at 1699-1700 (detailing the 28 states that enacted new death-penalty statutes in the first two years after \textit{Furman}), public opinion polls, see, e.g., Hubbard, supra note 5, at 1136 n.5 ("polls indicate that popular support for the death penalty is overwhelming"), and the willingness of capital sentencers to impose death sentences; see Note, supra note 30, at 407-08 (noting that as of November, 1990, 142 persons had been executed since \textit{Furman} and at least 2393 others were under sentence of death).


233. The Court also could reject the notion that its obligation in applying the eighth amendment is merely to enforce the prevailing consensus of decency rather than to lead the way in enforcing "broad claims of general humanity." \textit{Id.} at 61 (quoting Burke, \textit{Speech to the British Electors: A Defense of his Conduct in Parliament}, in Orations and Arguments by English and American Statesman 121 (B. Bradley ed. 1894)). The propriety of that approach is debatable, however, and, in any event, it is uncertain that a major-
Of course, this leaves open the question of how to explain our inability to enforce an eighth amendment command in all cases. Because accuracy or even great consistency is infeasible, some will be sentenced to die who do not deserve it in an absolute sense or even according to the views of most societal members. The answer must rest on an assumption that sufficient consensus exists about the meaning of terms like "culpability" and "moral merit" that generally will be reflected in capital-sentencing decisions. It is appropriate to question the propriety of this response given that it admits the inevitability of some erroneous decisions to impose the death penalty. Sentencers cannot measure offender "culpability" or "moral merit" with great accuracy or consistency. Still, some would contend that our inability to measure deserts accurately not only fails to call for abolition, but instead calls for reconsidering whether the eighth amendment really incorporates a proportionality principle.

Assuming the viability of the proportionality doctrine in the capital context, however, rejecting the argument for per se invalidation of capital punishment at least calls for serious efforts to vindicate the core eighth amendment objective of ensuring that only those who deserve the death penalty receive it. Our human inability to fathom "correct" answers to some of the subsidiary questions involved in desert assessments is irremediable and leaves room for the arbitrary influence of variable sentencer opinions. Yet some of the other problems are not beyond repair. For example, two protections urged by Professor Gillers are helpful in promoting "accurate" judgments of offender deserts. First, the sentencing body should be a jury, rather than a judge. A jury, more than a judge, is likely to include members whose views on the death penalty approximate of the current Justices would disfavor capital punishment even were they to assume the roles of Burkean legislators.


Despite precautions, nearly all human activities, such as trucking, lighting, or construction, cost the lives of some innocent bystanders. We do not give up these activities, because the advantages, moral or material, outweigh the unintended losses. Analogously, for those who think the death penalty just, miscarriages of justice are offset by the moral benefits and the usefulness of doing justice. For those who think the death penalty unjust even when it does not miscarry, miscarriages hardly can be decisive.

235. Cf. R. Berger, Death Penalties 40-41, 73 (1982)(arguing that a protection against disproportional punishments has no proper place in eighth amendment interpretation).

236. See Gillers, supra note 199, at 1111. Professor Gillers argues, as I have, that the capital sentencer should focus on offender deserts. However, he describes the sentencer's choice as one between "[m]ercy, and its converse, retribution", and, thus, appears not to view "mercy" as a concept outside the realm of rational justice, as I have. Id. In addition, Professor Gillers offers reasons different than mine to support his conclusion that offender deserts must be the focus of the capital-sentencing decision. He argues for a desert focus because the sentencer cannot produce accurate predictions about an offender's future dangerousness. See id. at 1095-1107. I agree with his conclusion, though I do not think it clarifies the affirmative argument for why a desert assessment should be a prerequisite to a death sentence.

237. See id. at 1084-95.
mate the societal consensus. If required to act by at least a substantial majority, a jury will more likely vindicate community views on the limits of appropriate retribution. Secondly, the sentencer should not be informed of any downward revisionary authority on the part of the executive branch regarding a life prison sentence. For reasons already mentioned, I would go further by requiring that jurors be told that no provision exists for parole or commutation of a life prison term. The Court already has declined to pursue these sorts of protections; it has allowed capital sentencing by a single judge who may have extreme views favoring the capital sanction and has authorized states to tell capital sentencers of the executive's downward revisionary authority over life sentences. Were the Court to pursue the notion that desert judgments should govern the capital sentencer's decision, however, it should also recognize the problems with these holdings.

The Court also should articulate the limits on attorney argument in capital-sentencing trials. Professor White has already described the tendency of prosecutors to extend well beyond arguments based on retribution in urging capital sentencers to impose death. He has also noted the absence of consistent guidance from the courts about the proper boundaries on prosecutorial summation in death-penalty trials. This problem must be addressed if desert judgments are to be the central focus of capital-sentencing decisions. The boundaries of appropriate summation must depend in part on what questions, other than the mandated desert inquiries, a state might choose to employ as a basis for allowing the capital sentencer to reprieve offenders from the death penalty. However, the Supreme Court can at least start with the proposition that where a state limits the sentencer's discretion to reprieve offenders based on the mandated desert inquiries, prosecutors cannot urge jurors to vote

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238. See id; cf. White, Fact-Finding and the Death Penalty: The Scope of the Capital Defendant's Right to Jury Trial, 65 Notre Dame L. Rev. 1, 21-27 (1989)(arguing that the sixth amendment requires a jury to make certain of the findings underlying the capital sentencing decision).

239. See Gillers, supra note 199, at 1107-10.

240. If it is deemed unacceptable not to tell sentencers the truth about the existence of parole eligibility of inmates after a certain term of years, the Court must resolve whether states can fail to offer the capital sentencer the option of imposing a life-imprisonment term without possibility of parole and, if so, what is the minimum acceptable term before the prisoner will become parole eligible. States cannot offer the sentencer an option to the death penalty that involves such a small term of required incarceration that death is chosen by default. See generally Gillers, supra note 199, at 1109-10 (a state that offers inadequate alternatives to a death sentence limits the jury to "an artificial choice").


243. See White, supra note 6, at 112-30.

244. See id. at 113.
for death based on general deterrence, incapacitation, or other unrelated arguments.

The Court also could help to remedy the influence of particularly odious factors on capital sentencers’ evaluations of offender deserts. As with other decisions to reprieve capital offenders, the Court could require that capital sentencers certify that they have not considered factors like the race, ethnic background, sexual preference, or place of residence of the offender or of the victim. This protection would do more than the Court has previously accomplished to encourage capital sentencers to confront their biases and to strive to overcome them. This course also would underscore the Court’s concern with ensuring eighth amendment justice.

CONCLUSION

*Equal Justice and the Death Penalty* provides valuable information about the functioning of Georgia’s archetypal capital-sentencing system. The statistical studies it describes indicate that death penalty decisions in Georgia frequently rest on concededly inappropriate factors — particu-

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245. The death penalty provisions of the Anti-Drug Abuse Act of 1988 incorporate this mandate. Title VII of the Act permits the death penalty to be imposed for some drug-related killings. One of the provisions regulating the sentencing hearing reads:

> In any hearing held before a jury under this section, the court shall instruct the jury that in its consideration of whether the sentence of death is justified it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or the victim, and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant, or the victim, may be. The jury shall return to the court a certificate signed by each juror that consideration of the race, color, religious beliefs, national origin, or sex of the defendant, or the victim, was not involved in reaching his or her individual decision, and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant, or the victim, may be.


246. The Court also should clarify the sphere of evidence that is necessarily relevant at the sentencing hearing after resolving the nature of the mandated desert questions to be put to the sentencer. I have argued that the sentencer should resolve both the offender’s culpability for the capital offense and his general moral worth. See *supra* notes 201-03 and accompanying text. If the Court were to conclude that the only mandatory question should focus on the offender’s culpability for the capital offense, it should narrow the current *Lockett* test of relevancy, which declares any evidence about the offender’s character, record, or crime, relevant to the sentencing inquiry regardless of whether it relates to culpability. Further, if the Court were to choose a dual approach, it should mandate a balancing of the probative effects of evidence bearing on the general moral worth question against its prejudicial effects. For example, evidence that the offender did not attend church regularly is more prejudicial than probative in resolving the offender’s deserts. Whatever approach is chosen, it is unclear whether the admissible evidence should be limited to evidence about the offender or his crime. Evidence about the nature of life in prison or execution procedures, for example, would appear to bear on the retributive effects of each sanction. For further discussion of these issues, see Howe, *supra* note 25, at ___.
larly on the race of the victim. Of course, the Supreme Court declined in the McCleskey case to reject the Georgia system based on this evidence. Nonetheless, these studies may have positively influenced the Court's decisions in other cases. It was nearly a year after the Court received McCleskey's certiorari petition\(^2\) that it decided Turner v. Murray\(^2\) and Batson v. Kentucky.\(^2\) Both cases overruled longstanding precedent to protect against racial bias among jurors in criminal cases. In Turner, the Court held that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias. In Batson, the Court restricted the ability of prosecutors in cases involving minority defendants to use peremptory strikes to eliminate potential jurors of the defendant's race. The Court made no reference in its opinions in either of those decisions to the Baldus studies. However, no other reason is apparent for the Court's rather sudden decision to alter existing principles governing jury voir dire and selection. The evidence from the Baldus studies may have influenced some of the Justices.

Despite the possible influence of the Baldus studies on the outcomes in Turner and Batson, the authors of Equal Justice and the Death Penalty contend that the Court failed to heed their evidence on the claim to which it was most relevant. In the McCleskey decision, the Court indeed demonstrated its ultimate unwillingness to demand statistical equality in the distribution of death penalties. The statistical evidence presented, which the Court purported to assume was valid, revealed that a defendant whose victim was white was 4.3 times more likely to receive the death penalty than a similarly situated defendant whose victim was black. That degree of disparity based on an illegitimate factor is unfathomable if one of the goals for regulating capital sentencing truly is consistency\(^2\) in the distribution of death sentences.

Though I disagree with the Court's relative indifference after Furman to the potential for improper discrimination in the distribution of death sentences (and believe abolition was the only truly effective remedy), I also disagree in two general respects with the authors' legal analysis of the McCleskey problem. First, I do not think it at all clear that, having forsaken the abolitionist course, the Court should decide the validity of capital punishment systems based on their propensity to produce statistical consistency in the sentencing of those who deserve death sentences.

\(^2\) McCleskey's lawyers filed the petition for certiorari in May, 1985. See S. Gross & R. Mauro, supra note 9, at 159. However, the Court did not finally grant certiorari in the case until July 7, 1986. See McCleskey v. Kemp, 478 U.S. 1019 (1986). "It is extremely unusual for the Court to withhold action for so long and then to grant a hearing in a major precedential case." S. Gross & R. Mauro, supra note 9, at 159 (emphasis in original). Thus, by the time the writ of certiorari issued, "it was already apparent that the case was uncommonly troublesome." Id.


A variety of intractable problems surround the view that the constitution demands statistical consistency in the distribution of death sentences. I believe that courts can only feasibly promote consistency in this area by mandating specific procedural protections that states can adopt and rely on. The flaw in the *McCleskey* Court's actions therefore center not as much on its unwillingness to adjudicate based directly on statistical evidence as on its earlier failure to implement any meaningful protections against improper discrimination in the capital-selection process.

My second objection to the authors' analysis focuses on their view that the eighth amendment mandates equality. There are two normative objectives for regulating capital sentencing procedure. One is to promote evenhandedness in the distribution of death sentences among those who deserve death. That is a fourteenth amendment concern. The other objective, at least as important, is to ensure that only those capital offenders who actually deserve the death penalty receive it. That is the eighth amendment objective. The authors' assumption that consistency is the objective under both the eighth and the fourteenth amendments stems from their failure to acknowledge that not all capital offenders deserve the death penalty and, thus, that equality is not the only explanation for the decision in *Furman*. Protecting against discrimination on odious grounds among those who deserve the death penalty is essential. Yet, by suggesting that inconsistency is the central problem with current capital sentencing jurisprudence, the authors obscure the true flaw in the Court's effort at eighth amendment regulation: its failure to ensure that the death penalty is imposed only on the deserving.