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CAPITAL PUNISHMENT: A CRITIQUE OF THE POLITICAL AND PHILOSOPHICAL THOUGHT SUPPORTING THE JUSTICES' POSITIONS

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I. INTRODUCTION

In *Furman v. Georgia*,[1] Justice Brennan argued: "In comparison to all other punishments today . . . the deliberate extinguishment of human life by the State is uniquely degrading to human dignity."[2] Four years later, the Supreme Court in *Gregg v. Georgia*,[3] upheld capital punishment as administered in Georgia.[4] Companion cases upheld the death penalty in Florida and Texas.[5] Although executions in

1. 408 U.S. 238 (1972).
2. *Id.* at 291 (Brennan, J., concurring).
3. 428 U.S. 153 (1976).
4. *Id.* at 207.
5. *See* Proffitt v. Florida, 428 U.S. 242, 247 (1976) (upholding Florida's imposition of

the United States had ceased after 1967 because of legal challenges,[6] in 1977 they recommenced with the execution of Gary Gilmore in Utah.[7] By 1987 a total of ninety-three persons had been executed, including seventeen in Florida and twenty-six in Texas.[8] In that year, there was a total of 1,984 prisoners on death row, including 277 in Florida, 256 in Texas, and 116 in Georgia.[9] By 1990, a total of one hundred and twenty-one persons had been executed, including twenty-one in Florida and thirty-three in Texas.[10]

Furthermore, many states confine prisoners on death row more restrictively and afford them less recreation than other inmates.[11] Since their rehabilitation is considered irrelevant, they are denied opportunities for work and training.[12] In *Gregg*, Justice Brennan, dissenting, explained:

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capital punishment); Jurek v. Texas, 428 U.S. 262, 276 (1976) (finding imposition of death penalty in Texas constitutional).

6. AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: THE DEATH PENALTY 13 (1987).

7. *See id.* at 195 (listing persons executed in United States).

8. U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1988 670 (Katherine M. Jamieson & Timothy J. Flanagan eds., 1988).

9. *Id.* at 664.

10. *See The Political Stampede on Execution*, N.Y. TIMES, Apr. 4, 1990, at A9 (charting number of executions since 1976). On May 21, 1992, Roger Coleman was executed in Virginia despite his denial of guilt. Reporting his execution, CNN stated: "There have been 17 executions so far this year in the United States compared to 14 in all of last year." *CNN: CNN News* (CNN Television Broadcast, May 21, 1992) (transcript #33-1).

The 1990 Sourcebook of Criminal Justice Statistics reported the following history of executions in the United States:

	U.S.	*Texas*	*Florida*
1977 -	1	—	—
1979 -	2	—	1
1981 -	1	—	—
1982 -	2	1	—
1983 -	5	—	1
1984 -	21	3	8
1985 -	18	6	3
1986 -	18	10	3
1987 -	25	6	1
1988 -	11	3	2
1989 -	16	4	2

U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1990 tbl. 6.137, at 683 (Kathleen Maguire, et al. eds., 1990).

11. AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: THE DEATH PENALTY 147 (1987).

12. *Id.*

> The fatal constitutional infirmity in the punishment of death is that it treats "members of the human race as nonhumans, as objects to be toyed with and discarded. [It is] thus inconsistent with the fundamental premise . . . that even the vilest criminal remains a human being possessed of common human dignity."[13]

Brennan's argument is an approximation of what could be termed a Personalist position. In a broad sense this position represents the opposition to capital punishment grounded in respect for each person's human dignity.[14] Justice Marshall, who regularly joined Justice Brennan in dissent, offered arguments which are an approximation of a modern Utilitarian rejection of capital punishment similar to that of H.L.A. Hart in his book *Punishment and Responsibility*.[15] The con-

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13. *Gregg*, 428 U.S. at 230 (Brennan, J., dissenting).

14. Justice Brennan's argument appears to be inspired by modern Personalism. *See* BERNARD HARING, THE CHRISTIAN EXISTENTIALIST: THE PHILOSOPHY AND THEOLOGY OF SELF-FULFILLMENT IN MODERN SOCIETY 10-11 (1968) (characterizing Personalism as concerned with viewing each individual as "unprecedented, irreplaceable person in his uniqueness"). Haring presents the following view:

> The self of man in the lonely crowd often experiences the deepest self-estrangement, frustration, and lack of self-communication from which abstract thought and a materially oriented knowledge is totally incapable to free him. Modern psychology recognizes ipsation (from the Latin *ipse*, "self") as a severe illness, a sign of man's immaturity. Ipsation represents man's incapacity for genuine human communication and, in short, his inability to emerge from himself in a genuinely human manner. *Id.*

Haring further states:

> Man exists as a person in word and in love, i.e., he emerges from himself in such a manner that his remaining self is not diminished but increased. Love is already implied in the word that is directed to the Other, to the Thou. The deep dialogue that actualizes community between the Thou and the I is more than the mere confrontation, speech, and administration that principally serve organization.
>
> Modern Personalism, as represented by such philosophers and theologians as Ferdinand Ebner, Martin, Buber, Max Scheler, Emil Mounier, Gabriel Marcel, Theodor Steinbuchel, Romano Guardini, Emil Brunner, Karl Barth, Dietrich Bonhoeffer, Richard Niebuhr, is a Personalism of encounter and community in word and love.

Id. at 11. To Haring's list one should add, among others, DAVID GRANFIELD, THE INNER EXPERIENCE OF LAW, A JURISPRUDENCE OF SUBJECTIVITY (1988); JOHN MACMURRAY, THE FORM OF THE PERSONAL (1961), which offers the best foundation for Personalist thought in the Anglo-American world; JOHN MACMURRAY, PERSONS IN RELATION (1961); JOHN NOONAN, PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS (1976); and KARL WOJTYLA, THE ACTING PERSON (Andrzej Potocki trans., 1969). For a fuller comment on Personalism see Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 754 & n.81-82, 798 & n.331 (1990).

15. *See generally* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 54-89 (1978) (repudiating capital punishment on Utilitarian grounds).

vergence between modern Utilitarian and Personalist thought regarding the death penalty is remarkable.

Both in and since *Gregg*, the Justices of the United States Supreme Court divided into three factions when voting on capital punishment. Although there was substantial similarity in voting patterns in the Burger and early Rehnquist Courts, there has been a number of changes in the composition and voting patterns of the Court. Composing the first faction, Justices Brennan and Marshall found all capital punishment unconstitutional. A right-wing faction, represented primarily by former Chief Justice Burger, the present Chief Justice Rehnquist, and now Justice Scalia, strongly deferred to state legislative decisions regarding capital punishment. The centrist Justices, the plurality of the Court, at times joined Justices Brennan and Marshall to find particular instances of the death penalty unconstitutional. Usually, though, the centrist Justices agreed with the right wing.

Since *McCleskey v. Kemp*,[16] a significant shift in voting patterns has arisen with Justices Blackmun and Stevens more frequently joining Justices Brennan and Marshall, either in the majority or the dissent of five-four decisions. When either Justice White or Justice O'Connor joined those opposed to capital punishment, there was a five-four decision striking down the death penalty in that particular instance. Now, with the resignations of Justices Brennan and Marshall, there is a new shift in voting patterns. Perhaps most significantly, the principal voice grounding opposition to capital punishment in human dignity will be missing. Indeed, after the resignations of both Justices Brennan and Marshall there will be an absence of any opposition to capital punishment grounded in a clearly expressed philosophical position.

The purpose of this article is to offer a philosophical critique of a number of the political ideas found in the Supreme Court decisions since *Gregg*. The political ideas offered by the various Justices will be compared and contrasted. A principal foundation for philosophical commentary on those political ideas will be John Rawls' *A Theory of Justice*[17] and a Rawlsian theory of criminal responsibility, both of which have been commented on and developed in previous articles.[18]

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16. 481 U.S. 279 (1987).

17. JOHN RAWLS, A THEORY OF JUSTICE (1972).

18. For a more thorough analysis of Rawlsian theory, see generally Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian theory (Ultimately Grounded in Multiple*

The first portion of this article will explore the convergence between Personalism, Utilitarianism, and a Rawlsian theory of capital punishment. The article will examine the thoughts of Justice Brennan, which are grounded in respect for human dignity, and the thoughts of Justice Marshall, which are based largely on reasons of societal advantage. There also will be a comparison of their thoughts with a Rawlsian theory of capital punishment. The second part of the article will examine and analyze the political ideas of the pre-*McCleskey* centrist plurality on the Burger and Rehnquist Courts. This discussion will include an analysis of *McCleskey*, a case that presents a significant challenge to an important ideal in the centrist position, namely fairness. The last part of the article will discuss the post-*McCleskey* Court and the current problems inherent in decisions regarding capital punishment. Two brief appendices will consider several principal 1991 and 1992 cases and legislative developments. The appendices will also assess the impact of Justice Marshall's resignation and the new membership of the Court. To some extent this article is a celebration of and conversation with the thoughts of Justice Brennan and Justice Marshall on capital punishment.

II. BRENNAN, MARSHALL, AND RAWLS: A RAWLSIAN THEORY OF CAPITAL PUNISHMENT

When interpreting the Eighth Amendment's prohibition of cruel and unusual punishments, the Supreme Court regularly employs two political or moral conceptions which are understood differently by the various Justices. To escape condemnation under the Eighth Amendment, a punishment must be in accord with the "evolving standards of decency" and must be consistent with "the dignity of man."[19] While the plurality tends to emphasize the "evolving standards" understood from a Majoritarian perspective, Justice Brennan, in what could be characterized as a rights-oriented approach to constitutional interpretation, gives central place in his analysis to the concept of human dignity. Justice Brennan explains:

Views Concerned with Human Dignity), 41 SYRACUSE L. REV. 741 (1990) (using Rawlsian theory in discussing goals of criminal punishment); Samuel J.M. Donnelly, *A Theory of Justice, Judicial Methodology and the Constitutionality of Capital Punishment: Rawls, Dworkin, and a Theory of Criminal Responsibility*, 29 SYRACUSE L. REV. 1109 (1978) (employing Rawlsian analysis in discussing the theory of criminal responsibility).

19. Gregg v. Georgia, 428 U.S. 153, 173 (1976) (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958)).

> At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death. In the United States, as in other nations of the western world, "the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century. . . . It is this essentially moral conflict that forms the backdrop for the past changes in and the present operation of our system of imposing death as a punishment for crime."[20]

In *Furman*, Justice Brennan finds failure to "comport with human dignity" as the essential characterization of punishments which are cruel and unusual.[21] "The State," he explains, "even as it punishes must treat its members with respect for their intrinsic worth as human beings."[22] The Justice then develops a series of tests for determining whether a punishment is in accord with human dignity, including whether it is arbitrarily inflicted, whether it is excessive, and whether it is acceptable to contemporary society.[23] Rejection by society, while a strong indication that a punishment does not accord with human dignity, remains one of several tests and is not the ultimate criterion for finding a punishment constitutionally prohibited.[24] Justice Brennan offers a rights-oriented rather than a Majoritarian approach to interpretation of the Eighth Amendment. In *Furman*, the Justice defines his rights position as follows:

> The right to be free of cruel and unusual punishments, like the other guarantees of the Bill of Rights, "may not be submitted to vote; [it] depend[s] on the outcome of no elections." "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. . . ."
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> Judicial enforcement of the Clause, then, cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe pun-

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20. Furman v. Georgia, 408 U.S. 238, 296 (1972) (Brennan, J., concurring).
21. *Id.* at 305.
22. *Id.* at 270.
23. *Id.* at 270-306.
24. *Furman*, 408 U.S. at 277.

> ishments for crimes. That is precisely the reason the Clause appears in the Bill of Rights. . . . [W]e must not, in the guise of "judicial restraint," abdicate our fundamental responsibility to enforce the Bill of Rights.[25]

While recognizing in *Gregg* the importance of the evolving standards of decency test, Justice Brennan argues that the test requires the Court to focus on the essence of capital punishment.[26] Since the essential nature of the punishment is out of accord with human dignity, it violates "the principle of civilized treatment" guaranteed by the Eighth Amendment.[27]

The political ideas offered by Justice Brennan in his argument that capital punishment is unconstitutional include the contentions that the State must treat all of its members "with respect for their intrinsic worth as human beings," that punishments out of accord with this human dignity must be rejected whether or not acceptable to contemporary opinion, and that the death penalty uniquely disregards human dignity because it treats human beings as objects which can be toyed with and discarded.[28] The Justice also emphasizes the role of the Supreme Court in enforcing the Bill of Rights.[29] If the Court abandons that role, rights may be declared in the ringing words of the constitutional amendments but "might be lost in reality."[30] Consequently, the Cruel and Unusual Punishments Clause would become "little more than good advice."[31] These political ideas are worth comparing with Rawlsian theory, including the theory of capital punishment.

A. *A Rawlsian Theory of Capital Punishment*

A Rawlsian theory of criminal responsibility would support two fundamental principles:

"1. Criminal punishment is permitted only if it is demonstrated that it serves the goal of crime control;

2. Criminal punishment is permitted only if it is demonstrated

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25. *Id.* at 268-69.

26. *Gregg*, 428 U.S. at 227 (Brennan, J., dissenting) (citing *Furman*, 408 U.S. at 257).

27. *Id.* at 230 (Brennan, J., dissenting) (quoting *Trop*, 356 U.S. at 99).

28. *See id.* at 229-30 (Brennan, J., dissenting) (rejecting imposition of capital punishment as degrading to human dignity).

29. *See Furman*, 408 U.S. at 269 (Brennan, J., concurring) (reiterating Court's fundamental responsibility to enforce Bill of Rights).

30. *Id.* at 269.

31. *Id.*

that the person on whom it is imposed deserves that punishment."[32]

Herbert L. Packer, in *The Limits of the Criminal Sanction*, first proposed these principles from a Utilitarian foundation.[33] A remarkable convergence exists between modern Utilitarian thought regarding criminal justice and capital punishment and a theory of criminal responsibility developed with the aid of Rawls' model, the Original Position. Use of Rawls' model, which Ronald Dworkin has argued is grounded in deep respect and concern for each individual,[34] has the advantage of offering a foundation for the principles of criminal justice. Rawls' model competes with traditional Kantian thought, and, like that thought and Justice Brennan's view, is grounded in respect for human dignity.[35]

The Original Position is a model and like economic models, it is a simplified view of reality. In this model, the contracting parties will agree unanimously to a proposed principle of justice, providing that

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32. Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 770 (1990).

33. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 62 (1968).

34. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180 (1977) (stating that one may argue that parties in Rawls' model are concerned with equal respect and concern).

35. *See* Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 745-60 (1990) (describing theory of criminal responsibility based on Rawls' model). Rawls has proposed a model, the Original Position, that prescribes the way in which citizens, viewed as moral persons, would ideally select principles of justice for a just, democratic, and constitutional society. *Id.* The assumptions of the model arguably are "necessary for fair and objective decision-making." *Id.* "Important assumptions of the model" are multiple contracting parties who must unanimously agree to the principles of justice under a veil of ignorance which conceals from them their own advantages, disadvantages, place in society, and rational plans in life. *Id.* at 751. Using strict rationality, the contracting parties will accept or reject a principle of justice on grounds that the proposed principle will tend or not tend to maximize their individual share of primary social goods upon lifting the veil of ignorance. Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 751 (1990). The primary social goods are those which are "necessary to achieve any rational plan in life." *Id.* The parties will "want to accept principles of justice which would maximize their opportunities of minimizing" or avoiding worst disasters. *Id.* A worst disaster is a severe or total loss of primary social goods. *Id.* Before casting their votes to accept or reject a principle of justice, the parties will examine it from the perspective of each representative position in society which may be affected by that principle. Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 751 (1990). A contracting party, upon lifting the veil of ignorance, may occupy one of these representative positions. *Id.* In that position, a party would not want to suffer a worst disaster. *Id.*

the model will both tend to maximize their shares of the primary social goods and tend to minimize the worst disaster. Primary social goods are those items necessary to pursue rational goals in life, such as liberty, a modicum of wealth, and self-respect.[36] A substantial or total loss of those social goods would be a worst disaster.[37]

The contracting parties decide upon the principles of justice under a veil of ignorance[38] which conceals from them their own goals in life and their own advantages and disadvantages, such as wealth and intelligence. Consequently, the parties must consider the representative positions affected by any proposed principle of justice. For example, in regard to criminal justice or indeed capital punishment, the representative positions would be those of the potential victim and the prospective accused.[39] Viewing a principle of justice or criminal responsibility from each representative position and imagining themselves in that position lifts the parties' veil of ignorance. The parties, then, would ask whether the proposed principle tends to maximize their shares of the primary social goods and minimize the worst disasters.[40] Murder is a worst disaster. If the principles fail that test, then using the strict rationality required by the rules of the model, the principle would not receive a unanimous vote and would be rejected.[41] This veto, based on a failure to minimize the worst disasters, is the foundation for Dworkin's contention that Rawls' model and the conclusions drawn from it are grounded in equal respect and concern for each person.[42]

From discussion of the crime control goal of deterrence, a corollary to the basic principles of criminal responsibility develops: as punishment increases in severity, the justification for punishment must be more seriously and must be more rigorously demonstrated.[43] Since

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36. *See* JOHN RAWLS, A THEORY OF JUSTICE 90-95, 142-50, 396-99, 433-39 (1972) (discussing social goods in Original Position); Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 751-52 (1990) (describing primary social goods).

37. JOHN RAWLS, A THEORY OF JUSTICE 90-95 (1972).

38. *See id.* at 136-42 (describing veil of ignorance).

39. Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 766 (1990).

40. *Id.* at 766-69.

41. *Id.* at 755.

42. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180-82 (1977).

43. Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ulti-*

the contracting parties in the Original Position would be concerned with maximizing their shares of the primary social goods and their opportunities to avoid the worst disasters, they would hesitate to allow severe punishment unless there was a corresponding protection of their shares of the primary social goods.[44] Viewed from the perspective of a potential accused, severe punishment could be a worst disaster.[45] At the very least, the parties viewing severe punishment from the accused's perspective would demand that it be seriously justified both in terms of crime reduction and deterrence.[46] Providing serious justification is a means for recognizing, in Justice Brennan's terms, that the State must respect the intrinsic worth of each of its members as human beings.[47]

As Justice Stewart stated in *Gregg*, "There is no question that death as a punishment is unique in its severity and irrevocability."[48] In *Woodson v. North Carolina*,[49] Justice Stewart explained, "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two."[50]

Using Rawls' model to develop a theory of criminal responsibility makes it clear that the contracting parties would not agree unanimously to capital punishment unless there were substantial proof and a strong probability that the death penalty would protect their liberty and their shares of the primary social goods.[51] The parties would insist on proof that the death penalty reduces crime before discussing the death penalty further.[52] Nevertheless, evidence of a crime reduction impact would not be a sufficient basis for adopting the death penalty. In the Original Position, the contracting parties place

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mately Grounded in Multiple Views Concerned with Human Dignity), 41 SYRACUSE L. REV. 741, 776 (1990).

44. *Id.* at 776-77.

45. *Id.* at 776.

46. *Id.*

47. Furman v. Georgia, 408 U.S. 238, 271-74 (1972) (Brennan, J., concurring).

48. Gregg v. Georgia, 428 U.S. 153, 187 (1976).

49. 428 U.S. 280 (1976).

50. *Id.* at 305.

51. Samuel J.M. Donnelly, *A Theory of Justice, Judicial Methodology and the Constitutionality of Capital Punishment: Rawls, Dworkin, and a Theory of Criminal Responsibility*, 29 SYRACUSE L. REV. 1109, 1143 (1978).

52. *Id.* at 1143.

themselves in the representative positions of both the potential murder victim and the prospective accused who may suffer capital punishment.[53] Recognizing that the death penalty is unique since it eliminates all possibility of pursuing rational plans, the contracting parties would be hesitant to agree to it.[54]

The classic crime reduction goals are general deterrence, special deterrence, incapacitation, and rehabilitation.[55] The relation of these goals to capital punishment is uniquely and obviously different from their relation to other punishments. For example, although rehabilitation is not a goal of capital punishment, with work it may again become a goal of imprisonment or other punishments.[56] While capital punishment is the most effective means of incapacitation known, it is not a means for special deterrence—the carried out threat which deters the individual punished from committing future crimes—unless one merges special deterrence with incapacitation. Therefore, incapacitation and general deterrence are the potential crime reduction goals for capital punishment.

Under Rawlsian analysis, retribution is not a sufficient goal by itself to support criminal punishment.[57] It would not enhance any of the primary social goods. One could say retribution reinforces the moral norms of society.[58] In this sense, it is a crime reduction goal very similar to general deterrence. The deterrent effect of criminal punishment may operate through the reinforcement of social norms.[59]

Since the early nineteenth century, the relevant conditions of soci-

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53. Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 766 (1990).

54. *See id.* at 766-67 (noting trade offs that must occur between parties).

55. *Id.* at 761; *see* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 35-61 (1968) (discussing justifications for criminal punishment).

56. *See* NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 28-57 (1974) (discussing rehabilitation as goal in penal reform).

57. *See* JOHN RAWLS, A THEORY OF JUSTICE 241 (1971) (explaining aspects of Original Position); Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 765 (1990) (stating parties in Original Position would punish accused only if punishment would secure parties' liberty or repair fabric of society).

58. *See* Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 769 (1990) (stating that retribution reinforces social solidarity).

59. *See* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 43-44 (1968) (describing relationship between socialization and punishment).

ety have changed. When the first Congress approved the Eighth Amendment, Congressman Livermore was troubled: "[I]t is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in . . . [the] future to be prevented from inflicting these punishments because they are cruel?"[60] Although it may have been necessary in the late eighteenth century to whip or to cut off ears because society had no alternative punishment, the advent of the modern prison system has made these punishments obsolete.[61]

Other elements of the nineteenth century paradigm also were significant for this purpose. For example, the development of the modern police force provides society with an effective means for apprehending criminals and suppressing crime which was not available in the eighteenth century. The development of police forces may have rendered obsolete arguments for *in terrorem* punishments, those punishments designed to terrify the population.[62] In the absence of any effective means for controlling crime, the argument for super-deterrence by such punishments as drawing and quartering for serious crimes or whipping for lesser ones may be persuasive. Society does not seek the terrifying effect of severe physical punishment when there are many other resources available, including large, well-administered police forces and modern prisons. Whipping and cutting off ears would now be cruel and unusual.[63] The question under discussion is whether hanging and other forms of capital punishments should join them in the trash can of history.

Because America has had a modern prison system for some time, one must ask whether the alternative of imprisonment has made capital punishment obsolete as a necessary means for incapacitation and general deterrence. In examining the crime reduction impact of capital punishment, a relevant question is whether it provides a signifi-

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60. *Furman*, 408 U.S. at 244 (Douglas, J., concurring) (quoting 1 ANNALS OF CONG. 754 (Joseph Gales ed., 1789)).

61. *See* MICHAEL SHERMAN & GORDON HAWKINS, IMPRISONMENT IN AMERICA 79-86 (1981) (tracing evolution of American colonies' philosophy regarding capital punishment).

62. *See* Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 775 (1990) (attributing crisis in early American justice system to haphazardly administered punishment).

63. *See Gregg*, 428 U.S. at 229 (Brennan, J., dissenting) (describing punishments such as "the rack, the screw and the wheel" as intolerable by today's standards).

cantly greater margin of deterrence than life imprisonment.[64] While some murderers will kill again, most murderers are not recidivists; upon emerging from prison they are considerably less likely than burglars to return.[65] Whether the incapacitating effect of capital punishment is required for most murderers is doubtful. Life imprisonment may be a sufficient incapacitation for those few who are likely to repeat.

Therefore, under the Rawlsian theory of criminal responsibility, the primary purpose for capital punishment would be to deter serious invasions of liberty.[66] Because capital punishment entails a complete loss of the primary social goods, the contracting parties would hesitate to adopt it and certainly would reject it if there was not convincing proof of the punishment's deterrent effect.[67] That proof should establish by the most sophisticated methodology available that the death penalty produces significantly greater marginal deterrence than life in prison. While other proof may have been satisfactory in the past, in the present age, sophisticated proof of deterrent effect requires the empirical evidence of properly conducted statistical studies.[68]

In the modern era, social scientists have extensively studied whether capital punishment has a deterrent effect.[69] In *Gregg*, Justice Stewart explained that the results of "statistical attempts to evaluate the worth of the death penalty as a deterrent . . . simply have been inconclusive."[70] There is agreement with Justice Stewart's assessment of the statistical studies.[71] The essence of his evaluation is that analy-

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64. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 71 (1968) (questioning deterrent effect of death penalty); Samuel J.M. Donnelly, *A Theory of Justice, Judicial Methodology and the Constitutionality of Capital Punishment: Rawls, Dworkin, and a Theory of Criminal Responsibility*, 29 SYRACUSE L. REV. 1109, 1144 (1978) (explaining that proper question is whether death penalty is significantly greater deterrent than other punishments).

65. *See* ALLEN BECK & BERNARD SHIPLEY, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1983 2 (1989) (noting 6.6% recidivism rate for released murderers and 31.9% recidivism rate for released burglars).

66. JOHN RAWLS, A THEORY OF JUSTICE 241 (1972) (discussing relationship of liberty and punishment); *see* Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 785 (1990).

67. Samuel J.M. Donnelly, *A Theory of Justice, Judicial Methodology and the Constitutionality of Capital Punishment: Rawls, Dworkin, and a Theory of Criminal Responsibility*, 29 SYRACUSE L. REV. 1109, 1143 (1978).

68. *Id.*

69. *Id.* at 1144 n.179 (citing *Gregg*, 428 U.S. at 184 n.31).

70. *Gregg*, 428 U.S. at 184-85.

71. *See* Samuel J.M. Donnelly, *A Theory of Justice, Judicial Methodology and the Consti-*

sis of the statistical data produces inconclusive results. After substantial study of a large amount of statistical evidence, the results of that sophisticated analysis are inconclusive.[72]

In the absence of a strong empirical basis for asserting that capital punishment deters crime, society might be tempted to resort to common sense as did the plurality in *Gregg*.[73] Common sense regarding the death penalty comes down to what H.L.A. Hart has called "the alleged truism that men fear death more than any other penalty, and that therefore it *must* be a stronger deterrent than imprisonment."[74] However, in deterrence theory, it is recognized that general deterrence is the communication of a threat to society which is enhanced by the clarity and consistency of the communication and the threat.[75] Lesser punishments consistently imposed are more likely to deter than severe punishments resorted to on occasion.[76] When a murder is committed, the killer does not face a certainty that the death penalty will be imposed.[77] Instead, he will rather vaguely recognize, since he is not acquainted with law, that if he is apprehended and convicted a jury or a judge will then decide, weighing aggravating and mitigating factors, whether he committed a sufficiently drastic killing to deserve the death penalty.[78] Following his conviction and sentencing, there will be a series of appeals. If all of these appeals fail, he may be executed a number of years after his conviction. H.L.A. Hart elaborates:

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tutionality of Capital Punishment: Rawls, Dworkin, and a Theory of Criminal Responsibility, 29 SYRACUSE L. REV. 1109, 1144 (1978) (accepting Justice Stewart's statement that statistical results concerning deterrent of death penalty are inconclusive).

72. *Gregg*, 428 U.S. at 184-85; *see id.* at 234-35 (Marshall, J., dissenting) (criticizing methodology of statistical analysis). *See generally* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 85 (1968); Samuel J.M. Donnelly, *A Theory of Justice, Judicial Methodology and the Constitutionality of Capital Punishment: Rawls, Dworkin, and a Theory of Criminal Responsibility*, 29 SYRACUSE L. REV. 1109, 1144 (1978).

73. *See Gregg*, 428 U.S. at 185-86 (recognizing that there are circumstances of murder where capital punishment provides deterrence).

74. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 85-86 (1968).

75. *See* Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 774 (1990) (explaining general deterrence).

76. *See* FRANKLIN E. ZIMRING & GORDON J. HAWKINS, DETERRENCE 146, 157, 199, 208-09 (1973) (discussing various examples of lesser punishments providing greater deterrence).

77. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 86 (1968) (explaining how one sentenced to death penalty only faces high probability of execution).

78. *See id.* at 86-87 (discussing how accused views possibility of execution); *cf.* GA. CODE ANN. § 17-10-30 (1990) (stating requirement for imposition of death penalty).

> But the existence of the death penalty does not mean for the murderer *certainty* of death *now*; it means a not very high probability of death in the future. And futurity and uncertainty, the hope of an escape, rational or irrational, vastly diminishes the difference between death and imprisonment as deterrents, and may diminish it to the vanishing point.[79]

Since the United States Supreme Court has restricted the use of the death penalty,[80] proponents have the added burden of demonstrating that capital punishment imposed only occasionally, and then in the discretion of judge or jury, would have a greater deterrent effect than other punishment. It may be that the more one restricts the resort to capital punishment and the more speculative its possibility, the more difficult it is to prove its benefits. Under the theory of criminal responsibility, it may be that in civilized times society is compelled to become yet more civilized.

Standing by themselves, the presence of the modern prison system and the availability of life imprisonment may render common-sense analysis of the effectiveness of the death penalty obsolete. The question no longer is whether the threat of death would deter a potential murderer but whether that threat would be significantly more effective than the threat of life imprisonment.[81] Under the complex circumstances in which modern capital punishment is imposed, common-sense analysis may be unable to answer that question. Statistical analysis may be the only possible means for addressing the question, and such analysis is producing inconclusive answers.[82]

One must recognize the differences between individuals. While the death penalty may deter one individual, others may react differently.[83] Also, threats considerably less severe than capital punishment may deter criminal behavior. However, potential murderers who may be highly emotional or who find themselves in difficult circumstances,

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79. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 86 (1968).

80. *See, e.g., Gregg*, 428 U.S. at 162-207 (limiting imposition of death penalty only where statutory scheme prevents arbitrary sentencing); *Woodson*, 428 U.S. at 285-304 (rejecting mandatory capital punishment statutes).

81. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 85 (1968) (advocating that proper question is whether death penalty is super-deterrent, not whether it merely deters).

82. *Gregg*, 428 U.S. at 184-85; Samuel J.M. Donnelly, *A Theory of Justice, Judicial Methodology and the Constitutionality of Capital Punishment: Rawls, Dworkin, and a Theory of Criminal Responsibility*, 29 SYRACUSE L. REV. 1109, 1143-44 (1978).

83. *See* FRANKLIN E. ZIMRING & GORDON J. HAWKINS, DETERRENCE 97-98 (1973) (discussing differences in threat sensitivities of individuals).

may not be deterred by any threats.[84] The threat of the death penalty may encourage some murderers who have suicidal or self-destructive tendencies.[85] H.L.A. Hart explains:

> Very large numbers of murderers are mentally unstable, and in them at least the bare thought of execution, the drama and the notoriety of a trial, the gladiatorial element of the murderer fighting for his life, may operate as an attractive force, not as a repulsive one. There are actual cases of murder so motivated, and the psychological theories which draw upon them must be weighed against the theory that the use of the death penalty creates or sustains our inhibition against murder.[86]

According to Amnesty International, homicides in Florida and Georgia increased after those states reinstituted the death penalty and performed their first executions.[87] Executions in Georgia, for example, resumed in 1983.[88] Homicides increased by 20% in Georgia during 1984 in contrast with a national decline in the homicide rate during that year.[89] It may be that capital punishment provides an incentive to some persons to commit homicide or the example of killing set by the state validates the private desire to kill.[90]

Given the complex social and psychological relations among the death penalty, individual motivation, and homicide, a common-sense analysis of the deterrent effect of capital punishment could be seriously misleading. At best, common-sense "guesstimates" are inconclusive. For the parties in the Original Position, common sense is not an appropriate fallback from the inconclusiveness of statistical evidence.[91] In a less sophisticated age, common sense might have been the only intellectual method available to assess the deterrent impact of the death penalty. In the present age, society recognizes not only the inconclusive nature of common sense but also its unreliability for this

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84. *See id.* at 136-38 (describing threat effectiveness in differing emotional settings).

85. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 88 (1968) (stating drama and notoriety could encourage mentally unstable to kill).

86. *Id.*

87. AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: THE DEATH PENALTY app. 7 at 211-12 (1987).

88. *See id.* at 195 (listing execution of John Elden Smith on December 15, 1983).

89. *Id.* at 210-12.

90. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 88 (1968) (recognizing that death penalty may tend to break down one's moral repulsion to murder).

91. Samuel J.M. Donnelly, *A Theory of Justice, Judicial Methodology and the Constitutionality of Capital Punishment: Rawls, Dworkin, and a Theory of Criminal Responsibility*, 29 SYRACUSE L. REV. 1109, 1144 (1978).

purpose as compared to statistical evidence. In order to respect the human dignity of those potentially accused of homicide, and therefore weigh the arguments that capital punishment is needed with appropriate seriousness, society must accept the conclusion of empirical research. The research is derived from using statistical analysis. This analysis indicates that the death penalty does not clearly deter homicide.[92]

Deterrence may operate indirectly through reinforcement of social norms. A crime reduction version of retribution would be the equivalent of this understanding of deterrence.[93] The recognition of the complexities of human motivation and of the manner in which punishment relates to the social norms encourages common-sense analysis to adopt more sophisticated language as a substitute for statistically supported conclusions. There is some indication that the plurality in *Gregg* and subsequent Supreme Court capital punishment decisions have employed this intellectual move. Any significant crime reduction caused by indirect deterrence or retribution which strengthens the social norms should be statistically measurable. The absence of a statistical indication of crime reduction leaves one with only a common-sense speculation that there may be a reduction of homicide through indirect deterrence and reinforcement of social norms. In addition to the usual flaws of common-sense analysis, that speculation carries with it all the disadvantages of wishful thinking.

The parties in the Original Position, then, would not find capital punishment justifiable as a means for deterring serious invasions of their liberty.[94] Most non-recidivists who do commit homicide do not require incapacitation. The modern prison is a generally satisfactory means for incapacitating those who can be expected to kill again. However, there remains a haphazard chance that the prison will fail

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92. *Id.* at 1144.

93. *See* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 43-44 (1968) (explaining how everyday examples of punishment reinforce our understanding of what constitutes wrongful action and what deters criminal conduct); Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 769 (1990) (stating that retribution which reinforces social solidarity and preserves parties' social goods is analogous to crime reduction goal).

94. *See* Samuel J.M. Donnelly, *A Theory of Justice, Judicial Methodology and the Constitutionality of Capital Punishment: Rawls, Dworkin, and a Theory of Criminal Responsibility*, 29 SYRACUSE L. REV. 1109, 1144 (1978) (explaining that without empirical evidence that capital punishment deters, contract parties would not agree to its imposition).

in its vigilance and that through some accident a recidivist murderer will be allowed to kill again.

It is worth contrasting a deliberate decision by the state to kill through capital punishment, a decision which if allowed under Rawlsian analysis is one which the parties to the Original Position explicitly would permit, with the haphazard chances of death by homicide, which are, unfortunately, among the events encountered in the world.

Under Rawlsian analysis, capital punishment is justifiable only if it is necessary to preserve the conditions of civilized living. Rawlsian terminology defines these conditions as the prospective ability of the parties in the Original Position to pursue any rational plans in life.[95] If there were sophisticated statistical analyses supporting the greater marginal deterrent effect of capital punishment over life imprisonment and all ability to pursue rational plans in life were at stake,[96] then the contracting parties might agree to imposition of the death penalty in appropriate circumstances. Since the contracting party is both a prospective accused and a potential victim, and until imprisoned and executed would wish to pursue rational plans in life, a party may be willing to trade off capital punishment for a substantial enhancement of the possibility of pursuing such rational plans.

However, when preservation of the conditions of civilized living is not at stake, the contracting parties would tolerate the haphazard chance of death by homicide rather than deliberately create a new worst disaster by authorizing capital punishment by the State.[97] In other words:

> Human experience, however, leads to the conclusion that it is futile and wrong to protect absolutely our own lives, as opposed to those of others. Normal human beings risk their lives to save others, to win wars, and to carry on ordinary and rational activities. People who are prudent, and some who are less careful, often balk at measures proposed to reduce the chance of death as unreasonable and burdensome. Americans were reluctant to lower the speed limit to fifty-five miles an hour, and, indeed, did so originally to save fuel rather than lives. It is not foreseeable that the speed limit will be lowered yet further to forty-five miles an hour even if that measure would produce an even greater reduction in the highway death rate. Although twenty-five people die every thirty

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95. *Id.* at 1144, 1151.

96. *Id.*

97. *See id.* at 1147-52 (discussing how contracting parties accept reasonable risks of private violence).

> months from skateboard accidents, it is not likely that the Consumer Product Safety Commission will ban skateboards—nor would we want it to. In protecting their own lives against haphazard accidents, prudent human beings only take reasonable measures. It is arguable that this rule, derived from life's experience, should apply to protecting our own lives against haphazard and unpredictable private violence. The hypothetical contracting parties would want the government to take reasonable measures but not every possible precaution to prevent murder.[98]

This conclusion applies a fortiorari to the problem of occasional lapses in prison vigilance which permit the haphazard chance of further killing by one incarcerated for homicide. The contracting parties viewing capital punishment from the perspective of the prospective accused and the potential victim would prefer to tolerate the haphazard chances of private violence as compared to the deliberate creation of a new worst disaster by authorizing capital punishment.

B. *Brennan Compared*

Justice Brennan's argument that the death penalty is a profound violation of human dignity supports his concurrence in *Furman* and his dissenting opinion in *Gregg*.[99] A difference in purpose could account for the contrast between Justice Brennan's simple and direct dismissal of capital punishment and the more complex Rawlsian theory just presented. Justice Brennan offers an understanding of cruelty in terms of the conceptualization prohibiting cruel and unusual punishments found in the Eighth Amendment. The Rawlsian analysis, however, is an extension of the theory of criminal responsibility. Because Justice Brennan is discussing cruelty rather than a theory of criminal punishment, the Justice can focus on human dignity rather than the advantages and disadvantages of capital punishment for society. In contrast, one using the Rawlsian model of the Original Position can weigh a threatened worst disaster for the potential victim of homicide against a worst disaster for a person convicted of murder

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98. Samuel J.M. Donnelly, *A Theory of Justice, Judicial Methodology and the Constitutionality of Capital Punishment: Rawls, Dworkin, and a Theory of Criminal Responsibility*, 29 SYRACUSE L. REV. 1109, 1147 (1978).

99. *See* Gregg v. Georgia, 428 U.S. 153, 230 (1976) (Brennan, J., dissenting) (stating disdain for death penalty); Furman v. Georgia, 408 U.S. 238, 291 (1972) (Brennan, J., concurring) (explaining negative view towards death penalty).

and sentenced to death.[100] Using Justice Brennan's analysis, one can take account of the human dignity of each person in society, including the potential victim and the possible convict. However, the simplification of society which makes the Rawlsian model useful includes a thin theory of social goods.[101] This theory reduces concern for human dignity to an estimate of the impact of societal rules or principles on each person's share of primary social goods. Although Justice Brennan does not detail it in his opinion, the Justice is able to draw upon a fuller understanding of humanity to develop a conceptualization of cruelty and to reject capital punishment as a violation of human dignity.

One could describe both Justice Brennan and Rawls as offering a construct. Rawls' model, the Original Position, and his theory of justice exemplify Kantian constructs.[102] These constructs are designed to present an idealized conception of moral individuals engaged in social cooperation. Justice Brennan offers an analysis and development of an artificial construct, the Eighth Amendment. The Justice's conceptualization or understanding of that constitutional provision is an artificial construct as are all legal rules and holdings in cases. Rawls designed his construct to appear reasonable from the perspective of a series of societal positions, including the Kantian desire to respect each person as an end in himself.[103] Rawls would want his theory to appear reasonable to a cluster of other positions. This cluster includes both philosophical and religious positions which desire to respect the human dignity of each person.[104] One can argue that the essence of Justice Brennan's justification is that his interpretation of

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100. Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 766 (1990).

101. *See* JOHN RAWLS, A THEORY OF JUSTICE 395-99 (1972) (defining theory of social goods).

102. *See generally* John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 515-54 (1980) (discussing Kantian constructivism's relation with justice as fairness). Rawls designates his conception of "justice as fairness" developed in *A Theory of Justice* as a variant of Kantian constructivism. *Id.* at 515. Rawls elaborates on what is meant by Kantian constructivism throughout the three lectures which constitute the text of this article.

103. Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 799-800 (1990); John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 229-36 (1985).

104. John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 229-36 (1985).

the Eighth Amendment, his construct, would appear reasonable to those concerned with human dignity.

Justice Brennan's rejection of capital punishment as cruel and unusual and the Rawlsian theory that the death penalty is not currently justifiable under the principles of criminal responsibility converge in other ways. To Justice Brennan, the excessiveness of the death penalty marks capital punishment as a cruel and unusual punishment because "the infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering."[105] Because capital punishment produces no seriously demonstrable benefits for society, that is to say because of the lack of advancement in protecting the liberty of the contracting parties, Rawlsian analysis would reject capital punishment.[106] Both Justice Brennan and Rawls would agree to protect the human dignity of each person in society, even that of the vilest criminal. Like Justice Brennan, the Rawlsian model would reject dismissal of a member of society, a contracting party, for societal advantage. Unless the contracting parties unanimously accepted a proposed principle after viewing it from each relevant representative position, the principle would be rejected. The argument that some uncivilized states of society might accept capital punishment if its deterrent effect were acceptably demonstrated rests on an assertion that the parties would not veto capital punishment from the accused's perspective.

Justice Brennan's conclusion that capital punishment violates human dignity may appear reasonable today because the modern prison system offers an adequate means for preserving civilized living conditions and provides a sufficient deterrent against criminal behavior. The Rawlsian analysis in modern circumstances likewise concludes that capital punishment is an unwarranted dismissal of and disrespect for a member of society represented as a contracting party.[107] The persuasiveness of that conclusion may also rest on the

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105. *Furman*, 408 U.S. at 279 (Brennan, J., concurring).

106. *See* Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 762 (1990) (discussing how contracting parties construct rules of society to discourage invasions of liberty); Samuel J.M. Donnelly, *A Theory of Justice, Judicial Methodology and the Constitutionality of Capital Punishment: Rawls, Dworkin, and a Theory of Criminal Responsibility*, 29 SYRACUSE L. REV. 1109, 1144-45 (1978) (elaborating on how contracting parties require significant proof of capital punishment's effects).

107. The contracting parties are engaged in a scheme of social cooperation in which principles of justice are to preserve everyone's share of primary social goods. *Cf.* KAROL

presence of the modern prison system. As society becomes more civilized, alternative means of punishment are developed. Also, as capital punishment is less frequently used, the death penalty more clearly becomes a violation of human dignity.

C. *Marshall, Hart, and Utilitarianism*

While Justice Brennan's position approximates Personalism, which may appear reasonable to a cluster of positions concerned with human dignity, Justice Marshall's position approximates Utilitarianism combined with enlightened Majoritarianism. H.L.A. Hart criticized the death penalty in *Punishment and Responsibility* while sketching a modern Utilitarian theory of capital punishment.[108] Because the Rawlsian theory of criminal responsibility tracks Utilitarianism, the positions of Marshall, Hart, and Rawls converge.

The Utilitarian position on capital punishment as described by H.L.A. Hart is not absolute.[109] Rather, it asks whether the death penalty "is needed to protect society from harm."[110] Hart would treat "the welfare of society as the justification for punishment."[111] This, as with more absolute positions, is a moral claim. Ultimately, it would be based on a more fundamental Utilitarian theory, such as the theory of general utility.[112] It could also be based on the theory of average utility,[113] which uses various formulas to balance the advantages and disadvantages to society. General deterrence of crime would be the principal advantage to society attributable to capital

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WOJTYLA, THE ACTING PERSON 280-83 (Andrzes Potocki trans., 1969) (postulating that common good is violated when common action is endangered or when participation of any individual in common action is threatened).

108. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 54-89 (1968).

109. *See id.* at 72-73 (questioning attitudes of more absolute Utilitarian position).

110. *Id.*

111. *Id.* at 73.

112. *See* JOHN RAWLS, A THEORY OF JUSTICE 183-92 (1972) (comparing principles of justice with classical Utilitarian thought).

113. *See id.* at 161-66 (discussing principle of average utility); *see* Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 758 (1990) (stating contracting parties would find average utility most attractive). *See generally* Samuel J.M. Donnelly, *A Theory of Justice, Judicial Methodology, and the Constitutionality of Capital Punishment: Rawls, Dworkin, and a Theory of Criminal Responsibility*, 29 SYRACUSE L. REV. 1109, 1123 (1978) (stating Rawls finds principle of average utility most attractive).

punishment.[114] In the absence of a reasonable demonstration that capital punishment would have a greater deterrent effect than life imprisonment, Utilitarians would oppose the death penalty.[115]

Hart distinguishes between statistical evidence of deterrence and "[a] 'common sense' conception of the strength of the fear of death as a motive in human conduct."[116] In regard to statistics he notes:

> Statistics have now been collected and surveyed in a more thorough fashion than ever before. Yet the Report of the Royal Commission, after considering the expert scrutiny of the figures available in Europe, the Commonwealth, and the United States, reached only a negative though still an important conclusion. This was a finding that there is no clear evidence in any of the figures that the abolition of the death penalty has ever led to an increase in the rate of homicide or that its restoration has ever led to a fall.[117]

Hart's discussion in *Punishment and Responsibility* provides a basis for criticizing the common-sense analysis of the death penalty's deterrent effect.[118] Hart offers several criticisms of a common-sense analysis. First, he argues that it contains a false assumption that the death penalty is a clear and present threat to one contemplating murder.[119] He notes that there is no certainty but only the speculative possibility that the death penalty will be imposed.[120] Second, "[i]n all countries murder is committed to a very large extent either by persons who, though sane, do not in fact count the cost, or are so mentally deranged that they cannot count it."[121] Hart does state that in some instances the death penalty may act as a stimulant to murder.[122] In the long run, "[t]he use of the death penalty by the state may lower, not sustain, the respect for life."[123]

The Rawlsian theory of capital punishment resembles the Utilita-

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114. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 80, 83 (1968) (opining that punishment protects society).

115. *See id.* at 83-89 (speculating on impact of death penalty).

116. *Id.* at 83.

117. *Id.*

118. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 86-88 (1968) (stating that fear of death not legitimate reason for imposing death penalty).

119. *See id.* at 87 (discussing that most persons who commit murder are mentally deranged and unable to understand fear of death).

120. *See id.* at 86 (contending death penalty is merely probability of death in future).

121. *Id.* at 87.

122. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 87 (1968).

123. *Id.*

rian position as described by Hart in several ways. Neither position is absolute. Under either position, capital punishment may be appropriate in some circumstances and inappropriate under changed circumstances. Both positions consider the advantages to society which flow from deterrence of criminal conduct, including murder and would not permit capital punishment if a deterrent effect were not shown. Indeed, one asset of the Rawlsian theory of criminal responsibility and its further development in a theory of capital punishment is the resemblance to Utilitarian thought. This aspect of the Rawlsian theory has proven helpful in the sophisticated analysis of criminal law.[124]

However, the contract theories of criminal responsibility and capital punishment differ from Utilitarianism in a number of ways. In their application, the contract theories require a more rigorous demonstration of benefits before allowing capital punishment. Under Rawlsian analysis, the contracting parties would not agree to capital punishment simply on the ground that it would deter some potential murderers but would agree only if it were necessary to preserve reasonable order in society.[125] While it is possible to make this argument under a contract theory, it would be more difficult, if not impossible, to do so using Utilitarian analysis. A Utilitarian would have difficulty rejecting a demonstrated societal advantage. Rawls' contracting parties, on occasion, would reject societal advantage in order to secure protection of the individual's basic interests.[126] Because a Utilitarian would dislike rejecting a societal advantage, a Utilitarian may have greater difficulty than a Rawlsian in insisting upon rigorous empirical demonstration of a deterrent effect before approving capital punishment. A Utilitarian may be more vulnerable to a somewhat persuasive common-sense argument for deterrence. That vulnerability arises from a Utilitarian's emphasis on societal advantage, while a Rawlsian insists upon preservation of individual rights. Because the contract

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124. Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 770 (1990).

125. *See* JOHN RAWLS, A THEORY OF JUSTICE 395-99 (1972) (reasoning that theory of social goods leads to well-ordered society).

126. *See* Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 751-52 (1990) (discussing how contracting parties would reject slavery even if permitted under principles of justice). One rule of choice in the Original Position is that the principle chosen must tend to maximize the opportunities of minimizing the worst disasters. *Id.*

theory would justify recognition of individual rights despite advantages to society,[127] it may provide a bridge between Utilitarian thoughts and those opponents of capital punishment, such as Justice Brennan, who employ primarily rights-oriented arguments.

Nevertheless, the convergence between Justice Brennan's rights position and Justice Marshall's combination of Majoritarian and Utilitarian arguments is remarkable. Justice Marshall, in *Gregg*, explained that two principal reasons support his opposition to the death penalty in *Furman*: "First, the death penalty is excessive . . . and second, the American people, fully informed as to the purposes of the death penalty and its liabilities, would in my view reject it as morally unacceptable."[128] Justice Marshall argues that the death penalty is excessive because it has no seriously demonstrable deterrent effect: it is "unnecessary to promote the goal of deterrence."[129] If an informed citizenry were aware that capital punishment simply constituted useless killing, "[t]hey would consider it shocking, unjust and unacceptable."[130]

The convergence between Utilitarianism and rights-oriented thought may be eased by the Utilitarians' subordinate or secondary rights theory. It is normally advantageous to society to protect the rights of individuals. Only on extraordinary occasions should rights be set aside in favor of an important competing societal advantage. As Justice Marshall concludes in *Gregg*:

> The mere fact that the community demands the murderer's life in return for the evil he has done cannot sustain the death penalty. . . . To be sustained under the Eighth Amendment, the death penalty must "compor[t] with the basic concept of human dignity at the core of the Amendment.". . . Under these standards, the taking of life "because the wrongdoer deserves it" surely must fall, for such a punishment has as its very basis the total denial of the wrongdoer's dignity and worth.[131]

Utilitarianism, Justice Brennan's rights-oriented concern for human dignity, and Rawlsian thought unite in opposition to capital punishment. That union may demonstrate a strong indication that capital punishment is not in accord with the evolving standards of

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127. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180-83 (1977) (declaring all persons equal because they are all human beings).

128. Gregg v. Georgia, 428 U.S. 153, 231-32 (1976) (Marshall, J., dissenting).

129. *Id.* at 241.

130. *Id.* at 232 (citing Furman v. Georgia, 408 U.S. 238, 360-69 (1972)).

131. *Id.* at 240-41.

human decency. However, the plurality in *Gregg* and subsequent decisions upholding capital punishment choose to deemphasize the words and standards in that political ideal and instead, substitute what amounts to a public opinion poll or nose count.

III. THE PLURALITY: BURGER AND PRE-*MCCLESKEY* REHNQUIST COURTS

One cannot accurately speak of a centrist plurality in Supreme Court death penalty cases, although doing so simplifies the discussion of political ideas, because the center group has a shifting composition. Nevertheless, before *McCleskey*, Justices Brennan and Marshall dissented when a plurality decided to uphold a death penalty.[132] When a death penalty was rejected as unconstitutional, Justices Brennan and Marshall concurred while a shifting group on the right disagreed.[133] Since *Gregg*, the Supreme Court has rejected the death penalty in several specific settings. These settings include instances when it is imposed for rape,[134] when it is imposed through the doctrine of felony murder on one "who neither took life, attempted to take life, nor intended to take life,"[135] when the state has mandatory capital punishment for some crimes,[136] and when only a narrow range of mitigating circumstances can be offered in evidence on behalf of the defendant.[137]

In *Coker v. Georgia*,[138] Chief Justice Rehnquist and Justice Burger dissented;[139] in *Enmund v. Florida*,[140] Chief Justice Rehnquist and Justices O'Connor, Burger, and Powell disagreed.[141] The dissenters in *Woodson* were Chief Justice Rehnquist and Justices Burger, White, and Blackmun;[142] and in *Lockett v. Ohio*,[143] Chief Justice Rehnquist

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132. *E.g.*, Tison v. Arizona, 481 U.S. 137, 159 (1987); Gregg v. Georgia, 428 U.S. 153, 227, 231 (1976).

133. *E.g.*, Enmund v. Florida, 458 U.S. 782, 801 (1982) (Brennan, J., concurring); Coker v. Georgia, 433 U.S. 584, 600 (1977) (Brennan & Marshall, JJ., concurring).

134. *Coker*, 433 U.S. at 592.

135. *Enmund*, 458 U.S. at 786.

136. Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

137. Lockett v. Ohio, 438 U.S. 586, 608 (1978).

138. 433 U.S. 584 (1977).

139. *Id.* at 604.

140. 458 U.S. 782 (1982).

141. *Id.* at 801.

142. *Woodson*, 428 U.S. at 306-07.

143. 438 U.S. 586 (1978).

and Justice White dissented.[144] The plurality in *Coker* were Justices Stewart, Blackmun, Stevens, and White;[145] in *Enmund*, Justices White, Blackmun and Stevens;[146] in *Woodson*, Justices Stewart, Powell, and Stevens;[147] and in *Lockett*, Justices Stewart, Powell, Stevens, and Burger.[148] Recently in *Tison v. Arizona*,[149] which significantly qualified *Enmund*, Chief Justice Rehnquist and Justices White, Powell, and Scalia[150] joined Justice O'Connor's opinion, with Justices Brennan, Marshall, Blackmun, and Stevens dissenting.[151] Justice Stewart wrote the original plurality opinion in *Gregg*. Justices Powell and Stevens joined Justice Stewart's opinion but Chief Justice Rehnquist and Justices White, Burger, and Blackmun wrote separate concurring opinions.[152]

The lack of a dominant theme in their opinions makes analyzing the shifting positions of the center more difficult. A cluster of several main ideas, which relate in complex ways to a series of subordinate positions, appears to support the Court's decisions. A possible dominant theme is the regular insistence on an objective criterion demonstrating the evolving standards of decency in society. Arguably, this amounts to a nose count of legislatures and juries that have either approved or rejected the death penalty in certain circumstances.[153] To the extent that the Court relies on such an objective criterion, the Justices could be said to employ a Majoritarian approach to judicial decision-making. A central idea in the plurality opinions, then, is that under democratic theory the Court, at least when deciding cruel and unusual punishments cases, should consider that majority opinion is an important factor in reaching a conclusion.

A second general theme in the decisions is the contention that capital punishment in some instances serves the social goals of retribution and deterrence while in other instances does not.[154] All the plurality

144. *Id.* at 621, 628.
145. *Coker*, 433 U.S. at 586.
146. *Enmund*, 458 U.S. at 783.
147. *Woodson*, 428 U.S. at 282.
148. *Lockett*, 438 U.S. at 589.
149. 481 U.S. 137 (1987).
150. *Id.* at 138.
151. *Id.* at 159.
152. *Gregg*, 428 U.S. at 158, 207, 226-27.
153. *See id.* at 179-82 (discussing import of juries' and states' decisions regarding death penalty).
154. *See id.* at 182-87 (analyzing role of capital punishment in society); *Enmund*, 458

Justices agree that the statistical evidence for deterrence is inconclusive. Rather, the Justices incorrectly rely on the common-sense conclusion that the death penalty will have some deterrent effect in some circumstances.[155] Normally, then, the state legislatures determine in what circumstances the death penalty is necessary for deterrence.[156] Thus, the common-sense understanding of deterrence overlaps with the plurality's admiration for Majoritarian decision-making.

In a few instances, the plurality employs common sense to conclude that the death penalty does not serve as a deterrent.[157] Apparently, the plurality's understanding of retribution is also based on common sense as it is not grounded in philosophical theory. At best, the plurality's understanding of retributive theory is a combination of quotations from previous judicial opinions joined with reasons of the sort acceptable to the regulars of a country store debating around a cracker barrel on a Saturday afternoon. Again, the plurality's position on retribution overlaps with democratic theory. It is normally for the state legislature and the jury to determine when the death penalty is appropriate as retribution. However, in some instances the plurality concludes that capital punishment is inappropriate retribution.[158]

The third main idea is the concern for fairness which was first enunciated clearly in *Furman*.[159] While under democratic theory legislatures and juries normally determine when capital punishment is appropriate for purposes of retribution and deterrence, their judgments must operate under some standards. The defendant must have an opportunity to offer mitigating evidence. To ensure evenhanded-

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U.S. at 797-801 (discussing relationship between degree of seriousness of crime and death penalty).

155. *See Gregg*, 428 U.S. at 185 (noting that other penalties also have deterrent effects); *Enmund*, 458 U.S. at 798-99 (questioning deterrent effect when accused lacks intent to commit murder).

156. *See Gregg*, 428 U.S. at 186 (reasoning that complexity of capital punishment issue requires that issue be left to legislatures).

157. *See Enmund*, 458 U.S. at 798-99 (questioning deterrent effect of capital punishment in felony murder case); *Coker*, 433 U.S. at 593 (looking to state legislatures to determine capital punishment does not deter rape).

158. *See Enmund*, 458 U.S. at 797-801 (reasoning that death penalty not appropriate punishment for one who does not intend to commit murder); *Coker*, 433 U.S. at 599 (describing death penalty as disproportionate to crime of rape).

159. *See* Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring) (concluding there is no meaningful basis distinguishing those cases where death sentence is imposed and those where it is not).

ness, courts appropriately compare decisions to impose the death penalty with competing decisions within the state and, in some instances, throughout the United States.[160] Sometimes it will be unfair to impose the death penalty.[161]

These three main ideas, a Majoritarian method for judicial decision-making supported by democratic theory, a common-sense understanding that the social goals of retribution and deterrence are or are not served, and a concern for fairness relate in complex ways to a series of subordinate ideas. These complex relationships can be illustrated by two examples: proportionality review and what could be called the "preferred procedure." This "preferred procedure" is the Georgia procedure, as approved in *Gregg*, with the modifications required by *Lockett*.[162]

Coker, *Enmund*, and *Tison* are examples of proportionality review.[163] In these cases the Supreme Court asked first whether the punishment of death, unique in its severity and irrevocability, comported with the heinousness of the offense. Second, the Court analyzed whether recent legislative authorization and judicial imposition of the death penalty occurred with sufficient frequency to be consistent with contemporary community standards.[164] In *Coker* and *Enmund* the Court decided the sentences were disproportionate.[165] In *Tison* the Court modified *Enmund* and concluded that the record would support the death penalty for accomplices who did not kill or

160. *See Gregg*, 428 U.S. at 153 (reviewing historical backdrop of "cruel and unusual" aspect of capital punishment).

161. *See, e.g., Enmund*, 458 U.S. at 801 (deciding imposition of death penalty on individual who participates in circumstances leading to killing, but does not himself kill victim, as excessive penalty); *Lockett*, 438 U.S. at 608 (stating statute which precludes consideration of mitigating factors violates constitutional requirements); *Coker*, 433 U.S. at 600 (concluding death sentence for rape is grossly disproportionate).

162. *See Lockett*, 438 U.S. at 606-09 (insisting that all statutes addressing mitigating factors be non-exclusive).

163. *See Enmund*, 458 U.S. at 791-92 (discussing various philosophies of capital punishment); *Lockett*, 438 U.S. at 601 (discussing that capital punishment appropriate in specific case); *Coker*, 433 U.S. at 591 (stating that death penalty neither disproportionate nor barbaric for charge of murder).

164. *See Tison*, 481 U.S. at 146-58 (using legislative and community opinion to determine proportionality); *Enmund*, 458 U.S. at 788-98 (explaining various standards for death penalty); *Coker*, 433 U.S. at 591-600 (stating that death penalty not cruel and unusual punishment).

165. *See Enmund*, 458 U.S. at 788-96 (refusing to impose death penalty for participant in robbery in which murder was committed); *Coker*, 433 U.S. at 592-93 (finding death penalty for rape disproportionate to crime).

intend to kill provided their conduct showed a reckless disregard for human life.[166] In each case the plurality counted noses by examining the positions of state legislatures and the verdicts of juries and asked whether retribution or deterrence would be served by the death penalty.[167] The Court's review for proportionality in itself reveals a concern for fairness and standards to ensure evenhandedness.

Before discussing Georgia's "preferred procedure" it would be worthwhile to compare Justice White's plurality opinion in *Enmund* with Justice O'Connor's opinion in *Tison*. Justice White concluded:

> For purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt. Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts. This is the judgment of most of the legislatures that have recently addressed the matter, and we have no reason to disagree with that judgment for purposes of construing and applying the Eighth Amendment.[168]

In *Tison*, the Supreme Court agreed that minor actors in a felony who did not intend to kill were not constitutionally eligible for the death penalty.[169] However, where a major participant in a felony which resulted in death showed "reckless indifference to human life," capital punishment is permissible.[170] Justice O'Connor explained the Court's position on retribution:

> We hold that the reckless disregard for human life implicit in knowingly engaging in criminal activity known to carry a grave risk of death represents a highly culpable mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.[171]

Both opinions seem to indicate that the glue which holds together the complex set of concepts employed by the plurality in death penalty cases may be a common-sense understanding of retribution.

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166. *See Tison*, 481 U.S. at 158 (holding that major involvement in felony satisfies *Enmund* culpability requirement).

167. *Id.* at 152-56; *Enmund*, 458 U.S. at 788-98; *Coker*, 433 U.S. at 592.

168. *Enmund*, 458 U.S. at 801.

169. *Tison*, 481 U.S. at 149-50.

170. *Id.* at 158.

171. *Id.* at 157-58.

In *Gregg*, the Court re-established the death penalty after finding that *Furman* arbitrarily imposed capital punishment without any discernable standards.[172] The Georgia procedure, approved in *Gregg*, satisfied the plurality's desire for standards. The procedure established several requirements. First, the state must conduct a bifurcated trial to determine both guilt and the appropriate sentence.[173] Second, before imposing the death penalty, the jury must consider both aggravating and mitigating circumstances and find at least one statutorily defined aggravating circumstance.[174] Third, the state must provide for prompt review by the Georgia Supreme Court in every death penalty case.[175] On appellate review, the state court should consider both the crime and defendant to determine whether the sentence "is excessive or disproportionate to the penalty imposed in similar cases."[176] A comparative review in the highest state court and, perhaps, the United States Supreme Court would eliminate departures from the national norms as revealed by the jury opinion poll. After *Lockett* it is clear that the defendant is free to present all mitigating circumstances.[177]

These statutory standards and the provision for appellate review satisfy the plurality's concern for fairness. The Court perceived the separate jury decision on the death penalty as an important reflection of democratic theory.[178] This jury decision relates to a common-sense understanding of retribution and the evolving standards of human decency.[179] Over time such jury verdicts would amount to a national opinion poll on what kinds of criminals and murderers deserve the death penalty.

The three main ideas in the plurality's death penalty opinions are worth separate comment and comparison with Rawlsian theory. The remainder of this part of the article will critically address Majoritarian decision-making under democratic theory, common-

172. *See Gregg*, 428 U.S. at 188-95 (finding that bifurcated sentencing procedure of Georgia prevented arbitrary imposition of capital punishment).

173. *Id.* at 190-91.

174. *Id.* at 196-97.

175. *Id.* at 198.

176. *Gregg*, 428 U.S. at 204 (quoting GA. CODE ANN. § 27-2537(c)(3) (Supp. 1975)).

177. *See Lockett*, 438 U.S. at 604 (allowing, "in all but the rarest kind of capital cases," presentation of any mitigating factor).

178. *See Gregg*, 428 U.S. at 190-91 (finding bifurcated procedure to be favored in sentencing).

179. *See id.* at 181-82 (stating that jury is reliable "index of contemporary values").

sense understanding of retribution and deterrence, and the plurality's concern for fairness.

A. *Democratic Theory*

Although one can perceive a Majoritarian emphasis in other decisions, including *Woodson*, *Enmund*, and *Tison*, the Supreme Court's decision in *Gregg* probably best exemplifies the plurality's reliance on and understanding of democratic theory.

Justice Stewart, who wrote the plurality opinion in *Gregg*, employed the concepts "evolving standards of human decency" and "accordance with human dignity"[180] normally used in discussing and developing a conceptualization or understanding of the Eighth Amendment's prohibition of cruel and unusual punishments. However, Justice Stewart's development of these twin concepts was at the time of his decision somewhat unusual and could be described as Majoritarian. For example, in discussing the evolving standards of human decency, the Justice states:

> The petitioners in the capital cases before the Court today renew the "standards of decency" argument, but developments during the four years since *Furman* have undercut substantially the assumptions upon which their argument rested. Despite the continuing debate, dating back to the 19th century, over the morality and utility of capital punishment, it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction.[181]

The arguments Justice Stewart used to support his conclusion concerning the evolving standards of decency relied heavily on the passage of statutes in thirty-five states since *Furman* which re-enact capital punishment in a manner designed to avoid constitutional problems.[182] Justice Stewart noted that juries had imposed capital punishment at least 460 times since *Furman*[183] and that Congress had prescribed the death penalty for air piracy.[184]

In regard to the second criterion of cruel and unusual punishments—accordance with human dignity—one can argue that

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180. Gregg v. Georgia, 428 U.S. 153, 173 (1976).

181. *Id.* at 179.

182. *Id.* at 179-80.

183. *Id.* at 182.

184. *Gregg*, 428 U.S. at 180 (citing Antihijacking Act of 1974, 49 U.S.C. §§ 1472(i), (n) (1970 ed. Supp. IV)).

although it is difficult to reduce an analysis of the dignity of man to an estimate of majority opinion, Justice Stewart succeeded in doing just that in *Gregg*. Although using the usual Supreme Court rhetoric decrying punishments inconsistent with human dignity, the Justice ultimately reduced the elements of the analysis to an understanding of majority will. A punishment, as Justice Stewart explained, normally violates human dignity if it is "grossly out of proportion to the severity of the crime" or requires "the unnecessary and wanton infliction of pain."[185] To avoid violating those standards, "the sanction imposed cannot be so totally without penalogical justification that it results in the gratuitous infliction of suffering."[186] Capital punishment, Justice Stewart argued, is not excessive and not contrary to human dignity because it serves "two principal social purposes," namely "retribution and deterrence of capital crimes by prospective offenders."[187] Because Justice Stewart's analysis of these social goals can be reduced to an estimate of majority opinion, it is arguable that the Justice's theory of punishments which violate human dignity is grounded in that same estimate of majority opinion.

In support of that conclusion, it makes sense to begin with the plurality's discussion of deterrence since that is perhaps the principal goal of criminal punishment. In discussing the deterrent effect of capital punishment, Justice Stewart explained that "statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders . . . simply have been inconclusive."[188] Since empirical evidence rigorously demonstrating the deterrent effect of the death penalty was not available, Justice Stewart "employed his common sense and assumed that the death penalty would deter some potential murderers and would not deter others."[189] While one can disagree with the use of such common-sense analysis of deterrent effect, one would not normally accept or reject it because it was Majoritarian. However, Justice Stewart went on to relate his common-sense analysis of the deterrent effect of capital punishment to Majoritarianism. The Justice explained:

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185. *Id.* at 173.

186. *Id.* at 183.

187. *Id.*

188. *Gregg*, 428 U.S. at 184-85.

189. Samuel J.M. Donnelly, *A Theory of Justice, Judicial Methodology and the Constitutionality of Capital Punishment: Rawls, Dworkin, and a Theory of Criminal Responsibility*, 29 SYRACUSE L. REV. 1109, 1132 (1978) (citing *Gregg*, 428 U.S. at 185-86).

> The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts. . . . Indeed, many of the post-*Furman* statutes reflect just such a responsible effort to define those crimes and those criminals for which capital punishment is most probably an effective deterrent.[190]

Justice Stewart argues that capital punishment has a deterrent effect because state legislatures think that such an effect is present. Without more rigorous support that the death penalty deters murder, such as statistical evidence, this argument reduces the understanding of deterrence to an estimate of majority opinion.[191] However, Justice Stewart's argument is not entirely Majoritarian. It rests in part on his own common-sense conclusion that the death penalty sometimes deters and sometimes does not.[192]

In discussing retribution, Justice Stewart also relied on majority opinion. While conceding that retribution "may be unappealing to many,"[193] the Justice contended that it is neither "a forbidden objective nor one inconsistent with our respect for the dignity of men,"[194] and further asserted that retribution expressed the majority's distaste for certain crimes:

> Indeed the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.[195]

Capital punishment, then, accords "with the 'dignity of man' which is the 'basic concept underlying the Eighth Amendment' "[196] because Justice Stewart found that "a substantial number of state legislatures believe that it has a deterrent effect on some murderers and also believe that it expresses the community's belief that murder is a grievous

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190. *Gregg*, 428 U.S. at 186.

191. *Id.* at 182.

192. Samuel J.M. Donnelly, *A Theory of Justice, Judicial Methodology and the Constitutionality of Capital Punishment: Rawls, Dworkin, and a Theory of Criminal Responsibility*, 29 SYRACUSE L. REV. 1109, 1132 (1978).

193. *Gregg*, 428 U.S. at 183.

194. *Id.*

195. *Id.* at 184.

196. *Id.*

crime."[197]

In *Woodson*, *Enmund*, and *Coker*, the plurality employed Majoritarian arguments to demonstrate that capital punishment in some instances constitutes cruel and unusual punishment. For example, in *Enmund*, Justice White argued, "Thus only a small minority of jurisdictions—eight—allow the death penalty to be imposed solely because the defendant somehow participated in a robbery in the course of which a murder was committed."[198] However, Justice White went on to comment in a way that reveals less reliance on Majoritarianism than is found in Justice Stewart's opinion in *Gregg*:

> Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries that it does not.[199]

B. *Rawls and Democratic Theory*

Rawls offers an understanding of democratic government which contrasts with that of the Supreme Court plurality in capital punishment cases. Rawls' theory offers an understanding of government controlled by principle. The two principles of justice adopted by the contracting parties in the model of the Original Position, the principle of equal liberty and the principle of fair distribution,[200] are lexically prior[201] to other conclusions which the parties reach. These other conclusions include the assessment that majority rule is a desirable and appropriate decision-making method.[202] Rawls proposes, then, a

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197. Samuel J.M. Donnelly, *A Theory of Justice, Judicial Methodology and the Constitutionality of Capital Punishment: Rawls, Dworkin, and a Theory of Criminal Responsibility*, 29 SYRACUSE L. REV. 1109, 1133 (1978).

198. *Enmund v. Florida*, 458 U.S. 782, 792 (1982).

199. *Id.* at 797.

200. JOHN RAWLS, A THEORY OF JUSTICE 60 (1972); Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 757 (1990).

201. JOHN RAWLS, A THEORY OF JUSTICE 42-44, 61 (1972); Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 757 (1990).

202. *See* JOHN RAWLS, A THEORY OF JUSTICE 356-62 (1972) (stating majority rule is

government where principle limits its power. The conclusion of the majority should not be followed when it violates the principles of justice.[203]

Rawls imagines a four stage sequence in which the contracting parties consider and accept principles governing a just society. After adopting the two principles of justice in the first stage, the parties in the subsequent three stages agree to principles for (1) a just constitution, (2) legislation, (3) application of rules to cases by judges and other government officials, and (4) compliance by the members of society.[204] At the constitutional and legislative stages, the parties adopt the principle of majority rule because that procedure best reflects background ideas of justice, including "those of political liberty—freedom of speech and assembly, freedom to take part in public affairs and to influence by constitutional means the course of legislation—and the guarantee of the fair value of these freedoms."[205] Majority rule also offers a procedure more likely to reach correct conclusions than competing alternatives such as autocratic or minority rule.[206] Rawls emphasizes, however, "There is nothing to the view . . . that what the majority wills is right."[207]

In discussing civil disobedience in the fourth stage, in which individuals develop principles for following rules, Rawls contends that this form of protest is justified as a means for recalling the majority to the principles of justice.[208] Rawls explains, "By acting in this way one addresses the sense of justice of the majority of the community and declares that in one's considered opinion the principles of social cooperation among free and equal men are not being respected."[209] Rawls remarks that "in a constitutional regime, the courts may finally side with the dissenters and declare the law or policy objected to

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ideal procedure in determining body of laws and policies when parties are guided by two principles of justice).

203. *See id.* at 363-68 (showing that civil disobedience is proper method for minority to demonstrate injustice in majority rule).

204. Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 759 (1990).

205. JOHN RAWLS, A THEORY OF JUSTICE 356 (1972).

206. *See id.* (discussing under what circumstances majority rule is preferred).

207. *Id.*

208. *Id.* at 366-67.

209. JOHN RAWLS, A THEORY OF JUSTICE 364 (1972).

unconstitutional."[210]

In discussing the rule of law and the work of the courts, Rawls does not elaborate on the function of declaring majority legislative decisions unconstitutional. However, in his book *Taking Rights Seriously*,[211] Ronald Dworkin offers an understanding of constitutional decision-making which comports with a Rawlsian theory of a limited government lexically subordinate to the principles of justice. Commenting on democratic theory, Dworkin explains:

> The constitutional theory on which our government rests is not a simple [M]ajoritarian theory. The Constitution, and particularly the Bill of Rights, is designed to protect individual citizens and groups against certain decisions that a majority of citizens might want to make, even when that majority acts in what it takes to be the general or common interest.[212]

When interpreting open-textured constitutional concepts such as cruel and unusual punishment, Dworkin argues that the Supreme Court should not defer to the country's majority opinion.[213] To do so, when the majority is accused of violating minority rights, makes the majority the judge in its own case.[214] That would be inappropriate in a regime where government is limited and subordinate to principles designed to protect the liberty of all, including members of minorities and those disliked by society. The support of Majoritarian judicial decision-making by a simple appeal to democratic theory is appropriate only "if men have no rights against the majority, if political decision is simply a matter of whose preferences shall prevail."[215]

The contracting parties in the Original Position would accept Dworkin's argument that courts should not resort to Majoritarian decision-making when interpreting open-textured constitutional provisions designed to protect minority rights. The parties desire to maximize their opportunities of minimizing the worst disasters.[216]

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210. *Id.* at 365.

211. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 131-49 (1977).

212. *Id.* at 132-33.

213. *See id.* at 142-43 (stating that majority should not be entrusted to adequately protect individual rights).

214. *Id.* at 142.

215. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 140 (1977).

216. Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 751 (1990).

Under this "maxi-mini" principle, the parties would favor constitutional provisions protecting minorities and those disliked by the majority. They would disfavor interpreting those protections by counting noses in society. In other words, they would favor principled interpretation rather than Majoritarian judicial decision-making.

Therefore, in contrast to Majoritarian judicial decision-making supported by democratic theory, Rawlsian theory would offer an understanding of a limited government whose decisions are lexically subordinate to principles of justice enforced by the courts, among others.[217] The principles of justice would protect minority rights and should not be interpreted by a method which will make the majority the judge in its own case. This theory fits better with the history and structure of our government than a more simple democratic theory which defers in a wide range of instances to majority will. To the extent that the plurality opinions in the capital punishment cases rest upon this more simple form of democratic theory, they are inappropriate.

Other legal scholars note that "it is not philosophically or logically necessary to reduce to a public opinion poll former Chief Justice Warren's dictum that the Eighth Amendment's prohibition of cruel and unusual punishment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' "[218] Dworkin would contend that the language "cruel and unusual punishments" creates a contested moral concept[219] which can be interpreted in different ways depending upon which competing theory or conceptualization one uses to understand that concept. Deeper theories of justice or government, in turn, support these conceptualizations. A Justice of the Supreme Court using methods similar to those described by Dworkin could ground an interpretation of the contested concept "cruel and unusual punishments" in what seems to the Justice to be the better or best theories of government or justice, including the better theories of criminal justice.[220] Those better theories, then, would express "the evolving standards of decency that mark the

217. JOHN RAWLS, A THEORY OF JUSTICE 356, 366-67 (1972) (explaining Rawlsian theory).

218. *Gregg*, 428 U.S. at 173 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1957)).

219. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 133-36 (1977) (arguing that "vague" standards in Constitution create need to identify those standards under strict or liberal theory).

220. *Id.* at 131-49.

progress of a maturing society."[221]

Although one might contend that the major current theories of justice are converging in opposition to capital punishment, one could agree with Justice Brennan that the concept of human dignity is at the heart of the Eighth Amendment. One could support Justice Brennan's opinion that the evolving rules concerning human decency, perhaps as represented by society's attitudes, are merely evidence of a threat to human dignity.

C. *Common-sense Retribution and Deterrence*

The twin decisions of the Supreme Court in *Enmund* and *Tison* illustrate the centrality of the plurality's common-sense understanding of retribution. When discussing robbery, the underlying felony in *Enmund*, Justice White quoted *Gregg* while explaining that it is not "so grievous an affront to humanity that the only adequate response may be the penalty of death."[222] In *Enmund*, some of the robbers did commit murder. However, "they were subjected to the death penalty only because they killed as well as robbed."[223] According to the Court, Enmund, himself, did not kill or intend to kill.[224] Instead, he only manned the getaway car waiting outside the scene of the robbery.[225] Justice White concluded:

> Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed, yet the State treated them alike and attributed to Enmund the culpability of those who killed the Kerseys. This was impermissible under the Eighth Amendment.[226]

Justice O'Connor, dissenting in *Enmund*, offered a different understanding of retribution. To Justice O'Connor, the Eighth Amendment requires more than merely an assessment of "contemporary standards of decency."[227] Beyond that, the Court should determine whether imposition of the death penalty is "proportional to the harm caused and the defendant's blameworthiness."[228] Justice O'Connor's

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221. *Trop*, 356 U.S. at 101.

222. Enmund v. Florida, 458 U.S. 782, 797 (1982) (*citing* Gregg v. Georgia, 428 U.S. 153, 184 (1976)).

223. *Id.* at 798.

224. *Id.*

225. *Id.* at 784.

226. *Enmund*, 458 U.S. at 798.

227. *Id.* at 823 (O'Connor, J., dissenting).

228. *Id.*

concern over retribution for the harm resulting from a crime appears in the following passage:

> Although the Court disingenuously seeks to characterize Enmund as only a "robber". . . it cannot be disputed that he is responsible, along with Sampson and Jeanette Armstrong, for the murders of the Kerseys. There is no dispute that their lives were unjustifiably taken, and that the petitioner, as one who aided and abetted the armed robbery, is legally liable for their deaths. Quite unlike the defendant in *Coker v. Georgia*, the petitioner cannot claim that the penalty imposed is "grossly out of proportion" to the harm for which he admittedly is at least partly responsible.[229]

Justice O'Connor wrote for the Court in *Tison*, which modified *Enmund*, and Justice White concurred.[230] In *Tison*, having joined the plurality, Justice O'Connor restated the position in *Enmund* and her understanding of retribution:

> While the States generally have wide discretion in deciding how much retribution to exact in a given case, the death penalty, "unique in its severity and irrevocability". . . requires the State to inquire into the relevant facets of "the character and record of the individual offender.". . . Thus, in Enmund's case, "the focus had to be on *his* culpability, not on that of those who committed the robbery and shot the victims, for we insist on "individualized consideration as a constitutional requirement in imposing the death sentence.". . . Since Enmund's own participation in the felony murder was so attenuated and since there was no proof that Enmund had any culpable mental state . . . the death penalty was excessive retribution for his crimes.[231]

The Tisons, however, were perceived as major participants in the crimes which in their case surrounded the murder. They had assisted in their father's escape from prison and helped in the kidnaping of the murder victims.[232] They knew of their father's propensity to kill.[233] Although they neither killed nor intended to kill, the Court held that their reckless disregard for life demonstrated sufficient culpability to support the death penalty. Justice O'Connor explained:

> A narrow focus on the question of whether or not a given defendant "intended to kill," however, is a highly unsatisfactory means of defini-

229. *Id.* at 824 (O'Connor, J., dissenting).
230. Tison v. Arizona, 481 U.S. 137, 138 (1987).
231. *Id.* at 149.
232. *Id.* at 139-41.
233. *Id.* at 144.

> tively distinguishing the most culpable and dangerous of murderers. Many who intend to, and do, kill are not criminally liable at all—those who act in self-defense or with other justification or excuse. Other intentional homicides, though criminal, are often felt undeserving of the death penalty—those that are the result of provocation. On the other hand, some nonintentional murderers may be among the most dangerous and inhumane of all—the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill."[234]

As exemplified by *Enmund* and *Tison*, the Supreme Court perceives itself and the lower courts as engaged in an effort to locate "the most culpable and dangerous of murderers."[235] That effort proceeds, case by case, by examining the individual characteristics of each murderer, not only in the Supreme Court but also at trial. The Court contemplates that the jury or the judge will weigh the particular circumstances surrounding each homicide in an effort to determine the culpability of the perpetrator. This effort represents a common-sense understanding of retribution since the Court offers no theory describing "the most culpable and dangerous of murderers" and no explanation of why these convicts, as opposed to others whose crimes bear some resemblance to theirs, uniquely deserve the death penalty. Rather, the Supreme Court trusts the sense of judgment exercised by juries and trial judges to determine who deserves death. On occasion the Court exercises its own non-theoretical judgment.

One could contrast Immanuel Kant's understanding of retribution[236] with that of the plurality. Kant's position on capital punishment represents a theoretical and principled explanation supporting

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234. *Tison*, 481 U.S. at 157.

235. *Id.*

236. *See* Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 763 n.120 (1990) (explaining Kant's view of retribution). "Kant's retributivist theory of criminal punishment contends the society is morally obligated to punish citizens who commit crimes. Criminals should be treated as ends in themselves and punished because they deserve it, not as a means to the fulfillment of societal goals." *Id.* at 741 n.4. For a related discussion of punishment based on desert, see MICHAEL E. SHERMAN & GORDON HAWKINS, IMPRISONMENT IN AMERICA-CHOOSING THE FUTURE 103-13 (1981).

its validity, as opposed to the common-sense view of the current Supreme Court. While one may disagree with both views, an additional reason for rejecting the Court's position is its lack of theoretical justification.

Kant's retributivist theory of punishment includes the claim that society is morally obligated to punish a citizen who commits a crime.[237] Although this may appear to be in sharp contrast to Kant's general ethical position, Kant did not argue that criminals should be punished as a means to some desirable societal goal.[238] Rather, it is the categorical imperative requiring one to treat others as ends in themselves which condemns the criminal to retribution.[239] Kant argued:

> Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else . . . .[240]

Retribution is the only adequate measure of the proper punishment because it is a principle of equality. Kant explained, "Accordingly, any undeserved evil that you inflict on someone else among the people is one that you do to yourself."[241] Kant concluded:

> [If a person] has committed a murder, he must die. In this case, there is no substitute that will satisfy the requirements of legal justice. There is no sameness of kind between death and remaining alive even under the most miserable conditions, and, consequently, there is no equality between the crime and the retribution unless the criminal is judicially condemned and put to death.[242]

For Kant, retribution is the proper punishment to inflict because

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237. *See* IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 102 (J. Ladd trans., 1965) (illustrating society's moral obligation to impose punishment as symbol of retribution).

238. *Id.* at 100. Kant's position is to treat others as ends in themselves. *See id.* (stating individuals cannot be manipulated for others).

239. *See* Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 763 n.120 (1990) (discussing Kant's justification for retributivist theory of punishment).

240. IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 100 (J. Ladd trans., 1965).

241. *Id.* at 101.

242. *Id.* at 102.

the person must be treated as an end rather than a means.[243] Therefore, Kant grounds his understanding of retribution and capital punishment in a respect for human dignity. Rawls' *A Theory of Justice* offers a modern version of Kantianism and can be understood as a more complex way of viewing persons as ends in themselves. The Rawlsian theory of criminal responsibility describes one way in which Rawls' theory can accept Kant's kingdom of ends and yet not be forced, as Kant was, to accept retribution as the only way to avoid treating the criminal as a means. While for Kant equal treatment means retribution, for Rawls equal treatment means "an equal right to the most extensive basic liberty compatible with a similar liberty for others."[244]

Nevertheless, Kant's understanding of capital punishment offers a standard to which the Supreme Court's plurality position can be compared. Kant emphasized equality and rooted his position on capital punishment in a regard for human dignity. The Supreme Court's haphazard method of selecting "the most culpable and dangerous of murderers" for capital punishment rests instead on trust for the common sense of juries and on its understanding of democratic theory.[245] Because only some murderers are selected for execution and those who escape capital punishment resemble them in some ways, equality is not an important characteristic of the Supreme Court's position. Because some murderers are executed while others are not, the Supreme Court's position cannot rest on the rigorous respect for the human dignity of the person convicted as found in Kantian theory. Retributive theory requires greater rigor in relating punishment to desert than is possible under the sentencing methods approved by the Supreme Court. The Court is correct that human dignity requires a consideration of mitigating factors and mercy for each individual.[246] This is not a basis, however, for justifying on retributive grounds the death penalty for those executed. The death penalty, as currently administered, is not based on respect for the human dignity of potential victims because it is not carefully related to deterrence. Rather, it is based, as the Supreme Court frequently indicates, on a societal goal of

243. *See id.* at 100 (stating persons should be treated as ends).

244. JOHN RAWLS, A THEORY OF JUSTICE 60 (1972).

245. *See Gregg*, 428 U.S. at 181-86 (describing jury's attitude toward death penalty and deterrent effect thereof).

246. *See generally* Lockett v. Ohio, 438 U.S. 586, 596-611 (1978) (discussing role of mitigating factors in deciding on death penalty).

retribution,[247] a goal which either expresses society's desires or reinforces society's values.

Because the goal of retribution relates to democratic theory as understood by the plurality, problems are presented which do not readily challenge a more rigorous retributive theory. State legislative selection of aggravating and mitigating factors and designation of what types of murder require capital punishment inject political manipulation into the process. Politicians will campaign for capital punishment in the form which seems most popularly acceptable whether they personally accept it or not. State capital punishment statutes may reflect the currently popular fads. Defendants whose deeds shock and capture the public imagination will constitute prime candidates for capital punishment. There is some indication that this is what happened in *Tison*.[248] In other circumstances, defendants with psychological problems will commit shocking deeds. In some instances they will be less blameworthy than the more normal variety of murderer. Despite the careful procedures employed since *Gregg*,[249] judges and juries may single out these less blameworthy persons for capital punishment because their deeds reflect statutory aggravating factors. Comparative review by appellate courts does not sort out these individuals since juries may normally recommend the death penalty in such cases. While dissenting in *Tison*, Justice Brennan elaborated:

> What makes this a difficult case is the challenge of giving substantive content to the concept of criminal culpability. Our Constitution demands that the sentencing decision itself, and not merely the procedures that produce it, respond to the reasonable goals of punishment. But the decision to execute these petitioners, like the the state courts' decision in *Moore*, and like other decisions to kill, appears less responsive than to other, more visceral, demands. The urge to employ the felony-murder doctrine against accomplices is undoubtedly strong when the killings stir public passion and the actual murderer is beyond human grasp. And an intuition that sons and daughters must sometimes be punished

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247. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 597-98 (1977) (describing act of rape as reprehensible in eyes of society); *Gregg*, 428 U.S. at 183-84 (1976) (noting society's instinct for retribution).

248. *Tison*, 481 U.S. at 142 (citing lower court's finding that crimes "heinous"). In *Tison*, attention focused on the sons because the actual killer, the father of the two defendants, died in the desert and was not available for punishment. *Id.* at 141.

249. *See Lockett*, 438 U.S. at 602 (noting that many states have revised their death penalty statutes to comport with holdings in post-*Gregg* cases).

> for the sins of the father may be deeply rooted in our consciousness. Yet punishment that conforms more closely to such retributive instincts than to the Eighth Amendment is tragically anachronistic in a society governed by our Constitution.[250]

Tison enhanced the temptation to impose the sins of the father on the sons because the father, who escaped from prison and actually killed the kidnaped persons, eluded capture, died in the desert, probably of thirst[251] and therefore was unavailable for execution. Justice Brennan generalized from the difficulties of assessing culpability in felony murder cases like *Tison* to the broader problem of distinguishing which murderers are most culpable and dangerous:

> This case thus illustrates the enduring truth of Justice Harlan's observation that the tasks of identifying "those characteristics of criminal homicides and their perpetrators which call for the death penalty, and [of] express[ing] these characteristics in language which can be *fairly* understood and applied by the sentencing authority appear to be . . . beyond present human ability." . . . The persistence of doctrines (such as felony murder) that allow excessive discretion in apportioning criminal culpability, and of decisions (such as today's) that do not even attempt "precisely [to] delineate the particular types of conduct and states of mind warranting imposition of the death penalty," . . . demonstrates that this Court has still not articulated rules that will ensure that capital sentencing decisions conform to the substantive principles of the Eighth Amendment. Arbitrariness continues so to infect both the procedure and substance of capital sentencing that any decision to impose the death penalty remains cruel and unusual.[252]

In *Gregg*, Justice Stewart perceived both retribution and deterrence as appropriate societal goals of punishment.[253] The Justice found a common-sense basis for deterrence in the decisions of the state legislatures[254] despite acknowledging the inconclusive statistical evidence concerning the deterrent effect of capital punishment.[255] In *Enmund*, Justice White rejected capital punishment for participants in a felony which results in death if the participants neither killed nor intended to kill because, among other reasons, that punishment would have little

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250. *Tison*, 481 U.S. at 183-84 (Brennan, J., dissenting).
251. *Id.* at 141.
252. *Id.* at 184-85 (Brennan, J., dissenting).
253. *See Gregg*, 428 U.S. at 185-86 (describing appropriate goals of punishment).
254. *See id.* at 179-80 (noting number of state legislatures providing for death penalty).
255. *Id.* at 184.

deterrent effect.[256] Justice White explained that the death penalty most likely serves as a deterrent "only when murder is the result of premeditation and deliberation."[257] Unless a person intends or expects that life will be taken, it would seem unlikely that the death penalty would enter into his calculations.[258] Because murder seldom happens in the course of robberies, Justice White concluded that it was unlikely that a potential robber would weigh the death penalty when determining to participate in that felony.[259] Justice White, then, employs a common-sense reasoning process to conclude that capital punishment has little deterrent effect on a participant in a robbery which resulted in a death, when the participant neither killed nor intended to kill.

In *Tison*, Justice O'Connor wisely avoids the question of the deterrent effect of capital punishment and concentrates on the retributive goal.[260] Justice O'Connor does note that the sons who participated in their father's escape from prison and the kidnaping of the murder victims did have a higher expectation that death might result from their crimes than did the felony murderers in *Enmund*.[261] Indeed, the Tisons' father had killed a prison guard in a previous escape attempt.[262] However, whether the death penalty would have any greater deterrent effect than life imprisonment on potential participants in such a crime is highly speculative. It appears evident that family considerations motivated the sons in *Tison* in ways which outweighed competing inputs to their decision-making process. At the time of the crimes, Arizona did have the death penalty.

Using common sense one can easily conclude that the death penalty is unlikely to deter someone such as Enmund. However, it is much more difficult to conclude that the death penalty will have a more significant deterrent effect than life imprisonment in regard to a particular variety of murder or murderer. A better conclusion would be

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256. *See Enmund*, 458 U.S. at 798-99 (stating that death penalty deters only premeditated murder).

257. *Id.* at 799.

258. *See Gregg*, 428 U.S. at 186 (explaining why death penalty not appropriate for vicarious felony murder).

259. *See Enmund*, 458 U.S. at 799 (asserting that most robberies committed without intent to take life).

260. *See Tison*, 481 U.S. at 149-58 (discussing whether crime proportionate to death penalty).

261. *See id.* at 151-52 (comparing *Tison* and *Enmund*).

262. *Id.* at 144.

that common-sense conclusions that the death penalty either deters or does not deter are both speculative. Statistical results are the only satisfactory evidence of deterrent effect and statistics do not prove such an effect. To rely upon state legislatures to find a common-sense deterrent effect in the absence of statistical evidence leaves an already speculative question open to answers influenced by the vagueness of politics and political advantage, as well as by waves of public emotion.

To reiterate, under Rawlsian theory if someone proposed the death penalty, the contracting parties would insist upon a rigorous demonstration that it was deserved and that it would have a crime reduction effect. Both conditions would have to be met before the contracting parties would consider the possibility of imposing the death penalty.

D. *Fairness*

McCleskey presented the most recent serious challenge to the fairness of capital punishment. A Georgia court convicted McCleskey, an African-American, of killing a white police officer in the course of a robbery.[263] Following the Supreme Court's favored procedure, at the penalty hearing after the conviction the jury found two statutory aggravating factors, the robbery and the slaying of the police officer, and the court recommended a sentence of death.[264] The Georgia Supreme Court, on review, found that the death sentence had been used in similar cases.[265] The state supreme court did not compare cases in which the death penalty was not imposed.

McCleskey challenged his sentence under the Equal Protection Clause of the Fourteenth Amendment as well as under the Cruel and Unusual Punishments Clause of the Eighth Amendment.[266] He relied primarily on a statistical study of death penalties in Georgia by Professor David Baldus.[267] The Baldus study, as described by Justice

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263. McCleskey v. Kemp, 481 U.S. 279, 283 (1987).

264. *Id.* at 284-85.

265. *Id.* at 306.

266. *Id.* at 291, 299.

267. *McCleskey*, 481 U.S. at 291, 299. For related discussions on comparative review in capital sentencing see generally David C. Baldus, et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133, 207-08 (1986) (illustrating different approaches to demonstrate arbitrary imposition of death penalty); David C. Baldus, et al., *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia (Death Penalty Symposium)*, 18 U.C. DAVIS L. REV. 1375, 1406-07 (1985) (evaluating effectiveness of measuring case culpability and describing findings on degree of arbitrariness of capital punishment sentencing); David C. Baldus, et al.,

Powell in the majority opinion, examined over 2,000 Georgia murder cases during the 1970's.[268] The basic figures in Georgia indicated that courts have imposed the death penalty "in 22% of cases involving black defendants and white victims; 8% of cases with white defendants and white victims; and only 1% of cases where a black defendant was convicted of killing a black victim."[269] After further extensive analysis, Baldus concluded that defendants who were "charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks."[270] One possible reason for the racial disparities found in Georgia could have been the practice of prosecutors who sought the death penalty in 70% of African-American defendant—white victim cases but in only 32% of white defendant—white victim cases and 15% of African-American defendant—African-American victim cases.[271] Justice Brennan, in his dissenting opinion, commented:

> At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of McCleskey's past criminal conduct were more important than the fact that his victim was white. Furthermore, counsel would feel bound to tell McCleskey that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks. In addition, frankness would compel the disclosure that it was more likely than not that the race of McCleskey's victim would determine whether he received a death sentence: 6 of every 11 defendants convicted of killing a white person would not have received the death penalty if their victims had been black, . . . while, among defendants with aggravating and mitigating factors comparable to McCleskey's, 20 of every 34 would not have been sentenced to die if their victims had been black. . . . Finally, the assessment would not be complete without the information that cases involving black defendants and white victims are more likely to result in a death sentence than cases

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Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach, 33 STAN. L. REV. 1, 68-80 (1980) (demonstrating the effectiveness of using quantitative approach to determine Eighth Amendment violations); David C. Baldus & Charles A. Pulaski, Jr., *Testing the Rehnquist "Impossibility" Hypothesis*, N.J. L.J., Mar. 19, 1987, at 34 (discussing comparative proportionality review).

268. *McCleskey*, 481 U.S. at 286.

269. *Id.*

270. *Id.* at 287.

271. *Id.*

> featuring any other racial combination of defendant and victim. . . . The story could be told in a variety of ways, but McCleskey could not fail to grasp its essential narrative line: there was a significant chance that race would play a prominent role in determining if he lived or died.[272]

While the fairness in the administration of the death penalty concerns the Supreme Court, the seriousness, consistency, and depth of that concern are questionable since the Court's rejection of McCleskey's challenge to capital punishment. In cases such as *Coker* and *Enmund*, the Court found capital punishment unfair because of the disproportion between the crime committed and the death penalty.[273] In other cases, for example *Woodson* and *Lockett*, the Court insisted on procedural fairness.[274] However, by upholding a system in which race apparently plays a large role in the selection of persons for death, the Supreme Court has compelled critics to question whether its ostensible concern for fairness is a facade providing respectability for other considerations. The Court may be ignoring the possibility raised most forcefully by Charles Black that it may be impossible to administer capital punishment fairly.[275] Fair administration may be particularly difficult in a society with a history and lingering effects of racial discrimination.

Justice Powell, in his opinion for the Court, addressed both the equal protection and cruel and unusual punishments arguments. Justice Powell's principal answer was that apparent disparities are inevitable in a sentencing system where discretion has an important role.[276] However, states should ensure that there is careful control over death sentencing by instituting a procedure akin to Georgia's preferred procedure which eliminated the major systemic defects found in *Furman*. Because discretion is fundamental to the criminal process, the statistical demonstration of general racial bias in death sentencing is not suf-

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272. *McCleskey*, 481 U.S. at 321 (Brennan, J., dissenting).

273. Enmund v. Florida, 458 U.S. 782, 788-96 (1982); Coker v. Georgia, 433 U.S. 584, 591-92 (1977).

274. *See* Lockett v. Ohio, 438 U.S. 586, 602-08 (1978) (concerning issue of whether Ohio statute provided defendant with opportunity to present mitigating factors); Woodson v. North Carolina, 428 U.S. 280, 286-305 (1976) (finding that mandatory death penalty sentence is unconstitutional in that it impermissibly allows unbridled jury discretion).

275. *See* CHARLES L. BLACK, JR., CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 29-36 (1974) (discussing difficulties in imposing penalties fairly which lead to appearance of arbitrariness).

276. *McCleskey*, 481 U.S. at 297.

ficient to establish its unconstitutionality in the absence of evidence of racial discrimination in the particular case before the Supreme Court.

Justice Brennan, in his dissent, replied that heavy racial influences on the death-sentencing procedure defeat the purpose of allowing discretion in criminal punishment.[277] Since each individual convicted of crime is unique, the courts respect the defendant's human dignity by allowing the jury or other sentencing authority to consider the defendant's particular characteristics when determining an appropriate sentence. However, permitting discretion as opposed to insisting on mandatory punishment, allows racial bias to influence the sentencing decision. Thus, the purpose of discretion is defeated. Treating the defendant as a member of a race or group is distinctly at odds with understanding the defendant as a unique human being. Selecting a person for death largely because the person is a member of a racial group constitutes a particularly serious denial of human dignity. As the Baldus study indicated, McCleskey's crime fell into a category of murders committed in Georgia that often does not result in a death sentence.[278] Therefore, it is arguable on the basis of the statistics, that the trial court selected McCleskey for death because he is African-American and had murdered a white person.

In an article reflecting on the Baldus study and other research showing racial bias in capital sentencing,[279] Professor Richard Lempert explained the dilemma presented by that finding:

> I suspect that the relationship researchers have found between the victim's race and the capital sanction results from a simple fact. Whites, who as judges, prosecutors and jurors dominate the death sentencing process, cannot help feeling more indignation upon learning that a white (like them) has been killed than they do when there is a black victim. This extra indignation may suppress what would otherwise be an instinct for mercy. There is little point in labeling such reactions and similar same race preferences by blacks with the pejorative "racism." They are simply part of what it is to be human in a race-conscious society. But to execute one whose victim is white when he would have been spared had his victim been black is intolerable in a system that demands equality and fairness, however understandable or even admirable the process that led to the distinction. At the same time, achieving equality

277. *Id.* at 335-36 (Brennan, J., dissenting).

278. *Id.* at 287 n.5.

279. Richard Lempert, *Capital Punishment in the '80's; Reflections on the Symposium*, 74 J. CRIM. L. & CRIMINOLOGY 1101, 1101-02 (1983).

> by suppressing what is most human about us and executing on the basis of hard data that neither reflects individualized judgments of the heinousness of the offense and offender nor allows for feelings of mercy seems equally intolerable. In such a system people will be killed not because those who hear their cases think *they* deserve to die but because the sentencers think that *others* do. If capital punishment is to endure, the measurement must be reversed. Where differences between offenders cannot be articulated or, as with the race of victim data, cannot withstand articulation, the more merciful disposition must control. If such a standard were faithfully applied we would soon find that capital punishment was confined to a small subset of the most heinous offenders. Other options are to turn a blind eye to the inequalities that permeate the system or to so increase the rate at which we sentence people to death that the state infliction of death will be, literally, an everyday occurrence. Or we may recognize that retribution by death inescapably conflicts with other deeply held and more civilized values, and for this reason we may cease to inflict it.[280]

Justice Powell was unwilling to select either horn of the dilemma, to abandon discretion and mercy by returning to mandatory sentencing or to eliminate capital punishment because the discretionary decision to impose it is inevitably affected by racial considerations.[281] The Justice was particularly reluctant to choose the latter course because he foresaw that all criminal sentencing decisions would be affected by similar racial influences and would be subjected to the same constitutional challenge.[282]

Charles Silberman has shown the pervasive relationship between race, prison sentences, and the criminal justice system.[283] In these circumstances it is likely that appropriate studies of criminal sentencing in general would parallel the Baldus findings. Justice Brennan addressed this problem:

> It hardly needs reiteration that this Court has consistently acknowledged the uniqueness of the punishment of death. "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the

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280. *Id.* at 1113-14.

281. *See McCleskey*, 481 U.S. at 307-13 (reaffirming importance of jury in capital punishment sentencing).

282. *Id.* at 314-15.

283. *See generally* CHARLES E. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 117-65 (1978) (discussing America's attitudes towards race and crime).

> determination that death is the appropriate punishment." . . . Furthermore, the relative interests of the state and the defendant differ dramatically in the death penalty context. The marginal benefits accruing to the state from obtaining the death penalty rather than life imprisonment are considerably less than the marginal difference to the defendant between death and life in prison. Such a disparity is an additional reason for tolerating scant arbitrariness in capital sentencing. Even those who believe that society can impose the death penalty in a manner sufficiently rational to justify its continuation must acknowledge that the level of rationality that *is* considered satisfactory must be *uniquely* high. As a result, the degree of arbitrariness that may be adequate to render the death penalty "cruel and unusual" punishment may not be adequate to invalidate lesser penalties. What these relative degrees of arbitrariness might be in other cases need not concern us here; the point is that the majority's fear of wholesale invalidation of criminal sentences is unfounded.[284]

Justice Brennan's argument parallels the Rawlsian principles of criminal responsibility: the more serious the sentence the more rigorous must be the justification. When imposing capital punishment, if it were permitted by the Rawlsian principles, one must use the most rigorous methods available in the culture to show both desert and the service of an important societal goal, normally general deterrence.[285] The contracting parties, who are concerned with crime reduction, would not demand the same rigor of justification for prison sentences. At the moment, there is no substitute for the general deterrence provided by the combination of prison sentences and the existence of our criminal justice system. In contrast, life imprisonment, which may have an equivalent deterrent impact, substitutes for capital punishment. While one would hesitate to abolish prisons because of unfair sentencing, it is nevertheless a significant question whether capital punishment provides any societal benefits which outweigh its unfair administration.

Invoking judicial deference,[286] Justice Powell believed that question should be addressed to the state legislatures.[287] The plurality's

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284. *McCleskey*, 481 U.S. at 340 (Brennan, J., dissenting).

285. Samuel J. M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 770, 776 (1990).

286. *See McCleskey*, 481 U.S. at 319 (stating that legislative bodies are best forum to determine propriety of punishment).

287. *See id.* (illustrating how legislatures are better qualified to determine sentencing).

Majoritarian view of democratic theory supports Justice Powell's understanding. However, this position conflicts with the role of principles in a Rawlsian theory of a just society.

A Rawlsian theory of fairness in criminal sentencing, developed by using the model of the Original Position, would support and parallel the arguments offered in Justice Brennan's dissent. With the veil of ignorance sufficiently lifted to understand their society as described in the Baldus study, the contracting parties would view capital punishment from the perspective of an African-American defendant charged with the murder of a white victim. If capital punishment were desirable as a means of deterring the worst disaster of homicide, then the parties would want the burden or responsibility of repairing the societal damage fairly distributed. The parties would reject a proposal that society select one class, such as African-American murderers of white victims, for more frequent application of the death penalty because on lifting the veil of ignorance, they might be in that class. If capital punishment cannot be administered without some inevitable bias against African-Americans, the benefits of capital punishment to protect primary goods and the ability to pursue rational life plans might be outweighed by the worst disaster of being singled out for capital punishment for racial reasons. Normally, the parties would conclude that the advantages of capital punishment were not sufficient.

Society might reach a different conclusion when presented with a similar set of problems in regard to a sentence of imprisonment. Again, the parties would reject a proposal that one class, such as African-Americans, uniquely bear the burden of repairing the harm crime causes society. However, when presented with inevitable bias in prison sentences, the parties would demand serious attention to reform but would not call for steps leading to elimination of prison sentences. Since the contracting parties favor crime reduction, they would resist rejecting incarceration altogether in the absence of a serious substitute. However, the parties would unanimously adopt a principle requiring fairness in criminal sentencing because on lifting of the veil of ignorance they might find themselves in the class subject to unfair discrimination. By compelling the contracting parties to view a problem from each relevant representative position, the Rawlsian model assures that the principles adopted treat each member of society as an end in himself and with deep respect and concern for human dignity. Consequently, fairness in the administration of criminal justice provides an additional reason to reject capital punishment.

IV. FAIRNESS AND THE POST-*McCLESKEY* COURT

During the time following the decision in *McCleskey* until the retirement of Justice Brennan, the rhetoric of the plurality dominated the Supreme Court's discussions of capital punishment. Most arguments centered on the question of whether imposition of capital punishment was fair, either procedurally or substantively, in the case before the Court.[288]

In analyzing the Court's decisions, however, one cannot separate the Court's understanding of fairness from common-sense retribution or deterrence, or from Majoritarianism. Retribution rather than deterrence has become an important theme in discussions of fairness. A decision to impose capital punishment would be procedurally fair if fair means had been employed in determining that the sentenced individual deserved the death penalty. When the sentence of death is proportional to the crime committed and to the moral desert of the person who committed the crime, capital punishment could be described as substantively fair. However, in determining whether it is substantively fair to impose capital punishment on retarded persons[289] or juveniles[290] or to mandate capital punishment for those who commit a second murder while serving a life term,[291] the Court assessed the dominant view among the state legislatures. Therefore, the court entwined its understanding of substantive fairness with Majoritarianism. At times procedural fairness relates to the Court's deference to state decision-makers. The Court questioned whether state legislatures focused adequately on what particular type of person, for example a juvenile, should be subjected to capital punishment.[292] While fairness was the focus of the Supreme Court's debates, the Court's understanding of fairness was complex and related to the Justices' desires and understanding of retribution.

Since *McCleskey*, the Supreme Court has struck down the death

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288. *E.g.*, Penry v. Lynaugh, 492 U.S. 302, 319 (1989); South Carolina v. Gathers, 490 U.S. 805, 811-12 (1989); Mills v. Maryland, 486 U.S. 367, 375 (1988); Maynard v. Cartwright, 486 U.S. 356, 361 (1988).

289. *See Penry*, 492 U.S. at 334-35 (1989) (listing statistical data opposing imposition of capital punishment against retarded individuals).

290. *See* Thompson v. Oklahoma, 487 U.S. 815, 824-31 (1988) (discussing state legislation which addresses sentencing minors to death penalty).

291. *See* Sumner v. Shuman, 483 U.S. 66, 71-72 (1987) (discussing state mandatory sentencing schemes).

292. *Thompson*, 487 U.S. at 824-31.

penalty in a remarkable number of instances, often by a vote of five to four.[293] Likewise, cases upholding the death penalty often were five-to-four decisions.[294] Justices Blackmun and Stevens consistently joined Justices Brennan and Marshall either in dissent or to make a majority.[295] This group of four who consistently opposed imposition of capital punishment would become successful in their opposition when joined by an additional member of the Court, usually either Justice White or Justice O'Connor.[296] Until his retirement, Justice Powell often voted against the death penalty.[297] On rare occasions, large portions of the Court agreed that the death penalty was inappropriate.[298]

While Justices Blackmun and Stevens regularly joined Justices Brennan and Marshall in opposition to capital punishment, they did not abandon the basic position that the death penalty was constitutional. When joining a dissenting opinion written by Justice Brennan, they would agree with all parts of the opinion except that part, usually Part IV, in which Justice Brennan expressed his basic opposition to capital punishment under any circumstances.[299] Justices Blackmun and Stevens separately voted at least once during this period in favor of the death penalty and on those occasions wrote the opinion for the Court.[300] Justice Blackmun wrote a substantial number of the Court's opinions striking down capital punishment in particular instances.[301] In both majority and dissenting opinions, Justices Blackmun and Stevens employed the reasoning and rhetoric of the plurality as distinguished from the Personalist arguments of Justice Brennan or the Utilitarian reasons of Justice Marshall.

The right wing, composed of Chief Justice Rehnquist, Justice

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293. *E.g.*, *Gathers*, 490 U.S. at 810-12; *Thompson*, 487 U.S. at 838; *Mills*, 486 U.S. at 384; Booth v. Maryland, 482 U.S. 496, 509 (1987).

294. *E.g.*, Saffle v. Parks, 494 U.S. 484, 485 (1990); Boyde v. California, 494 U.S. 370, 372 (1990); Blystone v. Pennsylvania, 494 U.S. 299, 300 (1990).

295. *E.g.*, *Saffle*, 494 U.S. at 495; *Boyde*, 494 U.S. at 386; *Blystone*, 494 U.S. at 309; *Gathers*, 490 U.S. at 805; *Thompson*, 487 U.S. at 817; *Mills*, 486 U.S. at 369; *Booth*, 482 U.S. at 497.

296. *E.g.*, *Gathers*, 490 U.S. at 805; *Thompson*, 487 U.S. at 817; *Mills*, 486 U.S. at 369.

297. *E.g.*, *Maynard*, 486 U.S. at 364; *Sumner*, 483 U.S. at 85; *Booth*, 482 U.S. at 509.

298. *Penry*, 492 U.S. at 306; *Maynard*, 486 U.S. at 357.

299. *See, e.g.*, *Blystone*, 494 U.S. at 307-08; *Saffle*, 484 U.S. at 495.

300. Burger v. Kemp, 483 U.S. 776, 777 (1987); Buchanan v. Kentucky, 483 U.S. 402, 404 (1987).

301. *Mills*, 486 U.S. at 369; *Sumner*, 483 U.S. at 67; Gray v. Mississippi, 481 U.S. 648, 650 (1987).

Scalia, and perhaps Justice Kennedy, used the same rhetoric with a different emphasis when arguing for imposition of the death penalty. Chief Justice Rehnquist wrote a substantial number of the majority opinions upholding capital punishment.[302] Justice Scalia often would write the dissenting opinions for the right wing.[303] In contrast to Justices Blackmun and Stevens, who would emphasize either procedural or substantive fairness, the right-wing members are concerned with Majoritarianism and retribution. In Justice Scalia's opinion particularly, there often would be some discussion of and concern for the "original intent" of the Eighth Amendment's prohibition of cruel and unusual punishments.[304] The right-wing opinions often would strongly dispute Justice Blackmun's count of the country's majority opinion and his understanding of the requirements of fairness.[305] A number of the vigorous disputes concerned the proper interpretation of precedent, often recent precedent.[306]

While Justices White and O'Connor voted regularly with the right wing to uphold capital punishment,[307] their separate decisions to join the opposition in particular instances made possible the five-to-four opinions opposing the death penalty.[308] The majority opinion in those cases, whether written by Justice Blackmun, Brennan, Marshall, or Stevens, would employ the rhetoric of the plurality. The concurring

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302. *See, e.g., Boyde*, 494 U.S. at 372; *Blystone*, 494 U.S. at 301; Murray v. Giarrantano, 492 U.S. 1, 3 (1989).

303. *E.g.*, McKoy v. North Carolina, 494 U.S. 433, 457 (1990); *Thompson*, 487 U.S. at 859; *Booth*, 482 U.S. at 519. *But see* Minnick v. Mississippi, __ U.S. __, __, 111 S. Ct. 486, 492-98, 112 L. Ed. 2d 489, 500-07 (1990) (Scalia, J., dissenting) (striking down capital punishment on right to counsel issue). In *Minnick*, Justice Kennedy joined the left wing and the center plurality on an issue which may be one of fundamental fairness. *See id.* at __, 111 S. Ct. at 488-92, 112 L. Ed. 2d at 494-99 (1990) (upholding accused's right to counsel during capital punishment case).

304. *Thompson*, 487 U.S. at 873 (Scalia, J., dissenting).

305. *E.g., Thompson*, 487 U.S. at 865-72 (Scalia, J., dissenting); *Sumner*, 483 U.S. at 86-88 (White, J., dissenting).

306. *See, e.g.*, Walton v. Arizona, __ U.S. __, __, 110 S. Ct. 3047, 3075, 111 L. Ed. 2d 511, 550 (1990) (Blackmun, J., dissenting) (disputing majority's interpretation of *Blystone* and *Boyde*); *Gathers*, 490 U.S. at 812-20 (O'Connor, J., dissenting) (arguing for proper interpretation of *Booth*).

307. *E.g., Saffle*, 494 U.S. at 485; *Boyde*, 494 U.S. at 372; *Blystone*, 494 U.S. at 300; *Murray*, 492 U.S. at 3.

308. *See, e.g., Gathers*, 490 U.S. at 812 (White, J., concurring) (agreeing that prosecution's comments concerning victim's characteristics were unconstitutional); *Thompson*, 487 U.S. at 848-59 (O'Connor, J., concurring) (concluding that Oklahoma's sentencing of minor to death penalty was unconstitutional).

opinions of Justices O'Connor and White would use the same rhetoric. Because those in sharp opposition to and those strongly in favor of capital punishment, as well as those who switched from side to side, all used the same rhetoric, one could describe the period from *McCleskey* to the resignation of Justice Brennan as a time of dispute over the meaning or understanding of the central concepts used in the plurality's rhetoric.

One way to derive an understanding of the dispute over these political ideas would be to examine the decisions in opposition to the death penalty joined by either Justice White or Justice O'Connor. Justice White joined in decisions which opposed imposition of the death penalty on grounds of procedural fairness[309] while Justice O'Connor joined in the opposition in cases concerned with substantive fairness.[310] Those sets of cases will be discussed separately. Following that discussion, there will be an analysis of the disputes, both judicial and legislative, concerning the use of habeas corpus and the expediting of appeals in death penalty cases. While influenced by differing positions concerning Majoritarianism and retribution, these disputes centered on questions concerning procedural fairness, including whether those accused of murder have had adequate assistance of counsel.

A. *Procedural Fairness: Decisions Joined by Justice White*

Justice White voted against capital punishment in four significant cases, *Mills v. Maryland*,[311] *McKoy v. North Carolina*,[312] *Maynard v. Cartwright*,[313] and *South Carolina v. Gathers*.[314] All of these concerned procedural fairness. In three of these cases, one could describe Justice White as casting the swing vote because the Justice voted in favor of capital punishment in similar cases.[315] *Maynard* was a unani-

309. *E.g.*, *McKoy*, 494 U.S. at 434; *Mills*, 486 U.S. at 368; *Maynard*, 486 U.S. at 357.

310. *E.g.*, *Penry*, 492 U.S. at 303; *Gathers*, 490 U.S. at 812; *Thompson*, 487 U.S. at 817; *Sumner*, 483 U.S at 66.

311. 486 U.S. 367 (1988).

312. 494 U.S. 433 (1990).

313. 486 U.S. 356 (1988).

314. 490 U.S. 805 (1989).

315. *See McKoy*, 494 U.S. at 434 (voting to find North Carolina's attempt to make constitutional unanimity requirement inadequate); *Mills*, 486 U.S. at 369 (finding unanimity requirement unconstitutional); *Maynard*, 486 U.S. at 357 (holding that "heinous, atrocious, or cruel" is unconstitutionally vague as aggravating factor).

mous decision.[316] *Mills* and *McKoy* struck down the death penalty in circumstances where state rules regarding unanimity in finding mitigating factors prevented the jury from considering all mitigating factors.[317]

In assessing Justice White's position, however, one must balance the Justice's votes prohibiting the death penalty with his votes imposing the death penalty in *Boyde v. California*[318] and *Blystone v. Pennsylvania*.[319] These were cases where defendants argued that instructions to the juries directing them to impose the death penalty if aggravating factors outweighed mitigating factors[320] or if there was at least one aggravating factor and no mitigating factor, prevented the juries from exercising discretion and considering all mitigating factors.[321] One must also consider Justice White's opinion for the majority upholding the death penalty in *Walton v. Arizona*.[322]

In *Maynard*, Justice White wrote the opinion for a unanimous Supreme Court opposing imposition of the death penalty where the jury had concluded that the murder was "especially heinous, atrocious, or cruel."[323] Allowing the jury to consider such an aggravating factor, the Court concluded, would allow juries to exercise unguided and unchanneled discretion. This would violate the opposition in *Furman* to arbitrary and capricious decisions in imposing the death penalty.[324] However, to understand Justice White's position, one must compare his opinion in *Maynard* with his apparently contrasting opinion in *Clemons v. Mississippi*.[325] In *Clemons*, the jury found two aggravating factors: (1) the accused committed murder in the course of a robbery, and (2) the murder was an "especially heinous, atrocious, or cruel killing."[326] The Supreme Court upheld the law permitting Mississippi's high court to reweigh the aggravating and

316. *Maynard*, 486 U.S. at 357.
317. *Mills*, 486 U.S. at 384; *McKoy*, 494 U.S. at 440-41.
318. Boyde v. California, 494 U.S. 370, 372 (1990).
319. Blystone v. Pennsylvania, 494 U.S. 299, 300 (1990).
320. *Boyde*, 494 U.S. at 374-76.
321. *Blystone*, 494 U.S. at 302.
322. __ U.S. __, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990).
323. *Maynard*, 486 U.S. 356, 355-58; *id.* at 366.
324. *Id.* at 361-65.
325. 494 U.S. 738 (1990).
326. *Id.* at 742.

mitigating factors and to impose the death penalty if it wished.[327] Again, one must consider Justice White's opinion for the Court in *Walton*.

Mills and *McKoy* on one hand, and *Maynard* and *Clemons* on the other, could be described as belonging to two related but perhaps contrasting or contradictory lines of decision. The *Maynard* and *Clemons* line begins with Justice White's objection in *Furman* to arbitrary and capricious imposition of the death penalty.[328] The line then continues through *Gregg* to *Godfrey v. Georgia*,[329] where the Court held that a description of the murder as "outrageously or wantonly vile, horrible or inhuman" could not be used as an aggravating factor.[330] The *Mills* and *McKoy* line of decisions begins with the insistence in *Lockett* that the jury be free to consider all mitigating factors[331] and it continues through *Eddings v. Oklahoma*,[332] *Skipper v. South Carolina*,[333] and *Hitchcock v. Dugger*.[334]

Both lines of cases join in *Walton*. Under Arizona law, after a defendant is convicted of first degree murder the court must hold a separate sentencing hearing.[335] State law directs that the judge shall impose the death penalty if there are no sufficient mitigating factors and the judge finds that one or more aggravating factors from the legislature's list are present.[336] In *Walton*, the judge found that the defendant committed the murder "in an especially heinous, cruel or depraved manner" and for "pecuniary gain."[337] Justice White held that allowing the judge to impose the death sentence does not violate the Sixth Amendment right to trial by jury.[338] The Justice also found that while juries should not hear the instruction prohibited in *Maynard* nor apply the similar standard employed in *Walton*, a judge does

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327. *See id.* at 750 (failing to find appellate reweighing at odds with contemporary standards of fairness).

328. *See* Furman v. Georgia, 408 U.S. 238, 310 (1972) (arguing death penalty applied arbitrarily).

329. 446 U.S. 420 (1980).

330. *Id.* at 428-29.

331. Lockett v. Ohio, 438 U.S. 586, 604-05 (1978).

332. 455 U.S. 104 (1982).

333. 476 U.S. 1 (1986).

334. 481 U.S. 393 (1987).

335. *Walton*, __ U.S. at __, 110 S. Ct. at 3051, 111 L. Ed. 2d at 521.

336. *Id.* at __, 110 S. Ct. at 3052, 111 L. Ed. 2d at 522.

337. *Id.*

338. *Id.* at __, 110 S. Ct. at 3054, 111 L. Ed. 2d at 524.

not violate the Constitution by employing the Arizona standard, especially when Arizona's supreme court has defined narrowly the language "heinous, cruel or depraved." [339] Last, Justice White held that the state statute does not prevent the judge from considering all mitigating factors or "automatically imposing" the death penalty in certain circumstances if the judge finds the balance of aggravating and mitigating factors as described in Arizona's statute.[340] There is an important and vigorous dissent by Justice Blackmun,[341] a separate dissenting opinion by Justice Brennan,[342] and a concurring opinion by Justice Scalia in which the Justice rejects portions of the plurality rhetoric and announces his refusal hereafter to follow the *Woodson-Lockett* line of precedent.[343] Justice Scalia explains his position:

> To acknowledge that "there perhaps is an inherent tension" between this line of cases and the line stemming from *Furman*, is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II. And to refer to the two lines as pursuing "twin objectives" . . . is rather like referring to the twin objectives of good and evil. They cannot be reconciled. Pursuant to *Furman*, and in order "to achieve a more rational and equitable administration of the death penalty," . . . we require that States "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance.' ". . . In the next breath, however, we say that "the State *cannot* channel the sentencer's discretion . . . to consider any relevant [mitigating] information offered by the defendant," . . . that the sentencer must enjoy unconstrained discretion to decide whether any sympathetic factors bearing on the defendant or the crime indicate that he does not "deserve to be sentenced to death." . . . The latter requirement quite obviously destroys whatever rationality and predictability the former requirement was designed to achieve.[344]

In *Walton*, then, a three-sided dispute exists. Justices White and Blackmun disagreed about the meaning and application of the plurality rhetoric while Justice Scalia clearly explained his partial departure from use of the plurality's rhetoric and standards. A further examina-

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339. *See Walton*, __ U.S. at __, 110 S. Ct. at 3057, 111 L. Ed. 2d at 528 (finding Arizona's "vague" standard has been given substance by state supreme court).

340. *Id.* at __, 110 S. Ct. at 3056, 111 L. Ed. 2d at 527.

341. *Id.* at __, 110 S. Ct. at 3070, 111 L. Ed. 2d at 544 (Blackmun, J., dissenting).

342. *Id.* at __, 110 S. Ct. at 3068, 111 L. Ed. 2d at 542 (Brennan, J., dissenting).

343. *Walton*, __ U.S. at __, 110 S. Ct. at 3068, 111 L. Ed. 2d at 542 (Scalia, J., concurring).

344. *Id.* at __, 110 S. Ct. 3063, 111 L. Ed. 2d at 535-36 (Scalia, J., concurring).

tion of the dispute in *Walton* would illustrate the conflict over the meaning of the plurality's rhetoric.

Justice Blackmun addresses the restrictions in Arizona on consideration of mitigating circumstances[345] and the state's classification of the crime committed "in an especially heinous, cruel or depraved manner" as an aggravating circumstance.[346] In arguing both points, Justice Blackmun emphasizes fairness. For example, in regard to mitigating factors, Justice Blackmun explains:

> From those holdings two closely related principles emerge. The first is that the "qualitative difference" between death and all other penalties necessitates a greater degree of "reliability in the determination that death is the appropriate punishment in a specific case." . . . The second is that the particularized sentencing procedure mandated by the Eighth Amendment requires that the sentencer be allowed to consider "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." . . . Only if the defendant is allowed an unrestricted opportunity to present relevant mitigating evidence will a capital sentencing procedure be deemed sufficiently reliable to satisfy constitutional standards. The Court said in *Eddings* that "the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency . . . ."[347]

Fairness to the individual, in the sense of being very sure that he deserves the death penalty, appears to be central to Justice Blackmun's position. Likewise, a court must shape and control the decision to impose the death penalty so that it is not unfair and capricious. Both prongs of Justice Blackmun's analysis appear grounded in the understanding that the death penalty is unique and that one must be extraordinarily serious and fair when imposing it. On the latter point, Justice Blackmun's analysis appears more technical and more concerned with the precedents of both the Supreme Court and the Arizona court. The Justice's conclusion is that the Arizona court itself has never sufficiently narrowed its understanding of a "heinous" mur-

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345. *See id.* at __, 110 S. Ct. at 3070-76, 111 L. Ed. 2d at 544-52 (Blackmun, J., dissenting) (concluding requirement that accused prove mitigating factors are substantial enough to call for leniency unconstitutional).

346. *Id.* at __, 110 S. Ct. at 3076-86, 111 L. Ed. 2d at 552-64 (Blackmun, J., dissenting).

347. *Walton*, __ U.S. at __, 110 S. Ct. 3070-71, 111 L. Ed. 2d 544-45 (Blackmun, J., dissenting).

der.[348] "Indeed," Justice Blackmun explains, "there would appear to be few first-degree murders which the Arizona Supreme Court would *not* define as especially heinous or depraved . . . ."[349]

Justice White, in his majority opinion, refuses to examine Arizona's actual application of its standard regarding "heinous" murders.[350] Blackmun comments on this in a passage which again illustrates his concern for carefullness and fairness when imposing the death penalty:

> Today this majority serves notice that capital defendants no longer should expect from this Court on direct review a considered examination of their constitutional claims. In adjudicating claims that will mean life or death for convicted inmates in Arizona and elsewhere, the majority makes only the most perfunctory effort to reconcile its holding with this Court's prior Eighth Amendment jurisprudence. Nor does the majority display any recognition that a decision concerning the constitutionality of a State's capital punishment scheme may require an understanding of the manner in which that scheme actually operates.[351]

Justice White adheres to his position in *Furman* opposing the arbitrary and capricious application of the death penalty. Nevertheless, once satisfied that there are sufficient safeguards to prevent capriciousness, Justice White will not strive for strong or absolute reliability of the decision in regard to desert. This probably is central to his disagreement with Justice Blackmun in *Walton*. To prevent capriciousness, Justice White is willing to place greater constraints on a jury's decision to impose the death penalty than on a judge's decision. Defendant Walton contended that Arizona violated the Eighth Amendment by requiring the defendant to establish mitigating factors by a preponderance of the evidence.[352] Justice White explains his rejection of this contention:

> We therefore, decline to adopt as a constitutional imperative a rule that would require the court to consider the mitigating circumstances claimed by a defendant unless the State negated them by a preponderance of the evidence.

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348. *See id.* at __, 110 S. Ct. at 3077-82, 111 L. Ed. 2d at 553-58 (Blackmun, J., dissenting) (discussing absence of clear definition of "heinous" by Arizona Supreme Court).

349. *Id.* at __, 110 S. Ct. at 3080, 111 L. Ed. 2d at 556 (Blackmun, J., dissenting).

350. *Id.* at __, 110 S. Ct. at 3055, 111 L. Ed. 2d at 526.

351. *Walton*, __ U.S. at __, 110 S. Ct. at 3086, 111 L. Ed. 2d at 563-64 (Blackmun, J., dissenting).

352. *Id.* at __, 110 S. Ct. at 3055, 111 L. Ed. 2d at 525.

> Neither does *Mills v. Maryland* . . . lend support to Walton's position. There this Court reversed a death sentence because it concluded that the jury instruction given at the sentencing phase likely led the jury to believe that any particular mitigating circumstance could not be considered unless the jurors unanimously agreed that such circumstance was present. The Court's focus was on whether reasonable jurors would have read the instructions to require unanimity and if so, the possible consequences of such an understanding. Here, of course, the judge alone is the sentencer, and *Mills* is, therefore, beside the point.[353]

In discussing Arizona's use of the aggravating factor "especially heinous, atrocious, or cruel," Justice White takes a similar stance:

> When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in *Maynard* and *Godfrey*. But the logic of those cases has no place in the context of sentencing by a trial judge. Trial judges are presumed to know the law and to apply it in making their decisions. If the Arizona Supreme Court has narrowed the definition of the "especially heinous, cruel or depraved" aggravating circumstance, we presume that Arizona trial judges are applying the narrower definition.[354]

Justice White, then, differed from Justice Blackmun in *Walton* because Justice White believed that judicial sentencing was sufficient to assure that the "death sentence was not 'wantonly and freakishly' imposed."[355] The Justice was not prepared to insist on the rigorous fairness desired by Justice Blackmun.

The two justices clashed again in *Clemons*. Like Arizona, Mississippi had a constitutionally impermissible aggravating factor where one could describe the murder as an "especially heinous, atrocious or cruel" killing.[356] Unlike Arizona, Mississippi's capital sentencing was by jury decision.[357] The Mississippi court sentenced Clemons to death on the basis of two aggravating factors: (1) Clemons committed the murder in the course of a robbery, and (2) the murder was especially heinous under the statutory standard.[358] Writing for the

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353. *Id.* at __, 110 S. Ct. at 3055-56, 111 L. Ed. 2d at 526.
354. *Id.* at __, 110 S. Ct. at 3057, 111 L. Ed. 2d at 528.
355. *Walton*, __ U.S. at __, 110 S. Ct. at 3058, 111 L. Ed. 2d at 530.
356. *Clemons*, 494 U.S. at 744.
357. *Id.* at 742-43.
358. *Id.* at 742.

Supreme Court, Justice White held the second factor constitutionally impermissible on the basis of *Maynard*.[359] However, the highest appellate court in a weighing state such as Mississippi could reweigh the aggravating and mitigating factors.[360] The Court reversed the Mississippi decision because it was not clear that the Mississippi court had conducted the suggested reweighing.[361] Justice White explained his approval of appellate reweighing:

> The primary concern in the Eighth Amendment context has been that the sentencing decision be based on the facts and circumstances of the defendant, his background, and his crime. . . . In scrutinizing death penalty procedures under the Eighth Amendment, the Court has emphasized the "twin objectives" of "measured consistent application and of fairness to the accused." . . . Nothing inherent in the process of appellate reweighing is inconsistent with the pursuit of the foregoing objectives.[362]

Justices Brennan, Marshall, Blackmun, and Stevens concurred in part and dissented in part in an opinion written by Justice White.[363] Justice Blackmun agreed, of course, in the conclusion that Mississippi's aggravating factor describing a murder as especially heinous was unconstitutional.[364] The Justice dissented, however, "from the majority's strong and gratuitous suggestion that the Mississippi Supreme Court nevertheless may 'salvage' Clemons' death sentence by performing its own weighing of aggravating and mitigating circumstances."[365] Justice Blackmun argued that appellate courts are "institutionally incapable" of performing the sentencing function of trial judges or juries.[366] Particularly, allowing appellate courts to reweigh and, in effect, perform the sentencing function on the basis of a cold record would be "devastating to any argument for consideration of what this Court has termed '[those] compassionate or mitigating factors stemming from the diverse frailties of humankind.' "[367] Jus-

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359. *Id.* at 741.

360. *Clemons*, 494 U.S. at 750.

361. *See id.* at 751-53 (explaining confusion in Mississippi Supreme Court's decision).

362. *Id.* at 748.

363. *Id.* at 756.

364. *See Clemons*, 494 U.S. at 756 (Blackmun, J., concurring in part and dissenting in part) (finding insufficient guidance for sentencing in Mississippi's "heinous, atrocious, or cruel" aggravating circumstance).

365. *Id.*

366. *Id.* at 765 (Blackmun, J., concurring in part and dissenting in part).

367. *Id.* at 770-71 (Blackmun, J., concurring in part and dissenting in part) (quoting

tice Blackmun elaborated:

> I therefore conclude that a capital defendant's right to present mitigating evidence cannot be fully realized if that evidence can be submitted only through the medium of a paper record. I also believe that, if a sentence of death is to be imposed, it should be pronounced by a decision maker who will look upon the face of the defendant as he renders judgment. The bloodless alternatives approved by the majority conveniently may streamline the process of capital sentencing but at a cost that seems to me to be intolerable.[368]

Justices White and Blackmun agree that the decision to impose the death penalty must be controlled to avoid capriciousness. This requires that aggravating factors be carefully shaped, rather than open-ended, to guide the judge or jury's decision. The Justices further agree that the decision-maker, the judge or jury, should hear all mitigating circumstances. Requirements of unanimity should not prevent the decision-maker from considering such circumstances. Nevertheless, Justice Blackmun exhibits a more exquisite sense of fairness than Justice White who appears content with some assuredness that the decision to impose the death penalty is not capricious. Without totally rejecting fairness concerns, the right wing is discontent with the plurality's fairness concern. Justice Scalia's dissent reveals both that discontent and a concern for shaping and guiding juries' consideration of mitigating factors.[369] Justice White may share this concern.

Justice White, then, has joined those regularly opposed to the death penalty in several decisions. Justice White also joined the death penalty opposition in *Gathers*.[370] Writing for the majority in *Gathers*, Justice Brennan held that a prosecutor acted improperly by quoting at length from a religious tract found in the victim's possessions.[371] Justice White concurred[372] primarily on the authority of *Booth v. Maryland*,[373] where Justice Powell concluded that a court could not use

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Caldwell v. Mississippi, 472 U.S. 320, 330 (1985); Woodson v. North Carolina, 428 U.S. 153, 304 (1976)).

368. *Clemons*, 494 U.S. at 770-71 (Blackmun, J., concurring in part and dissenting in part).

369. *See Walton*, __ U.S. at __, 110 S. Ct. at 3058-59, 111 L. Ed. 2d at 530-31 (Scalia, J., dissenting) (exhibiting concern for juries' consideration of mitigating factors).

370. *Gathers*, 490 U.S. at 812 (1989) (White, J., concurring).

371. *See id.* at 811-12 (finding that quotation did not relate to circumstances of crime).

372. *See id.* at 812 (White, J., concurring) (stating that lower court must be affirmed unless *Booth* is overruled).

373. 482 U.S. 496 (1987).

victim impact statements in death penalty hearings.[374] *Booth* held that description of the impact on the victim distorts a decision which a court must tailor to the defendant's own personal responsibility and moral guilt.[375] Justice White dissented in *Booth*[376] but concurred in *Gathers* stating, "Unless *Booth* is to be overruled, the judgment below must be affirmed."[377]

Procedural fairness concerns Justice White, but not excessively. The Justice primarily requires what appear to him to be reasonable safeguards to avoid arbitrary and capricious imposition of the death penalty.

B. *Substantive Fairness: Decisions Joined by Justice O'Connor*

Justice O'Connor voted against capital punishment in several significant cases between *McCleskey* and the retirement of Justice Brennan. These include *Penry v. Lynaugh*,[378] *Thompson v. Oklahoma*,[379] and *Sumner v. Shuman*.[380] One could describe each of these as cases concerned with substantive fairness since the central question in each was whether the death penalty was proportional to the crime committed or the moral desert of the person who committed the crime. However, the O'Connor opinions strove to transform the issues into ones of procedural fairness. In the circumstances of these cases, Justice O'Connor had difficulty in finding a national consensus against capital punishment despite arguments to that effect by Justices Blackmun or Stevens. Instead, Justice O'Connor asked whether the particular legislature or jury squarely faced the issue of whether capital punishment should be imposed in the type of case before the Supreme Court.[381]

In relating the three factors central to the plurality's approach to capital punishment—Majoritarianism, common-sense retribution and deterrence, and fairness—Justice O'Connor continued to give the

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374. *Id.* at 503-07.

375. *See id.* at 502-03 (discussing how jury's discretion to impose death penalty must be narrowly limited to minimize risk of arbitrary action).

376. *Id.* at 515 (White, J., dissenting).

377. *Gathers*, 490 U.S. at 812 (White, J., concurring).

378. 492 U.S. 302 (1989).

379. 487 U.S. 815 (1988).

380. 483 U.S. 66 (1987).

381. *See Penry*, 492 U.S. at 331 (looking to legislation to determine society's "evolving standards"); *Thompson*, 487 U.S. at 850-59 (O'Connor, J., concurring) (analyzing various legislation to determine society's views on sentencing minors to death penalty); *Sumner*, 483 U.S. at 70-85 (discussing statutes applicable to previous capital punishment cases).

most prominent role to retribution and appears to relate the other factors to that concern.[382] For example, in *Penry*, Justice O'Connor noted there is not a sufficient national consensus against executing mentally retarded persons to categorically prohibit it under the Eighth Amendment. However, the Justice held against imposing the death penalty in such cases because the jury is not instructed to consider the evidence of mental retardation as mitigating evidence which could have lessened the defendant's degree of guilt for the crime.[383] Justice O'Connor explained:

> Underlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant . . . .
>
> Although Penry offered mitigating evidence of his mental retardation and abused childhood as the basis for a sentence of life imprisonment rather than death, the jury that sentenced him was only able to express its views on the appropriate sentence by answering three questions: Did Penry act deliberately when he murdered Pamela Carpenter? Is there a probability that he will be dangerous in the future? Did he act unreasonably in response to provocation? The jury was never instructed that it could consider the evidence offered by Penry as *mitigating* evidence and that it could give mitigating effect to that evidence in imposing sentence . . . .
>
> Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a "reasoned moral response to the defendant's background, character and crime."[384]

Justice O'Connor rejected the argument that there is an emerging national consensus against execution of the retarded. While the "public sentiment expressed" in national opinion polls "may ultimately find expression in legislation," it is not a sufficiently objective indication of "contemporary values."[385] Justice O'Connor likewise rejected Penry's argument "that execution of a mentally retarded person like himself with a reasoning capacity of approximately a 7 year old would be cruel and unusual because it is disproportionate to his degree of

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382. *See Sumner*, 483 U.S. at 79-81 (discussing aspects of aggravating factors which determine whether "accused" "deserves" death penalty).

383. *Penry*, 492 U.S. at 319-22.

384. *Id.* at 319-28.

385. *Id.* at 335.

personal culpability."[386] Central to the Justice's rejection of that argument was her concern that some mentally retarded persons who commit murder may deserve the death penalty. The Justice did not find sufficient evidence in the record to conclude that all mentally retarded persons with mental ages of seven "inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty."[387]

The intellectual strategies Justice O'Connor employed in the majority opinion in *Penry* may also be perceived in the concurring opinion in *Thompson*.[388] In that case, Justice Stevens, who wrote the majority opinion, held that execution of the defendant for a murder committed when he was fifteen was unconstitutional under the Eighth Amendment.[389] Justice Scalia, dissenting sharply, disagreed with Justice Stevens over the national consensus regarding capital punishment for fifteen year olds.[390] All eighteen states which established a minimum age for capital punishment set that age at a minimum of sixteen years.[391] Other capital punishment states, including Oklahoma, simply specified no minimum.[392] Justice Stevens found a national consensus by adding the states with no capital punishment to the states with a minimum age of sixteen or more.[393] Justice O'Connor had greater difficulty than Justice Stevens in perceiving a national consensus. However, because Oklahoma had set no minimum, the Justice found that the state legislature had not consciously addressed whether capital punishment was appropriate for fifteen year olds.[394] Justice O'Connor explained:

> The disagreements between the plurality and the dissent rest on their different evaluations of the evidence available to us about the relevant social consensus. Although I believe that a national consensus forbidding the execution of any person for a crime committed before the age of 16 very likely does exist, I am reluctant to adopt this conclusion as a

386. *Id.* at 336.

387. *Penry*, 492 U.S. at 338.

388. *Thompson*, 487 U.S. at 848.

389. *Id.* at 838.

390. *See id.* at 872-73 (Scalia, J., dissenting) (disagreeing with majority opinion written by Justice Stevens).

391. *Id.* at 867 (Scalia, J., dissenting).

392. *Thompson*, 487 U.S. at 867 (Scalia, J., dissenting).

393. *Id.* at 823-30.

394. *See id.* at 857 (O'Connor, J., concurring) (failing to find that states with no set minimum age for imposing death penalty affirmatively allow such punishment for all individuals).

> matter of constitutional law without better evidence than we now possess. Because I conclude that the sentence in this case can and should be set aside on narrower grounds than those adopted by the plurality . . . I concur only in the judgment of the Court.[395]

The narrower ground was Oklahoma's failure specifically to address an appropriate minimum age. Justice O'Connor argued:

> Because it proceeded in this manner, there is considerable risk that the Oklahoma Legislature either did not realize that its actions would have the effect of rendering 15 year old defendants death eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death eligibility.[396]

Justice Stevens had argued that neither the goals of retribution nor deterrence justified capital punishment for fifteen year olds.[397] Justice O'Connor's response resembled her position regarding the moral desert of the mentally retarded:

> Granting the plurality's other premise—that adolescents are generally less blameworthy than adults who commit similar crimes—it does not necessarily follow that all 15 year olds are incapable of the moral culpability that would justify the imposition of capital punishment. Nor has the plurality educed evidence demonstrating that 15 year olds as a class are inherently incapable of being deterred from major crimes by the prospect of the death penalty.[398]

In contrast to Justices Blackmun and Stevens, Justice O'Connor, while voting occasionally against capital punishment, does not agree easily with a reasoned argument that the death penalty in particular types of cases involving the retarded or the immature is not consistent with the national consensus. Also the Justice does not agree that assessing the death penalty in such cases is cruel because it is not consistent with desert. Rather, the Justice demands rigorous proof on these points.

One should note that the Justice's view is in contrast with the Rawlsian theory of criminal responsibility which demands more rigorous proof of desert and service of a societal goal when the punish-

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395. *Id.* at 848-49 (O'Connor, J., concurring).

396. *Thompson*, 487 U.S. at 857 (O'Connor, J., concurring).

397. *Id.* at 836-38.

398. *Id.* at 853 (O'Connor, J., concurring).

ments imposed are more severe.[399] Justice O'Connor, rather, demands rigorous proof that the punishment is undeserved or inconsistent with the national consensus. The Justice's position, then, appears to be strongly Majoritarian and strongly retributive.

The right wing, of course, takes an even stronger position in the same direction. Justice Scalia, dissenting in *Thompson*, argued:

> It is assuredly "for us ultimately to judge" what the Eighth Amendment permits, but that means it is for us to judge whether certain punishments are forbidden because, despite what the current society thinks, they were forbidden under the original understanding of "cruel and unusual". . . or because they come within current understanding of what is "cruel and unusual" because of the "evolving standards of decency" *of our national society*; but not because they are out of accord with the perceptions of decency, or of penology, of mercy, entertained—or strongly entertained, or even held as "abiding conviction"—by a majority of the small and unrepresentative segment of our society that sits on this Court.[400]

Justice O'Connor did not write an opinion in *Sumner*. However, Justice Blackmun's opinion in that case, which Justice O'Connor joined, offers an analysis compatible with her reasoning in *Penry*[401] and *Thompson*.[402] Justice Blackmun held that mandatory capital punishment for a life prisoner who commits a murder during his term violates the Eighth Amendment.[403] Justice Blackmun argued that the court should permit the jury to weigh the exact degree of the defendant's guilt.[404] This argument is consistent with Justice O'Connor's concern for assessing the appropriate retribution for fifteen year olds and the mentally retarded:

> Just as the level of an offender's involvement in a routine crime varies, so too can the level of involvement of an inmate in a violent prison incident. An inmate's participation may be sufficient to support a murder conviction, but in some cases it may not be sufficient to render death an appropriate sentence, even though it is a life term inmate or an in-

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399. Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 776 (1990).

400. *Thompson*, 487 U.S. at 873 (Scalia, J., dissenting).

401. *Penry*, 492 U.S. at 307-40.

402. *Thompson*, 487 U.S. at 848-59.

403. *Sumner*, 483 U.S. at 85.

404. *See id.* at 72 (finding that overriding principle in previous capital punishment cases requires sentencing authority to consider all facts and circumstances of case).

mate serving a particular number of years who is involved.[405]

In discussions of fairness, the Court inevitably focuses on retribution. Justice O'Connor shares Justice Blackmun's concern for fair assessment of the individual's moral guilt. However, in contrast to Justice Blackmun, Justice O'Connor appears most concerned that those who deserve the death penalty do not escape it. There appears to be a significant factor distinguishing Justices Blackmun and Stevens from Justices White and O'Connor. Regardless of whether the Justice is primarily concerned with avoiding the imposition of the death penalty, Justices Blackmun and White require that the death penalty decision be procedurally and substantively fair. Justice O'Connor rather regularly expresses a strong concern that a court impose the death penalty where that punishment is fairly proportional to the defendant's guilt.

V. HABEAS CORPUS AND PROCEDURAL FAIRNESS: THE SUPREME COURT AND CONGRESS

A. *The Court*

The filing of repeated habeas corpus petitions, often immediately before a scheduled execution, is one means of delaying application of the death penalty. One can expect those who favor capital punishment to oppose this procedural delay or at least to be troubled by it. Since *McCleskey*, the Supreme Court has rendered decisions designed to discourage habeas corpus petitions or speed up the proceeding.[406] These cases have addressed two important issues: (1) whether a new rule established in a recent or present case will apply retroactively on collateral review of the state proceedings when challenged by a petition for habeas corpus and, (2) whether there is a right to assigned counsel in habeas corpus proceedings.

A spectrum of views concerning procedural fairness in death penalty cases underlie the disputes in the Court regarding habeas corpus.

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405. *Id.* at 79-80.

406. *See, e.g.*, Saffle v. Parks, 494 U.S. 484, 487-94 (1990) (disallowing petitioners claim because principle alleged constitutes "new rule" and any exceptions are inapplicable); Butler v. McKellar, 494 U.S. 407, 408-16 (1990) (finding that petitioner's habeas corpus claim did not fit under one of exceptions to "new rule" retroactive application bar); Murray v. Giarratano, 492 U.S. 1, 7-15 (1989) (stating that indigents have no right to counsel in habeas corpus petitions); Teague v. Lane, 489 U.S. 288, 311-15 (1989) (holding that new rule established in recent decision will not apply retroactively on collateral review).

The right wing would favor minimal procedural safeguards, while the plurality is split with Justices O'Connor and White requiring reasonable procedural safeguards but opposing what they believe are excessive procedural safeguards. In contrast to Justices O'Connor and White, Justices Blackmun and Stevens require strict procedural fairness. Justices White and O'Connor vote with the right wing in the cases restricting habeas corpus, while history shows that Justices Blackmun and Stevens tend to join Justices Brennan and Marshall in opposition.

Justice O'Connor wrote the opinion in *Teague v. Lane*[407] which established the new approach to habeas corpus petitions. *Teague* did not involve the death penalty. Justice O'Connor held that a new rule established in a recent decision or in the case before the Court will not apply retroactively on collateral review through a habeas corpus petition when that new rule constitutes "an explicit and substantial break" with prior precedent.[408] Such a new rule imposes obligations on the state which did not exist at the time that the petitioner's conviction became final.[409]

The *Teague* holding has not been consistently applied. In *Penry*, Justice O'Connor established a series of exceptions[410] to *Teague* and held that the granting of the petition for habeas corpus in *Penry* did not apply a "new rule" retroactively in violation of *Teague*.[411] In *Butler v. McKellar*,[412] Chief Justice Rehnquist held for the Court that *Teague* prohibits the defendant from benefiting from a Supreme Court decision published on the same day the Court denied Butler's petition for habeas corpus.[413]

In *Saffle v. Parks*,[414] in an instruction applicable to consideration of mitigating circumstances, the trial judge told the jury to "avoid any influence of sympathy, sentiment, passion, prejudice or other arbi-

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407. 489 U.S. 288 (1989).

408. *Id.* at 314-15.

409. *Id.*

410. *See* Penry v. Lynaugh, 492 U.S. 302, 313-20 (1989) (reasoning that sentence should reflect defendant's moral character).

411. *Id.* at 315.

412. 494 U.S. 407 (1990).

413. *Id.* at 412-16. In order for an accused to benefit from the announcement in a new case, such case must not announce a "new rule." *Id.* at 412. "A case announces a 'new rule' when it 'breaks new ground or imposes a new obligation.' " *Id.* Here, the court held that the case the accused was attempting to rely on did announce a "new rule." *Id.* at 415.

414. 494 U.S. 484 (1990).

trary factor when imposing sentence."[415] Justice Kennedy, writing for the Court, held that a decision overturning a death sentence on the ground that such an instruction impermissibly guided the jury's consideration of mitigating factors would be a new rule announced in a habeas case in violation of *Teague* and *Penry*.[416] Justice Kennedy concluded:

> The objectives of fairness and accuracy are more likely to be threatened than promoted by a rule allowing the sentence to turn not on whether the defendant, in the eyes of the community, is morally deserving of the death sentence, but on whether the defendant can strike an emotional chord in a juror.[417]

Justice Brennan, in a dissent joined by Justices Marshall, Blackmun, and Stevens, contended that the proposed new rule emerged from the Court's decisions in *Lockett* and *Eddings* and that application of it in this case would not violate *Teague*.[418] Justice Brennan added:

> Until today, the Court consistently has vacated a death sentence and remanded for resentencing when there was any ambiguity about whether the sentencer actually considered mitigating evidence. . . . The Court's failure to adhere to this fundamental Eighth Amendment principle is inexcusable. Distorting respondent's claim and our precedents in order to hide behind the smoke screen of a new standard of retroactivity is even more so.[419]

In *Murray v. Giarratano*,[420] Chief Justice Rehnquist, writing for the Court, held that indigent defendants on death row have no right to assigned counsel under either the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment.[421] The Due Process Clause requires states to assign counsel to indigents for the trial and the initial appeal from both the judgment and the sentence.[422] However, it does not require assigned counsel for a collateral attack on the

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415. *Id.* at 487.

416. *Id.* at 489.

417. *Id.* at 495.

418. *See Saffle*, 494 U.S. at 507 (Brennan, J., dissenting) (finding that "rule" in question should be applied retroactively under second exception to *Teague*).

419. *Id.* at 514-15 (Brennan, J., dissenting).

420. 492 U.S. 1 (1989).

421. *See id.* at 7-13 (finding that previous cases have ruled that there is no right to counsel for indigents after initial appeal).

422. *Id.* at 7.

judgment or the sentence through a habeas corpus proceeding.[423] Chief Justice Rehnquist also held that the evolving standards of decency relevant in interpreting the Eighth Amendment do not require a different rule in death penalty cases.[424] Chief Justice Rehnquist explained:

> The additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are, we think, sufficient to assure the reliability of the process by which the death penalty is imposed . . . .
>
> Virginia may quite sensibly decide to concentrate the resources it devotes to providing attorneys for capital defendants at the trial and appellate stages of a capital proceeding. Capable lawyering there would mean fewer colorable claims of ineffective assistance of counsel to be litigated on collateral attack.[425]

B. *Congressional Legislation*

In the closing days of the 101st Congress in October 1990, there was a confused but vigorous struggle over the Crime Control Act of 1990.[426] The House and the Senate versions of the Act contained significant differences but in many respects resembled each other. Both bills listed additional crimes for which the death penalty could be imposed.[427] Both contained restrictions on the use of habeas corpus in capital punishment cases.[428] Both provided for some gun control.[429] The House bill prohibited the imposition of capital punishment in racially discriminatory patterns,[430] a provision that had been dropped from the Senate bill.[431] The version which emerged from conference

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423. *See id.* at 10 (stating that collateral proceedings are sufficiently "adjunct" from trial and appellate proceedings so as to not require indigent counsel).

424. *See Giarrantano*, 492 U.S. at 10 (declaring that rule against indigent counsel after initial appeal does not provide distinction between capital and non-capital cases).

425. *Id.* at 10-11.

426. H.R. 5269, 101st Cong., 2d Sess. (1990); S. 1970, 101st Cong., 1st Sess. (1989).

427. H.R. 5269, 101st Cong., 2d Sess. §§ 202-12 (1990); S. 1970, 101st Cong., 2d Sess. § 3591 (1990).

428. H.R. 5269, 101st Cong., 2d Sess. §§ 1301-03 (1990); S. 1970, 101st Cong., 2d Sess. § 202 (1990).

429. H.R. 5269, 101st Cong., 2d Sess. § 701 (1990); S. 1970, 101st Cong., 2d Sess. §§ 404-06 (1990).

430. H.R. 5269, 101st Cong., 2d Sess. § 1801 (1990).

431. *See* S. Amend. 1694, 101st Cong., 2d Sess., 136 CONG. REC. 6884-910 (1990) (striking § 107 which would have prevented imposition of death penalty in racially discriminative manners).

in the closing days of the session and which the President signed[432] significantly differed from both House and Senate bills. All provisions regarding the death penalty, including those restricting use of habeas corpus and prohibiting imposition of the death penalty in racially discriminatory patterns, were dropped, ostensibly in exchange for eliminating the gun control provisions.[433] Nevertheless, the political ideas contained in the House and Senate bills are worth discussing briefly in order to provide a counterpoint to the decisions of the Supreme Court.

The Habeas Corpus Reform Act of 1990 passed by the Senate[434] addressed the procedural delays inherent in habeas corpus petitions in death penalty cases and offered a different solution than the Court's to the absence of assigned counsel in such proceedings.[435] It also addressed the applicability of new rules in habeas corpus appeals.[436] A committee of the Judicial Conference of the United States, the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases chaired by retired Justice Lewis Powell, proposed the bill in its original version.[437] On November 21, 1989, Senator Joseph Biden, chair of the Senate Judiciary Committee, filed Senate Bill 1970[438] which contained a further version of the Habeas Corpus Reform Act. On May 23, 1990, Senator Robert Graham offered an amended version on the Senate floor.[439] Senator Biden accepted the amendment entitled the "Habeas Corpus Reform Act of 1990."[440] The Senate passed that version.[441]

The Powell Committee explained its Majoritarian views, its under-

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432. Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (1990).

433. *Name Calling on Crime*, N.Y. TIMES, Nov. 1, 1990, at A28.

434. Habeas Corpus Reform Act of 1990, S. Amend. 1686, 101st Cong., 2d Sess., 136 CONG. REC. 6802-03 (adopted by voice vote as amending S. 1970) (1990).

435. *See id.* at 6803 (giving indigents right to counsel in capital cases including those seeking appellate and collateral review).

436. *Id.*

437. *See* AD HOC COMM. ON FEDERAL HABEAS CORPUS IN CAPITAL CASES, 101ST CONG., 1ST SESS., REPORT ON HABEAS CORPUS IN CAPITAL CASES 3-7 *reprinted in* 45 Crim. L. Rep. (BNA) 3239, 3241-3245 (Sept. 21, 1989) (providing statutory proposals for habeas corpus).

438. S. 1970, 101st Cong., 2d Sess. (1990).

439. Habeas Corpus Reform Act of 1990, S. Amend. 1686, 101st Cong., 2d Sess., 136 CONG. REC. 6802-03 (1990).

440. *Id.*

441. *Id.* at 6803.

standing of fairness, and its perception of the problem created by habeas corpus petitions in the following language:

> Studies of public opinion establish that an overwhelming majority of our citizens favors the death penalty for certain murders. The Supreme Court has made clear that the evolving standards of decency embodied in the Eighth Amendment permit imposition of this punishment for some offenders. Of course, both the Court and society have recognized that, because it is irreversible, death is a unique punishment. This realization demands safeguards to ensure that capital punishment is administered with the utmost reliability and fairness.
>
> But our present system of multi-layered state and federal appeal and collateral review has led to piecemeal and repetitious litigation, and years of delay between sentencing and a judicial resolution as to whether the sentence was permissible under the law. The resulting lack of finality undermines public confidence in our criminal justice system. Of course, any system of review entails some delay. It is not suggested that the delay needed for review of constitutional claims is inappropriate. But much of the delay inherent in the present system is not needed for fairness. Adding to the problem is the fact that prisoners often cannot obtain qualified counsel until execution is imminent. The resulting last minute rushed litigation disserves inmates, and saps the resources of our judiciary.[442]

The Graham version passed by the Senate embodied the compromise between fairness and expediency proposed by the Powell Committee. Namely, the proposal shortens the habeas corpus proceedings in exchange for more extensive use of competent assigned counsel, particularly in collateral challenges. Under the Graham bill, the limitations on the use of habeas corpus would be applicable in those states which provide assigned counsel at all levels of capital cases, including the initial trial, the appeal, and the habeas corpus proceeding in accordance with the standards set forth in the bill.[443]

The Graham bill provided a 365-day period, which is sometimes tolled, when an assigned counsel may file a habeas corpus petition.[444] During that period, there would be an automatic stay of execution

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442. AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES, 101ST CONG., 1ST SESS., REPORT ON HABEAS CORPUS IN CAPITAL CASES 1 *reprinted in* 45 Crim. L. Rep. (BNA) 3239, 3239 (Sept. 21, 1989).

443. Habeas Corpus Reform Act of 1990, S. Amend. 1686, 101st Cong., 2d Sess., 136 CONG. REC. 6803 (1990).

444. *Id.*

which would expire if the prisoner chose not to file a petition or was denied a petition and the denial was completely reviewed.[445] After the 365-day period and the appropriate tolling period expired, "no Federal court thereafter shall have the authority to enter a stay of execution or grant relief in a capital case."[446] There are exceptions to this rule. For example, when the failure to raise a ground for relief within the appropriate time period is the result of "Supreme Court recognition of a new Federal right that is retroactively applicable,"[447] the time period to file a habeas corpus petition would not expire.

The Graham bill took a position on the retroactivity of new rules established by the Supreme Court and their applicability in habeas corpus proceedings. Section 2255(A) of the bill stated:

> All claims in habeas corpus petitions brought by State prisoners in State custody who are subject to a capital sentence shall be governed by the law as it was when the petitioner's sentence became final, supplemented by any interim change in the law promulgated by the Supreme Court, if the Supreme Court determines, in light of the purpose to be served by the change, the extent of the reliance on previous law by law enforcement authorities and the effect on the administration of justice, that it would be just to give prisoners the benefit of the interim change in the law.[448]

The House bill contained provisions regarding the use of habeas corpus which differed in some respects from the Senate bill.[449]

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445. *Id.*

446. *Id.*

447. Habeas Corpus Reform Act of 1990, S. Amend. 1686, 101st Cong., 2d Sess., 136 CONG. REC. 6803 (1990).

448. *Id.*

449. The House bill required states to establish an appointing authority in accordance with standards set forth in the bill in order to govern the appointment of counsel at all stages of capital cases. H.R. 5269, 101st Cong., 2d Sess. § 1307 (1990). The bill provided a one-year stay of execution during which assigned counsel may file a habeas corpus petition, tolled, inter alia, during any period in which the state has failed to establish such an appointing authority. *Id.* § 2254(g)(1), (2)(A). The Senate bill applied only to those states that already had a mechanism for appointment of counsel. S. 1970, 101st Cong., 2d Sess. § 2256(b) (1990). Additionally, the House bill, unlike the Senate bill, did not expressly withhold authority of a federal court to enter a stay of execution after expiration of the one-year period increased by applicable tolls, but allowed reconsideration of a claim if it would serve "interests of justice." H.R. 5269, 101st Cong., 2d Sess. § 1303 (1990). However, both bills permitted granting relief after expiration of the applicable time period where failure to raise a claim is the result of a new federal right retroactively applicable. S. 1970, 101st Cong., 2d Sess. § 2257(c)(1)(B) (1990); H.R. 5269, 101st Cong., 2d Sess. § 1303(b)(2)(ii) (1990). Applicability of this "new rule" exception under the Senate bill would be determined in accordance with prevailing Supreme

C. *Fairness and Expediency*

How one assesses the truncation of the review process may depend upon whether one agrees with the minimalist approach to fair procedure of the right wing, the modest approach of Justices White and O'Connor, or the rigorous insistence upon fair procedure of the four regularly dissenting Justices. It also may depend upon whether one supports or opposes capital punishment. However, it is worth noting again that Justices Blackmun and Stevens do not oppose the death penalty despite their regular dissents. For example, they refused to join Part IV of Justice Brennan's dissent in *Saffle* where Justice Brennan reiterated his basic opposition to the death penalty.[450] Nevertheless, the comments of the dissenting Justices on expediting habeas corpus petitions have been vehement.

As mentioned previously, in *Butler*, Chief Justice Rehnquist wrote for the court and held that the defendant who had filed a habeas corpus petition could not benefit from a recently announced rule because precedent did not dictate it was available at the time conviction became final.[451] Justice Brennan, in dissent and joined by his usual three colleagues, argued:

> Today, under the guise of fine-tuning the definition of "new rule," the Court strips state prisoners of virtually *any* meaningful federal review of the constitutionality of their incarceration. A legal ruling sought by a federal habeas corpus petitioner is now deemed "new" as long as the correctness of the rule, based on precedent existing when the petitioner's conviction became final, is susceptible to debate among reasonable minds. . . . Put another way, a state prisoner can secure habeas relief only by showing that the state court's rejection of the constitutional challenge was *so* clearly invalid under then-prevailing legal standards that the decision could not be defended by any reasonable jurist. With this requirement, the Court has finally succeeded in its thinly

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Court precedent such as in the case of *Teague v. Lane*. S. 1970, 101st Cong., 2d Sess. § 2255(A) (1990); *Teague*, 489 U.S. at 316 (holding that habeas corpus principle cannot be used to create new constitutional rules of criminal procedure unless applied retroactively). Under the House bill, however, the term " 'new rule' means a sharp break from precedent announced by the Supreme Court . . . that explicitly and substantially changes the law from that governing at the time the claimant's sentence became final." H.R. 5269, 101st Cong., 2d Sess. § 1305(c) (1990). The House bill would expressly overturn *Teague*.

450. Saffle v. Parks, 494 U.S. 484, 495 (1990).

451. *See* Butler v. McKellar, 494 U.S. 407, 412-16 (1990) (stating that on collateral review accused cannot benefit from announced "new rule").

veiled crusade to eviscerate Congress' habeas corpus regime.[452]

In *Murray*, Justice Stevens wrote a dissent joined by Justices Brennan, Marshall, and Blackmun.[453] Justice Stevens argued contrary to Chief Justice Rehnquist and contended that due process requires that counsel be appointed in habeas corpus proceedings because "it is fundamentally unfair to require an indigent death row inmate to initiate collateral review without counsel's guiding hand."[454] Justice Stevens explained one argument in support of his conclusion of fundamental unfairness:

> Ideally, "direct appeal is the primary avenue for review of a conviction, and death penalty cases are no exception. When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence." . . . There is, however, significant evidence that in capital cases what is ordinarily considered direct review does not sufficiently safeguard against miscarriages of justice to warrant this presumption of finality. Federal habeas courts granted relief in only 0.25% to 7% of noncapital cases in recent years; in striking contrast, the success rate in capital cases ranged from 60% to 70%. Such a high incidence of uncorrected error demonstrates that the meaningful review necessary in a capital case extends beyond the direct appellate process.[455]

While the differing views of the right wing and the dissent regarding habeas corpus may represent different standards of due process, one minimal but reasonable and the other rigorous, the arguments offered by Justices Brennan and Stevens offer at least the possibility that truncating the habeas corpus process is designed primarily to increase the use of the death penalty while sacrificing considerations of fairness. A decision to do so would be supportable by a strong regard for Majoritarianism and retribution.

VI. Racial Discrimination and Proportionality

The most interesting legal development since *McCleskey* in regard to capital punishment and racial discrimination is a bill regularly filed in both houses of Congress prohibiting the imposition of death

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452. *Id.* at 417-18 (Brennan, J., dissenting).

453. Murray v. Giarrantano, 492 U.S. 1, 15 (1989) (Stevens, J., dissenting).

454. *Id.* at 20.

455. *Id.* at 23-24.

sentences in racially discriminatory patterns.[456] During the past year, the bill, sponsored at various points by either Senator Kennedy or Senator Biden, was to be incorporated into the Crime Control Act of 1990[457] but was ultimately dropped.[458] The House of Representatives passed a similar bill as part of its version of the Crime Control Bill of 1990.[459] The Conference bill dropped the prohibition on imposing capital punishment in racially discriminatory patterns, possibly in exchange for the elimination of the provisions expediting habeas corpus proceedings and imposing capital punishment for additional crimes.[460] Nevertheless, in discussing capital punishment and racial discrimination, it is worth reviewing the prohibitions in the recent bills as future possibilities.

Under the Senate bill, evidence that sentences of death are imposed on members of one race "with a frequency that is disproportionate to their representation among the numbers of persons arrested for, charged with, or convicted of, death eligible crimes" would establish a prima facie showing of a racially discriminatory pattern.[461] One could describe this pattern as race-of-the-defendant discrimination. Additionally, the Senate bill prohibited race-of-the-victim discrimination. Showing that courts impose the death penalty more frequently on those who have murdered whites rather than African-Americans would have also established a prima facie case of discrimination.[462] To establish a pattern, "ordinary methods of statistical proof [would have] suffice[d]."[463] Also, it would not have been necessary "to show discriminatory motive, intent, or purpose on the part of any individual or institution."[464] In other words, enacting this bill into law would have reversed *McCleskey*. The House bill resembled the Senate bill in most respects but with some differences.

The General Accounting Office (GAO) surveyed literature concerning racial discrimination in capital punishment.[465] While the

456. The Racial Justice Act of 1989, S. 1696, 101st Cong., 1st Sess. (1989).
457. S. 1970, 101st Cong., 1st Sess. (1989).
458. Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (1990).
459. H.R. 5269, 101st Cong., 2d Sess., tit. XVIII (1990).
460. S. 1696, 101st Cong., 1st Sess. § 2922 (1989).
461. *Id.* § 2922(c)(1)(A).
462. *Id.* § 2922(c)(1)(B).
463. *Id.* § 2922(b)(1).
464. S. 1696, 101st Cong., 1st Sess. § 2922(b)(2) (1989).
465. GEN. ACCOUNTING OFFICE REP. GAO/GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (Feb. 1990).

studies reviewed in the report offered mixed findings, the GAO concluded that there were significant indications that courts impose capital punishment according to racially discriminating patterns in various areas of our country.[466]

The Baldus, Woodworth, and Pulaski book, *Equal Justice and the Death Penalty*,[467] was published after the General Accounting Office report. The authors of the book also conducted the study of capital punishment in Georgia. This study served as the foundation for the defendant's appeal in *McCleskey*.[468] The Baldus book represents and analyzes the Georgia study and discusses the evidence of racial discrimination presented by studies in other states. While there is some evidence in the studies of discrimination against African-American defendants, Baldus concludes that there appears to be "a nearly complete reversal of the pre-*Furman* pattern of discrimination against black defendants, who appear to receive, on average, slightly more lenient treatment than whites."[469] However, there is evidence in many jurisdictions parallel to Georgia that "defendants who killed white victims receive more punitive treatment than those whose victims were black."[470] In modern America, then, race-of-the-victim discrimination is more serious than race-of-the-defendant discrimination in capital punishment cases. There is some indication that rural areas experience greater race-of-the-defendant discrimination as compared to urban areas.[471]

However, according to Baldus the most serious inequity is the failure of federal and state courts to pursue an effective proportionality review.[472] The result is that in the middle range of aggravated murder

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466. *See id.* at 6-7 (indicating different ways that death penalty was found to be imposed in discriminatory patterns).

467. DAVID C. BALDUS, ET AL., EQUAL JUSTICE AND THE DEATH PENALTY (1990).

468. McCleskey v. Kemp, 481 U.S. 279, 286 (1987). The principal source of evidence in the McCleskey record was the Changing and Sentencing Study (CSS). The primary emphasis of the study was the extent to which racial and other illegitimate characteristics influenced the disposition of cases from indictment, to the penalty-trial, to the death-sentencing decision. DAVID C. BALDUS, ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 313 (1990). The *McCleskey* appeal presents a description of the CSS. *Id.* at 306-70.

469. DAVID C. BALDUS, ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 265-66 (1990).

470. *Id.* at 266.

471. *Id.* at 179, 185.

472. *See* DAVID C. BALDUS, ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 290-92, 412-15 (discussing potential effectiveness of proportionality review). The performance of the courts in explaining and justifying the application of proportionality review statutes in

cases, the death penalty appears to be imposed haphazardly. That is, it is difficult to distinguish between the defendants who are sentenced to death and those who are not.[473] In contrast, the death penalty appears to be imposed evenhandedly in the most seriously aggravated set of murder cases.[474] In that set of cases, there also appears to be an absence of racial discrimination.[475] Perhaps an explanation is that in the most aggravated cases, the death penalty was regularly imposed whether the victim was African-American or white, while in the middle range cases the penalty was imposed more haphazardly and less frequently.

The authors of the Baldus book regret the Supreme Court's refusal "to make some form of proportionality review a constitutional requirement in every death sentence case."[476] They take this position despite the failure of the highest state courts to perform such reviews effectively, even in states where statutes require proportionality review. Arguably, in *Gregg* and subsequent cases, the Supreme Court made a commitment to (1) promote an "effective system of comparative proportionality review" which "would be an important guarantee against arbitrariness in death sentencing" and (2) find "[d]eath-sentencing systems that routinely impose discriminatory death sentences unconstitutional."[477] However, the Court reneged on this commitment in *Pulley v. Harris*.[478] The authors of the Baldus book believe

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individual cases has been disturbingly unsatisfactory. Generally, "the policy implications of the decisions are simply ignored, . . . [n]o hint is given of the selection criteria used, how they were applied, and what cases the court deemed to be comparable to the case under review." *Id.* at 287. A possible explanation for such ad hoc, unprincipled proportionality review is that state supreme courts view the task as unnecessary. *Id.* at 290. This attitude could stem from the Supreme Court ruling that as a matter of constitutional procedure, proportionality review is not necessary in death sentence cases. *Pulley v. Harris*, 465 U.S. 37, 50 (1984). Additionally, most state statutes requiring proportionality review are vague concerning the reviewing courts' responsibilities. DAVID C. BALDUS, ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 290-91 (1990).

473. *See* DAVID C. BALDUS, ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 88-89 (1990) (discussing statistical results which indicate randomness in imposition of death penalty).

474. *Id.*

475. *See id.* at 92 (showing that death-sentencing rate for defendants convicted of murder was 100% for cases with highest culpability level).

476. *Id.* at 290; *see Pulley*, 465 U.S. at 50-51 (stating that there is no Eighth Amendment requirement of proportionality review in capital punishment cases).

477. DAVID C. BALDUS, ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 406 (listing expectations implied from prior Supreme Court cases).

478. 465 U.S. 37 (1984).

that the state courts could conduct effective proportionality reviews which would ensure evenhanded imposition of the death penalty.[479] Given the modern reluctance to use the death penalty frequently, only restricting capital punishment to the most aggravated set of cases and eliminating its use in the middle range of murder cases can achieve evenhandedness. The authors believe that effective proportionality review could achieve that goal.[480]

Restricting the death penalty to the most aggravated cases arguably would avoid the widely prevalent race-of-the-victim discrimination and would eliminate haphazard use of the death penalty which appears to occur in the middle range of cases. Such reduction in the use of the death penalty would represent the goals of Justices Blackmun and Stevens as expressed in their dissent in *McCleskey*.[481] Arguably, this reduction would also meet the objections Justice White originally expressed to the then extant use of the death penalty in *Furman*.[482] Whether a more profound analysis of fairness would justify the use of the death penalty in these most aggravated cases must be considered.

VII. FAIRNESS

The post-*McCleskey* developments and decisions of the Supreme Court present a variety of questions concerning fairness and the imposition of capital punishment:

(i) How rigorously should the Court insist upon procedural fairness in decisions concerning the death penalty?

(ii) Is it proper to rest decisions concerning substantive fairness in whole or in part on majority will, however determined?

(iii) Is it proper to accept violations of procedural fairness, per-

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479. DAVID C. BALDUS, ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 292. The authors believe that currently available analytic methods provide sufficiently reliable answers to any court committed to the task of eliminating the excessive or discriminatory character of any given death sentence for purposes of judicial decision-making. *Id.* at 286 n.34. The Baldus book suggests recommendations for improving proportionality review. *Id.* at 293. These include: adopting a frequency approach to proportionality review; the inclusion of prosecutorial and jury decisions in the review; court documentation of its results; and the inclusion of some overall culpability measure in court findings. *Id.*

480. *Id.*

481. *See McCleskey*, 481 U.S. at 366-67 (Stevens, J., dissenting) (stating that narrowing class of eligible defendants in death penalty cases would reduce discriminatory imposition of capital punishment).

482. *See* Furman v. Georgia, 408 U.S. 238, 310-14 (1972) (White, J., concurring) (discussing constitutionality in regard to those convicted of murder or rape).

haps even violations of fundamental fairness, to achieve greater efficiency in the imposition of capital punishment as desired by the majority?

(iv) Is it proper, as Justice Powell opined in *McCleskey*, to tolerate patterns of racial discrimination in the imposition of capital punishment for the sake of preserving the institution of capital punishment, an institution desired by the American people?

(v) Since evenhandedness is at the core of fairness, is it necessary to have a rigorous proportionality review when such a review might reduce use of the death penalty to the most atrocious murder cases?

Each of these questions relates problems concerning fairness to retribution, which now, along with Majoritarianism, appears to be the focus of Supreme Court decisions concerning capital punishment. The tensions apparent in the post-*McCleskey* decisions raise more fundamental questions concerning the relationship between fairness, retribution, and Majoritarianism: Is the basic project of the plurality ill-conceived, resting as it does on the relationship between these concepts? While the cluster of concepts originally appeared appealing, has the pressure of decision-making on the multiple questions that have been posed revealed that fairness, retribution, and Majoritarianism ultimately are incompatible concepts? The decisions reveal at least a tendency to sacrifice more rigorous notions of fairness to Majoritarianism and perhaps retribution. That tendency has split the plurality since *McCleskey* with Justices Blackmun and Stevens regularly voting against the death penalty. Retribution itself appears to be understood in Majoritarian terms which may be at the heart of the misconception. Desert and Majoritarianism may not be compatible philosophical concepts. For example, short of insanity cases, those who least deserve capital punishment because they are heavily influenced by passion or psychological illness may be brought before juries. Within the pull and tug of the political process which designates the aggravating factors, these persons may appear as the most appealing candidates for the death penalty because of the atrocious nature of the crimes they commit.

There are at least two alternate descriptions of the plurality's project. One description was expressed by the authors of the Baldus book. They describe three promises made by public institutions regarding administration of the death penalty:

> Between *Furman v. Georgia* and *McCleskey*, state legislatures and state and federal courts made three promises in an effort to end arbitrariness

> and discrimination in capital sentencing. The first promise appeared in trial-court sentencing reforms adopted by many state legislatures after *Furman*, with the goal of eliminating arbitrariness and discrimination from capital sentencing at the trial-court level. These statutory reforms sought to channel the exercise of discretion by limiting the range of cases in which prosecutors could seek death sentences and by focusing the attention of sentencing juries on the most relevant aggravating and mitigating circumstances of each case. The second promise came from expanded appellate oversight, which many state legislatures required of their state supreme courts after *Furman*. The announced objective of this reform was the elimination of effects of any arbitrary or discriminatory death-sentencing that persisted in the post-*Furman* period. This expanded oversight, most importantly through a process known as "comparative proportionality review," would enable the state supreme courts to weed out excessive and arbitrary death sentences.
>
> The third promise came from *Furman* and a series of United States Supreme Court decisions in the late 1970's and early 1980's. These decisions developed a constitutional doctrine that, since death sentences are "qualitatively different" from other criminal sentences, courts should provide strict oversight of the state death-sentencing systems to ensure that the states conduct their death-sentencing systems in an evenhanded, nondiscriminatory fashion.[483]

Arguably, the Supreme Court in *Gregg* made or at least implied all three promises because the Georgia statute, which was found to be constitutional, contained provisions for channeling the trial court's discretion[484] and establishing appellate proportionality review.[485] The Baldus book contends that "none of these promises have been fulfilled; moreover, given the Supreme Court's decision in *McCleskey*, little improvement in this regard appears likely."[486]

While the Baldus book focuses on the fairness aspects of the plurality project, one should note that each of the promises just described, at least in the context of *Gregg*, relate to Majoritarianism. From the perspective of the Supreme Court, the controlled jury decisions, the comparative proportionality review, and the evenhanded, non-discriminatory conduct of the death-sentencing systems would produce a fairly administered method of determining the types of cases in which

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483. DAVID C. BALDUS, ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 1-2 (1990).

484. Gregg v. Georgia, 428 U.S. 153, 164-65 n.9 (1976) (citing GA. CODE ANN. § 27-2534.1 (Supp. 1975)).

485. *Id.* at 166-67 (quoting GA. CODE ANN. § 27-2537 (Supp. 1975)).

486. DAVID C. BALDUS, ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 2 (1990).

the American people believe the death penalty is appropriate. That belief, in turn, is tied to either common-sense retribution or deterrence, and in the most recent cases to retribution.

In the view of Justices Blackmun and Stevens as expressed in *McCleskey*,[487] this project perhaps would require restriction of the death penalty to the most serious crimes. Justice Stevens, joined by Justice Blackmun, explained in a dissenting opinion:

> One of the lessons of the Baldus study is that there exist certain categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender. If Georgia were to narrow the class of death-eligible defendants to those categories, the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated.[488]

The authors of the Baldus book argue that reduction of the use of the death penalty to those most serious cases is necessary not only to avoid racial discrimination in capital punishment, but also to ensure evenhanded rather than haphazard imposition of the death penalty.[489] One explanation of the regular votes of Justices Blackmun and Stevens against the death penalty, even in cases not involving racial discrimination, is that they now agree that evenhandedness requires reduction in use of capital punishment to the most serious cases.

An alternate but parallel description of the plurality's project exists. In *Furman*, Justice White rejected the then existing statutes governing the death penalty because the statutes imposed the penalty haphazardly. It was difficult to distinguish the cases which imposed the death penalty from those that did not.[490] Arguably, Justice White was content with the improvements in evenhandedness since *Gregg* and with a modicum of procedural fairness. Perceived from this perspective, one could describe the project of the plurality as an effort to determine, with reasonable evenhandedness and procedural fairness, the instances in which the American people, through their legislatures and juries, believe that the purposes of retribution and general deterrence require the death penalty.

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487. McCleskey v. Kemp, 481 U.S. 279, 366-67 (1987) (Stevens, J., dissenting).

488. *Id.* at 367 (Stevens, J., dissenting).

489. DAVID C. BALDUS, ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 2 (1990).

490. Furman v. Georgia, 408 U.S. 238, 313 (1972) (per curiam opinion) (White, J., concurring).

The following discussion reflects on the questions posed concerning fairness and the imposition of capital punishment from the perspectives of Justice Brennan's Personalism, Rawlsian theory of criminal responsibility, and Packer's integrated theory of criminal punishment. An analysis of these perspectives indicates that the plurality's project, in whichever way described, is fundamentally misconceived.

A. *Brennan and Fairness*

While continuing to oppose the death penalty on more fundamental grounds, Justice Brennan regularly offers arguments regarding fairness based primarily on the Supreme Court's precedents.[491] Although phrased gently, the arguments amount to a contention that the Court is abandoning its original concern for rigorous fairness in cases imposing the death penalty. Justice Brennan ultimately grounds his arguments concerning fairness and his analysis of the Court's precedent in concern for human dignity which the Justice believes is at the core of the Eighth Amendment. For example, in *Saffle*, a habeas corpus case questioning whether a new rule could be considered on collateral review, Justice Brennan dissented and argued:

> The foremost concern of the Eighth Amendment is that the death sentence not be imposed in an arbitrary and capricious manner. . . . To comply with this command, a State must narrow the class of defendants eligible for the death penalty and must also ensure that the decision to impose the death penalty is individualized. . . . The right to an individualized sentencing determination is perhaps the most fundamental right recognized at the capital sentencing hearing. . . . "[T]he fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." . . . "The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence." . . . "The requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating

491. *See, e.g.*, Walton v. Arizona, __ U.S. __, __, 110 S. Ct. 3047, 3069, 111 L. Ed. 2d 511, 542-43 (1990) (Brennan, J., dissenting) (discussing underlying fairness concerns of prior death penalty cases); Saffle v. Parks, 494 U.S. 484, 507-08 (1990) (Brennan, J., dissenting) (concluding from prior capital punishment cases that overriding concern of Eighth Amendment is particularized decision to impose death penalty).

> evidence." Rules ensuring the jury's ability to consider mitigating evidence guarantee that the jury acts with full information when formulating a moral judgment about the defendant's conduct. Because such rules are integral to the proper functioning of the capital sentencing hearing, they must apply retroactively under the second *Teague* exception. Thus, even if respondent's claim constitutes a "new rule," it must fall within the second exception. I fear that the majority's failure to provide any principled analysis explaining why the second *Teague* exception does not apply in this case reflects the Court's growing displeasure with the litigation of capital cases on collateral review.[492]

In *Walton*, Justice Brennan's displeasure with the Court's ungenerous construction of precedent for the sake of expediting the capital punishment process is more evident. In *Walton*, Justice White, writing for the majority, allowed a reweighing of the aggravating and mitigating factors on appeal.[493] In essence, the appellate court is allowed to resentence even though it has not seen the defendant. Justice Brennan objected vigorously:

> The Court's most cavalier application today of longstanding Eighth Amendment doctrines developed over the course of two decades of careful and sustained inquiry, when added to the host of other recent examples of crabbed application of doctrine in the death penalty context . . . suggests that this Court is losing sight of its responsibility to ensure that the ultimate criminal sanction is meted out only in accordance with constitutional principle.[494]

Justice Brennan added a brief explanation of his understanding of the Eighth Amendment. The Justice also grounded the requirement for a fair sentencing hearing in the concern for human dignity:

> Even if I did not believe that the death penalty is wholly inconsistent with the constitutional principle of human dignity, I would agree that the concern for human dignity lying at the core of the Eighth Amendment requires that a decision to impose the death penalty be made only after an assessment of its propriety in each individual case.[495]

Justice Brennan, then, grounded his understanding of fairness in a concern for human dignity. Arguably, the similar but different theory

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492. *Saffle*, 494 U.S. at 507 (Brennan, J., dissenting).

493. *See Walton*, __ U.S. at __, 110 S. Ct. at 3055, 111 L. Ed. 2d at 525 (holding Arizona's capital sentencing scheme allowing appellate reweighing of aggravating and mitigating factors constitutional).

494. *Id.* at __, 110 S. Ct. at 3068, 111 L. Ed. 2d at 542 (Brennan, J., dissenting).

495. *Id.* at __, 110 S. Ct. at 3069, 111 L. Ed. 2d at 543 (Brennan, J., dissenting).

of Rawls also can be grounded in respect and concern for the dignity of each person. Rawlsian theory offers a foundation for a more detailed analysis of fairness in capital punishment cases.

B. *Fairness and the Rawlsian Theory of Criminal Responsibility*

In Rawlsian theory, retribution is not a proper goal of criminal punishment, but only a condition. John Rawls argues that criminal justice should not be "founded on the idea that punishment is primarily retributive or denunciatory."[496] Rather, punishment should be imposed "for the sake of liberty itself."[497] Nevertheless, Rawls has a place for desert in what he would call a theory of criminal responsibility.[498]

The contracting parties in his Original Position have agreed to act as responsible citizens.[499] A crime is a violation of that individual responsibility to the scheme of social cooperation.[500] As responsible citizens, those who have committed a crime incur an obligation to repair the fabric of society breached by their criminal action.[501] Society would then impose punishment to repair the fabric of society by deterrence, rehabilitation, or incapacitation.[502] In other words, the reason for imposing punishment would be to reduce crime. However, punishment would be imposed only on those who incurred the responsibility for repairing the fabric of society by committing a blameworthy action.

A fundamental difficulty with the plurality's rhetoric regarding capital punishment is that recent cases focus almost exclusively on retribution as the goal justifying imposition of the death penalty. Rawlsian theory would not support retribution as a reason for capital punishment but only as a condition for its imposition.[503]

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496. JOHN RAWLS, A THEORY OF JUSTICE 241 (1972).

497. *Id.*

498. *Id.* at 314-15.

499. Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 764 n.123 (1990).

500. *Id.* at 764-65.

501. *Id.* at 765.

502. *Id.*

503. *See* Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 768-69 (discussing how contracting parties do not support retribution unless it serves as reenforcement of social solidarity).

Arguably, a commitment to afford all persons equal respect and concern supports Rawls' theory. Like Justice Brennan's understanding of the Eighth Amendment, a Rawlsian theory of criminal responsibility or of capital punishment rests on a deep regard for the human dignity of each person. Rawls describes his theory of justice as fairness.[504] It would, then, be a fundamental violation of human dignity and fairness to punish a person without a legitimate goal, or solely for reasons of retribution.

Under Rawlsian theory, a constitution containing a bill of rights with a prohibition on cruel and unusual punishments would appropriately place checks on majority will.[505] The purpose of these checks would be to establish a democracy which would be fair to all, including minorities and those out of power.[506] Under Rawlsian theory, it would be a fundamental violation of human dignity and fairness to impose capital punishment solely on the ground that the majority believes the accused deserves the death penalty.[507]

Under either description, then, the plurality's project is fundamentally flawed from the perspective of Rawlsian theory. The plurality project violates human dignity and fairness by upholding capital punishment imposed solely on the ground that the majority believed the accused deserved such punishment. The plurality project is fundamentally flawed even if the categories in which capital punishment is imposed are narrowed to the instances of murder viewed so seriously by the majority of Americans that the death penalty is imposed uniformly and regularly.

Although Rawlsian theory may be unable to justify the employment of the death penalty, the theory would more favorably regard such a penalty if one could seriously demonstrate that capital punishment serves the goal of general deterrence. Even so, there would be a requirement that the death-sentencing process be fair and even-handed. The contracting parties in the Original Position viewing capital punishment from the perspective of a prospective accused person

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504. JOHN RAWLS, A THEORY OF JUSTICE 11 (1972).

505. *Id.* at 228-31.

506. *Id.*

507. *See id.* at 354-62 (discussing under what circumstances majority rule is and is not justified); Samuel J.M. Donnelly, *A Theory of Justice, Judicial Methodology and the Constitutionality of Capital Punishment: Rawls, Dworkin, and a Theory of Criminal Responsibility*, 29 SYRACUSE L. REV. 1109, 1124 (1978) (stating that contracting parties support majority rule only when they do not violate individual's basic right to justice).

could not be persuaded to support the death penalty without those conditions.

In Rawlsian theory, a corollary principle of criminal punishment would be that the more severe the penalty, the more rigorous and serious must be the justification for the punishment. This justification must be more serious both in regard to (1) a social goal of punishment, such as general deterrence, and (2) desert.[508] One could argue, then, that the imposition of capital punishment is unfair unless there is a rigorous concern both procedurally and substantively for desert.

Assuming that capital punishment is shown to be necessary for general deterrence and perhaps for preservation of conditions of civilized living, there would still be a requirement under Rawlsian theory of vigorous procedural and substantive fairness. In this respect, Rawlsian theory would support the positions of Justices Brennan, Blackmun, and Stevens, although perhaps not entirely. The Rawlsian contracting parties strongly favor crime reduction.[509] If the parties accepted capital punishment because they perceived it necessary for crime reduction and protection of civilized living, they would require a reasonable procedure but not every conceivable safeguard.[510] For example, it would not be necessary under the standard of rigorous fairness that one convicted of murder and sentenced to death have multiple opportunities to make collateral attack on the conviction and sentence using the writ of habeas corpus.

On the other hand, under the standard of rigorous fairness one could argue that the absence of competent counsel at any stage, including reasonable habeas corpus proceedings, demonstrates a serious lack of procedural fairness. Likewise, it would be strongly arguable that those who have observed and confronted the accused should impose death sentences. Therefore, reweighing of aggravating and mitigating factors, in essence resentencing in the appellate court, would be inappropriate. One must note that a philosophical theory, including

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508. Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 776 (1990).

509. *See id.* at 770 (stating that contracting parties only impose capital punishment that has demonstrable effect on crime control).

510. *See* Samuel J.M. Donnelly, *A Theory of Justice, Judicial Methodology and the Constitutionality of Capital Punishment: Rawls, Dworkin, and a Theory of Criminal Responsibility*, 29 SYRACUSE L. REV. 1109, 1147 (1978) (explaining that contracting parties accept reasonable risks in devising procedure for protection from private violence).

the Rawlsian theory of criminal responsibility, can at best support a principle or standard rather than a particular procedure. Good lawyering must then develop procedures, perhaps alternate procedures, which will comply with that principle or standard. Nevertheless, it is arguable that the procedures just described do not comply with the standard of rigorous procedural fairness and may represent fundamental violations of fairness.

While the Rawlsian contracting parties strongly support crime reduction, they would not unanimously agree to a principle seriously truncating procedural fairness for the sake of crime reduction. Certainly the parties would not agree to truncate procedural fairness because the majority desired that the death penalty be more frequently and rapidly imposed.

Again, justice as fairness in the Rawlsian sense would not allow the imposition of the death penalty in a racially discriminatory pattern or with a clear lack of proportionality or even-handedness simply because fair and unbiased administration of justice is difficult or impossible. Certainly, Rawlsian justice would reject any suggestion that society must maintain a system of capital punishment despite those flaws just because the majority desires capital punishment. Justice as fairness allows the contracting parties, once the veil of ignorance is lifted, to veto any proposed principle of justice which would not tend to maximize the opportunity of each contracting party to minimize worst disasters.[511] Capital punishment imposed in a racially discriminatory pattern or with a clear lack of evenhandedness because of the majority's desires would be such a worst disaster. For similar reasons, the contracting parties would oppose a principle allowing the majority to determine questions of substantive fairness such as whether a fifteen year old or a mentally retarded person deserves capital punishment.

Again, the fundamental problem with the plurality position that infects its resolution of many of these questions is its decision to support capital punishment because the majority believes it is deserved. Under Rawlsian theory, retribution is not a reason but only a condi-

511. *See* JOHN RAWLS, A THEORY OF JUSTICE 90-95, 142-50, 396-99, 433-39 (1972) (discussing social goods in Original Position); Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 751-55, 766-69 (1990) (explaining Original Position).

tion for imposition of capital punishment.[512] Because of the requirement for a unanimous vote on principles of justice in the Original Position and because of the deep respect and concern for each individual which the requirement represents,[513] the contracting parties would reject any principle that allows majority will to determine whether an individual deserves the death penalty for certain varieties of crime. Consequently, Majoritarianism and retribution are incompatible under Rawlsian theory.

C. *Fairness and Utilitarian Theory*

Retribution under Utilitarian thought, such as that of Justice Marshall, Herbert L. Packer, or H.L.A. Hart, would not support the imposition of criminal punishment.[514] Utilitarian thought would require a social purpose or advantage to justify criminal punishment and outweigh the human suffering entailed in criminal punishment.[515] From the perspective of Utilitarian thought, then, the plurality's project, however described, is fundamentally flawed.

Rawlsian theory of criminal responsibility would accept Herbert L. Packer's integrated theory of criminal punishment. Rawlsian theory normally requires both a demonstration of desert as well as a social goal to justify criminal punishment.[516] Packer thought that criminal punishment is morally ambiguous since it involves the deliberate imposition of human suffering and Packer argued that limiting imposition of the death penalty to instances where it is deserved was desirable and necessary.[517] A broader Utilitarian theory of rights

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512. *See* JOHN RAWLS, A THEORY OF JUSTICE 241 (1971) (discussing Original Position); Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 765, 770 (1990) (stating parties in Original Position would punish accused only if punishment would secure parties' liberty or repair fabric of society).

513. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180-82 (1977).

514. Utilitarian theory emphasizes deterrence rather than retribution. *See, e.g.*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 1-27 (1968) (discussing justifications for punishment); HERBERT L. PACKER, LIMITS OF THE CRIMINAL SANCTION 9-145 (1968) (giving various rationales for imposing punishments).

515. HERBERT L. PACKER, LIMITS OF THE CRIMINAL SANCTION 71-89 (1968) (illustrating how infliction of harm must be justified by social benefit).

516. Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 770 (1990).

517. *See* HERBERT L. PACKER, LIMITS OF THE CRIMINAL SANCTION 68-70 (1968) (arguing for just system of capital punishment).

would support the normal requirement of limiting criminal punishment by demonstrating desert. This requirement protects liberty and security for the members of society and, hence, produces the greater good for the greater number. Therefore, Utilitarian thought would support the requirement of procedural and substantive fairness in determining whether to impose capital punishment. Major violations, such as sentencing a person without confrontation or denying competent counsel, would be objectionable under a Utilitarian standard of fairness.

Utilitarian thought is more compatible with Majoritarianism than is Rawlsian theory. Nevertheless, Utilitarians would not support imposition of capital punishment solely because the majority thought it was deserved. The satisfaction of the majority would have to be balanced against the disadvantages to society, including the imposition of suffering without serving a social goal of criminal punishment. Likewise, Utilitarian thought probably would reject determining substantive or procedural fairness on the basis of majority will. Utilitarian thought would reject racial discrimination and lack of evenhandedness in the imposition of capital punishment as serious disadvantages for society. This inequity would be unjustifiable or intolerable on the ground that the majority desired capital punishment. Utilitarian analysis would consider the plurality's rhetoric flawed since it links retribution and majority will.

Because of the resulting human suffering, objectively serious reasons relating to societal advantages would have to be offered under Utilitarian theory to justify imposing a severe penalty like capital punishment. Human suffering is a disadvantage to society which the Utilitarian calculus would weigh. Utilitarian theory would probably support the requirement that the rigor of the justification for a punishment increase with the severity of the punishment.

The fundamental flaw in the plurality's position from the perspective of Utilitarian thought is that it offers no objectively serious reason or societal advantage to support the imposition of capital punishment. Rather, the plurality position imposes a death penalty because the majority desires it.

D. *Fairness in General*

Fairness, as the term is used, generally is an unclear concept and is

what Dworkin would call a contested moral concept.[518] It is a concept which could be understood differently from various perspectives and from the foundation of different theories. Nevertheless, it is reasonable to argue that fairness as a political ideal is grounded in the view that all are equal before the law. As Dworkin would state, all persons are entitled to equal respect and concern in the establishment and administration of legal institutions.[519] The concept of fairness, in terms of a fair hearing, has a somewhat different meaning than the ideal just described. To have a fair hearing means to have a hearing without bias for or against one side, and with a reasonable opportunity to be heard without prejudgment or prejudice. Nevertheless, the concept of a fair hearing relates to the political ideal of fairness since a person is entitled to a fair hearing because the person is equal before the law.

It is proper to speak of holding a fair election or of taking a fair vote. In some respects the procedural fairness of an election resembles the procedure of a fair hearing. One must recognize that in our society both of these forms of fairness are rooted in our commitment to political equality. Nevertheless, in some respects the notion of fair election is different from, and should not be confused with, the fairness of judicial decision-making which is rooted in the equality of all before the law. For example, it would be improper to hold an election to determine which person should die. Such an election would be a denial of equality before the law and would resemble the thumbs-down decision of the crowd in the Roman gladiatorial arena. In that instance, the majority would be more equal than those chosen for death even though the election was conducted fairly. Here, equality before the law would demand that our judicial system treat each person equally, but not with some type of mathematical equality providing each an equal chance. Ultimately, there must be some other ground for selecting a person to die other than election by the majority.

In *Gregg*, that other ground was a belief for common-sense reasons that capital punishment serves the goals of retribution and general

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518. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134-35 (1977) (noting existence of different concepts of fairness); Samuel J.M. Donnelly, *A Theory of Justice, Judicial Methodology and the Constitutionality of Capital Punishment: Rawls, Dworkin, and a Theory of Criminal Responsibility*, 29 SYRACUSE L. REV. 1109, 1113-15 (1978) (discussing Dworkin's understanding of legal concepts and rules).

519. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180 (1977).

deterrence.[520] The Supreme Court then allocated to the legislatures the task of deciding when the death penalty is necessary to serve these goals.[521] In recent Supreme Court decisions, however, the goal of general deterrence appears to have vanished. Clearly, a common-sense belief in the deterrent effect of the death penalty is inadequate to serve as a serious justification for capital punishment.[522] In any event, capital punishment as presently administered, that is to say haphazardly, infrequently, and after long delay, cannot be supported seriously on the ground that it generally deters criminal behavior. Retribution in any traditional sense not associated with revenge requires evenhandedness. Perhaps under Kantian theory, retribution requires a rigorous evenhandedness that the present system has not achieved. The authors of the Baldus book conclude that capital punishment as presently administered serves neither the goal of retribution nor general deterrence but rather has a symbolic function in our society.[523]

The use of the death penalty as a symbolic function, where those chosen for punishment are selected because the majority believes that they are especially deserving of death, amounts to an election to determine which criminals shall die. Such a decision is fundamentally unfair because it fails to treat the accused as a person who is equal before the law. That fundamental unfairness becomes clearer when it relates to basic violations of procedural fairness, when for example, an appellate court which has not confronted the accused is allowed to resentence for the sake of expediting the resentencing process.[524] But unfairness is not confined to those cases. It pervades the system in a fundamental way and is a basic flaw in the project of the plurality.

VIII. CONSTITUTIONAL INTERPRETATION

This is an article on political ideas rather than constitutional inter-

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520. *See* Gregg v. Georgia, 428 U.S. 153, 185-87 (1976) (stating that state legislatures are best equipped to determine imposition of capital punishment policy).

521. *See id.* at 179-81 (describing legislative response to public view of capital punishment).

522. Samuel J.M. Donnelly, *A Theory of Justice, Judicial Methodology and the Constitutionality of Capital Punishment: Rawls, Dworkin, and a Theory of Criminal Responsibility*, 29 SYRACUSE L. REV. 1109, 1144 (1978).

523. DAVID C. BALDUS, ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 415-16 (1990).

524. *See* Clemons v. Mississippi, 494 U.S. 738, 750 (1990) (allowing appellate court to reweigh aggravating and mitigating factors).

pretation. Nevertheless, it is important to comment on Justice Scalia's assertion in *Thompson* regarding constitutional interpretation that directly challenges the arguments concerning fundamental unfairness. Justice Scalia argued that the Eighth Amendment only prohibits punishments because the punishments:

> were forbidden under the original understanding of "cruel and unusual". . . or because they come within current understanding of what is "cruel and unusual," because of the "evolving standards of decency" *of our* national society; but not because they are out of accord with the perceptions of decency, or of penology, or of mercy, entertained—or strongly entertained, or even held as "abiding conviction"—by a majority of the small and unrepresentative segment of our society that sits on this Court.[525]

Aside from majority will, there are two varieties of reasons which would support any criminal punishment: reasons based on advantages to society and reasons based on respect and concern for the individual. There are classical expositions on both sets of reasons[526] and these reasons represent a convergence in opposition to capital punishment as it exists in modern America. Justice Scalia would reject both sets of reasons and their classical expositions because they are "perceptions of decency, or of penology" out of accord with the standards "*of our national society.*"[527] Aside from original intent, Justice Scalia argues that majority will is the only foundation for interpretation of the Eighth Amendment.[528] The Justice would find it improper for Justice Marshall to use Utilitarian thought in an analysis that shows capital punishment is cruel because it is excessive and serves no legitimate goal of penology. Justice Scalia would also find it improper for Justice Brennan to find capital punishment cruel because it is out of accord with a deep understanding of human dignity. Furthermore, Justice Scalia would disagree with using Kantian thought to find capi-

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525. Thompson v. Oklahoma, 487 U.S. 815, 873 (1988) (Scalia, J., dissenting).

526. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 71-83 (1968) (discussing Utilitarian view); IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 100-02 (J. Ladd trans., 1965) (discussing principle of equality); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 62-70 (1968) (discussing Utilitarian position); JOHN RAWLS, A THEORY OF JUSTICE 60-65 (2d prtg. 1972) (discussing criminal punishment based on respect and concern for individual).

527. *Thompson*, 487 U.S. at 872 (Scalia, J., dissenting).

528. *See id.* In *Thompson*, Justice Scalia states: "on its face, the phrase 'cruel and unusual punishment' limits the evolving standards appropriate for our consideration to those entertained by society rather than those dictated by our personal conscience." *Id.*

tal punishment cruel because one could not pretend that courts administer it with evenhandedness and, hence, in accord with Kantian notions of retribution.

Justice Scalia's position rests on both a theory of original intent and the words "and unusual" in the Eighth Amendment. Those words offer a justification, and the only justification according to his quote, for going beyond original intent. While Justice Scalia's position is but one vote on the right wing of the Court, it presents a serious intellectual problem. The Majoritarianism of the plurality appears to be supportable only by a similar argument: A punishment not only must be cruel according to common sense, or basic penological theory, but also must be unusual in that a majority of the American people reject it according to some objective criteria.

That, of course, is not the only possible interpretation of the word "unusual." Since mainstream and conservative thought reject strict incorporation of the Bill of Rights into the Fourteenth Amendment, the Eighth Amendment applies to the states only because of the Due Process Clause of the Fourteenth Amendment. One conservative tradition is to interpret that clause in accord with the standards of Western civilization. At the moment, America is unusual in Western civilization in its practice of capital punishment.[529] Thus, punishment currently utilized in the United States could be struck down because it is cruel and unusual and inconsistent with the general practices of Western civilization.

An alternate theory of "unusual" would be that the punishment, as practiced, is unjustifiable under all the classic theories of criminal punishment. There is some indication in legal history that unusual punishments consist of those arbitrary punishments that are "illegal," contrary to English tradition, or foreign, that is, imported from Europe into America.[530] Under these interpretations, the punishments are rejected not merely because they are unusual, but because the punishments are particularly barbarous or cruel. A principled development of the notion that some punishments are arbitrary and cruel would encompass the conclusion that a punishment without a solid

529. *See* K. HAAS & J. INCIARDI, CHALLENGING CAPITAL PUNISHMENT, LEGAL AND SOCIAL SCIENCE APPROACHES 12-13 (1988) (stating all other industrialized Western nations except United States prohibit capital punishment).

530. *See generally* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 841-42 (1969) (tracing history of term "cruel and unusual punishments").

penalogical justification is not only cruel but unusual. In any event, Justice Scalia and the plurality have selected only one possible meaning of the word "unusual."

One can argue further that the position of Justice Scalia and the plurality depends on reading the words "cruel and unusual" conjunctively rather than disjunctively. It is possible to use the word "and" in both senses. One shopping in a supermarket may select both "apples and oranges" or "some of these and some of those." The first Congress, which proposed the Eighth Amendment, may have rejected both punishments which are "cruel" and punishments which are "unusual" rather than only punishments which are at the same time "cruel and unusual."

The proceedings of the first Congress do not provide a great deal of "legislative" history for the Eighth Amendment.[531] It is unclear whether the Congress meant the words "cruel and unusual" to be read conjuctively rather than disjunctively.[532] What is clear is that

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531. *See* Furman v. Georgia, 408 U.S. 238, 244 (1972) (stating that "the debates of the First Congress on the Bill of Rights throw little light on its intended meaning").

532. The language of the Eighth Amendment, "Excessive fines imposed, nor cruel and unusual punishments required," is similar to the language of the British Bill of Rights, "[T]hat excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted," and the Virginia Declaration of Rights, "In that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Compare* U.S. CONST. amend VIII *with* BILL OF RIGHTS, § 10, 1 W. & M., Sess. 2, c.2 (1689), *reprinted in* 5 PHILIP B. KURLAND & RALPH LERNER, THE FOUNDERS' CONSTITUTION 369 (1987) *and* VIRGINIA DECLARATION OF RIGHTS § 9 (1776) *reprinted in* 5 PHILIP B. KURLAND & RALPH LERNER, THE FOUNDERS' CONSTITUTION 373 (1987). The similarity of the provisions indicates that inherited language was copied into the Eighth Amendment without extensive discussion of whether the "and" was conjunctive or disjunctive. The fact that the Delaware Declaration of Rights and Fundamental Rules uses "or" in the key language, "That excessive Bail ought not to be required, nor excessive Fines imposed, nor cruel or unusual Punishments inflicted," while a declaration of Parliament reported in the *Case of Titus Oates*, 10 How. St. Tr. 1079, 1316 (K.B. 1685) uses "nor" in the key language, "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted," indicates that during the time the Eighth Amendment was adopted the "and" and the "or" may have been used interchangeably when describing cruel and/or unusual punishments. *Compare* DELAWARE DECLARATION OF RIGHTS AND FUNDAMENTAL RULES § 16 (1776) *reprinted in* 5 PHILIP B. KURLAND & RALPH LERNER, THE FOUNDERS' CONSTITUTION 373 (1987) *with Case of Titus Oates*, 10 How. St. Tr. 1079, 1316 (K.B. 1685) *reprinted in* 5 PHILIP B. KURLAND & RALPH LERNER, THE FOUNDERS' CONSTITUTION 368 (1987). Several of the Justices of the United States Supreme Court in their separate opinions in *Furman* reviewed the legislative history of the Eighth Amendment and came to differing conclusions. *Compare Furman*, 408 U.S. at 242-47 (Douglas, J., concurring) *and id.* at 258-64 (Brennan, J., concurring) *with id.* at 316-22 (Marshall, J., concurring) *and id.* at 376-83 (Burger, C.J., dissenting). While the possibility of reaching different reasonable conclusions from the legislative

the Founding Fathers, including those in the first Congress, by and large were not Majoritarians but rather were distrustful of the majority.[533] The Bill of Rights would serve in their view as a check upon government, upon those in power, and perhaps upon the majority. A Majoritarian interpretation of the Eighth Amendment seems most likely of the competing interpretations to be in disagreement with their views. Also, while phrased in modern philosophical terms, Dworkin's method of constitutional interpretation would seem closer

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history emphasizes the open textured nature of the Eighth Amendment's language, Justice Brennan's conclusions from a review of the legislative history appear sensible:

> Several conclusions thus emerge from the history of the adoption of the Clause. We know that the Framers' concern was directed specifically at the exercise of legislative power. They included in the Bill of Rights a prohibition upon "cruel and unusual punishments" precisely because the legislature would otherwise have had the unfettered power to prescribe punishments for crimes. Yet we cannot now know exactly what the Framers thought "cruel and unusual punishments" were. Certainly they intended to ban torturous punishments, but the available evidence does not support the further conclusion that *only* torturous punishments were to be outlawed.

Furman, 408 U.S. at 263. Justice Brennan notes the objection of Congressman Livermore to the "indefinite" nature of the language and to the possibility that physical punishments then in usage might be found unconstitutional. The Justice also notes that the Congress passed the Eighth Amendment despite those objections and then argues:

> As Livermore's comments demonstrate, the Framers were well aware that the reach of the Clause was not limited to the proscription of unspeakable atrocities. Nor did they intend simply to forbid punishments considered "cruel and unusual" at the time. The "import" of the Clause is, indeed, "indefinite" and for good reason. A constitutional provision "is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily *confined* to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth."

Id. at 263-64 (citing Weems v. United States, 217 U.S. 349, 373 (1910)). As indicated by the provisions of the Pennsylvania Constitution, the members of the first Congress may have been aware that they were in the midst of major developments in criminal punishment and they may have been content that the Eighth Amendment play some role in that development. *See* PENNSYLVANIA CONST. OF 1776, §§ 29, 38, 39 (1776) (mandating reform of penal laws) *reprinted in* 5 PHILIP B. KURLAND & RALPH LERNER, THE FOUNDERS' CONSTITUTION 373 (1987). *See also Furman*, 408 U.S. at 245-47 (Douglas, J., concurring) (discussing meaning of "cruel and unusual"); *id.* at 261-64 (Brennan, J., concurring) (explaining historical development of Cruel and Unusual Punishments Clause). *See generally* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 860-61 (1969) (discussing early American interpretation of Cruel and Unusual Punishments Clause).

533. *See* 5 PHILIP B. KURLAND & RALPH LERNER, THE FOUNDERS' CONSTITUTION 377 (1987) (discussing speech by Patrick Henry in opposition to Constitution because document lacked bill of rights protecting against imposition of cruel and unusual punishments).

to the Founders' views.[534]

For their own reasons, the plurality and Justice Scalia have selected one from a series of possible interpretations of the Eighth Amendment's prohibition against cruel and unusual punishments.[535] Those reasons may be based on one understanding of democratic theory that was likely not held by the Founding Fathers. On the other hand, Justice Scalia and the plurality's reasons may be based on ideological foundations appealing to conservatives. Those reasons are not based on "original intent" in any objective sense. The attempt to relate a Majoritarian interpretation of the Eighth Amendment to fairness has resulted in the development of a pattern of capital punishment which is fundamentally unfair. In addition, the administration of the punishment over the years since *Gregg* has resulted in an unraveling of the plurality's position.

IX. OVERTURNING THE SUBPARADIGM, RECONCEPTUALIZATION, AND LIFETIME RESTITUTION

Since *Gregg*, the Supreme Court has been developing what one could describe as a subparadigm[536] for capital punishment. That subparadigm is now at a point of crisis for two enduring and mutually

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534. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 131-49 (1977).

535. Harmelin v. Michigan, __ U.S. __, __, 111 S. Ct. 2680, 2684-2702, 111 L. Ed. 2d 836, 843-65 (1991) (offering historical analysis of Eighth Amendment focusing on proportionality test). *Harmelin* is not a capital punishment case. Accordingly, Justice Scalia concluded that the proportionality test had no place in Eighth Amendment jurisprudence. *Id.* at __, 111 S. Ct. at 2702, 115 L. Ed. 2d at 865. Fortunately, only the Chief Justice joined in that particular conclusion. Justice Scalia's historical analysis is inconsistent with an originalist and noninterpretivist understanding of the Eighth Amendment and appears to require strict incorporation of that amendment and that understanding into the Fourteenth Amendment's protection of the Liberty Clause. Justice Scalia does not discuss independently the appropriate interpretation of the Fourteenth Amendment. The Justice appears to insist that the first Congress simply followed "Virginia's prohibition of 'cruel *and unusual* punishment' . . ." *Id.* at __, S. Ct. at 2686, 115 L. Ed. 2d at 846. By his added italics, Justice Scalia implies that the "and" should be understood conjunctively although the various versions in other states would seem to indicate a loose understanding of that language. The Justice argues that the prohibition on cruel and unusual punishments in the British Declaration of Rights was concerned with illegal punishment and not disproportionate punishments. *Id.* at __, 111 S. Ct. at 2690-91, 115 L. Ed. 2d at 851-53. Justice Scalia does not propose "a blind incorporation" of an originalist interpretation of the British Declaration of Rights into the U.S. Constitution. Rather, the Justice argues a normal originalist view that we should interpret it by examining "what its meaning was to the Americans who adopted the Eighth Amendment." *Harmelin*, __ U.S. at __, 111 S. Ct. at 2691, 115 L. Ed. 2d at 852. Justice Scalia argues that "unusual" should mean "not regularly or customarily employed." *Id.* at __, 111 S. Ct. at 2691, 115 L. Ed. 2d at 853.

536. *See* Samuel J.M. Donnelly, *Principles, Persons and Horizons: A Friendly Analysis of*

supporting reasons. The Brennan and Marshall dissents represent the convergence of the better modern thought in regard to capital punishment. Even with the retirements of Justice Brennan and Justice Marshall, the criticism found in their dissenting opinions will present a continuing challenge to the plurality's position. Secondly, a fundamental premise of the subparadigm, that courts can fairly administer capital punishment, has been challenged by the Baldus study, the McCleskey appeal, and the unraveling of the plurality's position.

Those using the plurality's rhetoric now split into two groups which occasionally join. Justices Blackmun and Stevens, while continuing to believe that capital punishment in some instances is constitutional, regularly vote against it in cases before the Court. The majority opinions supporting capital punishment, while ostensibly focusing on Majoritarianism and considerations of fairness related to retribution, recently seem more likely to assert that capital punishment is appropriate simply because the American people want it. The authors of the Baldus book argue that capital punishment as presently administered in America no longer serves the goals of retribution or deterrence, but rather performs a symbolic function.[537]

While Justice Souter supposedly supports capital punishment,[538] it is not yet clear which group on the Court the Justice will associate with more closely. Perhaps, as additional Justices with intellectual integrity join the Court, the context of the argument will change and produce a new subparadigm.

While the intellectual foundations of the subparadigm are unraveling, it is not likely that the present Majoritarian Court will abandon its position in favor of capital punishment. The greatest obstacle to change is the fact that the American people probably want capital punishment as a symbol of their opposition to crime as well as for

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What Dworkin Has Overlooked, 26 ST. LOUIS L. REV. 217, 265-75 (1982) (discussing motion of paradigm for capital punishment).

537. Thompson v. Oklahoma, 487 U.S. 815, 872 (1988) (Scalia, J., dissenting).

538. *See Excerpts from Senate's Hearings on the Souter Nomination*, N.Y. TIMES, Sept. 15, 1990, at 10 (responding to Senator Strom Thurmond regarding moral aspects of capital punishment). In the same set of excerpts, Justice Souter discusses his principled approach to interpreting the Fourteenth Amendment. *See id.* (describing to Senator Arlen Specter that the 14th Amendment text must be starting place for equal protection analysis). Conceivably, Justice Souter could accept the notion discussed above in the text that the punishments rejected by the first Congress included those which are arbitrary and hence cruel. A principled development of that notion would reject punishments which are without solid penalogical justification.

other complex cultural reasons related to symbolic thought.[539] The debate on the floor of the House of Representatives on the Crime Control Bill immediately before the 1990 elections[540] appears to be an example of political use of capital punishment for symbolic purposes. House members supported a number of amendments adding a series of additional crimes punishable by the death penalty while dissenters chanted: "Kill, Kill, Kill."[541] The amendments were made on the floor without committee investigation or apparent deep discussion of the justifications for the death penalty.

Stuart Scheingold has described the manner in which myths can capture the public imagination and serve as foundations for decision-making.[542] One difficulty with capital punishment is that the time spent debating it and the money and effort used in administering it may be diversions from developing more serious solutions to the crime problem. Nevertheless, politicians who have no intention of seriously addressing crime may offer capital punishment as a symbolic solution. In particular, the death penalty may serve a symbolic retributive role in the public imagination: Criminals ought to be punished and capital punishment is evidence that "they are not getting away with it." When confronted with a serious challenge to its well-being, society tends to become more cohesive and begins strengthening its self-image by negating enemies. Capital punishment serves that function in regard to the challenges of crime.

In the same floor debate, the House of Representatives approved prohibitions on the use of capital punishment in racially discriminatory patterns.[543] The Baldus study and McCleskey's appeal have provided a basis for articulating a major objection to capital punishment: its heavy and arguably unfair impact on African-Americans. One can expect the African-American community and others concerned with civil liberties to mobilize around that position, which itself will serve a symbolic function. Like the philosophical arguments represented by

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539. DAVID C. BALDUS, ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 486 (1990); *cf.* STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS 13-23 (1974) (discussing "myth of rights" relation to mainstream American values).

540. *Stringent Rules on Death Penalty Added to Anti-Crime Bill in House*, N.Y. TIMES, Oct. 5, 1990, at A1 (reporting that many Congressmen support imposing death penalty as statement of anti-crime stand).

541. *Id.*

542. STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS 83-151 (1974).

543. H.R. 5269, 101st Cong. 2d Sess., 136 CONG. REC. 9041 (1990).

the Brennan and Marshall positions, the arguments based on discrimination will endure, despite the elimination of those provisions in conference.

Those opposed to the death penalty will and should continue to press questions of procedural and substantive unfairness. This pressure will continue to undermine the integrity of the plurality's position. The cutting edge of that challenge should be the contention that capital punishment has a heavier impact on African-Americans than whites and appears in racially discriminatory patterns.

Indeed, it may be a good political strategy in state legislatures, as well as in Congress, to amend all bills relating to capital punishment by adding prohibitions on the imposition of the death penalty in racially discriminatory patterns. The House or Senate bills could serve as models for such legislation. Arguably, those in Congress opposed to the death penalty have employed this strategy successfully. Possibly in exchange for dropping this prohibition, Congress eliminated a number of provisions imposing the death penalty, as well as the habeas corpus provisions designed to speed up executions.[544]

Ultimately, however, those opposed to capital punishment must address the problem of symbolism. The symbolic use of capital punishment may have less appeal as time passes and crime rates change. The bloodbath which may occur if those on death row are more rapidly and efficiently executed may result in capital punishment being viewed unfavorably as a symbol. Changes in paradigm, however, require the establishment of a new paradigm. New symbolism would appear to be an important aspect of a new paradigm. For that purpose, it may be helpful to reconceptualize punishment for crimes in a way which could provide an alternative set of symbols capable of capturing the public imagination. One candidate for a revised understanding of punishment in murder cases would be lifetime restitution.

The contracting parties in Rawls' model would favor restitution as a goal of criminal punishment. Restitution would tend to increase the parties' shares of the primary social goods and repair the damage caused by the worst disaster of murder.[545] Restitution could be made

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544. *See* Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (1990) (including provisions concerning capital punishment and habeas corpus).

545. Samuel J.M. Donnelly, *The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741, 786-89 (1990).

to the state or the family of the victim. If state prisons established reasonable incentives and conditions for productive work, restitution could be paid during the long prison sentence appropriate for some homicides and could continue during lifetime parole, if parole were appropriate.

X. APPENDIX I: DEVELOPMENTS IN 1991; THE RESIGNATION OF JUSTICE MARSHALL

The most significant development in 1991 was the resignation of Justice Thurgood Marshall which removed the last solid opponent of capital punishment from the Supreme Court. As noted earlier, while Justices Blackmun and Stevens regularly vote against capital punishment, they do not oppose it as a matter of constitutional principle.

Three of the major cases regarding capital punishment during 1991 concerned procedural fairness.[546] Previous voting patterns prevailed in those decisions. In two of the decisions, *Lankford v. Idaho*[547] and *Parker v. Dugger*,[548] the Court found imposition of capital punishment unconstitutional.[549] In *Lankford*, Justice Stevens, joined by Justices Marshall, Blackmun, O'Connor, and Kennedy, wrote the opinion for the Court.[550] Justice Scalia, joined by Chief Justice Rehnquist and Justices White and Souter, wrote the dissent.[551] In *Parker*, Justice O'Connor, joined by Justices Marshall, Stevens, Blackmun, and Souter, wrote for the Court.[552] Justice White dissented in an opinion joined by the Chief Justice, and Justices Scalia and Kennedy.[553] One should note the continuation of the White-O'Connor differences on matters of fairness and that Justices Souter and Kennedy will strike down capital punishment on questions of fairness, although perhaps not in the same case. There is some indication,

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546. *See* Payne v. Tennessee, __ U.S. __, __, 111 S. Ct. 2597, 2601, 115 L. Ed. 2d 720, 726 (1991) (victim impact evidence during penalty phase of trial); Lankford v. Idaho, __ U.S. __, __, 111 S. Ct. 1723, 1725, 114 L. Ed. 2d 173, 178 (1991) (concerning due process requirements of 14th Amendment); Parker v. Dugger, __ U.S. __, __, 111 S. Ct. 731, 733, 112 L. Ed. 2d 812, 819 (1991) (weighing mitigating and aggravating circumstances).

547. __ U.S. __, 111 S. Ct. 1723, 114 L. Ed. 2d 173 (1991).

548. __ U.S. __, 111 S. Ct. 731, 112 L. Ed. 2d 812 (1991).

549. *Lankford*, __ U.S. at __, 111 S. Ct. at 1733, 114 L. Ed. 2d at 187-89; *Parker*, __ U.S. at __, 111 S. Ct. at 740, 112 L. Ed. 2d at 827.

550. *Lankford*, __ U.S. at __, 111 S. Ct. at 1724, 114 L. Ed. 2d at 178.

551. *Id.* at __, 111 S. Ct. at 1733, 114 L. Ed. 2d at 189.

552. *Parker*, __ U.S. at __, 111 S. Ct. at 733, 112 L. Ed. 2d at 819.

553. *Id.* at __, 111 S. Ct. at 740, 112 L. Ed. 2d at 827.

then, that on questions of capital punishment Justices Souter and Kennedy will join the centrist plurality rather than vote consistently with the Chief Justice and Justice Scalia.

In both *Lankford* and *Parker*, Justice O'Connor voted against capital punishment.[554] In *Parker*, the Justice wrote the opinion.[555] Both cases ostensibly concern procedural fairness. In *Lankford*, the state did not recommend the death sentence. Nevertheless, after the penalty hearing the judge condemned the defendant to death.[556] The defendant argued, and in his majority opinion Justice Stevens agreed, that the defendant did not have adequate and fair notice that the death penalty was at stake.[557] In *Parker*, the trial judge set aside the jury's recommendation of life imprisonment and substituted a death sentence.[558] The Florida Supreme Court affirmed after striking two aggravating factors upon which the trial court relied.[559] The Florida court did not reweigh the aggravating and mitigating factors as required by *Clemons*.[560] Justice O'Connor held:

> In a weighing state, when a reviewing court strikes one or more of the aggravating factors on which the sentencer relies, the reviewing court may, consistent with the Constitution, reweigh the remaining evidence or conduct a harmless error analysis . . . .
>
> Following *Clemons*, a reviewing court is not compelled to remand. It may instead reweigh the evidence or conduct a harmless error analysis based on what the sentencer actually found. What the Florida Supreme Court could not do, but what it did, was to ignore the evidence of mitigating circumstances in the record and misread the trial judge's findings regarding mitigating circumstances, and affirm the sentence based on a mischaracterization of the trial judge's findings.

In both cases, Justice White dissented despite his normal concern for procedural fairness. The Justice's vote is explainable by his willingness to rely on trial judges or appellate courts to arrive at appropriate decisions. Justice O'Connor's vote against capital punishment in

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554. *Lankford*, __ U.S. at __, 111 S. Ct. at 1724, 114 L. Ed. 2d at 178; *Parker*, __ U.S. at __, 111 S. Ct. at 733, 112 L. Ed. 2d at 819.

555. *Parker* __ U.S. at __, 111 S. Ct. at 733, 112 L. Ed. 2d at 819.

556. *Lankford*, __ U.S. at __, 111 S. Ct. at 1726-28, 114 L. Ed. 2d at 180-82.

557. *Id.* at __, 111 S. Ct. at 1728, 1732-33, 114 L. Ed. 2d at 182, 187-89.

558. *Parker*, __ U.S. at __, 111 S. Ct. at 734, 112 L. Ed. 2d 819.

559. *Id.* at __, 111 S. Ct. at 734, 112 L. Ed. 2d at 820.

560. *See* Clemons v. Mississippi, 494 U.S. 738, 749-54 (1990) (outlining proper procedure for appellate reweighing).

both cases is more difficult to explain in light of her greater concern for substantive fairness than procedural fairness.

Nevertheless, Justice O'Connor often would frame a question of substantive fairness as one of procedure. There appear to be questions of substantive fairness lurking in both *Lankford* and *Parker*. In *Lankford*, the petitioner-defendant may have been only an after-the-fact accessory whose involvement did not amount to the level of participation required by Justice O'Connor's opinion in *Enmund*.[561] In *Parker*, none of the other participants in the particular crime received a death sentence.[562] The failure of the various courts to adequately weigh or reweigh the mitigating factors may have created a doubt as to the substantive fairness of the death penalty. Perhaps Justice O'Connor's votes in *Lankford* and *Parker* are consistent with her emphasis on substantive fairness.

In *Payne v. Tennessee*,[563] the Supreme Court upheld the imposition of the death penalty in an opinion written by Chief Justice Rehnquist.[564] Only Justices Marshall, Blackmun, and Stevens dissented.[565] The key issue, on which the Court had split previously, was whether victim impact evidence was admissible in the sentencing hearing. In *Booth* and *Gathers*, the Court held that such evidence was not admissible.[566] Justice O'Connor in particular questioned the lower court's exclusion of harm from the calculation of the defendant's guilt and desert. In *Payne*, Chief Justice Rehnquist allowed admission of victim impact evidence and in his opinion placed considerable emphasis on the importance of harm done in determining desert.[567] The impact of the *Payne* decision substantially overruled *Booth* and *Gathers* and fu-

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561. *Lankford*, __ U.S. at __, 111 S. Ct. at 1725, 114 L. Ed. 2d at 179. *See* Enmund v. Florida, 458 U.S. 782, 801 (1982) (finding that imposition of death penalty for one who did not kill or intend to kill unconstitutional).

562. *Parker*, __ U.S. at __, 111 S. Ct. at 736, 112 L. Ed. 2d at 822.

563. __ U.S. __, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991).

564. *Id.* at __, 111 S. Ct. at 2601, 115 L. Ed. 2d at 726.

565. *Id.* at __, 111 S. Ct. at 2619, 2625, 115 L. Ed. 2d at 748, 756.

566. *See* South Carolina v. Gathers, 490 U.S. 805, 811-12 (1989) (requiring victim impact evidence directly relate to circumstances in case); Booth v. Maryland, 482 U.S. 496, 502 (1987) (requiring scrutinization of victim impact evidence other than defendants' record, characteristics, and circumstances of crime).

567. *Payne*, __ U.S. at __, 111 S. Ct. at 2607-09, 115 L. Ed. 2d at 734-36. There may perhaps be other reasons for barring particular victim impact evidence. Chief Justice Rehnquist argued that "the Eighth Amendment erects no per se bar." *Id.* at __, 111 S. Ct. at 2609, 115 L. Ed. 2d at 736.

eled the dispute concerning stare decisis in the Supreme Court.[568]

Justice Marshall's dissent in *Payne*, announced on the last decision day of the Term just before his resignation, emphasized the role of stare decisis:

> Power, not reason, is the new currency of this Court's decision-making. Four Terms ago, a five-Justice majority of the Court held that "victim impact" evidence of the type at issue in this case could not constitutionally be introduced during the penalty phase of a capital trial. . . . By another 5-4 vote, a majority of this Court rebuffed an attack upon this ruling just two Terms ago. . . . Nevertheless, having expressly invited respondent to renew the attack . . . today's majority overrules *Booth* and *Gathers* and credits the dissenting views expressed in those cases. Neither the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years. Only the personnel of this Court did.[569]

Justice Stevens, in his dissent, finds two flaws in the use of victim impact evidence. First, under a retribution rationale the death penalty must be related to the defendant's "personal culpability."[570] Since the defendant does not know aspects of the victim's character at the time of the crime, introduction of those aspects in evidence does not justify the death penalty. Secondly, Justice Stevens detects a danger that reliance by a judge or jury on victim impact evidence will increase the opportunity for arbitrary and capricious decision-making contrary to the spirit of *Gregg*.[571] Justice Stevens argues: "Open-ended reliance by a capital sentencer on victim impact evidence simply does not provide a 'principled way to distinguish [cases], in which the death penalty [i]s imposed, from the many cases in which it [i]s not."[572]

A major aspect of discrimination in capital punishment cases as discussed in the Baldus study and the Baldus book is race-of-the-victim discrimination. Focusing on victim impact evidence as allowed by *Payne* will enhance the possibilities of race-of-the-victim discrimi-

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568. *See* David O. Stewart, *Four Spirited Dissenters*, A.B.A. J., Sept. 1991, at 40, 41-2.

569. *Payne*, __ U.S. at __, 111 S. Ct. at 2619, 115 L. Ed. 2d at 748 (Marshall, J., dissenting).

570. *Id.* at __, 111 S. Ct. at 2628, 115 L. Ed. 2d at 759 (Stevens, J., dissenting).

571. *Id.*; *see* Gregg v. Georgia, 428 U.S. 153, 168-87 (1976) (opinion of Stewart, Powell, & Stevens, JJ.) (illustrating concerns behind Eighth Amendment's relation to capital punishment).

572. *Payne*, __ U.S. at __, 111 S. Ct. at 2628, 115 L. Ed. 2d at 759.

nation. It will also generally produce a greater lack of proportionality in death penalty cases. Juries may be encouraged to award the death penalty when the victim is rich, prominent, or considered important. Juries may also be discouraged from imposing the death penalty when the victim is poor, whether African-American or white.

While another decision of the Court interpreting cruel and unusual punishments, *Harmelin v. Michigan*,[573] is not a death penalty case, it illustrates the determination of the right-wing Justices, Rehnquist and Scalia, to exclude proportionality tests from Eighth Amendment restrictions. Joined primarily by the Chief Justice, Justice Scalia concluded, after a historical examination, that the Founding Fathers did not intend the Eighth Amendment to restrict punishment under a proportionality test.[574] Fortunately, the rest of the Court disagreed even though the Justices refused to strike down the rather extreme punishment under the proportionality test.[575]

The resignations of Justices Marshall and Brennan leave the Court without principled opposition to capital punishment. In the near future, then, attacks on particular instances of capital punishment will focus on the absence of fairness. In Congress, the attack on racial discrimination in capital punishment continues. The original Judiciary Committee version of the Senate's Violent Crime Control Act of 1991 prohibited racially discriminatory capital sentencing and allowed the use of statistical evidence to demonstrate patterns of discrimination.[576] Unfortunately, the version finally adopted by the Senate, "The Biden-Thurmond Violent Crime Control Act of 1991," does not contain a parallel provision.[577] The House version, however, does prohibit racially discriminatory patterns of capital punishment in a similar manner.[578] Both bills include a process to expedite habeas corpus proceedings in capital punishment cases.

XI. APPENDIX II: COURT TERM 1991-1992

The most dramatic development during 1991-1992 was the recommencement of capital punishment by the State of California with the

573. __ U.S. __, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991).

574. *Id.* at __, 111 S. Ct. at 2692, 2696, 2701, 115 L. Ed. 2d at 853, 858, 864.

575. *Id.* at __, 111 S. Ct. at 2701-02, 115 L. Ed. 2d at 864-65.

576. S. 618, 102d Cong., 1st. Sess. § 202, 137 CONG. REC. S3044-78, (daily ed. Mar. 12, 1991).

577. S. 1241, 102d Cong., 1st Sess. (1991).

578. H.R. 1400, 102d Cong., 1st Sess. (1991).

gas chamber execution of Robert Alton Harris on April 21, 1992. The United States Supreme Court, in *Vasquez v. Harris*,[579] granted California's application to vacate the Ninth Circuit's stay of execution and directed that no federal court issue any further stays of execution for Mr. Harris.[580] Justices Blackmun and Stevens dissented.

Garrett v. Collins[581] presented a similar drama in the State of Texas.[582] Governor Ann Richards in effect denied a request from Pope John Paul II and the Roman Catholic Bishops of Texas for commutation of Garrett's sentence to life imprisonment. The religious authorities were concerned because of their express opposition to capital punishment and because Garrett had murdered a nun.[583] The United States Supreme Court denied certiorari in *Garrett* in three separate decisions.[584] Justices Blackmun and Stevens dissented to two of the three denials.[585] In *Garrett v. Collins*, the Fifth Circuit upheld denial of Garrett's application for habeas corpus.[586]

By late April 1992, the Supreme Court had decided three capital punishment cases with full opinion. In each, the Court rejected capital punishment. Both cases concerned federal habeas corpus questions: *Stringer v. Black*,[587] in which Justice Kennedy wrote the opinion and Justices Souter, Scalia and Thomas dissented, and *Blodgett*,[588] a unanimous decision with a separate concurrence by Justices Stevens and Blackmun. In *Stringer*, Justice Kennedy held that the appeal was not precluded based on a new rule even though sentence was final before *Maynard* or *Clemons*.[589] The decisions in those cases,

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579. __ U.S. __, 112 S. Ct. 1713, 118 L. Ed. 2d 418 (1992).

580. *Id.*; Katherine Bishop, *After Night of Court Battles, A California Execution*, N.Y. TIMES, April 22, 1992 at A1.

581. 951 F.2d 57 (5th Cir. 1992).

582. *Garrett*, 951 F.2d at 57.

583. *Texas Executes Killer of a Nun—Lethal Injection Administered a Month After a Reprieve the Pope Had Sought*, N.Y. TIMES, Feb. 12, 1992, at A22.

584. Garrett applied for certiorari in three separate habeas corpus petitions but all were denied. Garrett v. Collins, __ U.S. __, __, 112 S. Ct. 1072, 1072, 117 L. Ed. 2d 277, 277 (1992); Garrett v. Texas, __ U.S. __, __, 112 S. Ct. 1072, 1072, 117 L. Ed. 2d 278, 278 (1992); Garrett v. Texas, __ U.S. __, __, 112 S. Ct. 1073, 1073, 117 L. Ed. 2d 278, 278 (1992).

585. Garrett v. Collins, __ U.S. __, __, 112 S. Ct. 1072, 1072, 117 L. Ed. 2d 277, 277 (1992); Garrett v. Texas, __ U.S. __, __, 112 S. Ct. 1072, 1072, 117 L. Ed. 2d 278, 278 (1992).

586. *Garrett*, 951 F.2d at 59.

587. __ U.S. __, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992).

588. __ U.S. __, 112 S. Ct. 674, 116 L. Ed. 2d 669 (1992).

589. *Stringer*, __ U.S. at __, 112 S. Ct. at 1135-36, 117 L. Ed. 2d at 376-77.

Justice Kennedy argued, were implicit in previous decisions.[590] In *Blodgett*, the Court denied a mandamus petition by the State of Washington requiring the Ninth Circuit to issue a decision on a prisoner's second habeas petition.[591] Nevertheless, the Court pressured the Ninth Circuit to proceed rapidly.[592]

Dawson v. Delaware[593] was an appeal from a decision of the Supreme Court of the State of Delaware.[594] Chief Justice Rehnquist held it error to admit as evidence at the death penalty hearing that the defendant belonged to a white, racist gang while in prison.[595] All concurred except Justice Thomas who dissented. Justice Blackmun filed a separate concurring opinion.

In the closing days of the last Term, the Court decided three additional capital punishment cases. In *Morgan v. Illinois*,[596] the Supreme Court held that a trial court is required to grant an accused's request to ask potential jurors whether they would automatically vote to impose the death penalty regardless of the facts of the case.[597] Justice White, joined by Justices Blackmun, Stevens, O'Connor, Kennedy, and Souter stated that the due process requirement of the Fourteenth Amendment and the Sixth Amendment's provision for a fair and impartial jury require a trial judge to question potential jurors about their views on the death penalty when a defendant so requests.[598]

In *Sawyer v. Whitley*,[599] the Supreme Court held that for a defendant to show he was "actually innocent," and thus enable a court to reach the merits of a habeas petition claim, the defendant must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the defendant eligible for capital punishment.[600] Sawyer offered impeachment testimony in a fed-

590. *Id.* at __, 112 S. Ct. at 1140, 117 L. Ed. 2d at 382-83.

591. *In re Blodgett*, __ U.S. at __, 112 S. Ct. at 677, 116 L. Ed. 2d at 675.

592. *Id.*

593. __ U.S. __, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992).

594. Dawson v. Delaware, 581 A.2d 1078 (1990), *vacated*, __ U.S. __, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992).

595. *Dawson*, __ U.S. at __, 112 S. Ct. at 1099, 117 L. Ed. 2d at 318.

596. __ U.S. __, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992).

597. *Id.* at __, 112 S. Ct. at 2233, 119 L. Ed. 2d at 506-07.

598. *Id.* at __, 112 S. Ct. at 2228-35, 119 L. Ed. 2d at 500-09.

599. __ U.S. __, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992).

600. *Id.* at __, 112 S. Ct. at 2518-23, 120 L. Ed. 2d at 277-78. In *Sawyer*, the Court determined that the actual innocence requirement "must focus on those elements which render the defendant eligible for the death penalty, and not on mitigating evidence . . . [not] introduced as a result of claimed constitutional error." *Id.*

eral habeas petition and claimed that his trial attorney's failure to offer mental health records as mitigating factors constituted ineffective assistance of counsel. However, Chief Justice Rehnquist, joined by Justices White, Scalia, Kennedy, Souter, and Thomas stated that Sawyer still had failed to show that he was "actually innocent" because it could not be said that no reasonable juror would have found Sawyer ineligible for the death penalty.[601]

In *Sochor v. Florida*,[602] the Supreme Court addressed the issue of whether the Florida Supreme Court, by using harmless error analysis, properly cured a trial court's erroneous imposition of the death penalty.[603] Justice Souter delivered the opinion of the Court.[604] In that case, the trial court sentenced the accused to death after finding, among other things, that the killing was committed "in a cold, calculated . . . manner."[605] The Florida Supreme Court held that the trial court's conclusion was unsupported by the evidence but affirmed the imposition of capital punishment after finding other aggravating factors.[606] Although the Supreme Court did not affirmatively state a formula to indicate when harmless error analysis will sufficiently cure the weighing of an invalid aggravating factor, the Court was unable positively to find that the Florida Supreme Court had indeed employed harmless error analysis.[607] Therefore, it found that the Florida Supreme Court had failed to cure the invalid weighing of the trial court.[608]

The change in membership of the court obviously has affected voting patterns. There now are only two regular votes against capital punishment, Justices Blackmun and Stevens. The plurality, the center of the court, still hold and will often vote against capital punishment. Justice Kennedy now may be perceived as adhering to the plurality position in capital punishment cases and is prepared to qualify the Court's stern position on habeas corpus petitions and expediting capital punishment. Justice Thomas appears to adhere to the right wing.

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601. *Id.* at __, 112 S. Ct. at 2523-25, 120 L. Ed. 2d at 286.
602. __ U.S. __, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992).
603. *Id.* at __, 112 S. Ct. at 2118-19, 119 L. Ed. 2d at 336.
604. *Id.* at __, 112 S. Ct. at 2117, 119 L. Ed. 2d at 334.
605. *Id.* at __, 112 S. Ct. at 2118, 119 L. Ed. 2d at 335.
606. *Sochor*, __ U.S. at __, 112 S. Ct. at 2118, 119 L. Ed. 2d at 335-36.
607. *Id.* at __, 112 S. Ct. at 2123, 119 L. Ed. 2d at 342.
608. *Id.*

The most obvious impact of the Supreme Court's changed membership appears to be on the granting of certiorari. Many of the cases in which certiorari is granted appear to be ones in which the Court is prepared to reject capital punishment. Those Justices favoring capital punishment apparently, on occasion, are prepared to take stern measures to promote expediting capital punishment.[609]

The Supreme Court's decision in *Hudson v. McMillian*,[610] a non-capital, cruel and unusual punishments case, will affect Eighth Amendment and capital punishment jurisprudence. Justice O'Connor held that the use of excessive force on a prisoner constituted cruel and unusual punishment although the prisoner was not seriously injured.[611] Justice Thomas dissented, joined by Justice Scalia, partly based on "original intent," arguing that activities in prison were not the sorts of punishment contemplated at the time the Eighth Amendment was adopted.[612] It is worth noting that development of the American prison system is a phenomenon of the nineteenth century.

The "Violent Crime Control Act of 1991"[613] and the parallel House bill[614] ultimately failed.[615] In their final versions, the bills did not contain the prohibitions on racially discriminatory patterns of capital punishment.[616] The bills failed because the provision regulating habeas corpus and gun control did not appeal to the Bush Administration and Senators who threatened to filibuster.[617]

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609. *Cf. Vasquez*, __ U.S. at __, 112 S. Ct. at 1713, 118 L. Ed. 2d at 418 (vacating stay of execution granted by Ninth Circuit).

610. __ U.S. __, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992).

611. *Id.* at __, 112 S. Ct. at 996, 117 L. Ed. 2d at 164.

612. *Id.* at __, 112 S. Ct. at 1005-06, 117 L. Ed. 2d at 173-75.

613. S. 1241, 102d Cong., 1st Sess. (1991).

614. Violent Crime Prevention Act of 1991, H.R. 3371, 102d Cong., 1st Sess. (1991).

615. 138 CONG. REC. S2909 (daily ed. Mar. 5, 1992).

616. *See* 137 CONG. REC. H11,678 (daily ed. Nov. 26, 1991) (discussing provisions of bill).

617. *See* 138 CONG. REC. S3926 (daily ed. Mar. 19, 1992) (discussing threat of filibuster); *Senate Republicans, Soft on Guns*, N.Y. TIMES, Mar. 30, 1992, at A16 (stating Republicans sabotaged crime bill).