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REVIEW ESSAY

Patterns in Capital Punishment

CAPITAL PUNISHMENT AND THE AMERICAN AGENDA. By Franklin E. Zimring† & Gordon Hawkins.†† Cambridge: Cambridge University Press, 1987. Pp. xviii, 192.

Reviewed by Welsh S. White‡

Capital punishment in the United States seems to be gathering momentum. The population of death row has nearly tripled since 1980, climbing from 715 in December 1980¹ to 2021 in March 1988.² The pace of executions is increasing as well: whereas there were only eleven executions between 1977 and the end of 1983, there were eighty-two between 1984 and the end of 1987.³ Moreover, public enthusiasm for the death penalty has apparently never been stronger with public opinion polls indicating that an overwhelming proportion of people throughout the country approve of capital punishment.⁴ Recent California elections highlight the intensity and focus of public feeling on this issue: voters unseated three members of the state supreme court largely because they were perceived as reluctant to uphold death sentences.⁵ Perhaps most significantly, the current legal climate facilitates the application of the death penalty. Since 1983 the United States Supreme Court has generally upheld death sentences and state death penalty statutes against constitutional attack.⁶

Given these prevailing attitudes towards capital punishment in the

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1. Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 917 (1982).

2. Death Row, U.S.A., Mar. 1, 1988, at 1 (newsletter published by NAACP Legal Defense and Education Fund, Inc.).

3. There were 21 executions in 1984, 18 in 1985, 18 in 1986, and 25 in 1987. *Id.* at 3-4.

4. The Gallup Poll reported in February 1985 that 72% of Americans favor the death penalty for murder. This is the highest figure since 1936. See Silas, *The Death Penalty: The Comeback Picks up Speed*, A.B.A. J., Apr. 1985, at 48.

5. See Reidinger, *The Politics of Judging*, A.B.A. J., Apr. 1987, at 52.

6. See *infra* notes 42-45 and accompanying text.

United States, Gordon Hawkins and Franklin Zimring's *Capital Punishment and the American Agenda* is both timely and important. The authors examine why the death penalty continues to exist in the United States and identify some methods and institutions that might bring about its abolition (pp. xiii-xiv). After analyzing several patterns relating to the use of the death penalty in America and throughout the world, the authors conclude that "America has outgrown the death penalty, but is reluctant to acknowledge that fact in the 1980's" (p. 148). They predict that within a relatively short period of time—more likely fifteen years than fifty years—executions in the United States will end (p. 157), and that the Supreme Court, despite the trend of its recent decisions, will lead the abolition movement (p. 157).

Capital Punishment and the American Agenda is written forcefully and at times eloquently. The authors bring into focus important new perspectives on the application of capital punishment, and their discussions of these perspectives are often exceptionally perspicacious. In some cases, however, the force and clarity of the authors' arguments are achieved at the expense of a more thorough analysis. Despite the controversial nature of the subject, the authors display unswerving confidence in the correctness of their position. At times, their self-assurance leads them to ignore countervailing arguments or relevant alternative perspectives. In their analyses of patterns of the use of capital punishment, Zimring and Hawkins display both the richness of insight and the limitations in scope of their "advocacy scholarship"—a term they use to describe the academic study of capital punishment in the context of their strong commitment to its abolition (p. xvi-xvii).

In Part I of this Review, I examine four of the most interesting patterns identified by the authors. In Part II, I examine a pattern the authors did not consider: racially discriminatory application of the death penalty, and the Supreme Court's reaction to it in *McCleskey v. Kemp*.⁷ Zimring and Hawkins consider the discriminatory application of the death penalty tangential to their argument against capital punishment. In my judgment, however, it contributes to a fuller understanding of some of the issues the authors *do* discuss, especially the selection of capital defendants for execution and the Supreme Court's treatment of the death penalty.

I

PATTERNS IN CAPITAL PUNISHMENT

The authors' most valuable contribution to the death penalty debate is their identification and analysis of patterns of capital punishment in

7. 107 S. Ct. 1756 (1987).

the United States and abroad. Even readers who disagree with the book's conclusions will find the patterns that the authors elucidate thought provoking, intriguing, and at times disturbing. The authors' analysis serves as a starting point, however, rather than the final word; Zimring and Hawkins raise many questions which they do not answer fully, and they fail to explore issues that would provide a more complete understanding of the patterns they identify. Illustrative are their discussions of the international treatment of capital punishment, executions in the United States, death penalty litigation in the Supreme Court, and the selection of capital defendants.

A. *Capital Punishment in the World*

The second sentence of *Capital Punishment and the American Agenda* describes a striking pattern: "Every Western industrial nation has stopped executing criminals, except the United States" (p. 3). Most of these countries executed people during this century (p. 4), and became abolitionist despite substantial public support for the death penalty (p. 12). Furthermore, "the list of actively executing countries matches that of politically repressive countries" (p. 6). To support this last assertion, the authors point to present practices in countries such as South Africa, Uganda, Argentina, and the Soviet Union, all of which continue to execute large numbers of people.

The correlation between capital punishment and political repression suggests an attractive syllogism. Only countries that are politically repressive continue to impose the death penalty. This country is not politically repressive. Therefore, following the example of other Western industrial nations, it will not continue to impose the death penalty. The major premise of the syllogism is certainly debatable, however. Even if most countries that impose the death penalty are politically repressive, it does not follow that political repression is a necessary condition for the imposition of capital punishment. While there is clearly some relationship between political repression and capital punishment,⁸ other variables could also help determine the extent to which a nation continues to impose the death penalty. Examples might include the homicide rate, the population density, the existence of racial tensions, and the national policy decisionmaking process.

Nevertheless, the pattern identified by the authors is striking, and we would like to know more about it. It would be impossible to prove empirically that political repression is necessary for the continued existence of capital punishment. Some account of the death penalty's aboli-

8. In a sense, capital punishment is an integral aspect of political repression: in certain countries "the use of summary, as opposed to judicial, executions is not so much an index of disregard for human rights as the principal method for expressing it" (p. 7).

tion in democratic countries would have been instructive, however. By charting the path of abolition in other countries—including, for example, the government rationales for abolishing the death penalty and the social and political conditions that may have precipitated the movement towards abolition—the authors could have provided further insight into whether a similar path is likely to be followed here.

The authors do provide some fragments of case histories. In the six years before New Zealand's de facto abolition in 1958, its courts imposed death sentences only eighteen times, and only eight executions took place (p. 15). In Great Britain, the *Royal Commission on Capital Punishment* concluded in 1953 that the scope of the death penalty had become so reduced that "a stage has been reached where there is little room for further limitation short of abolition" (p. 12). Eleven years later the death penalty was abolished (p. 12). These examples indicate that when the death penalty is applied so infrequently as to be in a state of desuetude, de facto abolition and then formal abolition are likely to follow. But these observations merely trace the stages of abolition without explaining the underlying causes.

With respect to these causes, the authors do offer one intriguing suggestion. They refer to "the crucial connection between the cataclysmic lessons of the Nazi regime and the rejection of the death penalty throughout Europe when that regime ended" (p. 164). This connection suggests that the Nazi experience led Western European nations to believe that government should exercise its lethal powers of destruction sparingly and that therefore the death penalty was not a desirable instrument of social policy.⁹

Unfortunately, the connection between the Nazi experience and the abolition of the death penalty in Europe only highlights the fact that conditions and perceptions in the United States today may be quite different from those present in other Western industrial countries when they abolished the death penalty. Thus, the authors' discussion of the trend towards abolition in other countries provides an argument in favor of abolition, but in itself it does not strongly support the conclusion that abolition is soon likely to occur in this country.

B. *The Executing States*

Another remarkable pattern identified by the authors relates to the

9. This suggestion ties in with the authors' powerful statement at p. 164 of the benefits of abolition:

The symbolic value of abolition in Western society is the message of forbearance in modern governments, armed with an abundance of lethal technology, deliberately choosing not to kill in the face of criminal provocation. It is a statement about the proper limit on governmental power, a conception of the nature of democratic government with implications far beyond the field of criminal justice.

geographic distribution of the executions in the United States. Since the resumption of capital punishment in 1976 following *Gregg v. Georgia*,¹⁰ over 70% of the executions in this country have taken place in Florida, Texas, Louisiana, and Georgia (p. 136). This preponderance continues a historic pattern, since the same four states "ranked in the top seven [executing] states . . . between 1950 and 1959, sharing honors in that earlier decade only with the major population centers of California and two other Southern states" (pp. 136-37).

In the post-*Gregg* era, one could attribute this disproportionality in executions to fortuitous timing rather than to the four states' greater commitment to capital punishment. Three of the four states—Florida, Georgia, and Texas—got a head start because the Court upheld the constitutionality of their death penalty statutes first.¹¹ In some states, death penalty statutes enacted at about the same time as Florida's and Georgia's were invalidated by either the Supreme Court¹² or the state supreme court.¹³ In others, a relatively slow appeal process¹⁴ combined with some early reversals of individual death sentences¹⁵ caused similar delays. At present, some of the states that fell behind Florida, Georgia, Texas, and Louisiana are in a good position to at least narrow the gap. The combined death row population in California, Pennsylvania, Illinois, and Ohio approaches 500.¹⁶ If these states begin executing inmates in substantial numbers, the four Southern states will lose their oligopoly on executions.

Of course, this may never happen. As the authors indicate, there is a very significant "transition from the general to the specific, from the idea of capital punishment to the reality of execution" (p. 128). States with large death row populations that have not executed anyone for many years may become caught in this transition. It is possible that few, if any, of the death row inmates in these states will ever be executed. If

10. 428 U.S. 153 (1976). In *Gregg*, the Supreme Court upheld the constitutionality of a state death penalty statute for the first time since *Furman v. Georgia*, 408 U.S. 238 (1972), in which the court had found the death penalty "cruel and unusual" (p. 34).

11. See *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

12. See, e.g., *Lockett v. Ohio*, 438 U.S. 586 (1978).

13. See, e.g., *Commonwealth v. Moody*, 476 Pa. 223, 382 A.2d 442 (1977), cert. denied, 438 U.S. 914 (1978).

14. In California, for example, there is often a lapse of at least three years between the imposition of a death sentence and a ruling on its validity by the California Supreme Court. See W. WHITE, *THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* 25-26 n.74 (1987).

15. The California Supreme Court reversed death sentences in most of the capital cases it considered during the early 1980's. See, e.g., Barnett, *The Supreme Court of California, 1981-1982 Foreword: The Emerging Court*, 71 CALIF. L. REV. 1134, 1167 (1983).

16. As of March 1988, there were 494 prisoners on death row in these four states. See *Death Row, U.S.A.*, *supra* note 2, at 6, 11, 16, 17.

this scenario occurs, then the remarkable dichotomy between the four Southern states and the rest of the country will continue.

This dichotomy is more easily identified than accounted for. The authors conclude that the distinguishing factor between states that execute and those that do not "is not public support for capital punishment as evidenced in the polls. Rather, it is government tradition" (p. 137). In other words, the relatively large number of executions in Florida, Georgia, Louisiana, and Texas may best be explained by the fact that these same Southern states have traditionally been among the leaders in executions. This explanation is incomplete, however. That four of the states with the most executions in the 1950's have the most executions in the 1980's suggests that the dynamics that precipitated frequent executions in those states thirty years ago still operate today, but it does not explain the nature of the relevant dynamics.

The intensity of public opinion in particular regions may be one of the most significant of these dynamics. The authors rightly note that the public opinion polls indicate that popular support for the death penalty is no stronger in Georgia or Florida than it is in Pennsylvania or California (p. 135). But opinion polls do not measure the strength of a particular community's support for executing a particular capital defendant.

The Roosevelt Green case illustrates the intensity of support in certain Southern communities for executing particular capital defendants.¹⁷ Green, a young black man, was charged in 1977 with a capital offense for his participation in the abduction, rape, and murder of Teresa Allen, an eighteen-year-old white college student. One witness related a conversation with codefendant Carzell Moore in which Moore stated that he and Green had abducted the victim and that both of them had raped her.¹⁸ According to the witness, Moore also said that he alone had shot the victim without Green's knowledge and while Green was absent.¹⁹

Green and Moore were tried in Monroe County, Georgia, a rural community that is about sixty percent white.²⁰ For the most part, the white and black people live in separate parts of the county and do not know each other. According to Green's lawyers, his case was the first interracial death penalty case to be tried in the county in five years, and it generated intense and sustained feelings within the white community against the defendants. In 1977, Green was tried, convicted, and sen-

17. See *Green v. Georgia*, 442 U.S. 95, 96 (1979) (per curiam). For a fuller account of the *Green* case, see W. WHITE, *supra* note 14, at 117-27.

18. W. WHITE, *supra* note 14, at 118.

19. *Green*, 442 U.S. at 96. In one respect the physical evidence did not corroborate Moore's story. The tests conducted by the government showed that Allen had been raped by a man with blood type A. Moore had blood type A and Green blood type B. W. WHITE, *supra* note 14, at 119.

20. In 1980, Monroe County was 37.82% black. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, COUNTY AND CITY DATA BOOK 116 (10th ed. 1983).

tenced to death. The Supreme Court reversed the sentence on the ground that during the penalty trial the state court improperly excluded Moore's statement exonerating Green from involvement in the killing. The Court's action intensified community feeling against Green. In a front page article following the Supreme Court's decision, Sheriff Ed Coley was quoted as saying, "I think it's ridiculous. I think they ought to electrocute him."²¹

Green's second penalty trial was held in November 1979. The community's hostility towards Green was reflected in the voir dire of the jury selection. Every prospective juror remembered hearing talk within the community about the case. The recollection of prospective juror Fannie Watts was typical: "I did hear talk that Green was one of the accused and when I heard it, first thing I heard was that he would get the electric chair."²²

The community's antagonism were also evident during the penalty trial itself. According to Green's lawyers, the courtroom was filled to overflowing all six days of the trial, mostly with hostile white spectators. The crowd's hostility was particularly obvious near the end of the trial. After considerable deliberation, the jury returned with a sentence of death. Defense counsel then requested that the judge poll the jury. During the polling, the judge asked each juror whether their verdict was death and whether they adhered to that verdict. In response to the second question, Samuel Mobley, one of the two black members of the jury, said, "No, it's not, your honor. I cannot do it."²³ At this, the crowd became openly antagonistic. The judge discontinued further questioning and sent the jury to the jury room. Subsequently, the bailiff reported to the judge that Mobley said that he had misunderstood the judge's question and that he did adhere to the death penalty verdict. After a second polling of the jury in which all jurors affirmed the verdict, the judge imposed the death sentence.²⁴ Green was executed on January 9, 1985.²⁵

Intense public feeling in favor of the death penalty in particular cases almost inevitably has an impact on the state courts. In death penalty cases, state appellate courts have been traditionally inclined "to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance."²⁶ In some parts of the country, however,—and not only in the South—this no longer appears to be true. David Stebbins, the death penalty coordinator of the Ohio Pub-

21. W. WHITE, *supra* note 14, at 119.

22. *Id.*

23. *Id.* at 120.

24. *Id.*

25. Death Row, U.S.A., *supra* note 2, at 3.

26. *Stein v. New York*, 346 U.S. 156, 196 (1953).

lic Defender's Office, has said that in Ohio a criminal defendant now has a better chance on appeal if his case does *not* involve the death penalty.²⁷ The reason is that the Ohio Supreme Court is concerned that reversing death sentences may have adverse political consequences.²⁸

This same phenomenon appears to be true in the four Southern states with the most executions. In Florida, the state supreme court has rejected seemingly meritorious claims in death penalty cases.²⁹ In Georgia, the number of post-*Gregg* cases in which death sentences have been reversed by the United States Supreme Court³⁰ indicates that the Georgia Supreme Court has not been notably hospitable to federal constitutional claims in death penalty cases. A survey of state supreme court decisions in Texas³¹ and Louisiana³² suggests that the supreme courts in

27. See W. WHITE, *supra* note 14, at 17.

28. *Id.*

29. In *Barclay v. State*, 411 So. 2d 1310 (Fla. 1982), *aff'd sub nom Barclay v. Florida*, 463 U.S. 939 (1983), for example, the Florida Supreme Court affirmed a death sentence based on aggravating circumstances, at least one of which had a basis in state law, but several others "with no very clear basis in the facts or in state law." Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 356. For a discussion of both the lower court and Supreme Court decisions in *Barclay*, see *id.* at 354-58.

30. In the first four years of the post-*Gregg* era, there were three such cases. See *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Green v. Georgia*, 442 U.S. 95 (1979); *Coker v. Georgia*, 433 U.S. 584 (1977).

31. During the two year period from the beginning of 1985 to the end of 1986, the Texas Court of Criminal Appeals affirmed death sentences in 54 out of 65 capital cases. See *Modden v. State*, 721 S.W.2d 859 (Tex. Crim. App. 1986); *Mays v. State*, 726 S.W.2d 937 (Tex. Crim. App. 1986); *Rector v. State*, 738 S.W.2d 235 (Tex. Crim. App. 1986); *Dunn v. State*, 721 S.W.2d 325 (Tex. Crim. App. 1986); *Losada v. State*, 721 S.W.2d 325 (Tex. Crim. App. 1986); *Sawyers v. State*, 724 S.W.2d 24 (Tex. Crim. App. 1986); *Mann v. State*, 718 S.W.2d 741 (Tex. Crim. App. 1986), *cert. denied*, 107 S. Ct. 1633 (1987); *Bridge v. State*, 726 S.W.2d 558 (Tex. Crim. App. 1986); *Burdine v. State*, 719 S.W.2d 309 (Tex. Crim. App. 1986), *cert. denied*, 106 S. Ct. 1590 (1987); *Demouchette v. State*, 731 S.W.2d 75 (Tex. Crim. App. 1986); *Harris v. State*, No. 69,224 (Tex. Crim. App. Sept. 24, 1986); *Satterwhite v. State*, 726 S.W.2d 81 (Tex. Crim. App. 1986), *cert. granted sub nom. Satterwhite v. Texas*, 107 S. Ct. 2480 (1987) (No. 86-6284); *Romero v. State*, 716 S.W.2d 519 (Tex. Crim. App. 1986), *cert. denied*, 107 S. Ct. 963 (1987); *Clark v. State*, 717 S.W.2d 910 (Tex. Crim. App. 1986), *cert. denied*, 107 S. Ct. 2202 (1987); *Ex Parte Russell*, 720 S.W.2d 477 (Tex. Crim. App. 1986); *Duhamel v. State*, 717 S.W.2d 80 (Tex. Crim. App. 1986), *cert. denied*, 107 S. Ct. 1387 (1987); *Carter v. State*, 717 S.W.2d 60 (Tex. Crim. App. 1986), *cert. denied*, 108 S. Ct. 467 (1987); *Ellis v. State*, 726 S.W.2d 39 (Tex. Crim. App. 1986); *Callins v. State*, 726 S.W.2d 555 (Tex. Crim. App. 1986); *Anderson v. State*, 717 S.W.2d 622 (Tex. Crim. App. 1986); *Granviel v. State*, 723 S.W.2d 141 (Tex. Crim. App. 1986), *cert. denied*, 108 S. Ct. 205 (1987); *Kunkle v. State*, No. 69,501 (Tex. Crim. App. June 18, 1986); *McCoy v. State*, 713 S.W.2d 940 (Tex. Crim. App. 1986), *cert. denied*, 107 S. Ct. 1590 (1987); *Ibanez v. State*, No. 69,330 (Tex. Crim. App. June 11, 1986); *De Luna v. State*, 711 S.W.2d 44 (Tex. Crim. App. 1986); *Moreno v. State*, 721 S.W.2d 295 (Tex. Crim. App. 1986); *Wilkerson v. State*, 726 S.W.2d 542 (Tex. Crim. App. 1986); *Mayo v. State*, 708 S.W.2d 854 (Tex. Crim. App. 1986); *Jordan v. State*, 707 S.W.2d 641 (Tex. Crim. App. 1986); *Robinson v. State*, 720 S.W.2d 808 (Tex. Crim. App. 1986); *Sharp v. State*, 707 S.W.2d 611 (Tex. Crim. App. 1986); *Santana v. State*, 714 S.W.2d 1 (Tex. Crim. App. 1986); *Bell v. State*, 724 S.W.2d 780 (Tex. Crim. App. 1986), *cert. denied*, 107 S. Ct. 910 (1987); *Hogue v. State*, 711 S.W.2d 9 (Tex. Crim. App.), *cert. denied*, 107 S. Ct. 329 (1986); *Fierro v. State*, 706 S.W.2d 310 (Tex. Crim. App. 1986); *Thomas v. State*, 701 S.W.2d 653 (Tex. Crim. App. 1985); *Landry v. State*, 706 S.W.2d 105 (Tex. Crim. App. 1985), *cert. denied*, 107 S. Ct. 202 (1986); *Burns v. State*, 703 S.W.2d 649 (Tex. Crim. App. 1985);

those states are not excessively prone to reverse death penalties on any ground.³³ The state courts' reduced role in protecting the rights of capital defendants obviously eases the path towards execution.

If intense public opinion in favor of the death penalty is indeed the catalyst that precipitates executions, then more attention should be given to ascertaining what factors lead to such feelings. Accounts of particular cases indicate that racial hostility is sometimes a significant component,³⁴

Armstrong v. State, 718 S.W.2d 686 (Tex. Crim. App. 1985); Phillips v. State, 701 S.W.2d 875 (Tex. Crim. App. 1985), *cert. denied*, 106 S. Ct. 3285 (1986); Anderson v. State, 701 S.W.2d 868 (Tex. Crim. App. 1985), *cert. denied*, 107 S. Ct. 239 (1986); Moore v. State, 700 S.W.2d 193 (Tex. Crim. App. 1985), *cert. denied*, 106 S. Ct. 1167 (1986); Streetman v. State, 698 S.W.2d 132 (Tex. Crim. App. 1985); Guzman v. State, 697 S.W.2d 404 (Tex. Crim. App. 1985), *cert. denied*, 106 S. Ct. 1479 (1986); Goodman v. State, 701 S.W.2d 850 (Tex. Crim. App. 1985); Barney v. State, 698 S.W.2d 114 (Tex. Crim. App. 1985); McKay v. State, 707 S.W.2d 23 (Tex. Crim. App. 1985), *cert. denied*, 107 S. Ct. 239 (1986); Buxton v. State, 699 S.W.2d 212 (Tex. Crim. App. 1985), *cert. denied*, 106 S. Ct. 2929 (1986); Cordova v. State, 698 S.W.2d 107 (Tex. Crim. App. 1985), *cert. denied and appeal dismissed*, 106 S. Ct. 1942 (1986); Andrade v. State, 700 S.W.2d 585 (Tex. Crim. App. 1985), *cert. denied*, 106 S. Ct. 1524 (1986); Paster v. State, 701 S.W.2d 843 (Tex. Crim. App. 1985), *cert. denied*, 106 S. Ct. 1240 (1986); Bush v. State, 697 S.W.2d 397 (Tex. Crim. App. 1985); East v. State, 702 S.W.2d 606 (Tex. Crim. App.), *cert. denied*, 106 S. Ct. 418 (1985); Pierce v. State, 696 S.W.2d 899 (Tex. Crim. App. 1985); Franklin v. State, 693 S.W.2d 420 (Tex. Crim. App. 1985), *cert. denied*, 106 S. Ct. 1238 (1986); Nethery v. State, 692 S.W.2d 686 (Tex. Crim. App. 1985), *cert. denied*, 106 S. Ct. 897 (1986); Cannou v. State, 691 S.W.2d 664 (Tex. Crim. App. 1985), *cert. denied*, 106 S. Ct. 897 (1986); Brandley v. State, 691 S.W.2d 699 (Tex. Crim. App. 1985); Bird v. State, 692 S.W.2d 65 (Tex. Crim. App. 1985), *cert. denied*, 106 S. Ct. 1238 (1986); Barrow v. State, 688 S.W.2d 860 (Tex. Crim. App. 1985); Cruz v. State, 690 S.W.2d 246 (Tex. Crim. App. 1985); Roeder v. State, 688 S.W.2d 856 (Tex. Crim. App.), *cert. denied*, 106 S. Ct. 396 (1985); De Garmo v. State, 691 S.W.2d 657 (Tex. Crim. App.), *cert. denied*, 106 S. Ct. 337 (1985); Turner v. State, 685 S.W.2d 38 (Tex. Crim. App. 1985); Duff-Smith v. State, 685 S.W.2d 26 (Tex. Crim. App.), *cert. denied*, 106 S. Ct. 186 (1985); Penry v. State, 691 S.W.2d 636 (Tex. Crim. App. 1985), *cert. denied*, 106 S. Ct. 834 (1986).

32. During the same period, the Louisiana Supreme Court affirmed death sentences in 13 out of 19 cases. *See* State v. Perry, 502 So. 2d 543 (La. 1986), *cert. denied*, 108 S. Ct. 205 (1987); State v. Brown, 496 So. 2d 261 (La. 1986); State v. Bates, 495 So. 2d 1262 (La. 1986), *cert. denied*, 107 S. Ct. 1986 (1987); State v. Clark, 492 So. 2d 862 (La. 1986); State v. Williams, 490 So. 2d 255 (La. 1986), *cert. denied*, 107 S. Ct. 3277 (1987); State v. Loyd, 489 So. 2d 898 (La. 1986), *cert. denied*, 107 S. Ct. 1984 (1987); State v. Ford, 489 So. 2d 1250 (La. 1986), *vacated*, 107 S. Ct. 1272 (1987); State v. Ward, 483 So. 2d 578 (La.), *cert. denied*, 107 S. Ct. 244 (1986); State v. Byrne, 483 So. 2d 564 (La.), *cert. denied*, 107 S. Ct. 243 (1986); State v. Lowenfield, 495 So. 2d 1245 (La. 1985), *cert. denied*, 106 S. Ct. 2259 (1986); State v. Carmouche, 480 So. 2d 728 (La. 1985); State v. Hamiltou, 478 So. 2d 123 (La. 1985), *cert. denied*, 106 S. Ct. 3339 (1986); State v. Jones, 474 So. 2d 919 (La. 1985), *cert. denied*, 106 S. Ct. 2906 (1986); State v. Williams, 480 So. 2d 721 (La. 1985); State *ex. rel.* Burge v. Maggio, 466 So. 2d 451 (La. 1985); State v. David, 468 So. 2d 1133 (La. 1985), *cert. denied*, 106 S. Ct. 1998 (1986); State v. Wilson, 467 So. 2d 503 (La.), *cert. denied*, 106 S. Ct. 281 (1985); State v. Rushing, 464 So. 2d 268 (La. 1985), *cert. denied*, 106 S. Ct. 2258 (1986); State v. Busby, 464 So. 2d 262 (La.), *cert. denied*, 106 S. Ct. 196 (1985).

33. For an earlier and more detailed examination of appellate decisions in Georgia, Florida, and Texas, see Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97 (1979).

34. A more recent example of a case in which racial hostility seemed to play an important part in precipitating a death sentence appears in the *New York Times* account of the Clarence Lee Brandley case. Brandley, a black janitor, was sentenced to death in Texas for the rape and murder of Cheryl Dee Ferguson, a 16 year old white student. Blacks from the area where the crime was committed claimed that Brandley was singled out as a suspect because of his race and that evidence suggesting his innocence was destroyed or ignored. *N.Y. Times*, March 22, 1987, at 24, col. 3.

but there may also be others. The data presented by Zimring and Hawkins suggest that there is especially intense support for the death penalty in Florida, Georgia, Louisiana, and Texas, but it does not preclude the possibility that other states have or will generate sufficiently intense pro-death penalty sentiment to permit relatively frequent executions in the future.

C. *Capital Punishment and the Supreme Court*

In *Furman v. Georgia*,³⁵ decided in 1972, the Supreme Court held that the then-existing system of capital punishment was unconstitutional. The *Furman* decision can perhaps be viewed as the Court's effort to educate the states as to the inadvisability of capital punishment. If this was the Court's intent, however, the concurring justices in *Furman* must have been disappointed by the states' response. In the four years following *Furman*, thirty-five states passed new death penalty legislation (p. 41).

In *Gregg v. Georgia*,³⁶ the Court accepted this new legislation as evidence of widespread acceptance of the death penalty.³⁷ Yet Zimring and Hawkins interpret this new legislation differently. They assert that the post-*Furman* death penalty legislation can best be explained by social psychology, particularly the theory of psychological reactance: "The loss of freedom to legislate on the death penalty triggers a strong desire to reassert the legislative power to act" (p. 42). The authors support this theory by pointing to legislative and public resistance to the Court's other antimajoritarian rulings on issues such as pornography, abortion, and school prayer (pp. 44-45).

This theory seems plausible. As the authors say, "[t]he death penalty was precisely the type of politically charged, symbolic policy issue to which judicial invalidation has always provoked anger and resentment" (p. 45). In addition, the manner in which the Court invalidated the death penalty may have been a significant factor in precipitating the backlash. For example, if the Court had unambiguously declared capital punishment a barbarous anachronism, then the ruling might have provided moral leadership similar to that of *Brown v. Board of Education*,³⁸ although the initial response might still have been negative. Similarly, if the Court had held capital punishment unconstitutional because it is

Prosecutors maintain that Brandley is guilty and are persisting in their efforts to obtain his execution despite the fact that the defense has presented evidence that one white janitor admitted to his girlfriend that he killed a woman at the time of the Ferguson murder, and that two other white janitors stated that "they witnessed the attack and that Mr. Brandley did not commit the crime." *Id.*

35. 408 U.S. 238 (1972).

36. 428 U.S. 153 (1976).

37. *Id.* at 179-81.

38. 347 U.S. 483 (1954).

applied discriminatorily against Blacks, its decision would at least have rested on a clear moral principle. As written, however, the *Furman* decision seemed to invite a backlash—the Court was fragmented, the moral basis for its decision was unclear, and the states were not precluded from enacting new death penalty statutes. In retrospect, it should have been predictable that many states would respond by enacting any new death penalty statute likely to pass constitutional muster.³⁹

The authors' explanation of the reasons for the post-*Furman* legislation is particularly valuable because it provides insight into the subtle and complex nature of the relationship between the Court and the public. If the authors are correct in their analysis, the states' reaction to the *Furman* decision represented a backlash rather than a true reflection of society's feelings about capital punishment. Nevertheless, in *Gregg* the Court responded to this backlash as if it accurately reflected society's views.

The authors' insight into the interaction between the Court and the public also sheds light upon the Court's most recent shift in its attitude towards death penalty cases. In *Gregg* and succeeding cases the Court emphasized the importance of providing safeguards that would ensure a just and rational system of capital punishment. In the seven years following *Gregg*, the Court regularly reversed death sentences and provided new protections for capital defendants,⁴⁰ creating a situation where executions were delayed for years and few people were executed.⁴¹ Not surprisingly, the delays and reversals generated renewed hostility. The public perceived its efforts to impose the death penalty as again being thwarted by the Court. Proponents of capital punishment must have been particularly frustrated because there was no single Supreme Court decision with which to take issue.

The Supreme Court's reaction to this hostility was foreshadowed by Justice Powell in a speech delivered to federal judges in 1983. In a very unusual discussion of a specific case, he explained why the Supreme

39. As the authors indicate, the new death penalty legislation seemed to be designed solely to achieve this end (p. 90).

40. Between 1976 and 1983, the Court reversed all but one of the 17 "significant" death sentences it reviewed. See Gillers, *Proving the Prejudice of Death-Qualified Juries After Adams v. Texas*, 47 U. PITT. L. REV. 219, 254-55 (1985). The one exception was *Dobbert v. Florida*, 432 U.S. 282 (1977) (rejecting claim that a death sentence imposed for a crime committed before the effective date of the capital punishment statute violated the ex post facto clause). Gillers' definition of "significant" capital cases excluded cases that "routinely applied precedent" and those "which, though capital, contain holdings that do not depend on that dimension." Gillers, *supra*, at 254.

41. As the authors point out, however, it is overly simplistic to place the entire blame upon the courts for the present logjam on death row: "Blaming the courts may be a popular indoor sport, but it misinterprets the extent and breadth of ambivalence over capital punishment in the United States and the crisis of political accountability represented by the current contrast between the many who are condemned and the few who are executed" (p. 97).

Court had permitted the execution of John Louis Evans III, a defendant who had sought two stays of execution in the federal courts hours before his execution.⁴² In justifying the Court's reversal of a federal district judge's decision to grant Evans a stay, Justice Powell stated that "[c]ounsel offered no explanation for the timing" of his application. He added that "perhaps counsel should not be criticized for taking every advantage of a system that irrationally permits the now familiar abuse of process. The primary fault lies with our permissive system, that both Congress and the courts tolerate."⁴³ In still stronger language, Justice Powell went on to say that "[n]o lawyer or judge would suggest a rush to judgment in capital cases, . . . [but t]his malfunctioning of our system of justice is unfair to the hundreds of persons confined anxiously on death row. It also disserves the public interest in the implementation of lawful sentences."⁴⁴

Since Justice Powell's speech, the Court has been much less receptive to the claims of capital defendants.⁴⁵ While the Court has reversed

42. In 1977, John L. Evans III was convicted of murder and sentenced to death. His execution was scheduled for April 22, 1983. Forty hours before his scheduled execution, he filed an appeal with the Supreme Court. Twenty minutes after the Court rejected his claim, Evans filed a new petition with the federal district court and won a temporary stay of execution. At the request of the State of Alabama the Supreme Court lifted the stay, permitting Evans to be executed. *See* N.Y. Times, May 13, 1983, at A16, col. 1.

43. *Id.*

44. *Id.*

45. From the time of Justice Powell's speech through the 1987 term, the Supreme Court decided in favor of the capital defendant in only eight cases. Moreover, in each case the court based its decision on narrow grounds that did not widely affect the use of the death penalty. *See* Sumner v. Shuman, 107 S. Ct. 2716 (1987) (mandatory death sentence for murder by person under sentence of life imprisonment without possibility of parole held unconstitutional); Booth v. Maryland, 107 S. Ct. 2529 (1987) (introduction of victim impact statement at sentencing violates eighth amendment); Hitchcock v. Dugger, 107 S. Ct. 1821 (1987) (nonstatutory mitigating circumstances should have been included in instructions to advisory jury); Ford v. Wainwright, 106 S. Ct. 2595 (1986) (eighth amendment bars sentencing insane defendant to death; Florida's procedures for determining sanity were insufficient); Turner v. Murray, 106 S. Ct. 1683 (1986) (capital defendant accused of interracial crime entitled to have prospective jurors informed of the race of the victim and questioned on issue of racial bias); Skipper v. South Carolina, 106 S. Ct. 1669 (1986) (petitioner should have been permitted to present evidence of his good conduct in prison after the crime was committed); Caldwell v. Mississippi, 105 S. Ct. 2633 (1985) (prosecutor's advising the jury that the decision to impose the death sentence would be reviewable by the state supreme court violated the eighth amendment); Arizona v. Runsey, 467 U.S. 203 (1984) (initial life sentence constitutes an acquittal on the death penalty).

During the same period, the Court upheld the death penalty in 17 cases. *See* McCleskey v. Kemp, 107 S. Ct. 1756 (1987); Tison v. Arizona, 107 S. Ct. 1676 (1987); California v. Brown, 107 S. Ct. 837 (1987); Smith v. Murray, 106 S. Ct. 2661 (1986); Darden v. Wainwright, 106 S. Ct. 2464 (1986); Lockhart v. McCree, 106 S. Ct. 1758 (1986); Poland v. Arizona, 106 S. Ct. 1749 (1986); Cabana v. Bullock, 106 S. Ct. 689 (1986) (death sentence vacated, with possibility of reimposition after further factual findings); Baldwin v. Alabama, 105 S. Ct. 2727 (1985); Wainwright v. Witt, 469 U.S. 412 (1985); Spaziano v. Florida, 468 U.S. 447 (1984); Pulley v. Harris, 465 U.S. 37 (1984); California v. Ramos, 463 U.S. 992 (1983); Barclay v. Florida, 463 U.S. 939 (1983); Barefoot v. Estelle, 463 U.S. 880 (1983); Zant v. Stephens, 462 U.S. 862 (1983).

some death sentences and created some additional protections for capital defendants, its decisions indicate reluctance to take any action that will even temporarily prevent the states from executing capital defendants. Given the Court's shift in attitude, it is possible to view *Gregg* as the first case in a pattern that reflects the Court's increasing responsiveness to perceived frustration over its handling of capital punishment. In considering the likely role of the Court in the future of capital punishment cases, this pattern should be taken into account.

D. *Selecting Those Who Will Die*

In a chapter entitled "A Punishment in Search of a Crime," the authors discuss the fundamental problem of establishing criteria for selecting those who will die. As the title suggests, there is no well defined crime for which death is the specified punishment. During the nineteenth century, murder was always punishable by death.⁴⁶ Today, a murder conviction is a necessary but not sufficient condition for capital punishment. After a defendant is convicted of murder, there is a penalty trial at which additional evidence relating to the crime and the offender may be presented. Although the precise issues in the penalty trial vary from jurisdiction to jurisdiction, under nearly all of the current death penalty statutes "the judge or jury finds and considers certain 'aggravating' and 'mitigating' facts about the defendant's crime or character and then sentences him to either execution or life imprisonment."⁴⁷ The authors analyze and critique some current statutory provisions relating to capital sentencing, with particular emphasis on the American Law Institute's Model Penal Code provisions (pp. 79-87). This emphasis, however, seriously misjudges the current significance of the Code provisions. Recent events have not borne out the Code's 1980 prediction that the Court "in the future may transform [these provisions] into a paradigm of constitutional permissibility."⁴⁸ In fact, in a 1987 decision the Court ruled that the Code provisions will be unconstitutional if strictly applied.⁴⁹ Although the authors criticize Georgia's capital sentencing statute for departing from the Model Penal Code (p. 84), under current

46. Cf. Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 B.U.L. REV. 32 (1974) (summarizing the opinion of antebellum Americans that mandatory capital punishment deterred juries from convicting clearly guilty defendants).

47. Weisberg, *supra* note 29, at 306 (footnote omitted).

48. MODEL PENAL CODE § 210.6 comment 13 (1980).

49. *Hitchcock v. Dugger*, 107 S. Ct. 1821, 1824 (1987). In *Hitchcock*, the Court invalidated a death sentence imposed pursuant to the Florida death penalty statute, then nearly identical to the provisions of the Model Penal Code. The Court held the statute unconstitutional because the sentencing judge had interpreted it to preclude consideration of mitigating circumstances not specifically enumerated in the statute. *Id.* at 1822-24.

Supreme Court doctrine, Georgia's scheme more closely represents a model of constitutional permissibility than the Code provisions.

The Code provisions enumerate eight aggravating and eight mitigating circumstances designed to channel the sentencer's exercise of discretion.⁵⁰ The Code contemplates that the capital sentencing decision will be based on the sentencer's evaluation of the enumerated circumstances and not on some other basis.⁵¹ In *Lockett v. Ohio*,⁵² however, the Court ruled that the sentencer's discretion may not be so closely confined. "[The sentencer may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."⁵³ Thus, there is practically no limit on the mitigating circumstances that a sentencing jury may properly consider.⁵⁴ Moreover, the Supreme Court has indicated that statutorily enumerated aggravating circumstances may play a similarly limited role in capital sentencing. It held in *Zant v. Stephens*⁵⁵ that once a single aggravating circumstance is found, the sentencer may be given complete discretion to determine whether to impose the death penalty.⁵⁶

Given this model of capital sentencing, the authors' critique of the aggravating and mitigating circumstances contained in the Model Penal Code is almost beside the point. The sentencer is not limited to those circumstances in any event. At most, the Code's aggravating and mitigating circumstances direct the sentencer toward some factors to be considered.⁵⁷ The authors would have done better to focus less on whether

50. MODEL PENAL CODE § 210.6 (1980).

51. The Code provisions do permit the judge to admit other facts deemed relevant to sentence, *id.* § 210.6 comment 13, but there is no provision that allows the sentencer to take such facts into account if they do not relate to one of the enumerated aggravating or mitigating circumstances.

52. 438 U.S. 586 (1978).

53. *Id.* at 604 (emphasis in original) (footnotes omitted). The Court noted that there might be an exception to this rule in a very narrow category of cases, but it declined to decide the constitutionality of mandatory capital punishment for murder by a prisoner serving a life sentence. See *id.* at 604 n.11. Such a statute was subsequently found unconstitutional in *Sumner v. Shuman*, 107 S. Ct. 2716 (1987).

54. Since *Lockett*, the Court has held that it is unconstitutional to preclude a capital defendant from presenting evidence of a good prison record following the crime, *Skipper v. South Carolina*, 106 S. Ct. 1669 (1986), or of a troubled family background, *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

55. 462 U.S. 862 (1983).

56. In *Zant*, the Court upheld a Georgia death sentence that was based on the existence of three statutory aggravating circumstances, one of which was subsequently held invalid. At the Court's request, the Georgia Supreme Court certified that under the statute, once the jury finds a single aggravating circumstance, it may rely on any aggravating and mitigating evidence it finds useful to decide whether to impose the death penalty. Relying on this interpretation, the Court affirmed the constitutionality of the statute. For an excellent analysis of the *Zant* decision, see Weisberg, *supra* note 29, at 347-54.

57. Essentially, the sentencer has the same task it had under the pre-*Furman* statutes: determining the existence of at least one statutorily defined aggravating circumstance, and then making a moral judgment about whether the death penalty should be imposed.

statutes provide intelligible criteria for selecting the most heinous offenders, and more on whether a meaningful basis exists for distinguishing the defendants who receive the death penalty from those who do not.

The authors consider the latter issue only obliquely. They present the findings of an empirical study conducted in Georgia by Professor Arnold Barnett.⁵⁸ “[Professor Barnett] found that the cases in which the death penalty was imposed differed from the others on three primary dimensions: (1) the ‘certainty’ the defendant was a deliberate killer; (2) the ‘status’ of the victim;⁵⁹ and (3) the ‘heinousness of the killing’ ” (p. 88). After comparing Professor Barnett’s findings with the provisions of the Georgia statute, the authors conclude that “there is no reason to believe that any statutory provisions influence [the sentencing jurors] greatly when they make death penalty decisions” (pp. 88-89).

Since the Georgia statute’s aggravating and mitigating circumstances play a minimal role anyway,⁶⁰ this conclusion is not very significant. Once a sentencing jury determines that a single aggravating circumstance exists, it makes an essentially discretionary judgment to impose the death penalty or not. For example, a sentencing jury might find several aggravating circumstances in one case but nevertheless conclude that the death penalty should not be imposed because of mitigating circumstances in the defendant’s personal history. In another case, however, a sentencing jury might find the death penalty appropriate even though it found only one aggravating circumstance, if no mitigating evidence counterbalanced the evidence relating to the defendant’s crime. Given this model of capital sentencing, the lack of correlation between the statutory provisions and the death penalties imposed is hardly surprising.

As the authors undoubtedly recognize, whether sentencing juries are complying with the provisions of state death penalty statutes is less important than whether they are sentencing to death only the most heinous offenders. Or, as the authors might put it, we should determine whether there is a “moral equivalence” between the death sentence and the crimes for which offenders are sentenced to death.⁶¹ The authors assert that no such equivalence exists, but they offer no detailed supporting analysis⁶² or data. Thus, this portion of the authors’ presentation is

58. See Barnett, *Some Distribution Patterns for the Georgia Death Sentence*, 18 U.C. DAVIS L. REV. 1327 (1985).

59. “The ‘status’ of the victim represents the relationship between the victim and the accused, and reflects the widely observed pattern that stranger-to-stranger killings are more likely to result in death sentences than those in which the victim knew the defendant” (p. 88).

60. See *supra* note 56.

61. Zimring and Hawkins observe that “[t]he moral equivalence between murder and execution did not survive into the modern era” (p. 90).

62. The authors concentrate instead on the difficulty of characterizing prospectively those

both thought provoking and frustrating. Their analysis should have been more carefully focused on this critical issue, and their discussion should have explored it in greater depth.

II

DISCRIMINATORY APPLICATION OF CAPITAL PUNISHMENT AND THE *MCCLESKEY* DECISION

In *McCleskey v. Kemp*,⁶³ the defendant challenged his death sentence on the ground that Georgia's capital sentencing process is racially discriminatory, in violation of the eighth and fourteenth amendments.⁶⁴ Although this pattern is not discussed by Zimring and Hawkins (p. xv), it is intimately connected with patterns the authors do discuss, such as how society selects those who will be executed. Thus, an analysis of the discriminatory application of capital punishment, and the Supreme Court's response to it in *McCleskey*, illuminates issues Zimring and Hawkins address.

The defendant in *McCleskey* introduced into evidence the results of a massive empirical study conducted by Professors David Baldus, George Woodworth, and Charles Pulaski.⁶⁵ The Baldus study examined over 2,000 murder cases that occurred in Georgia during the 1970's.⁶⁶ The collected data indicated that defendants charged with killing white victims received the death penalty in 11% of the cases,⁶⁷ while defendants charged with killing black victims received the death penalty in only

killings that warrant capital punishment. "To define in advance the elements that make some killings more worthy of punishment than others is difficult in any context; but to define criteria for choosing one case in 100 or 200 is impossible" (p. 90). Yet, as indicated above, the modern system of capital punishment does not focus on defining in advance those offenders who should die. Rather, it requires an individualized sentencing determination in each capital case. The authors' analysis implies that if only one out of a couple hundred killers are to be sentenced to death, it will be impossible to distinguish that one killer from those who are spared.

This is not self-evident, however. The dissenting justices in *Furman* argued that the death penalty's infrequent application merely showed that sentencing juries were becoming "increasingly meticulous" in determining which capital offenders should die. *Furman v. Georgia*, 408 U.S. 238, 388 (1972) (Burger, J., dissenting). Moreover, just as it is relatively easy to pick the best or worst paper when grading a large class, there should generally be one or two capital cases out of one or two hundred that obviously exceed the others in heinousness. In fact, two of the dissenters in *McCleskey* suggested that in Georgia the death penalty would be more fairly applied if it were imposed only in the most extreme cases. *McCleskey v. Kemp*, 107 S. Ct. 1756, 1794 (1987) (Blackmun, J., dissenting); *id.* at 1806 (Stevens, J., dissenting).

63. 107 S. Ct. 1756 (1987).

64. *Id.* at 1763.

65. For some of the results of the Baldus study, see Baldus, Pulaski & Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); Baldus, Woodworth & Pulaski, *Monitoring and Evaluating Contemporary Death Sentencing Systems Lessons from Georgia*, 18 U.C. DAVIS L. REV. 1375 (1985).

66. 107 S. Ct. at 1763.

67. *Id.*

1% of the cases. Baldus subjected this data to extensive analysis, probing to find any nonracial variables that could explain the disparity. In one study he concluded that, "even after taking account of 39 non-racial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks."⁶⁸

It is sometimes difficult to grasp the practical implications of statistical evidence. In *McCleskey*, Justice Brennan eloquently bridged the gulf between the Baldus findings and their significance in the real world of criminal procedure:

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, 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 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.⁶⁹

The majority did not dispute Baldus' finding that in Georgia the race of the killer's victim is one of the most important factors in determining whether a capital defendant will live or die.⁷⁰ Nevertheless, it concluded that the disparities shown by Baldus were insufficient to establish that the death penalty was applied to McCleskey in violation of either the equal protection clause⁷¹ or the eighth amendment.⁷²

The Court's analysis of these two issues seems to reflect a certain ambivalence as to the nature of the issue before it. In responding to

68. *Id.* at 1764.

69. *Id.* at 1782 (citations omitted) (Brennan, J., dissenting).

70. *Id.* at 1775, 1777.

71. *Id.* at 1765-70.

72. *Id.* at 1770-78.

defendant's equal protection claim, the majority admitted that in other contexts, such as jury selection, proof of a racial disparity will establish a prima facie violation of equal protection.⁷³ Yet the Court attempted to distinguish McCleskey's equal protection claim by emphasizing that the defendant was challenging "decisions at the heart of the State's criminal justice system."⁷⁴ "Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused."⁷⁵ The Court's analysis suggests that the application of a death penalty statute must be largely shielded from constitutional scrutiny because the government has a very significant interest in imposing the death penalty.

In dealing with the eighth amendment issue, however, the Court emphasized that special protections are required when the decision to impose the death penalty is involved:

[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.⁷⁶

The Court then recounted the various safeguards of the Georgia statute and concluded that because they focus the jury's discretion on the proper subjects to be considered, it was appropriate to presume that the sentence was not "wantonly and freakishly imposed" and to reject the eighth amendment claim.⁷⁷

The Court also held that Georgia's capital punishment system did not violate the eighth amendment by being arbitrary and capricious in application.⁷⁸ Without any empirical support, the Court observed that the racial discrepancy established by the Baldus study is "a far cry from the major systemic defects identified in *Furman*."⁷⁹ It also reasoned that any discretionary procedure contains some risk of discrimination.⁸⁰ It reiterated that the state had imposed "safeguards designed to minimize racial bias in capital sentencing"⁸¹ and that entrusting discretion to a jury serves legitimate purposes.⁸² These considerations led the Court to con-

73. *Id.* at 1767; see, e.g., *Castaneda v. Partida*, 430 U.S. 482 (1977) (where the county's population was 79% Mexican-American, and where, over an eleven-year period, only 39% of the county's grand jurors were Mexican-Americans, proof of disparity was sufficient to create a prima facie violation of equal protection).

74. 107 S. Ct. at 1769.

75. *Id.*

76. *Id.* at 1772 (quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976)).

77. *Id.* at 1775 (quoting *Gregg*, 428 U.S. at 206).

78. *Id.* at 1775-78.

79. *Id.* at 1777 (citation omitted).

80. *Id.* at 1778.

81. *Id.*

82. *Id.*

clude that the "Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital-sentencing process."⁸³

The pattern revealed in *McCleskey* helps to reinforce some of the points made by Zimring and Hawkins. Most importantly, it provides powerful support for the authors' suggestion that there is no legitimate basis for distinguishing the few defendants who are executed from the many who are spared. The victim's race has no relationship to the defendant's culpability. It is a neutral factor—as insignificant as the color of the victim's eyes or the day of the week on which the crime was committed. Yet the Baldus study shows that this neutral factor plays a critical role in determining which capital defendants receive the death penalty. Thus, the victim's race is more determinative than such obviously relevant factors as whether the defendant was the "prime mover in planning" the homicide or contemporaneous felony,⁸⁴ and whether the victim was a stranger to the defendant.⁸⁵ Moreover, it is only slightly less significant than whether the defendant's prior record included a conviction for murder or armed robbery,⁸⁶ and whether the defendant killed more than one victim.⁸⁷ This evidence in itself undermines any claim that there is a moral equivalence between death penalties and the crimes for which they are imposed.

The Court's response to the *McCleskey* pattern is subject to mixed interpretations. On the surface, it casts doubt on the authors' prediction that the death penalty will soon be abandoned in this country. The Court's reasoning indicates that it will be unsympathetic to future claims that state death penalty statutes are unconstitutional as applied. Moreover, the Court's characterization of the death penalty as an important instrument of social policy, one not to be interfered with absent compelling reasons to the contrary, suggests that the states will be freer in the future to employ capital punishment without interference from the Court.

Yet viewed from a different perspective, the *McCleskey* decision provides considerable comfort for abolitionists. On a symbolic level, it is significant that *McCleskey* was a 5-4 decision. If one of the five Justices in the majority had switched his or her vote, every death sentence in Georgia⁸⁸ as well as "Death Penalty Decisions" in several other

83. *Id.*

84. Record at exhibit DB.82, *McCleskey* (No. 84-6811).

85. *Id.*

86. *Id.*

87. *Id.*

88. A ruling in favor of *McCleskey* would not necessarily have rendered unconstitutional every death penalty in Georgia. As Justice Stevens suggested in his dissent, the Court could have limited the scope of its holding to affect only those defendants convicted of killing white victims and only

states⁸⁹ might have been susceptible to constitutional attack. When the validity of so many death sentences is sustained on such a slender basis, the moral legitimacy of capital punishment becomes imperiled.

Moreover, even the majority of the Court seemed ambivalent about the moral legitimacy of capital punishment. On the one hand, the Court acknowledged that the decision to take a person's life is so momentous that a state's system of capital punishment should be hedged with extraordinary safeguards. On the other hand, the Court also treated the death penalty as so integral to the state's criminal justice system that its application should not be subject to close judicial scrutiny. The majority's conclusion that "McCleskey's arguments are best presented to the legislative bodies"⁹⁰ reinforces the opinion's ambivalence. The Court gave the impression that it rejected McCleskey's claims out of reluctance to interfere with a state's criminal justice system, not because it believed Georgia's death penalty was in fact being applied fairly.

Although nothing in the Court's opinion suggests that it will be willing to consider broad-based challenges to the death penalty in the near future, the *McCleskey* decision may eventually precipitate an abolitionist backlash because it exposed the insecure moral basis upon which our system of capital punishment stands.⁹¹ By essentially accepting that race plays an important part in deciding who is executed, the Court may have shifted the focus of the capital punishment debate. In the past, the Court has grounded its decisions more on criminal procedure, which concerned issues of deterrence and just deserts.⁹² The focus of the debate may now shift to equal protection and fundamental fairness, issues that present the most compelling arguments for abolition. If so, then Hawkins and

those defendants with similar or fewer aggravating circumstances than McCleskey. 107 S. Ct. at 1806 (Stevens, J., dissenting).

89. Although the Baldus data related only to the application of the death penalty in Georgia, data showing similar patterns in other states has already been collected. See, e.g., Gross & Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984).

90. 107 S. Ct. at 1781.

91. *Furman* precipitated a backlash in favor of capital punishment in part because its ruling against capital punishment did not rest on an unambiguous moral basis. See *supra* text accompanying note 38-39.

92. In its prior death penalty cases—even those that invalidated death penalty statutes—the Court did discuss arbitrary and infrequent application of the death penalty, but it never systematically addressed the issue of race. See e.g., *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty for rape unconstitutional); *Furman v. Georgia*, 408 U.S. 238 (1972) (statutes delegating to judges or juries unfettered discretion to apply the death penalty held unconstitutional). According to Michael Meltsner, "by choosing to avoid the racial issue in favor of a ruling based on criminal procedure, the Court stimulated a public debate over deterrence and just deserts rather than discrimination. Abolitionists lost the debate." Meltsner, *On Death Row, the Wait Continues*, in *THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT 1969-1986* 173 (H. Schwartz ed. 1987).

Zimring's bold prediction that this country will soon abandon capital punishment may yet prove accurate.

III CONCLUSION

Zimring and Hawkins admit that "[p]redicting that the Supreme Court of the United States will preside over the end of executions in the relatively near future is hardly the way to acquire a reputation for political common sense" (p. 158). But acquiring such a reputation is clearly not the authors' goal. Nor is their goal to present a comprehensive analysis of capital punishment in America, for they eschew counterarguments and complexities that would create difficulties for more cautious advocates of abolition. Though this approach surely has its drawbacks, ultimately it makes the book more stimulating. The authors present their arguments forthrightly and do not equivocate, challenging the reader to deny the force of their points. While *Capital Punishment and the American Agenda* is by no means the last word on the subject, it raises important new issues that death penalty advocates will have to address in the continuing debate over the future of capital punishment.

