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THE CAPITAL PUNISHMENT CONUNDRUM

Eric Schnapper*


After almost two decades of Supreme Court capital punishment decisions, the time has certainly arrived for a comprehensive evaluation of the complex of interrelated problems that continue to embroil and confound the Court. In the late 1960s, an intelligent observer might have thought that the only unresolved constitutional issue raised by the death penalty was whether such punishment violated the eighth amendment. Today capital punishment has emerged as a major branch of constitutional jurisprudence, encompassing questions regarding the right to jury trial, cruel and unusual punishment, and procedural and substantive due process. Virtually no one seems happy with the results. Many members of the Supreme Court appear uncomfortable with the erratic pattern of that Court's decisions, and annoyed, at the least, with the persistence and diversity of the continuing attacks on capital punishment procedures. Defense attorneys, on the other hand, perceive in that pattern an increasing unwillingness on the part of the Court to take seriously its responsibility to evaluate fairly the methods by which states are deciding which defendants will live and which are to die. Professor Hugo Bedau, in a foreword to this book, accuses the Court of having "contributed at least as much obscurity as clarity to the basic moral and constitutional issues involved" (p. vii). All three of these very different views find colorable support in the case law.

Professor Welsh White, who has followed these developments closely both as a litigator and as a scholar, has without question the experience and analytic skill needed to write a book providing a valuable overview of this complex and evolving body of law. But, regrettably, he has not yet attempted to do so. Life in the Balance consists largely of seven law review articles previously published by Professor White between 1974 and 1984. In capital punishment law, where doctrines and Supreme Court majorities seem to shift annually, a ten-year-old legal analysis is often no more valuable a tool for understanding the present state of affairs, and predicting future developments,
than a ten-year-old scouting report on the Chicago Bears. White's 1974 commentary on the meaning of *Furman v. Georgia*,\(^1\) for example, may be most significant as an illustration of how much the 1976 decision in *Gregg v. Georgia*\(^2\) was unforeseen by scholars and litigators alike. Others of the articles demonstrate White's astuteness in predicting subsequent legal developments, but his 1976 article arguing that capital punishment should not be imposed for the crime of rape, for example, is necessarily less important reading than the Supreme Court's 1977 decision\(^3\) on that subject. Substantially more current are White's articles regarding police interrogation techniques and the use of psychiatric testimony in capital cases, but these subjects are not at the core of capital punishment debates or litigation. The most valuable part of *Life in the Balance* is the portion that White wrote for the book itself—an introductory overview of the evolution of capital punishment law and a number of short "updates" of the earlier articles.

Professor Bedau quotes an attorney involved in capital punishment litigation as observing, with regard to his practice, "We've become technicians. The great moral issues have been removed from the legal arena" (p. vii). For a reader unfamiliar with what has occurred in this area of the law, White's analysis of some of those technical issues, particularly the problems of jury selection and psychiatric testimony in capital cases, provides a flavor of the complex practical and legal issues in which capital litigation has become embroiled. But White offers no serious account of how capital punishment case law evolved, or devolved, from the grand issues of *Furman* and *Gregg* to narrower and more individualized disputes, such as that in *Estelle v. Smith*\(^4\) regarding psychiatric testimony at sentencing hearings. White's articles, Bedau suggests, demonstrate that the current state of the law is "little more than an uneasy compromise among those who firmly refuse to give up the death penalty altogether, others who would destroy executions root and branch once and for all, and still others whose strongest commitment is . . . the desire to preserve federalism and state sovereignty" (p. vii). Were that the case, the current state and future course of the so-called technical issues would be equally unintelligible. A scholar who saw those three extreme positions as the only alternatives would have little reason to analyze the emerging technical issues, other than to seek to use those issues to support one of the extreme alternatives — arguing, for example, that a particular technical issue is insolvable, and thus dictates abandonment of capital punishment altogether.

White does not pursue any such nihilistic approach, but his analy-

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1. 408 U.S. 238 (1972).
ses do not attempt to offer an account of why the middle of the Court continues to avoid all three of the extreme positions described by Bedau, rejecting some arguments against particular death sentences, agreeing with others, all the while spawning new issues that seem increasingly narrow and complex. Proponents and opponents of capital punishment both have institutional interests in avoiding any effort to articulate an intermediate view, since their own arguments are strengthened by asserting that the only alternative to their position is, respectively, abolition of capital punishment for even the most vile of offenses, or the slaughter of hundreds of defendants selected from among many other equally culpable murderers on an arbitrary or even racial basis. But litigators who must practice in the present legal environment remain in need of some general analysis, broader than White's discussions of specific issues, of what the middle of the Supreme Court is doing and where it may be headed.

The case law sketched by Professor White suggests that the Supreme Court has indeed recognized the existence of many of the constitutional problems of which he complains. The Court has chosen, not to adopt the sort of broad per se rules which would guarantee an end to any constitutional violations, but to afford the states a chance to develop procedures that will be free of the identified constitutional vices. This compromise has taken two somewhat distinct forms. First, as I discuss in Part I, the Court in Gregg and its progeny has given the states an opportunity to develop general sentencing procedures that may in practice prove free of the arbitrariness condemned in Furman; disputes regarding whether particular procedures have met that goal have inevitably become, and are likely to remain, an ongoing source of litigation. Second, the Court has permitted the states to adjust certain practices on a case-by-case basis in order to avoid violations of identified constitutional rights; Part II describes the manner in which this approach has predictably led to a large number of meritorious or at least colorable appeals.

I. THE GREGG EXPERIMENT

The legal development that seems to exemplify best what both proponents and opponents of capital punishment object to is the apparent shift in the law from Furman to Gregg. In 1972 Furman struck down capital punishment as that penalty was then administered, holding that the number of individuals condemned to death, and actually executed, was so small that the selection of those who were to die was both arbitrary and freakish. In Furman, as in a number of later cases, there was no majority opinion. Justice Stewart, who apparently provided the swing vote, explained that "[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel
and unusual." Because all members of the Furman majority emphasized that the states condemned to death only a small proportion of the defendants who committed capital offenses, many commentators, Professor White among them, assumed that, if the Supreme Court were to uphold any future capital punishment statutes, the Court would require that the statutes make that penalty mandatory (pp. 24-25).

Gregg and its companion cases, decided in 1976, held precisely the opposite, concluding that mandatory capital punishment statutes were unconstitutional per se. Those decisions upheld capital punishment statutes in Georgia, Texas, and Florida that expressly conferred on juries discretion to decide whether a defendant was to live or die, and that established various types of standards to "guide" juries in the exercise of that discretion. Justices White and Rehnquist subsequently characterized Gregg's rejection of anything smacking of a mandatory sentence as a complete reversal of the principles of Furman. Death penalty critics, on the other hand, saw little basis for believing that the statutes approved in Gregg would, in operation, be any less arbitrary than the practice condemned in Furman; to them Gregg simply marked an abandonment of the principles of Furman, a callous and calculated decision to reinstate the death penalty regardless of how arbitrary its application might be.

Subsequent decisions seemed to confirm those fears. The plurality opinion in Gregg had emphasized that the Georgia statute contained an express provision requiring systematic appellate review of particular death sentences to assure that they were proportionate to sentences imposed in other cases. In Pulley v. Harris the petitioner challenged the California capital punishment statute on the ground that it lacked any such provision for proportionality review; the Court held that, at least in the context of the specific California statute at issue, no such review procedure was constitutionally required. Similarly, the Gregg plurality, in rejecting claims that the death penalty was cruel and unusual, emphasized that juries, which were presumed to reflect community values, continued to vote to impose that penalty; subsequently, in Spaziano v. Florida, however, the Court held that a state judge could constitutionally sentence a defendant to death even though the jury had voted against that sentence. Both Pulley and Spaziano stressed that the Court was unwilling to establish any one system for imposing

5. 408 U.S. at 309 (Stewart, J., concurring).
the death penalty, and in both decisions the Court noted that it was rejecting the claims involved only under the specific circumstances of those particular cases.

Professor White has no doubt that all capital punishment laws will be as arbitrary and freakish in their application as the statutes condemned in _Furman_. Statutes such as that approved in _Gregg_, he writes, contain guidelines “so broad and amorphous as to have the effect of vesting the capital sentencer with almost the same total discretion that the pre-Furman statutes vested in the sentencing jury.” 11 Any system that permits prosecutors to refrain from seeking the death penalty, or allows juries to avoid the possibility of such a sentence by convicting a particular defendant of a lesser offense, White argues, “will exhibit all of the vices that _Furman_ found antithetical to the values of the Eighth Amendment” (p. 25). _Gregg_ and its progeny seem to require both that a jury have sufficiently broad discretion to assure that any sentencing decision is based on the particular circumstances of each individual case, and that the exercise of any jury discretion be so circumscribed by “guidelines” as to assure that the imposition of the death penalty is reasonably uniform and predictable. 12 Professor White insists that these two requirements are so clearly inconsistent that no statute could possibly satisfy both (pp. 3-4).

_Gregg_ can be understood, at least in part, as premised on a rejection of precisely the sort of analysis that Professor White offers of this problem. Professor Bedau, in a passage that was apparently intended to convey approval, describes White’s methodology as “general and theoretical, as well as jurisprudential; hence narratives or case studies or statistically oriented investigations cannot suffice for his purposes” (p. vi). _Gregg_ does not profess any abandonment of _Furman_’s concern about the arbitrary imposition of the death penalty; 13 what _Gregg_ refuses to do is to predict on the basis of “general and theoretical, as well as jurisprudential” grounds that no guided discretion statute could possibly avoid such arbitrariness. _Furman_’s condemnation of the capital sentencing laws of that era was based on several decades of actual experience with those statutes, not on any theoretical assumptions about how such statutes might operate. Despite some loose language, _Gregg_ appears to leave open the possibility that one or more guided discretion statutes might prove as arbitrary in practice as the statutes

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11. Pp. 30-31. Elsewhere White predicts that the existence of statutory standards to guide juries in their selection of sentences “will neither alter the fundamentally discretionary character of capital sentencing nor change the pattern of rare, arbitrary, and freakish death penalties condemned by _Furman_.” P. 3.

12. The Supreme Court described its decisions as pursuing such “twin objectives” in _Spaziano_, 468 U.S. at 459-60.

13. On a number of occasions since _Gregg_ the Court has reiterated that a capital punishment statute would be unconstitutional if in practice those who were to die were selected in an arbitrary and unpredictable manner. See, e.g., _Spaziano_, 468 U.S. at 459-60 & n.7.
disapproved in *Furman*, and White himself reads *Gregg* to reserve resolution of that issue for some future date.\(^\text{14}\)

*Gregg* may reflect a refusal by the Court to predict that every conceivable guided discretion capital punishment statute would be un­avoidably arbitrary and freakish in its application, and a decision to afford the states a reasonable opportunity to attempt to devise one or more sentencing schemes that would in operation be free of the vice condemned in *Furman*. A court concerned with affording the states such an opportunity would be understandably reluctant to sweep aside practices of general application that might be an essential part of a sentencing scheme, which, taken as a whole, significantly reduced the degree of arbitrariness present in *Furman*. Thus, although the practice upheld in *Spaziano* may well be, as Professor Gillers has argued,\(^\text{15}\) inconsistent with the sixth or eighth amendments, it is possible that permitting judges to overrule jury recommendations of life imprisonment may in time be shown to increase the degree of uniformity in the administration of the death sentence in Florida. If the Supreme Court takes seriously its commitment to *Furman*, it cannot permit the states to continue indefinitely to devise whatever schemes they please, however bizarre and constitutionally suspect, for administering the death penalty. But a certain interval for a reasonable degree of diversity and experimentation may be important to identifying the types of schemes that best reduce the degree of arbitrariness that existed in the past, or to establishing that no satisfactory scheme can in fact be fashioned.

Although Professor White makes no effort to evaluate what actual experience has shown about the operation of guided discretion statutes, the Supreme Court is increasingly in a position to do so. Within the last year two detailed and sophisticated sentencing studies have been published, one conducted by Professor Arnold Barnett of M.I.T., and a second by Professors David Baldus, George Woodworth, and Charles Pulaski, Jr.\(^\text{16}\) The two studies, using quite distinct methodolo-

\(^{14}\) P. 15. In *Spaziano* the Court commented that "it is to be hoped that current procedures have greatly reduced the risk that jury sentencing will result in arbitrary or discriminatory application of the death penalty, see *Gregg v. Georgia*." 468 U.S. at 460. This passage seems to indicate that a capital defendant could seek to establish that the hope on which *Gregg* was based had proved unfounded. The Court upheld the death penalty in *Spaziano* in part because it saw "nothing that suggests that the... procedure has resulted in arbitrary or discriminatory application of the death penalty, either in general or in this particular case." 468 U.S. at 466.

The Court's decision in *Pulley* also appears to leave open the possibility that actual experience might demonstrate that a guided discretion statute was in fact as arbitrary and capricious as the statutes condemned in *Furman*: "Any capital sentencing scheme may occasionally produce aberrational outcomes. Such inconsistencies are a far cry from the major systemic defects identified in *Furman*... *As we are presently informed, we cannot say that the California procedures provided... inadequate protection against the evil identified in *Furman*." 465 U.S. at 54 (emphasis added).


gies and analyzing over 500 cases each, arrived at strikingly similar conclusions. Amongst all defendants convicted of murder, the proportion ultimately sentenced to death averages less than twenty percent. That proportion is clearly small enough to raise questions under Furman, absent substantial evidence that those condemned to death are in fact being selected in a reasonably uniform and predictable manner. The studies further indicate, however, that in certain types of cases the probability that a defendant will be sentenced to death is predictably high; both studies were able to identify circumstances in which two-thirds or more of all defendants would receive that sentence. That high probability exists in certain categories of cases despite the exercise of discretion by prosecutors in deciding what crime to charge and what sentence to seek, and despite the ability of the jury not only to fix the sentence but also to convict a defendant of a lesser included offense. The application of the death penalty to this group involves a situation that is, to say the least, radically different from the situation condemned in Furman or the result predicted by Professor White.

On the other hand, both studies found that a significant number of death sentences were being imposed on defendants in circumstances in which the death penalty was ordinarily extremely rare. The studies demonstrated that approximately one-third of all death sentences were being imposed under circumstances in which a majority of similarly situated defendants were only sentenced to imprisonment, and that about five percent of the death sentences were imposed in cases in which ninety percent of similarly situated defendants were spared. Neither study identified any circumstance or combination of circumstances that could explain why these particular defendants had been singled out for execution, while apparently indistinguishable defendants received life sentences instead. With regard to this subset of capital defendants, it appears that the states have not met their constitutional responsibility to "administer that penalty in a way that can rationally distinguish between those individuals for whom death is an


20. These figures are calculated by combining the categories of defendants in each study who were guilty of nonheinous crimes. See Barnett Study, supra note 16, at 1342; Baldus Study, supra note 16, at 1396.
appropriate sanction and those for whom it is not."22

The decision in Gregg was based on the assumption that prosecutors and juries were limiting the application of the death penalty to "extreme cases," and on a holding that capital punishment was appropriate in precisely such circumstances. The available data suggests that the Court's prediction is accurate regarding a substantial number of the instances in which the death penalty is being imposed. The types of situations in which juries will ordinarily impose the death penalty are cases that a judge or ordinary citizen might well characterize as particularly egregious.23 The Barnett study found that the three critical factors for predicting whether a defendant would receive the death penalty were: (1) whether the murder was premeditated; (2) whether the victim was a stranger; and (3) whether the murder was committed in a particularly horrendous manner.24 Where two of these three factors were present, well over fifty percent of the defendants were ultimately sentenced to death. This data strongly indicates that a significant number of the defendants sentenced to death would have received that sentence regardless of the judge, jury, or prosecutor involved in the case.

But it is equally clear that a substantial number of defendants have been sentenced to death in circumstances in which a majority of similarly situated defendants are not being given capital sentences. The decision regarding who among defendants committing nonextreme offenses will live or die appears to be neither predictable nor intelligible; the statutory sentencing standards that may have produced some uniformity in the treatment of the most extreme cases have evidently failed to bring about any coherent treatment of other defendants. The imposition of the death penalty on a small minority of the defendants


23. It may not be fortuitous that the disposition of capital punishment cases in the Supreme Court appears to correlate with the egregiousness of the crime involved. Compare Baldwin v. Alabama, 105 S. Ct. 2727, 2729-30 (1985) (victim sodomized, raped, stabbed, choked, and run over with car; death sentence affirmed); Wainwright v. Witt, 105 S. Ct. 844, 847 (1985) (premeditated killing of young boy, body sexually abused; death sentence affirmed); Spaziano v. Florida, 468 U.S. 447, 450 (1984) (torture murder of two women; death sentence affirmed); and Strickland v. Washington, 466 U.S. 668, 671-72 (1984) (three brutal stabbing murders, torture, kidnap­ping, severe assaults, attempted murders, and attempted extortion and theft; death sentence affirmed), with Caldwell v. Mississippi, 105 S. Ct. 2633, 2647 (1985) (Rehnquist, J., dissenting) (victim killed when she screamed during robbery; death sentence reversed); Francis v. Franklin, 105 S. Ct. 1965, 1969 (1985) (victim killed when he slammed door, causing defendant to fire his gun; conviction reversed); and Ake v. Oklahoma, 105 S. Ct. 1087, 1090-91 (1985) (delusional defendant who believed that he was the Lord's "sword of vengeance"; death sentence and conviction reversed because indigent defendant did not have assistance of psychiatrist). On retrial Ake was again convicted, but the jury voted not to impose the death penalty. N.Y. Times, Feb. 14, 1986, at A15, col. 1 (late ed.).

24. This is a very rough summary of the criteria used by Barnett. See Barnett Study, supra note 16, at 1338-42, 1364-70; see also Baldus Study, supra note 16, at 1396 (criteria used in that study).
guilty of less egregious offenses appears to retain precisely the degree of arbitrariness condemned in Furman.

If the Supreme Court is to reconcile the principles of Furman and the assumptions underlying Gregg with actual experience under guided discretion statutes, it will have to narrow the circumstances in which capital punishment can be imposed to the types of cases in which the likelihood of a capital sentence is fairly high, and in which the danger that its imposition will be arbitrary is thus reasonably low. Making that distinction will require some difficult judgments. A state statute defining capital murder so broadly that only five percent of those covered are actually sentenced to death clearly has not met that standard; conversely, a statute that limits the death penalty to cases so extreme that juries and prosecutors favor death in ninety percent of all cases would not raise any obvious problem under Furman. There is, however, no particular rate of imposition that marks a clear boundary between uniformity and arbitrariness.

On the other hand, a substantial historical and constitutional precedent exists for Supreme Court action limiting the types of murder cases in which the death penalty can be imposed in order to reduce the arbitrariness in the imposition of that penalty. In eighteenth-century England, defendants convicted of most felonies were technically subject to a mandatory death sentence. In reality, however, a host of practices existed, chief among them a refusal by juries to return convictions for those offenses, which prevented the imposition of the death penalty in most instances. The result was precisely the sort of system condemned by Furman, one in which, for example, a handful of unlucky horse thieves or forgers would die for an offense that ordinarily resulted only in imprisonment. The colonies and states, and later England itself, responded to this situation by redefining what conduct was to be treated as a capital offense, generally limiting that penalty to murder, the crime that prosecutors and juries in 1800 apparently regarded as ordinarily warranting the death penalty. Later in that century, when juries began to balk at imposition of the death penalty for all homicides, recognizing that some killings were less culpable than others, the states responded by delineating several different degrees of murder, limiting capital punishment to the most extreme forms of the offense.

It would doubtless be possible to narrow again the definition of capital murder to the categories of cases in which the death penalty is imposed in a substantial portion, a majority for example, of all prosecutions. The California death penalty statute upheld in Pulley was framed to narrow substantially the types of murder cases in which the imposition of the death penalty could even be considered by the jury.

26. See 465 U.S. at 51 n.13. The Court in Pulley emphasized, in upholding that statute, that
and thus precluded California juries from considering, and doubtless deterred California prosecutors from even seeking, the death penalty in some of the types of cases in which its imposition in other jurisdictions is technically possible but a practical rarity. Even in the face of evidence that restrictions such as those in the Pulley statute are needed to comply with Furman, however, the Court may balk at announcing a constitutional rule with the degree of specificity necessary to distinguish between cases in which the death penalty is regularly applied and cases in which it is only infrequently utilized.

The Court has other means available to it, however, for moving toward the same result; indeed, even if the Court declines to face up to the Furman-Gregg problem as such, other constitutional principles will tend to lead to a similar result. Writing in 1976, Professor White correctly foresaw that the Court would declare unconstitutional the imposition of the death penalty for rape, as it did the next year in Coker v. Georgia. In Coker the Court reasoned that the rare imposition of the death penalty for rape demonstrated that capital punishment was widely regarded as a disproportionate sanction for a crime other than murder. As White observes, under both Coker and the subsequent decision in Enmund v. Florida, the actual practice of juries in deciding whether to impose the death penalty in a particular category of cases is of vital if not decisive significance in assessing whether, measured by community values, the imposition of the death penalty for that category of cases is excessive and thus constitutes cruel and unusual punishment (pp. 13, 95). The Barnett and Baldus studies provide precisely the sort of information to which Coker and Enmund attach critical significance. It appears, for example, that the imposition of the death penalty for an unpremeditated murder arising out of a lover's quarrel or barroom brawl is as rare as the imposition of the death penalty for rape or for a felony murder involving no intent to kill. In Coker the Court thought that the imposition of the death penalty in less than one of ten rape cases demonstrated the disproportionality of the death sentence for that particular crime. If the Court were to apply to various types of murder the standards of Coker and Enmund, it would be compelled to conclude that the death penalty was generally regarded by juries as excessive, and was thus unconstitutional, in a variety of specific types of cases. Over time a series of such decisions would narrow the types of cases in which a state could impose the death penalty to those in which experience demonstrated that the penalty is imposed with a substantial degree of frequency.

it limited "the death sentence to a small subclass of capital-eligible cases." 465 U.S. at 53. The categories of capital murder delineated by the California statute in Pulley are significantly broader than the categories in which actual experience shows the death penalty is regularly applied.

A similar narrowing, albeit an indirect and erratic one, is likely to follow from the Court's decision in *Strickland v. Washington*.

*Strickland* holds that a defendant who has been denied effective assistance of counsel is not entitled to have his conviction or sentence overturned unless there is a substantial reason to believe that the denial of counsel affected the outcome of the trial or sentencing proceeding. In *Strickland* itself, the Court denied such relief because it regarded the evidence as so overwhelming in support of the prosecution that any denial of effective assistance of counsel was unlikely to have affected the outcome of the proceeding. The available sentencing studies make it possible to delineate the categories of cases in which the likelihood that the death penalty would be imposed is well under half, and in many instances under one in ten. In cases of this sort it will *never* be possible to say with assurance that a denial of effective counsel might not have affected the resulting sentence; on the contrary, precisely because the imposition of the death penalty in these categories of cases is essentially inexplicable, any constitutional error, no matter how slight, might well have been the difference between a sentence of death and a sentence of imprisonment. Thus the criteria fashioned by Barnett and Baldus to define cases in which the death penalty is only rarely imposed also delineate a group of cases in which virtually any constitutional error at the sentencing stage would be reversible error. Because, as Professor White notes, ineffective assistance of counsel is particularly likely to be a problem in capital cases (pp. 13-14), a conscientious consideration of such claims in light of *Strickland* is likely to lead to reversals of death sentences in many of the types of cases in which that sentence was unlikely.

The courts will be impelled toward the same result if they come to take seriously the evidence that whether or not a defendant is sentenced to death is often affected by the race of the defendant and that of his victim. The Supreme Court has already recognized that the discretion inherent in the administration of a capital punishment statute provides "a unique opportunity for racial prejudice to operate but remain undetected." Initial empirical studies of capital cases as a whole indicate that the likelihood of a death sentence is substantially higher if the victim was white or the killer black. The more refined Barnett and Baldus studies have confirmed and qualified that conclusion. The decision to impose the death penalty does not correlate significantly with race in those extreme cases in which the death penalty

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30. 466 U.S. at 694.
31. 466 U.S. at 700.
is almost always, or almost never, imposed. But in the intermediate cases, where the death penalty is imposed occasionally but not ordinarily, the correlation of that sentence with the race of the victim and perpetrator is not only pronounced, but substantially greater than was initially perceived to be the case for capital punishment cases as a whole.34 Thus the more conservative response to this evidence of racial discrimination in sentencing would be not to abolish the death penalty in all cases, but rather to forbid the use of that penalty in those marginal cases in which the decision is likely to turn on race.

The interconnection of these issues demonstrates the danger of a "general theoretical" approach to capital punishment issues. On their face the decisions in Gregg, Coker, and Strickland seem unrelated to one another or to the constitutional prohibition against racial discrimination. Viewed in light of actual sentencing experience, however, the principles and implementation of these decisions tend to converge. That convergence may be of considerable practical importance in at least the short term. Whatever the original rationale of Gregg, in the last decade a majority of the Supreme Court has been extremely resistant to any argument that might result in the invalidation for essentially procedural reasons of a large number of existing death sentences. In 1972 the fact that hundreds of defendants faced execution seems to have contributed to the decision in Furman effectively striking down every capital punishment statute then in existence; today the prospect that a significant number of death row inmates might escape execution appears to militate against sustaining constitutional challenges to a specific death sentence or procedure. But while a general reconsideration of Gregg seems unlikely for the present, despite the existence of the type of evidence unavailable in 1976, the Court has remained willing to consider arguments that the imposition of the death penalty on a specific individual or group of individuals is excessive, or carries with it an undue risk of error.35 Thus while the Court seems inclined to overlook procedural problems rather than reverse the sentences of defendants who have committed particularly heinous crimes, it has been more scrupulous in reviewing claims that the imposition of the death penalty in less egregious cases may have been unwarranted:36

35. See, e.g., Caldwell v. Mississippi, 105 S. Ct. 2633 (1985) (argument by prosecutor that appellate courts will reconsider a death sentence); Ake v. Oklahoma, 105 S. Ct. 1087 (1985) (denial of assistance of psychiatrist to indigent defendant whose sanity was clearly in doubt).
36. Although the Court does not openly acknowledge applying such a distinction, a number of its decisions are difficult to explain on any other basis. For example, in Beck v. Alabama, 447 U.S. 625 (1980), the Court overturned the death sentence of a defendant who had participated in a burglary during which his accomplice, apparently without premeditation or warning, struck and killed their victim. In explaining that decision the Court noted that Alabama law directed the jury to return the death penalty in such cases, while leaving the ultimate determination of the sentence to the trial judge; the majority observed that it was "manifest that the jury's verdict must have a tendency to motivate the judge to impose the same sentence that the jury did." 447 U.S. at 645. Five years later the constitutionality of that statute was challenged on the ground
opments in this area may thus be most likely to follow from application of the principles of *Coker* and *Enmund* to other types of cases in which the imposition of the death penalty is in practice relatively rare. The continuing innovation by the states of new procedures for administering capital punishment statutes, together with the emerging body of information regarding the impact of those practices, will necessarily spawn an ongoing series of constitutional issues.

II. THE *WITHERSPOON* EXPERIENCE

In *Witherspoon v. Illinois* the Supreme Court fashioned a quite different type of compromise between vindicating constitutional principles and respecting a state's interest in the retention of capital punishment. *Witherspoon* recognized that the wholesale exclusion of veniremen who had reservations about the death penalty could result in the creation of a hanging jury uncommonly likely to favor the execution of a capital defendant. Rather than simply prohibit any inquiry into a venireman's attitude towards capital punishment, however, the Court in *Witherspoon* attempted to draw a fine line delineating precisely which jurors could and could not be excused for cause. *Witherspoon* limited such exclusions to those jurors who stated that they would automatically vote against the imposition of the death penalty regardless of the evidence, and those whose attitude toward the death penalty would prevent them from making an impartial decision as to a defendant's guilt. Thus the process of striking the balance between a defendant's interest in a constitutionally selected jury and a prosecutor's desire to impose the death penalty was left for implementation on a case-by-case basis. In the years since *Witherspoon* prosecutors have sought in virtually every capital case to remove jurors for cause based on their views regarding the death penalty, and arguments that such exclusions were unconstitutional have been the single most common issue in capital punishment appeals.

Professor White correctly observes that "the lower courts have had enormous difficulty in administering" *Witherspoon*'s distinction between jurors with only general conscientious or religious scruples and

that it made a mandatory jury verdict part of the sentencing process. The defendant at issue had been charged with raping and sodomizing his victim, and then killing her by stabbing her, choking her, running her over with a car, and then cutting her throat with a hatchet. A majority of the Court, in upholding the death sentence imposed on that defendant, held that it "defie[d] logic to assume that a judge will be swayed to impose the death penalty" because the jury, in compliance with state law, had included such a sentence in its verdict. Baldwin *v. Alabama*, 105 S. Ct. 2727, 2736 (1985).

38. 391 U.S. at 522 n.21.
jurors who would automatically vote against the death penalty regardless of the evidence presented at trial:

The line that separates these two groups of veniremen is not very clear. A prospective juror may be absolutely opposed to capital punishment but still feel that there might be some case in which she would at least want to consider the evidence before deciding whether to vote against the death penalty. In this type of situation, the distinction between opposing the death penalty and automatically voting against it may be too subtle for ordinary minds to grasp. [p. 4].

The theoretical distinction established by Witherspoon was indeed to spawn philosophical and jurisprudential issues that would sorely test the analytic skill, if not the patience, of the most ingenious academic.

The application of Witherspoon in the real world has been even more difficult. Even if it had proved possible to agree on what types of scruples fall on which side of the constitutional boundary, actual jurors have simply proved unable in a large number of cases to delineate their views in the detail, or with the certainty, that Witherspoon seems to require. Some jurors candidly admit under questioning that they simply do not know how they would act if called upon to consider imposition of the death penalty. An even larger number have expressed uncertainty as to the precise nature of their views, or have given different answers to the often differently phrased questions asked by the prosecution and defense. The process of administering Witherspoon has been compounded by the identity of the personnel involved. Although the legal and practical problems raised by Witherspoon are enormously complex, defense attorneys in capital cases have only occasionally had any significant prior experience with death penalty litigation, and ordinarily have no familiarity with Witherspoon issues. The types of questions, arguments, and objections that might aid implementation of Witherspoon are thus only rarely raised by defense counsel. State court trial judges, who often sit on a wide variety of civil and criminal cases, typically have little understanding of or experience with Witherspoon issues. Prosecutors, of course, are likely to be more familiar with these problems, but their interest lies in excluding as many scrupled jurors as possible, not in faithfully adhering to the commands of Witherspoon; thus prosecutors will naturally object for cause to almost any scrupled jurors, and judges and defense counsel have often been ill equipped to deal with the complex issues raised by such objections.

After seventeen years of experience with Witherspoon it was apparent to judges and lawyers alike that the theoretical and practical difficulties raised by it were calling into question the constitutionality of many, perhaps even most, death sentences. Against that background

40. See id. at 993-1032.
the Supreme Court attempted in *Wainwright v. Witt*\(^{41}\) to refashion the balance that had been struck by *Witherspoon* between constitutional and nonconstitutional values. Rather than articulate a distinction between excludable and nonexcludable jurors so clear that state courts would only rarely violate the rule, however, the Court in *Witt* chose simply to shift the vague boundary so as to reduce the number of nonexcludable jurors.

In the long term *Witt* is likely to compound rather than eliminate the problems that Professor White identified in the administration of *Witherspoon*. The new standard announced by *Witt* is that a juror may be excused for cause if his or her views would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.”\(^{42}\) Under *Witherspoon* the inquiry focused on whether a juror would never vote for the death penalty no matter what the evidence; a juror might well be uncertain as to the nature of his views, but at least he would have had a reasonable idea what it meant to “never vote for the death penalty.” But a juror asked in the words of *Witt* whether his views would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath” might well have no idea what that question meant. A juror could not assess the possible inconsistency of his views with his “duties,” “instructions,” and “oath” unless he was told what those duties, oath, and instructions would be. The nature of a juror’s duty, oath, and instructions with regard to the penalty phase of a trial varies from state to state; a juror’s scruples might be inconsistent with his duty in Texas, with his oath in Florida, or with his instructions in Alabama, but be entirely consistent with his legal obligations in California or some other state. Only by explaining to a venireman in detail the substance of the oath and instructions that will be given to the jury, or by focusing questions on specific aspects of that oath or those instructions, will it be possible to ascertain whether the venireman’s scruples would prevent or substantially impair obedience to one or more specific portions of that oath or instructions with regard to sentencing. This problem did not arise in *Witt* because the juror there was challenged and excluded on the basis of an apparent conflict between her scruples and her ability to pass impartially on the guilt or innocence of the defendant.\(^{43}\) The juror needed no particular understanding of Florida law to be able to respond to such an inquiry; indeed, her answer would doubtless have been the same in any state that imposed the death penalty. But an inquiry about the juror’s ability to do her duty at the sentencing phase of the proceeding would have been

\(^{41}\) 105 S. Ct. 844 (1985).

\(^{42}\) 105 S. Ct. at 850 (quoting Adams v. Texas, 448 U.S. 38, 45 (1980) (emphasis deleted)).

\(^{43}\) 105 S. Ct. at 848.
meaningless without an explanation of precisely what duty Florida law would impose on her at such a hearing.

In the hope of reducing the role of federal courts in Witherspoon litigation, the Court in Witt also ruled that the decision of a state trial judge holding a venireman excludable under Witherspoon is a "factual" finding, and thus entitled to a "presumption of correctness" under 28 U.S.C. § 2254(d). That holding, far from simplifying Witherspoon litigation, is certain to embroil federal courts in a vast new array of legal and factual issues that must be resolved in order to determine the applicability of section 2254(d). For example:

(i) In Witt, as is ordinarily the case, the state judge gave no explanation of his decision to exclude the disputed juror; the Supreme Court, noting that a state judge is presumed to have applied the correct legal standard, reasoned that the judge must have implicitly made the factual findings which were necessary as a matter of law to exclude a juror. But the cases cited by the Court for that presumption are expressly limited to situations in which the nature of the correct legal standard is not a matter of controversy or dispute. There have in fact been relatively few disputes about the standard for excluding a juror, like the juror in Witt, whose scruples might interfere with his ability to decide on guilt or innocence. But disputes regarding the meaning of Witherspoon with regard to sentencing have been legion, and Witt alters but does not eliminate those controversies. Once a federal habeas corpus petitioner identifies a colorable legal dispute as to the standard for excluding a disputed juror, the "presumption of correctness" relied on in Witt would simply evaporate.

44. 105 S. Ct. at 853-55. Section 2254 provides that, except under certain specified circumstances, in a federal habeas corpus proceeding "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct . . . ." 28 U.S.C. § 2254(d) (1982).
45. 105 S. Ct. at 856.
46. 105 S. Ct. at 855-57.
47. The Court relied expressly on Townsend v. Sain, 372 U.S. 293 (1963). Townsend made clear that the presumption that the state court applied the correct legal standard, and thus the presumed existence of factfinding by the state judge, was appropriate only when the relevant legal principles were both clear and undisputed:

Unless the district judge can be reasonably certain that the state trier would have granted relief if he had believed petitioner's allegations, he cannot be sure that the state trier in denying relief disbelieved these allegations. If any combination of the facts alleged would prove a violation of constitutional rights and the issue of law on those facts presents a difficult or novel problem for decision, any hypothesis as to the relevant factual determinations of the state trier involves the purest speculation. The federal court cannot exclude the possibility that the trial judge believed facts which showed a deprivation of constitutional rights and yet (erroneously) concluded that relief should be denied.

48. See text at note 40 supra.
(ii) In order to ascertain the legal standard applied by the state judge in *Witt*, the Supreme Court referred to the questions asked and instructions given to other veniremen by the trial judge.\(^{49}\) In future cases prosecutors and defense counsel alike will have to scrutinize the state judge's questions and instructions to determine what the judge believed the applicable legal standard to be. A defendant need not establish with certainty that the state judge was guilty of legal error; once the parties identify any serious question regarding the legal standard the judge was applying, it becomes impossible to infer from the judge's action in excluding a juror what facts he must have found in order to have taken that action. Where a prosecutor has directly or indirectly argued for an incorrect interpretation of the law, any possibility that the trial judge may have accepted that argument will ordinarily defeat the section 2254(d) presumption.

(iii) Although *Witt* emphasizes that demeanor may play an important role in a state judge's decision, it does not suggest that the section 2254(d) presumption of correctness could salvage a state court decision excluding a venireman whose actual answers clearly fell short of the standard of *Witt* and *Witherspoon*. In *Witt* the defendant argued that the statements of the disputed juror were insufficient to justify exclusion because the juror had indicated only that her views would "interfere" with her ability to pass on guilt or innocence; the defendant contended that the juror might have meant only that her views would have made it unpleasant to sit as a juror, or created merely an insubstantial problem. In rejecting this contention the Court noted that, while the term "interfere" was ambiguous, one possible meaning was to "create an [insurmountable] obstacle"; that ambiguity was one which the trial judge was free to resolve on the basis of demeanor.\(^{50}\) But this reliance on presumed demeanor evidence was appropriate only because the term "interfere" was indeed ambiguous; the result would presumably be different if a juror's literal testimony contained no such ambiguity. Thus dispute about the terms used in both questions and answers must remain an important part of litigation under *Witt*, just as it was, albeit in a somewhat different form, under *Witherspoon*.

(iv) *Witt*'s section 2254 analysis depends entirely on the presumed existence of a legal analysis and factfinding on the part of a state judge who articulated neither. The judge's silence in that particular case may be understandable in view of the fact that the defense attorney neither sought to question the disputed juror nor objected to her exclusion. Under those circumstances the Supreme Court believed that the trial judge "was given no reason to think that elaboration was neces-

\(^{49}\) 105 S. Ct. at 856 & n.12.

\(^{50}\) 105 S. Ct. at 857.
sary." But this entire method of analysis would seem to be suspect if a defendant objected to the exclusion of a disputed juror, and would certainly be inappropriate if a defendant expressly requested that the state judge explain the legal basis of his decision, or set forth any findings he was making regarding the meaning of the juror's statements. Such requests would be entirely reasonable, since they would permit the defendant to do precisely what the defendant failed to do in Witt: ask further questions needed to "resolv[e] any . . . ambiguities" perceived by the trial judge. A trial judge's refusal to accede to such a request and articulate the basis of his proposed decision would interfere with the defendant's ability to present his case at trial, and would obstruct appellate review, as deliberately and effectively as if the trial judge willfully destroyed the court reporter's notes of the voir dire hearing.

(v) The decision in Witt correctly stressed the importance of the role of defense counsel in questioning prospective jurors. Practical experience under Witherspoon has made it clear that jurors can easily be led to give disqualifying answers by the use of carefully phrased prosecution questions; time and again answers obtained in this way have been discredited by further questioning by defense counsel which demonstrated that the views of the disputed juror fell well within the protections of Witherspoon. In light of that experience, a refusal by a state judge to permit defense counsel to ask questions, or to ask additional questions to clarify responses obtained by a prosecutor, would deny the defendant the fair and adequate hearing required by section 2254(d)(6).

This array of problems is typical of the sort of morass into which the Supreme Court has repeatedly fallen when it has chosen to maximize a state's ability to impose the death penalty, rather than adopt a clear rule of simple application. The decision in Gregg to avoid mandating any particular sentencing procedure committed the Supreme Court to dealing on a case-by-case basis with every procedural and evidentiary quirk that the various states might devise for imposing the death penalty. Professor White's book provides a preview of some of the many issues that will thus have to be resolved.

Decisions such as Gregg and Witt do not forsake entirely the constitutional principles that may be at issue, but relegate them to evaluation on a more fact specific, often individualized, basis. This may

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51. 105 S. Ct. at 856.
52. 105 S. Ct. at 858.
53. See Schnapper, supra note 39, at 1015-32.
54. The Court has repeatedly emphasized its unwillingness "to say that there is any one right way for a State to set up its capital sentencing scheme." Spaziano v. Florida, 468 U.S. 447, 464 (1984), and cases cited.
55. See particularly pp. 11-12 and pp. 203-63.
avoid an immediate and major limitation on state practices, but in the long term it spawns the sort of administrative problems that existed under Witherspoon, and that seem certain to re-emerge under Witt. The seemingly endless challenges to particular practices or death sentences is thus, to some degree, a situation of the Court's own making. Had the Supreme Court in 1968 simply forbidden the exclusion of jurors based on conscientious scruples, the entire body of capital punishment litigation prompted by Witherspoon, and continued by Witt, would never have emerged. Actual experience in states that never sought to exclude scrupled jurors makes it clear that the abolition of such exclusions would not have prevented continued application of the death penalty.

The value of a broader approach, casting aside practices fraught with constitutional problems rather than trying to delineate on a case-by-case basis precisely which actions are and are not constitutional, is well illustrated by practical experience under Miranda v. Arizona. As Professor White notes, Miranda adopts a per se rule regarding the conduct of custodial interrogations; rather than become embroiled in individualized disputes about what police officers should say to suspects, the Supreme Court in 1966 spelled out precisely what warning was to be given, and what answers were to be deemed sufficient to preclude further questioning. To grasp the practical importance of that per se approach, one need only reflect for a moment on what would have occurred if the Court in Miranda, as occurred in Witt, had declined to mandate any set language, choosing instead to permit every police officer and prosecutor to draft his or her own warning. Free to fashion whatever admonitions they pleased, the states would have devised an enormous variety of statements calculated to provide as little information as possible about either the right to counsel or the privilege against self-incrimination. Under such circumstances judicial administration of the principles of Miranda would have been a nightmare.

Whatever the original rationale of this prophylactic rule, the Court now correctly regards simplicity as the preeminent virtue of Miranda. In Berkemer v. McCarty the Court unanimously held that Miranda should be applied to interrogations of suspects being held on misdemeanor charges, reasoning that the implementation of a distinction between suspected misdemeanants and suspected felons would confront the courts with byzantine doctrinal problems, and "seriously . . . impair the simplicity and clarity of the holding of Miranda." The Court emphasized, as it did in Oregon v. Elstad, its belief that the

58. 468 U.S. at 432.
“bright line” established by *Miranda* had been effective in eliminating much litigation regarding the voluntariness of particular confessions.61

Professor White praises *Miranda* for drawing a “bright line,” and suggests that a number of peripheral issues regarding the scope of *Miranda* should be resolved by the adoption of additional per se rules (pp. 163-84). Whatever the merits of these proposals with regard to *Miranda*, this is an approach that warrants serious consideration in the resolution of issues related to capital punishment. Decisions such as *Witherspoon* and *Witt*, which attempt to draw unworkably fine lines in a complex legal world, will inevitably generate an enormous number of colorable claims of legal error. Shifting the standards in favor of the prosecutor, as was apparently the purpose of *Witt*, does little to alleviate these administrative problems; increasing the proportion of veniremen who are arguably excludable does not necessarily clarify the distinction between those veniremen and others who cannot be excluded for cause. However much the Court may modify constitutional doctrine to make it easier to impose the death penalty, prosecutors are still going to try to exceed or evade any restrictions whose substance is not crystal clear. Similarly, the absence of specific Court-mandated procedures under *Gregg* has had precisely the result the Court foresaw would occur if the per se approach of *Miranda* were abandoned, prompting a welter of litigation creating on a case-by-case basis “an elaborate set of rules, interlaced with exceptions and subtle distinctions.”62

Rules such as those in *Witherspoon* and *Witt* are more than just an administrative burden on the courts. As such rules become more complex and fact-intensive, their correct application in specific cases will depend increasingly on the quality of representation that defendants have, particularly at trial. Thus the effect of *Witherspoon* and *Witt* is not simply to allow the state to execute some defendants who would not be sentenced to death were the Court to forbid the exclusion of

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60. *Elstad*, 105 S. Ct. at 1292 n.1 (“bright line”), 1296 (“A subsequent administration of *Miranda* warnings to a suspect who has [earlier] given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement.”), 1298 (“[I]n evaluating the voluntariness of his statements . . . [t]he fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative.”).

61. The Court explained in *Berkemer*:

The purposes of the safeguards prescribed by *Miranda* are to ensure that the police do not coerce or trick captive suspects into confessing . . . and as much as possible to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary. . . .

. . .

We do not suggest that compliance with *Miranda* conclusively establishes the voluntariness of a subsequent confession. But cases in which a defendant can make a colorable argument that a self-incriminating statement was “compelled” despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare.

any jurors on account of religious or conscientious scruples. In the administration of a complex rule, some defendants who might have received the death penalty despite the inclusion on their juries of all scrupled jurors will, because of errors in complying with Witherspoon and Witt, receive only life sentences, while individuals who would have been sentenced to life imprisonment had those decisions been adhered to will, because of unavoidable errors in application, be sentenced to die. Thus the Court, by adopting complex fact-intensive rules, introduces into the sentencing process precisely the type of arbitrariness that Furman and even Gregg condemn.

The adoption of clear-line prophylactic rules would also have another enormously desirable consequence. The increasing number of individuals under sentence of death — today well over a thousand — has complicated the likely consequences and significance of any constitutional decision. The acceptance of any new constitutional argument, or even the conscientious enforcement of a well-established doctrine, is likely to call into question the sentences or convictions of literally hundreds of the nation's most hardened and dangerous criminals. It would blink reality to pretend that the Supreme Court is not seriously concerned about the retroactive impact of its decisions in this area. In his discussion of mounting evidence that death-qualified juries — juries from which certain opponents of the death penalty have been excluded — are significantly biased in favor of conviction, Professor White notes that a Supreme Court decision sustaining his argument would, if retroactive, have a great impact on the administration of justice, calling into question the convictions of literally thousands of inmates, not only those under sentence of death, but many if not most of the convicted murderers in the nation (p. 9). When, following the publication of White's book, the Supreme Court took up the question of whether death-qualified juries were impermissibly conviction prone, the problem of retroactivity was emphasized not only in the brief for the state, but also in questions from the bench at oral argument. The Court held in Lockhart v. McCree not only that the defendant had failed to prove that death-qualified juries were conviction prone, but also that the Court would refuse even to consider in any future case additional information that tended to prove that such juries were biased. The breadth of the decision undoubtedly reflected a determination by the majority to assure that no subsequent empirical study could result in the release of many of the nation's most dangerous criminals.

The problem that White recognizes with regard to conviction-proneness is present, albeit in a less extreme form, in every case involv-

64. 54 U.S.L.W. 3475-76 (oral arguments, Lockhart v. McCree).
ing a challenge to the procedures by which a state imposes the death penalty. In a very real sense the most important precedent influencing the Court's present decisions in capital punishment cases may be, not *Furman* or *Gregg*, but *Linkletter v. Walker*, which establishes the principles for determining whether a constitutional decision will be applied retroactively. Whatever the merits of *Linkletter* and its progeny, the specter of retroactivity has an intolerable and increasingly distortive effect on capital punishment appeals. When the Court manipulates its constitutional decisions to avoid reducing or calling into question the sentences of large numbers of inmates on whom the states have already imposed the death penalty, it decides that future defendants who would not be sentenced to death under a constitutional scheme will have to die in order to facilitate the execution of past defendants. The ultimate premise of such an approach is that it is better to kill some defendants who do not deserve to die than to spare the lives of some defendants who may indeed deserve that sentence. That is a morally and constitutionally horrendous result.

If, as appears to be the case, the specter of retroactivity is beginning to affect the Court's decisions on the merits of constitutional issues, then the time may have come to reconsider the standards the Court uses to determine the retroactive effect of a decision. In at least some instances this problem, as well as the administrative difficulties discussed earlier, can be resolved by adopting bright-line prophylactic rules, the sort of rules that, because they are framed to prevent rather than merely define constitutional violations, are not ordinarily retroactive in application. Such an approach may hold out the most realistic prospect for increasing the coherence, reliability, and predictability of capital sentencing systems. Such an approach may also provide a basis for the Court ultimately to assess whether the best of such systems can, in operation, meet minimal constitutional standards.

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