13: Capital Punishment and the Constitution

The death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. . . . Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.

—JUSTICE BLACKMUN, Callins v. Collins

Arguments from Pure Principle: For and against the Death Penalty

Americans are passionately divided about capital punishment. About 55 percent say that they are in favor of the death penalty, while about 41 percent are opposed. The argument that one most often hears in its support appeals to basic principles of justice. The kinds of crimes that warrant death at the hands of the state are so brutal, violent, and just plain evil that it is only reasonable that murders would pay the ultimate price. Death penalty abolitionists appeal to contrary intuitions of basic principle. They argue that the death penalty itself is brutal, violent, and just plain evil. Yes, murder is the most serious crime and deserves the most serious criminal punishment. But opponents believe that at this stage of society’s development, life imprisonment without the possibility of parole is an incredibly serious form of punishment and to go any further crosses a moral line and degrades the basic moral foundations of our society. I am far from neutral on this debate. As long as I can remember having strong moral or political stances regarding anything, I have been a passionate opponent of the death penalty.

I would be happy and indeed proud to lay out for you my reasons for thinking capital punishment is morally wrong, but that is not my intention in this chapter. I will eschew my normative case against the death penalty for three reasons. One is simple pedagogy. This is a book about practical epistemology and evidence evaluation, not contemporary moral controversies. The second is that I want to explore the death penalty, not as a moral controversy, but as a constitutional issue. One where many of the skills we have been discussing in the last few chapters are directly relevant. Perhaps my
main reason for refraining from resting my abolitionist case on basic principles of justice, decency, and integrity, however, is that I have become convinced that it would not work. Oh, sure, those of you who already agree with me will applaud my insight, rhetorical skill, and moral vision. But those of you who are in favor of capital punishment are very unlikely to be won over. The same goes in reverse. Arguments appealing to retributive justice resonate well with death penalty advocates but carry very little persuasive power with those of us who are opposed on moral grounds.

I want to rest my case against the death penalty on a strategy that I have taken from Supreme Court Justice Harry Blackmun, what I have called an “argument from contingent realities.” Blackmun argues that the US Constitution may very well permit the use of the death penalty in the abstract, but given certain contingent facts about contemporary society, its current application violates the Constitution. Blackmun’s concern, as we shall see, is that certain facts about the American criminal justice system almost guarantee that it will be administered in such a way that it is infected with “arbitrariness, discrimination, caprice, and mistake.” He places particular emphasis on the notions of arbitrariness and caprice—the fact that the very similar kinds of murders result in wildly different criminal sentences. We see very violent multiple murders not even prosecuted as death penalty cases, think of the O. J. Simpson case, while John Spenkelink, claiming sexual assault and self-defense and offered a plea bargain of a jail sentence on a second-degree murder charge, was executed. I think Blackmun was absolutely right that we continue to see arbitrary and capricious administration in capital cases. But I want to extend his argument to focus on other contingent realities. I will argue that the statistics show that a disproportionate number of defendants, and victims, in capital cases are poor and that they are members of racial minorities.

Constitutional Texts

The US Constitution is justly heralded as a written document. The rules of the game of national government and the rights of the citizens are laid out in a beautiful legal text. Scholars, editorial writers, and Supreme Court justices often find themselves debating what this text means and usually what it means in a specific and controversial context. In these cases, the simple model from chapter 10 immediately encounters predictable problems. Yes, there is a written text, but this text is maddeningly vague, ambiguous, and unclear, at precisely those places where the scholarly, political, or legal debates are occurring in the first place. What does it mean to talk of “due process of law,” “equal protection of the law,” “cruel and unusual punishments,” or “respecting an establishment of religion”? And yes, this text had an author, but in this case, that author was a collective composed of the “founders,” including, but not limited to, those at the Constitutional Convention (surely Jefferson counts) as well as those who authored its amendments. And what of those responsible for voting each time ratification was required? So what do we do about cases where the authors disagreed? Their words were at times (to say the least) unclear, they are all dead now, we’re not really sure who to count or not in the collective, and there must have been cases where they disagreed with one another (think of slavery).

This doesn’t, at least in my mind, mean that the model of textual interpretation we developed earlier must be abandoned for the Constitution. But it does mean the model is far from simple and will likely result in many controversial interpretations for even the fairest and most conscientious user.

Precedent

It’s easy enough to imagine a system where every time an issue comes before a judge, she would simply exercise her
professional knowledge and render the opinion that she believed is correct. We are lucky, though, that that is not our system. Consider what it would be like to never really have an idea about how a tricky case in torts or contracts would be decided. How could you conduct business or decide on what kind of insurance to have? After all, in our imagined system, each case would be decided afresh and depend on that judge’s view of the law and justice.

The English and American common law system puts a high premium on previous decisions by other courts and judges. The doctrine of precedent says the earlier decisions help define what the current state of the law is. There are many complications with this simple model. For one thing, there is a hierarchy of courts in our state and federal system. And precedent is only binding on lower courts following the decisions of higher courts. In addition, precedent only makes sense for “similar” kinds of cases for which the same articulated “principles” apply. Obviously, there’s a good deal of room for disagreement about all this. Finally, courts, at least at the same or higher level, can overturn precedent on the grounds that the earlier court made a mistake or that circumstances had so radically changed that the earlier principles no make sense.

Now there is no higher court than our Supreme Court, but they do make it a practice to honor earlier Supreme Court precedent. This usually happens when they choose to not even hear a case because it is settled constitutional law. But even in those cases they do decide to hear, there is, and I believe there should be, great deference to earlier rulings. There are occasions, however, where the Court will, and again I believe should, explicitly overturn an earlier decision.

### Inference to the Best Constitutional Interpretation

The constitutional text, and what we know of its authors, provides a good deal of data that needs to be explained.

**e1.** The US Constitution says . . .

**e2.** This text has many authors.

**e3.** We know or can infer many things about the concrete attitudes and beliefs of these authors.

**e4.** We know many things about the abstract meanings of many important constitutional principles that are articulated in the text.

**e5.** There is often relevant constitutional precedent for the case at hand.

The Supreme Court does not have the luxury of sitting around and asking themselves what does the Constitution mean? Their business is mainly deciding whether a particular happening—a decision in a lower court, an action on the part of a legal official, or generally what they call a state action—offends a specific part of the Constitution. So in addition to all the textual data, there is also data about the occurrence that is claimed to be unconstitutional.

**e6.** It has been alleged that a particular state action violates the guarantees to citizens within the Constitution.

So what’s the best explanation of all this? Those of you who know anything about our Supreme Court no doubt are well aware of this, but it should be acknowledged up front. The best interpretation will usually be very controversial for everyday citizens, for scholars and pundits, and also for the justices themselves. Furthermore, there seems to be a pretty clear correlation between how many of the justices interpret the Constitution and who those justices are as
people—their politics and their legal philosophy. Some become very cynical about all this and see constitutional law as simply one more political game. I prefer the view that constitutional issues are incredibly difficult and that it is inevitable not only that they be intrinsically controversial but that equally smart and dedicated professionals, as virtually every justice is and has been, can hardly avoid bringing their backgrounds and beliefs into the process.

With all that then, we can simplify the explanatory candidates to two:

t_c. The state action does not violate the Constitution—it is constitutional.

t_uc. The state action does violate the Constitution—it is unconstitutional.

### Some Key Constitutional Text

The first sort of evidence that Blackmun needs in his constitutional case against the death penalty is the constitutional language itself.

e1. From the Fifth and Fourteenth Amendments: “[No person shall be] deprived of life, liberty, or property, without due process of law.”

e2. From the Eighth Amendment: “Cruel and unusual punishment [shall not be] inflicted.”

e3. From the Fourteenth Amendment: “[No State shall] deny to any person within its jurisdiction the equal protection of the laws.”

This language, as it stands, is problematic to Justice Blackmun’s case against the death penalty for two reasons. The first, of course, is that the language of due process, equal protection, and cruel and unusual punishment is abstract, vague, and inherently controversial. How those words came to be in the Constitution, a fundamentally explanatory question, is the subject of deep historical and jurisprudential debate. The interpretive question of what they mean is even more controversial. The second problem, though, is more immediate. The language of the Fifth and Fourteenth Amendments strongly suggests that persons may be deprived of life by the state without violating their constitutional rights.

To address this second problem, Blackmun should appeal to a useful interpretive distinction first introduced by Ronald Dworkin.3 Dworkin notes that the venerable methodology of authorial or original intent is ambiguous. Consider the following: You have been elected as the very first student member of the Faculty Personnel Committee. This is a huge tribute but also a huge responsibility. Your vote will help determine who is promoted, granted tenure, and, in some sad cases, fired. You do me the great honor of scheduling a meeting with me and asking my advice about how these personnel decisions should be made. I ask you to give me the weekend to collect my thoughts and we can discuss it at the beginning of the week. Bright and early next Monday, you show up at my office door, and it’s time for me to put up or shut up. Suppose my advice goes as follows.
Personnel decisions should always be made in the best interest of the university and its students. Since we are primarily a teaching institution, being a first-rate classroom instructor is an absolute precondition for tenure or promotion. We also value scholarship, so being engaged in active and productive research is also required.

Here's the problem. My little speech is a text, and I am its author. According to authorial intent models, the words mean what I am trying to communicate. We both know that Professor Green is up for tenure. Being indiscrete and more than a tad unprofessional, I have let some of my students know that I think Green should not be granted tenure. I believe he enjoys a great reputation as a teacher because he is showy and an easy grader. I don’t believe the students learn much in his classes at all. I also think his research is a joke. He’s published several articles—that’s true—but mainly in clubby journals edited by like-minded colleagues. So since you ask my advice about tenure, and you know my thoughts about the concrete case of Green, if you respect my advice, you should vote against Professor Green. Right?

Well, maybe not. My text didn’t talk about Green at all. It appealed to abstract notions like “best interest of the university and its students,” “being a first-rate classroom instructor,” and “being engaged in active and productive research.” You’ve looked at Green’s record. You think the teaching evaluations are very impressive, and he really has more publications than I do. You think it’s definitely in the best interest of the institution to tenure one of its brightest young stars. Dworkin argues that words can have both an abstract intention and a concrete intention. You might attempt to honor my advice by voting along the lines of my concrete intention regarding Green. But Dworkin argues, and I certainly agree, that you do more honor to my advice when you focus on the abstract considerations such as best interest, first-rate teacher, and active and productive research. Of course, to do that honestly, it becomes your responsibility to assess Green against these abstract standards. The same distinction applies to the language in the Fifth, Eighth, and Fourteenth Amendments.

e4. The authors of the Fifth, Eighth, and Fourteenth Amendments concretely intended that capital punishment did not violate the Constitution.

e5. The authors of the Fifth, Eighth, and Fourteenth Amendments abstractly intended that the entire criminal justice system, including capital punishment, adhere to the theoretical standards of avoiding cruel and unusual punishments and be administered with due process of law and equal protection of the law.

The past almost fifty years are replete with important constitutional precedents on the death penalty. In these five decades, we have gone from a period in our history where, though constitutional and with defendants being sentenced to death, virtually no one was being executed (1968–1972); where capital punishment as it was then administered was ruled to be unconstitutional (1972–1976); where newer laws for the administration of capital punishment were deemed to be constitutional (1976); where there was a pretty steady ascendance in executions (1981–1999) to a recent decline in executions (2000–2018). Here are some of the highlights of this tumultuous constitutional history.

Some Key Constitutional Precedent
E6. MCGAUTHA V. CALIFORNIA 402 U.S. 183 (1971)

The constitutional issues are succinctly stated in the case syllabus.

Petitioner in No. 203 was convicted of first-degree murder in California, and was sentenced to death. The penalty was left to the jury’s absolute discretion, and punishment was determined in a separate proceeding following the trial on the issue of guilt. Petitioner in No. 204 was convicted of first-degree murder, and was sentenced to death in Ohio, where the jury, which also had absolute penalty discretion, determined guilt and penalty after a single trial and in a single verdict. Certiorari was granted to consider whether petitioners’ rights were infringed by permitting the death penalty without standards to govern its imposition, and in No. 204, to consider the constitutionality of a single guilt and punishment proceeding.

The defendant’s attorneys argued that such systems inevitably resulted in arbitrary and capricious administration of the death penalty. Justice Brennan in an unchallenged characterization of the then-common standards for capital sentences characterized the situation as follows:

Capital sentencing procedures . . . are purposely constructed to allow the maximum possible variation from one case to the next, and provide no mechanism to prevent that consciously maximized variation from reflecting merely random or arbitrary choice. [Justice Brennan, dissenting.]

In spite of this, however, Justice Harlan, writing for the Court, ruled that

petitioners contend that to leave the jury completely at large to impose or withhold the death penalty as it sees fit is fundamentally lawless, and therefore violates the basic command of the Fourteenth Amendment that no State shall deprive a person of his life without due process of law. Despite the undeniable surface appeal of the proposition, we conclude that the courts below correctly rejected it.

E7. FURMAN V. GEORGIA 408 U.S. 238 (1972)

The case of Furman v. Georgia was unusual in many respects. It initiated the one and only time in our nation’s history when the death penalty was determined to be unconstitutional. It was an exceedingly close (5 to 4) ruling, with the five justices in the majority so at odds about why capital punishment was cruel and unusual punishment that the Court issued a rare pur curium (by the court) instead of the standard opinion of the Court authored by one or more of the justices. Still, most legal analysts see the case as raising the same issues as McGautha, only phrased as an Eighth Amendment concern rather than a Fourteenth Amendment due process one. Justice Stewart’s reasoning is the most often seen as the relevant precedent.
These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously . . . selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. . . . But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.


The Gregg v. Georgia case did three things, two of which were to the dismay of death penalty abolitionists like your author. Perhaps most significantly, it ruled that capital punishment was not, per se, cruel and unusual punishment under the Eighth Amendment. It also ruled that new sentencing procedures initiated after Furman had successfully eliminated the problem of arbitrary and capricious administration of the death penalty in Georgia. But, and this is crucial to my argument, it reinforced the basic finding of Furman (in many respects, this is unsurprising, since the opinion was written by Justice Stewart who was quoted previously). Justice Stewart quotes both himself and Justice White.

While Furman did not hold that the infliction of the death penalty per se violates the Constitution’s ban on cruel and unusual punishments, it did recognize that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. MR. JUSTICE WHITE concluded that “the death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.” . . . Indeed, the death sentences examined by the Court in Furman were “cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [capital crimes], many just as reprehensible as these, the petitioners [in Furman were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”


Warren McCleskey was a young black man who murdered a white police officer in the course of an armed robbery. At his appeal, evidence was introduced that seemed to show that “the Georgia capital sentencing process [was] administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments to the United States Constitution.” Justice Powell sees the racial disparities in Georgia’s death sentences (since the new law following Furman) as falling exclusively under the Equal Protection Clause. He then finds it relatively easy to dismiss the Fourteenth Amendment challenges to capital punishment.
Our analysis begins with the basic principle that a defendant who alleges an equal protection violation has the burden of proving "the existence of purposeful discrimination." Whitus v. Georgia, 385 U.S. 545, 550 (1967). A corollary to this principle is that a criminal defendant must prove that the purposeful discrimination "had a discriminatory effect" on him. Wayte v. United States, 470 U.S. 598, 608 (1985). Thus, to prevail under the Equal Protection Clause, McCleskey must prove that the decision makers in his case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence.

We shall have occasion to look at the data the Court was considering later in this chapter, but notice at this point how differently this case was decided compared to Furman. In McGautha, the Court had ruled that potentially arbitrary and capricious sentences did not, in and of themselves, constitute a denial of due process under the Fourteenth Amendment, but in Furman, they ruled that these same worries about procedural unfairness did constitute a kind of cruel and unusual punishment under the Eighth Amendment. One might have thought, therefore, that even if equal protection precedent required purposeful and particularized discrimination, the Court could have found that discriminatory sentencing is even worse than arbitrary and capricious sentencing and therefore counted as a very serious form of procedural cruelty under the Eighth Amendment. This was not their reasoning, though. And it’s hard for this author not to conclude that the real reason had to do with Justice Powell’s recognition that racial prejudice infects all the criminal justice system.

McCleskey’s claim, taken to its logical conclusion, [p315] throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties. Solem v. Helm, 463 U.S. 277, 289–290 (1983); see Rummel v. Estelle, 445 U.S. 263, 293 (1980) (POWELL, J., dissenting). Thus, if we accepted McCleskey’s claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.

E10. CALLINS V. COLLINS No. 93–7054 (1994)

I want to conclude this lengthy, and far from neutral, review of death penalty jurisprudence with one final case. Justice Blackmun, a moral opponent of capital punishment but an early supporter of its constitutionality, finally decided at the very end of his career that no amount of procedural tinkering could ever elevate capital sentences to the high standards imposed by the Eighth Amendment.

It is virtually self evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants “deserve” to die?—cannot be answered in the affirmative.

His eloquent and impassioned dissent from the Court’s denial of certiorari is doomed to be just a footnote in the history
of capital punishment. But he does state a succinct and clear explanation of the Constitution’s language and the Court’s precedent.

t₀. The death penalty must be imposed fairly and with reasonable consistency or not at all.

I am claiming that t₀ is the best explanation of the abstract intentions of the authors of the Bill of Rights, the authors of the Fourteenth Amendment, and the emerging body of constitutional law developed over the past two hundred years. Those of you who disagree with me—and I certainly realize that many of you will—have an obligation to articulate an interpretive theory you believe better explains all this. It is a challenge that I invite you to undertake. I remain hopeful once you have tried to find a better rival, you will come to agree with me that t₀ is the most plausible. Unfortunately, we may end up disagreeing but that is hardly surprising given the controversial nature of the constitutional text with which we have been dealing.

Statistics and the Death Penalty

I want now to continue with my case against the death penalty by arguing that both fairness and reasonable consistency are demonstrably absent. My argument to this effect will depend on the analysis of statistical evidence.

I take it that legal historians would agree with me that capital punishment has, in the past, been applied in a manner that was clearly discriminatory. We would like to think, however, that we have made some progress in the area of racial justice. That is why the following data are so disappointing.

Professor Baldus examined more than 2,400 homicide cases in the state of Georgia during the period between 1974 and 1979. The dates are significant because the Georgia murder statute had been rewritten after *Furman v. Georgia* in order that death sentences not be administered in a “random and capricious manner.” Here’s a brief summary of what Professor Baldus discovered:

<table>
<thead>
<tr>
<th>RACE</th>
<th>DEATH SENTENCE</th>
<th>PERCENTAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>KILLER/VICTIM</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Black/white</td>
<td>50 of 223</td>
<td>22%</td>
</tr>
<tr>
<td>White/white</td>
<td>58 of 748</td>
<td>8%</td>
</tr>
<tr>
<td>Black/black</td>
<td>18 of 1443</td>
<td>1%</td>
</tr>
<tr>
<td>WHITE/BLACK</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total by victim</td>
<td>2 of 60</td>
<td>3%</td>
</tr>
<tr>
<td>RACE</td>
<td>DEATH SENTENCE</td>
<td>PERCENTAGE</td>
</tr>
<tr>
<td>------</td>
<td>----------------</td>
<td>------------</td>
</tr>
<tr>
<td>White</td>
<td>108 of 981</td>
<td>11%</td>
</tr>
<tr>
<td>Black</td>
<td>20 of 1503</td>
<td>1%</td>
</tr>
</tbody>
</table>

The original Baldus study controlled for more than two hundred nonracial variables such as the defendant’s record and the severity of the crime. When all the data were considered, the study concluded that murderers of white victims were 4.3 times as likely to receive the death penalty. Justice Brennan expressed this correlation in characteristically vivid language.

At some point in this case, Warren McCleskey doubtless asked his lawyer whether the jury was likely to sentence him to die. A candid reply to this question would have to tell McCleskey that few of the details of the crime or of McCleskey’s past criminal record 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 die as defendants charged with killing blacks.

I have discussed the McCleskey case with hundreds of students in the last several years. Many simply refuse to accept the following data.

e11. When controlled for over two hundred non-racial variables such as the defendant’s record and the severity of the crime, the Baldus study concluded that murderers of white victims were 4.3 times as likely to receive the death penalty.

It is, of course, true that life in the inner city is different from life in the suburbs and that black culture is in many ways different from white culture. The shocking figure that more than four times as many murderers of whites receive the death penalty takes all that into account. I know some of you will continue to believe that “statistics always lie.” But the very same techniques that tell us that cigarette smoking causes cancer or that so-and-so will win next month’s election tell us that the connection between race and the death penalty in Georgia is for real. Thus the question before us is producing an explanation of why this correlation holds. There is no big mystery about the reason for this disparity. The original study contained the crucial data.

e12. District attorneys ask for a capital sentence in 70 percent of the cases involving a black defendant and a white victim. When the victim is black and the defendant is white, however, a mere 19 percent are even prosecuted as capital cases.

In one sense, the Baldus study’s database is not a sample at all but an analysis of the entire population of homicides in Georgia from the time the state rewrote its aggravated murder statute in response to Furman v. Georgia to the conclusion of the study in 1979. For the purposes of the Gregg trial, this was ideal, since it was the laws and behavior of legal officials in Georgia that were at issue. But Justice Blackmun, and certainly yours truly, believe that capital
punishment, in general, is discriminatory. We can treat the Baldus study as telling us something about the death penalty in this country.

t₀. Capital punishment in the United States is administered in a racially discriminatory manner.

Such an explanation of the data in the Baldus study immediately invites two rival explanations that raise very different issues of bias.

 t₁. All the data comes from a state in the Deep South where there is a long history of racial discrimination.

 t₂. All the data comes from the late 1970s, racial discrimination has greatly dissipated in the ensuing two generations.

I concede that these are legitimate counterarguments, but I still believe that t₀ is the best explanation. It’s true that gathering all one’s data from a single state or region of the country is a less-than-ideal polling technique, but sometimes one has to take the data that are available. Remember that medical researchers took the Framingham data very seriously, even though all of it came from the Northeast. As for the claim that attitudes about race have greatly improved since the latter half of the 1970s, I am of two minds. I would like to believe that your generation, and your parent’s, is less racist than those who came of age in the ’40s, ’50s, ’60s, and early ’70s. I think there is some evidence for this. But at the same time, one need only turn on the TV or radio and be aware of what is going on in our country right now to see that whatever improvements we see with respect to race, we still have a hell of a long way to go.

My main reason for continuing to support t₀, however, is that the Baldus study is not all the data that is available. In 1990, the United States General Accounting Office released a report, “Death Penalty Sentencing: Research Indicates a Pattern of Racial Disparities,” that reviewed research from across the entire county. Here is their summary of their findings.

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Our synthesis of the 28 studies shows a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the Furman decision.

In 82 percent of the studies, race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks. This finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques.

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A Causal Explanation of the Correlation

In Furman, the Supreme Court was concerned with the arbitrary and capricious actions of trial judges and particularly juries. It appears now, however, that the judgments, both arbitrary and prejudicial, of other legal officials are even more problematic. An obvious explanation of the Baldus data is the following.

 t*₀. The race of the murder victim causally influences the decision whether to seek the death penalty.

Given my earlier interpretation of the Eighth Amendment, this account of the murder statistics in Georgia seems to
demand that the Supreme Court declare capital punishment, at least in the state of Georgia, to be unconstitutional.

As I hope by this point you are all already thinking, the crucial question is whether $t_0$ is really the best explanation. I, personally, cannot see any way that this could be a case of “reverse causation.” Thus I reject any possibility that the following needs to be considered at all:

$t^1$. The decision to seek the death penalty causes the race of the victim.

I, also, find it pretty hard to explain the Baldus study results as simply a “statistical fluke.” Such things are always possible, but modern statistical analysis guarantees us that they are exceedingly unlikely. Consequently, the following is also very low on my plausibility ranking:

$t^2$. It’s just a coincidence that victims’ race “correlated” with capital sentences in Georgia.

The only serious competitor I can imagine, therefore, is that there is some unnoticed “common cause” that is independently responsible for both the race of the homicide victims and the fact that their murderers received the sentences they did. The Baldus team tried to think of some of the possible factors in their original evaluation of the data. That’s what they were up to when they performed the statistical tests that “controlled for over two hundred nonracial variables.” Even when they did this, it turned out that murderers of white victims were 4.3 times as likely to receive death sentences. Maybe something else is responsible for the correlation, but we have yet to see what it is. Hence I am willing to take the following seriously as a potential rival explanation.

$t^3$. Some unidentified nonracial factor is responsible for the correlation of victim race and death sentences.

Since we have yet to even think of what this nonracial factor might be, I admit its possibility but rank it significantly lower than the causal explanation in $t^0$.

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**Some Other Contingent Realities**

My argument, so far, has depended on two contingent realities, and so, even if the Constitution permits capital punishment in the abstract, given the world we live in, the death penalty still remains arbitrary and capricious and, in at least some cases, racially prejudicial and is therefore unconstitutional. But there are at least two other contingent realities that make capital punishment even more constitutionally problematic.

I believe passionately that the Baldus study, and the others surveyed in the Government Accountability Office (GAO) report, tells us that racial prejudice plays a huge causal role in who receives the death penalty and who is executed. But I think that there may be other causal factors at work as well. Our nation does not gather data regarding socioeconomic class; we seem to believe that we are a “classless” society. Were such data readily available, I am quite certain it would show an even stronger correlation between poverty and the death penalty than the one we saw in the Baldus study. I am convinced that poor people are treated by the criminal justice system as second-class murder victims, just as we have seen minorities are. But I am also convinced that the death penalty is also a “poor man’s punishment.”7 Those with the financial resources to hire first-class criminal lawyers, and make the state’s murder trial very expensive, have a much greater chance of having their charges plea bargained down to a noncapital sentence.
The last contingent reality I want to mention seems to be actually changing some people’s minds as an argument against the death penalty and changing the minds of some public officials such as governors. We now have a record of several cases where defendants are potentially liable for capital charges, and in some cases, defendants charged and convicted in capital trials have subsequently been shown to be innocent for the crime they were charged with. Some of us believe that demonstrably innocent prisoners have actually been executed. The mere possibility that innocent defendants might be executed is certainly a worry that the current criminal justice system invites.

**EXERCISES**

1. What do you think is the strongest argument, moral or constitutional, in favor of the death penalty?
2. What do you think is the strongest argument, moral or constitutional, against the death penalty?
3. Why do so many studies show a consistent correlation between race, either of the victim or of the defendant, and capital sentences?

**QUIZ THIRTEEN**

In this chapter, I make a sustained argument that capital punishment, as it is now administered in our country, violates the Constitution. My argument depends on evidence for an interpretation of the Constitution, on evidence provided in a detailed statistical analysis of the death penalty (the Baldus study), and on a causal explanation of that statistical data. Your task is to assess the quality of the evidence that I marshal in defense of my thesis. You will need to utilize the tools of inference to the best explanation for an assessment of my evidence for the constitutional interpretation as well as the inference from a sample to a population and the inference from a correlation to a cause.

**Notes**