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A Response and Retort

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I. INTRODUCTION

Mr. Tabak's thorough and informative article is convincing in its thesis—that the capital punishment climate in this country is changing "in significant part because of substantial doubts about the legal system's ability to prevent innocent people from being executed."[1] The article credits the change to the use of DNA evidence, the exoneration of more than ninety people since 1973, and other analytical advances in identification and catalogues a number of initiatives prompted by the growing concern.[2]

Having convincingly established the proposition with which he begins, Mr. Tabak notes, in conclusion, that the public's predicted concern for the execution of the innocent should not take place within a vacuum.[3] He suggests that these initiatives, prompted by concerns that the innocent will be executed, should invite attention to the broader systemic problems of this country's capital punishment system. It is upon these significant system-wide problems, and their impact on respect and support for the American system of justice, that this Response and Retort focuses.

II. ARBITRARINESS, DISCRIMINATION, UNFAIRNESS AND, NOW, UNRELIABILITY

When the United States Supreme Court reauthorized capital punishment following a ten-year moratorium,[4] it did so presumably because state

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1. Ronald J. Tabak, *Finality Without Fairness: Why We Are Moving Towards Moratoria on Executions, and the Potential Abolition of Capital Punishment*, 33 CONN. L. REV. 733, 762 (2001).

2. *Id.* at 739-42.

3. *Id.* at 762.

4. *See* Gregg v. Georgia, 428 U.S. 153, 169 (1976) (Stewart, Powell, and Stevens, JJ.). In each decade from the 1930s until the 1960s, the use of capital punishment had steadily declined. In the 1930s, for example, an average of 167 people were executed each year. That number fell to 129 in the 1940s and to 72 in the 1950s, when ninety percent of those executed were executed for rape. In 1961, only 42 persons were executed, and in 1967, the states executed only two individuals. No other execu-

legislatures had reconfigured their death penalty schemes to alleviate the problems that had led the Court to conclude, in 1972, that the death penalty, as it was then applied, violated the Eighth and Fourteenth Amendments to the United States Constitution.[5] These problems included, as Mr. Tabak notes, arbitrariness, discrimination, and unfairness.[6] More than two decades later when new concerns about the system's proneness to error have once again placed capital punishment in the national spotlight, one must wonder whether the problems of yesterday have been replaced by, or merely supplemented with, the problems of today.

While this error proneness—or stated less benignly, unreliability—may be the impetus for the lessening of Americans' enthusiasm for the death penalty,[7] the problems of yesterday are as troublesome in the case of a guilty capital defendant as in the case of an innocent one. Certainly, an arbitrary and discriminatory system *may* produce unreliable, error prone results. But even when the results are accurate, that is, even when a guilty, death-eligible defendant is sentenced to die, a system that is arbitrary and discriminatory is indefensible and breeds contempt and disrespect for the justice system and for the law.

In the event, then, that a more understanding, concerned public takes a broad look at capital punishment in America, what will they find? Will they find a system that suffers only from a proneness to error, but that has been purged of the indictments of arbitrariness and discrimination? Or will they find a system that after twenty-five years of effort continues to smack of unfairness in its arbitrary and discriminatory imposition of death?

A. *Answers to the* Furman *Problems*

The fifty thousand words of the nine separate opinions[8] in *Furman v. Georgia* emphasized the unconstitutionality of a capital punishment system

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only 42 persons were executed, and in 1967, the states executed only two individuals. No other executions took place until after the Supreme Court's decision in 1976. R. Sherrill, *Death Trip: The American Way of Execution*, THE NATION, Jan. 8/15, 2001, at 22.

5. Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (per curiam). One month prior to the grant of certiorari in *Furman*, the Court denied relief in a case asserting that the Fourteenth Amendment Due Process Clause required guided discretion for the jury in capital cases. McGautha v. California, 402 U.S. 183, 185-86 (1971). In that opinion authored by Justice Harlan, the five-member majority expressed skepticism that guidance could be put in "language which can be fairly understood and applied," deeming that task "beyond present human ability." *Id.* at 204. Justice Harlan was not a member of the *Furman* Court.

6. Tabak, *supra* note 1, at 755.

7. *Contra* Alexis M. Durham, H. Preston Elrod, Patrick P. Kinkade, *Public Support for the Death Penalty: Beyond Gallup*, 13 JUST. Q. 705, 706 (Dec. 1996) (citing polls showing public support for capitol punishment rising from mid-1960s to mid-1990s).

8. The *Furman* Court issued a single paragraph per curiam opinion holding that the "imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Furman*, 408 U.S. at 239-40. Each justice then wrote separately with Justices Douglas, Brennan, Stewart, White, and Marshall concurring, and Justices Burger, Blackmun, Powell, and Rehnquist dissenting.

which operated arbitrarily or discriminatorily. Justice Douglas, for example, concluded that the death penalty would be unusual, and thus in violation of the Eighth Amendment, if it was administered in an arbitrary or discriminatory manner.[9] Justice Brennan emphasized the need for proportionality and found no reason to believe that the death penalty served any legitimate penal purpose more effectively than alternative punishment.[10] Justice Stewart focused on arbitrariness and decried a system that permitted "this unique penalty to be so wantonly and freakishly imposed."[11]

Justices Marshall and White, likewise, had separate bases for their conclusions.[12] Despite their differences, a consistent theme throughout the opinions of the five justices in the majority was the presence of arbitrariness and discrimination in the existing application of the states' capital punishment laws. The seizing of this consistent theme to demonstrate the evils of the present system was far more than rhetoric. When the Supreme Court halted executions officially in 1972, approximately six hundred people were on death rows across America.[13] Two-thirds of those condemned to die were from the South, with the vast majority awaiting death in Florida and Texas. All of the inmates sentenced to death for rape were on Southern death rows, with one-third of them in Florida. Fifty-five percent of the offenders were black and forty-three percent were white.[14]

In order to resume executions, the states began revising their death penalty statutes to attempt to address the problems identified in *Furman.* In many states, juries had been given the discretion to sentence defendants in capital cases to death, but were given little guidance in the exercise of their discretion. This unguided discretion was among the culprits identified by the *Furman* Court as leading to an arbitrary and discriminatory system. Thus, to eradicate the problems, many states proposed the use of aggravating and mitigating circumstances to help juries decide between life and death.[15] As an additional check on the juries' function, state courts

9. *Id.* at 249 (Douglas, J., concurring).

10. *Id.* at 270-80 (Brennan, J., concurring).

11. *Id.* at 310 (Stewart, J., concurring).

12. Justice Marshall concluded that the death penalty was per se unconstitutional because it was excessive and morally unacceptable. He suggested that a fully informed citizenry would find the death penalty morally unacceptable in light of its arbitrary and discriminatory use. *Id.* at 363-66 (Marshall, J., concurring). Justice White did not find per se unconstitutionality, but believed that the state laws before the Court violated the Constitution because they were rarely used and had ceased to accomplish the purpose for which they were intended. *Id.* at 311-13 (White, J., concurring).

13. *See* DEATH PENALTY INFO. CTR., HISTORY OF THE DEATH PENALTY, *at* http://www.deathpenaltyinfo.org/history2.html#SuspendingtheDeathPenalty (last visited March 30, 2001). The nation's death row population as of October 1, 2000 exceeded 3700. BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 546-47, tables 6.81-6.83 (Ann L. Patore & Kathleen Maguire eds., 1999).

14. *A National Study of the* Furman-*Commuted Inmates: Assessing the Threat to Society from Capital Offenders, in* THE DEATH PENALTY IN AMERICA 162, 165-66 (Hugo Adam Bedau, ed. 1997).

15. *See infra* notes 17-22 and accompanying text.

revised appellate review procedures in capital cases.[16]

Four years after *Furman*, the Court sanctioned the resumption of capital punishment when it held that three southern states had been successful in their efforts to constitutionalize their administration of capital punishment.[17] In Georgia, Florida, Texas, Louisiana and North Carolina, persons had been sentenced to death despite the *Furman* decision under modified state statutes.[18] The five cases were consolidated for appeal. The statutes of Georgia, Florida, and Texas passed constitutional muster; the mandatory death statutes of Louisiana and North Carolina did not.[19]

In upholding the three statutes, the Court acknowledged that a death penalty procedure that included a substantial risk that death would be inflicted in an arbitrary or capricious manner could not withstand constitutional review.[20] These problems had been largely eliminated by the safeguards employed by the states—defined criteria for the exercise of sentencing discretion[21] and meaningful appellate review. [22]

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16. Since at least 1932, in *Powell v. Alabama*, the Supreme Court has noted a difference in kind between a life sentence and a death sentence and has demanded "heightened reliability" in capital cases. *Compare* Powell v. Alabama, 287 U.S. 45, 63, 72-73 (1932) *with* Simmons v. South Carolina, 512 U.S. 154, 172 (1994) (Souter, J., concurring), *and* Sumner v. Shuman, 483 U.S. 66, 72 (1987).

> Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (Stewart, Powell, and Stevens, JJ.). This heightened reliability requires, among other things, "meaningful appellate review." Proffitt v. Florida, 428 U.S. 242, 251 (1977) (Stewart, Powell, and Stevens, JJ.).

17. At least one author has suggested this disturbing notion:

> It may be, of course, that the Court's prediction in *Gregg* of a new era of fairness in capital sentencing was a sham, window dressing for what was in reality nothing more than a capitulation to the mounting public clamor for a resumption of executions. But if the justices sincerely believed that new legal guidelines and jury instructions would really solve the problems of arbitrariness and racial discrimination in death penalty cases, they were wrong.

David Bruck, *Decisions of Death*, *in* CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 55, 58 (Randall Coyne & Lyn Entzeroth eds., 1994).

18. Gregg v. Georgia, 428 U.S. 153 (1976) (Stewart, Powell, and Stevens, JJ.); Proffitt v. Florida, 428 U.S. at 247-48; Jurek v. Texas, 428 U.S. 262, 268 (1976) (Stewart, Powell, and Stevens, JJ.); Woodson v. North Carolina, 428 U.S. at 285; Roberts v. Louisiana, 428 U.S. 325, 331 (1976) (Stewart, Powell, and Stevens, JJ.).

19. The *Woodson* Court concluded that a mandatory death sentence designed to treat all persons convicted of a designated offense as "a faceless, undifferentiated mass" did nothing to eliminate the concerns of arbitrariness in sentencing. *Woodson*, 428 U.S. at 304.

20. *Gregg*, 428 U.S. at 195; *Proffitt*, 428 U.S. at 258-59; *Jurek*, 428 U.S. at 274.

21. *Gregg*, 428 U.S. at 192-93.

22. *Proffitt*, 428 U.S. at 251. An additional safeguard employed by the new state statutes was the bifurcation of the guilt and penalty phase. In *McGautha v. California*, counsel for an Ohio defendant in a companion case to *McGautha* had urged the Court to require bifurcated capital proceedings. 402 U.S. 183 (1971). The California system required bifurcation and the American Law Institute had similarly recommended separation. Justice Harlan was not persuaded. In his opinion for the Court, he wrote:

> It may well be . . . that bifurcated trials and criteria for jury sentencing discretion are superior means of dealing with capital cases . . . . But the Federal Constitution . . . does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened

As the states prepared to fire up their execution machinery, the Supreme Court periodically elaborated on the safeguards necessary to assure that this new, improved capital punishment system operated fairly. By defined criteria for the exercise of discretion, the Court meant that the death sentence must be reserved for the worst of the worst. That determination must be made by sufficiently narrowing those eligible for the ultimate penalty;[23] by an individualized consideration at sentencing based on the character of the defendant and the circumstances of the crime;[24] and by adequately instructing the jury as to the requirements for each determination.

"Meaningful appellate review," on the other hand, included some means of assuring that a person would not be sentenced to die by an aberrant jury. The Georgia legislature and the Florida courts, for example, had provided for appellate proportionality review.[25] Likewise, Texas had required appellate review in a court with statewide jurisdiction. These measures provided a means, the Court assured, of promoting "the evenhanded, rational, and consistent imposition of death sentences under law."[26]

How have these safeguards fared in their role as guardians against an arbitrary and discriminatory capital punishment system? In each instance the safeguards have eroded into meaningless promises.

1. *Arbitrariness*

a. Guided Discretion

The Supreme Court's capital punishment jurisprudence has been certain in at least one regard—that the death penalty cannot be automatically imposed. It must be preserved for the worst of situations, determined by narrowing those convicted of murder who are eligible for the death penalty and considering specially defined aggravating circumstances or other appropriate narrowing mechanisms.

> ideas of students of the infant science of criminology, or even those that measure up to the individual predilections of members of the Court. . . . [W]e cannot conclude that it is impermissible for a State to consider that the compassionate purposes of jury sentencing in capital cases are better served by having the issues of guilt or punishment determined in a single trial than by focusing the jury's attention solely on punishment after the issue of guilt has been determined.

McGautha, 402 U.S. at 221 (citations omitted).. No Supreme Court decision has held otherwise.

23. Zant v. Stephens, 462 U.S. 862, 874-80 (1983) (death penalty schemes must "genuinely narrow the class of persons eligible for the death penalty").

24. *Id.* at 879. Although a death sentence cannot be imposed solely based upon a non-statutory aggravating circumstance, the Supreme Court has declined to limit information at sentencing to information directly related to mitigating or aggravating circumstances, allowing in addition that information which relates to the offender and the offense. "What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Id.*

25. *Gregg*, 428 U.S. at 198; *Proffitt*, 428 U.S. at 259-60.

26. Jurek v. Texas, 428 U.S. 262, 276 (1976) (Stewart, Powell, and Stevens, JJ.).

Yet, in *Zant v. Stephens*, the United States Supreme Court upheld a death sentence based upon a jury's finding of two aggravating circumstances when a part of one of the circumstances was later held to be unconstitutional.[27] Thus the Court implicitly approved the practice of allowing a jury to exercise unchecked discretion once the jury had found at least one aggravating circumstance. Soon after, in *Barclay v. Florida*,[28] the United States Supreme Court upheld a judge override of a jury recommendation for life based on a finding of one valid statutory aggravating circumstance and other invalid, non-specified ones. The judge overruled the jury's verdict of life (as he had done in three previous cases), found no mitigating circumstances, and found that Barclay deserved to die because, among other things, he had an extensive criminal record and had been involved in efforts to begin a race war against whites. Those two factors were not among the aggravating circumstances listed in the Florida death penalty statute.[29] Nonetheless, the United States Supreme Court upheld the judge-imposed death sentence in an opinion authored by Chief Justice Rehnquist holding that "mere errors of state law" did not concern the High Court.[30]

Similarly the Court's repeated concern that discretion "must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action"[31] has dissipated as well. In *Furman* and *Gregg*, the Court recognized that sentencing juries, though preferable in capital cases,[32] have little experience in dealing with the kind of information which is relevant to sentencing. To alleviate the problem, the Court commented that the jury should be "given guidance regarding the factors about the crime and the defendant that the State, representing organized society,

27. Zant v. Stephens, 462 U.S. 862 (1983). In *Zant*, the jury found two aggravating circumstances. One of the aggravating circumstances allowed a finding based on alternative grounds, i.e., if the defendant had a prior record of conviction for a capital felony or had a substantial history of serious assaultive criminal convictions. After conviction and during appeal, the state supreme court found that the second clause of the aggravating circumstance was unconstitutionally vague. Arnold v. State, 224 S.E.2d 386, 391 (Ga. 1976). Because both of the two alternatives were factually substantiated, as well as the separate aggravating circumstance, and because "the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty," the Court found no error. Interestingly, the Court also noted that the affirmance rested in part on the "existence of an important procedural safeguard, the mandatory appellate review . . . to assure proportionality." *See infra* Part II.A.1.d.

28. 463 U.S. 939 (1983).

29. *Id.* at 956.

30. *Id.* at 957.

31. *Gregg*, 428 U.S. at 189.

32. Juries are preferable in capital sentencing because they "maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" Furman v. Georgia, 408 U.S. 238, 388 (1972) (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 n. 15 (1968) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958))).

deems particularly relevant to the sentencing decision."[33] The sentencer's discretion must be, the Court has said, channeled by "clear and objective standards" that provide specific and detailed guidance.[34]

As a result, in 1980 and 1988, the Court overturned death sentences when the jury concluded that the crime was "outrageously or wantonly vile, horrible and inhuman"[35] or "especially heinous, atrocious, or cruel,"[36] but had no guidance from the Court in understanding those terms. Absent definition, the terms provided no safeguard against the arbitrary and capricious imposition of capital punishment. The Court, however, limited both of the holdings to the specific facts before it.

But the scrutiny evidenced by those decisions has been replaced with deference in cases where similarly ambiguous terms are not defined, but are simply modified by a string of equally ambiguous adjectives. So, for example, in 1990, the Court upheld an Idaho aggravating circumstance which allowed a sentence of death for murderers who exhibited "utter disregard for human life."[37] Because the Idaho Supreme Court had elaborated on the aggravating circumstance,[38] and the sentencer, the trial judge, had presumably considered that elaboration, the Court found the aggravating circumstance to be constitutional. One need only review the elaboration for evidence of the Supreme Court's new deferential, rather than a scrutinizing review.

"Utter disregard for human life," according to the Idaho Supreme Court, required a showing of the "highest, the utmost, callous disregard for human life, i.e., the cold-blooded pitiless slayer."[39] The United States Supreme Court reasoned that "pitiless" *would be* an ambiguous aggravator if it was defined as "devoid of mercy or compassion;" however, "pitiless" somehow became clear and objective when defined as "without feeling or sympathy."[40]

b. Narrowing

Equally problematic is the Court's seeming retreat from the principle

33. *Gregg*, 428 U.S. at 192.
34. *Id.* at 198.
35. Godfrey v. Georgia, 446 U.S. 420, 426 (1980).
36. Maynard v. Cartwright, 486 U.S. 356, 359 (1988).
37. Arave v. Creech, 507 U.S. 463, 465 (1993).
38. State v. Osborne, 631 P.2d 187, 193-201 (Idaho 1981).
39. *Id.* at 200-01.
40. *Creech*, 507 U.S. at 470-76. Justice Blackmun in dissent noted that between the time that the Idaho Supreme Court decided the case before it and the time of the Court's decision, the Idaho court had offered yet another explanation of the aggravating circumstance. This time, in *State v. Fain*, the court held that utter disregard meant a "lack of conscientious scruples against killing another human being." 774 P.2d 252, 269 (Idaho 1989). As Justice Blackmun suggested, it is difficult to imagine any first-degree murder case (or perhaps any murder case except one of self defense or mercy killing) that would not fall within that definition. *Creech*, 507 U.S. at 486-87 (Blackmun, J., dissenting).

that the ultimate penalty is reserved for the ultimate, or worst, offender. The Court had frequently commented that "[t]o pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty, and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" [41]

That narrowing function can be accomplished either at the guilt phase, by limiting those for whom the state may seek death; at the penalty phase, by specifying aggravating circumstances which must be found before a sentence of death may be imposed; or at both the guilt and sentencing phases.[42] Nonetheless, the Court's generosity in interpreting various methods of narrowing has led state legislatures to disregard the narrowing requirement.

When the Court initially endorsed the new Texas death penalty scheme in *Jurek v. Texas*, it endorsed a scheme that was categorically different from the others before it. Unlike Georgia and Florida, Texas did not attempt to narrow those eligible for a death sentence by adopting a list of statutory aggravating circumstances. Rather, Texas chose to accomplish its narrowing at the guilt phase in its definition of capital murder.[43]

The Court was satisfied that the Texas statute did indeed narrowly define the categories of murder for which death was an available sentence. If the jury found that a Texas defendant had committed one of the narrowed categories of murder, a death sentence was required if the jury also found beyond a reasonable doubt that the murder was committed deliberately and the defendant would be a continuing threat to society.[44] These findings, in the Court's opinion, allowed the jury to consider the mitigating aspects of the offense and the unique characteristics of the offender, guided the exercise of the jury's discretion, and paralleled the narrowing provisions of Georgia and Florida:

> While Texas has not adopted a list of statutory aggravating circumstances . . . as have Georgia and Florida, its actions in narrowing the categories of murder . . . serves much the same purpose. . . . In fact, *each of the five classes of murder* made capital by the Texas

41. Lowenfeld v. Phelps, 484 U.S. 231, 244 (1988) (quoting Zant v. Stephens, 462 U.S. 852 (1983)).

42. *See id.* In *Lowenfeld*, the Court upheld a death penalty scheme in which the narrowing was accomplished by the jury at the guilt phase when it found that the defendant had committed a murder with a "specific intent to kill or to inflict great bodily harm upon more than one person." *Id.* (citing LA. REV. STAT. ANN. §14:30A(B) (West 1986)). In dissent, Justice Marshall vigorously argued that limiting the narrowing function to the guilt phase reduced it to a "mechanical formality entirely unrelated to the choice between life and death." *Id.* at 257 (Marshall, J., dissenting).

43. Jurek v. Texas, 428 U.S. 262, 270 (1976) (Stewart, Powell, and Stevens, JJ.).

44. *Id.* at 269. Under appropriate cases, the jury was also required to find beyond a reasonable doubt that the defendant's acts were an unreasonable response to the victim's provocation. *Id.*

> statute is encompassed in Georgia and Florida by one or more of the statutory aggravating circumstances. . . . Thus, in essence the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed. So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option—even potentially—for a smaller class of murderers in Texas.[45]

Today, those five classes of murder have grown to ten.[46] Texas leads the nation in the number of death row inmates and the number of executions.[47] If the Texas statute as it existed at the time of *Jurek* actually did narrow the category of death-eligible defendants, its ability to do so is highly suspect today.[48]

Texas does not stand alone in its expansion of the definition of capital murder. The Virginia General Assembly, for example, has expanded its capital punishment definition in each of the last five years.[49] Some states have followed Virginia's example;[50] others have defied the narrowing requirement instead by adding aggravating circumstances.[51] Perhaps most disconcerting are the states that have expanded the ranks of the death eligibility by adding aggravating circumstances and broadening the definition of capital murder. Alabama, for example, presently has eighteen capital offenses and ten aggravating circumstances.[52] Among those eligible for death are those who commit murder with a weapon if either the defendant or the victim is in a car.[53]

The narrowing requirement, which was seen as a means of assuring that arbitrary death sentences were not given, has become a fallacy. Indeed it is difficult in many states to fathom any murder that could not result in a death sentence given the expansive definitions of capital murder and the

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45. *Id.* at 270-71.

46. TEX. PENAL CODE ANN. §19.03 (Vernon 1994).

47. As of January 1, 2001, Texas had 448 inmates on death row, 23 of which were juveniles. Since 1976 Texas has executed 240 inmates, more than one third of the total number of inmates executed in the entire United States. DEATH PENALTY INFO. CTR., STATE BY STATE DEATH PENALTY INFORMATION, *at* http://www.deathpenaltyinfo.org/texas.html (last visited March 3, 2001) (on file with author).

48. For one author's view that the Texas death penalty statute did not even approximate a carefully drafted statute capable of eliminating disparity and arbitrariness, see Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1777 (1987).

49. *Compare* VA. CODE ANN. §18.2-31 (Michie 1996) *with* VA. CODE ANN. §18.2-31(Michie 1996 & Supp. 2000).

50. *Compare* ARIZ. REV. STAT. ANN. §13-1105 (West 1989) *with* ARIZ. REV. STAT. ANN. §13-1105 (West 1989 & Supp. 2000).

51. *Compare* ALA. CODE §13A-5-49 (1994) *with* ALA. CODE §13A-5-49 (1994 & Supp. 2000).

52. ALA. CODE §§13A-5-40 & 13A-5-49 (1994 & Supp. 2000).

53. *Id.* §§13A-5-40 (17) & (18).

growing number of aggravating circumstances.[54]

c. Jury Instructions

Even before the Supreme Court became immersed in capital punishment jurisprudence, the "truly awesome responsibility" of the capital jury was recognized.[55] In order for a jury to exercise that awesome responsibility, the jury must be given clear, complete jury instructions, which guide their discretion.[56] Thus, in *Gregg* the Court commented that it is "desirable for the jury to have as much information before it as possible when it makes the sentencing decision."[57] This information would include, in addition to the evidence adduced at trial and at sentencing, the law as stated by the judge in the jury instructions.

But just as with the narrowing requirement, the Court's early embracing of the idea of direct, complete jury instructions has been replaced with a frightening, cavalier attitude about the information given to a capital jury. In many contexts, the Court seems content with the jury receiving no information or even misleading information.

After executions had resumed, the Court, at times, jealously protected the capital jury's right to complete, correct information. When prosecutors misled jurors as to the effect[58] or finality[59] of their decisions, the High Court and other courts stepped in to assure that death sentences based on such misinformation were not tolerated. Then, perhaps in response to what was viewed as the public's perception of the reality of the death penalty,[60]

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54. As an assignment for students working at a law school program which assisted court-appointed capital attorneys in Virginia, each student was given one week to hypothesize a murder for which the Commonwealth could not seek death.

55. McGautha v. California, 402 U.S. 183, 208 (1971). Justice Harlan in *McGautha* believed that states could assume that "jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequence of their decision." *Id.*

56. The Supreme Court has noted that the jury will, and should, look to the judge for direction as to what to do with the evidence that it hears. *See* Taylor v. Kennedy, 436 U.S. 478, 488-89 (1978).

57. Gregg v. Georgia, 428 U.S. 153, 204 (1976) (Stewart, Powell, and Stevens, JJ.). Similarly, albeit in a defensive posture, the Court discussed the importance of complete jury instructions in *Penry v. Lynaugh*, 492 U.S. 302 (1989). There, the Court held that the duty to instruct the jury as to specific mitigating circumstances was not a "new rule" under *Teague v. Lane*; thus petitioner was "*Teagued*" out on his habeas claim. *Penry*, 492 U.S. at 319 (citing Teague v. Lane, 498 U.S. 288, 301 (1989)). "The rule Penry seeks—that when such mitigating evidence is presented, Texas juries must, upon request, be given jury instructions that make it possible for them to give effect to that mitigating evidence . . . is not a new rule under *Teague* because it was dictated by [our prior cases]." *Penry*, 492 U.S. at 318-19.

58. *See* Caldwell v. Mississippi, 472 U.S. 320, 328-29 (1985) (holding that the Constitution does not allow a death sentence that rests on a determination by a sentencer who has been misled into believing that the ultimate determination of the defendant's fate rests elsewhere).

59. *See* Wheat v. Thigpen, 793 F.2d 621, 627-29 (5th Cir. 1986) (disallowing death sentence to stand when a prosecution had told the jury that their decision was not "final").

60. Anthony Paduano & Clive A. Stafford Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 COLUM. HUM. RTS. L. REV. 211, 211 (1987)

prosecutors orchestrated another approach.

Lest the jury think that a life sentence was sufficient, prosecutors began to warn jurors of extra-evidence considerations such as clemency and parole. Some states required jury instructions advising the jury about parole and clemency.[61] Defendants responded by requesting jury instructions on their ineligibility for parole and the unlikelihood of clemency. Ultimately, the Supreme Court allowed an instruction that advised jurors that one sentenced to life without parole might eventually receive a commutation to a sentence that allowed parole.[62] In another case, the Court declined to address the constitutionality of a law that prohibited a capital defendant from presenting truthful information to a jury about parole eligibility, despite the existence of another law requiring that the jury be advised about parole.[63]

While much of the initial retreating in this area occurred in this context of instructions explaining sentencing contingencies, eventually the Court retreated as well from the general notion that juries should be well informed in capital cases. Notable in this regard are two cases which came to the Court from Virginia, at one time the state that placed second in the death penalty race.

In *Buchanan v. Angelone*,[64] the Court held that the Constitution does not require a jury instruction explaining the concept of mitigating circumstances or detailing a particular statutory mitigating circumstances.[65] Under Virginia law, the jury was instructed that a sentence of death could not be imposed unless the jury found beyond a reasonable doubt that the defendant was "vile." The instruction further explained, that absent a finding of vileness, a life sentence was required, but with a finding a vileness, the jury could impose either a life or death sentence.[66]

Buchanan's lawyers had presented two days of testimony during the sentencing hearing about his significantly troubled upbringing. They then argued that the trial court should instruct the jury on four factors in mitigation, each of which was listed as a statutory mitigating circumstance in

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(noting that typical capital jurors believe that a life sentence will result in parole and that release may be in as early as seven years).

61. Texas law provides that a jury must be advised as to parole eligibility. TEX. CODE CRIM. PROC. ANN., art. 37.07, § 4(a) (Vernon Supp. 2000).

62. California v. Ramos, 463 U.S. 992, 1009 (1983). This so-called "Briggs Instruction" was later declared unconstitutional on state constitutional grounds by the California Supreme Court. People v. Ramos, 689 P.2d 430, 439-40 (Cal. 1984).

63. Brown v. Texas, 522 U.S. 940, 941 (1997) (Stevens, Souter, Ginsburg, and Breyer, JJ., dissenting from denial of certiorari).

64. 522 U.S. 269 (1998).

65. *But see* ALA. CODE § 13A-5-49 (1994 & Supp. 2000).

66. Buchanan v. Angelone, 522 U.S. 269, 272-73 (1998).

Virginia,[67] and as to mitigation in general.[68]

Recognizing the accuracy of the requested instructions, the Court nonetheless held that "the state may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence."[69] Since the trial judge told the jury to consider *all* of the evidence and since the defense had been allowed to present mitigating evidence,[70] the jury was sufficiently advised.

Two years later, the Court reaffirmed its new predilection for directionless instructions in capital cases. Another death row inmate in Virginia sought review of his capital case in which the Virginia Supreme Court had upheld a trial judge's refusal to answer directly the jury's question about the imposition of the death penalty. During sentencing deliberations, the jury asked whether it was required to sentence the defendant to death having found guilt on at least one aggravating circumstance.[71] Rather than answer the question with a straightforward "no," the answer under Virginia law, the trial judge referred the jury to a seventy-eight-word sentence in the standard jury instructions.[72]

Relying on the presumption that a jury understands the judge's instructions,[73] the High Court denied relief. The Court majority seems satisfied

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67. These four factors were: no significant criminal history; extreme mental or emotional disturbance; significantly impaired capacity to appreciate or conform conduct to the law; and age. VA. CODE ANN. §19.2-264.4(B) (Michie 1995).

68. Defendant suggested the following instruction: "In addition to the mitigating factors specified in other instructions, you shall consider the circumstances surrounding the offense, the history and background . . . and any other facts in mitigation of the offense." *Buchanan*, 522 U.S. at 273.

69. *Id.* at 276.

70. Again, the Court's position is directly contradictory with the defensive position it took in *Penry* where the Court noted that "it is not enough simply to allow the defendant to present mitigating evidence to the sentencer." Penry v. Lynaugh, 492 U.S. 302, 319 (1989).

71. Weeks v. Angelone, 528 U.S. 225, 228-29 (1999). The jury also asked the judge about Virginia's laws regarding parole eligibility which are equally well defined, but about which the judge chose to tell the jury: "You should impose such punishment as you feel is just under the evidence, and within the instruction of the Court. You are not to concern yourselves with what may happen afterwards." *Id.*

72. The sentence read:

> If you find from the evidence that the Commonwealth has proved, beyond a reasonable doubt, either of the two alternatives, and as to that alternative, you are unanimous, then you may fix the punishment of the defendant at death, or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at imprisonment for life, or imprisonment for life with a fine not to exceed $100,000.

Weeks, 528 U.S. at 229.

73. The Court cited as support an 1826 opinion by Chief Justice Marshall. In that case, *Armstrong v. Toler*, the Chief Justice wrote that the "utmost willingness was manifested [by the trial judge] to gratify [the jurors], and it may fairly be presumed that they had nothing farther to ask." 24 U.S. (11 Wheat.) 258, 279 (1826). The case was a breach of contract action in which the jury requested assistance on this statement by the court:

> Whether the plaintiff has any interest in the goods imported by the defendant from New Brunswick, or was the contriver of, or concerned in, a scheme to introduce these goods, or even his own, if he had any, into the United States, by means of a collusive capture or oth-

with this evasive and oblique method of instructing capital juries and responding to their inquiries.

In light of social science research,[74] the obvious question is, "What is to be lost by completely and correctly charging a jury as to its obligations in a capital case?" More pointedly, what can be gained by playing "hide and seek" with pattern jury instructions which are generally written by lawyers or judges and are all-too-often unnecessarily verbose and complex?

Either the Court has abandoned its post-*Furman* idea that juries need to be given specific, complete instructions in order to exercise their discretion in capital cases appropriately or the Court is ignoring a simple fact. Poorly worded, ambiguous, incomplete, or unclear capital jury instructions leave a jury without an objective basis for its decision. In the same way that bias and prejudice can lead to death sentences that are inappropriate, so may inept instruction compromise a jury's ability to decide matters of life and death impartially and nonarbitrarily.[75]

d. Meaningful Appellate Review—Comparative Proportionality

Another lauded factor of the *Gregg*, *Proffitt*, and *Jurek* newly-devised capital legislation was the mandatory appellate review by a court with broader experience than the jury in recognizing appropriate death cases. Thus, the Court placed great faith in the appellate courts, and in particular, in their ability to compare death cases to assure that sentences were comparatively proportionate and not arbitrary or capricious.[76]

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erwise, or consented to become the consignee of the defendant's goods, with a view to their introduction, are questions which must depend upon the evidence, of which you must judge. *Id.* at 263.

74. Literally dozens of researchers have concluded that jury instructions, particularly those given in the sentencing phase of capital cases, are not understood by juries. *See, e.g.*, Michael B. Blankenship et al., *Jurors' Comprehension of Sentencing Instructions: A Test of the Death Penalty Process in Tennessee*, 14 JUST. Q. 325, 334-41 (June 1997) (citing numerous studies in appendix which reach the same result in other states and nationally).

Just a small sampling of the conclusions reached by researchers is enough for great alarm. *See* Craig Haney, *Taking Capital Jurors Seriously*, 70 IND. L.J. 1223, 1224 (1995) (concluding that the decision-making process is "governed by confusion, misunderstanding, and even chaos"); Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 BUFF. L. REV. 339, 360 (1996) ("Nearly one-third of the jurors were under the mistaken impression that the law required a death sentence if they found heinousness or dangerousness . . . ."); William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Trials*, 15 AM. CRIM. L.J. 1, 41 (1989) (noting that a significant number of jurors in death penalty cases believed that the death penalty was mandatory or presumed for first degree murder).

75. Studies show that juries that do not understand the instructions they are given resort to their inherent biases. "[W]hen errors were made [in the comprehension of jury instructions], they were likely to be in the direction of sending offenders to death row." Blankenship et al., *supra* note 74, at 339.

76. *See* Gregg v. Georgia, 428 U.S. 153, 195 (1976) (Stewart, Powell, and Stevens, JJ.).

> The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty . . . [and] substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury.[77]

The Court's reliance on appellate proportionality review to protect against an arbitrary capital punishment system was snubbed only six years later when the Court held that the Eighth Amendment did not mandate appellate proportionality review.[78] Parsing the notion of proportionality into two distinct concepts, "traditional" and "comparative," the Court dismissed any idea that comparative proportionality review was required as a safeguard against arbitrary death sentences.[79] "Traditional" proportionality, in which a court asks whether the sentence was disproportionate to an offense, was alive and well.[80] But comparative proportionality, in which the sentence imposed is compared to sentences of others convicted of the same crime, was not.

In justifying this result, the majority of the Supreme Court revised its *Gregg-Proffitt-Jurek* analysis, suggesting that the approval in *Pulley v. Harris* of the Texas system in *Jurek* had made it clear that comparative proportionality review was little more than an extra.[81] Language, similarly supportive of comparative proportionality review used in *Zant v. Stephens*, decided the year before *Pulley*, was likewise revisited.[82]

As would be expected, in reaction to the Supreme Court's retreat from its praise for comparative proportionality review, many states either repealed or discontinued appellate proportionality review.

Many of those with state statutes requiring appellate proportionality review, like Georgia's, repealed those statutes and abolished the require-

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77. *Id.* at 206. Florida courts had "in effect adopted the type of proportionality review mandated by the Georgia statute." Proffitt v. Florida, 428 U.S. 242, 259 (1976) (Stewart, Powell, and Stevens, JJ.). Texas provided "review . . . in a court with statewide jurisdiction, [as] a means to promote the even-handed, rational, and consistent imposition of death sentences under law." Jurek v. Texas, 428 U.S. 262, 276 (1976) (Stewart, Powell, and Stevens, JJ.).

78. *See* Pulley v. Harris, 465 U.S. 37, 45 (1984).

79. *Id.* at 42-44.

80. *Id.* at 42-43. An examination of the gravity of the offense, the severity of the penalty, and the sentencing practices in other jurisdictions must be probed. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957 (1991) (plurality opinion); Solem v. Helm, 463 U.S. 277 (1983); Enmund v. Florida, 458 U.S. 782 (1982); Rummel v. Estelle, 445 U.S. 263 (1980); Weems v. United States, 217 U.S. 349 (1910).

81. *See Harris*, 465 U.S. at 45.

82. Zant v. Stephens, 462 U.S. 862, 890 (1983).

> Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality. . . . As we noted in *Gregg*, we have also been assured that a death sentence will be vacated if it is excessive or substantially disproportionate to the penalties that have been imposed under similar circumstances.

Id. (footnote and citations omitted).

ment.[83] When the state legislatures did not act, state courts did, demonstrating an awareness in their superficial reviews that comparative proportionality claims were no longer viable federal issues.[84] Similarly, most states in which court decisions had mandated appellate proportionality review, courts discarded the requirement.[85]

So yet another leg of the Supreme Court's table of safeguards against arbitrary and capricious death sentences was removed. State courts are no longer required to compare death sentences to assure that an aberrant jury has not sentenced an inappropriate individual to death. Just as with the other safeguards noted in the post-*Furman* opinions, comparative proportionality review retains no vitality in efforts to assure a fair capital punishment system.

2. *Discrimination*

One repeated concern of the *Furman* majority was that the death penalty as administered discriminated on the basis of race.[86] Justice Douglas, for example, criticized the statutes as "pregnant with discrimination."[87] A capital punishment system that selected only those who were disadvantaged—poor, illiterate, underprivileged, or members of a minority—was simply inconsistent with equal protection.[88]

Implicit, if not explicit, in the Supreme Court's approval of the post-*Furman* death statutes, was the expectation that the new statutes—complete with their narrowing requirements, meaningful appellate review, and guided discretion for the sentencer—contained safeguards against racial discrimination. After the Court's approval of the Georgia, Florida, and Texas statutes, lower courts took the position that racial claims had been foreclosed by the Supreme Court's pronouncements that the new laws were "fair."[89]

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83. At least six states have repealed their provisions. 1995 Conn. Pub. Acts 95-16; IDAHO CODE §19-2827(c) (Michie 2000) (by court decision in *State v. Sivak*, 901 P.2d 494, 500 (Idaho 1995)); NEV. REV. STAT. § 177.055(2)(d) (Michie 1997) (by court decision in *Guy v. State*, 839 P.2d 578 (Nev. 1992)); OKLA. STAT. tit. 21, § 701.13(c) (Supp. 2001) (by court decision in *Berget v. State*, 824 P.2d 364 (Ok. Crim. App. 1991); PA. STAT. ANN. tit. 42, § 9711(h)(3)(iii) (West 2000); WYO. STAT. ANN. § 6-2-103(d)(iii) (Michie Supp. 1991).

84. *See, e.g.*, People v. Davis, 794 P.2d 159, 173-74 (Colo. 1990); Jackson v. State, 684 A.2d 745, 754 (Del. 1996); State v. Wacaser, 794 S.W.2d 190, 196 (Mo. 1992).

85. *E.g.*, Williams v. State, 902 S.W.2d 767, 772 (Ark. 1995); State v. Salazar, 844 P.2d 566, 578, 583 (Ariz. 1992).

86. Furman v. Georgia, 408 U.S. 238, 244-45, 249 (1972) (Douglas, J., concurring).

87. *Id.* at 257 (Douglas, J., concurring).

88. *See id.* at 363-64 (Marshall, J., concurring). Justice Marshall was particularly convinced by the statistics before the Court. He concluded that "there is evidence of racial discrimination." *Id.* at 364. *See also* McCleskey v. Kemp, 481 U.S. 279 (1987) (holding that racial discrimination in capital cases must be purposeful to be unconstitutional); Gregg v. Georgia, 428 U.S. 153 (1976).

89. *See* Spenkelink v. State, 350 So.2d 85, 85 (Fla. 1977) (per curiam) (noting that issues raised on post-conviction by Spenkelink regarding racial discrimination in the execution of the death penalty were resolved by the Supreme Court of the United States in *Proffit v. Florida*).

Social scientists and criminologists were not as impressed with the "if we say it's fair, it's fair" rhetoric. Less than a year after the first involuntary execution after *Furman*,[90] criminologists at Northeastern University announced the results of a study of the death sentences in Florida, Georgia, and Texas.[91] Their conclusions challenged the Supreme Court's *ipse dixit* reasoning.

Black defendants whose victims were white, the study found, were four to six times more likely to face execution than white defendants.[92] Moreover, both black and white defendants were more likely to be executed when the victim was white.[93] Thus the research was "consistent with a single underlying racial tenet: that white lives are worth more than black lives. From this tenet it follows that death as punishment is more appropriate for the killers of whites than for the killers of blacks and more appropriate for black killers than for white killers."[94] This evidence stood in "direct challenge to the [finding of] constitutionality of the post-*Furman* capital statutes."[95]

A much more comprehensive study, conducted by David Baldus, examined more than one thousand Georgia murder cases using more than two hundred variables ascertained from court records.[96] Its conclusions were the same—black defendants who kill white victims are substantially more likely than any other defendants to receive a death sentence.[97]

When capital defendants attempted to raise the issue of racial discrimination, the courts, including the Supreme Court,[98] relied upon the endorse-

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90. John Spenkelink was executed by the state of Florida on May 29, 1979, the first involuntary execution in the United States in twelve years. Dudley Clendinen, *The Long Search for a Civilized Way to Kill*, N.Y. TIMES, Nov. 7, 1999, Sec. 4, at 14.

91. The first study conducted at Northeastern, the Bowers-Pierce study, was astonishing in some respects. For example, it found that black defendants in Florida were thirty-seven times more likely to be put to death if the victim was white than if the victim was also black; in Texas, the ratio was eighty-four to one. William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post-*Furman *Capital Statutes*, CRIME & DELINQ. 563, 594 tbl.2 (Oct. 1980). When the class of capital offenses studied was limited to felony murders, the study suggested that both the race of the defendant and the race of the victim produced significant disparities. *Id.* at 563-635; *see also* William J. Bowers, *The Pervasiveness of Arbitrariness and Discrimination under post-*Furman *Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067 (Fall 1983).

92. Bowers & Pierce, *supra* note 91, at 596.

93. *Id.*

94. *Id.* at 601.

95. *Id.*

96. David C. Baldus et al., *Law and Statistics in Conflict: Reflections on* McClesky v. Kemp, *in* RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 133, 133-35 (1994). The Baldus studies began with 2,484 Georgia murder cases. These cases resulted in either a murder or voluntary manslaughter convictions. *Id.* Of that number, 1,620 were death-eligible. From those, the study drew a sample of 1,050 all of which advanced to a sentencing hearing. *Id.* For each case, information was collected involving over 200 variables. *Id.*; *see generally* DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990).

97. McCleskey v. Kemp, 481 U.S. 279, 287 (1987).

98. *See id.* at 313.

ment of the post-*Furman* statutes as an implicit finding of the absence of discrimination unless some specific, intentional act of discrimination was established.[99] Is this reliance justified? Have the post-*Furman* statutes eradicated racial discrimination in the imposition of capital punishment in America?

Most of those knowledgeable about the present state of capital punishment would answer those questions with a resounding "no!" If ugly examples[100] of blatant racism are easy to locate, statistical support that the capital punishment system is rife with racial discrimination is plentiful. A 1990 review by the United States General Accounting Office (GAO) of the relevant studies currently in existence found "a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty" regardless of who did the study or where and how the study was conducted.[101] Just as was the case in the early Northeastern and Baldus studies, the GAO concluded that the race of the victim had a "strong . . . influence" on capital case processing, while the "race of offender influence is not as clear cut and varies across a number of dimensions."[102]

Since the High Court has virtually eliminated any possibility of courts remedying this racial disparity,[103] Congress has been called upon to act. In

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99. In the Fifth Circuit for example, the court found no merit to a discrimination claim raised by John Spenkelink, holding that "if a state follows a properly drawn statute in imposing the death penalty, then the arbitrariness and capriciousness—and therefore the racial discrimination—condemned in *Furman* have been conclusively removed." Spinkellink [sic] v. Wainwright, 578 F.2d 582, 613-14 (5th Cir. 1978) (footnote omitted), *relied on in* Smith v. Balkcom, 660 F.2d 573, 585 (5th Cir. 1981) ("[I]n the absence of proof of 'some specific act or acts evidencing intentional or purposeful . . . discrimination' [on the basis of race], a petitioner is not entitled to relief. . . .").

100. Testimony in the case of Clarence Brandley, a black man convicted of murdering a white girl in Texas, included that of a police officer who said: "One of you two is gonna hang for this . . . . Since you're the nigger, you're elected." NICK DAVIES, WHITE LIES: RAPE, MURDER, AND JUSTICE TEXAS STYLE 23 (1991). After spending nearly ten years on death row, Brandley was exonerated. *Id.* at 399.

In Philadelphia, a former assistant District Attorney produced a training tape for prosecutors to assist them in hiding their racial motivation for striking jurors. Michael Janofsky, *Under Siege, Philadelphia's Criminal Justice System Suffers Another Blow*, N.Y. TIMES, Apr. 10, 1997, at A14.

101. *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities*, *in* THE DEATH PENALTY IN AMERICA, *supra* note 14, at 268, 268-72. The GAO examined twenty-eight studies pertaining to death penalty practices in nine states. "In eighty-two 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." *Id.* at 271.

102. *Id.* at 272.

103. Justice Powell, who authored *McCleskey*, told his biographer that he would change his vote in *McCleskey* (and all capital cases) if he could. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451 (1994). Justice Blackmun ultimately reversed his thinking on the death penalty as well. Callins v. Collins, 510 U.S. 1141,1145, 1153 (1994) (Blackmun, J., dissenting from denial of certiorari) ("From this day forward, I no longer shall tinker with the machinery of death. . . . Even under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die.").

1990 and 1994, the House of Representatives passed the Racial Justice Act, a law intended to eradicate racial discrimination across the nation, but the Act failed to receive Senate approval.[104] Few positive efforts have been made since to address the serious problem of racial disparities in the administration of capital punishment.

III. CONCLUSION

Despite what Mr. Tabak applauds as emerging public awareness of various problems with the death penalty in America, he correctly recognizes that today, almost forty years after the Court undertook to mend the capital punishment system, "[t]he people being put to death . . . are not the products of a capital punishment system purged of arbitrariness, discrimination, error-proneness, and unfairness. To the contrary, they include people [who were] sentenced to death as a result of racial prejudice, or arbitrariness and capriciousness."[105]

Perhaps, however, his prediction that innocence-prompted moratoria could lead to "serious consideration of whether the death penalty can serve any useful purpose" is not overly optimistic.[106] Perhaps the Innocence Protection Act will pass; perhaps more states will pay for DNA testing, raise fees for court-appointed counsel, or provide resources for investigation and expert assistance. Yet, while these and other remedial measures may spare a few innocent people from wrongful death at the hands of the state, can these measures fulfill *Furman*'s promise of a fair, nondiscriminatory and nonarbitrary capital punishment system?

This Response has demonstrated that the promise has been broken. The procedural safeguards once believed to be essential to achieving the fair and consistent application of the death penalty have been abandoned one by one. If indeed it remains America's promise that the death penalty will be imposed fairly and evenhandedly, then the real question is not whether we are willing to bandage an aching system to avoid the inconceivable, that is, the execution of another innocent person.[107] Rather, the real question is whether we are willing to invest in difficult, and sometimes costly, solutions aimed at providing a fair, nonarbitrary, and nondiscriminatory capital punishment system. If we are not, then we must accept Justice Blackmun's conclusion that America's experiment with the death penalty "has failed."[108]

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104. Daniel E. Lungren & Mark L. Krotoski, Symposium, *Violent Crime Control and Law Enforcement Act of 1994: The Racial Justice Act of 1994—Undermining Enforcement of the Death Penalty Without Promoting Racial Justice*, 20 DAYTON L. REV. 655, 656-57 (1995); Racial Justice Act of 1990, H.R. 4618 101st Cong., 2d Sess. (1990); Racial Justice Act of 1994, H.R. 4092 103d Cong., 2d Sess. Title IX (1994).

105. Tabak, *supra* note 1, at 755.

106. *Id.* at 763.

107. *See generally* MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE (1992).

alty "has failed."[108]

While a comprehensive discussion of potential solutions is beyond the scope of this Response, obvious answers cry out for inclusion.[109] State courts must give real meaning to the requirement of narrowing. Every legislative act that broadens the category of those eligible for the ultimate punishment should be measured against the original notion and purposes of narrowing. Vague aggravating circumstances that defy consistent application should be repealed.

As Justice Stevens has often noted, the risk of arbitrary imposition of the death penalty is "significantly decreased, if not eradicated" when states "narrow the class of death-eligible defendants."[110] By requiring genuine narrowing both in the definition of capital murder and in the specification of aggravating circumstances, and by allowing a jury discretion to return a life sentence even for a death-eligible defendant, arbitrariness could be diminished. Further, narrowing the class of death-eligible defendants to those cases in which "prosecutors consistently seek, and juries consistently impose, the death penalty" would dramatically decrease the likelihood of arbitrariness.[111]

Just as proper narrowing would help eradicate arbitrariness, so would it lessen the chance of a racially discriminatory death sentence. The categories of cases in which prosecutors consistently seek[112] and juries consistently return death sentences without consideration of the race of either the victim or the defendant, are identifiable. Narrowing those categories of death-eligible defendants to defendants in that class would minimize the chances of a racially motivated death sentence.[113]

Another ally in the battle against arbitrary and discriminatory death sentences would be the rewriting and clarification of jury instructions in capital cases. Rather than run from the research that verifies the miserable comprehension level of capital juries, courts should solicit help in formulating understandable instructions. When jurors ask questions that demonstrate their confusion, judges, after receiving input from counsel for both sides, should attempt to eliminate the confusion by supplying jurors with the answers. While the questions may sometimes be impertinent, when they are not, as when a jury asks simply whether a state law provides for parole, the judge should respond.

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108. McCollum v. North Carolina, 512 U.S. 1254, 1256 (1994) (Blackmun, J., dissenting from denial of certiorari).

109. No attempt is made to argue that these suggestions are constitutional requirements; rather they are offered as potential means to eliminate the existence of an arbitrary, racially discriminatory death penalty system which, by definition, would violate the Eighth Amendment.

110. *See* Walton v. Arizona, 497 U.S. 639, 716 (Stevens, J., dissenting).

111. *Id.* As Stevens notes, these cases have been identified by social science research. *Id.*

112. Beyond the scope of this Article is the very real problem of the unfettered discretion of the prosecutor in determining when to seek the death penalty.

113. *Walton*, 497 U.S. at 716.

As quickly as courts and legislatures dispatched with comparative proportionality review, they could restore it. State legislators and state appellate courts are uniquely positioned to help eliminate the arbitrariness and discrimination which still invades our capital punishment system. Because neither narrowing the crimes for which death is an available sentence, nor carefully instructing a jury can guard against an inflamed jury or an overly zealous prosecutor, legitimate appellate proportionality review must be reinstated as an additional safeguard against the imposition of aberrant and arbitrary death sentences. Only appellate judges who have reviewed countless death penalty cases can determine whether a death sentence is inconsistent with the punishment usually imposed in a similar case.

It is ultimately the courts' responsibility to assure that the death penalty is administered fairly. Respect for the justice system flows from the existence of a fair, indiscriminate system, not an unfair and selective one. To this end, the Model Code of Judicial Conduct provides that "judges . . . must . . . strive to enhance and maintain confidence in our legal system."[114] But legislators, too, must act if the American system of capital punishment is ultimately going to be defensible. Perhaps not tomorrow, but ultimately, the American public will demand to know why its leaders have perpetuated a system that is unfair in determining who the state will kill in their name.

114. ABA MODEL CODE OF JUDICIAL CONDUCT 1 (2000 ed.) (Preamble).