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“DEATH IS DIFFERENT” AND OTHER TWISTS OF FATE

DEBORAH W. DENNO*

THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE
MODERN SYSTEM OF CAPITAL PUNISHMENT. By *Welsh S. White*.
University of Michigan Press 1991. Pp. 223.

I. INTRODUCTION

Professor Welsh White's book, *The Death Penalty in the Nineties*, reviews those United States Supreme Court decisions and developments that have occurred in the four years since the publication of his earlier book, *The Death Penalty in the Eighties*.¹ In *The Nineties*, White claims that these recent developments, which have significantly limited capital defendants' habeas corpus appeals, are likely to increase both the rate and the geographical reach of executions which, in the past, have occurred mostly in the South.²

The Nineties' first two chapters are new: a discussion of the Supreme Court's recent death penalty cases (chapter one), and a description of the criminal justice system's application of the death penalty and noted miscarriages of justice (chapter two). The remaining chapters in *The Nineties*, however, simply repeat the same text presented in *The Eighties* apart from a one and one-half page

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¹ WELSH S. WHITE, *THE DEATH PENALTY IN THE EIGHTIES* (1987).

² WELSH S. WHITE, *THE DEATH PENALTY IN THE NINETIES 2* (1991). Currently, there are about 2,500 prisoners on death row. Mark Hansen, *Final Justice: Limiting Death Row Appeals*, 78 A.B.A. J. Mar. 1992, at 64. Annual data compiled on persons held on death row show that 25.3% of all death row cases reported from 1977 through 1990 are reversed on appeal. The reversal rate is 32% for persons sentenced to death from 1979 through 1984 (after reversals attributed to defects in a state's death penalty statutes, and providing time for federal appeals). More than half (56.6%) of this group remain under a death sentence whereas, of the remainder, 5.4% have been executed, 4.4% have died from other causes and 1.6% have had their sentences commuted. John B. Arango, *Status of Persons Sentenced to Death*, 7 CRIM. JUST., Spring 1992, at 44 (citing BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, CAPITAL PUNISHMENT 1990 (1992)).

update concluding the segment on discrimination (chapter seven).³

Whether or not this "selected updating" is disappointing depends upon the reader's purpose. Even the "older" (1987) chapters provide a practical perspective on how the death penalty system operates, covering such topics as plea bargaining (chapter three); the penalty phase of the capital trial (chapter four); the defendant's rights at the penalty trial (chapter five); the legal and psychological issues pertaining to when prosecutors present particular types of closing arguments at the penalty trial (chapter six); racial discrimination in capital sentencing (chapter seven); cases where defendants want to be executed (chapter eight); and cases dealing with the government's use of death-qualified juries (chapter nine).

In *The Nineties*, White sets out to examine the modern system of capital punishment objectively, allowing his readers to decide for themselves if the system is fair. To his credit, White admits that he personally believes that the system is unfair and acknowledges that his view "may sometimes color" his presentation.⁴ But White's own views are ultimately so pervasive in *The Nineties* that his quest for objectivity fails.⁵ What White hoped to be measured, detached and objective instead is merely bland.⁶

White's pretense of objectivity also confines his scope. By striving, however unsuccessfully, to simply "convey information" to his

³ The updated chapter seven (chapter six in *The Eighties*) discusses McCleskey v. Kemp, 481 U.S. 279 (1987), which had not yet been decided at the time *The Eighties* was published. See *infra* notes 19-27 and accompanying text.

⁴ WHITE, *supra* note 2, at 3.

⁵ Others have commented on White's lack of objectivity. In her review of *THE EIGHTIES*, Vivian Berger notes, for example, that White's statement of purpose is "slightly misleading in its neutrality. Professor White clearly intends not merely to convey information to the reader." Vivian Berger, *Born-Again Death*, 87 COLUM. L. REV. 1301, 1302 (1987) (book review). Similarly, Victor Streib states that in *THE NINETIES*, White "cannot be seen as 'reasonably objective' or as just providing raw data and information for which the reader is to provide the analysis and conclusions . . . Moreover, the tone and style suggest that the favored audience is the capital defense bar." Victor Streib, Book Review, 53 U. PITT. L. REV. 251, 254 (1991).

⁶ On this issue, this review of *THE NINETIES* appears to differ from other reviews of both *THE EIGHTIES* and *THE NINETIES*. For example, Berger credits White with having garnered "his evidence in detailed and convincing fashion, shedding light on topics too often productive merely of heat." Berger, *supra* note 5, at 1302; see also Ernest van den Haag, Book Review, 49 U. PITT. L. REV. 607 (1988) (commenting that *THE EIGHTIES* is "informative, careful and reasonably unemotional"). Likewise, in suggesting that *THE NINETIES* must be read as "a lawyer's brief against the death penalty" because of the book's lack of neutrality, Streib credits White with an approach that is "neither unusual nor overly strident. In fact, it is perhaps even more effective by employing a subtle nudging rather than loud, table-pounding near hysteria." Streib, *supra* note 5, at 254. Unfortunately, these reviewers equate lack of emotion with reasonableness. Granted, White is not "hysterical." However, White's bias in presenting material can both elude potential compatriots and repel those familiar with both sides of the argument.

readers, White avoids the raging philosophical and historical debates surrounding the death penalty.⁷ If White had considered these debates and analyzed his subject more thoughtfully, perhaps he would have written a more satisfying account of recent death penalty jurisprudence. As this review notes, he may also have been more "objective."

Others have reviewed both *The Eighties*⁸ and *The Nineties*.⁹ After discussing some of the analytical and methodological shortcomings of *The Nineties*, this review will focus on *The Nineties*' most frustrating missed opportunity: its failure to develop the far-reaching implications of the principle that death is different from all other punishments.¹⁰

The Court first gave precedential force to the "death is different" doctrine in *Furman v. Georgia*,¹¹ in which each justice wrote his

⁷ Berger, *supra* note 5, at 1301; *see also* David C. Baldus et al., *Reflections on "Modern" Death Sentencing Systems*, 1 CRIM L.F. 185, 193 (1989) (book review) (noting that THE EIGHTIES "touches only briefly on the philosophical justifications of the abolitionist and retentionist perspectives"). Berger emphasizes the disadvantages of White's pretense at simply "conveying information." Apart from his analysis of the major decisions on the death qualified jury, "most of [White's] discussions of appellate opinions are confined to imparting information and serve as text or illustration without generating deep insights." Berger, *supra* note 5, at 1305.

⁸ Reviews of THE EIGHTIES include: Baldus et al., *supra* note 7, at 193 (1989); Berger, *supra* note 5, at 1301; Steven G. Gey, *Death is Different: Or, How We Stopped Worrying and Learned to Love the Chair*, 41 RUTGERS L. REV. 451 (1988) (book review); Ernest van den Haag, *supra* note 6.

⁹ Reviews of THE NINETIES include: Thomas L. Shaevsky, Book Review, 90 MICH. L. REV. 1689 (1992); Strieb, *supra* note 5; Mark V. Tushnet, *The Politics of Executing the Innocent: The Death Penalty in the Next Century?* 53 U. PITT. L. REV. 261 (1991) (book review).

¹⁰ *See generally* Daniel Ross Harris, *Capital Sentencing After Walton v. Arizona: A Retreat From the "Death is Different" Doctrine*, 40 AM. U.L. REV. 1389, 1389-92 (1991). Other reviewers have chosen to focus on other aspects of White's work. According to Berger, for example, White's purpose in THE EIGHTIES is not simply to provide information as White states, but to "prove his overriding thesis - that the death penalty is still arbitrary." Berger, *supra* note 5, at 1302 (footnotes omitted). Likewise, Gey notes that THE EIGHTIES overviews the Court's "hesitant and often inconsistent" death penalty jurisprudence. Gey, *supra* note 8, at 451. Shaevsky's review of *The Nineties* reaches a similar conclusion. Shaevsky, *supra* note 9, at 1689.

Streib's review of THE NINETIES takes a different tack. He claims that "White reveals most starkly a largely unacknowledged premise of the book. That premise is continually to look to the federal courts, particularly to the United States Supreme Court, as the sole source for pro-defense controls on prosecutive excesses, here for stringent limitations on capital cases." Streib, *supra* note 5, at 254. For this reason, Streib suggests that White's subtitle for THE NINETIES should be, "Decline and Fall of Supreme Court Protectionism over Capital Defendants." *Id.* at 255. Tushnet reviews THE NINETIES by creating his own theme: explaining the reasons why at some point during this decade, an innocent person will be executed, and what the implications will be. Tushnet, *supra* note 9, at 261.

¹¹ *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

own separate opinion.¹² Although it is not clear if there is an actual *Furman* "holding,"¹³ the case established that all existing death penalty statutes were unconstitutional under the Eighth Amendment's "cruel and unusual" punishment clause because of arbitrary and inconsistent applications.¹⁴ The Court also set forth the "death is different" principle emphasizing that, relative to other punishments, death was "an unusually severe punishment, unusual in its pain, in its finality, and in its enormity."¹⁵

The "death is different" principle has provided the foundation for the Court's creation of two requirements to monitor the constitutionally valid application of the death penalty. The first requirement, presented in *Furman*, stated that a capital sentence must not result from unguided discretion;¹⁶ the second requirement, presented after *Furman*, mandated a consideration of all relevant mitigating evidence, such as the defendant's character, record or other circumstances of the offense, to enable individualized sentencing.¹⁷ Together, these two requirements established death as a punishment necessitating additional safeguards to prevent the cruel or unusual application of the death penalty.¹⁸

More recently, however, the Court has twisted the purpose of "death is different" to such an extent that the doctrine now represents the ultimate irony: Death as a unique form of punishment

¹² Five justices filed separate supporting opinions, in which two positions can be identified. Justices Marshall and Brennan contended that any method of capital punishment violated the Eighth and Fourteenth Amendments. See, e.g., *id.* at 364-66 (Marshall, J., concurring); *id.* at 293 (Brennan, J., concurring). Rejecting this *per se* position, Justices Douglas, White and Stewart stated that existing capital punishment statutes were deficient in their form. *Id.* at 240-57 (Douglas, J., concurring); *id.* at 306-10 (Stewart, J., concurring); *id.* at 310-14 (White, J., concurring). They claimed that the statutes allowed decisionmakers to have unbridled discretion that resulted in "wanton" or "freakish" capital sentencing patterns. *Id.* at 309-10 (Stewart, J., concurring); *id.* at 313-14 (White, J., concurring). Justices Burger, Blackmun, Powell and Rehnquist filed separate dissenting opinions.

¹³ Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 314-15 (1984).

¹⁴ See, e.g., *Furman*, 408 U.S. at 428-29 (Douglas, J., concurring).

¹⁵ *Id.* at 287-89 (Brennan, J., concurring). As Justice Stewart further explained: The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Id. at 306 (Stewart, J., concurring).

¹⁶ *Id.* at 256-57 (Douglas, J., concurring); *id.* at 274-97 (Brennan, J., concurring).

¹⁷ *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978) (plurality opinion).

¹⁸ *Harris*, *supra* note 10, at 1391-92; see also *California v. Ramos*, 463 U.S. 992, 998 (1983) (recognizing that the "qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination").

often triggers fewer safeguards in certain circumstances relative to lesser forms of punishment. White recognizes this distortion in *The Nineties*, but does so haltingly, without acknowledging its broad significance. This review intends to explore the profound consequences of the twisted "death is different" doctrine more completely than White did, discussing the judicial evolution of the doctrine, its applicability throughout the capital litigation process, and then proportionality review and the Supreme Court's limitation of death penalty appeals since the publication of *The Nineties*. First, however, this review notes some of the book's organizational and analytical difficulties.

II. THE PROBLEM WITH *THE NINETIES*

The Nineties' presentation of recent death penalty jurisprudence is uneven and analytically problematic. For example, White oddly devotes only one and one-half pages to *McCleskey v. Kemp*,¹⁹ one of the Court's most significant decisions in the history of death penalty jurisprudence.²⁰

In *McCleskey*, the Court affirmed by a 5-4 vote the Eleventh Circuit's rejection of McCleskey's Eighth and Fourteenth Amendment claims of racial discrimination and arbitrariness. The Court held that the statistical evidence of racial discrimination presented by David Baldus and his colleagues did not support McCleskey's equal protection challenge to the capital sentencing system because neither Baldus' statistical evidence nor the other nonstatistical proof that McCleskey offered was sufficient to show that any of the decisionmakers in McCleskey's particular case had acted with a discriminatory purpose.²¹ The Court explained that, "[a]t most, the Baldus study indicates a discrepancy that appears to correlate with race,"²² a finding that the Court considered relatively untroubling because "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system."²³ Moreover, Baldus' statistics did not compare to the other methods the Court has accepted for showing classwide claims of purposeful discrimination, such as those used in

¹⁹ 481 U.S. 279 (1987).

²⁰ See, e.g., Hansen, *supra* note 2, at 64. At the time *THE EIGHTIES* went to press, the Court had not yet decided *McCleskey* and White's analysis necessarily relied entirely on the Eleventh Circuit's opinion. See *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985), *aff'd* 481 U.S. 279 (1987).

²¹ *McCleskey*, 481 U.S. at 291-98; see also DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY* 345-69 (1990).

²² *McCleskey*, 481 U.S. at 312.

²³ *Id.* (footnote omitted).

jury selection and Title VII cases.²⁴

Victor Streib's comments summarize well White's failure to consider adequately the Court's analysis:

The other obvious addition incorporated in this book is the one and one-half page update on the Supreme Court's decision in *McCleskey v. Kemp*. While certainly serviceable and accurate, the reader may find this update as too disjointedly tacked on to the original chapter. As it now stands, White gives far more play to the Eleventh Circuit's opinion than to that of the Supreme Court. This chapter thus appears terribly dated and thrown together, in contrast to the rest of the book which has aged quite well.²⁵

Indeed, as others have noted, the Court's majority opinion in *McCleskey* is "[by] far 'the jewel in the crown' of the Court's shoddy death penalty jurisprudence,"²⁶ yet White devotes little attention to it. White also does not consider the considerable commentary and further updates on *McCleskey* that were made soon after the decision.²⁷

Comparably significant is White's failure to correct a misattributed quotation noted in Vivian Berger's review of *The Eighties*.²⁸ Berger explained White's error:

Professor White erroneously attributes to the "researchers" the conclusion that "'on average a white victim crime is 6 percent more likely to result in the [death] sentence than a comparable black victim crime.'" In fact, the source from which he quotes, Professor Gross'

²⁴ *Id.* at 293-97. The Court cited a number of reasons for concluding why statistical analyses of capital sentencing decisions were "fundamentally different" from comparable kinds of analyses of venire-selection or Title VII cases. *Id.* at 294. First, death penalty decisions are made by a specifically selected jury, unique in composition, whose decision relies on "innumerable factors" based upon the characteristics of the defendant and the facts of the case. Such complexity is not characteristic of venire-selection or Title VII cases, which involve fewer variables and "entities." The Court stated that, therefore, an inference made from the general statistics to a specific outcome at a capital trial and sentencing could not compare with an inference made from the general statistics to a specific venire-selection or Title VII case. Moreover, in venire-selection and Title VII cases, the plaintiff has the opportunity to explain any statistical outcome suggesting possible discriminatory intent, whereas the State in a death penalty case has no such opportunity. The Court also noted the policy considerations underlying the prosecutor's reliance on "wide discretion" in decisionmaking. Lastly, because discretion is critical to the criminal justice process, the Court would require "exceptionally clear proof" before determining that discretion had been abused. *Id.* at 294-97. The Court therefore concluded that the study by Baldus and his colleagues "is clearly insufficient to support an inference that any of the decisionmakers in *McCleskey's* case acted with discriminatory purpose." *Id.* at 297.

²⁵ Streib, *supra* note 5, at 256 (footnotes omitted).

²⁶ Franklin E. Zimring & Gordon Hawkins, Book Review, 9 CONST. COMMENTARY 135, 139-40 (1992) (reviewing SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING (1989)).

²⁷ A thorough analysis can be found in BALDUS ET AL., *supra* note 21.

²⁸ WHITE, *supra* note 2, at 151.

[law review] piece,²⁹ makes clear that this quote comes from the Eleventh Circuit opinion. This is no trivial error, either, since the author unwittingly repeats the mistake of the en banc court which, by confusing the concept of percent and *percentage points*, radically understated the average race-of-victim effect. As Professor Gross remarks: "Although the court seems to have missed the point entirely, this ["'6%'"] disparity actually means that defendants in white-victim cases are several times more likely to receive death sentences than defendants in black-victim cases."³⁰

Another problem with *The Nineties* is White's overreliance on the examples and personal experiences provided by lawyer-practitioners and others he has interviewed. White tends to use this information to focus on one spectacular, yet perhaps atypical, case. While Berger considers White's approach a "unique contribution"³¹ and Baldus and his colleagues claim that White's interviews "enrich the reader's insight,"³² Streib more accurately characterizes White's interview method "as the major structural weakness" of White's book.³³ Streib does acknowledge that "real-world" examples can often be illuminating; however, he notes that White's examples are used instead as substitutes for the more sophisticated and informative, quantitative analyses of samples or universes of death penalty cases.³⁴

White's ten-page discussion of the Roosevelt Green case³⁵ as a means of illustrating a "racist system of capital punishment" provides an example of some of Streib's criticisms, although Streib does not mention the case specifically. Green, a young black man, was tried and executed for the rape and murder of a white female college student.³⁶ Much of White's description of Green's case suggests that racially discriminatory factors were highly influential in the handling of the case.³⁷ Regardless, however, this one-case approach (by itself) is a dated, speculative and simply less credible method of attempting to illustrate system-wide discrimination in light of the enormous amount of empirical research on racial disparities in the administration of the death penalty.³⁸

²⁹ Samuel R. Gross, *Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing*, 18 U.C. DAVIS L. REV. 1275 (1985).

³⁰ Berger, *supra* note 5, at 1311 n.42 (citations omitted).

³¹ *Id.* at 1306.

³² Baldus et al., *supra* note 7, at 193.

³³ Streib, *supra* note 5, at 257.

³⁴ *Id.*

³⁵ WHITE, *supra* note 2, at 139 (citing *Green v. Georgia*, 442 U.S. 95 (1979)).

³⁶ *Id.* at 139-50.

³⁷ *Id.*

³⁸ For an analysis of this empirical research, see BALDUS ET AL., *supra* note 21; Leigh B.

Moreover, White concedes this weakness by explaining that individual cases are only a "microcosm" of the statistical evidence on racial discrimination and that one case alone cannot determine if the discrimination is so pervasive it is unconstitutional.³⁹ Although White turns to a discussion of the Baldus study to settle this issue, his statistical discussion is limited and it only focuses on the Baldus study. White's general tendency to favor individual cases in lieu of statistics is unwarranted given the newer methods of examining biases and patterns in death penalty jurisprudence. A balanced approach requires a probing analysis of both individual cases and statistics.

Although it may be presumed that practitioners provide accurate accounts of their death penalty experiences, White does not demonstrate that these accounts are representative of all such experiences, or that the practitioners he has interviewed are typical of the death penalty bar. Baldus and his colleagues agree that White's study "might have been even more compelling if he had also interviewed some prosecutors,"⁴⁰ noting further that White does not explain how he selected the defense lawyers he interviewed, "a fact that certainly would have interested the empiricists in his audience."⁴¹ In this sense, then, *The Nineties* "falls into the pattern of the professor telling war stories in the classroom to illustrate a point, often an effective teaching technique but no substitute for a scholarly treatment of empirical data."⁴² Moreover, White's approach differs from the more rigorous and systematic method of journalistic reporting followed by, among others, Albert Alschuler in his different studies of plea bargaining,⁴³ as well as from large-scale studies of the death penalty that provide both quantitative and qualitative (case study) analyses of cases.⁴⁴

Perhaps because he strives for objectivity, White tries so hard to report information that he frequently misses good opportunities to analyze his material. This reluctance to analyze is probably White's

Bienen et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27, 100-58 (1988); Gross, *supra* note 29.

³⁹ WHITE, *supra* note 2, at 149-50.

⁴⁰ Baldus et al., *supra* note 7, at 194.

⁴¹ *Id.*; see also Shaevsky, *supra* note 9, at 94-96 (emphasizing White's obvious presentation of the defense side).

⁴² Streib, *supra* note 5, at 257.

⁴³ See, e.g., Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975); Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968).

⁴⁴ See, e.g., Bienen et al., *supra* note 38.

greatest drawback. White does not seem to understand that analysis may enrich his attempt to present information objectively.

For example, White fails to analyze adequately the circumstances surrounding the effect that the public's view of the death penalty may have on the Court. He explains that since 1980 the Court has altered its position on the death penalty for two reasons: changes in the Court's composition and, most significantly, the political climate as determined by public opinion polls.⁴⁵ Although in the early seventies the public was fairly evenly divided in its opinion regarding whether capital punishment should be retained or abolished (42% favored capital punishment for murder), recent polls indicate an overwhelming (80%) public response in favor of it.⁴⁶ According to White, "[a]lthough the Supreme Court is theoretically insulated from political pressures, the public's current mood has undoubtedly affected the Court's perception of capital cases."⁴⁷ He suggests that some members of the Court agree with the public's view that the capital sentencing system hinders the swift execution of defendants. White also provides examples of how individual justices, such as Justice Powell, have shifted their views toward capital punishment in line with public opinion over the past decade.⁴⁸

White, however, does not seem to question even hypothetically why the public, and thus the Court, have changed their opinions. Some commentators have suggested that the public's change in opinion came about because those individuals who had never been victims of crime directly perceived an increase in violent crime. These individuals were apt to begin supporting the death penalty as a means of self-protection.⁴⁹ Others have noted that public support for the death penalty was greater in the earlier low crime years (such as the early sixties) than it was in the higher crime years during the late sixties and early seventies.⁵⁰ Evidence indicates, however, that during the higher crime years, public opinion on crime was linked to a variety of factors, including the post-civil rights movement, Vietnam war protesting, higher per capita income, greater youth unemployment and generally increased public support for more

⁴⁵ WHITE, *supra* note 2 at 23-24.

⁴⁶ *Id.* at 24.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See ARTHUR L. STINCHCOMBE ET AL., *CRIME AND PUNISHMENT: CHANGING ATTITUDES IN AMERICA* 2 (1980).

⁵⁰ See generally Tanya Minhas, *Newspapers, Crime and the Public*, in *A DECADE OF CAPITAL PUNISHMENT IN NEW JERSEY* 73 (1992) (Policy Conference Final Report on file at the Woodrow Wilson School of Public and International Affairs, Princeton University).

politically liberal positions.⁵¹

Moreover, there is compelling evidence that public opinion could also be strongly linked to newspaper accounts of crime. Research on newspaper reporting shows that between 1972 and 1982, "media attention to crime has been increasing."⁵² One theory suggests a linear relationship between crime, media attention to crime, fear of crime and the desire to punish. The higher the personal fear of crime (which is not necessarily linked to the actual level of crime), the greater the perception that others are being victimized. Both the fear of crime and the perception of victimization contribute to an increased desire to punish.⁵³ Given that in another study 95% of those questioned cited the media as their primary source about the level of crime,⁵⁴ and that newspapers provide an exaggerated impression of the frequency of most kinds of violent crime,⁵⁵ it can be suggested that media attention to violence contributed to changing public opinion on the death penalty.

There are also other influences on public opinion. Gallup Poll data show, for example, that the level of support for the death penalty differs considerably according to the options presented on polling questionnaires. Overall public support for the death penalty would drop from 76% to 53% if life imprisonment, with no possibility of parole, was a certain penalty for convicted murderers.⁵⁶ Moreover, public support for the death penalty drops to 43% when the possibility of life imprisonment without parole remains an option and new evidence is provided to demonstrate that the death penalty does not act as a deterrent to murder.⁵⁷

White, then, simply describes the Court's post-1980 shift. But although he mentions the results of public opinion polls on capital punishment, White fails to go further and ask why public opinion might have changed. If he had included additional evidence and a more searching analysis, perhaps he would have given his readers a sharper picture of why the Court began to cut back its protections for death penalty defendants in the eighties. This sharper picture would not have made White's presentation any less objective.

⁵¹ STINCHCOMBE ET AL., *supra* note 49, at 2-3.

⁵² *Id.* at 10; *see also* Minhas, *supra* note 50, at 113-23 (providing confirming evidence).

⁵³ STINCHCOMBE ET. AL., *supra* note 49, at 10-11.

⁵⁴ DORIS GRABER, *CRIME NEWS AND THE PUBLIC* 27-29 (1980).

⁵⁵ *Id.* at 42-51.

⁵⁶ Derrick Milam, *Capital Punishment and Perception: Public Opinion and Its Influence*, in *A DECADE OF CAPITAL PUNISHMENT IN NEW JERSEY* 109, 111 (1992) (Policy Conference Final Report on file at the Woodrow Wilson School of Public and International Affairs, Princeton University) (quoting GALLUP POLL 1991 at 1).

⁵⁷ *Id.* at 114.

Rather, it would have given his readers a more complete understanding of the current system, better allowing them to make up their own minds about it.

III. THE SUPREME COURT'S REVERSAL OF "DEATH IS DIFFERENT"

While White's reporting may often be uneven and analytically unsatisfying, his account of the Supreme Court's new, twisted "death is different" doctrine is thought-provoking. This review will consider some of White's good, if sketchy observations on the doctrine, and supplement these observations with additional historical background. It will also suggest that the doctrine has broad consequences that White did not address.

As White notes, prior to 1968 the Supreme Court was uninvolved in the administration of capital cases because the death penalty's constitutionality was "simply assumed," based upon long and widely accepted use.⁵⁸ After 1968, however, the Court decided several challenges to the then-existing system which culminated in *Furman's* declaration in 1972 that the existing system of capital punishment was unconstitutionally discretionary.⁵⁹ Four years later in *Gregg v. Georgia*,⁶⁰ however, the Court clarified that the death penalty was not automatically unconstitutional, only that it could not be applied in an "arbitrary and capricious manner."⁶¹

As characterized by White, the Court's subsequent fourteen years of deciding death penalty cases comprises two parts: (1) 1976-1983, when the Court delineated various procedural protections to be provided capital defendants, and (2) 1983 to the present, when the Court increased procedures to expedite executions.⁶² In attempting to account for the Court's changes over time, White frequently pinpoints the Court's origins and evolving treatment of the "death is different" standard.

Between 1976 and 1981, for example, the Court decided a series of cases that established safeguards for capital defendants and that appeared to derive from the Court's recognition that "the death penalty determination is different in kind from any other sentencing

⁵⁸ WHITE, *supra* note 2, at 4; *see, e.g.*, *Trop v. Dulles*, 356 U.S. 86, 99 (1958) (noting the historical use and acceptance of the death penalty); *see also* *In re Kemmler*, 136 U.S. 436, 446-49 (1890) (upholding the constitutionality of a New York statute stating that execution by electricity was constitutional).

⁵⁹ *See supra* notes 11-16 and accompanying text.

⁶⁰ 428 U.S. 153 (1976).

⁶¹ *Id.* at 188.

⁶² WHITE, *supra* note 2, at 5.

decision.”⁶³ Among other things, the Court established that: (1) the sentencer, except in the most unusual cases, may consider any aspect of the defendant’s character, record or the circumstances of the offense as a mitigating factor in deciding whether death should be imposed;⁶⁴ (2) an aggravating circumstance cannot be so broadly worded that it does not adequately restrain or direct the jury’s use of discretion;⁶⁵ and (3) the trial judge cannot be prohibited from instructing a capital jury on any lesser included offenses.⁶⁶

White notes, however, that the Court’s attitude toward capital safeguards began to shift in 1982 and 1983. In each of four cases in 1983⁶⁷ the Court upheld the death penalty, emphasizing that the penalty can be enforced despite imperfections in the deliberative process.⁶⁸ Most significantly, however, in these cases “the Court placed a bizarre twist on the meaning of its oft-repeated statement that death is different. It indicated that the fact that death is different from other sanctions may cause a capital defendant to lose rights rather than gain additional protections.”⁶⁹

This twist is perhaps best exemplified by *Barefoot v. Estelle*,⁷⁰ where the Court upheld the Fifth Circuit’s unprecedented expedited appeal procedure for a capital defendant and where the Court’s “death is different” rationale was a radical reversal from its previous interpretation of the “death is different” doctrine. As the Court explained, death penalty cases were different from other cases because “unlike a term of years, a death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding.”⁷¹ Thus, the Court encouraged the federal courts to develop procedures to expedite capital appeals in order to satisfy the states’

⁶³ *Id.* at 8; see *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (expressing the Court’s reasoning at this time):

From the point of view of the defendant, it [death] is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

See also *Harris*, *supra* note 10 (detailing the evolution of the Court’s original “death is different” doctrine).

⁶⁴ *Lockett v. Ohio*, 438 U.S. 586 (1978).

⁶⁵ *Godfrey v. Georgia*, 446 U.S. 420 (1980), *cert. denied*, 456 U.S. 919 (1982).

⁶⁶ *Beck v. Alabama*, 447 U.S. 625 (1980).

⁶⁷ *Zant v. Stephens*, 462 U.S. 862 (1983); *Barefoot v. Estelle*, 463 U.S. 880 (1983); *Barclay v. Florida*, 463 U.S. 939 (1983); *California v. Ramos*, 463 U.S. 992 (1983).

⁶⁸ WHITE, *supra* note 2, at 9.

⁶⁹ *Id.*

⁷⁰ 463 U.S. 880 (1983).

⁷¹ *Id.* at 888.

interests in obtaining rapid executions.⁷² Ironically, however, this aspect of the Court's decision left capital defendants procedurally more vulnerable than defendants accused of even the most minor crimes.⁷³

But there are other aspects of *Barefoot* exemplifying the "death is different" twist that White fails to mention, perhaps because they involve empirical issues concerning a psychiatrist's ability to predict behavior with which White appears to be unfamiliar. In a number of states, including Texas, where Thomas Barefoot was convicted of the capital murder of a police officer, the death penalty statutes require that the execution of first-degree murderers depends upon the jury's making a factual finding that the defendant is likely to repeat the violent acts that he or she committed.⁷⁴ In *Barefoot*, the jury affirmatively answered two questions required to impose the Texas death penalty statute: (1) whether the defendant's conduct was "committed deliberately and with reasonable expectation that the death of the deceased or another would result;" and (2) whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."⁷⁵

The *Barefoot* Court allowed the use of psychiatric testimony to determine the issue of the defendant's future dangerousness despite the position presented in the *amicus* brief of the American Psychiatric Association that such evidence was highly unreliable because, in its estimate, "two out of three predictions of long-term future violence made by psychiatrists are wrong."⁷⁶ Despite the Court's ac-

⁷² As Tabak notes, the *Barefoot* Court assumed that a death row inmate's attorney requires a minimal amount of time to prepare the federal appeals brief, believing that the attorney can rely on the same brief that was submitted on the direct appeal to the state supreme court. Those attorneys who handle habeas corpus appeals in capital cases rarely repeat the same presentation made on direct appeal, however, for a number of reasons: the poor quality of many direct appeals briefs; the need to incorporate relevant criminal cases decided since the time the direct appeal brief was prepared; and the obligation to brief additional issues in the federal appeals court that were not raised on direct appeal, such as ineffective assistance of counsel. Ronald J. Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 14 N.Y.U. REV. L. & SOC. CHANGE 797, 835 (1986).

⁷³ WHITE, *supra* note 2, at 10.

⁷⁴ See JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW: CASES AND MATERIALS 293 (1990).

⁷⁵ *Barefoot v. Estelle*, 463 U.S. 880, 884 (1983) (citation omitted).

⁷⁶ *Id.* at 920 (Blackmun, J., dissenting) (emphasis omitted). As the majority acknowledged:

[T]he "best" clinical research currently in existence indicates that psychiatrists and psychologists are accurate in no more than one out of three predictions of violent behavior over a several-year period among institutionalized populations that had both committed violence in the past . . . and who were diagnosed as mentally ill.

knowledge that psychiatrists are wrong in their predictions "most of the time,"⁷⁷ it held the testimony to be admissible because the adversarial process could successfully decipher reliable from unreliable evidence regarding future dangerousness.⁷⁸

Berger precisely pinpoints the consequences and irony of the *Barefoot* Court's determination with regard to the admissibility of such highly unreliable evidence, an angle White does not mention in *The Nineties*. As Berger notes, "[s]uch a tack truly turned the 'death is different' cliché on its head since the Court had refused to countenance arguably equally or less untrustworthy evidence of different types where life or death was not at stake."⁷⁹

The Court's post-*Barefoot* decisions are comparably extreme. As the last section of this review discusses, the Court has increasingly limited attempts by criminal defendants to challenge their sentences and convictions through habeas corpus appeals.⁸⁰ White notes that the Court's habeas decisions also appear to be determined by factors entirely unrelated to whether the sentence should be death:

[I]n view of the Court's repeated concern for establishing a system of capital punishment that does not appear to be arbitrary, the habeas decisions' impact seems troubling and ironic. By these decisions, the Court shows it will now tolerate a system of capital punishment in which the determination of whether a person will be executed sometimes turns upon factors that have no relation to the question of whether death is the appropriate penalty for the defendant.⁸¹

Moreover, in some circumstances, these decisions have continued the trend that capital defendants may have fewer procedural protections than non-capital defendants.⁸² For example, in *Lockhart v. McCree*,⁸³ the Court upheld the use of death-qualified juries,⁸⁴ thereby establishing the practice of trying capital defendants by juries which were more likely to convict than juries used in non-capital cases.⁸⁵

White's explanation for the Court's changes has been stated previously in this review.⁸⁶ Since 1980, the Court has altered its

Id. at 900 n.7 (citation and emphasis omitted).

⁷⁷ *Id.* at 901.

⁷⁸ *Id.*

⁷⁹ Berger, *supra* note 5, at 1304 & n.18.

⁸⁰ See *infra* notes 164-92 and accompanying text.

⁸¹ WHITE, *supra* note 2, at 23.

⁸² *Id.* at 11.

⁸³ 476 U.S. 162 (1986).

⁸⁴ *Id.* at 183-84.

⁸⁵ WHITE, *supra* note 2, at 186-87.

⁸⁶ See *supra* notes 45-48 and accompanying text.

composition, and the public's support of the death penalty now is overwhelming in contrast to the public's relatively split view before *Furman*.⁸⁷ Unfortunately, White neither expounds on the propriety of the Court's bending with the times nor offers a more insulated judicial philosophy that favors legal protection over public pronouncement. Rather, White concludes his major contribution to *The Nineties* update (chapter one) with a brief discussion of the Court's future role, suggesting that, in light of the political climate, the Court will "invariably" vote in favor of the government in capital cases. Capital defendants may have some success if they can show that their cases have "limited significance" beyond the particular death penalty statute at issue in their case.⁸⁸

If this approach is White's "attempt toward objectivity," substantively it succeeds, yet at a price. Although the chapter is informative, it is not much more than that; the reader is left wanting the sort of philosophical critique and framework that White appears to offer in some sections of his book (*e.g.*, the chapter on death qualification).

IV. THE "DEATH IS DIFFERENT" DOCTRINE APPLIED

The consequences of the modern "death is different" doctrine extend to each stage of the capital sentencing process. At the start of a case, for example, the police and prosecutor can be so influenced by a desire to obtain the death penalty for a particularly heinous crime that they are more apt to bring a capital charge against "unsympathetic" defendants (*e.g.*, racial minorities or those who do not reside in the local community) in order to enhance their chances of obtaining a death verdict.⁸⁹ Likewise, miscarriages of justice are more likely in capital than non-capital cases because there is more political and emotional pressure to find a defendant.⁹⁰

As an example, White discusses the prosecution of Clarence Brandley who was released from Texas' death row in 1989.⁹¹ In 1981, Brandley, a janitor at a Texas high school, was convicted and sentenced to death for the rape and murder of one of the school's students. The location of the student's body and the circumstances of her death suggested that a school employee was most likely involved in the crime. Brandley, the only black person among five

⁸⁷ WHITE, *supra* note 2, at 24.

⁸⁸ *Id.*

⁸⁹ *Id.* at 43-44.

⁹⁰ *Id.* at 45.

⁹¹ See *Ex Parte Brandley*, 781 S.W.2d 886 (Tex. Ct. App. 1989), *cert. denied*, 111 S.Ct. 61 (1990).

janitors working at the high school the day the student's body was discovered, was arrested five days after the murder, before the case investigator interviewed any witnesses. Two days after Brandley's arrest, the investigator met with three of the other janitors. Rather than being interviewed separately, the three janitors participated in a "walk-through" whereby the investigator questioned them in a group and then walked them through the events occurring on the day of the murder.⁹² Another janitor testified that the investigator had informed him that because "the nigger" Brandley was physically large enough to have committed the murder, the "nigger was elected" to be the defendant.⁹³

At the trial, the three janitors provided testimony consistent with what they had been told during the walk-through, thereby suggesting that Brandley was the only person in the vicinity of the crime when it occurred. After two trials, Brandley was convicted and sentenced to death, his conviction was affirmed on appeal and he was scheduled twice for execution.⁹⁴ The Texas courts, however, eventually reversed Brandley's conviction and death penalty after being presented evidence that the investigation procedure was so improperly conducted that it violated due process of law.⁹⁵ Two of the janitors who testified at the trial on behalf of the prosecution subsequently confessed that they perjured themselves, stating that the other janitors had killed the student, and Brandley had nothing to do with it. A third janitor then changed his story.⁹⁶

According to White, the investigator's statement that "the nigger was elected" suggested that the investigator was probably selecting the janitor he thought a local jury would most likely convict, and who was most likely to receive the death penalty.⁹⁷ White explains: "Given Texas authorities' apparent concern for securing death penalties in disturbing or notorious murder cases, [the investigator] may well have concluded that, in a case involving the rape and murder of a white woman, the community was more likely to impose the death sentence on a black man than on a white one."⁹⁸

As White notes in his discussion of "plea bargaining and the death penalty,"⁹⁹ these political influences also pervade the plea bargaining process. Unfortunately, White's source of support for

⁹² *Id.* at 888.

⁹³ *Id.* at 890.

⁹⁴ WHITE, *supra* note 2, at 44.

⁹⁵ *Brandley*, 781 S.W.2d at 894.

⁹⁶ *Id.* at 888-89.

⁹⁷ WHITE, *supra* note 2, at 45.

⁹⁸ *Id.* (footnote omitted).

⁹⁹ *Id.* at 53-72.

this conclusion relies heavily on interviews with defense counsel, indicating that vast differences in plea bargaining policies exist even within the same state. He therefore fails to consider that such anecdotal reports are not only confirmed, but also more accurately characterized, by empirical research demonstrating grossly different death penalty plea bargaining policies depending upon the particular county in which a crime occurred. For example, in a study of 703 homicide cases occurring during the first three years (1982-1985) of the application of the New Jersey capital punishment statute, marked differences were found among counties with regard to plea versus trial decisions for death possible cases. Moreover, while controlling for aggravating and mitigating circumstances, as well as a wide range of variables relating to defendants' and victims' characteristics and the seriousness of the crime, regression models showed both significant race and county effects predicting the defendant's risk of going to trial. The trial risk was higher for black defendants with white victims and a particular group of pro-death penalty counties.¹⁰⁰

The "death is different" irony adds to these effects. As White explains, defendants who choose to go to trial and are convicted are more likely to receive harsher sentences than their arguably more culpable or dangerous counterparts who accept a plea bargain.¹⁰¹ This acknowledged drawback of our criminal justice system becomes all the more significant when the defendant who has elected to go to trial receives the death penalty. Moreover, because the risks of trial are so great, it is likely that those defendants with the weakest cases are most apt to take a plea bargain because bargains are offered to most capital defendants.¹⁰² In turn, defendants with the strongest cases are more apt to go to trial in an effort to prove their innocence. These same defendants, though, risk the higher likelihood that they will receive the death penalty.

From the government's perspective, the goal of reserving the death penalty for only the most heinous offenders was subordinated to the policy of imposing the maximum penalty on capital defendants who refuse to plea bargain. Thus, the policy of plea bargaining - a policy that is justified primarily on the ground that it conserves judicial resources - apparently has the effect of leading to the imposition of death sentences on defendants who by any objective criteria do not deserve to be executed.¹⁰³

¹⁰⁰ See Bienen et al., *supra* note 38, at 190-95.

¹⁰¹ WHITE, *supra* note 2, at 61-62 (discussing, as one example, *Lockett v. Ohio*, 438 U.S. 586 (1978)).

¹⁰² WHITE, *supra* note 2, at 61-62.

¹⁰³ *Id.* at 61 (footnote omitted).

Compared to non-capital cases, the plea bargaining process in capital cases is also more likely to create a rift in lawyer-client relations. First, counsel may use the fear of death itself or the unbearable conditions of death row to convince a particularly stubborn defendant to enter a plea. Counsel who bargain in non-capital cases do not have the leverage to force the defendant to make choices of this magnitude. Second, because of the high stakes involved, counsel are more likely to induce a defendant to accept a good offer, at times inviting pressure from relatives and convincing the defendant of the lack of alternatives.¹⁰⁴ Despite attorneys' beneficent motives, such tactics can alienate a client, hinder further representation and raise ethical questions.

Comparable difficulties are evident at the penalty trial. Many attorneys fail to understand the differences between representing capital as opposed to non-capital defendants. As a result, inexperienced attorneys may have no strategy for handling their case when their client is convicted at the guilt phase, and thus may present little or no mitigating evidence at the penalty phase.¹⁰⁵ This situation is compounded by the emotional and mental problems characteristic of many capital defendants who inadvertently impair their attorney's representation (particularly at the penalty phase) by being hostile and noncommunicative.¹⁰⁶ One of the "tragic ironies"¹⁰⁷ of capital punishment, then, is the separate penalty trial which, although created to promote sentencing reliability, has succeeded primarily in furthering the arbitrary application of the death penalty by enhancing the disparities in capital attorneys' representation of their clients at trial.¹⁰⁸

The outcome is one more paradox of the capital sentencing process: In the modern effort to reduce arbitrariness, the jury is provided more guidance and information about the defendant, but may become more confused by the application of a vague balancing formula for aggravating and mitigating circumstances. In turn, the defendant relies even more on an attorney's representation that may often be totally inadequate for the legal complexities of such litigation.¹⁰⁹ White concludes that, "to some extent, the addition of the penalty trial only exacerbates the disadvantaged position of a defendant who for whatever reason is unable to present a full picture

¹⁰⁴ *Id.* at 41-43.

¹⁰⁵ *Id.* at 76.

¹⁰⁶ *Id.* at 76-79.

¹⁰⁷ Berger, *supra* note 5, at 1309.

¹⁰⁸ *Id.*

¹⁰⁹ WHITE, *supra* note 2, at 90-91.

of his background to the penalty jury."¹¹⁰

Reliance on an inexperienced defense counsel can increase a prosecutor's impact on the jury, particularly during closing arguments at the penalty trial where references to different penological theories can gain considerable force.¹¹¹ As White notes, a prosecutor can dash a defense attorney's recommendations for incapacitation by offering the final step - death - as the only sure way to permanently remove a violent and incorrigible offender from society and, indeed, to protect the jury and their family members.¹¹²

Acknowledging the prosecutor's impact, White suggests a "double standard" for closing arguments that illustrates White's gift for creativity. White would prohibit a prosecutor from relying on broad penological theories of punishment, such as retribution or deterrence, and from provoking the jury's fear of the defendant. Instead, he would allow the defense attorney to argue to the jury that the death penalty would be a cruel device to inflict upon a fellow human being. White justifies this approach with a convincing rationale: The modern death penalty statutes were implemented to ensure greater fairness, not to provide the prosecutor with unyielding discretion to dispose a jury toward capital punishment. If such prosecutorial discretion was encouraged, the purpose of the new statutes, which was to direct the jury's use of discretion toward weighing aggravating and mitigating circumstances, would be defeated. Thus, as under the old system, the defense attorney should have the liberty to argue for mercy, whereas the prosecutor should refrain from diverting the jury from its role of evaluating and weighing the evidence.¹¹³

White's "double standard" suggestion appears even more appealing in light of other unique aspects of the capital defendant's "death is different" status. For example, execution appears to be actively sought by some capital inmates, albeit by a minority (Gary Gilmore is perhaps the most famous example). These inmates would choose to halt appeals made in their behalf, thus avoiding the depressing and confining environment of death row. Alternatively, a number of capital defendants appear to be suicidal or suffer from mental defects that limit their ability to control their behavior.¹¹⁴

¹¹⁰ *Id.* at 87.

¹¹¹ *Id.* at 44.

¹¹² *Id.* at 126-29.

¹¹³ *Id.* at 129-30.

¹¹⁴ *Id.* at 165-70. Unfortunately, White does not discuss much of the interesting new evidence indicating that death row defendants may be disproportionately inflicted by severe mental impairments. For example, in one study of 15 death row inmates, a medical team found that all 15 "had histories of severe head injury, five had major neurologi-

Although some attorneys contend that death row inmates are not acting voluntarily when they request an execution, the larger issue White emphasizes is whether a convicted capital defendant who prefers death should be allowed to follow a course that would heighten the chances of a death sentence.¹¹⁵ Again, White emphasizes that:

the defendant's preference for death over life imprisonment is not the same as a preference for one institution over another or even for prison over probation. Because the punishment of death is different in kind from all others, society's interest in ensuring an appropriate sentence is arguably greater in the death penalty situation than it is when other sentencing decisions are involved.¹¹⁶

Also significant, according to White, is the composition of the capital jury that ultimately selects the defendant's penalty. Starting in 1968 in *Witherspoon v. Illinois*,¹¹⁷ for example, the Court held that a prosecutor can remove all potential jurors from a capital case who said that they would automatically vote against the death penalty (*i.e.*, the "Witherspoon-excludables"), or that their attitude toward the death penalty would prevent them from offering an impartial decision regarding the defendant's guilt (*i.e.*, the "nullifiers").¹¹⁸ Nearly two decades later in *Lockhart v. McCree*,¹¹⁹ the Supreme Court established that such death qualification did not deny a defendant's Sixth Amendment right to a trial before an impartial jury.¹²⁰

White shows, however, how the *McCree* Court discounted evidence demonstrating that death-qualified juries not only shared attitudes that distinguished them from non-death-qualified juries, but that they were also less apt to favor protections that should be af-

cal impairment, and seven others had other, less serious neurological problems (*e.g.*, blackouts, soft signs)." Dorothy O. Lewis et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838 (1986). Such evidence achieved a particularly significant role in winning a stay of execution, however brief, for Robert Alton Harris, who was convicted of murdering two teenagers in 1978 and sentenced to die in California's gas chamber. See *infra* notes 179-85 and accompanying text. Harris's attorneys claimed that neurological tests administered to Harris during the past two years indicated that damage to his brain impaired his judgment and caused his violence. For example, Harris was born prematurely after his mother was kicked in the stomach by his father during an argument when both parents had been drinking heavily. After his birth, Harris was diagnosed as suffering from fetal alcohol syndrome and was subjected to multiple beatings by his parents during his childhood, most likely contributing to further brain damage. See David Stipp, *Twisted Minds: The Insanity Defense in Violent-Crime Cases Gets High-Tech Help*, WALL ST. J., March 4, 1992, at A1, A6.

¹¹⁵ WHITE, *supra* note 2, at 171.

¹¹⁶ *Id.*

¹¹⁷ 391 U.S. 510 (1968).

¹¹⁸ *Id.* at 514-20.

¹¹⁹ 476 U.S. 162 (1986).

¹²⁰ *Id.* at 183-84.

forded every criminal defendant. For example, death-qualified juries were more likely than non-death-qualified juries to: (1) doubt the innocence of a defendant who did not testify; (2) reject the insanity defense; (3) distrust defense attorneys; and (4) underplay the dangers of erroneous convictions.¹²¹

Thus, in creating a death-qualified jurisprudence, White claims that the Court has:

ignored its prior commitment to safeguarding capital defendants from rules that diminish reliability in capital sentencing. Indeed, instead of providing greater protection to capital defendants than to noncapital defendants, the Court seemingly reversed its priorities. It held that states may death qualify the jury in capital cases, even though this unique means of jury selection creates juries that may be significantly more likely to convict and significantly less likely to honor constitutional protections than juries that are used in criminal cases in which the death penalty is not at issue.¹²²

This erosion of safeguards, however, is not unlimited. Most recently, in *Morgan v. Illinois*,¹²³ the Court held that an Illinois trial judge's refusal to engage in "reverse-*Witherspoon*" questioning during *voir dire* in order to target jurors who would automatically vote to execute anyone convicted of first degree murder was inconsistent with the the Due Process Clause of the Fourteenth Amendment.¹²⁴ Applying its *Witherspoon* reasoning, the Court concluded that "[w]ere *voir dire* not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would *always* impose death following conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless as the State's right, in the absence of questioning, to strike those who would *never* do so."¹²⁵ For now, then, the Court's death-qualification jurisprudence has reached a ceiling.

While White provides a detailed analysis of the case law on the death-qualified jury, however, his chapter on discrimination is relatively lean, a shortcoming that is particularly significant in light of the Court's growing reliance on the "flip side" of its original "death is different" jurisprudence. If, indeed, the "death is different" doctrine is being applied in a distorted fashion, such distortions will disproportionately affect black defendants with white victims,

¹²¹ WHITE, *supra* note 2, at 191-99; see also *McCree*, 476 U.S. at 185-88 (Marshall, J., dissenting) (citing research evidence).

¹²² WHITE, *supra* note 2, at 205.

¹²³ 112 S.Ct. 2222 (1992).

¹²⁴ *Id.* at 2230-32.

¹²⁵ *Id.* at 2232.

thereby compounding existing discriminatory results in the death penalty's application.

Empirical research conducted soon after *Furman* also indicated that *Furman* had no impact on eliminating racial bias. Most notably, black defendants who were convicted of killing white victims had a significantly higher probability of receiving the death penalty.¹²⁶ Subsequent studies of homicides have also revealed a similar black-defendant, white-victim pattern in the capital sentencing process, which varied depending on the sample, its location and the circumstances of the case.¹²⁷

As the Rodney King incident demonstrated,¹²⁸ racial and ethnic bias exists throughout the criminal justice system for all kinds of crimes.¹²⁹ By failing to analyze the empirical research showing strong black-defendant, white-victim correlations with the death penalty, however, White bypasses an additional twist on the "death is different" doctrine as it relates to race. Frank Zimring and Gordon Hawkins¹³⁰ take note of this twist in their favorable review of *Death and Discrimination: Racial Disparities in Capital Sentencing*,¹³¹ which details a large-scale study of racial discrimination in capital cases: "There is, of course, some irony in the fact that one of the things that may have convinced the Supreme Court that race-of-victim patterns are so pervasive as to be beyond correction is the study

¹²⁶ For example, in the first study of racial differences among post-*Furman* cases, Riedel compared racial distributions in a post-*Furman* sample of 407 death-sentenced offenders in 28 states with a pre-*Furman* sample of 493 death-sentenced offenders in 28 states. Riedel found that a significantly higher proportion (62%) of non-whites had been sentenced to death under post-*Furman* statutes relative to the proportion (53%) of non-whites sentenced to death under pre-*Furman* statutes. Analyses showed no significant differences between mandatory and guided discretion statutes on 18 selected characteristics, including race of the offender, the victim, circumstances of the offense and the trial. Riedel's results suggested that post-*Furman* statutes do not successfully reduce discriminatory sentencing because the proportion of non-white offenders increased relative to the pre-*Furman* period, and there were no significant differences found between mandatory and guided discretion statutes. Although Riedel's study used tabular and not multivariate statistics and focused on the defendant's race rather than the interaction between the defendant's and the victim's races, the study's emphasis on measuring changes over time relative to significant developments in the case law is a crucial and frequently disregarded aspect of death penalty research. See Marc Riedel, *Discrimination in the Imposition of the Death Penalty: A Comparison of the Characteristics of Offenders Sentenced Pre-Furman and Post-Furman*, 49 TEMP. L.Q. 261, 270-72 (1976).

¹²⁷ See Baldus et al., *supra* note 7, at 194.

¹²⁸ See Daniel E. Georges-Abeyie, *Law Enforcement and Racial and Ethnic Bias*, 19 FLA. ST. U. L. REV. 717 (1992).

¹²⁹ See generally *id.*; Charles J. Ogletree, *Does Race Matter in Criminal Prosecutions?*, THE CHAMPION 7 (July 1991).

¹³⁰ Zimring & Hawkins, *supra* note 26.

¹³¹ Gross, *supra* note 29.

reported in the pages of this book."¹³²

Although there has been no definitive study on whether racial factors are more significant in determining capital cases than non-capital cases,¹³³ there is no indication that they are less significant. If the Court's original "death is different" doctrine were still intact, evidence of racial bias in capital cases should be given a heightened scrutiny rather than simply justified on the basis that racial discrimination is so pervasive. As the next section shows, other aspects of the "death is different" doctrine may compound these concerns.

V. PROPORTIONALITY REVIEW, THE LIMITS ON DEATH ROW APPEALS AND THE FUTURE DIRECTION OF "DEATH IS DIFFERENT"

This section will examine some of the ramifications of the "death is different" doctrine that White did not consider. First, it will explore proportionality review in light of the "death is different" doctrine and then it will update White's analysis by discussing the Court's most recent restrictions of death row appeals.

A. PROPORTIONALITY REVIEW

The history and requirements for proportionality review are ill-defined.¹³⁴ In general, a death sentence can be disproportionate in two ways: (1) the sentence is more severe than sentences imposed upon comparably culpable defendants; and (2) the sentence is more severe than is warranted by the defendant's culpability and the severity of the offense. Both types of disproportionality reflect a policy based upon the consistent and uniform application of the death penalty for a like group of offenses.¹³⁵

Proportionality review is not constitutionally mandated. In *Pulley v. Harris*,¹³⁶ the Court held that the Eighth Amendment does not require a state appellate court to make a determination of proportionality, concluding that the California capital sentencing system at issue allowed for other procedural safeguards to satisfy constitu-

¹³² Zimring & Hawkins, *supra* note 26, at 135.

¹³³ Personal communication with Bryan A. Stevenson, Esq., Alabama Capital Representation Resource Center, June 23, 1992.

¹³⁴ See Raymond Paternoster & Ann Marie Kazyaka, *An Examination of Comparatively Excessive Death Sentences in South Carolina 1979-1987*, 17 N.Y.U. REV. L. & SOC. CHANGE 475, 476-82 (1989-90); see also Ellen Liebman, *Appellate Review of Death Sentences: A Critique of Proportionality Review*, 18 U.C. DAVIS L. REV. 1433, 1442-58 (1985) (analyzing proportionality review under Georgia's statutory scheme).

¹³⁵ Paternoster & Kazyaka, *supra* note 134, at 482.

¹³⁶ 465 U.S. 37 (1984), *cert. denied*, 493 U.S. 1051 (1990).

tional requirements.¹³⁷ According to some commentators, however, this result has sent a message to the state court that the “death is different” doctrine is no longer as significant as it once was. Ellen Liebman explains: “By refusing to supervise the constitutionality of death penalty schemes the Court ignores the fact that it is no longer necessary, as it was in 1976, to rely on unproved assumptions about what the state appellate courts can do in their review of death sentences.”¹³⁸ Moreover, *Pulley* has left unclear what standards should be followed by those states that continue to require some form of proportionality review of capital cases.¹³⁹

For example, a key issue in proportionality review is determining the appropriate “universe” of cases for comparison, *i.e.*, the pool of cases the court deems similar for review. If the universe consists only of those cases recommended for a death sentence and not those in which a death sentence was not imposed, the results of a proportionality review can be very different.¹⁴⁰

In one of the first studies of proportionality, Baldus and his colleagues examined the Georgia Supreme Court’s selection of similar cases for its proportionality review of sixty-eight of the first sixty-nine post-*Furman* death sentences for murders affirmed between 1973 and 1979 in Georgia.¹⁴¹ The statute required the court to conduct a proportionality review, comparing the sentences of those cases under review with the sentences of selected cases with similar characteristics.¹⁴² The sixty-eight death-sentence cases were compared with a total of 724 cases, 130 decided pre-*Furman* and 594 post-*Furman*. A separate file was created for each case which included data on more than 200 potentially aggravating and mitigating factors. These factors were used to develop the seven measures of comparative excessiveness for the study.¹⁴³

As the authors noted, no court opinion establishes a quantified or quantifiable measure of comparative excessiveness.¹⁴⁴ Two prior Georgia Supreme Court decisions, however, indicated that the Georgia court may “classify a death sentence as excessive if the

¹³⁷ *Id.* at 44-54.

¹³⁸ Leibman, *supra* note 134, at 1433.

¹³⁹ See, e.g., Tabak, *supra* note 72, at 823 (emphasizing that “many state supreme courts have failed to comply with their states’ laws”).

¹⁴⁰ See Baldus et al., *supra* note 7, at 280-305; David Baldus, *Death Penalty Proportionality Review Project: Final Report to the New Jersey Supreme Court* 44-64 (September 24, 1991).

¹⁴¹ Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 679-83 (1983).

¹⁴² *Id.* at 673-84.

¹⁴³ *Id.* at 680 & n.81.

¹⁴⁴ *Id.* at 696.

death-sentencing frequency in 'similar' cases is somewhat less than .35,"¹⁴⁵ a standard which the authors adopted. In turn, if the death sentencing rate was .80 or greater, a case was classified as "presumptively evenhanded."¹⁴⁶

Overall, the authors found that the Georgia Supreme Court was biased toward over-selecting as "similar" those cases in which a jury imposed a death sentence. Moreover, homicide cases were processed differently according to the race of the victim; black-victim cases showed a death sentencing rate of .06 relative to a rate of .24 for white-victim cases.¹⁴⁷

A comparably extensive proportionality review study of South Carolina concluded that the state provided "inadequate protection against either relatively or absolutely disproportionate death sentences."¹⁴⁸ Because South Carolina excluded life sentences from its sample of comparable cases, the state court could not determine whether a death sentence was usually imposed in cases similar to the case being reviewed. Consequently, even a jury's highly aberrant imposition of a death sentence would be exempt from challenge.¹⁴⁹

The most recent proportionality review study occurred in New Jersey which, along with twenty other states, modelled its death penalty statute after Georgia.¹⁵⁰ However, although New Jersey included proportionality review in its statute, like other states it never explicitly defined proportionality. This issue has been of considerable concern since the New Jersey Supreme Court's 1988 appointment of Baldus to conduct a study in order to make recommendations on how the court should conduct proportionality review.¹⁵¹ Only recently did New Jersey's governor create a law providing that the universe of cases for proportionality review can only be those that resulted in a death sentence, and not all murder cases. This restriction is intended to limit the number of possible grounds for overturning death sentences.¹⁵²

Whether this law will be binding on the New Jersey Supreme

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 698.

¹⁴⁷ Baldus et al., *supra* note 23, at 709.

¹⁴⁸ Paternoster & Kazyaka, *supra* note 134, at 526.

¹⁴⁹ *Id.*

¹⁵⁰ Baldus, *supra* note 140, at 27.

¹⁵¹ Alexis Done, *The Future of Proportionality Review*, in A DECADE OF CAPITAL PUNISHMENT IN NEW JERSEY 241, 243 (1992) (Policy Conference Final Report filed at the Woodrow Wilson School of Public and International Affairs, Princeton University).

¹⁵² Jerry Gray, *Florio Signs Bill to Strengthen Death Penalty*, N.Y. TIMES, May 13, 1992, at B6.

Court's future determinations of how proportionality review will be conducted is, as yet, unknown.¹⁵³ In his initial recommendations, however, Baldus emphasized that New Jersey adopt a broad interpretation of the universe of cases that would include all penalty trial cases, regardless of their outcomes, as well as death-eligible, non-penalty-trial cases.¹⁵⁴

There are a number of reasons for this recommendation that bear on the Supreme Court's original interpretation of the "death is different" doctrine. First, "[w]ithout knowledge of the life-sentenced cases, the Court would be unable to determine whether there is a 'meaningful basis' for distinguishing the death sentences it reviews from the 'many cases' in which sentences are imposed."¹⁵⁵ Second, in light of past research, Baldus suggests that there may be strong disparities among counties in the number of times similarly situated defendants are sentenced to death in penalty trials.¹⁵⁶ Thus, if all penalty trial cases are excluded from the universe, a defendant convicted of a capital crime in a county where death-sentencing rates are high would be unfairly sentenced to death if his case was not compared with similar cases in a county where the death sentencing rates are considerably lower.¹⁵⁷

The primary reason for including death-eligible, non-penalty trial cases, however, concerns the considerable discretion that prosecutors have in New Jersey and elsewhere regarding how to handle cases that appear to meet the requirements for capital sentencing. Because prosecutors have the unilateral power to decide whether to pursue a death penalty or a life sentence, possible inconsistencies in their decisionmaking can arise among different counties.¹⁵⁸ As Baldus explains, "[e]ven if a case could support a capital murder conviction, a prosecutor might reasonably determine that a death sentence was not a likely result and that a murder or felony murder plea would produce the same result as a penalty-trial life sentence or term of years, each with a minimum of thirty years."¹⁵⁹ Thus, expanding the universe of cases would provide greater safeguards so that one person does not receive a death sentence for a crime in

¹⁵³ Personal communications with David C. Baldus, May 31, 1992, and with Leigh B. Bienen, June 17, 1992.

¹⁵⁴ Baldus, *supra* note 140, at 48.

¹⁵⁵ *Id.* at 44.

¹⁵⁶ *Id.* This county disparity has been demonstrated in New Jersey. See Bienen et al., *supra* note 38, at 165-92 (finding highly significant county differences).

¹⁵⁷ Baldus, *supra* note 140, at 44.

¹⁵⁸ *Id.* at 46-47; see also Done, *supra* note 146, at 251-52.

¹⁵⁹ Done, *supra* note 151, at 252.

which another person in the same state received a life sentence.¹⁶⁰

Despite these proposed safeguards, however, the New Jersey attorney general contends that the proper universe of cases should consist only of those cases in which the death penalty was actually imposed. The attorney general reasoned that the capital sentencing system already provides sufficient safeguards for defendants and that a broad interpretation of the universe would hinder prosecutorial use of the death penalty as a system of punishment.¹⁶¹ This view coincides with the New Jersey governor's comment that "[t]he proportionality review, if left open-ended, could so frustrate prosecutors that [the state would] never have a workable death penalty."¹⁶² Perhaps the strongest argument against a broad interpretation of the universe of cases, however, is *Pulley* itself. If proportionality review is not constitutionally required, then New Jersey and other states should not invest the substantial sums needed to implement a broad interpretation of proportionality review.¹⁶³

In general, the future of proportionality review in New Jersey is undetermined. Given the Supreme Court's continuing twist of the "death is different" doctrine, it is difficult to predict what the future of proportionality review will be in those states that have it, or whether it will have a future at all.

B. DEATH ROW APPEALS

The most stunning blow to the "death is different" doctrine is the Court's curtailment of the rights of death row prisoners to appeal their sentences, the very issue that, ironically enough, prompted the updating and subsequent outdateding of *The Nineties*. Indeed, beginning with Warren McCleskey's first appeal in 1987, the Court's death penalty decisions have "continued to rewrite the book on capital punishment"¹⁶⁴ so quickly that it can be questioned why White decided to write *The Nineties* at all.¹⁶⁵

As commentators have noted, the Court's death penalty reform efforts have implemented what remained stalled in Congress.¹⁶⁶ Although the Court had earlier introduced considerable restrictions

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 253-54.

¹⁶² Gray, *supra* note 152.

¹⁶³ Done, *supra* note 151, at 256.

¹⁶⁴ Hansen, *supra* note 2, at 65.

¹⁶⁵ Three of the Court's decisions last year have significant consequences for death penalty litigants: *McCleskey v. Zant*, 111 S.Ct. 1454 (1991); *Coleman v. Thompson*, 111 S.Ct. 2546 (1991); and *Payne v. Tennessee*, 111 S.Ct. 2597 (1991).

¹⁶⁶ Hansen, *supra* note 2, at 65.

on federal habeas corpus,¹⁶⁷ starting with last year's *McCleskey v. Zant*,¹⁶⁸ the Court set out guidelines prohibiting death row inmates from filing multiple federal appeals. It held that a prisoner could not raise an issue in a habeas corpus petition if failure to raise it in a prior petition constituted "inexcusable neglect."¹⁶⁹ The Court stated that an acceptable excuse must meet a "cause and prejudice" standard¹⁷⁰ which, according to some death penalty litigators, is "virtually insurmountable."¹⁷¹

In *Coleman v. Thompson*,¹⁷² for example, the Court altered habeas corpus doctrine for first-time petitioners by holding that the defendant's constitutional claims were barred by his lawyer's failure to follow state procedural rules. The lawyer had missed, by three days, Virginia's deadline for filing the defendant's notice of appeal from the denial of state habeas relief.¹⁷³ Thus, *Coleman* superseded the Court's ruling in *Fay v. Noia*,¹⁷⁴ which allowed state prisoners to file federal habeas petitions if it could be shown that they were not deliberately attempting to avoid the state courts. *Coleman* then replaced *Fay*'s test with the cause and prejudice standard it had created in *McCleskey*.¹⁷⁵

As one commentator notes in his analysis of the Court's limitations on death row appeals, "[w]hile 1991 was a bad year for death row inmates, it could have been worse."¹⁷⁶ The first half of 1992 has been. The extensive media coverage of Roger Coleman's appeals,¹⁷⁷ for example, did not change the date of his execution,

¹⁶⁷ For an analysis of some of the case law on these earlier restrictions, see Marc M. Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After Teague v. Lane*, 69 N.C.L. REV. 371 (1991); Maria L. Marcus, *Federal Habeas Corpus After State Court Default: A Definition of Cause and Prejudice*, 53 FORDHAM L. REV. 663 (1985).

¹⁶⁸ 111 S.Ct. 1454 (1991).

¹⁶⁹ *Id.* at 1471.

¹⁷⁰ *Id.* at 1470-71.

¹⁷¹ Hansen, *supra* note 2, at 67.

¹⁷² 111 S.Ct. 2546 (1991).

¹⁷³ *Id.* at 2552-53.

¹⁷⁴ 372 U.S. 391 (1963).

¹⁷⁵ *Coleman*, 111 S.Ct. at 2564-65. According to the *Coleman* Court's reasoning:

Fay was based on a conception of federal/state relations that undervalued the importance of state procedural rules. The several cases after *Fay* that applied the cause and prejudice standard to a variety of state procedural defaults represent a different view. We now recognize the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them.

Id. at 2565.

¹⁷⁶ Hansen, *supra* note 2, at 68.

¹⁷⁷ Roger Keith Coleman was on the May 18, 1992, cover of *TIME*, which contained a lead story concerning the existence of new evidence in his case. See Jill Smolowe, *Must This Man Die?*, 139 *TIME* 40 (May 18, 1992). Coleman also appeared on a number of talk shows and achieved considerable newspaper coverage. See e.g., Mike Allen, *New Clues*

which took place on May 20, 1992.¹⁷⁸ Also indicative of this trend in limitations was the recent execution of Robert Alton Harris by lethal gas, marking California's first execution in twenty-five years¹⁷⁹ and the end of Harris' long history of appeals.¹⁸⁰ In 1978, Harris was convicted of shooting to death two 16-year-old boys so that he could use their car to rob a bank in San Diego. At the time of the killing, Harris was on parole for pleading guilty to manslaughter for the 1975 beating death of a neighbor. In 1979, Harris was sentenced to death and in 1981, the California Supreme Court upheld the sentence.¹⁸¹ Harris then appealed his case to the Supreme Court five times. On the morning of April 21, 1992, Harris' fifth execution date, Harris was put to death following an unusual effort by various judges of the Ninth Circuit Court of Appeals to stay the execution by issuing four stay orders during the night.¹⁸² Expressing its chagrin with these delays, the Court issued an unprecedented order that barred the Ninth Circuit judges from issuing any more stays of execution in the case.¹⁸³

Harris' final arguments centered on whether California's method of execution was in itself cruel and unusual,¹⁸⁴ a contention that one Justice claimed "should have been brought a decade ago."¹⁸⁵ But the Court's further restrictions on habeas appeals continue as this article goes to press.¹⁸⁶

As mentioned, these decisions have far-reaching consequences

Fuel A Race with Executioner's Clock, N.Y. TIMES, May 8, 1992, at B9; Peter Applebome, *Death Case Goes to Court and TV*, N.Y. TIMES, May 20, 1992, at A14; *Wilder Refuses Execution Stay in 1981 Murder*, N.Y. TIMES, May 19, 1992, at A12.

¹⁷⁸ Peter Applebome, *Virginia Executes Inmate Despite Claims of Innocence*, N.Y. TIMES, May 21, 1992, at A20; Peter Applebome, *Execution Stirs Up Troubling Questions*, N.Y. TIMES, May 22, 1992, at A14; *Few in Coal Area Mourn Native Son Put to Death*, N.Y. TIMES, May 22, 1992, at A14. On May 12, a federal judge rejected Coleman's appeal that new evidence, including the testimony of 20 witnesses, would absolve Coleman and implicate the victim's neighbor. See *Execution Appeal Denied in Virginia*, N.Y. TIMES, May 13, 1992, at A19. Coleman's only remaining strategy was to take his appeal to the United States Court of Appeals for the Fourth Circuit, and then to the Supreme Court.

¹⁷⁹ See Katherine Bishop, *After Night of Court Battles, A California Execution*, N.Y. TIMES, April 22, 1992, at A1, A22; Katherine Bishop, *Foes of Execution Fear California May Set Tone*, N.Y. TIMES, April 21, 1992, at A14.

¹⁸⁰ See, e.g., *Pulley v. Harris*, 465 U.S. 37 (1984).

¹⁸¹ *People v. Harris*, 623 P.2d 240, cert. denied, 454 U.S. 882 (1981).

¹⁸² Bishop, *supra* note 179.

¹⁸³ *Gomez v. United States*, 112 S.Ct. 1652, 1653 (1992); see also Linda Greenhouse, *A Window on the Court*, N.Y. TIMES, May 6, 1992, at A20.

¹⁸⁴ *Gomez*, 112 S.Ct. at 1653; see also *id.* at 1654-56 (reviewing Harris' claims and those made by others that execution by lethal gas is cruel and unusual punishment in violation of the Eighth Amendment).

¹⁸⁵ *Id.* at 1653 (Kennedy, J., concurring); see also Bishop, *supra* note 179.

¹⁸⁶ Greenhouse, *supra* note 183; Linda Greenhouse, *High Court Votes to Further Limit Prisoner Appeals*, N.Y. TIMES, May 5, 1992, at A1, B10.

for the original "death is different" doctrine. Habeas corpus is one of the most forceful means for attacking death sentences.¹⁸⁷ Over the past sixteen years, for example, federal judges have reported constitutional errors in over 40% of the death penalty cases that they have reviewed as a result of habeas petitions.¹⁸⁸ The Court's limits on prisoners' habeas corpus petitions, however, serve a number of goals of the current Supreme Court, which include: (1) reducing the role of the federal judiciary; (2) elevating the role of the states within the federal system; and (3) allowing states that have the death penalty to impose death sentences promptly.¹⁸⁹

Restrictions on habeas corpus, then, are one of a number of byproducts of a broader federalism debate. Mounting criticism has focused particularly on the role of the federal courts in the capital litigation process, not only because they are a more highly visible target than the many state judiciaries, but also because death-sentenced habeas petitioners have, until recently, experienced a high success rate in having their petitions granted in federal court.¹⁹⁰ Such success, however, can be viewed as a slap in the face of state courts. "The fact that the usual [habeas corpus] victory involves a lower federal court vacating a judgment of a state's highest court piles psychic insult on practical injury."¹⁹¹

As yet there is no evidence, however, that state courts will be more willing as a result of their new-found strength to uphold the original "death is different" doctrine.¹⁹² Indeed, the Court's limits on death row appeals appear to ensure that the newer "death is different" twist is firmly planted. Whether there will be public reaction to the Court's agenda is open to question, although none so far has been forthcoming.

VI. CONCLUSION

In his review of *The Nineties*, Streib predicts that "[b]y the turn of the century the Supreme Court may be almost completely out of the picture on death penalty questions, leaving us with a chaotic,

¹⁸⁷ See generally Vivian Berger, *Justice Delayed or Justice Denied? - A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665 (1990); Robert Weisberg, *A Great Writ While It Lasted*, 81 J. CRIM. L. & CRIMINOLOGY 9 (1990).

¹⁸⁸ Greenhouse, *supra* note 181.

¹⁸⁹ See, e.g., Coleman, 111 S.Ct. 2546, 2552-54; Greenhouse, *supra* note 186.

¹⁹⁰ See Berger, *supra* note 187, at 1665-66; Baldus et al., *supra* note 7, at 186-87.

¹⁹¹ Berger, *supra* note 187, at 1666.

¹⁹² Arkin, on the other hand, offers a compelling discussion of the possible arguments supporting a constitutional right to a criminal appeal. See generally Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503 (1992).

state-by-state patchwork quilt of statutes and state court rulings.”¹⁹³ In light of recent events, this forecast appears likely. One question that remains is whether those who oppose the death penalty can argue with sufficient force to change the minds of those, perhaps the great majority, who appear to be so avidly allied with the Court.

The Nineties breaks its promise to portray recent death penalty developments objectively; White’s bias against the system is transparent throughout his book. On the other hand, White fails to convince his readers of his own position because his pretense of objectivity inhibits him from arguing forcefully against the system. This review has examined some of White’s missed opportunities and attempted to add to White’s tantalizing but unsatisfying account of the “death is different” doctrine. While White’s scholarship and experience are unassailable, he remains in an academic gridlock where he fails at both objectivity and persuasion.

¹⁹³ Streib, *supra* note 5, at 260.

