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The Death Penalty in the Eighties: An Examination of the Modern System of Capital Punishment

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BOOK REVIEW

THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT. By Welsh S. White. The University of Michigan Press, Ann Arbor, Michigan: 1987. Pp. 198.

Reviewed by Ronald J. Tabak*

In *the Death Penalty in the Eighties,*[1] Professor Welsh S. White[2] presents a careful analysis of the system by which capital punishment is actually being implemented in the 1980s. His book reveals that—contrary to what the Supreme Court would have us believe[3]—the present death penalty system equals, or even exceeds, in

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1. W.S. WHITE, THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MOD-

includes:

arbitrariness and capriciousness the system which existed before 1972, when *Furman v. Georgia*[4] swept clear the nation's death rows. The book also explains *why* the courts have failed to eliminate the egregious unfairness permeating the capital punishment system.

A. *Ways In Which The Death Penalty System Continues To Be Arbitrary And Capricious*

In his book, Professor White discusses numerous respects in which the current death penalty system is both arbitrary and capricious. These include: (1) the imposition of the death penalty on the innocent, (2) the imposition of the death penalty on those who have neither committed the worst murders nor have the worst backgrounds, (3) various problems affecting the fairness of the penalty phase of capital trials, (4) racial discrimination in capital sentencing, and (5) procedural bars which result in executions of men whose convictions or death sentences were unconstitutionally imposed through harmful error.

1. The Death Penalty Is Still Imposed On The Innocent

The Supreme Court held in *Lockhart v. McCree*[5] that it is constitutional to exclude from the jury, in a capital case, all people who would never be willing to vote for the death penalty. In reaching its decision in *McCree,* the Court evidently considered it constitutionally insignificant that such exclusions produce juries which are somewhat more prone to convict than juries in non-capital cases. Hence, the Court did not order that there be separate juries selected for (i) the guilt phase and (ii) the penalty phase of a capital trial.

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old requirement of at least one aggravating circumstance, and (3) mandatory review by the state's highest court).

4. 408 U.S. 238 (1972). The Supreme Court held that the imposition and carrying out of the death penalty constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments.

5. 476 U.S. 162 (1986). At McCree's capital felony murder trial, the state-court judge, during voir dire, removed prospective jurors who stated that they would not under any circumstances impose the death penalty upon conviction. McCree was convicted and sentenced to life imprisonment without parole. The conviction was affirmed, and McCree's petition for state post-conviction relief was denied. 266 Ark. 465, 585 S.W.2d 938 (1979). McCree then sought federal habeus corpus relief, arguing that the "death qualification" of the jury violated his rights under the sixth and fourteenth amendments, which entitled him to an impartial jury selected from a representative cross-section of the community. The district court granted relief, 569 F. Supp. 1273 (E.D. Ark. 1983), *aff'd,* 758 F.2d 226 (8th Cir. 1985). The Supreme Court held that the Constitution does not prohibit the removal for cause of prospective jurors who oppose the death penalty, prior to the guilt phase of the trial. The Court further held that the "death qualification" neither violated the fair cross-section requirement nor the constitutional right to an impartial jury. 476 U.S. at 173-77, 183-84.

After attacking the Court's "misguided" evaluation of social science data[6] Professor White adds an important insight: the exclusion from guilt phase juries of all those who would never vote for the death penalty will, at least in certain types of cases, "substantially increase the risks of an unwarranted conviction."[7] The danger of convicting the innocent apparently arises from the fact that guilt phase juries selected in this exclusionary manner are less likely than normal juries "to provide protections that should be available to every criminal defendant."[8] For example, they are more likely to view the defendant's choice not to testify as evidence of guilt, to be antagonistic to the insanity defense, to be less trustful of defense counsel, and to be less concerned about the risk of convicting the innocent.[9] They are also less likely than normal juries to remember the evidentiary facts accurately.[10]

Hence, the way in which the guilt phase jury is selected is apparently one important factor underlying a phenomenon which Professor White notes: "There are documented cases in which innocent defendants are sentenced to death and/or executed."[11] Another important factor leading to the convictions and executions of the innocent is the political pressure on prosecutors to secure death sentences.[12] Over-zealousness frequently leads prosecutors to make improper arguments[13] and to withhold evidence favorable to the defendant.[14]

Since the preparation of the book, several more examples have been uncovered of innocent people ending up on death row,[15] and there

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6. WHITE, supra note 1, at 170.

7. *Id.* at 180 (included within chapter 8, "The Supreme Court and the Death-Qualified Jury," at 162-95).

8. *Id.* at 179 (demonstrated by empirical data presented in *McCree).*

9. *Id.* at 179 & n.128 (citing *McCree,* 476 U.S. at 184 (Marshall, J., dissenting)).

10. *Id.* at 179 & n.129 (citing Grigsby v. Mabry, 569 F. Supp. 1273, 1305 (1983)).

11. *Id.* at 67 & nn.45-46 (included within a discussion of chapter 3, "The Penalty Trial," at 51-74).

12. *Id.* at 17. In the current political climate, not to seek the death penalty in certain cases could adversely affect public figures' political aspirations. *Id.* In this climate, it is not surprising that prisoners are being added "to death row faster than at any time since the thirties." *Id.* From December, 1980 through May, 1986 over 1000 people were added to death row, increasing the population from 715 to 1714. *Id.* By mid-1988, that figure had increased to approximately 2110 people on death row. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW, U.S.A. (Aug. 1, 1988).

13. WHITE, *supra* note 1, at 90-112 (chapter 5, "The Prosecutor's Closing Argument at the Penalty Trial").

14. *See, e.g.,* Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1986) (conviction overturned where prosecutor failed to disclose existence of agreement made with key prosecution witness after witness testified that no agreement had been made).

15. *See, e.g., Judge Orders New Trial for 2 Death Row Inmates,* Miami Herald, Nov. 4, 1987, at 1A (new trial ordered for two inmates who were convicted based on the testimony of three witnesses—one who admitted lying to the jury; another who "saw the murder in a dream"; and, a third witness who could not "make up her mind," having

has been at least one recent execution of a man whose innocence is asserted by many.[16] In most cases where the defendant was alive when his innocence was established, the reason why he had not already been executed was *not* his possible innocence, but rather the pendency of other legal claims. Hence, these cases are not evidence that the present capital punishment system works. Rather, they show that only under fortuitous circumstances does the present death penalty system avoid executing innocent people.

2. The Present System Imposes The Death Penalty On People Who Have Not Committed The Worst Crimes And Do Not Have The Worst Criminal Records

Death Penalty in the Eighties discusses several factors which help explain another problem with the present capital punishment system: it imposes the death penalty on people who have not committed the worst crimes and do not have the worst criminal records. One such factor is the public pressure which many prosecutors and courts feel in

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sworn "that she lied and she told the truth"); Williams, *In second trial, defendant cleared in officer's slaying,* Atlanta Constitution, June 5, 1987, at 1-D, 3-D (former Georgia death row inmate Robert Lewis Wallace, after being granted retrial on grounds that he had not been competent to stand trial, was found not guilty of murder at retrial, in which he testified that he had grabbed the police officer's hand in self-defense; no such testimony was presented at the original trial); *Defendants Found Innocent After Five Trials,* Associated Press, Jan. 21, 1987 (LEXIS, NEXIS, Omni file) (Darby Williams and Perry Cobb, after five trials and serving time on death row, were found not guilty after a prosecutor from another Illinois county cast doubt on the credibility of the state's key witness, who had told him many years earlier that her boyfriend had killed the victim); *60 Minutes: A Good Cop* (CBS television broadcast, Jan. 11, 1987) (Neil Ferber released from Pennsylvania's death row and prison after a police captain developed evidence that a prosecution witness had lied about Ferber's purported confession); *20/20: Hours From Execution* (ABC television broadcast, July 23, 1987) (Joseph Green Brown released after 13 years on Florida's death row because the prosecution knowingly relied on false testimony); Kaplan, *Death Row Dilemma: A Story of 2 Lawyers And a Matter of Ethics that Could Cost a Life,* N.Y.L.J. Jan. 19, 1988 (Georgia death row inmate Henry Drake was known to be innocent by counsel for witness whose perjured testimony was basis for Drake's conviction; parole board granted Drake relief after jury at retrial voted 10-2 for acquittal; retrial had been ordered due to an unconstitutional charge to the jury.). *See generally* Bedau and Radelet, *Miscarriages of Justice in Potentially Capital Cases,* 40 STAN. L. REV. 21 (1987). In the United States during the twentieth century, at least 350 innocent defendants have been convicted and sentenced to death. *Id.* at 35. At least twenty-three such defendants were executed. *Id.* at 73; *see also,* Applebome, *Rise in Executions Widening Debate,* N.Y. Times, Nov. 1, 1987, at A30, col. 4 (state district judge recommends new trial for Clarence Lee Brandley, a Texas death row inmate, in view of "conflict[ing] . . . testimony that raised questions about the verdict").

16. Willie Jasper Darden was executed on March 15, 1988, even though two witnesses came forward after the trial with evidence supporting Darden's innocence. *See* Lefevere, *Major Justice Questions Lurk in Some Executions,* Nat'l Cath. Rep., July 1, 1988, at 7-8.

seeking, obtaining, and upholding death sentences.[17] This pressure is not necessarily the strongest in the cases in which the murder is the most heinous or the defendant's criminal history is the worst. Much depends on such factors as the race and background of the victim and the part of the state in which the crime occurred.[18]

The overbreadth of prosecutors' and juries' discretion to seek and impose the death sentence has not been corrected by post-*Furman* statutes requiring that at least one statutorily-indicated aggravating circumstance be found to exist before the death penalty may be imposed. Although in certain places in his book Professor White asserts that statutory aggravating circumstances are "objective" factors that have been carefully defined,[19] he later recognizes that some such circumstances, such as torture or the defendant's future dangerousness, "involve guidelines that are so vague that they restrain the sentencer's exercise of discretion only slightly."[20] Moreover, he consistently points out that since most post-*Furman* statutes require the sentencing body to decide how to weigh the aggravating and mitigating factors, "the sentencing authority still has vast discretion to make what is essentially a moral judgment."[21] Thus, the jury essentially "has the same kind of task as it had under the pre-*Furman* statutes" which the Supreme Court found unconstitutional because they established no guidelines to limit the jury's discretion.[22]

Whether a jury will get to exercise *its* discretion depends on whether the prosecutor has exercised *his* discretion to offer a plea bargain and whether the defendant has accepted that offer. Professor White's many interviews of capital defense counsel lead him to conclude that "the likelihood of a plea bargain in a capital case will be dramatically affected by factors that have nothing to do with the nature of the crime or the strength of the evidence against the defendant."[23] Such factors include the place where the crime occurred, the county's ability to absorb the expense of a capital trial, the time re-

17. *See supra* note 11 and accompanying text; *see also* 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, 799 (prosecutors), 846-47 (courts) (1986) [hereinafter Tabak].

18. *See* WHITE, *supra* note 1, at 128-29. Chapter 6, "Discrimination" at 113-39, includes a discussion of the Baldus study on sentencing in Georgia, which revealed data that showed statewide discrimination based on the race of the victim.

19. WHITE, *supra,* note 1 at 53. The factors he cites include, for example, "whether the victim was a police officer, whether the murder was committed during a felony, and whether the defendant was previously convicted of a felony." *Id.* (footnotes omitted).

20. *Id.* at 115.

21. *Id.* at 115-16.

22. *Id.* at 54.

23. *Id.* at 32 (included within chapter 2, "Plea Bargaining and Death Penalty," at 31-50).

maining before the prosecutor's next election, whether defense counsel has moved for a change of venue or for expensive discovery, and the perceived expertise of the defense attorney.[24] Professor White adds that defendants' willingness to *accept* plea bargains offered in capital cases may be distorted by serious mental problems, lack of judgment, or an unwillingness to detract from "their macho image."[25]

Ironically, even where defendants act "rationally," the system works to produce anomalous results. As Professor White states:

> [T]he likelihood that a capital defendant will accept [a plea bargain] is probably inversely related to her assessment of the chances of obtaining a favorable outcome at trial. . . . Thus, the defendants who rationally believe that they have chances of obtaining a favorable outcome at trial—a group that includes some of our least culpable capital defendants—are more likely to go to trial; as a result, their chances of receiving the death penalty are increased.[26]

Even if the most culpable and least culpable people accused of murder were all to reject plea bargains, the manner in which their trials are conducted and the ways in which juries exercise their discretion would *still* lead to outcomes which in theory would seem surprising. Trial outcomes are affected by numerous factors unrelated to the nature of the crime or the offender, such as the quality and resources of the opposing attorneys, prosecutorial misconduct in arguing for the death penalty, the jury's misunderstanding of the consequences of its actions, and bias among the jurors.[27] Moreover, while some juries vote *death* sentences in the erroneous belief that those sentences will be changed to life sentences that will keep the defendants in jail longer than if the juries had actually voted for life sentences,[28] other juries vote *life* sentences for particularly nefarious murderers, believing that such defendants will suffer more from a life sentence than from the death sentence.[29]

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24. *Id.* at 32-35 (section in chapter 2 entitled "The Prosecutor's and Defense Attorney's Roles in the Plea Bargaining").

25. *Id.* at 36-37 (section in chapter 2 entitled "The Capital Defendant's Role in Plea Bargaining," at 36-38). Attorneys with wide experience in representing death-row inmates believe that well over half of all current death-row inmates were offered, but rejected, plea bargains which would have kept them from receiving death sentences. Telephone discussion with Joseph Nursey, Team Defense Project, Atlanta, Ga., on Nov. 14, 1987.

26. White, *supra* note 1, at 40 (footnote omitted).

27. *See generally* Tabak, *supra* note 17, at 801-20.

28. *Id.* at 819 (one justice of the Supreme Court of Georgia believes juries return death sentences in an effort to ensure longer jail stays).

29. This reportedly occurred, for example, at the California trial of Joe Hunt, who was involved in two killings under gruesome circumstances. One juror said afterwards,

Thus, we now have, as Professor White says, a system that in some ways is even "more chaotic" than before *Furman*.[30] Eighty-nine percent of those on death row under today's capital punishment system have *no* prior homicide record.[31] Meanwhile, there is no assurance that the death penalty is sought for, or imposed on, serial murderers.[32] The current system also allows those who intentionally commit murder to secure life sentences by agreeing to testify against their far less culpable accomplices, who may receive the death penalty even if they neither killed nor intended that a killing occur and were not present when the killing took place.[33]

Thus, as Professor White concludes, the Supreme Court's "efforts to provide rationality in capital sentencing" have certainly had "paradoxical consequences."[34]

3. Particular Problems Undermine Fairness In The Penalty Phase Of A Capital Trial

Professor White describes in detail three principal sources of the anomalous results in capital sentencing: (a) deficiencies of defense counsel, (b) misunderstandings by juries concerning both deterrence and the nature of life sentences for capital murder, and (c) improper penalty phase arguments by prosecutors.

"The death penalty is too quick for Joe Hunt. He needs to have time to think about the murders he committed." Chambers, *Jury Recommends Life Term for Leader of California Club*, N.Y. Times, June 5, 1987, at A19, col. 1; *see also* Tabak, *supra* note 17, at 843 n.329 (describing several cases in which Georgia juries voted life sentences, instead of the requested death sentences, in particularly gruesome murder cases); *infra* note 32.

30. WHITE, *supra* note 1, at 69. "Under the pre-*Furman* system, the jury rendered a moral decision; it reached into its gut to decide whether death was the appropriate punishment for the defendant. Now, however, the jury is sometimes torn between rendering a moral decision and applying a legal formula they don't quite understand." *Id.*

31. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT, 1987, at 8, table 7 (July 1988).

32. *See* WHITE, *supra* note 1, at 35-36 (describing life sentence offered to alleged serial killer Ted Bundy—who was on death row only because he declined the offer). A California jury voted a life sentence for Angelo Buono, Jr., convicted in nine brutal "Hillside Strangler" killings, because it felt the death penalty would be "too good" for him and that "he should suffer like the women he killed." *Juror Says Death Would Have Been Too Good For Buono,* Associated Press, Nov. 20, 1983 (LEXIS, NEXIS, Omni file).

33. *See* WHITE, *supra* note 1, at 38-40 (discussion of the Sandra Lockett case, 438 U.S. 586 (1978)). Subsequent to the writing of Professor White's book, the Supreme Court held that it is constitutional, under some circumstances, to impose the death sentence on someone who neither kills nor intends to kill and is not present when the killing occurs, if the defendant has the required culpable mental state. Tison v. Arizona, 481 U.S. 137 (1987).

34. WHITE, *supra* note 1, at 69.

a. Deficiencies of Defense Counsel

As Professor White explains, many capital defense counsel place their principal, or even exclusive, focus on the guilt phase of the trial, even where, as frequently is the case, their clients' only real hope is to secure a life sentence in the penalty phase. Indeed, lawyers sometimes present a defense in the guilt phase which is inconsistent with what would be their most effective argument in the penalty phase. For example, some counsel vigorously maintain in the guilt phase that the defendant did not commit the crime and then assert in the penalty phase that the jury should be merciful because the defendant is truly remorseful for having committed the crime.[35]

A surprisingly large number of defense counsel fail to present *any* mitigating evidence in the penalty phase, even where plenty of such evidence is available. For example, Professor White's readers, unlike the jury and trial judge, know that John Spenkellink, who was executed in 1979, had at age eleven found his beloved, war-hero father dead of asphyxiation and had then begun a career of minor crime which was largely due to treatable, but untreated, psychological problems arising from his father's suicide.[36] Professor White states several reasons why such powerful mitigating evidence may not be presented even when defense counsel would very much like to introduce it: defense attorneys' inability to develop rapport with defendants from different backgrounds or having mental problems; counsel's lack of time and resources to compile information on the defendant's life; and many lawyers' lack of expertise in how to present a defendant's life story.[37]

Professor White states that where the defense *does* present a complete life story of the defendant at the penalty phase, as numerous Supreme Court decisions allow,[38] the jury may decide not to impose the death penalty—no matter how heinous the murder was.[39] But:

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35. *See id.* at 55-56. Defense strategy in the guilt phase should be tailored to the strategy that will be most persuasive in the penalty phase, if the capital defendant has little chance of avoiding conviction on a capital charge. *Id.* In such cases, defense counsel could assert during the guilt phase that there has been insufficient proof to warrant a conviction or could urge conviction for a lesser included offense. That would enable counsel to be consistent in the eyes of the jury when presenting the most persuasive case for a life sentence during the penalty phase. *Id.*

36. *Id.* at 56; *see* Tabak, *supra* note 17, at 805-06 for other examples.

37. WHITE, *supra* note 1, at 56-57.

38. *See, e.g.*, Eddings v. Oklahoma, 455 U.S. 104 (1982) (death sentence vacated when court refused to consider, in mitigation, defendant's emotional disturbance and history of abuse as a child); Lockett v. Ohio, 438 U.S. 586, 606 (1978) (death sentence vacated when imposed without "the type of individualized consideration of mitigating factors . . . required by the Eighth and Fourteenth Amendments in capital cases").

39. WHITE, *supra* note 1, at 65.

> On the other hand, when the defense fails to present a complete case at the penalty trial, the death penalty may be imposed even if the defendant's capital crime would not be viewed as particularly heinous by any reasonable standard. Thus, 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 of his background to the penalty jury.[40]

b. Sentencing Juries' Misunderstandings Regarding Both Deterrence And The Nature of Life Sentences

Professor White recognizes that although the "vast empirical literature relating to the question whether the death penalty deters the commission of capital crimes has generally been judged inconclusive," death penalty proponents nevertheless continue to advance a deterrence argument in favor of the death penalty.[41] More ominously for defendants at capital trials, when prosecutors ask juries to impose the death penalty, they frequently cite the supposed deterrent effect of capital punishment.[42]

When jurors rely on their own preconceptions or prosecutors' assertions about deterrence, they are acting on the basis of a misunderstanding of the facts. The belief that the death penalty deters crime is premised upon the unsupported hypotheses that prospective murderers (1) consider the penal consequences in advance and (2) prefer a life sentence to the death sentence. Professor White points out the fallacies underlying those hypotheses. He then notes that whereas there have been cases in which defendants have killed because they wished to be executed, there are *no* reported instances—even in states without the death penalty—where people killed in order to get life imprisonment. Professor White concludes that "[g]iven the imponderables involved in measuring the death penalty's efficacy as a deterrent and the near certainty that it will in fact precipitate killings that would not otherwise have occurred," it is quite possible that the death penalty system causes a net *increase* in murders.[43]

Even law enforcement officers are beginning to acknowledge, outside of the courtroom, that capital punishment is not having any deterrent effect. For example, Texas' chief law enforcement official, Attorney General Jim Mattox, recently said, in advocating televised executions, that Texas' executions are now so routine that they lack de-

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40. *Id.* (footnote omitted).

41. *Id.* at 155 (included within chapter 7, "Defendants Who Elect Execution," at 140-61).

42. *Id.* at 91, 97-98, 102.

43. *Id.* at 156-57.

terrent effect.[44] Unfortunately, jurors in Texas, and elsewhere, do not hear such concessions and remain misled, even if defense counsel try to debate the point.[45]

Jurors frequently also misunderstand the nature of the alternative to the death penalty: life imprisonment. As illustrated by Professor White's account of the Roosevelt Green case, this misunderstanding often remains despite juries' unsuccessful efforts to ask judges what a life sentence entails.[46] In reality, a life sentence *for capital murder* means life without possibility of parole *ever* in a growing number of states and life without the possibility of parole for twenty, thirty or even more years in many other states.[47] Yet, the public's *perception* is

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44. *See Top Official and Death Row Fear Texas Is Shrugging Off Executions*, N.Y. Times, July 2, 1987, at A21, col. 1 (also noting that when the death penalty was first restored, hundreds of death penalty proponents and opponents turned out at the prison gate for the first executions but now the public shows little interest).

45. *See* WHITE, *supra* note 1, at 97-98 (stating that jurors are misled in the penalty phase because having accepted the prosecutor's position on the issue of guilt at the guilt phase, they are more likely to view the defense counsel's position as less credible in the penalty phase).

46. *See id.* at 120; *see also* Tabak, *supra* note 17, at 819 n.162 (juries impose the death sentence in an effort to compensate for what they view as a lenient parole procedure). The en banc Fifth Circuit recently held that a capital defendant has no constitutional right to inquire during voir dire into jurors' attitude about life sentences and parole. King v. Lynaugh, 850 F.2d 1055 (5th Cir. 1988) (en banc).

47. An incomplete survey indicates the growing number of states in which a life sentence for capital murder is given without parole. *See, e.g.*, Alabama: ALA. CODE § 13A-5-45a (1987); Arkansas: ARK. STAT. ANN. § 5-10-101(c) (1987); California: CAL. PENAL CODE § 190.2(a) (West 1988); Connecticut: CONN. GEN. STAT. ANN. § 53a-46a(f) (West 1985); Delaware: DEL. CODE ANN. tit. 11, § 4209(e) (1987); Louisiana: LA. REV. STAT. ANN. §

[redacted]

14:30(C) (West 1987); Missouri: Mo. Ann. Stat. § 565.020(2) (Vernon Supp. 1989); Nebraska: NEB. REV. STAT. §§ 83-192(9)(e), 83-1 110 (1987) (no minimum term for life imprisonment means no parole eligibility unless commuted to term of years) (confirmed by phone conversation with Nicki Rissen, Nebraska Department of Corrections, January 9, 1989); New Hampshire: N.H. REV. STAT. ANN. § 630:5(V) (1986); Pennsylvania: PA. STAT. ANN. tit. 61, § 331.17 (Purdon Supp. 1988) (power of Board of Parole extends only to "definite or flat sentences"); South Dakota: S.D. CODIFIED LAWS ANN. § 24-15-4 (1988); Washington: WASH. REV. CODE ANN. § 10.95.030 (Supp. 1988). The capital sentencer has discretion to impose life without parole in Maryland, MD. ANN. CODE art. 27, § 412(b) (Supp. 1988), art. 41-4-516 (Supp. 1988), Nevada, Nev. Rev. Stat. § 175.552 (1987), and

that a life sentence means the defendant will be released within seven to ten years. This frequently leads juries to vote a death sentence out of a desire to keep the defendant in jail longer—a misguided action which all too often actually leads the defendant to the execution chamber.[48]

As Professor White states, prosecutors frequently assert, without any foundation, that even if the defendant does remain in prison, he is likely to kill a prison guard.[49] Yet, in reality, murders by defendants convicted of capital murder are extremely rare. Indeed, in two states from which information has already been gathered, Georgia and Kentucky, not a single person removed from death row as a result of the 1972 *Furman* decision has committed another homicide—either in or out of jail—in the fifteen years thereafter, and in a third state, Texas, only one allegedly committed a homicide (and he then committed suicide prior to any judicial proceeding).[50] These facts were not known to the Georgia jury which sentenced Richard Tucker to death after hearing the "save the prison guards" closing argument which Professor White quotes[51]—or to many other juries which have voted death penalties due to misunderstandings about life sentences.

c. Other Prosecutorial Misconduct In Closing Argument

Professor White describes various other kinds of improper

CODE ANN. § 2929.03(c)(2) (Anderson 1987) (20 or 30 years before parole possible); South Carolina: S.C. CODE ANN. § 16-3-20(A) (Law Co-op Supp. 1988) (30 years before parole possible where a statutory aggravating circumstance is found; 20 years before parole possible where no such circumstance is found).

48. *See* Tabak, *supra* note 1, at 819-20; *see also* Paduano and Stafford, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 COLUM. HUM. RTS. L. REV. 211 (1987).

49. *See infra* note 51.

50. Letter from Silas Moore, Deputy Director of Central Operations, Georgia State Board of Pardons and Paroles to Pat Koester (October 20, 1987); Vito and Wilson, *Back From the Dead: Tracking the Progress of Kentucky's Furman-Commuted Death Penalty Population*, 5 JUST. Q. 101 (1986); Marquart and Sorenson, Institutional and Post-Release Behavior of the Texas Furman-Commuted Inmates, (1987) (unpublished manuscript); *see also* BEDAU, THE DEATH PENALTY IN AMERICA 175-80 (3d ed. 1982) (while data show that some murderers do kill again after years of imprisonment, "the number of such repeaters is very small"—the lowest recidivism rate of all classes of offenders).

51. WHITE, *supra* note 1, at 105-06.

> You're afraid of putting this man to death? Let the next victim of Richard Tucker be on your conscience. Let some prison guard, fifty-five years old, been working for twenty years at Reidsville—let some poor prison guard down there who can't carry a weapon because these people down there will grab it and use his weapon against him—let some prison guard down there who is right now on the job thinking about his pension, thinking about retiring in a few years. [sic]

Id. at 105 (quoting Tucker v. Francis, 723 F.2d 1504, 1507 (11th Cir. 1984)). Mr. Tucker was executed on May 22, 1987. *Georgia Execution is Second in Week*, N.Y. Times, May 23, 1987, at A9, col. 6.

prosecutorial closing arguments in the penalty phase of capital trials. For example, prosecutors frequently ask juries to conclude that capital defendants lack remorse, on the basis of (1) those defendants' exercise of their constitutional right not to testify or (2) their failure to testify about their remorse—even though there may be many reasons *other than* a lack of remorse for the absence of such testimony.[52]

While prosecutors often also argue for the death penalty on the basis of society's perceived general need for retribution, in view of such things as the crime rate,[53] they fail to point out that the crime rate may actually rise faster if executions take place.[54] Such arguments may mislead juries into failing to carry out their duty to give an individualized sentence based on what the particular defendant has done and may cause them to impose the death penalty due to anger about *other* defendants' crimes.[55]

Many prosecutors are particularly adept at making very persuasive emotional arguments which play upon the jury's fears, such as suggestions that the death penalty should be imposed in order to protect the jurors themselves or other citizens. Such arguments may also divert jurors from their proper function: imposing a sentence based on relevant evidence about the defendant's character and crime.[56]

Some prosecutors seek to lessen the jury's responsibility by inviting them to engage in "legal arithmetic," a comparison of the *number* of aggravating and mitigating factors. Yet, the jury's actual role is to make what Professor White calls a "moral judgment," by weighing the aggravating and mitigating factors in whatever manner the jurors deem appropriate.[57] Indeed, the jury is entitled to give a single mitigating factor greater weight than a large number of aggravating factors. Unfortunately, prosecutors' arguments, sometimes buttressed by charges to the jury, frequently leave the jurors inclined to take an easy way out by using "legal arithmetic."[58]

Professor White argues persuasively that in view of the Supreme

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52. *See* WHITE, *supra* note 1, at 99-102.

53. *Id.* at 102-03.

54. *See supra* note 43 and accompanying text.

55. WHITE, *supra* note 1, at 102-03. While the Supreme Court insists on individualized sentencing in capital cases, prosecutors have not been completely precluded from discussing matters unrelated to the particular defendant's character or offense. *Id.* at 103. White asserts that generalized arguments should not be permitted since they "increase the risk of inaccurate capital sentencing because they are likely to distort the jury's perception of their role." *Id.* at 103.

56. *See id.* at 104-05 (although there was no evidence that the defendant had threatened anyone, the prosecutor made a personalized and forceful appeal to the jury's fear that death was necessary to protect the jurors themselves, the witnesses, the prosecutor, his family and staff from the defendant's revenge).

57. *See id.* at 109 n.5.

58. *See id.* at 68-69.

Court's decision in *Caldwell v. Mississippi*,[59] any death penalty imposed after improper prosecutorial closing argument at the penalty phase which has conveyed inaccurate or misleading information should be vacated unless the state can demonstrate that the improper argument had "no effect" on the sentencing decision. As he points out, the Supreme Court recognized in *Caldwell* that it would be futile for appellate courts to speculate on whether the jury would have voted the death penalty if it had not heard the improper argument. Instead, Professor White says that an appellate court should consider the immediate effect of the prosecutor's argument and should vacate the death penalty unless it concludes that "the prosecutor's improper argument was so insignificant that its impact on the sentencing jury was only negligible."[60] He notes that "[i]n most cases it would be difficult to infer that such an argument did not have a measurable impact on the jury,"[61] particularly since prosecutors are unlikely "to make closing arguments that are not calculated to influence the jury."[62]

However, most lower court decisions involving improper penalty phase closing arguments by prosecutors have *not* used *Caldwell's* "no effect" test. Even when, unlike most state courts, the federal courts have recognized that the prosecutors' arguments have been improper, they have mostly proceeded to use what Professor White aptly terms "a remarkably permissive harmless error standard," under which the defendant must show a "reasonable probability" that he would not have received the death sentence if the prosecutor had not argued improperly.[63]

Fortunately, at least one federal circuit court *is* generally using the *Caldwell* test with respect to "closing arguments during the sentencing phase of capital cases."[64] Perhaps, the Supreme Court will eventually hold that the *Caldwell* test is to be applied to all cases involving prosecutorial misconduct in capital sentencing proceedings.[65]

4. Racial Discrimination Still Occurs In Capital Sentencing

After noting that "most knowledgeable observers agree that the

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59. 472 U.S. 320 (1985) (constitutionally impermissible to rest a death penalty upon a sentence imposed by a jury which was led to believe that responsibility for making the sentencing determination rested elsewhere).

60. WHITE, *supra* note 1, at 92, 96.

61. *Id.* at 96.

62. *Id.*

63. *Id.* at 95.

64. *See* Coleman v. Brown, 802 F.2d 1227, 1238 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 2491 (1987).

65. For further arguments why the *Caldwell* test should be used, see Brief Amici Curiae of National Legal Aid and Defender Association, *et al.*, in Tucker v. Kemp, *cert. denied*, 107 S. Ct. 1359 (1987) (No. 86-6099); *see also*, Tabak, *supra* note 17, at 842-44.

switch to the post-*Furman* statutes has had only a minimal effect on racial discrimination in capital sentencing,"[66] Professor White explains how such racism persists. He points out that prosecutors seek the death penalty much more often when the victim is white than when the victim is black.[67] Moreover, racial prejudice can distort the jury's exercise of its tremendous discretion in those cases in which the prosecutor *does* seek the death penalty.[68] This is particularly true if the prosecutor uses peremptory challenges to exclude most or all blacks from the jury[69] or if, as reportedly occurred at Roosevelt Green's trial, the few blacks on the jury either (a) are removed during deliberations on the basis of the white foreperson's unsubstantiated assertion that they are ill or (b) succumb to the pressure engendered by the community's, and their fellow jurors', hostility.[70]

As also illustrated by Roosevelt Green's case, white trial counsel, even if otherwise effective, may lack the time or ability to develop the rapport with a black defendant and his friends and relatives that is usually necessary if favorable mitigating evidence is to be developed. Due to the absence of such rapport, the trial lawyer, and hence the jury, are frequently left with woefully incomplete histories of indigent black defendants.

In Green's case, the defense lawyer and jury never learned the following facts, which were later uncovered—long after Green's death sentence was imposed—by a black investigator: Green was a victim of child abuse; he was abandoned at age four by his mother; he went to live with his grandmother, who died when he was ten; at that point, the white man for whom the grandmother had worked forced Green to leave and refused to give him his grandmother's accumulated salary;

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66. WHITE, *supra* note 1, at 115.

67. *Id.* at 116. White states that in one state, "prosecutors' tendency to deal with white victim cases more severely than black victim cases may be even more marked in 1986 than it was in 1972." *Id; see also* McCleskey v. Kemp, 481 U.S. 279, 356 (1987) (Blackmun, J., dissenting) ("black defendant/white victim cases advance to the penalty trial at five times the rate of black defendant/black victim cases").

68. *See* WHITE, *supra* note 1, at 115-16 (despite the new guidelines—which are so vague they restrict the jury's discretion only slightly—the jury still has vast discretion to make a moral judgment, which racial prejudice could easily affect).

69. *See id.* at 117.

70. *See id.* at 120, 122-27. An additional way in which racism can affect capital sentencing is if the defense lawyer fails to challange racial discimination in the composition of the venire from which the jury is selected, out of fear that jurors will hold against the black defendant the fact that he successfully attacked the discriminatory jury selction method. The Eleventh Circuit recently held that a trial lawyer's decision not to make a jury venire challenge under such circumstances was "reasonable," even though his black client had ended up being convicted and sent to death for the murder of a white woman by an all-white jury. *See* Gates v. Zant, No. 87-8870, slip op. at 8-14 (11th Cir. Jan. 6, 1989).

Green returned five years later—at age fifteen—to try to get his inheritance, but was shot by the grandmother's former employer and then imprisoned for having broken into that man's house; and Green had a good record in prison until he came under the domination of another prisoner.[71] Green was sentenced to death as an allegedly willing accomplice in that other prisoner's killing of a woman, even though Green was not present when it occurred.[72]

Green's case also illustrates that the system's final guard against arbitrariness and discrimination—the clemency process—is not working. A member of the pardons board stated that he would uphold Green's death penalty because he believed, contrary to the scientific evidence, that Green had raped the victim. The board member considered irrelevant the fact that it has been unconstitutional since 1977 to execute someone for committing rape.[73] As has been true in virtually every case in the South since 1981,[74] Green was denied clemency and later executed.[75]

The Baldus study,[76] which Professor White describes as "the most exhaustive study" ever of racial discrimination in capital sentencing,[77] found that in post-*Furman* Georgia, killers of white victims have been 4.3 times more likely to receive the death penalty than killers of black victims.[78] This disparity is "particularly evident" in the middle range of cases, "where there is a reasonable probability but not a certainty that the death penalty will be imposed."[79]

This study, prepared by Professor David Baldus and two colleagues, was considered by the federal courts in the case of Warren McCleskey. Writing after the Court of Appeals for the Eleventh Circuit had rejected McCleskey's claim but before the Supreme Court affirmed that decision, Professor White explains why the circuit court's attacks on the Baldus study are incorrect.[80]

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71. *See id.* at 119, 121-22, 127.

72. *Id.* at 118, 127.

73. *See id.* at 127.

74. *See* Tabak, *supra* note 17, at 844. Clemency has even been denied when it has been requested by both the trial prosecutor and the victim's father. *Id.* at 845.

75. WHITE, *supra* note 1, at 127.

76. *Id.* at 128.

77. *Id.* The Baldus study was composed of two parts. *Id.* The first part included information on over 200 variables for all defendants tried and sentenced for murder in Georgia from March, 1973 through July, 1978. *Id.* The second part covered 1,066 Georgia homicide prosecutions from 1973 through 1980—manslaughter convictions and guilty pleas as well as murder convictions—and included data relating to about 500 variables, including such factors as the strength of the government's case and the possibility of pretrial discrimination in charging and plea bargaining. *Id.*

78. *Id.* at 129.

79. *Id.* at 129 (footnote omitted).

80. *Id.* at 131-35.

Professor White thought it unlikely that any court which recognized the sophisticated nature of the Baldus study would uphold the Georgia capital punishment system, which has demonstrably produced racially discriminatory outcomes.[81] He must therefore have been dismayed when the Supreme Court, although recognizing that Baldus had done "a sophisticated multiple regression analysis" which it assumed to be statistically valid,[82] held that the study did "not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital-sentencing process."[83] In justifying its decision, the Supreme Court said that "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system,"[84] and pointed to "the safeguards designed to minimize racial bias in the process . . . ."[85]

The *McCleskey* decision ignores the fact that, as Professor White shows, the supposed safeguards against racism frequently do not work. Ironically, the Supreme Court's decision even seems to countenance one of the failures of a supposed safeguard:[86] the Georgia Supreme Court's refusal, in conducting the statutorily mandated proportionality review, to look at cases in which *life* sentences have been imposed. This means that the Georgia Supreme Court would uphold a death sentence even if in most cases with similar facts the defendants have received life sentences.[87]

Professor White, writing prior to the Supreme Court's decision in *McCleskey,* said "that if we come to recognize the effect of race on our system of capital punishment, we will have to choose between retaining a capital punishment system that operates arbitrarily or abandoning the death penalty entirely."[88] The Supreme Court chose, as a matter of constitutional law, to retain the present system, by a 5-4 vote. In so doing, it maintained that "McCleskey's arguments are best presented to the legislative bodies."[89] If prior racial discrimination claims had similarly been rejected by the federal courts on the ground that they should instead be considered by southern state legislatures, segregation laws might still be in effect. It remains to be seen whether Congress or state legislatures will take action in light of "evidence of widespread discrimination by race of victim" which "is stronger than *any* evidence of racial discrimination in capital sentencing for homicide that was

81. *See id.* at 134.
82. *See* McCleskey v. Kemp, 481 U.S. 279, 291 n.7 (1987).
83. *Id.* at 313.
84. *Id.* at 312.
85. *Id.* at 313.
86. *Id.* at 308-10.
87. For further discussion of the Georgia Supreme Court's meaningless proportionality review, see Tabak, *supra* note 17, at 823-25.
88. WHITE, *supra* note 1, at 136.
89. *McCleskey,* 481 U.S. at 319.

available in 1972"[90] when, partly on the basis of racial discrimination, Georgia's previous death penalty system was held unconstitutional in *Furman*.[91]

5. Procedural Bars Create Life-And-Death Distinctions Based On Whether Defense Counsel Objected In Time

One other major source of arbitrariness in the present capital punishment system is discussed by Professor White: the imposition, by judicial fiat, of procedural bars which have literally resulted in life-and-death distinctions between defendants, based on whether their attorneys objected to an unconstitutional occurrence in a timely manner. These procedural default rulings bar the consideration of constitutional claims even when they are meritorious and involve harmful constitutional error.[92]

We know this to be so because of the instances in which the exact same unconstitutionality has affected the cases of two co-defendants, one of whom has been granted a retrial because his or her attorney did not run afoul of a procedural bar, and the other of whom has been executed because his attorney unwittingly failed to raise the identical issue at an early enough stage of the proceedings. Professor White describes one of these instances, involving a husband and wife.[93]

Professor White aptly summarizes the effect of these procedural

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90. WHITE, *supra* note 1, at 133 (quoting Gross, *Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing*, 18 U.C. DAVIS L. REV. 1275, 1319 (1985)) (emphasis in original).

91. *See* WHITE, *supra* note 1, at 113. At its annual meeting in August 1988, the American Bar Association decided to support "the enactment of federal and state legislation which strives to eliminate any racial discrimination in capital sentencing which may exist." ABA Resolution No. 109 (adopted Aug. 9, 1988).

92. *See* WHITE, *supra* note 1, at 18-20.

93. *Id.* at 19. In the cases of Mr. Smith, and his common law wife, the latter was granted a new trial and received a sentence of life imprisonment (rather than death) based on the underrepresentation of blacks and women in the venire from which her jury was selected. *Id.* Mr. Smith, however, was denied a new trial based on his identical claim of underrepresentation of blacks and women in the *very same* venire. The federal courts held that his failure to raise the claim in state court precluded him from having it considered in the federal court. *Id.* Therefore, Mr. Smith was executed even though the venire from which his jury was selected had already been held to have been unconstitutionally selected. *Id.* Another such example involved Georgia death row inmates Joseph Thomas and Ivon Stanley. The Court of Appeals for the Eleventh Circuit granted a new trial to Thomas because the charge to the jury on intent unconstitutionally shifted the burden of proof to the defendant, and this was not a harmless error. Thomas v. Kemp, 800 F.2d 1024 (11th Cir. 1986) (per curiam), *cert. denied*, 107 S. Ct. 1982 (1987). Yet, when Thomas' co-defendant, Stanley, attempted to litigate that same burden-shifting charge issue, the court refused, on procedural grounds, to consider the issue. Stanley v. Kemp, 737 F.2d 921 (11th Cir. 1984) (per curiam), *cert. denied*, 468 U.S. 1220 (1984). Stanley was then executed.

bars:

> [A] capital defendant represented at trial by a knowledgeable and effective attorney will have a substantial possibility of having his death sentence reversed at some later point in the proceedings. On the other hand, capital defendants represented by attorneys who are not familiar with the modern system of capital punishment have substantially less chance of avoiding a death sentence at trial or successfully challenging it later on.[94]

B. *Why The Judiciary Has Failed To Act To Eliminate The Arbitrariness And Capriciousness In The Implementation Of Capital Punishment*

Professor White recognizes that the courts are not holding the death penalty unconstitutional, either in its entirety or in particular applications, because of "the present political and moral climate" in the country.[95] What he wrote in the wake of *Lockhart v. McCree*[96] is even more apparent in the wake of the Supreme Court's decision in *McCleskey v. Kemp*:[97] the Supreme Court "is very reluctant to take any action that would even temporarily frustrate the operation of the system of capital punishment."[98] Indeed, in *McCleskey,* as in *McCree,* the Court has provided *less* protection to capital litigants than to other litigants.[99] Unfortunately, "the present Court holds that maintaining the smooth functioning of our system of capital punishment is a higher priority than protecting the rights of capital defendants."[100]

In order to change the way in which the courts view these issues, it evidently will be necessary to educate the public about how the capital punishment system actually works. As even advocates of the death penalty recognize, such education will diminish public support for capital punishment. The facts—which death penalty proponents try to bury with appeals to emotion—are overwhelmingly against the present death penalty system.[101] Professor White's *The Death Penalty in the*

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94. WHITE, *supra* note 1, at 20.

95. *Id.* at 135.

96. 476 U.S. 162 (1986); *see also supra* notes 5-10 and accompanying text.

97. 481 U.S. 291 (1987).

98. WHITE, *supra* note 1, at 183.

99. *See id.* at 181; *see also McCleskey,* 481 U.S. at 361-65. (1987) (Blackmun, J., dissenting).

100. WHITE, *supra* note 1, at 183.

101. Virginia Assistant Attorney General Robert Harris has conceded that most of the data on capital punishment supports its abolition. He said it was unsurprising that widespread public debate in Canada caused a drop in support for capital punishment, since "[t]here is a lot of information out there that questions the wisdom of the death penalty . . . . It's the educational aspect. I have always perceived the popular support for the death penalty as a basically emotional response." Makin, *U.S. Watches Execu-*

Eighties, if widely disseminated, would go a long way towards educating the public about those facts.

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tion Debate, The Globe and Mail, June 12, 1987, at A3, col. 1. The Canadian Parliament, after that debate, rejected the reinstitution of capital punishment by a 148-127 vote. *Canada's Parliament Rejects Move To Restore Capital Punishment*, N.Y. Times, July 1, 1987, at A7, col. 6.