Scared to Death: Capital Punishment as Authoritarian Terror Management

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INTRODUCTION

> "Fearing death so much we could not live if we expected to die; we should die of unceasing terror . . . . More or less, all the world tremble at the thought of dying, and therefore, behave as if they were born to live for ever." All people must hold the unbearable at bay, [Wakefield] continued; and it was "just so with the hanging laws . . . When you make a law to punish with death, you fly in the face of nature; and she beats you hollow. You mean to frighten the people, and you frighten them overmuch. You want them to think of the punishment, [but it] is so dreadful that they will not think of it."
>
> V.A.C. Gatrell[1]

American capital punishment is a study in contradictions, a phenomenon in search of an explanation. Despite serious questions about its fairness and practical utility, and a general abolitionist trend among developed nations worldwide, the institution is flourishing in the United States.[2] Popular support for it is approaching an all-time, almost frenzied, high.[3] The number of executions since the 1976 reinstatement of capital punishment has topped 600.[4] Politicians feel compelled to proclaim their zealotry for the

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[1] V.A.C. GATRELL, THE HANGING TREE: EXECUTION AND THE ENGLISH PEOPLES 1770-1868 (quoting EDWARD GIBBON WAKEFIELD, THE HANGMAN AND THE JUDGE: OR A LETTER FROM JACK KETCH TO MR. JUSTICE ALDERSON 3-5 (1833)). Wakefield was himself a death row inmate in Newgate prison.

[2] *See generally* ROGER HOOD, THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE 7-9 (1989) (reporting that "the world-wide movement towards abolition has proceeded at an increasing pace," although there are regions, including United States, in which trend has been resisted); FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 8-10 (1986) ("[T]he decline of executions in the West constitutes part of a long-term evolutionary process — the development of civilization, in fact."); Hugo Adam Bedau, *The Laws, the Crimes, and the Executions*, *in* THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 26, 33 (1997) [hereinafter CURRENT CONTROVERSIES] (presenting summary of worldwide status of death penalty); Laurence A. Grayer, *A Paradox: Death Penalty Flourishes in U.S. While Declining Worldwide*, 23 DEN. J. INT'L L. & POL'Y 555, 555 (1995) (reviewing how international law and other countries approach death penalty and contrasting U.S. approach); William Schabas, *International Law and Abolition of the Death Penalty*, 55 WASH. & LEE L. REV. 797, 797-846 (1998) (discussing death penalty in context of universal declaration of human rights).

[3] *See* Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, *in* CURRENT CONTROVERSIES, *supra* note 2, at 90.

[4] *See* NAACP Legal Defense and Education Fund, *Essential Information's Web Server*, Death Penalty Information Center (visited Feb. 1, 2000) <http://www.essential.org

death penalty.[5] Legislators propose ever wider expansions of capital offenses and greater limitations on procedural rights.[6] By contrast, the American Bar Association's House of Delegates has called for a moratorium on capital punishment until an acceptable degree of fairness, impartiality, and accuracy in the death penalty process, which substantial evidence indicates is currently lacking, can be ensured.[7]

This fervor for capital punishment in the face of troubling facts suggests a discontinuity between stated and actual ends.[8] There is reason to suspect that capital punishment is mostly about something other than the commonly proffered purposes of general deterrence, incapacitation, or retribution. First, American capital punishment is so poorly suited to the accomplishment of those

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/dpic/dpicexe.html> (on file with author). As of February 1, 2000, the number stood at 610. There were 98 executions in 1999.

[5] *See infra* notes 120-23 and accompanying text. An especially gruesome example occurred when Florida's highest law enforcement officer gloated publicly about a botched execution that appeared to set a human being on fire. *See, e.g., A Morbid Fascination*, ST. PETERSBURG TIMES, Apr. 6, 1998, at 8A (criticizing demagoguery concerning capital punishment). For descriptions of Florida's two electrocution debacles, in which the flesh of Jesse Tafero and Pedro Medina was scorched or charred, see *Jones v. State*, 701 So. 2d 76, 85-88 (Fla. 1997) (Shaw, J., dissenting).

[6] *See infra* notes 234-36 and accompanying text. As President Clinton found it expedient to boast during the 1996 presidential debates, the 1994 Omnibus Crime Bill created more than sixty new federal death penalty offenses; and the Anti-Terrorism and Effective Death Penalty Act of 1996 severely restricted capital inmates' access to collateral review under habeas corpus. *See* Marcia Coyle, *Clinton, Dole Rate Low on Civil Liberties*, NAT'L L.J., Oct. 28, 1996, at A1.

[7] *See* AMERICAN BAR ASSOCIATION RESOLUTION ON THE DEATH PENALTY Feb. 3, 1997 [hereinafter ABA RESOLUTION]. The moratorium movement gained new momentum when death-penalty supporter Illinois Governor George Ryan, citing a "shameful record of convicting innocent people and putting them on death row, " declared a halt to executions in that state January 31, 2000. In announcing the measure, Governor Ryan observed that, since the state's 1977 resumption of capital punishment, the number of men sentenced to death that have been subsequently exonerated (13) exceeds the number of inmates put to death (12). Dirk Johnson, *Illinois Governor Imposes 1st Moratorium on Executions*, New York Times News Service, Feb. 1, 2000, *available in* 2000 WL-NYT 0003200033. At least five other states have recently considered legislation that would halt executions, but strong public support for capital punishment has contributed to the measures' defeat in each case. The Nebraska legislature did enact moratorium legislation, but Governor Mike Johanns vetoed the measure. Robert Tanner, *Illinois Gives Death Penalty Critics Hope, AP Online*, Feb. 1, 2000, *available in* 2000 WL 12386693. *See generally* MICHAEL A. MELLO, DEAD WRONG: A DEATH ROW LAWYER SPEAKS OUT AGAINST CAPITAL PUNISHMENT (1997) (providing impassioned indictment of American capital punishment).

[8] The controversy surrounding the execution of Karla Faye Tucker exposed ambivalence even among otherwise ardent supporters of capital punishment. *See, e.g.*, Jim Jones, *Death Penalty Editorial Criticized*, THE PATRIOT LEDGER, Apr. 25, 1998, at 18 (describing divisions among evangelical Christians concerning capital punishment revealed by Tucker execution).

objectives, and so fantastically costly, as to raise serious doubts about the extent to which those are the primary purposes.[9] Second, research suggests that popular support for the death penalty depends more upon its relation to basic attitudes and beliefs (such as conservatism and authoritarianism) than on its instrumental penal efficacy.[10] To put it bluntly, if we are not accomplishing our stated goals, and if our stated goals are not our actual goals, then why are we killing all of these people?

I believe that American capital punishment serves, through mostly nonconscious processes, more indirect and symbolic than direct and tangible purposes.[11] Such symbolic significance deserves close study for both legal and moral reasons. First, the Constitution demands a minimal level of rationality for all government action — a requirement that ought to be more than merely perfunctory when the activity in question is the deliberate taking of human life. Meaningful review does not take purported governmental objectives at face value but instead inquires into actual purposes, at least when there is a good reason to do so.[12] Second, public policy decisions involving such high moral stakes for the community ought to be based on carefully considered and informed judgment rather than reactive passions that are only dimly, if at all, perceived and understood.[13]

Metaphorically speaking, then, this Article offers a form of collective cognitive therapy — one that deals with problematic thought processes that are usually not held in conscious awareness — for the capital punishment debate.[14] It seeks (1) to bring into conscious awareness those implicit processes postulated to contrib-

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[9] The materials presented in Part III bear on the efficacy issue. *See* Richard C. Dieter, *Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty*, *in* CURRENT CONTROVERSIES, *supra* note 2, at 401 (stating that exorbitant cost of capital punishment places crushing financial burdens on state and local governments, accomplishes little or nothing as response to crime, and diverts money from much more effective "long-term crime reduction: many additional police officers; speedier trials; or drug rehabilitation programs").

[10] *See infra* notes 102-07 and accompanying text.

[11] *See* DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 416 (1990) (stating that "[i]f, in fact, capital sentencing in the United States does not really advance in any meaningful way the goals of deterrence or retribution, its only remaining function must be symbolic").

[12] *See infra* Part IV.

[13] This point, which could be defended on either deontological or utilitarian grounds, I simply assume a priori for present purposes.

[14] *See infra* note 374.

ute substantially to support for and imposition of capital punishment and, in so doing, and (2) to enable policy makers to decide more deliberately and rationally whether capital punishment is a minimally acceptable behavioral choice.

Toward that end, this Article proposes a theoretical account of the social psychology of capital punishment by drawing on a body of research termed "terror management" theory. As explained below, that theory contends that cultural institutions provide both direct and symbolic protection against the existential terror that results from humans' awareness of their own physical vulnerability and ultimate mortality.[15] Referring to capital punishment, a number of justices of the United States Supreme Court have recognized that, as a matter of criminal procedure, death is different.[16] Death awareness is also different as a matter of cognition. Because humans have both the capacity to understand their own mortality and the innate motivation for self-preservation, they are vulnerable to the emotional consequence of such awareness – terror. This terror drives individuals to deploy psychological defenses against death and the fears it provokes. Cultural institutions provide both direct, practical protection and indirect, symbolic protection against such terror. Research has shown that, when threatened with the terror that awareness of mortality provokes, people tend to increase substantially the vigor with which they seek the symbolic comfort of cultural institutions.

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[15] *See infra* Part I (describing terror management theory and its underlying research).

[16] *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 994 (1991) (noting that "death is different" and deserves constitutional protections provided nowhere else); Lankford v. Idaho, 500 U.S. 110, 125 (1991) (holding that due process requires adequate notice of possibility of death sentence); Streetman v. Lynaugh, 484 U.S. 992, 995 (1988) (Brennan, J., dissenting from denial of stay of execution); Eddings v. Oklahoma, 455 U.S. 104, 117-18 (1982) (O'Connor, J., concurring); Gardner v. Florida, 430 U.S. 349, 357 (1977) (plurality opinion); Spaziano v. Florida, 468 U.S. 447, 468-69 & n.3 (1984) (Stevens, J., concurring in part and dissenting in part); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion). For Justice Scalia, however, death is only different when the result is denial to the noncapital defendant of procedural protections available in death penalty proceedings. *See Harmelin*, 501 U.S. at 995. He has invoked the "death-is-different" argument to uphold denial of the opportunity to present mitigating evidence to a defendant facing a mandatory life sentence for possession of 600 grams of cocaine. *See id.* But he has complained bitterly in other cases of the role of the "'death-is-different' jurisprudence which this Court is in the apparently continuous process of composing" and through which the "heavily outnumbered opponents of capital punishment have successfully opened yet another front in their guerilla war to make this unquestionably constitutional sentence a practical impossibility." Simmons v. South Carolina, 512 U.S. 154, 185 (1994) (Scalia, J., dissenting).

I extrapolate from that research to propose that the peculiar effect of death awareness on cognitive processing suggests a social psychological account of capital punishment as a cultural institution.[17] Specifically, this Article proposes that American capital punishment is largely a nonconscious, symbolic defense against the terror that accompanies awareness of human mortality. This proposition is based on terror management theory's link between fear of death awareness and several phenomena that are relevant to capital punishment: (1) hyperpunitiveness, (2) aggression, and (3) authoritarianism. People tend to increase the level of punishment of and aggression toward values transgressors (e.g., criminals) when an experimental manipulation is imposed (heightened death awareness) that activates the nonconscious defense mechanism of identification with and protection of cultural institutions. This effect is also linked to authoritarian behaviors — specifically, ingroup favoritism and hostility and discrimination against members of outgroups, such as racial or religious minorities. Capital punishment presents the necessary ingredients for activation of the terror management effect: a reminder of mortality, time to push awareness of it to the fringes of consciousness, and an opportunity to indulge in punitive and often authoritarian aggression against an offending target person. That capital punishment operates as a form of terror management is evident in its most troublesome attributes — its tendency toward arbitrary, excessive, discriminatory, and dehumanized application.[18] Once the terror management phenomenon is shown to drive an important portion of public support for and actual implementation of capital punishment, the practice can be seen as a sacrificial form of nonconscious psychological defense against awareness of our own mortality. The question then arises whether American society ought to continue to defy a trend among developed nations away from such a morally and technically problematic practice. It seems self-evident that such irrational, ritualized killing of human beings (however loathsome the particular individuals selected might be) is neither morally nor legally justified.

This Article addresses these issues in four parts. Part I provides an overview of the terror management and authoritarianism con-

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[17] This Article is an extrapolation because researchers of terror management have not yet considered the theory's application to the issue of capital punishment.

[18] *See infra* Part III.

structs. Part II describes a theory of capital punishment as authoritarian terror management, which portrays the death penalty as a form of ritual human sacrifice. Part III offers evidence to support the theory. Part IV argues that, seen as a form of ritual human sacrifice to ward off fear of death awareness, capital punishment violates the fundamental constitutional norm of rationality. This Article concludes on a pessimistic note, observing that neither judicial nor legislative substantive self-inquiry and reform seem likely in the foreseeable future.

I. TERROR MANAGEMENT

> Death's a fearful thing. . . .
> The weariest and most loathed worldly life
> That age, ache, penury, and imprisonment
> Can lay on nature, is a paradise
> To what we fear of death.
>
> William Shakespeare[19]

A. Overview

There is more to capital punishment than meets the ear. As explained in Part II, support for capital punishment depends more on emotional commitment to general worldview than on its utility as a practical response to crime. Instrumentalist justifications, however, dominate death penalty debate.[20] Many capital punishment supporters will not question their beliefs concerning deterrence, retribution, or crime, and opponents probably do not look past specific humanitarian concerns to a more pervasive and diffuse liberal commitment.[21] As researchers have noted, "Symbolic

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[19] WILLIAM SHAKESPEARE, MEASURE FOR MEASURE, act 3, sc. 1.

[20] *See infra* notes 278-84 and accompanying text.

[21] This kind of nonconscious, defensive process is distinguished from deliberate deployment of arguments for or against capital punishment, such as the recent emergence of "pragmatic abolitionism," which opposes capital punishment as fiscally inefficient rather than inhumane. *See* HERB HAINES, AGAINST CAPITAL PUNISHMENT: THE ANTI-DEATH PENALTY MOVEMENT IN AMERICA, 1972-1994, at 167-68 (1996) (reviewing pragmatic abolitionism of antideath penalty movement). Activists making such moves candidly admit that their main concern is with morality, not economic efficiency, and that their reliance on efficiency arguments is purely tactical in view of their perception that the public is unresponsive to humanitarian pleas. *See, e.g.*, Herb Haines, *Pragmatic Abolitionism* (paper presented at 1993 Annual Meetings of the Midwest Sociological Society, posted on <http://www.abolish@maelstrom.stjohns.edu>). Pragmatic abolitionism is an example of a factually valid argument in which its proponent has little emotional investment. But more typically,

or ritual institutions and practices [such as capital punishment] are commonly supported quite unreflectively, without any clear conception on the part of those supporting them as to why they do so."[22] As a symbolic act, capital punishment bears striking resemblance to ritual human sacrifice, theoretical conceptions of which include the terror management elements of death transcendence, worldview defense, religiosity, and outgroup hostility.[23]

The possibility of a nonconscious, symbolic function for capital punishment that is related to defense of worldview points toward terror management theory, a key component of which involves an unconscious defense of one's worldview to ward off incipient death awareness.[24] Moreover, physical aggression and authoritarianism have been implicated in the terror management effect.[25] And religious institutions and ritual practices have been identified as prototypical anxiety buffers in the face of incipient mortality awareness.[26] Terror management's strong theory and robust research results, and the construct of authoritarianism, are described in this Part.[27]

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typically, advocates appear to have substantial affective investment in their arguments, however meritless those arguments (e.g., deterrence) may be. *See* Ellsworth & Gross, *supra* note 3, at 92 (stating that "general opinions about the death penalty are subjectively important to many, if not most, people in this society").

[22] ZIMRING & HAWKINS, *supra* note 2, at 17.

[23] *See infra* Part I.B.

[24] *See id.*

[25] *See infra* text accompanying notes 44-51.

[26] *See infra* text accompanying notes 37-38 (religious institutions and rituals).

[27] "There is a large gap between the Big Theories and the Little Studies" concerning the psychology of death. ROBERT KASTENBAUM, THE PSYCHOLOGY OF DEATH 135 (1992). On one hand, theory development has often far outrun data collection. For example, Freud's view that because "in the unconscious every one of us is convinced of his own immortality" any expression of anxiety concerning death must manifest some other latent conflict (e.g., castration anxiety) is empirically dubious in both its premise and conclusion. *Id.* at 136, *quoting* SIGMUND FREUD, *Thoughts for the Times on War and Death, in* 4 COLLECTED WORKS 288-317 (James Strachey ed. & trans., Hogarth Press 1953). On the other hand, much of the empirical research has been atheoretical, correlational, and based on samples of convenience; it has also tended to rely heavily on self-report measures. *See* KASTENBAUM, *supra*, at 146-48. The most widely used is a fifteen-item scale, the Death Anxiety Scale ("DAS"). *See id.* at 149-67; RICHARD LORETTO & DONALD I. TEMPLAR, DEATH ANXIETY 7-37 (1986). Terror management research, by contrast, is based on a strong theory and employs quasi-experimental methodology.

According to the constructive realist model of social science, a construct's validity is a function not only of its susceptibility to operationalization and replicated, *modus tollens* testing, but also of its nexus to a nomological net of cognate constructs. *See infra* note 128. In other words, the theory not only should generate testable hypotheses but also should increase understanding of the area under study. By these criteria, terror management theory must be regarded as relatively strong. In addition to demonstrating robustness across nu-

B. Basic Theory

Terror management theory proceeds from two fundamental premises.[28] First, humans have the unique capacity to comprehend the implacable fact of our own physical vulnerability and eventual mortality.[29] Second, humans (like other animals) are innately motivated toward self-preservation. "This awareness of the inevitability of death in an animal instinctively programmed for self-preservation creates the potential for paralysing terror."[30] In this context, "[t]he term *terror* refers simply to the emotional manifestation of the self-preservation instinct in an animal intelligent enough to know that it will someday die."[31] Like Thomas Hobbes, terror management theorists regard civil society as serving the primary purpose of protecting its members against threats to life and limb. Importantly, however, the theory further posits that such protection extends not only against injury and death but also against the terror that awareness of those eventualities evokes.

Terror management theory's central claim is that culture offers not only direct but also symbolic defense against such threats and their concomitant extreme anxiety. Culture directly seeks to reduce the risk of injury and mortality through a variety of familiar mechanisms. For example, criminal, civil, and regulatory laws attempt to control health- and life-threatening activities, and medical

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merous studies, the theory's cognitive model is at home with the growing prevalence within psychology of two-process cognitive models. *See infra* notes 54-60 and accompanying text.

[28] *See generally* ERNEST BECKER, ESCAPE FROM EVIL (1975) (analyzing root of human evil); ERNEST BECKER, THE DENIAL OF DEATH 11-24 (1973) (discussing mankind's desire to transcend death). To Becker, like Zilboorg before him, fear of death is the root of anxiety; and severe mental disorder reflects inadequate defense against the paralyzing terror that accompanies mortality awareness. *See* G. Zilboorg, *Fear of Dying*, 12 PSYCHOANALYTIC Q. 465, 465-66 (1943). While Becker's conclusions concerning the psychodynamic etiological role of death awareness in mental disorder seem incomplete today, his concept of anxiety buffer and its relationship to death awareness has found empirical support. *See infra* notes 29-40 and accompanying text (citing Jeff Greenberg & Linda Simon, *Testing Alternative Explanations for Mortality Salience Effects: Terror Management, Value Accessibility, or Worrisome Thoughts?*, 25 EUR. J. OF SOC. PSYCHOL. 417, 418 (1995) [hereinafter Greenberg & Simon, *Testing Alternative Explanations*]).

[29] *See* Greenberg & Simon, *Testing Alternative Explanations*, *supra* note 28, at 418. Thus, terror management theory rejects Freud's sweeping assertions concerning death agnosticism. Instead, terror management theory contemplates a more complex cognitive process of mortality-awareness accessibility and defense. *See id.*

[30] *Id.*

[31] Jeff Greenberg & Linda Simon, *Terror Management and Tolerance: Does Mortality Salience Always Intensify Negative Reactions to Others Who Threaten One's Worldview?*, 63 J. PERSONALITY & SOC. PSYCHOL. 212, 212 (1992).

science combats disease-related threats. Such protections, including the penological goals of deterrence and incapacitation, are tangible. Ultimately, however, no cultural institution can completely insulate one from harm; in the end death claims us all. Culture therefore performs the additional necessary function of offering "a *symbolic* means of minimizing [the] existential terror" that awareness of this grim reality elicits.[32]

My central point is that capital punishment functions more as symbolic protection against fear of death awareness than direct, tangible protection against physical harm itself. As described below, it performs that function as an act of ritual human sacrifice.[33]

The need for symbolic protection against fear of death is well recognized. Describing what Otto Rank referred to as "immortality systems," for example, Robert Jay Lifton observed that "[w]e thus seek a *sense* of immortality, of living on in our children, works, human influences, religious principles, or in what we look upon as eternal nature."[34] Lifton expressly tied this concept to state-sanctioned homicide, and, moreover, a strong sense of symbolic immortality is empirically associated with less self-reported fear of death and reduced manifestation of fear of death awareness.[35]

Existential terror is moderated cultural worldview, an individualized version of which we acquire through socialization.[36] Faith in and adherence to the standards embodied in one's worldview defend against existential terror in two ways. First, cultural worldviews contain a religious component that promises actual immortality conditioned on observance of prescribed standards.[37] Sec-

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[32] Greenberg & Simon, *Testing Alternative Explanations*, *supra* note 28, at 418 (emphasis added).

[33] *See infra* Part II.D.

[34] ROBERT JAY LIFTON, THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE 14 (1986) [hereinafter NAZI DOCTORS] (citing OTTO RANK, BEYOND PSYCHOLOGY (1941)); *see also* ROBERT JAY LIFTON, THE BROKEN CONNECTION: ON DEATH AND THE CONTINUITY OF LIFE 13-111 (1979) (describing modes of symbolic immorality).

[35] *See* NAZI DOCTORS, *supra* note 34, at 14 (linking concept to state-sanctioned homicide); Victor Florian & Mario Mikulincer, *Symbolic Immortality and the Management of the Terror of Death: The Moderating Role of Attachment Style*, 74 J. PERSONALITY & SOC. PSYCHOL. 725, 729-33 (1998).

[36] Greenberg & Simon, *Testing Alternative Explanations*, *supra* note 28, at 418 (stating that "cultures transmit to their developing members a relatively benign conception of reality that imbues the world with order, stability, meaning, and permanence").

[37] Sources outside the terror management literature concur in the relationship between religion and defense against death awareness. *See generally* Donald P. Judges, *Scared to Death III: Terror Management, Capital Punishment, and Ritual Sacrifice* (unpublished manuscript, on file with author).

ond, culture offers symbolic immortality through association with institutions, religious and secular, that are more enduring than one's own corporeal self. Identification with such institutions assures that an important aspect of one's being will continue to exist after physical death. In general, then, successful management of the potential terror of death awareness depends on the extent to which the individual embraces an operative cultural worldview. People experience less anxiety in the face of mortality awareness when they enhance their self-esteem by defending their worldviews. Symbolic-cultural institutions and activities, both religious and secular, play a central role in worldview defense. Indeed, the terror management effect has been explicitly tied to the phenomenon of American civil religion.[38] I contend that both that effect and that phenomenon manifests in capital-punishment-as-ritual-human-sacrifice. And research outside the terror management field indicates that support for capital punishment derives more from basic worldview than from specific beliefs and attitudes about crime.[39]

C. Capital Punishment as Fear of Death Awareness

The proposition that capital punishment operates as a nonconscious symbolic defense against fear of death awareness follows from the findings of terror management research. Most of that research measures the effects of manipulations that increase subjects' awareness of death, or "mortality salience." Keep in mind that, by increasing self-esteem, defense of one's worldview reduces anxiety in the face of death awareness.[40]

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[38] *See* Jeff Greenberg et al., *Evidence of a Terror Management Function of Cultural Icons: The Effects of Mortality Salience on the Inappropriate Use of Cherished Cultural Symbols*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 1211 (1995); *see also infra* Part II.C-D.

[39] *See infra* notes 102-07 and accompanying text.

[40] *See* Jeff Greenberg et al., *Effects of Self-Esteem on Vulnerability-Denying Defense Distortions: Further Evidence of an Anxiety-Buffering Function of Self-Esteem*, 29 J. EXPERIMENTAL SOC. PSYCHOL. 229, 230-32 (1993); Jeff Greenberg et al., *Why Do People Need Self-Esteem?: Converging Evidence of an Anxiety-Buffering Function*, 63 J. PERSONALITY & SOC. PSYCHOL. 913, 914, 917-21 (1992); Linda Simon et al., *Mild Depression, Mortality Salience, and Defense of Worldview: Evidence of Intensified Terror Management in the Mildly Depressed*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 81, 82 (1996) [hereinafter Simon, *Mild Depression*] (citing Tom Pyszczynski et al., *The Effects of Threatening or Bolstering the Cultural Worldview on Reactions to Mortality Salience: Evidence that Cultural Worldviews Buffer Death Anxiety* (unpublished manuscript, University of Colorado, Colorado Springs)).

First, the role that worldview defense plays in reducing anxiety has particular significance in the context of punishment. When presented with an opportunity to punish an individual who represents a threat to their worldview, people who are reminded of their own mortality tend to impose much more severe penalties than do people whose mortality is not made salient.[41] Death awareness thus results in hyperpunitive "worldview defense" when death-aware subjects are confronted with an individual who represents a repudiation of the subjects' worldview.[42] This hyperpunitive terror management response is seen even in people, like judges, who are supposedly trained to be objective.[43] Moreover, this response has been specifically shown to manifest in actual physical as well as symbolic aggression against worldview-threatening targets.[44] And it is displayed more prominently among persons whose sense of symbolic immortality (i.e., connection to family, work, society, culture, and religious beliefs) or faith in their worldview is relatively weak: insecure worldview requires more highly activated defense (including through hyperpunitiveness) in response to the terror of death

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[41] *See* Abram Rosenblatt & Jeff Greenberg, *Evidence for Terror Management Theory I: The Effects of Mortality Salience on Reactions to Those Who Violate or Uphold Cultural Values*, 57 J. PERSONALITY & SOC. PSYCHOL. 681, 682 (1989) [hereinafter Rosenblatt & Greenberg, *Evidence for Terror Management Theory I*]. Investigators measured subjects' (municipal court judges) reactions (amount of bond set) to a hypothetical moral transgressor (a prostitute) after the subjects' mortality was made salient. As predicted, a substantial hyperpunitive effect emerged: the mortality-salient judges set a much higher bond (nine times as high) than did judges in the control group, but only if the transgressor represented a threat to subjects' worldview. The effect was specifically limited to targets who violated the subject's own worldview; it did not occur for subjects whose worldview was not threatened by the transgressor or in response to targets with whom the subjects merely associated a negative affective state.

[42] *See id.* at 684. In another study, investigators found that reversing the valence of the target also reversed the direction of the mortality-salience effect. As predicted, mortality salience led subjects to increase their desire to reward a target who upheld the subjects' worldview. Several studies eliminated alternative explanations for the effect, such as mood, increased general self-awareness, increased arousal, and the form of the death questionnaires used. *See id.* at 685-88. Other studies have found that the effect is indeed a reaction to awareness of death, as opposed for example, to heightened accessibility of subjects' value systems or induction of generally worrisome thoughts. *See* Jeff Greenberg et al., *Role of Consciousness and Accessibility of Death-Related Thoughts in Mortality Salience Effects*, 67 J. PERSONALITY AND SOC. PSYCHOL. 627, 629-32 (1994) [hereinafter Greenberg, *Role of Consciousness*]; Greenberg & Simon, *Testing Alternative Explanations*, *supra* note 28, at 422.

[43] *See supra* note 41.

[44] *See* Holly McGregor et al., *Terror Management and Aggression: Evidence that Mortality Salience Motivates Aggression Against Worldview-Threatening Others*, 74 J. PERSONALITY & SOC. PSYCHOL. 590, 603-05 (1998) (finding that providing subjects opportunity to verbalize negative attitudes toward target reduced physical aggression).

awareness.[45] In short, when we are reminded of our mortality, we take comfort from inflicting extra punishment on people we find threatening, especially when we feel insecure about our place in the world.

Second, authoritarian processes, which are described more fully below,[46] are active in the terror management effect. Thus, when confronted with awareness of their own mortality, people tend to exhibit greater prejudice against members of outgroups (e.g., ethnically, racially, religiously, or attitudinally dissimilar others),[47] and death awareness increases stereotypic thinking.[48] Because the effect is a form of worldview defense, people who characteristically tend toward authoritarianism also display greater hostility against outgroups when made aware of their own vulnerability than do people who are more egalitarian.[49] Conversely, while "mortality salience encouraged intolerance of a dissimilar other among conservatives, it did not do so for liberals and actually seemed to increase their tolerance of a dissimilar other."[50] And the extent to which people react to awareness of death with intolerance appears to be susceptible to external influence such as prompting.[51]

In sum, death awareness provokes defense of worldview, which can take the form of physically aggressive hyperpunitiveness against

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[45] Thus, the punishment-increasing effect of mortality salience occurred among subjects who scored low in symbolic immortality. *See* Florian & Mikulincer, *supra* note 35, at 729. Clinical application of terror management research has found that the effect is more prominent when faith in worldview is relatively weak but extant, as is presumably the case with moderately depressed subjects. *See* Simon, *Mild Depression*, *supra* note 40, at 82-87.

[46] *See infra* Part I.E.

[47] *See* Jeff Greenberg et al., *Evidence for Terror Management Theory II: The Effects of Mortality Salience on Reactions to Those Who Threaten or Bolster the Cultural Worldview*, 59 J. PERSONALITY & SOC. PSYCHOL. 308, 317-18 (1990) [hereinafter Greenberg, *Evidence for Terror Management Theory II*]. Religious conflict offered a particularly virulent example of intergroup bias. The effect manifested in this context as negative stereotypic trait ratings of outgroup members (Jews) by ingroup members (Christians) exposed to mortality salience. *See id.* at 309-13.

[48] *See* Jeff Schimel et al., *Stereotypes and Terror Management: Evidence that Mortality Salience Enhances Stereotypic Thinking and Preferences*, 77 J. PERSONALITY & SOC. PSYCHOL. 905, 921-24 (1999).

[49] Greenberg, *Evidence for Terror Management Theory II*, *supra* note 47, at 313. The researchers defined authoritarianism as "a pattern of traits or generalized behavioral style characterized by high regard for authority, rigidity, conventionality, and contempt or disdain for those who are worse off." *Id.* Subjects who were made aware of their own mortality and who scored high on a scale of authoritarianism indeed tended to demonstrate more outgroup hostility (whether threat to worldview was immediate or generalized) than did low authoritarians. *See id.* at 314-17. *See generally* THEODORE W. ADORNO ET AL., THE AUTHORITARIAN PERSONALITY (1982) (discussing construct of authoritarianism).

[50] Greenberg & Simon, *supra* note 31, at 215.

[51] *See id.* at 216-18.

individuals who threaten one's worldview. This effect is seen even in people, like judges, who should know better.[52] The identification of such threats and consequent infliction of that extra measure of punishment are affected by the authoritarian processes of ingroup favoritism, outgroup hostility and aggression, and cognitive rigidity. And those processes can be intensified by external influences.

The presence of authoritarian-infused hyperpunitiveness in a death-related context is evidence that the terror management effect is at work. In other words, the extra measure of suffering is probably being inflicted largely as a symbolic response to fear of death awareness. Capital punishment is a death-related context likely to involve this effect because it constitutes part of the cultural anxiety-buffer, provokes death awareness, and sometimes itself threatens worldview. In other words, capital punishment enacts reassuringly potent ritualistic control over death itself and expresses authoritarian aggression against hated and feared attributes as represented by extreme values transgressors and outsiders, while also providing occasional graphic reminders and actual demonstrations of everyone's own vulnerability and mortality. And it threatens those worldviews that include proscriptions against killing and in favor of mercy, humaneness, and tolerance. The juxtaposition of these conflicting forces results in the sporadic outbreak, encouraged and exploited by politicians' rhetoric, of the largely arbitrary authoritarian hyperpunitiveness that is American capital punishment.

D. Terror Management as Nonconscious Defense

The forces underlying capital punishment, while readily responsive to fear-based communications, are remarkably unresponsive to reasoned objection.[53] This is because the death penalty is more symbolic than practical. It is also because, as discussed here, those forces operate largely outside of conscious awareness.

The terror management effect, like the related authoritarian processes of stereotypy and prejudice,[54] functions mostly as a non-

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[52] *See supra* note 38.

[53] *See infra* notes accompanying Part II.B.

[54] *See* John A. Bargh & Tanya L. Chartrand, *The Unbearable Automaticity of Being*, 54 AM. PSYCHOLOGIST 462, 470 (1999) (reviewing literature); Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 15-19

conscious, automatic defense to protect the individual from the terror that knowledge of one's mortality provokes.[55] In other words, only "when thoughts of death are outside of consciousness but are still highly accessible, does intensified worldview defense occur."[56] The terror management effect thus operates in the realm known to cognitive psychology as "implicit," "automatic," and "nonconscious" processes, which are distinguishable from the conscious, relatively effortful processes that transpire in active mem-

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(1995); Eliot R. Smith & Michael A. Zárate, *Exemplar-Based Model of Social Judgment*, 99 PSYCHOL. BULL. 3, 3-4 (1992). Specifically, from the very first encounter with another person, individuals automatically begin a process of "primitive categorization" through which the other is placed according to stereotypical dimensions such as gender, race, and age. *See* Marilynn B. Brewer, *A Dual Process Model of Impression Formation*, 1 ADVANCES SOC. COGNITION 1, 6-9 (1988). Unless it appears that the target other has relevance to the observer's immediate needs and purposes, further processing of information concerning the other will be relatively shallow and follow the perceiver's extant typology of person categories. *See id.* at 9-20. Significantly, if a target person whose impression is processed in this impersonal fashion manifests stereotype-defying information, that information is *not* mindfully fed back to modify the stereotypic parameters of the category but instead contributes to the formation of a new, isolated category subtype. The original inaccurate stereotypic category features, such as dependent female or aggressive male, tend to remain intact. *See id.* at 20-22.

A related, two-process, "dissociation" model of stereotype activation describes the phenomenon of prejudice as "automatically activated, providing a 'default' basis for responding in the presence of members of the stereotyped group or their symbolic equivalent." Patricia G. Devine, *Prejudice and Out-group Perception*, *in* ADVANCED SOCIAL PSYCHOLOGY 467, 497-99 (A. Tesser ed., 1995). More reflective, later-learned, nonprejudicial personal beliefs concerning target groups "are less accessible cognitive structures than stereotypes and rely on controlled processing for their activation." *Id.*

[55] Terror management research "suggests that there may be a sequence of two rather distinct defensive modes of responding to the threat implied by conscious consideration of one's mortality. The first *directly* defends against *conscious* aversive thoughts, including thoughts of death. The second *symbolically* defends against the *unconscious* threat of the knowledge of mortality." Greenberg, *Role of Consciousness*, *supra* note 42, at 635. The initial response to current awareness of one's mortality thus takes the form of active suppression to remove such thoughts from consciousness. But humans implicitly know that death is inevitable. The second response comes into play once mortality is no longer in active awareness but lurks just beyond the fringes of consciousness. It keeps the terror of that implicit knowledge at bay via the cultural anxiety-buffer (which provides a sense of security and hope of salvation). *See id.* at 636.

[56] *Id.* at 635. The subtle induction of thoughts of one's own death showed the strongest terror management effect. The effect also appeared when subjects were encouraged to delve extensively into thoughts of their own death and to contemplate the death of a loved one, but less powerfully than in the subtle-induction/own-death condition. *See id.* Additional research found that "the problem of death may produce its effects most strongly when it is accessible but no longer in current active memory." *Id.* at 630. Researchers concluded that "after being reminded of their mortality, subjects initially suppress death-related thoughts [resulting in lower accessibility]. After being distracted from the problem of death, however, this suppression is relaxed and such thoughts consequently increase in accessibility." *Id.* at 634.

ory.[57] Research in this area shows that (1) subjects need not actively experience fear for the terror management effect to manifest,[58] and (2) the effect emerged in response to subtle, but not relatively intensive, induction of death awareness.[59]

Terror management works in the following way: once death-related thoughts actually intrude into awareness, subjects' initial response is to deploy direct, conscious defenses either to remove such thoughts from consciousness or to minimize their impact (through, for example, distraction, denial, or delay). The problem with death, however, is that "although defenses involving distraction, simple denial, or delaying may help deal with the problem on a conscious level, they are unlikely to be effective in dealing with one's implicit knowledge of the inevitability of death."[60] Death does not go away simply because one has stopped thinking about it. That implicit knowledge creates the potential for, and need for protection from, existential terror. The cultural anxiety-buffer, by offering both a reassuring sense of security and at least symbolic escape from death, keeps that terror at bay. "Terror management thus consists of an unconscious set of defenses that provides individuals with psychological equanimity in the face of inevitability of death by securely embedding them in the benign and meaningful symbolic conception of reality espoused by their culture."[61] Be-

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[57] *See generally* Bargh & Chartrand, *supra* note 54, at 463-64 (reviewing literature of two-process models); HENRY GLEITMAN, PSYCHOLOGY 694-95 (4th ed. 1995) (describing two-process model). Social psychologists have recently realized the extent to which implicit processes can actively influence social judgments. *See* Greenwald & Banaji, *supra* note 55, at 5. Implicit (i.e., automatic) processes play an important role in aspects of social cognition that are relevant to the anxiety-buffer and mortality-salience effect, including attitudes and self-esteem. *See id.* at 9-12. *See generally* Mahzarin R. Banaji & Deborah A. Prentice, *The Self in Social Contexts*, 45 ANNUAL REV. PSYCHOL. 297 (1994) (examining studies on how self directs social behavior); Anthony G. Greenwald, *The Totalitarian Ego: Fabrication and Revision of Personal History*, 35 AM. PSYCHOLOGIST 603 (1980) (arguing that ego is characterized by cognitive biases similar to totalitarian control strategies that function to preserve organization of knowledge); Daniel T. Gilbert, *How Mental Systems Believe*, 46 AM. PSYCHOLOGIST 107, 108-10 (1991) (distinguishing active memory from nonconscious processes in context of belief formation). Attitudes also can be influenced through either peripheral-route, relatively thoughtless and heuristic processing of communications directed at persuasion, or central-route, relatively thoughtful and elaborated processing of such communications. *See* Richard E. Petty & John T. Cacioppo, *The Elaboration Likelihood Model of Persuasion*, 19 ADVANCES IN PSYCHOL. 123, 125-26 (1986).

[58] *See* Greenberg, *Role of Consciousness*, *supra* note 42, at 628. This finding illustrates the limits of research relying on self-report measures of death anxiety such as the DAS. *See supra* note 28 and accompanying text.

[59] *See* Greenberg, *Role of Consciousness*, *supra* note 42, at 268.

[60] *Id.* at 636.

[61] *Id.*

cause this process operates outside of consciousness, "reminders of mortality are most likely to produce their effects in precisely those situations in which one is least aware of their impact."[62]

To be sure, implicit processes and psychological defenses are part of every mentally healthy individual's modus vivendi; but, like the human immune system, they are subject to pathological dysfunction and hyperfunction.[63] Terror management theory maintains that, without the protective shield of the cultural anxiety-buffer, humans' capacity to compass their own demise could lead to potentially disabling terror. Such processes, however, have their costs, and they can compromise the well being of self and others if inappropriately or excessively activated. Automatic, implicit processes are quick and free up working memory for immediate, constantly changing demands; but they can also be inflexible and inaccurate, as studies of heuristics and biases in human judgment have demonstrated.[64] Moreover, such processes have a self-reinforcing and sometimes "ironic" property — they tend toward dominance as the individual comes under stress[65] — and they can disrupt conscious mental and behavioral control when activated by strong mo-

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[62] *Id.*; *see also* Tom Pyszczynski et al., *A Dual-Process Model of Defense Against Conscious and Unconscious Death-Related Thoughts: An Extension of Terror Management Theory*, 106 PSYCHOL. REV. 835 (1999) (describing terror management theory's cognitive model).

[63] For example, the "fundamental attribution error" has been associated with an implicit process: the tendency nonconsciously to make dispositional (as opposed to situational) attributions to account for the behavior of others. *See* Daniel T. Gilbert, *Attribution and Interpersonal Perception, in* ADVANCED SOCIAL PSYCHOLOGY (A. Tesser ed., 1995). Although a large body of research has demonstrated that situational factors play a much larger role in influencing behavior than most people believe is the case, people nevertheless generally manage to negotiate their social environments successfully: "Lay psychology, like lay physics, generally gets the job done reasonably well using dramatically mistaken principles . . . ." LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION 20 (1991). *See generally* Dennis L. Krebs & Kathy Denton, *Social Illusions and Self-Deception: The Evolution of Biases in Person Perception, in* EVOLUTIONARY SOCIAL PSYCHOLOGY 21-47 (Jeffry A. Simpson & Douglas T. Kenrick eds., 1997) (discussing evolutionary role of cognitive biases and heuristics).

Psychodynamic theory posits that so-called "regulatory defenses" moderate socially unacceptable impulses. *See* LEE WILLERMAN & DAVID B. COHEN, PSYCHOPATHOLOGY 165-69 (1990). *See generally* GEORGE E. VAILLANT, ADAPTATION TO LIFE 72-192 (1977) (discussing psychological defenses and human adaption).

[64] *See generally* JUDGMENT UNDER UNCERTAINTY (D. Kahneman et al. eds., 1982) (presenting comprehensive review of research devoted to uncovering judgmental heuristics and exploring its effects).

[65] *See, e.g.*, Gilbert, *supra* note 57, at 109-10 (describing principle of premature output when mental system is under stress).

tivational forces.[66] And both psychodynamic and cognitive clinical theory recognize the potentially maladaptive consequences of some defenses and so-called "automatic thoughts."[67]

American capital punishment is a maladaptive consequence of a largely nonconscious defensive terror management process. It is maladaptive in both its manifestation and its motivation. That is, the arbitrariness, excessiveness, discrimination, and dehumanization that characterize the death penalty in America are, like obsessive hand washing, symptomatic of underlying dysfunction. More particularly, those features are evidence that capital punishment is more an inherently irrational practice of ritual human sacrifice unconsciously motivated by fear of death awareness than a considered and pragmatic response to crime. This process is maladaptive because no rational, adequately socialized person in a civilized, post-Enlightenment society would deliberately choose to single out a few individuals for ritual sacrifice as a symbolic means to stave off the fear provoked by awareness of death.

E. Authoritarianism: Outgroup Hostility and Dehumanization

If the terror management effect is at work in capital punishment, the demonstrated role of authoritarian processes in stimulating that effect suggests that such processes may also strongly shape the contours of capital punishment.[68] Authoritarianism's core disposi-

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[66] *See* Sam Glucksberg, *The Influence of Strength of Drive on Functional Fixedness and Perceptual Recognition*, 63 J. EXPERIMENTAL PSYCHOL. 36, 36-38 (1962); Daniel M. Wegner, *Ironic Processes of Mental Control*, 101 PSYCHOL. REV. 34, 34-35 (1994).

[67] *See infra* note 374.

[68] This proposition is supported both by conceptual analyses and by empirical research tying authoritarian beliefs to beliefs regarding criminal law in general and support for capital punishment in particular. *See, e.g.*, Michael L. Perlin, *"The Borderline Which Separated You From Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1395-97 (1997) (linking authoritarianism to attitudes regarding criminal law issues). For empirical research concerning attitudes toward capital punishment, see *infra* notes accompanying Part II.B.

The original Adorno et al. study (sometimes referred to as the "Berkeley Study") of fascism, anti-Semitism, and social discrimination led to an extensive program of research that eventually identified core attributes of authoritarianism. The Berkeley Study hypothesized a personality profile of "the *potentially fascistic* individual, one whose structure is such as to render him particularly susceptible to anti-democratic propaganda." Max Horkheimer, *Foreword* to ADORNO, *supra* note 49. The study's major finding was that "individuals who show extreme susceptibility to fascist propaganda have a great deal in common." *Id.* Despite its flaws, the Berkeley Study remains influential. *See* M. Brewster Smith, *Foreword* to JOHN P. KIRSCHT & RONALD C. DILLEHAY, DIMENSIONS OF AUTHORITARIANISM: A REVIEW OF RESEARCH AND THEORY vii-viii (1967). An expanded version of this Article's overview of authoritarianism previously appeared in Donald P. Judges, *When Silence Speaks Louder Than*

tional attributes of outgroup hostility, cognitive rigidity, and aggression and the related situational process of obedience and dehumanization are both implicated in capital punishment.[69]

1. Outgroup Hostility, Cognitive Rigidity, and Aggression

Ingroup favoritism and outgroup derogation occur whenever people form even minimal groups, but some individuals take these basic tendencies to authoritarian behavioral extremes.[70] Hostility toward and aggression against outgroups are the defining charac-

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Words: Authoritarianism and the Feminist Antipornography Movement, 1 PSYCHOL. PUB. POL'Y & L. 643, 654-68 (1995); *see also* Detlef Oesterreich, *Authoritarianism: The End of A Concept?*, 68 HIGH SCH. J. 97, 97-99 (1985) (presenting overview of historical development of authoritarianism). *See generally* HAROLD W. METZ & CHARLES A.H. THOMSON, AUTHORITARIANISM AND THE INDIVIDUAL (1950) (studying how systems based on supremacy of society control life of individual).

[69] One of the foundational dichotomies in social and personality psychology is the distinction between dispositional and situational phenomena, which is referred to above in connection with the fundamental attribution error. *See supra* note 63 and accompanying text. Situationalists emphasize the causal role in human behavior of variables in the situation as opposed to stable individual differences or traits. *See* WALTER MISCHEL, INTRODUCTION TO PERSONALITY 177 (4th ed. 1986) (examining situationalist perspective in personality theory). *See generally* ROSS & NISBETT, *supra* note 63 (examining situationalist perspective in social psychology). Dispositionalists invert that emphasis. *See generally* PERSONALITY DISORDERS AND THE FIVE-FACTOR MODEL OF PERSONALITY (Paul T. Costa, Jr. & Thomas A. Widiger eds., 1994) (providing example of one dispositional, dimensional model of personality in clinical application). Choice of sides in that debate is unnecessary for present purposes, because terror management and authoritarianism theory draw on both perspectives. Terror management research adopted a dispositional perspective when it found a larger terror management effect among subjects who rate high on scales of authoritarianism. But the terror management effect itself is generally a situational phenomenon in that it reflects the influence of the situational variables of mortality salience and target characteristic. Authoritarianism similarly can be considered from both points of view.

The Berkeley Study's dispositional approach conceived of the authoritarian personality in terms of a psychoanalytic model. *See generally* ADORNO, *supra* note 49. Because the authoritarian individual fears and feels ill-equipped to confront directly aggressive and sexual impulses, he or she defends against them indirectly through several mostly unconscious defense mechanisms: repression, displacement, projection, and splitting. *See* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, DSM-IV 751-57 (Michael B. First, M.D. et al. eds., 1994) [hereinafter DSM-IV] (defining defense mechanisms).

Dispositional authoritarianism research thereafter sought to develop a more valid and reliable Fascism ("F") scale with which to identify authoritarian tendencies. *See, e.g.*, STUDIES IN THE SCOPE AND METHOD OF "THE AUTHORITARIAN PERSONALITY" 121-96 (Richard Christie & Marie Jahoda eds., 1954). The revised F scale eventually was found to correlate with numerous other ideological, cognitive, attitudinal, and personality characteristics to develop a profile of the authoritarian personality. *See* Frances Cherry & Donn Byrne, *Authoritarianism*, *in* PERSONALITY VARIABLES IN SOCIAL BEHAVIOR 109, 120-21 (Thomas Blass ed., 1977); KIRSCHT & DILLEHAY, *supra* note 68, at 1-34.

[70] *See* Devine, *supra* note 54, *passim* (reviewing literature regarding prejudice formation).

teristics of authoritarianism and present troubling implications for the role of terror management-driven authoritarianism in capital punishment.[71] Authoritarianism's ethnocentric, intolerant pattern of hostile intergroup relations is receptive to negative imagery of outgroup members, tends to generalize those images, and perceives outgroup members as threatening.[72] The authoritarian tendency toward generalized distrust and rigid, categorical thinking reinforces this largely automatic and effortless process.[73] Authori-

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[71] Although originally focused on anti-Semitism and other forms of ethnocentrism, the Berkeley Study eventually concluded that intolerance for and hostility toward outgroups in general characterize the authoritarian personality. *See* ADORNO, *supra* note 49, at 102-04. Cross-cultural studies have described "the universal ethnocentric person "as one who is "authoritarian, conforming, uncritical of cultural values, conservative, and intolerant of ambiguity." KIRSCHT & DILLEHAY, *supra* note 68, at 37. They displace against and project onto outgroups the hostility generated by the authoritarian process. Having failed internally to develop a reflective, consistent, and enduring set of values, the authoritarian resentfully gravitates toward external sources of behavioral control. *See* Cherry & Byrne, *supra* note 69, at 111-12. For other studies considering authoritarianism in terms of ego development, see Deborah L. Browning, *Developmental Aspects of Authoritarian Attitudes and Sex Role Conceptions in Men and Women*, 68 HIGH SCH. J. 177 (1985); Deborah L. Browning, *Ego Development, Authoritarianism, and Social Status: An Investigation of the Incremental Validity of Loevinger's Sentence Completion Test (Short Form)*, 53 J. PERSONALITY & SOC. PSYCHOL. 113 (1987).

[72] The authoritarian's worldview typically consists of negative "nuclear ideas" about outgroup members that draw to themselves many other negative images, ideas, and rumors. This process leads to stereotypes of interpersonal relationships and experiences and an inability to experience outgroup members as individuals. Each outgroup member is regarded as a "sample specimen of the stereotyped, reified image of the group." *See* ADORNO, *supra* note 49, at 92-94. For cognitive theories of this process, see *supra* note 55.

[73] *See* KIRSCHT & DILLEHAY, *supra* note 68, at 93. Research into the more generalized phenomenon of dogmatism or closed-mindedness (i.e., the *structure* rather than the *content* of belief systems across the political spectrum) also supports this portrait of authoritarian worldview formation and defense. *See* MILTON ROKEACH, THE OPEN AND CLOSED MIND: INVESTIGATIONS INTO THE NATURE OF BELIEF SYSTEMS AND PERSONALITY SYSTEMS (1960) (analyzing research on various belief systems); *see also* Jean-Pierre Deconchy, *From the Construct of "Dogmatism" to the Construct of "Orthodoxy": The Articulation of the Subject and the Group within the Ideological Field*, 68 HIGH SCH. J. 327, 330 (1987) (hypothesizing that "in an orthodox system, the rational fragility of information is functionally counter-balanced by the strictness of social control"); Sam G. McFarland et al., *Authoritarianism in the Former Soviet Union*, 63 J. PERSONALITY & SOC. PSYCHOL. 1004, 1008 (1992) (stating that authoritarianism is tied to conventionalism rather than ideology); Ralph B. Vacchiano, *Dogmatism*, *in* PERSONALITY VARIABLES IN SOCIAL BEHAVIOR, *supra* note 69, at 281-82 (commenting that "research tends to support Rokeach's concept). In a closed belief/disbelief system, the person does not distinguish between the intrinsic substantive merit of information and extraneous factors such as interpersonal or intergroup power issues. Closed-mindedness and authoritarian thought processes proceed largely through nonconscious, rather than deliberate, processing. *See supra* note 54.

Dogmatic people tend to see the world as a threatening place; to feel isolated and helpless; and to experience self-hate, misanthropy, and insatiable need for, yet fear of, power. *See* Vacchiano, *supra* at 289-301. Further, "[i]ndividuals with strong religious and authoritarian beliefs tend[] to be more rigid and dogmatic in their attitudes about morally controversial behaviors." Roger C. Katz et al., *Findings on the Revised Morally Debatable Behav-*

tarian intolerance of complexity, ambiguity, and anxiety leads to reliance on relatively primitive defense mechanisms, such as splitting "good" characteristics from "bad" ones[74] — "authoritarian people judge others as all good or all bad and assign them to ingroups or outgroups accordingly."[75]

The perception of outgroup members as threatening, which is most likely to arise when personal distance from outgroup members is increased, contributes to the terror management effect of worldview defense.[76] First, ingroup members stereotypically regard outgroup members as specific value violators (i.e., a source of moral contamination or corruption), while seeing themselves as value preservers. Second, ingroup members view outgroup mem-

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iors Scale, 128 J. PSYCHOL. 15, 17 (1993). Finally, dogmatic people have difficulty processing, and tend to resist, belief-discrepant information — at least for social objects of high ideological relevance. *See* KIRSCHT & DILLEHAY, *supra* note 68, at 44-45. As noted below, attitudes toward capital punishment are resistant to belief-discrepant information. *See infra* notes 105-06 and accompanying text.

Consistently with the individual/collective and adjudicative/legislative distinction suggested below, and the worldview-defense concept of terror management theory, dogmatism researchers have concluded that if a perceived "threat leads to dogmatism in individuals, by the same token it should also lead to dogmatism in institutions. Dogma serves the purpose of ensuring the continued existence of the institution and the belief-disbelief system for which it stands." ROKEACH, *supra*, at 68. Like authoritarians, persons who are high in dogmatism tend to be hyperpunitive, defensively self-righteous, and engaged in the submission/domination pattern of interpersonal and intergroup relations. *See* KIRSCHT & DILLEHAY, *supra* note 68, at 48-50 (discussing how highly dogmatic people tend to be more anxious); Vacchiano, *supra* at 297-98 (dogmatism as defense against self-hate and anxiety); Toni Falbo & James A. Shepperd, *Self-Righteousness: Cognitive, Power, and Religious Characteristics*, 20 J. RES. PERSONALITY 145, 154-55 (1986) (stating that broad-minded individuals have strong convictions, but low self-righteousness); Dorothy Lee & Howard Erlich, *Beliefs About Self and Others: A Test of the Dogmatism Theory*, 28 PSYCHOL. REP. 919, 920-22 (1971).

[74] Individual defense mechanisms are ranked hierarchically in order of increasing pathological impact. The defense mechanism of splitting of the image of others into bad or good falls under major image-distorting level of defense. *See* DSM-IV, *supra* note 69, at 751-57.

[75] KIRSCHT & DILLEHAY, *supra* note 68, at 110. Thus, similar values of opposite valence are ascribed wholesale to the ingroup and outgroup. For example, "What is called power seeking and clannishness in the outgroup is transformed into moral righteousness, self-defense, and loyalty in the ingroup. In all other respects the ingroup is regarded as the opposite of the outgroup: clean, unaggressive, hardworking and ambitious, honest, disciplined, well-mannered." ADORNO, *supra* note 49, at 149.

[76] "[T]he anxieties inherent in large-group [i.e., too large for face-to-face encounters among all members at any one time] membership are even more intense than those associated with membership in small groups and that the fear of loss of ego boundaries is especially salient." Thomas L. Morrison et al., *Manifestations of Splitting in the Large Group*, 125 J. SOC. PSYCHOL. 601, 602-03 (1985). Thus, the defense of splitting, to cope with the conflicting feelings of insecurity, resentment, and hostility, is deployed more readily and powerfully by large groups. See *infra* notes 85-95 and accompanying text (discussing facilitating effect of increased personal distance on dehumanization of situational authoritarianism).

bers as presenting a general social threat (i.e., as seeking to usurp worldview).[77] Authoritarianism's "core construct" thus revolves around intense ingroup identification and "generalized hostility or distrust towards outgroups."[78]

Outgroup hostility, closed-mindedness, and worldview defense combine to manifest behaviorally in the authoritarian tendency to attribute negative characteristics to outgroup members as a justification for aggression against them.[79] Authoritarian aggression as worldview defense is augmented by the tendency to adhere fiercely to authoritatively established social conventions.[80] Targets of authoritarian aggression tend to be violators of "conventional" values, especially mores concerning sexual behavior.[81] This generally hy-

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[77] *See* KIRSCHT & DILLEHAY, *supra* note 68, at 95. The investigators concluded that outgroup members in this connection become an object onto which authoritarians "project their unconscious [immoral] desires and fears." *Id.* at 96.

[78] John Duckitt, *Social Class and F Scale Authoritarianism: A Reconsideration*, 68 HIGH SCH. J. 279, 285 (1985).

[79] This outcome involves the authoritarian dilemma concerning power relationships. Thus:

> Ethnocentrism is based on a pervasive and rigid ingroup-outgroup distinction; it involves stereotyped negative imagery and hostile attitudes regarding outgroups, stereotyped positive imagery and submissive attitudes regarding ingroups, and a hierarchical, authoritarian view of group interaction in which ingroups are rightly dominant, outgroups subordinate.

ADORNO, *supra* note 49, at 150.

[80] *See* BOB ALTEMEYER, ENEMIES OF FREEDOM: UNDERSTANDING RIGHT-WING AUTHORITARIANISM (1988); BOB ALTEMEYER, RIGHT-WING AUTHORITARIANISM 147-74 (1981). Authoritarians tend to endorse, often uncritically and aggressively, the norms of the particular external agency with which they happen to be aligned; and they also tend to coerce others to adhere to those values. Conventionalism, thus, is also closely linked both to authoritarian aggression and to rigidity and absolutism in adherence to the particular values of the group (and therefore includes elements of dogmatism). *See supra* note 74.

[81] For a discussion of race effects in capital punishment for rape, see *infra* notes 260-65 and accompanying text.

One item from the Authoritarian Aggression portion of the F scale is: "Sex crimes, such as rape and attacks on children, deserve more than mere imprisonment; such criminals ought to be publicly whipped." ADORNO, *supra* note 49, at 161. Authoritarians evince "[a] strong inclination to punish violators of sex mores (homosexuals, sex offenders)." *Id.* at 170. This tendency may indicate both "a general punitive attitude based on identification with ingroup authorities" and that the "subject's own sexual desires are suppressed and in danger of getting out of hand." *Id.* at 170. Subsequent research has "consistently verified that authoritarians respond negatively to many aspects of sex." DONN BYRNE & KATHRYN KELLEY, AN INTRODUCTION TO PERSONALITY 187 (3d ed. 1981). "Because authoritarians are extremely negative toward any sexual behavior they consider deviant and because they tend to aggress against those who violate [ingroup] social norms," they are inclined to be more punitive toward unacceptable sexuality. *Id.* at 190; *see also* Kathryn Kelley, *Sexuality and Hostility of Authoritarians*, 68 HIGH SCH. J. 173, 173 (1985) (stating that central concern of authoritarians is control of others' sexuality).

permobilized worldview defense is, therefore, susceptible to propagandistic manipulation by external agents. This point is implicitly understood by politicians who seek to exploit the capital punishment issue for political advantage, as discussed below.[82]

Authoritarian aggression can thus be regarded as a form of worldview defense that manifests as the punitive expression of hostility aimed at outgroups.[83] And the evidence suggests that this mechanism operates largely through nonconscious, automatic processes.[84]

2. Dehumanization and the Infliction of Harm

The ease with which situation and role, in addition to disposition,[85] can facilitate obedience to authoritative demands for even

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[82] *See infra* notes 119-22 and accompanying text.

[83] Consistently with the process of authoritarian submission, the subject must direct authoritarian aggression against outgroups because ingroup figures may not be attacked. *See* ADORNO, *supra* note 49, at 162.

Authoritarians favor punitive means to control the behavior of others, especially lawbreakers. Authoritarians are also more punitive toward low-status targets and tend to take the target's "character" into account in deciding levels of punitiveness when the target is not aligned with authority. *See* Cherry & Byrne, *supra* note 69, at 126-27; *see also* James L. May, *Authoritarians and Applicant's Sex and Attitudes as Determiners of Perceived Need and Deservingness in a Charity Situation*, 68 HIGH SCH. J. 190, 191 (1985) (stating that "authoritarianism-punitiveness relationship is modulated by social status differences and by perceived characteristics"). This view is consistent with "just-world" theory, which holds that ethnocentric aggressors attribute negative characteristics toward the outgroup victim as a means to justify their aggression. *See* Qamar Hasan, *Dogmatism, Values and Intergroup Orientation*, 68 HIGH SCH. J. 341, 345 (1985). This process includes a sense of destructiveness and cynicism, manifested as the displacement of repressed aggression against outgroups and a generalized negative image of humankind (which image also helps to excuse aggression as simply "human nature"). *See* ADORNO, *supra* note 49, at 167.

[84] *See supra* note 54 and accompanying text; *see also* John A. Bargh, *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230 (1996) (presenting research showing that behavioral responses to stereotypes and attitudes, including hostility, can be activated through nonconscious processes).

[85] This approach overlaps with the dispositional perspective. Compliance is sensitive to situational factors such as role and status as well as to individual differences. For example, authoritarian tendencies become more evident when the individual faces "novel material, situations involving real concern, and the absence of structural constraint." KIRSCHT & DILLEHAY, *supra* note 68, at 46. And conflicting or compelling social attachments can mitigate authoritarian attitudes. *See id.* at 61. For example, high F scale scorers tend to conform more and aggress less with figures whom they perceive as having high status or legitimacy. *See* Cherry & Byrne, *supra* note 69, at 125.

Scholars have noted the tendency to conform to group expectations, apart from individual differences in authoritarian tendencies. *See generally* MUZAFER SHERIF, THE PSYCHOLOGY OF SOCIAL NORMS 89-112 (1936); Solomon E. Asch, *Opinions and Social Pressure*, 22 SCI. AM. 81 (1955); Richard S. Crutchfield, *Conforming and Character*, 10 AM. PSYCHOL. 191

completely unjustified infliction of physical suffering, injury, and death on others became uncomfortably evident in Stanley Milgram's controversial experiments.[86] One of Milgram's most disturbing findings was that most people would obey authoritative commands to administer electric shocks (up to 450 volts) to another individual, despite that individual's protests, pleas, cries of pain, screams, and even apparently fatal silence. In addition to the powerful influence of the "experimenter's" authoritative presence, Milgram also found that increased personal distance between the subject "teacher" and the victim "learner" facilitated subjects' obedience to commands to inflict physical harm.[87] Thus, when the social distance and depersonalization that result from stereotypy are combined with the tendency to submit to the legitimizing control of authority figures (such as ingroup leaders), the authoritarian process yields a strong proclivity toward authoritarian physical aggression, including the deliberate electrocution of another human being.

Capital punishment undeniably constitutes the infliction by a group of persons of extreme harm on a fellow human being in the name of authority. The authoritarian processes described above facilitate the disinhibition of harmful behavior against worldview-negative targets, which helps protect against the terror of death awareness. In addition to providing the self-esteem boost associated with ingroup identification, stereotyping and situational factors can foster (1) the process of deindividuation (i.e., the submergence of one's self into a collective activity), as well as (2) diffusion of individual accountability,[88] and thereby disable the psychological

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(1955). One such study, while replicating Asch's results, also found a positive correlation between conformity and F scale scores. *See* Crutchfield, *supra* at 194-96.

[86] *See generally* STANLEY MILGRAM, OBEDIENCE TO AUTHORITY (1974) [hereinafter MILGRAM, OBEDIENCE TO AUTHORITY] (finding that act carried out under command is of different character than spontaneous action); Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOL. 371 (1964) (finding that obedience may be deeply ingrained behavior tendency, overriding ethics and moral conduct).

[87] Further, the obedient subjects exhibited ingratiating behavior toward the experimenter and hostile behavior toward the victim. *See* A.C. Elms & Stanley Milgram, *Personality Characteristics Associated with Obedience and Defiance Toward Authoritative Command*, 1 J. EXPERIMENTAL RES. PERSONALITY 282, 286 (1966). In addition to situational effects, authoritarianism also emerged as an important individual factor. Elms and Milgram found significantly higher F scale scores among obedient subjects and lower scores among defiant subjects. *Id.* at 284.

[88] *See* Steven Prentiss-Dunn & Ronald Rogers, *Deindividuation and the Self-Regulation of Behavior, in* PSYCHOLOGY OF GROUP INFLUENCE 87 (Paul B. Paulus ed., 2d ed. 1989) (describing phenomenon of deindividuation).

behavior-regulating mechanisms of either natural care or internalized norms of social propriety.[89]

Harmful behavior thus "results from a group member's active calculations that his or her attacks on another person will not be subject to scrutiny and possible retaliation from victims and authority figures."[90] Situations that promote deindividuation facilitate group-based violence, such as wartime torture and mutilation and racial and ethnic aggression.[91] This process is starkly evident in the atrocities committed by lynch mobs: "[A]s the lynchers became less self-attentive, or more deindividuated, [there occurred] a breakdown in normal self-regulation processes, which in turn led to an increase in the transgressive behaviors represented by the composite index of atrocity."[92] American capital punishment similarly has been described as "a complex system of denying and dispersing responsibility" for "the infliction of physical violence that is capital punishment."[93]

Finally, the processes that facilitate the ability to inflict harm on others involve a bilateral dehumanization. As one of Milgram's subjects put it, "You really begin to forget that there's a guy out there, even though you can hear him."[94] According to one review of the conformity and obedience literature:

> This dehumanization of the victim is a counterpart to the obedient person's self-picture as an agent of another's will, someone "who has a job to do" and who does it whether he likes it or not. The obedient person sees himself as an in-

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[89] *See id.* at 94; *see also* Donald P. Judges, *Taking Care Seriously: Relational Feminism, Sexual Difference, and Abortion*, 73 N.C. L. REV. 1323, 1389-91 (1995) (analyzing construct of natural care).

[90] Prentiss-Dunn & Rogers, *supra* note 88, at 94; *see also* Albert Bandura, *Behavior Theory and Models of Man*, 29 AM. PSYCHOLOGIST 859 (1974) (discussing responsibility diffusion).

[91] *See* Prentiss-Dunn & Rogers, *supra* note 88, at 94-200 (citing Ronald W. Rogers & Steven Prentiss-Dunn, *Deindividuation and Anger Mediated Racial Aggression: Unmasking Regressive Racism*, 41 J. PERSONALITY & SOC. PSYCHOL. 63 (1981)).

[92] *Id.* at 100 (quoting B. Mullen, *Atrocity as a Function of Lynch-Mob Composition: A Self-Attention Perspective*, 12 PERSONALITY & SOC. PSYCHOL. BULL. 187, 187 (1986)). *See generally* BILL BUFORD, AMONG THE THUGS: THE EXPERIENCE, AND THE SEDUCTION, OF CROWD VIOLENCE (1991) (providing anecdotal account of phenomenon of disinhibition through both deindividuation and responsibility diffusion).

[93] Markus Dirk Dubber, *The Pain of Punishment*, 44 BUFF. L. REV. 545, 545 (1996).

[94] MILGRAM, OBEDIENCE TO AUTHORITY, *supra* note 86, at 38.

> strument; by the same token, he sees the victim as an object. In his eyes, both have become dehumanized.[95]

II. A THEORY OF TERROR MANAGEMENT, AUTHORITARIANISM, AND CAPITAL PUNISHMENT

> [N]o one can embark upon a study of the death penalty without making the commonplace observation that from a philosophical and policy stand point there appears to be nothing new to be said.
>
> Roger Hood[96]

> Now tell me what's goin' on?
>
> Marvin Gaye, Al Cleveland, & Renaldo Benson (1971)

In short: (1) the potential terror associated with incipient awareness of one's own mortality provokes an unconscious process of worldview defense, which can include authoritarian outgroup hostility and ingroup favoritism, dehumanization, physical aggression, and hyperpunitiveness against perceived value transgressors, and (2) prejudice, stereotyping, and authoritarianism themselves generally tend to be activated through automatic, implicit processes. Hence, when death awareness threatens to appear, hyperpunitiveness, aggression, and authoritarianism are probably not far behind. The hypothesized link between terror management, authoritarianism, and the death penalty is described in this Part.

A. Preliminary Issues

This Article argues that capital punishment's form (how it actually is implemented) and its function (what it is supposed to do) are better explained by terror management theory as a nonconscious psychological defense mechanism against fear of mortality awareness than as a deliberate practical response to crime. The likelihood that capital punishment's existence cannot be adequately explained by its proffered objectives suggests that it might be better understood as a symbolic, ritualistic act with covert meanings. If so, then what kind of act with what meanings? An intui-

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[95] GLEITMAN, *supra* note 57, at 476.

[96] HOOD, *supra* note 2, at 6.

tively compelling possibility is that capital punishment bears a strong resemblance to ritual human sacrifice, theoretical conceptions of which are consistent with terror management theory.

B. Capital Punishment: Instrumental or Symbolic?

Although the issues of general deterrence, retribution, and fear of crime have traditionally dominated discourse about capital punishment's purposes,[97] it seems unlikely that they provide most of the motivation. First, deterrence claims lack empirical support.[98] Second, although death penalty proponents may arguably justify capital punishment in a particular case on retributive or incapacitative grounds, it is difficult to defend the institution as a whole on such bases.[99] American capital punishment is too arbitrary, excessive, and discriminatory to meet the requirements of a coherent system of justice that is the foundation of retributive claims; and it is too haphazard to function overall as a rational system of incapacitation.[100]

In any event, there is evidence that public support for capital punishment does not ultimately rest on criminological goals or fear of crime. Research into the bases for public support for capital punishment has yielded two divergent theoretical accounts. One view is that people do support it on instrumental grounds (i.e., deterrence, retributive goals, and concern about crime).[101] The

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[97] For an example of traditional death penalty debate, see ERNEST VAN DEN HAAG & JOHN P. CONRAD, THE DEATH PENALTY: A DEBATE 3 (1983) (discussing purposes of death penalty). For review of the evidence that deterrence and retribution are the most frequently stated reasons given in support of capital punishment, see Ellsworth & Gross, *supra* note 3, at 95-98. Over the past twenty years, the retributive rationale has become the dominant stated purpose. *See id.* at 96.

[98] *See infra* notes 278-84 and accompanying text.

[99] *See* Donald Beschle, *What's Guilt (or Deterrence) Got To Do with It?: The Death Penalty, Ritual, and Mimetic Violence*, 38 WM. & MARY L. REV. 487, 507 (1997) (stating that deterrence claims fail on empirical and theoretical grounds and that retribution claims fail in systems that permit risk of execution of innocent and that imposes death penalty on small subset of killers); *see also* BALDUS, *supra* note 11, at 416 (noting that because of extremely low rate of capital sentencing and high proportion of presumptively excessive sentences, retribution is satisfied in only few cases).

[100] *See* WILLIAM J. BOWERS, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982, at 67-102, 171-376 (1984); CURRENT CONTROVERSIES, *supra* note 2, at 1-35; RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA 115-83 (1991); Richard C. Dieter, *Twenty Years of Capital Punishment: A Re-evaluation*, DEATH PENALTY INFORMATION CENTER REPORT (June 1996) <http://www.essential.org/dpic/rpts.html> (on file with author).

[101] *See generally* Charles W. Thomas, *Eighth Amendment Challenges to the Death Penalty: The Relevance of Informed Public Opinion*, 30 VAND. L. REV. 1005, 1021-29 (1977) (discussing public belief that capital punishment serves deterrence goals); Charles W. Thomas & Robin Cage,

second perspective attributes support for capital punishment to symbolic rather than instrumental goals. Under this latter view, support is associated with basic attitudes and worldviews such as authoritarianism and conservatism rather than accomplishment of practical objectives related to crime. The symbolic account of support for capital punishment would regard the assertion of instrumentalist arguments in public discourse as rationalizations rather than reasons.[102]

Although both perspectives claim support in studies considering each in isolation:

> The results of a direct comparison of the instrumental and symbolic perspectives on death penalty support the symbolic perspective. Political and social beliefs were found to exercise a strong influence upon support for capital punishment, while the influence of crime-related concerns was small. This was true even when such concerns were weighted by beliefs in the effectiveness of punishment. In fact, the results of this study suggest that the findings associated with the instrumental perspective can best be explained as a direct result of beliefs in the value of the death penalty, beliefs which are closely associated with political-social attitudes.[103]

In other words, among the variables of demographics, crime-related experiences and concerns, and political and social beliefs, the variable of political and social beliefs (particularly authoritarianism, dogmatism, or liberalism) is by far the strongest predictor of support for capital punishment. And, while beliefs concerning deterrence and retribution do exercise some independent influ-

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Correlates of Public Attitudes Toward Legal Sanctions, 4 INT'L. J. CRIMINOLOGY & PENOLOGY 239, 240, 251-52 (1976) (discussing effectiveness of deterrence as base of support for death penalty); Charles W. Thomas & Samuel Foster, *A Sociological Perspective on Public Support for Capital Punishment*, 45 AM. J. ORTHOPSYCHIATRY 641, 649-55 (1975) (arguing that fear of crime, faith in deterrence, and willingness to use capital punishment as response to crime underlie public support for death penalty).

[102] *See* Phoebe Ellsworth & Lee Ross, *Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists*, 29 CRIME & DELINQ. 116, 117 (1983) (analyzing underlying bases for peoples' opinion regarding death penalty); Philip W. Harris, *Over-Simplification and Error in Public Opinion Surveys on Capital Punishment*, 3 JUST. Q. 429, 435 (1986) (discussing death penalty as revenge); Neil Vidmar & Tony Dittenhoffer, *Informed Public Opinion and Death Penalty Attitudes*, 23 CAN. J. OF CRIMINOLOGY 43, 44 (1981) (discussing retribution as justification for capital punishment).

[103] Tom R. Tyler & Renee Weber, *Support for the Death Penalty: Instrumental Response to Crime, or Symbolic Attitude?*, 17 L. & SOC'Y REV. 21, 40 (1982).

ence on capital punishment support, those beliefs are in effect largely reflections of basic political and social attitudes.[104]

Moreover, attitudes toward capital punishment are resistant to change even when their underlying factual assumptions are controverted. Research indicates that most people whose faith in deterrence is challenged nevertheless continue to support capital punishment and that people resist learning new information about the death penalty that is contrary to their existing beliefs.[105] Hence, death penalty beliefs emerge as rationalizations — "cognitions to support an affective orientation" involving "basic political-social attitudes."[106]

Although stripping the veneer of instrumentalist rationalizations is a necessary step in coming to terms with capital punishment, it is not sufficient. Capital punishment is more than an abstraction about which one has opinions. It is an actual organized human activity occurring in a specific cultural milieu. Some observers have argued that the symbolic function inheres in the murder trial itself rather than in the execution.[107] The occurrence of execu-

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[104] *See id.* at 39. Note that popular support for capital punishment has increased over time in conjunction with increases in the rates of violent crime in general and homicide in particular. *See* Ellsworth & Gross, *supra* note 3, at 108-09. Those authors point out, however, that such support is not an expression of rational belief in the practical efficacy of capital punishment; nor is it clear that the association is symmetrical, with support declining as violent crime declines. *See id.* at 108.

[105] *See* Tyler & Weber, *supra* note 103, at 41. A substantial number of supporters (typically a majority) would continue to support capital punishment despite the absence of any deterrent effect, or even if it caused more murder than it prevented. ZIMRING & HAWKINS, *supra* note 2, at 19 (reviewing literature on opinions about death penalty). In one study, "the most striking finding was that those who either strongly or very strongly favored the death penalty were, with few exceptions, unswayed by the information presented." *Id.* at 18; *see also* Ellsworth & Gross, *supra* note 3, at 95-96, (stating that proponents' support for and opponents' opposition to capital punishment is resistant to position-discrepant information concerning deterrence).

[106] Tyler & Weber, *supra* note 103, at 41.

[107] According to one analysis:

> [I]t seems likely that the symbolic significance of death penalty legislation, the ritual nature of the murder trial, and the incantatory power of the death sentence constitute a large part of the appeal for supporters of the death penalty. This may suggest an explanation for the curious ambivalence in contemporary societies that want to preserve death penalty legislation and murder trials yet appear to feel no need for executions. In a simple, homogeneous tribal society a human sacrifice performed with the intention of influencing or manipulating the course of human events is required. In larger, more complex societies the same psychological need is fulfilled, without an actual sacrifice, by the performance of the preliminary rituals. The latent social function is the same.

tions, however, indicates that the symbolic function is served not only by legislative endorsement of capital punishment and occasional capital sentencing but also by the actual killing of human beings.

C. Ritual and Symbolic-Cultural-Religious Systems

Capital punishment displays attributes that bear an uncanny resemblance to another form of ritualistic killing — human sacrifice. Bourdillon, for example, has pointed out that:

> Another type of ritual killing which has characteristics in common with sacrifice is the execution of a criminal. Although in modern societies, execution is defended as a pragmatic way of coping with particularly serious cases of deviance rather than as a ritual expression of beliefs and values, some aspects of capital punishment can be associated with sacrifice. An execution is normally surrounded by ritual which prescribes procedures before death, the manner of the killing, necessary witnesses and functionaries, and so on. . . . A further link between capital punishment and sacrifice arises when the demand for capital punishment expresses a reaction to community fears, often the result of a state of general lawlessness. . . . Convicted criminals die on account of something much wider in society than their particular crimes.[108]

But if the motivational force of those instrumentalist factors — the "pragmatic" aspects (deterrence and retribution) and the "something wider" (reaction to fear of crime) — is discounted for the reasons discussed above, then it remains to be accounted for.

I describe elsewhere how, when situated within a theory of symbolic, cultural, and religious systems, capital punishment can be seen as a form of substitutionary sacrifice — hyperactivated worldview defense through the symbolic execution of death itself.[109] I conclude there that the various symbolist interpretations of sacri-

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ZIMRING & HAWKINS, *supra* note 2, at 10-11; *see also* Dubber, *supra* note 93, at 545 (citing MICHEL FOUCAULT, DISCIPLINE AND PUNISH 9 (1978)) (stating that "[a]s Foucault's analysis of the enlightenment account of criminal punishment would suggest, the ceremonial focus of the practice of capital punishment indeed has shifted from its infliction to its imposition in public trials").

[108] M.F.C. Bourdillon, *Introduction* to SACRIFICE at 1, 13-14 (M.F.C. Bourdillon & Meyer Fortes eds., 1980).

[109] *See* Judges, *supra* note 37.

fice converge on a series of points which mesh with a terror management model of capital punishment. First, sacrifice generally involves ritual control of death. Second, it specifically projects undesired qualities (e.g., sinfulness and mortality) onto the sacrificial object. Third, the sacrificial object is chosen in part based on outsider characteristics. Fourth, through sacrifice the hated and feared qualities may be symbolically destroyed. And fifth, unconscious processes may be at work. Extra-human agency within the representational system of the American ritual of capital punishment, which supplies its religion-like nature, arises because the secular state itself assumes demiurgic status in the so-called American civil religion.

In these ways, capital-punishment-as-sacrifice symbolically expresses the extra-human, mortality-controlling potency of the sovereign and is an institution people readily identify with in order to establish an anxiety-buffering association with a transvital entity.[110] It also permits authoritarian aggression against the outgroup embodiment of feared and hated attributes, which, under terror management theory, would be the expected response to incipient mortality awareness combined with threat to worldview.[111] Capital punishment in this sense both effectuates an implicit reminder that the "ultimate political power includes the power to kill"[112] and provides an opportunity to agress against a scapegoat whose identity is often influenced by outgroup hostility and ingroup favoritism. In terror management terms, it would be reassuring to know that the religious-like institution with which one has identified not only controls such awesome power but also directs it against an effigial, outsider manifestation of reviled attributes, and does so righteously in the name of justice. And the degradation heaped on the sacrificial object produces a figure by comparison to whom even the most disadvantaged members of society can feel superior and reap the anxiety-buffering benefits of the resulting enhancement of self-esteem.[113] Terror management theory thus provides an account of

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[110] *See supra* Part I.B-C.

[111] *See supra* Part I.C-D.

[112] Bourdillon, *supra* note 108, at 23.

[113] *See* Sheldon Solomon et al., *Terror Management Theory of Self-Esteem, in* HANDBOOK OF SOCIAL AND CLINICAL PSYCHOLOGY: THE HEALTH PERSPECTIVE at 32-35 (C.R. Snyder & Donelson R. Forsyth eds., 1991) (discussing relationship between social comparison, self-esteem, and terror management).

the psychological defense mechanism that may be the driving force behind capital punishment.

D. Capital Punishment as Worldview Defense in Adjudicative and Legislative Settings

The terror management effect may operate with respect to capital punishment in both adjudicative and legislative settings.[114] Most of the research protocols to date have been limited to simulated "adjudicative" settings (i.e., those in which subjects are given an opportunity to react to a particular target person who bolsters or threatens the subjects' cultural worldview). Application to legislative settings (i.e., those involving expressions of global attitudes regarding capital punishment generally) is also consistent with terror management theory. The theory's cultural anxiety-buffer hypothesis implicitly assumes that the existence of cultural institutions, as well as their defense, is motivated in part by the effect. As mentioned, the terror management effect arises both in connection with cultural symbols themselves and worldview-relevant target persons.[115] Such collective creation of cultural institutions is part of what I mean by "legislative" processes. It thus appears that both kinds of processes can be implicated in each of the dual purposes — the direct and symbolic response to threat — that terror management theory ascribes to cultural institutions.

Terror management is equally applicable to the adjudicative and legislative settings that perpetuate capital punishment. Because death is ubiquitous, mortality salience will occur throughout every person's life. Terror management research implies that the effect will form at least part of the motivating force for the formation and operation, as well as the defense, of important cultural institutions. In other words, terror management theory makes sense as both an individual and collective process, and the existence of cultural anxiety-buffers themselves manifests a collective effort to ward off

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[114] By "adjudicative," I broadly mean all situations in which persons pass judgment on the propriety of capital punishment in a particular case, whether that judgment is passed in a formal, law-applying setting or an informal setting. By "legislative," I mean all settings in which persons pass judgment on the propriety of capital punishment in general or with respect to a class of cases, again whether that judgment is passed in a formal, law-making setting or an informal, law-supporting setting.

[115] *See* Jeff Greenberg et al., *Evidence of a Terror Management Function of Cultural Icons: The Effects of Mortality Salience on the Inappropriate Use of Cherished Cultural Symbols*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 1221 (1995).

the terror of death awareness. It would be anomalous if the death penalty, society's most punitive and death-related response to value transgressors, were not potently infused with the terror management effect. Capital punishment, more than other criminal sanctions, therefore involves symbolic defenses against perceived threats to culture-members' collective survival. In other words, capital punishment is a cultural anxiety-buffer.

Both legislative and adjudicative endorsement of capital punishment is probably driven in large part by the terror management process of symbolic worldview defense. As explained in Part I, the enactment and enforcement of death penalty laws provides a symbolic, ritualized manifestation of control over death in the form of hyperpunitive authoritarian aggression against values transgressors. To that extent, the capital convict is executed not only (and perhaps not even primarily) because it is just or necessary in view of the crime he committed, but also because those who would put him to death are afraid to confront the inevitability of their own mortality.

Both the adjudicative and legislative processes of capital punishment provide the necessary predicates for the terror management effect. Decision makers in adjudicative settings (prosecutors, judges, and juries) experience periodic subtle, third person (and perhaps first person) mortality salience as the result of the very proceeding itself, which often involves graphic depiction of violent acts against the victim and instantiates the mortality of the defendant. But much of the time even in capital sentencing trials is also taken up with issues that do not continuously maintain mortality salience (e.g., expert witness credentials and testimony, character evidence, evidence of defendant's future dangerousness, etc.). Mortality salience, therefore, will be followed by extensive "distraction" periods during which mortality thoughts are pushed to the fringes of active consciousness and the cultural anxiety-buffer kicks in. Further, neither jury instructions nor deliberation phases of trials are likely to maintain mortality awareness continuously, although both may sometimes provoke it.[116]

In the end, capital trials give the decision maker, after repeated mortality inductions and distractions, an opportunity (at the sen-

[116] Indeed, it has been argued that the jury instruction and deliberation phases are structured to diminish jurors' sense of personal responsibility for the infliction of death. *See* Dubber, *supra* note 93, at 574-79.

tencing phase) to aggress in an extreme fashion against someone who has already been identified (in the guilt phase) as a worldview transgressor of an especially threatening kind. Further, this opportunity will occur while the decision makers are under substantial cognitive and affective stress — conditions that facilitate dominance of nonconscious, automatic cognitive processes.[117] Capital proceedings thus resemble an extreme terror management research protocol, under conditions likely to optimize nonconscious and authoritarian responses, except that the target is real and the effect permanent. And the decision makers will have been selected in part for their lack of humanitarian opposition to capital punishment in their worldviews.[118]

Like everyone else, decision makers in legislative settings also experience mortality salience as the result of life experience. Public debate concerning capital punishment and violent crime may also tend to arouse mortality awareness, especially as politicians seek to exploit the powerful psychological forces activated by such awareness.[119] Indeed, public officials have long implicitly understood what terror management research has only recently put into explicit theory — individuals (i.e., constituents) can be mobilized to support candidates who promise symbolic protection against threat and that such support can be enhanced by manipulating the perception of the threat. Political promise of symbolic protection may have force regardless of the alleged threat's actuality or the proposed remedy's instrumental efficacy. Authoritarian fear mongering is a venerable political tradition.[120] And, it has come expressly to involve grossly uninformed and sometimes transparently racist reliance on capital punishment as worldview defense: "Thus, we confront a corollary of Gresham's law, in which a debased political rhetoric drives out any reliance on the facts and norms rele-

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[117] For a recent comprehensive review of the growing body of literature concerning the distinction between conscious and automatic mental processes, see Bargh & Chartrand, *supra* note 54, *passim.*

[118] *See infra* notes 119-22, 143 (discussing "death qualification" of jurors and political influences on prosecutors and judges).

[119] For example, President Clinton boasted during the first 1996 presidential debate that he had signed 60 new death penalty provisions into law. *See supra* note 6.

[120] *Cf.* Howard Leventhal, *Findings and Theory in the Study of Fear Communications*, 5 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 119 (1970) (discussing positive interactions between fear and persuasion in nonpolitical context).

vant to developing a sound public policy on punishment."[121] These effects are not limited to legislators, but also include judges and prosecutors (many of whom are elected), pardon board officials, and governors, for all of whom an expressed extreme procapital punishment bias is often a virtual prerequisite to election.[122] The interaction between politicians' manipulations and constituents' reactions produces this demand through a process marked by mortality salience, outgroup hostility, ingroup favoritism, and dehumanization. The result is endorsement of hyperpunitive authoritarian aggression in the form of capital punishment.

Indeed, mortality salience is probably more intermittent and subtle, the distracters more effective, and deindividuation and diffusion of responsibility more pronounced in the legislative than the adjudicatory settings. Participants in capital sentencing proceedings are more directly confronted with both the grisly details of the capital crime itself and the reality of their role as agents of death than are participants in legislative or electoral debate. The personal distance between trial participants and the target (the defendant) also is much reduced – the target is an actual person who is physically present in the courtroom and about whom some personal information may be introduced into evidence, not some hypothetical figure invoked by manipulators of public sentiment.[123] Consistently with terror management theory, public opinion and legislative support for capital punishment in the abstract often

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[121] Hugo A. Bedau, *Background and Developments, in* CURRENT CONTROVERSIES, *supra* note 2, at 24; *see also* Ellsworth & Gross, *supra* note 3, at 110-11 (noting influence of death-penalty rhetoric in recent elections, particularly "Willie Horton" episode in 1988 Bush/Dukakis race: "It is no coincidence that Willie Horton is Black, or that the Bush campaign did everything humanly possible to make sure that every American voter got to see his picture."); Charles Kenneth Eldred, *The New Federal Death Penalties*, 22 AM. J. CRIM. L. 293, 295 (1994) (commenting in reference to enactment of Violent Crime Control and Law Enforcement Act of 1994 that "[i]t is difficult to find a reasoned discussion of the effectiveness or morality of the death penalty in the Congressional Record. Rather, members of Congress simply declared themselves for or against the death penalty in general, as if that answered all questions regarding the details of when the death penalty should be implemented").

[122] *See, e.g.*, Richard C. Dieter, *Killing for Votes: The Dangers of Politicizing the Death Penalty Process*, DEATH PENALTY INFORMATION CENTER REPORT (Oct. 1996) <http://www.essential.org/dpic/rpts.html> (on file with author) (reviewing impact of politicization on judges, prosecutors, pardon officials, and governors); Mark Hansen, *Hanging Judges: Going Against Prevailing Currents in Capital Cases Can Sink a Career*, 85 A.B.A. J. 91 (1999) (describing examples of former judges who attribute their ouster to politically unpopular opinions in death penalty cases, and Senate Judiciary Committee Chairman Orrin Hatch's indications that pro-death penalty views are litmus test for confirmation of federal judicial nominees).

[123] *See supra* note 121 (discussing Willie Horton incident).

exceeds adjudicative decision makers' willingness to impose it in the flesh and blood.[124]

Note that the abolitionist movement in many other nations does not disconfirm my argument.[125] I do not contend that there can be no terror management without capital punishment. To the contrary, terror management theory implies that cultural institutions are generally implicated in the effect. And there are obviously many ways short of ritually slaughtering an almost random selection of transgressors for a society symbolically to defend its cultural worldviews. What I do argue is that capital punishment, at least in the way it is generally practiced in this country, is unlikely to exist independently of terror management.[126]

So, what would capital punishment look like if it involved the interrelated constructs of terror management and authoritarianism? Well, it would look a lot like it actually does. If capital punishment forms part of a nonconscious cultural anxiety-buffer against the existential terror of mortality awareness, then its adoption and imposition should (1) display evidence of a symbolic function beyond any practical defensive purpose it may serve, and (2) reflect the effects of the mortality salience that its adoption and imposition create, including hyperpunitiveness and both dispositional and situational authoritarian processes.[127] Capital punishment thus

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[124] Evidence for this prediction is set forth in Part III. Some anecdotal support for the suggestion that the process of capital punishment provokes mortality salience and anxiety among its more proximal witnesses comes from Gatrell's study of public executions in early nineteenth century England, discussed below. *See infra* notes 301-10 and accompanying text.

[125] Evidence for cross-cultural validation of the terror management theory is growing. *See* Pyszczynski, *supra* note 62, at 836 ("To date, more than 75 separate experiments conducted in the United States, Canada, Germany, Israel and the Netherlands have provided support for terror management theory.").

[126] For an overview of international differences in attitudes and practices with respect to capital punishment, see HOOD, *supra* note 2, *passim* and ZIMRING & HAWKINS, *supra* note 2, at 4-10. Such differences are not a new phenomenon. The European community's negative reaction to American capital punishment finds a counterpart in striking differences between late eighteenth- and early nineteenth-century execution rates in England compared to those in Scotland and on the Continent. *See generally supra* note 1, at 8-9 (comparing execution rates in England, Scotland, and Ireland). According to Article 1, Protocol Six of the 1983 amendment to the European Convention for the Protection of Human Rights and Fundamental Freedoms, "The death penalty shall be abolished. No one shall be condemned to such penalty or executed," apart from the power reserved in Article 2 for capital punishment in wartime. ZIMRING & HAWKINS, *supra* note 2, at 5 (quoting European Convention).

[127] This Article does not set out to "prove" conclusively that the terror management effect "causes" capital punishment to exist in general or to be imposed in a particular case. Although the methodology here is qualitative and uncontrolled, it does offer theory-based hypotheses for disconfirmation. Hence, if the predictions this Article offers are not substantiated, then the theory is probably wrong (unless, of course, the predictions are improperly

should exhibit the following four attributes: arbitrariness, excessiveness, discrimination, and dehumanization.

III. THE EVIDENCE

> They hang us now in Shrewsbury jail;
> The whistles blow forlorn,
> And trains all night groan on the rail
> To men that die at morn.
> And naked to the hangman's noose
> The morning clocks will ring
> A neck God made for other use
> Than strangling in a string.
>
> Alfred Edward Housman[128]

During his final term on the Supreme Court, Justice Blackmun declared that "I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed."[129] He explained that, two decades after "this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, . . . the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake."[130] This Part reviews the ample evidence in support of a terror management model of capital punishment.

A. Arbitrariness

If capital punishment serves symbolic rather than practical purposes, it should display several attributes. First, its actual imposition should be relatively rare and haphazard. The availability and occasional invocation of capital sentencing should usually be more

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formulated or operationalized). But, if a number of substantiated predictions converge on a theory that has explanatory power, then the theory is worth retaining at least as a provisional matter. The underlying empirical research on terror management follows the constructive realist tradition of studying unobservable constructs through operationalized variables tied to a nomological network through linking laws. *See* Judy Garber & Zvi Strassberg, *Construct Validity: History and Application to Developmental Psychopathology*, *in* 2 THINKING CLEARLY ABOUT PSYCHOPATHOLOGY 219-58 (William M. Grove & Dante Cicchetti eds., 1991) (providing overview of construct validation process). For the classic work, see Lee J. Cronbach & Paul E. Meehl, *Construct Validity in Psychological Tests*, 52 PSYCHOL. BULL. 281 (1955).

[128] ALFRED EDWARD HOUSMAN, *A Shropshire Lad*, *in* COMPLETE POEMS (1959).

[129] Callins v. Collins, 510 U.S. 1145, 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting from denial of certiorari).

[130] *Id.* at 1129.

important than the actual execution of the sentence; nevertheless, real executions would occur episodically.[151] One would also expect to see relatively high tolerance for inaccuracy and arbitrariness in the selection of those who are sentenced to die and who are actually killed. Next, because the death penalty also instantiates the very things that this Article hypothesizes it is a defense against — anxiety resulting from awareness of human mortality and violation of cultural norms against killing and in favor of mercy — it will probably reflect considerable ambivalence. That ambivalence, together with the effect of interpersonal distance from the target, should produce a disparity between legislative and adjudicative endorsement of the penalty.[152] Second, if capital punishment is mostly about symbolically fending off citizens' fear of death awareness rather than accomplishing penological objectives, then attributed guilt and desert matters more than actual culpability and the appearance of procedural justice matters more than its substance. One thus would expect to see an adjudicatory system that provides grossly inadequate legal resources for indigent capital defendants and that values finality more than accuracy.

1. Crime, Sentencing, and Execution Rates

Arbitrariness rather than principle dominates the selection of the condemned in two interrelated respects. First, out of the total number that commit death-eligible crimes, a relatively small proportion of defendants are sentenced to death and only a tiny fraction are actually executed. Second, it is often difficult to distinguish the cases of those few who are sentenced to death from those that receive a lesser sentence, such as life imprisonment. According to the comprehensive Georgia study conducted by Baldus and colleagues, and their review of the literature nationwide:

> The most striking feature of capital sentencing in the United States, both before and after *Furman*, is the infrequency with which death sentences are imposed. . . . Although the five concurring justices each employed a different legal analysis, they

[151] See *supra* note 107.

[152] The disparity between public opinion polls showing strong support for capital punishment and the low sentencing rates described below indicates that the American public supports capital punishment "on the books" much more strongly than the routine execution of convicted murderers. *See* Hugo A. Bedau, *American Attitudes Toward the Death Penalty, in* CURRENT CONTROVERSIES, *supra* note 2, at 68.

> were all concerned with the small number of death sentences imposed under pre-*Furman* law and with their inability to discern any principled distinction between the larger number of defendants who received life sentences or less and the relative handful who were condemned to die.[133]

The infrequency issue can be approached from several perspectives. One approach looks at the frequency with which defendants are sentenced to death and at the selectivity and rationality of prosecutorial and jury decision making.[134] The Baldus study examined the frequency and selectivity issues from three angles. First, it summarized sentencing rates nationally for the decade before *Furman v. Georgia*[135] and after *Gregg v. Georgia*.[136] The Supreme Court effectively imposed a moratorium on capital punishment in 1973 when it ruled in *Furman* that Georgia's standardless, discre-

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[133] BALDUS, *supra* note 11, at 398. Other studies of the arbitrariness issue have concurred. *See, e.g.*, PATERNOSTER, *supra* note 100, at 182-83 (finding arbitrariness resulting from infrequency, disproportionality, interstate variation, and prosecutorial orientation).

[134] As David Dow has noted, "at least six members of the Supreme Court and virtually every commentator that has addressed the issue believe that two contradictory principles are at the center of modern death penalty jurisprudence. They believe that, on the one hand, the Eighth Amendment forbids discretion, whereas on the other hand, it requires it." David R. Dow, *The Third Dimension of Death Penalty Jurisprudence*, 22 AM. J. CRIM. L. 151, 152 (1994). The Court has prohibited mandatory sentencing. *See* Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (holding mandatory death sentence statute unconstitutional); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (finding state statute violated Eighth and Fourteenth Amendments). This seems at odds with the "infrequency" criticism raised by several justices in *Furman*. Dow argues that, if capital sentencing is conceived of in three dimensions rather than two, this apparent conflict disappears. To the two dimensions of severity of punishment and egregiousness of crime, Dow argues, the Supreme Court's jurisprudence under *Lockett v. Ohio*, 438 U.S. 586 (1978), adds a third dimension of individual characteristics, which, hypothetically, should account for the discrepancy between death-eligible and death-sentenced defendants. *See* Dow, *supra* at 165-70.

There are several problems with Dow's position. First, it is not clear that, even hypothetically, *Lockett*-mandated consideration of the mitigating impact of "any aspect of a defendant's character or record" fully accounts for the observed disparities. Second, data from Baldus and other studies, which Dow does not address, suggest that sentencing has a high level of real arbitrariness. *See infra* notes 139-51 and accompanying text. Third, Dow's model assumes that mitigating factors are adequately presented to juries, an assumption that the shortcomings in representation of many capital defendants calls into question. *See infra* notes 170-85 and accompanying text. Recently the Court ruled that, although a capital defendant must be allowed to present mitigating evidence, there is no constitutional right to a jury instruction on the concept of mitigating evidence or any particular mitigating factor. *See* Buchanan v. Angelove, 118 S. Ct. 757, 759 (1998) (holding that Eighth Amendment does not require that jury be instructed on mitigating evidence).

[135] 408 U.S. 238 (1972) (per curiam).

[136] 428 U.S. 153 (1976). The Baldus Study's national rates are adjusted to include only those homicides that occurred in jurisdictions for which statutory authorization for capital punishment existed. *See* BALDUS, *supra* note 11, at 230.

tionary capital sentencing scheme was unconstitutional under the Eighth and Fourteenth Amendments.[137] Three years later in *Gregg*, however, the Supreme Court lifted the capital punishment moratorium when it upheld Georgia's revised system of guided discretion.[138] Second, the Baldus study examined rates in Georgia and other selected jurisdictions. Third, it parsed the Georgia data to determine its degree of arbitrariness, taking into account relative culpability between cases. Each level of analysis indicates that the system is more arbitrary than principled.

As Baldus and colleagues noted, notwithstanding a post-*Furman* increase, "rates . . . are still relatively low compared to the number of death-eligible cases processed each year when considered against the Supreme Court's assumption in *Gregg* — that, in death-eligible cases, prosecutors would regularly seek and juries would regularly impose the death penalty."[139] For example, the death sentencing rates for criminal homicides for the decade preceding *Furman* never exceeded 1.13%. The rates for the comparable post-*Gregg* periods did not exceed 1.54%.[140]

The Baldus group's Georgia studies consisted of the Procedural Reform Study ("PRS") and the Longitudinal Charging and Sentencing Study ("CSS"). The PRS compared levels of arbitrariness and discrimination in 156 of 294 pre-*Furman* capital cases to 594 post-*Furman* cases. The CSS, on the other hand, considered the impact of racial and other suspect characteristics on the disposition of cases from charging to sentencing.[141]

With respect to arbitrariness, the Baldus team first found that, as in the nation as a whole, "prosecutorial discretion continues to dominate the system and that only a small portion of the death-eligible cases actually result in a death sentence."[142] Two points follow from this finding. First, consistent with my prediction regarding ambivalence, interpersonal distance, and the disparity between adjudicative and legislative endorsement of capital punish-

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[137] *Furman*, 408 U.S. at 239-40.

[138] *See Gregg*, 428 U.S. at 197-207.

[139] BALDUS, *supra* note 11, at 231. Rates, rather than absolute numbers, are used to take into account variations in the crime rate and population size.

[140] *See id.* at 231 tbl.48.

[141] *See id.* at 40-66 (describing methodology of two studies). One of the most powerful aspects of the Baldus analysis, in addition to its large data set, is classification of cases according to relative culpability. The creation of a comparative metric allowed the researchers to quantify the issues of arbitrariness, excessiveness, and discrimination.

[142] *Id.* at 399.

ment, "[t]he behavior of both prosecutors and juries reflects much less enthusiasm for capital punishment in practice than the theoretical support for it expressed in public opinion polls and in broad death-sentencing statutes of the type found in Georgia law."[143] Apparently, there is a huge difference between endorsing the death penalty for a hypothetical defendant and ordering the execution of a particular human being.[144] Second, a decisional system dominated by virtually unfettered prosecutorial discretion is subject to arbitrariness and authoritarianism-promoting influences, including a particular prosecutor's personal religious and moral beliefs, geographic disparities within a state, racial biases, and potential political conflicts between prosecutors, attorneys general, and governors.[145]

The Baldus Study also concluded that, although Georgia's pre-*Furman* system was not quite as utterly random as Justice Stewart's metaphor of lightning striking implied,[146] its "random qualities . . . outweighed its selective capacity."[147] For example, less than one quarter of death sentences "appear to be evenhanded."[148] Although post-*Furman* cases showed some decrease in arbitrariness,[149] a substantial measure remains: "prosecutors and juries do not reserve the death penalty for only the most extreme cases."[150]

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[143] *Id.* at 97.

[144] Indeed, it was legislative efforts to counteract the tendency toward jury nullification that led to the Court's ruling in *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968), in which the Court upheld the state's exclusion of jurors who would "invariably" or "automatically" vote against the death penalty but not jurors who simply expressed moral or religious reservations about capital punishment.

[145] For a discussion of these issues in the context of the controversy that erupted when Bronx District Attorney Robert T. Johnson announced (prior to his reelection by a wide margin) his intention not to seek enforcement of New York's newly reenacted death penalty, see John A. Horowitz, *Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty*, 65 FORDHAM L. REV. 2571, 2581-87 (1997). For a sketch of a particularly zealous prosecutorial advocate of capital punishment, see Tina Rosenberg, *The Deadliest D.A.*, *in* CURRENT CONTROVERSIES, *supra* note 2, at 319-32, which describes Philadelphia District Attorney Lynne Abraham. For a discussion of prosecutorial discretion and race effects, see *infra* notes 252, 255 and accompanying text. For a discussion of prosecutorial discretion and political influence, see *supra* notes 119-22.

[146] Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

[147] BALDUS, *supra* note 11, at 88.

[148] *Id.*

[149] *See id.* at 88-89 (stating that proportion of Georgia cases that resulted in death sentences increased by 8% and overall selectivity apparently increased).

[150] *Id.* at 98.

Baldus's analysis of excessiveness, discussed below, also supports this conclusion.[151]

Another approach takes a more coarse-grained but panoramic perspective by examining the relationship between the rates of executions and the rates of criminal homicide. By focusing on executions rather than sentencing, this view recognizes the possibility that the capital trial has symbolic importance distinct from that of actual executions.[152] Moreover, it also recognizes the role of postconviction remedies, including clemency, in the process.[153] In other words, this approach regards capital punishment as an entire process of human decision making and behavior that begins with enactment of death penalty laws, proceeds through trial, and includes postsentencing judicial review and executive review for clemency.[154] To the extent that the execution rate is substantially lower than the already low sentencing rate, the likelihood increases that a few individuals are being arbitrarily chosen for ritualized killing — unless, of course, one could be confident that less deserving cases are being effectively winnowed out. The evidence indicates, however, that such selectivity is lacking.

The roughest approach would take the nation as a whole, and thus include the full range of legislative, adjudicative, and executive choices — including constitutional judgments and clemency — that combine to produce executions in America. The data indicate that actual execution is rare in relation to the criminal homicide rate. For example, the execution rate between 1965 and 1994 — for the years that capital punishment was constitutionally available nationwide — was a mere .06%.[155] Because the *Furman* decision

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[151] *See infra* notes 194-98 and accompanying text.

[152] *See supra* note 107 and accompanying text.

[153] For examples of the clemency process in Texas, see JAMES W. MARQUART ET AL., THE ROPE, THE CHAIR, AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923-1990, at 99-107 (1994).

[154] *See generally* Dubber, *supra* note 93, *passim* (discussing issue of comprehensive responsibility for capital punishment).

[155] Between 1965 and 1994, for example, 267 persons were executed for murder under civil authority in the United States. *See* UNITED STATES DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1995, at 615 tbl.6.86 (1996) [hereinafter SOURCEBOOK]. During that same period, excluding the *Furman*-imposed moratorium between 1972 and 1976, there were 440,768 total murders and nonnegligent homicides. *See id.* at 351 tbl.3.124. I chose the time period 1965-1994 because 1964 is the last year in which a person was executed in the United States for a crime other than murder. There were six executions for rape in 1964. As noted above, the United States Supreme Court ruled in *Coker v. Georgia*, 433 U.S. 584, 592 (1977), that the death penalty could not be applied constitutionally for rape.

forms part of the capital punishment decision-making process, however, that figure overestimates the actual execution rate.[156] The execution rate for the period 1930 to 1964 (when procedural protections, including controls on jury discretion, were much weaker) is considerably higher at approximately one percent, but still low in any reasonable sense.[157] One might contend, as did the Baldus study, that homicides from abolitionist states should be excluded from the total.[158] Excluding such states for 1965-1994 only marginally increases the relative execution rate (to .068%).[159] Comparing the actual execution rates to the sentencing rates calculated by the Baldus study (i.e., excluding abolitionist states) further illustrates the extent to which capital punishment's purposes are served by its abstract availability, the symbolic processes of murder trials, and the only occasional ritual killing of capital defendants.[160]

It is difficult to conceive of any rational system capable of slicing justice so fine as to discriminate meaningfully among cases at those rates.[161] In other words, it is hard to believe that, out of the hun-

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[156] According to Bedau's analysis, the average annual execution rate for the past decade — the number of actual executions per hundred criminal homicides — is 0.1%. Bedau, *supra* note 2, at 26, 31-32. This higher rate reflects the recent sharp increase in executions.

[157] Between 1930 and 1964, 3324 persons were executed for homicide. *See* SOURCEBOOK, *supra* note 155, at 615 tbl.6.86 (noting that this number accounts for 86% of all executions during the period). There were approximately 306,159 homicides during that period. *See* UNITED STATES DEPARTMENT OF COMMERCE, 1 HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 414, Series H 971 (1975) [hereinafter HISTORICAL STATISTICS]. One recent summary reduced the data concerning the overall risk of execution to approximate ratios of one execution annually per 1000 criminal homicides, 700 arrests for criminal homicide, 450 convictions for criminal homicide, 100 inmates on death row, and 10 inmates admitted to death row. *See* Bedau, *supra* note 2, at 26, 33.

[158] The argument would be that citizens of Wisconsin (an abolitionist state), for example, as a practical matter have virtually no impact on death penalty policy in Texas.

[159] For example, between 1965 and 1994 (again conservatively excluding the *Furman* period), the approximate number of homicide rates among death penalty states was 393,521. *See* U.S. DEPT. OF JUSTICE, CRIME IN THE UNITED STATES: UNIFORM CRIME REPORTER (1965) to (1995). Similar analysis for 1930 to 1964 is unlikely to produce a different pattern. If anything, the impact should be even less because proportionality fewer and less populous states were abolitionist. Maine, Minnesota, and Wisconsin have had no death penalty between 1930 and 1939; and Alaska and Hawaii have not had capital punishment since 1960, the year their statistics were first included in Department of Justice tabulations.

[160] The average annual execution rates for the three pre-*Furman* periods used by Baldus are 0.05, 0.07 and 0%, respectively. For the three post-*Gregg* periods, the average annual execution rates are 0.002, 0.004 and 0.066%, respectively. Data are compiled from SOURCEBOOK, *supra* note 155, and Bedau, *supra* note 2, at 32 (noting ratio of annual executions to capital sentences).

[161] *See* Bedau, *supra* note 2, at 33 (stating that "[b]oth friends and enemies of capital punishment must wonder how [such] a death penalty system of criminal justice can be taken seriously").

dreds of thousands of murders committed in the United States, the relatively few cases actually leading to executions were uniquely and palpably appropriate — whether as a matter of retribution, deterrence, or incapacitation — for the death penalty. In view of the glaring shortcomings in the American death penalty system, especially the inadequate provision for defense counsel, the likelihood of accomplishing penological objectives seems remote indeed.[162] By contrast, it would arguably serve ritual sacrifice purposes just as well to execute only a handful chosen almost at random from among the large cohort of murderers — so long as some minimal appearance of procedural justice is maintained.

Two other points bear mention. First, as the Baldus report noted, several explanations might be offered to account for the infrequency of sentencing and execution (at least in recent years), such as high trial costs and protracted appellate delays. The Baldus group concluded, however, that it is more likely that the low rates "reflect society's efforts to resolve the profound value conflicts implicated in capital punishment."[163] Ambivalence resulting from reconciliation of competing worldviews and the effect of interpersonal distance is consistent with a terror management theory of capital punishment.[164]

Second, capital punishment proponents might respond that the obvious solution to the infrequency problem is more executions. This Article, however, looks at how capital punishment is actually practiced. My *observation* is that the system apparently does operate in a more arbitrary than principled fashion. My *argument* is that the arbitrariness resulting from the extremely low sentencing and execution rates and the lack of selectivity that have long characterized American capital punishment is evidence that the institution serves symbolic rather than practical purposes. A symbolic purpose

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[162] For discussion of the problem of inadequate defense resources, see *infra* notes 174-82 and accompanying text.

[163] BALDUS, *supra* note 11, at 411. This conclusion meshes with the views of other commentators. One example is Zimring and Hawkins's "perspective theory," which, like my "ambivalence" hypothesis, asserts that the disparity between public opinion support for capital punishment and its actual implementation results more from perspective than opinion. Policy makers and implementers "are much closer to the nexus between policy and practice, between the death penalty as statute, and killing people as punishment." ZIMRING & HAWKINS, *supra* note 2, at 22 (quotation omitted); *see also* Dubber, *supra* note 93, at 581 (stating that "[t]he most important cause of the current delay lies in the deeply troubling impact capital cases continue to have on judges all over the country").

[164] *See supra* note 124, 132 and accompanying text.

consistent with this pattern, and the other attributes described below, is accounted for by terror management theory.

The "more executions" argument overlooks the ambivalence factor predicted by application of terror management theory. England's experience during the early nineteenth century resurgence of the "bloody code" is instructive. Execution rates were relatively high by the standards of either their day or ours, but the gallows could not keep up with prosecutorial and legislative zeal for capital punishment. The result was a corresponding rise in conditional pardon rates, even as the number of executions soared.[165] Implementation of government's sanguinary ambitions became intolerable: "It was calculated in the 1820s that if you hanged all the condemned, you would have to hang four people every day of the year, excluding Sundays. The 'people' might put up with a lot. But they would not put up with this."[166] The consequence of the system's struggle to reconcile this fundamental conflict was arbitrariness.[167] America's well-known experience with jury nullification of capital punishment legislation reflects a similar process.[168] With the current resurgence of legislative fervor for capital punishment, the problem seems likely to persist.[169]

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[165] For example, Gatrell reported the following conviction, execution, and pardon frequencies for England and Wales for the period between 1806-1820:

Years	Convictions	Executions	% Pardoned
1806-10	1874	286	85
1811-15	2760	374	86
1816-20	5853	518	91

GATRELL, *supra* note 1, at 617 tbl.2.

[166] *Id.* at 21.

[167] Gatrell noted: "Tensions deepened as the widening disproportion between death sentences pronounced but respited and death sentences executed highlighted the grim fate of the wretches chosen to hang. Romilly's point that English justice was now a lottery could hardly be gainsaid. Outsiders like Wakefield could mercilessly expose the fact that capital law had come to look randomly cruel and terminally silly." *Id.*

[168] *See, e.g.*, Dubber, *supra* note 93, at 574 (stating that "[e]vidence abounds of jurors who had favored capital punishment as late as voir dire, but found themselves deeply troubled by, if not incapable of, imposing the death penalty on a particular individual").

[169] *See* Hugo A. Bedau, *Offences Punishable By Death, in* CURRENT CONTROVERSIES, *supra* note 2, at 36-54 (describing recent legislative initiatives to expand availability of capital punishment).

2. The Appearance Rather than the Substance of Justice

A growing body of critical commentary bears out terror management prediction that American capital punishment is concerned more with the appearance than the substance of justice. More than a decade ago, Ronald Tabak warned that several factors have produced a capital punishment system pervaded by inconsistency and a high risk of error.[170] They include inadequate provision for counsel for indigent capital defendants, judicial rules that impair counsel's ability to defend capital cases, rules that often preclude adequate postconviction review, and the political considerations influencing the judgment of elected prosecutors and judges.[171] Tabak concluded that, "In view of these basic problems with the death penalty and the arbitrary and capricious way in which it still operates, it is apparent that this country cannot administer capital punishment fairly."[172] Recently, a staff report of the House Judiciary Committee concluded that, "there is a real danger of innocent people being executed in the United States."[173]

Inadequate provision for defense counsel remains an especially glaring problem, one that has been aggravated by the drastically reduced opportunities for post-trial review. Stephen Bright's study catalogues the problems.[174] First, many of the states with the highest execution rates lack well-organized public defender programs

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[170] *See* Ronald Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980's*, 14 N.Y.U. REV. L. & SOC. CHANGE 797, 797-848 (1986).

[171] *See id.* at 801-10.

[172] *Id.* at 848.

[173] *Staff of House Comm. on the Judiciary, Subcomm. on Civil and Constitutional Rights*, 103d Cong. (1993), *reprinted in Innocence and the Death Penalty: Assessing the Danger of Mistaken Executions*, *in* CURRENT CONTROVERSIES, *supra* note 2, at 344-45. A recent article following up on the Staff Report concluded that, with "[t]he current emphasis on faster executions, less resources for the defense, and an expansion in the number of death cases," the problem will get worse and that "the execution of innocent people is inevitable." Richard C. Dieter, *Innocence and the Death Penalty: The Increasing Danger of Executing the Innocent*, DEATH PENALTY INFORMATION CENTER 2 (July 15, 1997) <http://www. essential.org/dpic/inn.html> (on file with author). The leading work in this area is MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992) (describing almost two dozen cases in which evidence indicates that wrong person may have been executed); *see also* Samuel Gross, *The Risks of Death: Why Erroneous Convictions are Common in Capital Cases*, 44 BUFF. L. REV. 469, 469-500 (1996) (noting factors which cause erroneous convictions in death penalty cases). *But see* Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 121 (1988) (arguing that Bedau-Radelet study is flawed in several critical respects).

[174] *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1849 (1994).

that can hope to hold their own against prosecutorial resources.[175] Attorneys often are simply appointed by trial judges from among the local bar.[176] Thus, "the poor are often represented by inexperienced lawyers who view their responsibilities as unwanted burdens, have no inclination to help their clients, and have no incentive to develop criminal trial skills."[177] Second, funding is often grossly inadequate.[178] In some instances, the hourly compensation rate has actually fallen below minimum wage levels, and fee caps can almost guarantee inadequate representation: "At such rates, it is usually impossible to obtain a good lawyer willing to spend the necessary time."[179] Third, too often it is the marginal or incompetent counsel who are actually appointed.[180] Horror stories abound of counsel appointed to defend a man's life who have never before tried a case or who declared themselves to be incompetent.[181] Indeed,

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[175] *See id.* at 1844-47.

[176] *See id.* at 1849-50.

[177] *Id.*

[178] *See id.* at 1850-55.

[179] *Id.* at 1853. Other studies have reached similar conclusions. *See* THE SPANGENBERG GROUP, STUDY OF REPRESENTATION IN CAPITAL CASES IN TEXAS 157 (1993) (finding compensation rates are "absurdly low"); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF L. REV. 329, 334 (1995); Marcia Coyle et al., *Fatal Defense*, NAT'L L.J., June 11, 1990 at 30 (noting that compensation rates in Mississippi average $11.75 per hour).

[180] *See* Bright, *supra* note 174, at 1857 (noting that "[t]he reality is that popularly elected judges, confronted by the local community that is outraged over the murder of a prominent citizen or angered by the facts of a crime, have little incentive to protect the constitutional rights of the one accused in such a killing").

[181] *See id.* at 1856-57; Richard C. Dieter, *With Justice for Few: The Growing Crisis in Death Penalty Representation*, DEATH PENALTY INFORMATION CENTER REPORT (Oct. 1995) <http://www.essential.org/dpic/dpic.roz.html> (on file with author). Other examples have been noted of cases "in which people were sentenced to death when represented by lawyers who had not read the state's death penalty statute, who had slept through the trial, who were addicted to drugs, or who made no defense whatever." *Panel Discussion, The Death of Fairness? Counsel Competency and Due Process in Death Penalty Cases*, 31 HOUS. L. REV. 1105, 1109 (1994) (recounting comments of Anthony Lewis (citing McFarland v. Scott, 512 U.S. 1256, 1259 (1994))). *See generally* Bruce R. Braun, *Getting What You Paid For: The Judicial Cap on Attorneys' Fees for the Representation of the Condemned in the Supreme Court*, 69 N.Y.U. L. REV. 1014, 1036 (1994) (noting that limit on attorney's fees has restricted availability of habeas review and relief); Rosemary Butler, *Dying for Counsel*, NEW L.J. Dec. 16, 1994, at 1743 (giving example of defense counsel's failure to introduce mental history of client who had history of mental problems); Marcia Coyle et al., *supra* note 179 (describing problem of inadequate representation in capital cases); Steven Keeva, *Justice on Death Row: Incompetent Lawyers, Proposed Laws Threaten Representation*, A.B.A. J. Apr. 1996, at 105 (noting inclination of judges to impose death penalty and let lawyers deal with problems on appeal); Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 368-70 (1993) (stating that courts may encourage counsel's inclination to do minimum on each case due to amount of cases); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13

inadequate representation has been described as "[t]he single greatest problem" in American capital punishment.[182]

Consequently, the complex procedural protections that the United States Supreme Court has deemed necessary to ensure minimal levels of accuracy, proportionality, fairness, and consistency in capital cases are likely to be more illusory than real. Indeed, "these procedures have done too little to remove the influence of prejudice and caprice in the life and death decisions made by prosecutors, judges, and juries in capital cases."[183] Because "[a]ccording to some estimates, approximately ninety percent of those charged with capital murder are indigent when arrested and virtually all are indigent by the time their cases reach the appellate courts," these problems have become the norm rather than the exception.[184]

These and other concerns led the American Bar Association House of Delegates in 1997 to issue a statement formally calling for a moratorium on capital punishment. In addition to the problem of underfunded and ineffective counsel, the ABA noted other developments which, taken together, "have resulted in a situation in which fundamental due process is now systematically lacking in capital cases."[185] In particular, recent federal legislation has substantially constricted federal court review of capital cases for constitutional defects. First, Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") sets tight limits on the time

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HASTINGS CONST. L.Q. 625, 638-39 (1986) (noting factors courts use to determine if representation was inadequate); Leslie Ryan, *Responding to the Crisis in Death Penalty Representation*, HUMAN RIGHTS, Spring 1996, at 5 (noting case of man released from death row only after struggle to get free adequate legal assistance); Christine M. Wiseman, *Representing the Condemned: A Critique of Capital Punishment*, 79 MARQ. L. REV. 731, 742-44 (1996) (noting case in which attorney visited client one time, failed to interview witnesses, and failed to introduce relevant evidence on mental health and past abuse); *see also* ABA RESOLUTION, *supra* note 7 (noting cases documenting problem of inadequate representation).

[182] Vick, *supra* note 179, at 334 (footnotes and citations omitted); Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard*, 1993 U. ILL. L. REV. 323, 376 (1993) ("The single greatest problem with our system of capital punishment in the quality of representation afforded capital defendants."). The problem is especially acute for mentally disabled defendants. *See* Michael L. Perlin, *"The Executioner's Face is Always Well-Hidden": The Role of Counsel and the Courts in Determining Who Dies*, 41 N.Y.L. SCH. L. REV. 201, 207-14 (1996).

[183] Vick, *supra* note 179, at 332; *see also* Strickland v. Washington, 466 U.S. 668, 687 (1984) (challenging effectiveness of counsel is high standard to meet); Perlin, *supra* note 182, at 205 (noting that standard established in *Strickland* is pallid and nearly impossible to violate).

[184] Vick, *supra* note 179, at 332.

[185] ABA RESOLUTION, *supra* note 7, at 2.

for filing federal habeas petitions, the scope of federal judicial review (both at the trial and appellate level), and the relief that federal courts can award.[186] The ABA concluded that the new law "dramatically undermines the federal courts' capacity to adjudicate federal constitutional claims in a fair and efficient manner."[187] Second, termination of funding for postconviction defender organizations is another development that has limited capital defendants' access to postconviction review.[188] Third, many states have diluted or abandoned important procedural safeguards recommended by the ABA.[189] Finally, the Supreme Court has created its own set of barriers to meaningful postconviction review in capital cases.[190]

The ABA Resolution also condemned the pervasive racism that characterizes capital punishment.[191] This problem, along with the problem of excessiveness, is a form of arbitrariness in that no rational penological objectives exist for imposing capital punishment in a racially disproportionate or excessive manner. Because these two problems are distinct for purposes of terror management theory, however, they are discussed separately below.

B. Excessiveness

Excessiveness in capital punishment's legislative and adjudicative domains fits a terror management model in several overlapping ways. First, disproportionate capital sentencing evidences hyperpunitiveness. A terror management model predicts that there will be a substantial number of cases in which the death penalty is imposed for crimes that are no more, and may be less, severe than those receiving life sentences. Second, the legislative and adjudica-

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[186] *See* Pub. L. No. 104-132, 110 Stat. 1217. In a case presenting a stark conflict between the interests of accuracy, adequate representation, and finality in capital proceedings, the United States Supreme Court recently invoked the "spirit" of the AEDPA to modify the abuse of discretion standard of review of the Ninth Circuit's sua sponte recall of its mandate denying habeas relief. *See* Calderon v. Thompson, 523 U.S. 538 (1998).

[187] ABA RESOLUTION, *supra* note 7, at 4.

[188] *See id. See generally* Roscoe C. Howard, Jr., *The Defunding of the Post-Conviction Defense Organizations As a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863, 866 (1996) (arguing defunding of postconviction defense organizations will eliminate progress made in providing adequate counsel for indigent defendants); Al Shay, *The Elimination of Death Penalty Resource Centers*, THE ARK. LAW., Winter 1996, at 32 (describing impact of defunding at local level).

[189] *See* ABA RESOLUTION, *supra* note 7, at 3.

[190] *See id.* at 11-12; *infra* notes 355, 361 and accompanying text.

[191] *See* ABA RESOLUTION, *supra* note 7, at 12-14.

tive processes associated with capital punishment are likely to stimulate mortality awareness, and thus risk creating a positive-feedback loop whereby the very existence of the practice increases the demand for itself. In a fitful vicious-circle process, reminders of mortality prompt deployment of terror management defenses, which could include greater support for capital punishment and eventually increase the rate of capital sentencing and executions. That increase itself would contribute to death awareness and provoke terror management defenses, including perhaps more capital punishment, and so on *ad moribundus*.[192] Killing human beings to stave off the terror of one's own mortality is like drinking salt water to slake one's thirst or scratching the itch of poison ivy — the remedy can be expected to aggravate the underlying condition. One would therefore expect to see spikes in death penalty legislation, sentencing, and execution. But, because of the value conflicts implicated in capital punishment and concomitant ambivalence, and perhaps because of eventual habituation and diminished mortality salience, this process should be intermittent with occasional remission.[193] Third, because of capital punishment's largely symbolic function, the pattern is unlikely to bear much relation to crime rates.

1. Indicia of Excessiveness in Capital Sentencing

The clearest evidence of excessiveness in capital punishment comes from the Baldus group. In their PRS, discussed above,[194] they found that, in the pre-*Furman* cases: "Even our most conservative measure classifies nearly one half of the death sentences imposed as presumptively excessive. Similarly, even when viewed in

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[192] Note that Gatrell's analysis of early nineteenth-century public executions in England concluded that executions do not engender more executions. But his perspective on early nineteenth-century England's less democratic political system essentially negates the responsibility of the "people" — as manifest in the scaffold crowd — for capital punishment. *See* GATRELL, *supra* note 1, at 94 ("The state controlled the violence, not the people. . . . [T]he crowd comprised reactive observers, not initiating agents.").

[193] These predictions concerning rate of *increase* in capital punishment are distinct from the points discussed above concerning sentencing and execution rates. The point here is that, even if defendants are rarely sentenced to death and even more rarely are actually executed in proportion to the murder rate, one would expect to see occasional steep fluctuations in execution rates that are unaccompanied by corresponding variations in murder rates.

[194] *See supra* text accompanying note 141.

the most favorable light, fewer than one quarter of the death sentences imposed appear to be evenhanded."[195]

Although the Baldus group found the post-*Furman* reforms produced some reduction in excessiveness, several problems remain. First, "the statutorily designated aggravating circumstances in Georgia's post-*Furman* law do not serve in practice to distinguish murder cases in which death sentences are routinely imposed from those that normally result in a life sentence."[196] Second, even post-*Furman*, "prosecutors and jurors do not reserve the death penalty for only the most extreme cases. From fifteen percent to thirty percent of the death sentences imposed appear to be presumptively excessive . . . and nearly one half of Georgia's post-*Furman* death sentences show some evidence of excessiveness."[197] Further, because the PRS considered only defendants convicted of murder, its analyses probably understated the extent of excessiveness resulting from prosecutorial charging and plea-bargaining decisions.[198] Third, the effectiveness of post-*Furman* reforms depends in large part on the adequacy of representation, which, again, is woefully lacking.[199]

Excessiveness also results when aggravating factors are systematically exaggerated. Future dangerousness is a dominant, overt consideration in capital jury deliberations.[200] Jury deliberation may be heavily influenced by expert testimony, which all too often lacks an adequate empirical basis and is prone to numerous error-producing methodologies.[201] Available longitudinal data indicate

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[195] BALDUS, *supra* note 11, at 88.

[196] *Id.* at 97.

[197] *Id.* at 97-98.

[198] *See id.* at 98.

[199] *See supra* notes 170-82 and accompanying text. One example of this is the problem of mental disability and capital punishment. *See* Perlin, *supra* note 182, at 216 (stating that "Justice O'Connor's *Penry* assertion that the insanity defense protects against conviction and punishment of persons with severe mental disability stands in stark contrast to counsel's dismal track record in this area. And certainly, post-*Ford* litigation on this issue gives no support whatsoever to this assertion.").

[200] *See* Joseph Hoffman, *How Juries Decide Death Penalty Cases: The Capital Jury Project, in* CURRENT CONTROVERSIES, *supra* note 2, at 333, 336-38 ("One of the most important issues for jurors — more important than the defendant's criminal history, background and upbringing, and remorse — is whether the defendant, if he is allowed to live, is likely to pose a danger to society in the future.").

[201] *See generally* Mark D. Cunningham & Thomas J. Reidy, *Don't Confuse Me with the Facts: Common Errors in Violence Risk Assessment at Capital Sentencing*, 26 CRIM. JUST. & BEHAV. 20 (1999); Mark D. Cunningham & Thomas J. Reidy, *Integrating Base Rate Data in Violence Risk Assessments at Capital Sentencing*, 16 BEHAV. SCI. & L. 71 (1998).

that subsequent violence among capital convicts has been overpredicted. For example, one study tracked over a fifteen-year period the institutional and postrelease behavior of 558 capital convicts (239 of whom were eventually released) who had their sentences commuted in the wake of *Furman.* The authors concluded that:

> these prisoners did not represent a significant threat to society. Most performed well in prison; those few who have committed additional violent acts are indistinguishable from those who have not. Therefore, over-prediction of secondary violence is indicated. More than two-thirds of the *Furman* inmates, using a very liberal definition of violence, were false positives — predicted to be violent but were not.[202]

The authors also examined the rate of re-offending parolees. They found that "murderers do sometimes kill again even after years of imprisonment, [but] the data show that the number of such repeaters is very small. Both with regard to the commission of felonies generally and the crime of homicide, no other class of offender has such a low rate of recidivism."[203]

Another study examined the postconviction behavior of ninety-two Texas *Furman*-commuted capital convicts for whom the jury had specifically found future dangerousness.[204] The authors similarly concluded that:

> Overall these former death row prisoners were not a disproportionate threat to the institutional order, other inmates, or the custodial staff. Indeed, their total rate of assaultive institutional misconduct was lower than those of both the capital murder offenders who were given a life sentence and the general prisoner population. Further, the majority of the infractions were committed by a minority of the capital prisoners; and most never

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[202] James W. Marquart & Jonathan R. Sorensen, *A National Study of the* Furman*-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 LOY. L.A. L. REV. 5, 28 (1989). Overall, the sample were responsible for six murders in prison. Most of the convicts served their time with few or no instances of misconduct; a minority committed most of the infractions. Of the parolees, 21% were returned to prison for new offenses; 12% committed new felonies. One parolee committed a second homicide. *See id.* at 27.

[203] *Id.* at 25.

[204] *See* James W. Marquart et al., *Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 L. & SOC'Y. REV. 449, 451 (1989).

> committed any serious rule violations after their release from death row.[205]

Thus, once again, "overprediction is the norm."[206]

2. Legislative and Adjudicative Endorsement

Capital punishment has always been something of a Sorcerer's Apprentice. Until recently, the death penalty has been imposed for a wide range of crimes.[207] After a brief abolitionist period under William the Conqueror, the death penalty in England "was reinstated with a vengeance," and a host of crimes, from murder to witchcraft to "coin clipping," became capital offenses.[208]

Anglo-American culture thus has periodically tended toward apparent excess with respect to capital punishment. Broadly speaking, the English experience with capital punishment since Henry VIII approximates the episodic pattern described above — at least in terms of the frequency of executions. During the century 1530 to 1630, the number of executions has been estimated in the tens of thousands.[209] The number dropped precipitously and then stabilized over the next 120 years, in part because of the availability of transportation as an alternative.[210] The number then rose abruptly: "[D]ramatically, in the later eighteenth century it looked as if the bad old killing days were returning. There had been a mere 218 London hangings between 1701 and 1750; there were nearly *five* times as many between 1751 and 1800."[211] The number continued to climb — Gatrell estimated that 7000 people were executed in

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[205] *Id.* at 464-65. Of the 12 prisoners released, one "committed a second homicide, a brutal slaying in some ways similar to the offense for which he was originally sentenced to death. This, of course, is a disturbing finding. At this point, on the basis of a sample of twelve, the post-prison behavior of the former death row inmates cannot be assessed . . . ." *Id.* at 465.

[206] *Id.* at 465.

[207] For example, under Mosaic and Roman law, unchastity could be punishable by death (preferably stoning). *See* ROBERT H. LOEB, JR., CRIME AND CAPITAL PUNISHMENT 13-14 (1978).

[208] *Id.* at 15.

[209] *See* GATRELL, *supra* note 1, at 7 (citing P. Jenkins, *From Gallows to Prison?: The Execution Rate in Early Modern England*, 7 CRIM. JUST. HIST. 52 (1986)). It has been estimated that during the reign of Henry VIII (1509-1547) there were 3780 executions, and during Edward VI's reign (1547-1553) there were 3360. *See* PATERNOSTER, *supra* note 100, at 5 (citing L. RADZINOWICZ, 1 A HISTORY OF ENGLISH CRIMINAL LAW 140-42 (1948)).

[210] *See* GATRELL, *supra* note 1, at 7. *See generally* PATERNOSTER, *supra* note 100, at 5 (noting that frequency of executions and number of capital offenses reduced over time).

[211] GATRELL, *supra* note 1, at 7.

England and Wales between 1770 and 1830, the majority for property crimes.[212]

At least in England, the abandonment of the bloody code and the beginning of the slow movement toward formal abolition was preceded by a veritable frenzy of executions. The sharp increase in executions in England came on the eve of England's 1832 Reform Act, which repealed most of the capital code and greatly reduced the frequency of both capital convictions and executions.[213] As Gatrell observed, "[t]hen suddenly — and I do mean suddenly — this ancient killing system collapsed."[214]

The intermediate step in that progression — the transition away from public executions — probably contributed to the century delay until formal abolition.[215] Although the process of de facto abolition preceding formal abolition is a common one,[216] and at least some countries otherwise formally committed to abolition have made occasional exceptions to execute collaborators and war criminals following World War II,[217] there are notable examples of the pattern of occasional killing sprees while a society is actively practicing capital punishment. Some are extreme instances in which the terror management profile described in this Article — authoritarian aggression, arbitrariness, excessiveness, and dehumanization — emerges with florid, unmistakable clarity. Twentieth-century examples include the genocide of the Nazi period in Germany, the Stalinist purges in the former Soviet Union, the

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[212] *See id.* Gatrell described the breakdown of offenses for which those hanged in the 1820s in England were executed: "a fifth were hanged for murder, a twentieth for attempted murder, another twentieth or so for rape, and somewhat fewer for sodomy. Two-thirds were hanged for property crimes: over a fifth of these for burglary and housebreaking, a sixth for robbery, a tenth for stealing horses, sheep, or cattle, and a twelfth for forgery and uttering false coins. Forgery convictions killed off one in five of those hanged between 1805 and 1818." *Id.* at 7-8.

[213] *See id.* at 9.

[214] *Id.*

[215] *See id.* at 23 (stating that "the abolition of public hanging in 1868 all but silenced the abolitionist cause for nearly a century"). The issue of public executions is discussed further below in connection with dehumanization. *See infra* notes 302-16 and accompanying text.

[216] *See* ZIMRING & HAWKINS, *supra* note 2, at 8-10 (noting that "abeyance often has been preceded by a period in which the number of executions gradually decreased"); *see also* HOOD, *supra* note 2, at 31 (stating that "[a]s is well known, in many countries the abolition of the death penalty (at least for ordinary crimes) has followed a lengthy period during which no executions have taken place"). In the United States the virtual abandonment of executions was followed not by formal abolition but by reinstatement with a vengeance.

[217] *See* ZIMRING & HAWKINS, *supra* note 2, at 12 (citing Netherlands, Norway, Denmark, and Israel as examples of countries that executed war criminals after World War II).

slaughter by the Pol Pot regime in Cambodia, the Rawandan massacres, and the euphemistically termed process of "ethnic cleansing" in the Balkans.[218] A much earlier example, at a time when Europe was literally awash with mortality salience, was the virtual extermination in parts of Europe of the Jews, on whom the Black Death was blamed.[219]

Another aspect of this process is the role of public opinion. As noted above, public support for capital punishment probably is related more closely to its symbolic than instrumental function.[220] Perhaps not surprisingly in view of capital punishment's ritualistic nature and the feedback-loop effect posited above, public opinion concerning capital punishment sometimes follows or reacts to, rather than leads, practice.[221] In some countries public support for capital punishment has tended to rise sharply immediately after formal abolitionist steps. For example, although capital punishment had been largely abandoned in England prior to a legislated moratorium in 1965 and in the United States prior to the judicially imposed *Furman* moratorium, support for capital punishment increased notably following the imposition of each formal suspension.[222] In other words, capital punishment's symbolic rather than practical availability came to dominate support for it where its actual implementation had already substantially declined with little objection. In other instances, when the transition from killing to not killing has been much more abrupt, as in Germany's 1948 abolition of capital punishment in the wake of Nazi excesses, "after-abolition support for the death penalty diminishes."[223]

The capital punishment pattern in the United States bears both important similarities and differences to England's. First, the early experience was an extension of English practice, although the

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[218] For a suggested link between the Holocaust and symbolic immortality, which has been tied to terror management, see NAZI DOCTORS, *supra* note 34, at 12-18; Donald P. Judges, *Scared to Death II: Terror Management and Capital Punishment's Dehumanizing Effect on Mental Health Professionals* (unpublished manuscript, on file with author).

[219] *See generally* BARBARA TUCHMAN, A DISTANT MIRROR: THE CALAMITOUS 14TH CENTURY 112-18 (1978) (describing pogroms of 1349).

[220] *See supra* Part II.B.

[221] *See generally* ZIMRING & HAWKINS, *supra* note 2, at 41-44 (noting that "both the shifts in public opinion and the legislative backlash evidently represent a response to the deprivation of the death penalty option").

[222] *See id.* at 12, 42-44.

[223] *Id.* at 13. The change in Germany was striking, from 74% in favor of capital punishment immediately before abolition under the Basic Law in 1948 to only 26% by 1980. *See id.*

number of capital offenses was more restricted.[224] Second, America followed the English movement away from local, public executions to centralized, private ones.[225] Third, the frequency of executions in America has waxed and waned over time in no apparent relation to the direct threat posed by crime.[226] And fourth, the current post-*Gregg* upsurge in executions may parallel in some ways the English killing spree of the first three decades of the nineteenth century.[227]

There was at one time considerable variation in the number and kind of capital offenses in America. Reflecting its theocratic origins, capital crimes in the Massachusetts Bay Colony, for example, included idolatry, witchcraft, bestiality, sodomy, and man-stealing.[228] Several other colonies initially had less harsh codes; but, by the time of the American Revolution, most colonies had adopted similar capital statutes that included crimes such as arson, robbery, sodomy, and sometimes horse theft and counterfeiting, in addition to murder and rape.[229] Capital codes in the antebellum South also included slavery-related offenses, such as "concealing a slave with intent to free him, slave stealing, and inciting slaves to insurrection or circulating seditious literature among slaves."[230]

This "wealth of capital statutes in force" continued until only recently invalidated by *Furman*.[231] Nevertheless, most of the executions since 1930 have been for murder and rape (with a small proportion for kidnapping, armed robbery, sabotage, espionage, burglary, and aggravated assault by a life prisoner), and since 1965 all have been for murder.[232] Thus, the practical narrowing of the range of capital offenses has been accomplished largely through the adjudicative (prosecutorial and jury discretion, and Supreme Court mandate) rather than legislative process. Moreover, the de-

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[224] *See infra* notes 228-36 and accompanying text.

[225] *See infra* notes 300-14 and accompanying text.

[226] *See infra* Part II.B.3.

[227] See *infra* note 238 and accompanying text.

[228] *See* PATERNOSTER, *supra* note 100, at 5 (noting that influence of church resulted in executions for religious transgressions); Bedau, *supra* note 121, at 8 (describing early capital offenses).

[229] Bedau, *supra* note 121, at 7.

[230] PATERNOSTER, *supra* note 100, at 5.

[231] *See generally* Bedau, *supra* note 121, at 15-16 (noting impact of *Furman* on state statutes).

[232] *See* HISTORICAL STATISTICS, *supra* note 157, at 422; SOURCEBOOK, *supra* note 155, at 568.

lays in the capital process frequently complained of by legislators are largely of judicial creation.[233]

To justify the historical tendency toward legislative excess, lawmakers have sometimes pointed to isolated, high-profile cases that bear little correspondence to overall trends in crime rates.[234] Examples include legislative responses in the 1930s to the Lindbergh kidnapping, to the Kennedy and King assassinations in the 1960s, and to skyjacking and terrorism in the 1970s.[235] A more recent example is the AEDPA, enacted in the aftermath of the Oklahoma City bombing, a strikingly anomalous event in American criminal history.[236]

3. Changes in Execution and Crime Rates

If support for capital punishment is more symbolic than practical, and if it includes the terror management effect, one would expect to see episodic fluctuations in execution rates that bear no apparent relationship to corresponding variations in crime (e.g., criminal homicide) rates. The coarsest approach would simply examine execution frequency over time. By the end of 1997, there have been almost 15,000 recorded executions by state and local governments in America. Table 1 sets forth the raw number of executions by state and local authorities and the percentage of the total for each time period. In gross terms, there are several relative peaks: 1800-1865, the 1930s, and, if present trends continue, the

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[233] *See generally* Dubber, *supra* note 93, at 580-84 (noting that "current delays of often ten years would be impossible without the active assistance of federal and state judges")

[234] *See* Hugo A. Bedau, *Deterrence: Problems, Doctrines, and Evidence, in* CURRENT CONTROVERSIES, *supra* note 2, at 93, 100 (observing that "[e]ven if the superior deterrent efficacy of the death penalty seems doubtful where criminal homicide is involved, it still manages to claim adherents whenever a particular kind of crime strikes terror into large segments of society, or where a particularly loathsome type of criminal violence rises to command the headlines").

[235] *See id.* at 100-01.

[236] *See* Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); *see also* Federal Death Penalty Act of 1994, 21 U.S.C. § 848(p) (1994); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 60002(a), 108 Stat. 1796, 1959 (1994) (providing recent example of federal legislative expansionism); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001, 102 Stat. 4181, 4387 (1988) (offering an earlier example of federal legislative expansionism, popularly known as "Drug Kingpin Act").

One might argue that such legislation merely reflects a utilitarian response to a perceived threat. As discussed in Part II, however, it is more likely that such reactions manifest a symbolist rather than instrumentalist concern. That is, such reactions reflect symbolic worldview defense in the wake of mortality salience events.

1990s. Clearly, the raw frequency of executions does not vary simply as a function of population.

TABLE 1

Years	Executions	Percentage
1600s	162	1.08
1700s	1391	9.28
1800-65	2453	16.36
1866-79	825	5.50
1880s	1005	6.70
1890s	1098	7.32
1900s	1280	8.54
1910s	1091	7.28
1920s	1289	8.60
1930s	1676	11.18
1940s	1284	8.57
1950s	715	4.77
1960s	291	1.94
1970s	3	0.02
1980s	117	0.78
1990-97	309	2.06
Total[237]	**14,989**	**99.98**

Another way to illustrate this point is to examine the relationship between criminal homicide rates and executions over time. As discussed above, one might argue that the long delay between sentencing and execution renders meaningless comparison of execution and homicide rates for any given year.[238] I disagree for several reasons. First, as argued above, capital punishment is the product of continuous decision making and action from the enactment of capital sentencing statutes to the final act of execution. At every point in that process, some individual or group of individuals,

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[237] Table 1 combines data from Victoria Schneider & John Ortiz Smykla, *A Summary Analysis of* Executions in the United States, 1608-1987: The Espy File, *in* THE DEATH PENALTY IN AMERICA: CURRENT RESEARCH 1, 6 (Robert M. Bohm ed., 1991), and more recent sources. The original source for *The Espy Files* data is M. WATT ESPY & JOHN ORTIZ SMYKLA, *Executions in the United States: 1608-1987, The Epsy File* (1987). The Schneider and Smykla data include a total of 14,541 rather than the 14,570 reported by Espy because the location for some executions could not be ascertained.

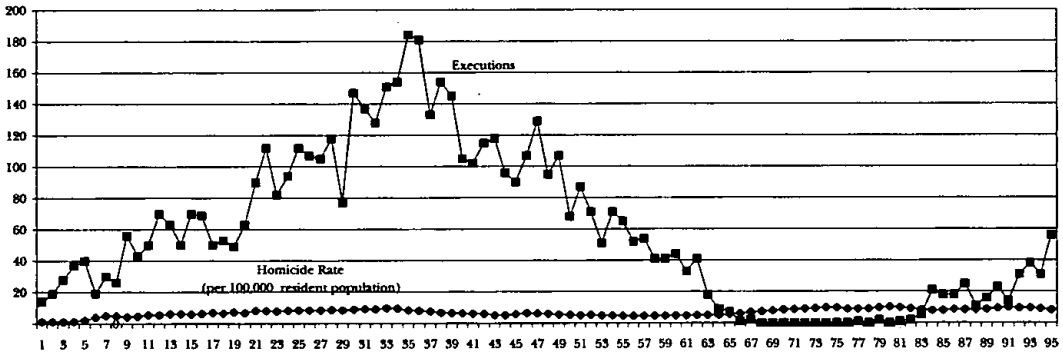
The data up to the 1960s are taken from Schneider and Smykla. The data for the 1960s through 1995 come from SOURCEBOOK, *supra* note 155, at 567 tbl.6.72. The data for 1996-1997 are taken from NAACP LEGAL DEFENSE FUND, DEATH ROW U.S.A. REPORTER 1090 (Current Service, January 1, 1998) [hereinafter DEATH ROW U.S.A. REPORTER].

[238] *See supra* note 163 and accompanying text.

whether legislator, prosecutor, juror, judge (trial or appellate), or executive officer. exercises official power. Second, protracted delay is a relatively recent phenomenon made possible by procedural protections that did not exist in the earlier decades of this century. Third, if there is a relationship between execution and homicide rates, it should be detectable across a wide enough time span despite delay. Figure 1 charts the annual national criminal homicide rates and number of executions for homicide between 1901 and 1996.[239]

The phenomenon can also be seen when the execution rate, i.e., the number of executions per 1000 homicides, is plotted as in Figure 2. As can be seen, the rate is subject to periodic steep fluctuations.[240] Relatively narrower but nevertheless sharp fluctuations are easier to see if the extremely high rates of 1901 to 1905 are removed, as in Figure 3.

Figure 1: National Homicide Rates and Executions for Criminal Homicide, 1901-1995



[239] The homicide rates are per 100,000 population. The data are compiled from the following sources: Homicide rates from 1901 to 1970, HISTORICAL STATISTICS, *supra* note 157, at 414, Series H 971-986; homicide rates from 1971-1995, SOURCEBOOK, *supra* note 155, at p. 306 tbl.3.106; executions from 1901 to 1929, BOWERS, *supra* note 100, at app. A; executions from 1930 to 1995, SOURCEBOOK, *supra* note 155, at p. 568 tbl.6.73; executions for 1996, DEATH ROW U.S.A. REPORTER, CURRENT SERVICE, *supra* note 237, at 1090. This compilation is at best a crude estimate, because methods for determining homicide rates and the number of executions have varied across time and between sources. I have excluded executions for rape and other nonhomicide offenses.

[240] The data for Figure 2 come from the same sources as for Figure 1. *See supra* note 239.

Figure 2: Execution Rate per 1000 Criminal Homicides, 1901-1995

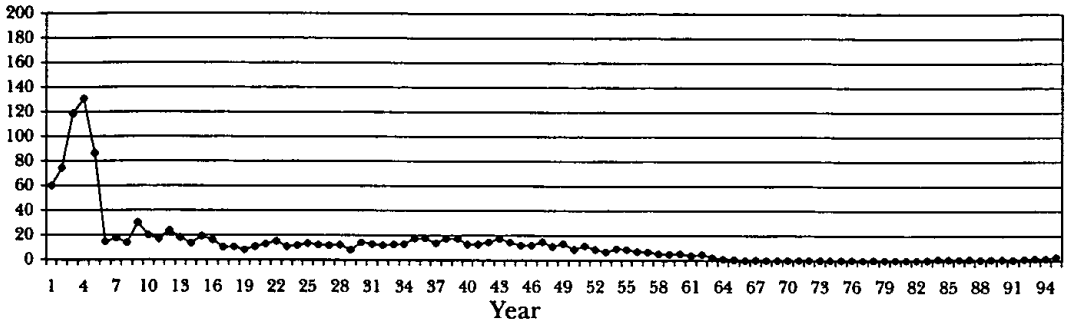
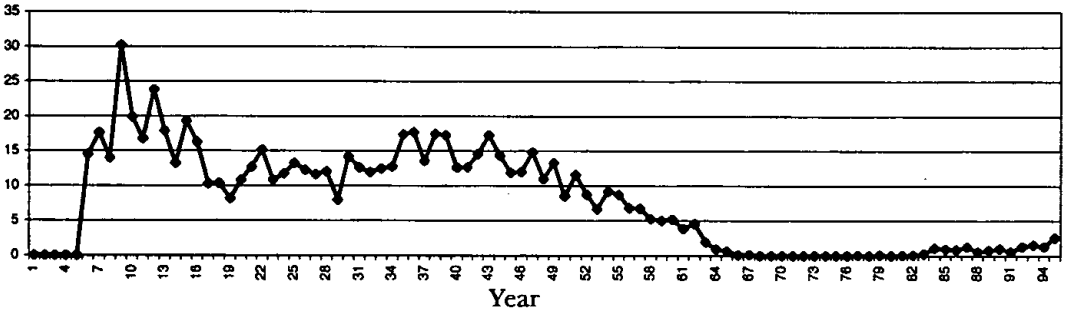


Figure 3: Execution Rate per 1000 Criminal Homicides, 1906-1995



Figures 1-3, which span a ninety-five year period, suggest that the incidence and rate of executions are subject to sharp fluctuations over time and that there is little correspondence between the rates of execution and criminal homicide. In other words, increases or decreases in the rate of one or the other appear to be unrelated. This analysis by itself does not, of course, prove that fluctuations in execution rates over time are caused by the terror management effect. Myriad potential contributing factors would have to be controlled before such an inference could be sustained on the basis of these data. The point is that these fluctuations are consistent with the theory described in this Article, and that there is some basis to conclude that the variable most directly connected to pragmatic penological goals — criminal homicide rate — has little relation to execution rate.

C. Discrimination

The most obvious manifestation of the authoritarian processes of ingroup favoritism and outgroup aggression would be systemic racial disparities in capital punishment. Evidence of such effects could occur in both race-of-defendant and race-of-victim disparities. One would also expect to see a connection between outgroup prejudice and authoritarian concern with sexuality, for example in racial disparities in connection with the death penalty for rape.

Two striking points emerge from available data: race effects abound in American capital punishment and both the United States Supreme Court and Congress have refused to remedy them.[241] The Supreme Court rejected an equal protection challenge to Georgia death penalty proceedings premised on the Baldus group's Charging and Sentencing Study ("CSS").[242] Con-

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[241] The states, however, have taken some action. For example, Kentucky recently enacted the Kentucky Racial Justice Act, which allows proof "that race was the basis of the decision to seek a death sentence" (i.e., a "significant factor" in such decisions) through evidence of race-of-victim or race-of-defendant statistical disparities. KY. REV. STAT. ANN. § 532.300(3) (Banks-Baldwin 1998). The statute also requires that the defendant "state with particularity how the evidence supports a claim that racial considerations played a significant part in the decision to seek a death sentence in his or her case." *Id.* § 532.300(4). The standard of proof is "clear and convincing evidence that race was the basis of the decision to seek the death penalty." *Id.* § 532.300(5).

[242] *See* McCleskey v. Kemp, 481 U.S. 279 (1987), *reh'g denied*, 482 U.S. 920 (1987). The CSS, which was conducted in support of McCleskey's, claim was based on "a universe of 2484 [Georgia] defendants charged with homicide between 1973 and 1979 and subsequently

gress thereafter considered several "Racial Justice" or "Fairness in Death Sentencing" bills,[243] but has consistently refused to pass such legislation.[244]

The CSS tracked the cases from indictment to sentencing decision.[245] Both the PRS and the CSS found pre- and post-*Furman* race effects. For pre-*Furman* race effects in Georgia, the Baldus group concluded:

> *By and large, race is a major case characteristic distinguishing cases that received a death sentence from the great bulk of life-sentenced cases.* Black defendants and defendants with white victims received the worst treatment. On the average, the probability that a black defendant would receive a death sentence was 12 percentage points higher than the probability for white defendants after adjustment for case culpability. Moreover, defendants with white victims had a 12-percentage-point higher risk of receiving a death sentence than defendants with black victims.[246]

Race effects were especially marked in cases in which the aggravating factors fell into a relative middle range of severity, often exceeding twenty to thirty percent.[247]

Results from the post-*Furman* period also evidence a consistent pattern of ingroup favoritism. Overall, the Baldus study failed to find a race-of-defendant effect but did find that race-of-victim effects continued.[248] Indeed, the race-of-victim effect was robust

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convicted of murder or voluntary manslaughter. The data set is a stratified sample of 1066 cases, 128 of which resulted in a death sentence." BALDUS, *supra* note 11, at 395.

[243] *See, e.g.*, H.R. 3329, 103d Cong. (1993) (allowing use of statistical and other information to challenge capital sentences on grounds of disproportionate racial impact); H.R. 2851, 102d Cong. (1991); H.R. 2466, 101st Cong., 1st Sess. (1989) (same); H.R. 4442, 100th Cong. (1988).

[244] *See* Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for The Racial Justice Act*, 35 SANTA CLARA L. REV. 519 (1995) (discussing Congress's failure to enact Racial Justice Act); *see also* Daniel E. Lungren & Mark L. Krotoski, *The Racial Justice Act of 1994 — Undermining Enforcement of the Death Penalty Without Promoting Racial Justice*, 20 U. DAYTON L. REV. 655 (1995) (providing criticism of Racial Justice Act, premised largely on individualist-intent paradigm applied in *McCleskey*); Ronald J. Tabak, *Is Racism Irrelevant? Or Should the Fairness in Death Sentencing Act Be Enacted to Substantially Diminish Racial Discrimination in Capital Sentencing?*, 18 N.Y.U. REV. L. & SOC. CHANGE 777 (1990-1991) (supporting Racial Justice Act).

[245] *See* BALDUS, *supra* note 11, at 395.

[246] *Id.* at 399 (emphasis added).

[247] *See id.* The Baldus study found no evidence that defendants' sex or socioeconomic status affected sentencing. *See id.* at 400.

[248] There is some indication that "altered record-keeping practices post-*Furman* may have suppressed somewhat evidence of discrimination against black defendants with white

across each of the Baldus group's adjustments for relative case culpability.[249] In other words, in both the PRS and CSS, the Baldus researchers found that defendants with white victims faced a higher risk of receiving a death sentence than did defendants of black victims.[250] Once again, the race-of-victim effect is much more pronounced — up to a twenty percent disparity — in cases in the midrange of relative culpability, when the influence of aggravating factors is relatively weaker.[251] The Baldus group found that race-of-victim effects appeared in both urban and rural areas and that prosecutorial discretion in seeking the death sentence is the most important source of race-of-victim effects.[252]

Other comprehensive reviews of the literature have found the same basic pattern: "Racial discrimination [is] based on the race of

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victims." *Id.* at 401. The Baldus group found that rural prosecutors tended to discriminate against black defendants, but that such discrimination was largely offset by jury decision making. The study also found, surprisingly, that prosecutors and juries somewhat discriminated against whites in urban areas. Baldus cautioned that race-of-defendant effects may still occur; and mock-jury studies show a race-of-defendant effect that is correlated with the race of the decision maker. *See id.* at 266.

[249] *See id.* at 401.

[250] *See id.*

> After adjustment for case culpability among all cases in the PRS that resulted in a murder-trial conviction, the average defendant with a white victim faced a statistically significant 7- to 9-percentage-point higher risk of a death sentence than did a similarly situated defendant whose victim was black. In the CSS, we examined the combined effects of prosecutorial and jury decisions from the indictment to the final sentencing decision; the results were comparable to those obtained in the PRS.

Id. Prediction analysis showed that the "average odds of receiving a death sentence among all indicted cases were 4.3 times higher in cases with white victims." *Id.* Analysis controlling for numerous variables found an "average 6- to 7-point higher death sentencing rate in the white-victim cases." *Id.*

[251] *See id.* at 401-03.

[252] *See id.* at 403. Jury decision-making effects did not reach statistical significance. The Baldus group also noted that elimination of racial disparity in sentencing, whether the benchmark is set at the black or white victim rates, would have resulted in an increase in the total proportion of black convicts sentenced to death because most black victims are killed by black perpetrators. *See id.*

The Baldus study also reviewed other studies of racial disparity in sentencing. Pre-*Furman* studies in the South, which did not adjust for relative culpability, resembled Baldus's Georgia findings of a race-of-defendant effect that disadvantaged black defendants. *See id.* at 248-50. Such effects were particularly evident in rape cases. *See id.* at 250-51; *see also infra* notes 260-65 and accompanying text. Results of studies from other regions, however, were "inconclusive"; some found such effects, others did not. *See id.* at 253. Post-*Furman* studies, which have concentrated on the South, have generally yielded results similar to the Georgia study: "no systematic race-of-defendant effect, but a strong and consistent race-of-victim effect." *Id.* at 254.

the victim. In state after state, statistical analysis reveals that under otherwise similar circumstances, the killer of a white is far more likely to receive the death penalty than the killer of a black."[253]

One recent analysis of capital sentencing in Philadelphia found a strong race-of-defendant effect. Controlling for variables such as defendant's background and severity of the crime, the study found that the odds of being sentenced to death are 3.9 times higher for black defendants.[254] Another recent study, consistent with the CSS finding that race effects are attributable to prosecutorial decision making, suggests that racial disparities may result from the racial

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[253] Tabak, *supra* note 244, at 780-83 (discussing congressional testimony on behalf of ABA's support of proposed Racial Justice Act.) According to the review by the General Accounting Office of 28 post-*Furman* studies:

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

U.S. GEN. ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES A PATTERN OF RACIAL DISPARITIES 12268 (Feb. 1990). For reviews of the literature regarding race-of-victim effects, *see generally* STAFF OF SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS OF SENATE COMM. ON THE JUDICIARY, 103D CONG., 1ST SESS. (1993), *available at* <http://www.essential.org/dpic/dpic.r06.html> (on file with author); Leigh B. Bienen et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27, 118-56 (1988); Gary Kleck, *Life Support for Ailing: Modes for Summarizing the Evidence for Racial Discrimination in Sentencing*, 9 L. & HUMAN BEH. 271, 271-84 (1985); Gary Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783 (1981). For an example of a high quality study and literature review, in addition to that of the Baldus group, that found substantial race-of-victim effects, see SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 35-105(1989) (analyzing capital sentencing for homicides from 1979 to 1980 in Florida, Georgia, Illinois, North Carolina, Mississippi, Oklahoma, Virginia, and Arkansas). According to the ABA Resolution on the Death Penalty:

> Numerous studies have demonstrated that defendants are more likely to be sentenced to death if their victims were white rather than black. Other studies have shown that in some jurisdictions African Americans tend to receive the death penalty more often than do white defendants. And in countless cases, the poor legal services that capital clients receive are rendered worse still by racist attitudes of defense counsel.

ABA RESOLUTION, *supra* note 7, at 13 (footnotes omitted).

[254] Death Penalty Information Center, *The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides*, DEATH PENALTY INFORMATION CENTER REPORT (June 1998) <http://www.essential.org/dpic/rpts.html> (on file with author).

composition of prosecutors, 97.5% of whom are white in states that employ the death penalty.[255]

The existence of race effects supports the hypothesis that capital punishment is infected with authoritarian processes and, by inference, the claim that the terror management effect is at work — even if the Supreme Court's stringent intent and causation requirements cannot be met in a particular case like McCleskey's.[256] Race-of-defendant disparities disfavoring minorities obviously constitute racial discrimination; but the well-established race-of-victim effect also discriminates "against the black community by denying it equal treatment with respect to those who kill its members."[257] That is, race-of-victim disparities evidence the dominant group's disregard for, if not vicarious aggression against, the outgroup's welfare and its correspondingly greater commitment to protecting the welfare of its own members. Such disparities are reminiscent of the Black Codes' more formal efforts to exclude African Americans from the protection of murder laws, which had the effect of holding victims' lives at a discount.[258] This group perspective has little place in the Supreme Court's problematic individual rights paradigm, but it is relevant to the social psychology of capital punishment.[259]

The existence of racial disparities in capital punishment for rape is an especially strong marker of authoritarian processes.[260] The evidence of both race-of-defendant and race-of-victim effects for rape is overwhelming. Studies show that black men who raped white women were much more likely to be sentenced to death than white men who raped white women or black or white men who

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[255] *See* ABA RESOLUTION, *supra* note 7, at 13-15.

[256] *See infra* note 356 and accompanying text.

[257] Randall Kennedy, McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1391 (1988).

[258] *See* Blyew v. United States, 80 U.S. 581, 599 (1872) (Bradley, J., dissenting) (describing how Black Codes had effect of branding African Americans with "badge of slavery" and leaving "their lives, their families, and their property unprotected by law"); *see also* Robert D. Goldstein, Blyew*: Variations on a Jurisdictional Theme*, 41 STAN. L. REV. 469 (1989) (providing background on *Blyew* case).

[259] *See* Donald P. Judges, *Bayonets for the Wounded: Constitutional Paradigms and Disadvantaged Neighborhoods*, 19 HASTINGS CONST. L.Q. 599, 599 (1992) (critiquing both Supreme Court's individual rights paradigm and group rights paradigm sponsored by advocates of affirmative action).

[260] *See supra* note 82 and accompanying text; *cf.* Barbara Holden-Smith, *Inherently Unequal Justice: Interracial Rape and the Death Penalty*, 86 J. CRIM. L. & CRIMINOLOGY 1571, 1571 (1996) (book review) (stating that "[t]he execution of black men for allegedly raping white women is a defining characteristic of the history of race relations in the South").

raped black women.[261] An indicator of racial effect is the relative likelihood that a black rapist would be sentenced to death compared to white rapists.[262] Pre-*Furman* studies have revealed that, in some years, "blacks were twenty times more likely to be sentenced to death than white offenders for the crime of rape."[263] A recent analysis of Texas cases between 1942 and 1971 confirms the "well-established fact" of race effects:

> When males from an African-American background raped an Anglo female, the case was approximately *thirty-five times* more likely to result in capital punishment than a prison sentence. If an Hispanic male raped an Anglo female, the comparable chances were about two to one. In only one case did the rape of a black female result in a death sentence and actual execution.[264]

Actual executions for rape are almost monochromatic — of the 455 men executed under civil authority since 1930 for rape, eight-nine percent were African American.[265]

Overwhelming race effects also can be seen in "executions" that occur outside the boundaries of civil authority. Race effects in lynchings are especially potent indicators of authoritarian processes because they combine extreme outgroup prejudice, ingroup protectionism, and the dehumanizing phenomenon (via deindividuation and responsibility diffusion) of violent group outlawry.[266] Between 1882 and 1964 (the last year in which a recorded lynching occurred), there were 4745 lynchings in the United States. Of those, 3449, or approximately seventy-three percent, were African American.[267]

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[261] *See* BALDUS, *supra* note 11, at 250-51; JAMES W. MARQUART ET AL., THE ROPE, THE CHAIR, AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923-1990, at 53 (1994) (noting that disparity "was interwoven with the caste-like boundaries between blacks and whites" and that "[w]hen it came to sexual relationships between black males and white females taboos could be obsessively absolute"). Several reviews of the literature support the interaction between capital punishment and this "peculiarly construed chivalry." MARQUART, *supra* at 53 (quoting leader of Association of Southern Women for the Prevention of Lynching, Jessie Daniel Ames).

[262] *See* MARQUART, *supra* note 261, at 54.

[263] *Id.* at 54.

[264] *Id.* at 56-58.

[265] *See* HISTORICAL STATISTICS, *supra* note 157, at 422. Every rapist executed in Virginia between 1908 and 1964 was black. *See* BALDUS, *supra* note 11, at 250 (citing David Portington, *The Incidence of the Death Penalty for Rape in Virginia*, 22 WASH. & LEE L. REV. 43 (1965)).

[266] *See supra* notes 90-93 and accompanying text.

[267] *See* HISTORICAL STATISTICS, *supra* note 157, at 422.

D. Dehumanization

One of the "true curses" of institutionalized authoritarian excesses is their dehumanizing effect on those who commit them.[268] Not only does capital punishment reflect the special dehumanization inherent in racial discrimination, its defining characteristic as the ultimate act of state-sanctioned individual aggression also generally results in dehumanization of its sponsors, functionaries, and targets.[269] The obedience studies demonstrate the extent to which ordinary people can be induced in the name of authority to violate otherwise powerful norms against the infliction of extreme harm on others.[270] Homicide, even if legally sanctioned, is a most distressing kind of norm violation.[271] Such behavior can precipitate a potential psychological crisis by threatening the self-esteem that arises from the anxiety-buffering belief that one is adhering to societal values.[272] To defend against such threats, actors may resort to a variety of moves.[273] One is simply to rationalize the behavior as necessary, for example, to serve deterrent or retributive purposes. Another is implicitly or explicitly to discount the actors' moral re-

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[268] *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 445 (1968) (Douglas, J., concurring) (observing that "[t]he true curse of slavery is not [only] what it did to the black man, but what it has done to the white man").

[269] Although terror management research has not yet explicitly addressed this situational aspect of authoritarianism, it would be consistent with terror management theory (particularly its findings with respect the effect of mortality awareness on physical aggression) to see it manifest in conditions that otherwise give rise to the terror management effect.

[270] *See supra* notes 86-87 and accompanying text.

[271] *See* Dubber, *supra* note 93, at 580 (stating that "virtually everyone who actually participates in the system of capital punishment, from the capital sentencing jurors to the state trial and appellate judges, to their federal counterparts, and on to the governor, the warden, the physician, and the executioner, struggles with the fundamental inhibition against inflicting the always physical violence of execution"). Further evidence of the force of the proscription against killing, even when state-sanctioned and the actor's personal safety is threatened, is seen in the effort military trainers must exert to render recruits willing actually to kill in battle. It was found that, during World War II, "on average only 15 percent of trained combat riflemen fired their weapons at all in battle. The rest did not flee, but they would not kill — even when their own position was under attack and their lives were in immediate danger." GWYNNE DYER, WAR 118 (1985). These findings led to revision in basic training methods to include those specifically designed to socialize recruits to killing, increasing the ratio to at least 50%. *See id.* at 120.

[272] *See supra* text accompanying notes 32-39.

[273] *See* Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1448 (1997) (discussing "psychological mechanisms that are employed in death penalty law and trial practice to bridge the gulf between the deep-seated inhibitions of capital jurors against hurting others and state-sanctioned violence of the most profound sort").

sponsibility for agency in the event, those humanitarian sentiments contributing to the moral conflict, or the moral worth of the target. Thus, we would expect to find denial and diffusion of responsibility by the sponsors and functionaries of capital punishment and the degradation and humiliation of the condemned.[274] This is dehumanization of self by dissociation, dehumanization of other by debasement. Others have written of the dehumanization imposed on the condemned.[275] My focus here is primarily on the self-inflicted dehumanization of those at the hangmen's end of the rope.

1. Rationalization

To the extent that commonly invoked practical, direct-protection rationalizations for capital punishment lack foundation, the penalty's purpose appears more symbolic than penological. When Americans actually kill for such symbolic purposes, we are truly engaging in human sacrifice, the bilateral dehumanizing implications of which are self-evident. In other words, evidence that capital punishment does *not* accomplish its stated objectives sheds light on what the death penalty actually *does* do.[276]

As discussed above, while the death penalty may arguably be justified in a given case on grounds of retribution or incapacitation, it is difficult to defend the institution as a whole on such a basis.[277] Deterrence is essentially an empirical question. A recent comprehensive review of the voluminous deterrence literature in the

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[274] *See supra* notes 41-50 and accompanying text.

[275] *See, e.g.*, ROBERT JOHNSON, CONDEMNED TO DIE: LIFE UNDER SENTENCE OF DEATH (1981); SISTER HELEN PREJEAN, DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN AMERICA (1993); WILLIAM A. SCHABAS, THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE (1996); John P. Rutledge, *The Definitive Inhumanity of Capital Punishment*, 20 WHITTIER L. REV. 283 (1998).

[276] For example, Philadelphia District Attorney Abraham, one of the most ardent enthusiasts of capital punishment, has in effect conceded that the death penalty serves symbolic rather than practical objectives: "To her, it doesn't offer society control over crime — she doesn't believe it's a deterrent but instead gives the *feeling* of control demanded by a city in decay." Rosenberg, *supra* note 145, at 319, 321.

[277] *See supra* notes 100-01 and accompanying text. An implicit, and perhaps unwitting, concession that capital punishment is not really about incapacitation is evident in prosecutors' reaction to a new Kansas statute requiring juries in capital cases to consider whether a term of imprisonment (life with no possibility of parole for 40 years) is adequate to protect society. According to the executive director of the Kansas County and District Attorneys' Association, the new law "almost really means we don't have a death penalty anymore." Tony Rizzo, *Amendment May Affect Death Penalty in Kansas*, THE KAN. CITY STAR, July 2, 1998, at A1.

United States concluded that, after decades of intensive study, "a significant general deterrent effect for capital punishment has not been observed, and in all probability does not exist."[278] Thus, "with the lonely exception of Ehrlich, whose work generally has been seriously questioned if not totally discredited, death penalty researchers have found virtually no support for the argument that the level of use of capital punishment (certainty) influences U.S. murder rates."[279] The so-called certainty hypothesis thus lacks an empirical foundation. Even long time defenders of capital punishment have largely abandoned the deterrence rationale.[280]

The same review likewise found other deterrence hypotheses to be unsupported. The authors found "no evidence that speedy executions discourage murder," and, thus, no support for the celerity hypothesis.[281] They found "no creditable evidence that the level of print or electronic media attention devoted to executions significantly discourages . . . murder," and, thus, no viable support for the publicity hypothesis.[282] No evidence emerged of deterrent effects for certain kinds of murder (e.g., capital murder generally, felony murder, and stranger murder), and, thus, no support appeared for the specialization hypothesis.[283] And the review found "no evidence that overall and specific types of police killing rates were responsive

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[278] William C. Bailey & Ruth D. Peterson, *Murder, Capital Punishment, and Deterrence: A Review of the Literature, in* CURRENT CONTROVERSIES, *supra* note 2, at 135, 155. Deterrence in this sense is defined as the marginal effect of capital punishment over alternative punishments.

[279] Bailey & Peterson, *supra* note 278, at 143. The authors go on to note:

> Importantly, the periods examined extend back to the early part of this century, when rates of execution for murder were at much higher levels than in recent decades. This suggests that contrary to the complaints of some death penalty proponents, a return to the "good old days" when there were more executions is not likely to result in greater deterrence.

Id.; *see also* William C. Bailey & Ruth D. Peterson, *Murder, Capital Punishment, and Deterrence: A Review of the Evidence and an Examination of Police Killings*, 50 J. SOC. ISSUES 53 (1994) (finding no evidence of deterrent effect, either in literature generally or in specific case of police killings); *cf.* Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397, 397-417 (1975) (using economic modeling to show deterrent effect).

[280] *See, e.g.*, Ernest van den Haag, *The Death Penalty Once More, in* CURRENT CONTROVERSIES, *supra* note 2, at 445, 449-54 (conceding that evidence that capital punishment deters more effectively than other measures is "inconclusive," and discounting utility of statistical analyses and shifting argument to justice grounds).

[281] Bailey & Peterson, *supra* note 278, at 143-44.

[282] *Id.* at 147-48.

[283] *See id.* at 149-50.

to changes in the provision for capital punishment, to the certainty of execution, or to the amount and type of television news coverage devoted to executions."[284]

The growing certainty that the death penalty does not accomplish penological goals comes at a time when popular support for capital punishment is at an all-time high in both numbers and intensity.[285] This inverse relationship between increasing willingness to kill and decreasing likelihood that killing accomplishes direct, practical objectives underscores capital punishment's symbolic function. As one review concluded, "Most people care a great deal about the death penalty but know little about it, and have no particular desire to know. This is not surprising, as their attitudes are not based on knowledge."[286] Indeed, there is substantial psychological cost to advocating capital punishment with full awareness of its realities.

2. Counterdeterrence

Capital punishment may also dehumanize through counterdeterrence — it may sometimes incite crime by setting a savage example.[287] As Bowers put it, "The lesson of execution, then, may be to devalue life by the example of human sacrifice."[288] Bowers' review of the literature concluded that "executions may have — contrary to prevailing belief — not a deterrent but a brutalizing effect

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[284] *Id.* at 151.

[285] *See* Ellsworth & Gross, *supra* note 3, at 90, 107.

[286] *Id.*

[287] *See* BOWERS, *supra* note 100, at 274 (quoting Cesare di Beccaria, an early opponent of capital punishment). Beccaria wrote in 1764:

> The punishment of death is pernicious to society, from the example of barbarity it affords. If the passions, or the necessity of war, have taught men to shed the blood of their fellow creatures, the laws, which are intended to moderate the ferocity of mankind, should not increase it by examples of barbarity, the more horrible, as this punishment is usually attended with formal pageantry. Is it not absurd, that the laws, which detest and punish homicide, should, in order to prevent murder, publicly commit murder themselves?

Marquis Beccaria, *Of the Punishment of Death, in* 1 THE OPINIONS OF DIFFERENT AUTHORS UPON THE PUNISHMENT OF DEATH 20, 25 (1984) (Basil Montagu ed., 1813) [hereinafter OPINIONS]; *see also* Francis Grose, *On the Criminal Laws of England, in* 3 OPINIONS, *supra* at 295 ("The sanguinary dispositions of our laws is a matter generally and with reason complained of. This, besides being a national reproach, is, strange as it may appear, an encouragement, instead of a terror, to delinquents.").

[288] BOWERS, *supra* note 100, at 274.

on society by promoting rather than preventing homicides."[289] Bowers' own analysis found that: "[E]xecutions as they have been imposed historically in New York [S]tate have contributed to homicides in the month immediately following. . . . [T]he way we have carried out executions historically in the United States appears to have contributed slightly but significantly to the increase in homicides."[290] A more recent review found the evidence to be mixed. One study found no evidence of the brutalization effect for death sentences or executions for felony murder,[291] while another showed a brutalization effect for stranger murder.[292]

3. Distancing, Denial, and Responsibility Diffusion

Two phenomena support the proposition that capital punishment involves dehumanization of its participants through distancing, denial, and responsibility diffusion. One is the increasing interpersonal distance from the condemned and the physical realities of killing them. Denial, detachment, and rationalization have come to dominate the relationship between society's members-at-large and the executions carried out in their name. Another is the stance of official participants in capital proceedings. For example, Dubber has described the mechanisms by which jurors' "sense of responsibility is diminished."[293] The sentencing task, and hence accountability for the result, is diffused among the group; mechanized by the "arithmetical" approach of tallying aggravating against mitigating circumstances; obscured in jurisdictions using advisory juries, and; denied when jurors convince themselves that the sen-

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[289] *Id.* at 285. Bowers further noted that:

> The earliest research in the period of public executions was fully and strongly consistent with such a brutalizing effect. Later studies comparing periods of abolition and retention between and within jurisdictions consistently show lower homicide rates at times and places of abolition, suggesting that the availability, and by implication the use, of the death penalty stimulates homicide. And recent studies using econometric modeling and regression estimation techniques have begun to reveal more positive than negative estimates of the effects of execution risk on homicide rates — notwithstanding analytic problems that have tended to bias results in favor of deterrence.

Id.

[290] *Id.* at 301-02.

[291] *See* Bailey & Peterson, *supra* note 278, at 149-50.

[292] *See id.* at 153-54.

[293] Dubber, *supra* note 93, at 574.

tence will never be carried out.[294] The effect of increasing emotional remoteness as one moves up the social and legal hierarchy can be seen, for example, in the reactions of courts, particularly appellate courts, which tend to distance themselves from the proceedings.[295]

a. Generalized Interpersonal Distance

Capital punishment has been described as "a complex system of denying and dispersing responsibility for the infliction of pain."[296] This denial manifests in several forms.[297] One is the disparity between adjudicative and legislative endorsement of capital punishment, discussed above, which illustrates the relative ease with which one can remotely order the killing of a hypothetical exemplar as opposed to a specific person in the flesh.[298] Attitude studies confirm that "people are far more likely to favor the death penalty in the abstract than they are to favor it in specific, concrete cases."[299]

From an historical perspective, another indication of increasing interpersonal distance is the nineteenth-century transition in England and the United States from public to private executions.[300] Gatrell's description of public executions in England notes several points that are consistent with my theory. The first concerns the gallows crowds' reactions to executions. Most relevant is that described by Edward Gibbon Wakefield, himself a death row inmate in Newgate prison, in the passage quoted at the beginning of this Article: "You mean to frighten the people [with death], and you frighten them overmuch. You want them to think of the punishment, [but it] is so dreadful that they will not think of it."[301]

Gatrell concluded that those reactions, ranging from solemnity to drunken debauchery, expressed a defense against fear of death

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[294] *See id.* at 574-77.

[295] Dehumanization effects also appear as health professionals struggle with the ethical dilemmas presented by their participation in the capital punishment process. This issue is discussed in Judges, *supra* note 218.

[296] Dubber, *supra* note 93, at 545.

[297] *See id.* at 546.

[298] *See supra* notes 132-33 and accompanying text.

[299] Ellsworth & Gross, *supra* note 3, at 107.

[300] *See* GATRELL, *supra* note 1, at 22-23 (describing similar transition in England); PATERNOSTER, *supra* note 100, at 7 (describing transition from public to private executions in United States).

[301] *See supra* note 1 and accompanying text.

which included submission to authority and dehumanization of the condemned:

> [The crowd's] passion helped to cancel out terror while camouflaging its submission to the authority that did these things. Defence took many forms. Laughter was one; anger another. Some identified with the sheriffs, the executioner: for to identify with the aggressor against his victim is a standard defence against fellow-feeling when fellow-feeling must be fruitless.[302]

Gatrell further noted that attendance at public executions was a function of social distance: "the biggest and most approving crowds assembled to watch the hangings of people least like themselves," suggesting "that there was no deep psychic return in watching the deaths of men and women rather like themselves . . . ."[303]

Next, Gatrell argued that the purpose behind the move to private executions was not to humanize them, but to conceal their fundamental inhumaneness and to further dehumanize the condemned.[304] Most vividly, public executions revealed "what the noose really did to people"[305] — the often slow strangulation, the screaming, the voiding of urine and feces, the occasional decapitation, and the horrors of botched executions.[306] Moreover, the crowd's reactions "mirrored the state's violence too candidly. The crowd had come to seem like a repudiated *alter ego* or shadow-self which spoke too truthfully for a progressive nation to tolerate. The crowd gave the lie to the great world's representation of itself as civil, benign, and humane."[307] More subtly, "[t]o kill felons without ceremony and in private was to deny them the only worldly support they could hope for in their last hours."[308]

Privatization, thus, insulated the populace from an excess of mortality salience and from direct contact with the humanity of the condemned. It allowed the brutal fact of killing, and hence moral responsibility for all of its awful implications, to be defensively pushed to the fringes of consciousness. It also facilitated the state's

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[302] GATRELL, *supra* note 1, at 76.
[303] *Id.* at 100-02.
[304] *See id.* at 24, 37.
[305] *Id.* at 32.
[306] *See id.* at 38, 45-55.
[307] *Id.* at 23-24.
[308] *Id.* at 37.

effort to dehumanize the condemned. The result, Gatrell concluded, was to delay formal abolition by almost a century.[309]

The modern debate about televising executions recapitulates these themes. Some death penalty opponents and media-access advocates argue that confronting the public with the ugly reality of killing would provoke an outpouring of support for abolition.[310] Opponents of televising executions reply that it would be too offensive, shocking, and distasteful.[311] Indeed, the privatization movement in the United States originated in part in an effort to forestall support for abolition.[312] The dilemma here, as in capital punishment generally, is that dehumanization inheres in both hiding from public view "such a 'shocking' governmental proceeding"[313] and in the potential for commercial exploitation and sensationalization of executions.[314] An execution's secrets are too awful to face in the clear light of day, yet hiding them only makes them more shameful.

Capital punishment's paradoxes — its simultaneous defense of and threat to worldview and its resultant bilateral dehumanization — are also reflected in attitudes toward the executioner. Far from representing a hero of natural justice, the hangman has long been an object of execration. As Gatrell noted, "Upon the executioner was lodged as upon a scapegoat the evil that justice had to do."[315]

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[309] *See id.* at 24.

[310] *See* John D. Bessler, *Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to State Executions*, 45 FED. COMM. L.J. 355 (1993) (discussing media access to executions); Roderick C. Patrick, *Hiding Death*, 18 NEW ENG. J. ON CRIME & CIV. CONFINEMENT 117, 117-45 (1992) (arguing that privatization of executions results from fear that, if made public, executions would not be tolerated and that this form of censorship violates "inmates'" First Amendment rights); *see also Public Should See Reality of Capital Punishment*, USA TODAY, May 17, 1994, at 10A (Editorial) ("In the abstract, the death penalty appeals to many as a tidy way of disposing of society's garbage. In the flesh, the death penalty is barbaric. A televised version of reality may make that case best of all.").

[311] *See* Patrick, *supra* note 310, at 136.

[312] *See generally* Bessler, *supra* note 310, at 360 ("During 1830s, however, in response to a growing movement to abolish capital punishment, several states began to prohibit public executions.").

[313] Patrick, *supra* note 310, at 136.

[314] This problem emerged, for example, in the controversy surrounding distribution of the video *Executions*, produced by EduVision, which shows 21 executions. *See, e.g.*, Richard Brooks, *Video Nasty or Sick Marketing?*, THE GUARDIAN (London), June 25, 1995, at 004 ("Is *Executions* . . . an exploitative snuff movie or a genuine polemic against capital punishment?").

[315] GATRELL, *supra* note 1, at 100; *see also* Beccaria, OPINIONS, *supra* note 287, at 25 (asking "[w]hat are the natural sentiments of every person concerning the punishment of death? We may read them in the contempt and indignation with which every one looks on the

Privatization of capital punishment thus depersonalized not only the condemned but also the executioner and thereby helped to sanitize the process. As observed by Ellul:

> The executioner now carries out a public function; he is a civil servant. Could anything be more reassuring or less frightening than that? . . . In addition, he really has little to do with the inflicting of death: all he does is press a button, and the button may even be in another room.[316]

Just as everyone wants to go to heaven but hardly anyone wants to die to get there, many people are for capital punishment but few want to take full personal responsibility for actually killing a human being. Studies of jury decision making suggest that jurors resolve the psychological crisis precipitated by deliberately ordering the killing of another human being by distancing themselves from responsibility for that result.[317] Modern execution methods combine responsibility diffusion and deindividuation into a medicalized, Milgramesque chain of command with specified tasks but calculatedly vague responsibility:

> [T]he capital punishment system has evolved into a complex sequence of tasks, each of which is assigned to a different participant and all of which are necessary, but none of which is sufficient, to inflict the death penalty on a given person. Along with the fragmentation of tasks comes the fragmentation of responsibility. As a result of the fragmentation of tasks, 'no actor in the legal system can say he had no choice;' as a result of the independent insufficiency of their tasks, *every actor in the legal system can say he had no choice.*[318]

The hangman has been replaced by a committee.

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executioner"); Dubber, *supra* note 93, at 551 (executioners, their offspring, and even anyone who touched them, classified as "infamous persons" during Middle Ages).

[316] Jacques Ellul, *The Betrayal of the Individual: The Executioner*, 6 KATALLAGETE 17, 19 (1978).

[317] *See* Haney, *supra* note 273, at 1475-76.

[318] Dubber, *supra* note 93, at 547 (quoting Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 395) (emphasis added). Dubber discounts the claims of those proponents of capital punishment who assert that they would be happy to "have pulled the switch" as at best empty posturing and at worst moral bankruptcy. *See id.* at 580. "The only people [apart from "fanatical Nazis" such as Adolph Eichmann] who express a desire to inflict capital punishment personally are those who not only have nothing to do with the imposition or infliction of this penalty, but also never will be in a position to inflict it." *Id.*

Bureaucratization of executions "not only fractures the execution procedure and distributes the resulting tasks among an army of officials but also ensures that those officials can think of themselves both as united in the pursuit of a common perilous task and as duty bound unquestioningly to obey the orders of their superiors."[319] Thus, "a whole army of technicians took over from the executioner."[320] Jack Ketch has become the man on the Clapham Omnibus.[321]

Thus, both the American movement to private executions and the search for more "humane" methods may be motivated more by a need to sanitize the harsh facts of legal homicide than by any sincere concern for the condemned's welfare.[322] Use of lethal injection, for example, like the introduction of lethal gas before it, conjures up nonthreatening images of a benign medical procedure.[323] In other words, such procedures tend to buffer the mortality-salience and worldview-threatening effect of executions. The advent of "lethal injection" represents a significant achievement in our effort to blur the distinction between physical and symbolic aggression.

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[319] *See id.* at 570, 580 (stating that "[n]ot unlike the Milgram experiment, the capital punishment system creates a hierarchical and formal environment that permits even those who possess a well-developed empathic capacity to suspend that capacity in a clearly defined and limited context"); *see also* Haney, *supra* note 273, at 1475-76 (describing modern execution methods as Milgramesque examples of moral disengagement).

[320] FOUCAULT, *supra* note 107, at 11.

[321] "Jack Ketch," an actual hangman who died in 1686, became the fictionalized personification of the hangman in later plebeian Punch and Judy shows, broadsides, and novels. *See* GATRELL, *supra* note 1, at 114-16, 121-22; *see also* Hall v. Brooklands Club [1933] 1 K.B. 205, 224 (Greer, L.J.) (discussing "the man on the Clapham omnibus" and describing negligence law's schematic "reasonable man").

[322] *See, e.g.*, GATRELL, *supra* note 1, at 20-24 (discussing how eighteenth-century "gutter songs" were symbolic of common people's need to sanitize horror of public executions through humor and how privitization of executions dehumanizes condemned); Peter S. Adolf, Note, *Killing Me Softly: Is the Gas Chamber, or Any Other Method of Execution, "Cruel and Unusual Punishment?"*, 22 HASTINGS CONST. L.Q. 815, 819 n.19 (1995) (citing Ian Fisher, *Merits of Lethal Injection Are Questioned by Its Foes*, N.Y.TIMES, Feb. 17, 1995, at B5) (commenting that "even if the litigation is successful, and all states switch to a less painful and degrading method like lethal injection, the result will only make the death penalty more palatable to the public, and perhaps prolong its use").

[323] *See* Dubber, *supra* note 93, at 564 (stating that "[t]he advantage of such a medicalized execution procedure . . . is obvious: if the condemned experiences no physical pain, the inhibition against inflicting pain remains unaffected"). Indeed, the need to create interpersonal distance between the killers and the killed and the symbolic value of "medicalization" contributed to the Nazis' use of gas chambers as an alternative to shooting their victims. *See* NAZI DOCTORS, *supra* note 34, at 159.

b. Courts

Emotional detachment and social distance from the condemned and the actual killing have became institutionalized among those that implement a system of capital punishment. Although at one time judges, other officials, and members of the social elite were active participants in the infliction of corporal and capital punishment, they have gradually distanced themselves from the process.[324] Judges in modern times seek to diminish their personal responsibility for the killing in several ways.[325] One is to privilege the formal stakes of judicial involvement (e.g., the value of judicial restraint, federalism, and the rule of law) over the moral stakes (i.e., the moral implications of participation in the killing of another human being).[326] Another is to shift responsibility to others (e.g., prosecutors, jurors, other judges), which frees judges "of the disagreeable task of inflicting punishment" and thereby allows them to "become[] associated exclusively with the ritual of the imposition of punishment."[327] The third is to minimize discretionary substantive judicial review.[328]

Those moves are illustrated in the tendency of appellate courts to eschew close scrutiny of the means of execution. As noted by Adolf, "Ever since the Supreme Court first heard arguments on methods of execution and the Eighth Amendment in *Wilkerson v. Utah*,[329] courts have been reluctant to create standards for deciding what punishments violate the 'cruel and unusual punishments' clause."[330] When confronted with constitutional challenges to exe-

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[324] *See* Dubber, *supra* note 93, at 552 (noting that no judicial official participates in executions); *see also* GATRELL, *supra* note 1, at 100 (stating that "[n]o judge met the hangman who executed his sentence").

[325] *See* Dubber, *supra* note 93, at 584-92. Dubber draws on Robert Cover's work on judicial responsibility for judges' role in the violence that the law inflicts, ROBERT COVER, JUSTICE ACCUSED: ANTI SLAVERY AND THE JUDICIAL PROCESS (1975), and John Noonan's essay on his role in the Robert Alton Harris case, John T. Noonan, Jr., *Horses of the Night*: Harris v. Vasquez, 45 STAN. L. REV. 1011 (1993).

[326] *See* Dubber, *supra* note 93, at 585. A striking example of this move is Justice O'Connor's peroration in *Coleman v. Thompson*. 501 U.S. 722, 726 (1991) ("This is a case about federalism.").

[327] Dubber, *supra* note 93, at 586.

[328] *See id.* at 592-605.

[329] 99 U.S. 130 (1878).

[330] Adolf, *supra* note 322, at 822-23. To be sure, there may sometimes be structural reasons for such diffidence, such as the difficulty of collecting scientific evidence concerning any particular new method's claims to greater humaneness or reasonable limitations on the number of witnesses at any execution. *See id.* at 823. But it would also be consistent with the

cution methods, courts have found a variety of ways to avoid shaking hands with the hangman.[331] One is to rely on historical practices.[332] Another is simply to defer to legislative judgment,[333] or to assume that executions will be conducted properly and with due concern for minimizing suffering.[334] At least one court, in catch-22 fashion, upheld an execution method on the grounds that the challenger failed to cite any caselaw striking it down, even though the challenger introduced eyewitness testimony concerning the method.[335] Other courts have greatly restricted the range of admissible evidence concerning the method in question[336] or simply minimized or ignored evidence of malfunctions.[337] Some have conclusorily rejected the sufficiency of evidence of pain and terror, with[338] or without[339] much discussion of its content. Not surpris-

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dehumanization portion of my theory for courts to be reluctant to confront both the grim reality of executions and their own agency in the process.

[331] *See* Adolf, *supra* note 322, at 855-64; Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution?: The Engineering of Death Over the Century*, 35 WM. & MARY L. REV. 551, 676-92 (1994) (questioning constitutionality of electrocution); Allen Huang, *Hanging, Cynanide Gas, and the Evolving Standards of Decency: The Ninth Circuit's Misapplication of the Cruel and Unusual Clause of the Eighth Amendment*, 74 OR. L. REV. 995, 1008-29 (1995) (critiquing Ninth Circuit analysis of death penalty); Robert J. Sech, *Hang 'Em High: A Proposal for Thoroughly Evaluating the Constitutionality of Execution Methods*, 30 VAL. U. L. REV. 381, 398-420 (1995) (analyzing constitutionality of various execution methods).

[332] For example, in *Wilkerson v. Utah*, the Court referred to the historical practice of military firing squads in commenting in dicta that a sentence of death by shooting did not violate the Eighth Amendment. 99 U.S. 130, 134-35 (1838). The Court subsequently rejected this historicist approach in *Weems v. United States*, 217 U.S. 349, 380-81 (1909), in which the Court imposed a requirement that criminal sentences must be proportional to the offense, and in *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion), which articulated the notion of "evolving standards of decency that mark the progress of a maturing society."

[333] *See, e.g.*, DeShields v. State, 534 A.2d 630, 640 (Del. 1987) (regarding hanging); State v. Adkins, 725 S.W.2d 660, 664 (Tenn. 1991) (involving electrocution); State v. Black, 815 S.W.2d 166, 178 (Tenn. 1991) (same).

[334] *See, e.g.*, State v. Gee Jon, 211 P. 676, 682 (Nev. 1923) (concerning use of lethal gas); *In re* Kemmler, 136 U.S. 436, 444 (1890) (regarding electrocution).

[335] *See* Hunt v. Smith, 856 F. Supp. 251, 260 (D. Md. 1994) (regarding electrocution).

[336] *See* Campbell v. Wood, 18 F.3d 662, 682 (9th Cir. 1994). In *Jones v. State*, 701 So. 2d 76, 77-78 (Fla. 1997), the Florida Supreme Court upheld the constitutionality of execution by Florida's electric chair — the same one that some observers allege set Pedro Medina and Jesse Tafero on fire. The majority opinion did not engage in close scrutiny of the record and limited the scope of the trial court's inquiry to the issue whether a repeat of the *Medina* incident could be avoided. The most careful consideration of the *Medina* and *Tafero* episodes can be found in the dissenting opinion. *See* 701 So.2d at 85-87 (Shaw, J., dissenting).

[337] *See* Squires v. Dugger, 794 F. Supp. 1568, 1579-80 (M.D. Fla. 1992) (involving unsuccessful challenge to Florida's electric chair based upon botched electrocution of Jesse Tafero).

[338] *See* Gray v. Lucas, 710 F.2d 1048, 1057-61 (5th Cir. 1983) (holding that evidence of pain and terror from execution does not implicate Eighth Amendment).

ingly, the most candid and deliberate considerations of the gruesome facts can usually be seen in the few opinions that have found execution methods to be unconstitutionally cruel.[340]

More generally, all three aspects of judicial avoidance of responsibility for participation in legal homicide are evident in the Supreme Court's disengagement from the substantive questions presented by capital punishment.[341] Robert Burt's social-conflict model describes three distinct phases in the Court's capital punishment jurisprudence, which eventually abandoned substantive effort to participate in reconciliation of the hostilities, violently manifested through capital punishment, that polarize American society.[342] During Phase One, the Court began to entertain doubts about the constitutionality of capital punishment, open acknowledgment of which could have played an important role in promoting national deliberation on the subject.[343] *Furman v. Georgia*,[344]

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[339] *See* Hunt v. Nuth, 57 F.3d 1327, 1337 (4th Cir. 1994). In *Hunt*, the court adopted the district court's proclamation that "graphic descriptions of the death throes of inmates executed by gas are full of prose calculated to invoke sympathy, but insufficient to demonstrate the execution by the administration of gas involves the wanton and unnecessary infliction of pain." *Id.* at 1338. In *Francis v. Resweber*, 329 U.S. 459, 466 (1947) (plurality opinion), the Court upheld a Louisiana death warrant reissued after the first attempt to electrocute Francis failed. The plurality opinion emphasized the "accidental" nature of the botched execution attempt and avoided the issue of what the dissent referred to as "death by installments." *See* 329 U.S. at 474 (Burton, J., dissenting).

[340] *See, e.g.*, Fierro v. Gomez, 865 F. Supp. 1387, 1397-1408, 1413-15 (N.D. Cal. 1994) (examining evidence regarding cruelty of execution using cyanide gas, and holding method unconstitutional), *aff'd*, 77 F.3d 301 (9th Cir. 1996), *vacated*, 519 U.S. 918 (1996); State v. Frampton, 627 P.2d 922, 927 (Wash. 1981). As this Article was going to print, the United States Supreme Court agreed to review an Eighth Amendment challenge to the use of electrocution as an execution method. *See* Bryan v. Moore, 120 S.Ct. 394 (1999) (granting certiorari).

[341] *See* Dubber, *supra* note 93, at 545-47.

[342] *See* Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1741-42 (1987). According to Burt, the question of capital punishment and how it is to be resolved lies at the heart of our society's capacity for social reconciliation: "Of all social practices, inflicting death on a transgressor is the most definitive and vivid affirmation that social conflict in the particular case is irreconcilable. Capital punishment is warfare writ small." *Id.* at 1764.

[343] *See id.* at 1743-65. An important example of this period is *Witherspoon v. Illinois*, 391 U.S. 510 (1968), in which Justice Stewart's opinion for the Court preserved some room for jury nullification and expressly noted declining support for capital punishment. *See* Burt, *supra* note 342, at 1746-50. As Burt pointed out, there were many key events during this period. Furman v. Georgia, 408 U.S. 238 (1972); McGautha v. California, 402 U.S. 183 (1971) (ruling that due process requires neither bifurcated guilt and sentencing phases nor specified standards to limit jury discretion); *Witherspoon*, 391 U.S. at 510 (concerning the standard for excluding potential capital case jurors); Rudolph v. Alabama, 375 U.S. 889 (1963) (Goldberg, J., dissenting) (expressing doubts about the constitutionality of capital

which temporarily preempted legislative resolution of doubts about capital punishment and demonstrated the Court's inability to form even a plurality on its constitutionality, both marked the end of this period and exemplified the failure of social reconciliation.[345] *Furman* briefly forestalled, but utterly failed to resolve, deliberation concerning the social choice of abolition or retention.[346]

Phase Two, ushered in by *Gregg v. Georgia*[347] and its companion cases, found the Justices clustered according to degree and kind of disengagement: (1) The "willfully isolated, alienated" dissenters Brennan and Marshall, whose "same formulaic statement" in later cases (that they believe capital punishment to be unconstitutional in all cases) became an impotent "vigil against the death penalty" rather than an effort to engage their colleagues;[348] (2) those Justices who, to varying degrees, were prepared to defer to state legislative judgments on most matters regarding retention and implementation of capital punishment;[349] and (3) those whose ambivalence manifested in a willingness to engage in continued close scrutiny over the process.[350]

To Burt, the Court's effort to give the kind of continued close attention to capital punishment that it has devoted to racial segregation was doomed to collapse: "[T]he unruly social and psychological forces inherent in the death penalty make it especially difficult for anyone to give sustained, openly acknowledged attention to it."[351] Under terror management theory, the usual initial reaction to death awareness is active suppression followed by nonconscious worldview defense.[352] Dehumanization occurs as one disavows one's personal responsibility for morally suspect actions taken in defense of worldview. The exception that proves this point is Justice Blackmun, whose continued anguished engagement ultimately led him to repudiate his prior position on capital punishment's

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punishment, especially for rape); Powell v. Alabama, 287 U.S. 45 (1932) (providing that state capital defendants have a right to appointed attorneys).

[344] 408 U.S. 238 (1972).

[345] *See* Burt, *supra* note 342, at 1765.

[346] For discussion of *Furman* and *Gregg*, see *infra* notes 368-73 and accompanying text.

[347] 428 U.S. 153 (1976).

[348] Burt, *supra* note 342, at 1768-69.

[349] *See id.* at 1769-71.

[350] *See id.* at 1771-80.

[351] *Id.* at 1781.

[352] *See supra* notes 55-62 and accompanying text.

constitutionality as his last major message from the Court.[353] The result of the process was Phase Three, in which the Court has largely been "intent on suppressing rather than exploring doubts about capital punishment."[354] In this phase, doubts about accuracy, arbitrariness, and excessiveness are replaced by a worldview-defensive, responsibility-shifting and -denying "presumption of regularity" and concern for expediency, finality, and federalism.[355] The Court's rejection in *McCleskey v. Kemp* of an equal protection challenge to capital punishment,[356] despite the well-documented history of race effects in American capital sentencing and the specific evidence from the Baldus group, "represents the capstone of this effort to suppress all doubts."[357]

Taken together, the post-*Gregg* cases reflect a rejection of the possibility that cumulative doubts could lead, as Justice White refused to accept in *Gregg*, "to an indictment of our entire system of criminal justice."[358] Just as death itself is too awful to contemplate,

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[353] *See supra* notes 129-30 and accompanying text.

[354] Burt, *supra* note 342, at 1788-89.

[355] *See id.* at 1784-95. Burt noted examples of this trend. *See, e.g.*, Lockhart v. McCree, 476 U.S. 162 (1986) (rejecting argument that "death-qualified" juries are "conviction-prone"); Wainwright v. Witt, 469 U.S. 412 (1985) (eliminating *Witherspoon*'s requirement that jurors could be excluded based on their opposition to capital punishment only if they make it "unmistakably clear . . . that they would *automatically* vote against imposition of capital punishment"); Pulley v. Harris, 465 U.S. 37 (1984) (abandoning requirement of proportionality review); Barefoot v. Estelle, 463 U.S. 880 (1983) (upholding use of hypothetical questions to psychiatric experts concerning defendant's future dangerousness); Zant v. Stephens, 462 U.S. 862 (1983) (invalidating one of three statutory aggravating circumstances on which jury verdict rested did not require setting aside death sentence).

[356] *See* McCleskey v. Kemp, 481 U.S. 279 (1987). The *McCleskey* Court interpreted the intent requirement to mean that, "to prevail under the Equal Protection Clause, McCleskey must prove that the decision makers in *his* case acted with discriminatory purpose." *Id.* at 292 (emphasis added). Although the Baldus data would easily create a prima facie case of discrimination under Title VII, the Court distinguished such proceedings from the presumptively individualized, guided-discretionary proceedings of capital sentencing. *Id.* at 294-97. For a proposal to apply Title VI to capital sentencing systems that operate with federal funds, *see* Michael Mello, *Defunding Death*, 32 AM. CRIM. L. REV. 933, 972 (1995). To support his Eighth Amendment claim, McCleskey also attempted to prove that his death sentence was tainted by the systemic racial bias in Georgia's capital sentencing system found by the Baldus CSS, described above. Although the Court assumed that the Baldus Study was methodologically sound, it concluded that "the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital-sentencing process." *McCleskey*, 481 U.S. at 313.

[357] Burt, *supra* note 342, at 1795.

[358] Gregg v. Georgia, 428 U.S. 153, at 226 (White, J. concurring) (declining to interfere with Georgia's criminal laws against murder despite evidence of discrimination in sentencing); *see also* Burt, *supra* note 342, at 1794 (arguing that Court's approach to death penalty seeks to remove doubts about fairness of implementation).

it is as if the enormity of the implications of doubts concerning capital punishment precludes deliberately considering them. The result, predictably, has been worldview defense and dehumanization by denial. So, too, with racial discrimination. The Court's intent test as a liability criterion generally has shielded the Court from the potentially overwhelming remedial consequences of redressing demonstrable endemic, systematized racial discrimination.[359] In effect, the test is a legal form of denial. The Court's refusal in *McCleskey* to give legal effect to the evidence reflects a retreat from reality in the specific context of capital punishment, which entails both more limited and manageable remedial consequences and arguably more direct personal moral responsibility by the judges themselves than does general societal discrimination. While the interrelated problems of state action and negative rights arise in the context of general societal discrimination, capital punishment inarguably is something that state actors, judges included, affirmatively do to someone and therefore could simply cease doing. Indeed, as a strictly fiscal matter, it would be much less costly to abolish than to retain the death penalty. Nevertheless, Justice Powell's opinion for the Court echoes the denial implicit in White's *Gregg* opinion: "McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system."[360]

The Court's pattern of substantive doubt denial, worldview defense, and process tinkering has continued with congressional support. One result has been to drastically curtail the availability of habeas corpus review of death sentences and, thus, further to insulate the judiciary from the unpleasant business of capital punishment.[361] The Court apparently has read the national mood cor-

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[359] *See generally* Judges, *supra* note 259, at 605-28 (arguing that Supreme Court's interpretations in entitlement, state action, school finance, and school desegregation cases shield members of Court from impact of their decisions).

[360] *McCleskey*, 481 U.S. at 314-15 (stating further that "if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we would soon be faced with similar claims as to other types of penalties"); *see also* Burt, *supra* note 343, at 1795 (arguing that *McCleskey* represented "capstone" of efforts to suppress doubts about integrity of death penalty).

[361] *See* Brecht v. Abrahamson, 507 U.S. 619, 638 (1993) (noting that actual prejudice is required even when constitutional violation shown); Herrera v. Collins, 506 U.S. 390, 403 (1993) (indicating that to establish miscarriage of justice, claims of actual innocence must be accompanied by showing of violation of some independent constitutional right); Sawyer v. Whitley, 505 U.S. 333, 345 (1992) (stating that actual innocence extends to negation of element of offense or existence of aggravating factors, but not to establishment of mitigating

rectly. So long as the appearance (or illusion) of justice can be maintained, substantive doubts about capital punishment are kept at a comfortable distance. As noted above, "the people" know little about the actual workings of the death penalty, and they don't really want to know.[362] And the Court, while certainly in a position to confront capital punishment's glaring problems, has chosen instead to turn away and stubbornly insist that the system must be fundamentally just, not because it truly is, but because it would be too unbearable if it were not. This process demonstrates the deployment of denial as a worldview defense.

IV. CAPITAL PUNISHMENT AND RATIONALITY

> How long soever it hath continued, if it be against reason, it is of no force in law.
>
> Sir Edward Coke[363]

There is ample evidence of capital punishment's arbitrariness, excessiveness, discriminatory application, and dehumanizing effect. Each of those problems is reason enough to oppose capital punishment on policy grounds. Since *Gregg*, however, none has been sufficient to declare it unconstitutional and the capital punishment debate has become the prisoner of its own rhetoric. The Court and many legislators and constituents apparently are prepared to accept a horribly flawed and clumsy system.[364] But those attributes, even if not themselves grounds to invalidate capital punishment, taken together are *evidence* of the basis to do so. Viewed

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factors); Keeney v. Tamayo-Reyes, 504 U.S. 1, 12 (1992) (stating that petitioner must show both cause and prejudice before obtaining evidentiary hearing to consider newly discovered exculpatory evidence); Coleman v. Thompson, 501 U.S. 722, 735 (1991) (noting that ambiguous state decisions presumed to rest on state rather than federal ground); McCleskey v. Zant, 499 U.S. 467, 493 (1991) (holding that successive petitions presumptively regarded as "abuse of the writ" unless cause and prejudice can be shown or unless petitioner can show a miscarriage of justice); Penry v. Linaugh, 492 U.S. 302, 319 (1989) (applying *Teague* principle to capital sentencing); Teague v. Lane, 489 U.S. 288, 310 (1989) (holding that except in very limited circumstances, new rules announced after petitioner's trial are generally not applied retroactively).

[362] *See supra* note 286 and accompanying text.

[363] SIR EDWARD COKE, INSTITUTES: COMMENTARIES UPON LITTLETON, FIRST INSTITUTE 62a.

[364] *See* MELLO, *supra* note 87, at 12 (arguing that if death penalty is to be abolished, it will not be in response to abstract arguments that dominate debate, but because of practical and perhaps emotional objections).

in the light of terror management theory, such evidence suggests that a nonconscious defense against death awareness is at work. If so, then capital punishment more closely resembles ritual human sacrifice than a practical response to crime and hence fails one of the most fundamental norms of American constitutionalism — the requirement that government action be rational. To recognize capital punishment's irrationality, however, one must deliberately examine the underlying nonconscious sources of its flaws.

In terms of constitutional analysis, the problem is to make a prima facie showing to negate the usual presumption that "the law . . . is really calculated to effect any of the objects entrusted to government . . . ."[365] A reliable guide to the vulnerability of a particular constitutional value is the degree to which the Court is prepared to assume that government has acted rationally to achieve a legitimate objective in a particular case. The two are inversely related: the more sensitive the constitutional concern, the more intrusive the Court's review into governmental purpose and the rationality of the "fit" between the alleged purpose and the chosen means. The Court has identified categories of circumstances in which legitimate and rational distinctions are hardly ever drawn; in such cases the usual presumption of rationality is reversed.[366] When judicial skepticism is at its height, as in the paradigmatic case of intentional racial classification, the purpose is presumed to be illegitimate and the state is put to a heavy burden of justification.[367]

With respect to capital punishment, the Court's post-*Gregg* focus has been largely on "structural concerns" — the processes of law making and law applying — rather than the substantive policy itself.[368] Apart from the minority of justices who have concluded that capital punishment is per se unconstitutional,[369] the various approaches of the justices have converged on the general Eighth

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[365] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819).

[366] *See* United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938) (noting narrower presumption of constitutionality where legislation appears on its face to be within specific prohibition of Constitution).

[367] For a description of this analytic process, see *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235-36 (1995).

[368] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 17-3, at 1684-85 (2d ed. 1988) (describing Supreme Court's structure for determining constitutionality of death sentences). *See supra* notes 342-62 and accompanying text (noting three phases of Court's treatment of capital punishment).

[369] *See supra* text accompanying note 348.

Amendment standard articulated by Justice Stewart in *Gregg v. Georgia*:

> *Furman [v. Georgia]* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.[370]

In *Furman*, a badly divided Court ruled that Georgia's death penalty procedure, and that of virtually every other state, was unconstitutional because it vested essentially standardless discretion in juries in capital cases.[371] The *Furman* approach implied that, if legislatures could draft sentencing procedures that provided sufficient guidance, and thus were marginally less arbitrary and discriminatory, the death penalty could be constitutionally imposed. In a series of cases in 1976, the Court outlined key components of such procedures.[372] Thus:

> in the course of articulating the precise requirements of the Eighth Amendment, the Court effectively transposed the result-oriented character of *Furman* into an essentially procedurally oriented inquiry. Instead of asking whether sentences imposed under the new capital-sentencing procedures were, in fact, rational

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[370] Gregg v. Georgia, 428 U.S. 153, 189 (1976).

[371] Furman v. Georgia, 408 U.S. 238, 240 (1976) (per curiam). Justice Brennan rested his position on capital punishment's "severe and degrading" nature, its arbitrariness, its lack of deterrent value, and its rejection by contemporary society. *See id.* at 257, 305 (Brennan, J., concurring). According to Justice Douglas, such procedures enabled jurors to impose the death penalty for impermissible purposes (such as racial discrimination). *See id.* at 240, 245 (Douglas, J., concurring). Justice Stewart objected that such a system was simply arbitrary and freakish, like being struck by a bolt of lightning. *See id.* at 309 (Stewart, J., concurring). In Justice White's view, a standardless system served no legitimate penal purpose such as deterrence or retribution. *See id.* at 310, 312-13 (White, J., concurring).

[372] In *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court embraced the concept of guided discretion, in which the fact-finder receives evidence concerning mitigating and aggravating circumstances, subject to proportionality review on appeal, to produce individualized, rational, and even-handed outcomes. *See* 428 U.S. at 197-207; *see also* Jurek v. Texas, 428 U.S. 262, 271-74 (1976); Proffitt v. Florida, 428 U.S. 242, 251-54 (1976). In other rulings, the Court struck down mandatory capital sentencing schemes as too inflexible to meet those three requirements. *See, e.g.*, Roberts v. Louisiana, 428 U.S. 325, 332-37 (1976) (striking down Louisiana's narrow statutory definition of first-degree murder as amounting to mandatory death penalty, which was unconstitutional and capricious exercises of power); Woodson v. North Carolina, 428 U.S. 280, 303-05 (1976) (striking down North Carolina's mandatory death penalty because it provided no way to check arbitrary and capricious exercises of power).

> or evenhanded, the Court asked itself if the new procedures seemed capable of minimizing the risk of arbitrary or capricious sentences.[373]

This Article urges a return to substance.[374] It relies on evidence of arbitrariness, excessiveness, race effects, and dehumanization together to demonstrate the presence of the terror management effect, and ultimately capital punishment's irrationality.[375]

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[373] BALDUS, *supra* note 11, at 26.

[374] This Article offers a metaphorical cognitive therapy for the capital punishment debate. The goal is to bring the posited nonconscious process into conscious awareness. *Cf.* Charles R. Lawrence, III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (applying psychoanalytic concepts to characterize racism as mental disorder). Note that the present Article relies instead on cognitive theories that enjoy stronger empirical support than does psychoanalytic theory. Terror management literature has found that "the conscious experience of the unacceptable emotion from which defensive behaviour provides protection may actually interfere with such defensiveness." Greenberg et al., *Testing Alternative Explanations*, *supra* note 28, at 431 (reviewing literature). A key step in cognitive therapy for individuals is the conscious, deliberate examination of irrational, automatic thoughts. *See, e.g.*, AARON T. BECK ET AL., COGNITIVE THERAPY OF DEPRESSION 18 (1979); William P. Sacco & Aaron T. Beck, *Cognitive Theory and Therapy in* HANDBOOK OF DEPRESSION (E. Edward Beckman & William R. Leber eds., 2d ed. 1995); Jeffery E. Young et al., *Depression, in* CLINICAL HANDBOOK OF PSYCHOLOGICAL DISORDERS: A STEP-BY-STEP TREATMENT MANUAL (David H. Barlow ed., 2d ed. 1993). Although traditional cognitive therapy has explicitly eschewed consideration of nonconscious processes (largely as a reaction against psychoanalysis), more recent cognitive approaches have incorporated the two-process paradigm into their intervention strategies. *See generally* Chris Brewin, *Theoretical Foundations of Cognitive-Behavioral Therapy for Anxiety and Depression*, 47 ANN. REV. PSYCHOL. 33 (1996) (arguing cognitive-behavior therapy for anxiety and depressive disorders is promising treatment because it includes practice of critically analyzing faulty thinking patterns and nonconscious processes). Social psychologists have also argued that the remedy for potentially harmful automatic thinking, as in the formation and activation of group prejudice, is to reroute such thoughts through the conscious, deliberate mode. *See supra* note 54. So, too, with capital punishment. As suggested above, nonconscious defenses serve necessary psychological functions; but they can also contribute to dysfunction. *See supra* notes 63-67 and accompanying text.

In general, the terror management process serves the essential function of moderating fear of death awareness. The critical question is whether capital punishment is a permissible behavioral option to serve that purpose. Seen as a form of ritual human sacrifice that symbolically defends against collective fear of death awareness, capital punishment is unquestionably an improper choice.

[375] Given the relationship noted in Part II between religious ritual and capital punishment, one might raise a constitutional objection under the Establishment Clause of the First Amendment. *See* James McBride, *Capital Punishment as the Unconstitutional Establishment of Religion: A Girardian Reading of the Death Penalty*, 37 CHURCH & STATE 263, 279-87 (1995). Such a claim would ultimately reduce to a challenge to the American civil religion itself as the essential element of extra-human agency. *See* Judges, *supra* note 37 (forthcoming article regarding capital punishment as ritual sacrifice). Not only would a challenge to such a pervasive aspect of American culture probably involve impossibly heavy lifting, *see* Deborah K. Helper, *The Constitutional Challenge to American Civil Religion*, 5 KAN. J. L. & PUB. POL'Y 93,

Evidence of a terror management effect suggests why the constitutionality of capital punishment would be doubtful were it subject to a meaningful rationality requirement under the Equal Protection Clause, substantive due process, or the Eighth Amendment.[376] On occasion, the Court has given teeth to substantive review for irrationality under the Equal Protection clause. For example, in *Romer v. Evans* the Court struck down Colorado's Amendment 2, which precluded state governmental entities from extending the protection of civil rights laws to persons discriminated against on the basis of sexual orientation.[377] Earlier, in *City of Cleburne v. Cleburne Living Center*, the Court had held unconstitutional a city's denial of a special use permit for a group home for mentally retarded persons.[378] In neither case did the Court expressly rely on the two traditional bases for heightened judicial scrutiny — either governmental interference with fundamental rights or intentional discrimination by "suspect classification" (such as race, ethnicity, or gender).[379]

In effect, *Romer* and *Cleburne* suggest that the Equal Protection Clause constrains patent authoritarian extremes even if not directed at the limited roster of judicially recognized outgroups. In

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108 (1996) (discussing Establishment Clause challenges to America civil religion), it would miss the more pertinent problem of substantive irrationality discussed above in text.

[376] Because the argument presented here is one of categorical substantive irrationality, rather than the cruelty or novelty of the punishment, the Equal Protection Clause rather than the Eighth Amendment is the more appropriate vehicle for analysis. The specificity rule of *Graham v. Connor*, 490 U.S. 386, 395 (1989) — that if a particular constitutional provision explicitly covers the case then that provision rather than the more generalized concept of substantive due process must be applied — therefore does not mandate application of the Eighth Amendment. *See, e.g.*, County of Sacramento v. Lewis, 523 U.S. 833 118 S. Ct. 1708, 1714-15 (1998) (holding that because more explicit provision, Fourth Amendment, did not cover plaintiff's claim, generalized substantive due process analysis applied in police-pursuit case). Even if it did, a similar analysis should obtain; for the assumption that capital punishment actually serves (i.e., is rationally related to) deterrent and retributive purposes formed one of the bases for the Court's ruling in *Gregg*. *See Gregg*, 428 U.S. at 197-203. This Article challenges that key assumption. *See generally* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW §§ 2.11-2.14 (2d ed. 1986 & Supp. 1999) (discussing constitutional limitations on substantive criminal law).

[377] 517 U.S. 620, 635 (1996).

[378] 473 U.S. 432, 447-50 (1985).

[379] That mental retardation is not legally regarded as a "suspect classification" was subsequently made clear in *Heller v. Doe*, 509 U.S. 312, 330 (1993), in which the Court applied a deferential standard of review to uphold different involuntary commitment procedures and standards for the mentally retarded compared to the mentally ill. And in *Romer*, the Court neither questioned its previous holding in *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986), that adult consensual homosexual relations is not a fundamental right nor indicated that homosexuality constitutes a "suspect classification."

Romer, the Court offered two bases for its decision. First, the Colorado provision had "the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation." Second, the law's "sheer breadth is so discontinuous with the reasons offered for it that the amendment *seems inexplicable by anything other than animus toward the class that it affects*; it lacks substantial relationship to legitimate state interests."[380] In *Cleburne*, the implausibility of the city's proffered reasons for denial of the permit led the Court to conclude that "requiring the permit in this case appears to us to rest on an *irrational prejudice* against the mentally retarded, including those who would occupy" the home.[381]

Romer and *Cleburne* stand in stark contrast to the Court's long-standing deference to legislative judgments in cases that do not involve fundamental rights or identified suspect classifications. In the typical case, the Court will require the challenger to carry the usually impossible burden of proving that the state action lacks a rational relationship to a legitimate governmental purpose.[382] The Court almost always assumes that such a relationship exists and will even invent purported "legitimate" governmental purposes.[383] What made *Romer* and *Cleburne* unusual was the Court's willingness to consider, under rational basis review, possible illegitimate authoritarian motivations for the challenged legislation.[384]

Otherwise, the Court long ago largely abandoned supervision of the struggles between interest groups for legislative advantage and has declined to second-guess legislative line drawing,[385] even if such

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[380] *Romer*, 517 U.S. at 632 (emphasis added).

[381] *Cleburne*, 473 U.S. at 450 (emphasis added).

[382] *See, e.g.*, Morey v. Doud, 354 U.S. 457, 463-65 (1957).

[383] *See infra* note 386.

[384] A cynical explanation for this anomaly would be that the Court simply cheated in *Romer* and *Cleburne* — that it really treated homosexuality and mental retardation as "virtual" suspect classifications even as it denied doing so. If, however, one agrees with Ronald Dworkin's proposition that judicial precedent is to be interpreted, if at all possible, so as to render it part of a coherent, on-going narrative that reflects the political morality of the community, then the "cheating" interpretation is unsatisfying and one must search instead for a unifying principle. *See generally* RONALD DWORKIN, LAW'S EMPIRE 82 (1986) (describing law as process of interpretation reflecting community's morality); *see also* Donald P. Judges, *Keeping the Faith?: The Lower Courts' Dubious Interpretation of* Lynch v. Donnelly *and Stare Decisis*, 24 WYO. LAND & WATER L. REV. 167, 193 (1989) (applying Dworkin's view to interpretation of Supreme Court precedent regarding Establishment Clause).

[385] One important modern exception to the Court's usual deference arises in connection with property rights. *See, e.g.*, Dolan v. Tigard, 512 U.S. 374 (1994) (finding city's requirement of land dedication for easement unconstitutional taking without compensation

choices appear to be nothing more than naked and sometimes ill-advised favoritism for the particular dominant interest group.[386] Although the Court usually attempts to articulate some purported "rational basis" for the legislative classification, such line drawing often would not survive meaningful scrutiny. In the Court's view, the legislature is the forum of last resort as a practical matter for such decisions.

The contrast between the Court's ordinary deference to legislative judgment and its exceptional interventionism in cases like *Romer* and *Cleburne* suggests that legislative outcomes that simply reflect poor judgment or successful selfishness are not ordinarily cause for constitutional concern while outcomes strongly indicative of extreme, irrational hatefulness or fearfulness may be.[387] As the Court once put it:

> The Constitution presumes that, *absent some reason to infer antipathy*, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unre-

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because requirement was not "roughly proportional" to impact of proposed use); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (holding South Carolina's Beach Management Act unconstitutional taking in violation of Fifth Amendment because application of Act virtually destroyed lawful uses of property); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (holding California Coastal Commission's conditions for building permits unconstitutional taking without compensation because conditions did not bear "essential nexus" to governmental purposes). And at least some justices appear willing to deploy the Taking Clause to intensify judicial scrutiny of economic legislation, constitutional work that at one time was done under substantive due process. Eastern Enters. v. Apfel, 524 U.S. 498 (1998) (plurality opinion) (ruling that Coal Industry Retirement Health Benefit Act of 1992 effected unconstitutional taking).

[386] The Court, thus, has upheld legislative choices to prefer: one group of railroad retirees over another for reduction of benefits, *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980); licensed optometrists and ophthalmologists at the expense of opticians with respect to regulation of eyeglass lens fitting or replacement, *Williamson v. Lee Optical*, 348 U.S. 483 (1955); vehicle owners over vehicle lessors with respect to regulation of delivery-vehicle advertising, *Railway Express Agency v. New York*, 336 U.S. 106 (1949); "old-timer" property owners over "newcomer" property owners in the imposition of property taxes, *Nordlinger v. Hahn*, 505 U.S. 1 (1992); and commonly owned or managed buildings over separately owned or managed buildings in access to cable television, *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993).

[387] The occasional occurrence of additional examples of interventionism suggests that there may be other, perhaps poorly defined principles at work, such as a diluted concern for some "outsider" classifications that implicate federalism concerns. *See, e.g.*, Zobel v. Williams, 457 U.S. 55 (1982) (holding Alaska's favoring of established residents over new residents violated equal protection guarantees).

> lated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.[388]

While *Cleburne* and *Romer* involved *exclusion* (from access to favorable zoning rulings and enactment of antidiscrimination legislation, respectively), capital punishment manifests authoritarian excess in a different, at least equally troubling, form. If support for capital punishment is driven largely by the terror management process, then affirmative evidence of a basis for special constitutional concern does indeed exist. The problem is not that capital defendants do not deserve the community's hate or fear — the guilty ones surely do. From a substantive standpoint, capital punishment as a response to the community's outrage toward the criminal and his crime, and a need for direct, tangible protection from him and persons like him, easily passes rational basis review. And the sloppiness of the capital punishment process itself (a line drawing problem) does not alone appear to offend contemporary norms of justice. The problem, according terror management theory, is that capital punishment largely reflects an irrational response to something else — the fear that awareness of one's own mortality creates. It is one thing to put the capital convict to death largely because we hate and fear him for what he has done; it is quite another to do so because the process symbolically and unconsciously protects its supporters against their fear of death.

In summary, capital punishment becomes constitutionally suspect if it can be shown to be an irrational response to fear of a threat — death awareness — not particularly associated with the criminal in question or even crime in general. This Article, like the Court since *Gregg*, assumes that the imposition of the death penalty to accomplish general deterrence, retribution, and incapacitation satisfies the requirement of minimal rationality. This Article further assumes that, so long as capital punishment appears truly aimed at those objectives, its clumsiness and inefficacy in accomplishing them is unlikely to be subjected to meaningful judicial review as a categorical matter. The evidence, however, indicates that capital punishment is not so aimed; and its ineptitude is part of that evidence.[389]

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[388] Vance v. Bradley, 440 U.S. 93, 97 (1979) (emphasis added).

[389] *See* BALDUS, *supra* note 11, at 415-16 (summarizing evidence and its implications).

To the extent that capital punishment is infused with the terror management effect, its relation to the offense becomes attenuated and its irrationality becomes dominant. At some point, the balance between a direct, practical (albeit emotional and inept) response to the external threat of crime and the indirect, symbolic, and nonconscious reaction to the internal threat of the terror of death awareness has so shifted that the procedure has crossed the line from punishment for crime to ritual sacrifice. The more that capital punishment is a symbolic act driven by nonconscious fears, the more it resembles a modern variant of the inarguably irrational and constitutionally indefensible practice of ritual human sacrifice. If the imposition of substantial civil disabilities, when motivated by an irrational fear of mental retardation or homosexuality (or at least fear and hatred of the classes of persons who manifest those characteristics), violates the minimal constitutional requirement of rationality, then the deliberate ritualized killing of human beings to ward off timor mortis surely runs afoul of that basic requirement.

CONCLUSION

> Power and superiority are so flattering and delightful, that fraught with temptation and exposed to danger as they are, scarcely any virtue is so cautious, or any prudence so timorous, as to decline them. . . . We love to overlook the boundaries which we do not wish to pass; and as the Roman Satirist remarks, he that has no design to take the life of another, is yet glad to have it in his hands.
>
> Dr. Johnson[390]

Not much about American capital punishment offers cause for optimism and this Article is no exception. The evidence of arbitrariness, excessiveness, discriminatory application, and dehumanization is consistent with a terror management model of the death penalty as an authoritarian anxiety buffer. As such, capital punishment amounts to the manifestly irrational practice of legalized human sacrifice — the ritualistic, symbolic enactment of control over death itself as a nonconscious defense against fear of death awareness — which no constitution worth having could possibly

[390] [*Untitled*], 114 RAMBLER (Apr. 20, 1751), *reprinted in* OPINIONS, *supra* note 287, at 1.

permit. Yet the judicial, legislative, and executive branches at the federal level and in many states continue to mandate, impose, and carry out death sentences; and the public cannot seem to get enough.

Exposure to conscious consideration of the implicit processes described in this Article creates the opportunity for therapeutic social change.[391] In other words, if decision makers looked beyond the usual rationalizations for capital punishment and saw it for the fundamentally irrational activity it actually is, then they would have to consciously confront the choice between abolition and continuation of the ritual sacrifice of human beings. The likelihood of such an epiphany, however, seems remote.

The legislative momentum at present is clearly retentionist and even expansionist with little sign of interest in critical self-examination of society's propensity for institutionalized violence.[392] And given its current worldview-defensive posture of responsibility shifting, denial, and disengagement, the Court seems unlikely to assume a leadership role in a transformatory process. The dilemma is, thus, that if past experience is any guide, the usual judicial check on authoritarian excesses may not function effectively in the capital punishment context. And a real killing spree can occur, as was the case in early nineteenth-century England and appears to be the case in the United States today, before conditions favor a shift in legislative attitudes.

I sincerely hope that I am wrong about all of this. If American capital punishment cannot fairly be said to involve much arbitrariness, excessiveness, discrimination, or dehumanization, then the theory offered here lacks evidentiary foundation, the Court's post-*Gregg* faith in the process is justified, and the capital punishment debate really is a technical and philosophical one about the efficacy and legitimacy of deterrence, incapacitation, and retribution after all. Alternatively, if those features do characterize the death penalty, but bear no relationship to terror management, then the system is egregiously flawed but at least probably directed at practical penological objectives. But if, as other observers have con-

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[391] *See supra* note 37.

[392] *See* Mark Tushnet, *Reflections on Capital Punishment: One Side of an Uncompleted Discussion*, 7 J. L. & RELIGION 21, 24-25 (1981) (arguing against abolition until American society has psychologically prepared itself for renunciation of pervasive and institutionalized resort to violence).

cluded, arbitrariness, excessiveness, discrimination, and dehumanization do pervade the system, and if I have adequately specified the predictions of a terror management model of capital punishment, then the system is largely a symbolic form of authoritarian terror management manifesting as ritualistic human sacrifice. If that is indeed why we are killing all of these people, then perhaps the sentencing incantation should be, "may God have mercy on *our* souls."