"Reasonable Levels of Arbitrariness" in Death Sentencing Patterns: A Tragic Perspective on Capital Punishment

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After sketching the process model for capital punishment adopted by the Supreme Court, this Article discusses the need for judicial review of capital sentencing patterns and the "arbitrariness" inevitably involved in providing this review. The paradox involved in providing such arbitrary review indicates the need for adopting a tragic perspective on capital punishment. From this perspective, various positions on the propriety of the death penalty can be understood as tactics to avoid the tragic dilemma resulting from the inability of our cultural framework of values to resolve the dispute about the justice of executions. This Article discusses and views the process model adopted by the Supreme Court as such a tactic. In addition, this Article analyzes judicial responses to challenges to the sentencing patterns that result from this process model in terms of a desire to avoid the tragic conflict involved. Finally, this Article criticizes these tactics and urges an honest acceptance of the tragic situation.

INTRODUCTION

Murders and executions stir our most profound emotions and raise disturbing questions about fundamental social values. As a result, the question of whether to execute a murderer forces society to discover once again that there is a tragic dimension to the human condition. It is not simply that injustice or immorality exists. Our human pretensions can accommodate occasional violations of the moral order. The tragic aspect of the capital punishment question is that our value systems pro-

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vide such ambiguous and contradictory guidance that we cannot be confident that there is any moral order at all.

Because of this tragic dimension, the dispute about the justice of capital punishment is, in a very real sense, unresolvable. Consequently, issues raised by statistical patterns in death penalty sentencing are also difficult, if not impossible, to answer satisfactorily. However, the lack of "answers" to these death penalty issues underscores the importance of the question from another perspective. Since the disagreement results from conflict among fundamental social values, it can provide valuable insights into our responses to such dilemmas.

This Article addresses a number of these responses by evaluating assertions that statistical sentencing patterns indicate that capital punishment is not being imposed in a constitutionally fair, equal, and nonarbitrary manner. Part I of this Article summarizes the constitutional model for death penalty schemes. Part II explains how evaluating patterns requires subjective decisions about classifying similar patterns, allocating the burden of proof, using systemic patterns to decide individual cases, and setting standards of improper variations in sentencing. Part III considers several tactics used to avoid the tragic dilemmas inevitably involved in making these subjective decisions and illustrates how the dispute over "fair" sentencing patterns can be understood in terms of these tactics.

I. The Model of Capital Punishment in the United States

A. The Basic Constitutional Model — Providing a Meaningful Basis for Death Sentences

In a series of opinions, the United States Supreme Court has constitutionalized the application of the death penalty by prohibiting capital punishment unless there is a "meaningful basis" for sentencing the individual defendant to death.[1] To ensure that such a meaningful basis exists, the Court has imposed a process model on all death penalty schemes.[2] This model emphasizes procedural protections to ensure that

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[1] *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring), in which capital punishment was held unconstitutional unless there is a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."

[2] *See, e.g.*, Pulley v. Harris, 104 S. Ct. 871 (1984); Zant v. Stephens, 462 U.S. 862 (1983); Zant v. Stephens, 456 U.S. 410 (1982); Godfrey v. Georgia, 446 U.S. 420 (1980); Bell v. Ohio, 438 U.S. 637 (1978); Lockett v. Ohio, 438 U.S. 586 (1978); Gardner v. Florida, 430 U.S. 349 (1977); Woodson v. North Carolina, 428 U.S. 280 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238

the death penalty is not arbitrarily or capriciously imposed. However, it is based on the eighth amendment prohibition of cruel and unusual punishment rather than on constitutional requirements such as due process and equal protection.[3] This model can be summarized in terms of several components.

First, where murder is involved, the death penalty is not unconstitutional per se.[4] The Constitution only requires a meaningful basis for selecting the persons to be executed.[5]

Second, a constitutionally legitimate reason for capital punishment would exist if it deters some murders that life imprisonment does not.[6] However, it is impossible to determine whether such deterrence exists.[7] As a result, the constitutional model proceeds on the assumption that so long as it is plausible to think that some persons can be so deterred, then a legitimate reason for executing such persons exists.[8]

Third, since we cannot be sure about the existence of a deterrent effect, it is impossible to rely solely upon it as the basis for selecting persons to be executed. In addition, we seek to ensure that the persons executed are extremely culpable and that their crimes involve egregious wrongdoing. This may ensure that if we are wrong about deterrence, only very culpable wrongdoers will suffer.[9] It is also argued that a con-

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(1972).

[3] *Compare, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976) *and* Furman v. Georgia, 408 U.S. 238 (1972) (eighth amendment requires reasonably fair procedures) *with* McGautha v. California, 402 U.S. 183 (1971) (fourteenth amendment due process clause does not require special procedures for imposing the death penalty).

[4] *Compare, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976) *and* McGautha v. California, 402 U.S. 183 (1971) (with proper procedural safeguards, murderers may be executed) *with, e.g.*, Coker v. Georgia, 433 U.S. 584 (1977) (rapist may not be executed) and Enmund v. Florida, 458 U.S. 782 (1982) (certain felony murderers may not be sentenced to death).

[5] *Compare, e.g.*, Furman v. Georgia, 408 U.S. 238, 313 (1972) (death penalty scheme stricken down because "meaningful basis" did not exist) *with, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976) (death penalty upheld because procedural scheme adequate).

[6] *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 183-87 (1976); Hubbard, Burry & Widener, *A "Meaningful" Basis for the Death Penalty: The Practice, Constitutionality and Justice of Capital Punishment in South Carolina*, 34 S.C.L. REV. 391, 559-64 (1982) [hereafter Hubbard, *Meaningful Basis*].

[7] *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 184-87 (1976); Hubbard, *Meaningful Basis, supra* note 6, at 560-61; Kaplan, *The Problem of Capital Punishment*, 1983 U. ILL. L. REV. 555, 555-65 [hereafter Kaplan, *Problem*].

[8] *See, e.g.*, Enmund v. Florida, 458 U.S. 782, 798-800 (1982); Hubbard, *Meaningful Basis, supra* note 6, at 561-74.

[9] Hubbard, *Meaningful Basis, supra* note 6, at 564-70. For criticisms of the asser-

cern for the degree of culpability helps ensure that the death penalty is proportionate to the wrong involved[10] and thus meaningfully expresses moral outrage and affirms social values.[11] Moreover, there should always be room for mercy where a death sentence is involved — for example, in response to sincere, substantial rehabilitation and reformation.[12] Because of these various concerns, the model also includes retribution as a factor in determining who should be executed.[13]

Fourth, life is too complicated for us to devise mechanical, per se systems to identify in terms of the twin goals of deterrence and retribution those persons who should be executed. As a result, mandatory capital punishment schemes are unconstitutional.[14] Such schemes do not provide for individualized consideration of the defendant and his crime, and thus their use involves a serious risk of executing persons who could not plausibly have been deterred, whose crime and character are not sufficiently culpable, or who should legitimately receive mercy.

Finally, because death is a unique penalty, it can only be applied in accordance with special, heightened, or "super" due process.[15] Death penalty schemes must therefore contain sufficient procedural safeguards to ensure a meaningful basis for identifying persons to be executed. More specifically, this process must make us reasonably confident that two conditions concerning the particular crime and defendant are satisfied. First, in order to serve the deterrent goal, we must have a basis for ensuring that no person is executed unless that person is a member of a class of persons who might plausibly be deterred by the death penalty but not by life imprisonment. Second, the retributive goal requires that we assure that no person is executed unless he and his crime, in light of all the relevant circumstances, are severely reprehensible and morally

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tion that only culpable wrongdoers will be killed if capital punishment is used, see *infra* note 167 and accompanying text. Although innocent parties often suffer from punishment, e.g., the relatives of a criminal sentenced to prison, this appears to be a necessary consequence of any punishment scheme. *See* Hubbard, *Meaningful Basis*, *supra* note 6, at 531, 555, 565, 567.

[10] *See, e.g.*, Hubbard, *Meaningful Basis*, *supra* note 6, at 494-503, 564-73.

[11] *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 183-84 (1976); Hubbard, *Meaningful Basis*, *supra* note 6, at 557. For a critical discussion of moral outrage and affirmation of values as a basis for capital punishment, see *infra* notes 130-37, 154-60, 163-71 and accompanying text.

[12] *See, e.g.*, Hubbard, *Meaningful Basis*, *supra* note 6, at 565-68.

[13] *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 183-84 (1976).

[14] *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280 (1976).

[15] *See, e.g.*, *supra* notes 2 & 5 and accompanying text; Hubbard, *Meaningful Basis*, *supra* note 6, at 472-510, 561-73; Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980).

blameworthy.[16]

Although the details of the schemes vary from state to state, one can summarize them in terms of a four-stage "winnowing" process for selecting persons who are properly subject to capital punishment. In stage one, the legislature identifies those persons who are candidates for the death penalty — for example, by listing aggravated forms of murder or by providing relevant, nonvague statutory "aggravating circumstances" — that must accompany the murder for the defendant to be a candidate for execution.[17] At the second stage the prosecution exercises its traditionally wide discretion to select from this pool of candidates the persons who will be tried for capital murder.[18] The next stage occurs at trial. If the defendant is found guilty of murder, the statutory sentencing authority then exercises its discretionary power to determine whether, in light of both aggravating and mitigating circumstances, the particular murderer should be sentenced to death.[19] In most states the jury is the sentencing authority and it possesses a veto power over the death penalty, because its decision for life imprisonment cannot be reversed.[20] In a few states the jury's decision for life imprisonment is advisory only, and in some states the decision is made by the judge or a panel of judges.[21] Finally, although varying in specifics, all states provide for a fourth stage consisting of judicial review of the sentence at the trial and/or appellate level.[22] As the next section discusses, one purpose of this review is to ensure that the sentence is proportional to the crime and defendant.

If a person has gone through these four stages and has been sentenced to death, then the winnowing process arguably legitimizes the conclusion that there is a meaningful basis to execute that person. Such legitimation, however, depends upon two assumptions: first, that such a process could ever legitimize capital punishment, and second, that the process "works" — that is, it effectively curbs both intentional and unintentional arbitrariness. Although there is good reason to question

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[16] *See, e.g.*, Hubbard, *Meaningful Basis*, *supra* note 6, at 562.

[17] *See, e.g.*, Note, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1220-21 (1984) [hereafter Note, *Fairness and Consistency*].

[18] *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 199-200 (1976).

[19] Note, *Fairness and Consistency*, *supra* note 17, at 1219-41.

[20] Spaziano v. Florida, 104 S. Ct. 3154, 3164 (1984); Note, *Fairness and Consistency*, *supra* note 17, at 1240-41.

[21] Spaziano v. Florida, 104 S. Ct. 3154, 3164 (1984).

[22] Pulley v. Harris, 104 S. Ct. 871, 876 (1984); Note, *Fairness and Consistency*, *supra* note 17, at 1241-43.

these assumptions,[23] this Article does not fully address this concern. Instead, it partially addresses the second assumption by focusing on the type of review of sentencing patterns required to be consistent with the other components of the constitutional model. This Article argues that this review must consider whether sentencing patterns indicate that the second assumption is not valid. Such review is necessary because appellate courts must seriously consider whether the four-stage model successfully guides discretion in actual practice. If they do not consider this issue, we cannot be sure that a meaningful basis for capital sentencing exists and the process model can no longer even arguably legitimize capital punishment.

B. Equal Treatment and Proportionality Review

Every capital punishment state provides for some sort of proportionality review of death sentences. Most death penalty statutes explicitly require the state supreme court to review all death penalty cases to determine if the defendant's sentence is proportional to the penalty in similar cases.[24] It is difficult to generalize about the application of these statutory proportionality review provisions because they vary considerably. Nevertheless, it seems that the supreme courts in each of these states have apparently been reluctant to commit the substantial resources that would be required to review every homicide to consider proportionality. As a result, the concepts of "similar cases" and "proportionality"[25] have been interpreted restrictively — for example, to require a review only of cases where the death penalty has actually been imposed[26] or where the defendant is convicted of first degree murder.[27] A comparative review of all homicides or all cases where death might have been sought or imposed is not required. In those states where the statute does not explicitly provide for any comparative evaluation of sentences, the state supreme courts have interpreted the scheme to require a determination of whether capital punishment is proportional to

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[23] For a consideration of these assumptions in the context of a particular state's death penalty scheme, see, e.g., Hubbard, *Meaningful Basis*, *supra* note 6, at 561-82.

[24] Pulley v. Harris, 104 S. Ct. 871, 876 (1984); Note, *Fairness and Consistency*, *supra* note 17, at 1242.

[25] *See, e.g.*, Hubbard, *Meaningful Basis*, *supra* note 6, at 571-73.

[26] *See, e.g.*, Pulley v. Harris, 104 S. Ct. 871, 876-80 (1984); Hubbard, *Meaningful Basis*, *supra* note 6, at 440-42, 570-73.

[27] *See, e.g.*, State v. Moore, 210 Neb. 457, 316 N.W.2d 33, *cert. denied*, 456 U.S. 984 (1982).

the defendant's wrongdoing.[28] Thus, all capital punishment schemes share two characteristics. First, they provide for appellate review of trial sentencing and thus help ensure that a defendant's sentence is proportional to his wrongdoing. Second, this appellate review is limited and no state requires the appellate court to ensure that the death penalty is only imposed in cases where every "similar" defendant would also be executed.

In *Pulley v. Harris*[29] the defendant argued that this approach to proportionality review was unconstitutional because evenhandedness was not ensured by such schemes. In particular, he challenged his death sentence on the ground that the California scheme did not provide for "comparative" proportionality review. The thrust of his argument was not that his sentence had not been reviewed to determine if it was proportional to his crime and personal culpability, because such personal or objective proportionality review was provided.[30] Instead, he argued that he was entitled to comparative proportionality review of all cases where death might have been sought or imposed to determine if his sentence was proportional when compared to all other similar defendants.[31]

The Supreme Court rejected his argument on the ground that the particular four-stage winnowing process used in California provided a meaningful basis for his sentence. Justice White's opinion conceded that any process such as this "may produce aberrational outcomes."[32] However, he concluded that perfection is not required and that such occasional inconsistencies "are a far cry from the major systemic defects" held unconstitutional in earlier cases.[33]

The result in *Pulley* is clearly consistent with the basic model of capital punishment. The four-stage process is designed to identify a particular class of murderers and thus ensure that no one is executed unless he clearly merits such punishment.[34] Defenders of the model are confident that this identification results because the selection process is biased in favor of life and thus ensures that the death penalty is not

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[28] *See, e.g.*, Pulley v. Harris, 104 S. Ct. 871, 876, 878-79, 881 (1984); People v. Frierson, 25 Cal. 3d 142, 183, 158 Cal. Rptr. 281, 305, 599 P.2d 587, 611-12 (1979).

[29] 104 S. Ct. 871 (1984).

[30] *Id.* at 876, 880-81. Comparative proportionality review "presumes that the death sentence is not disproportionate to the crime in the traditional sense." *Id.* at 876.

[31] *Id.* at 876.

[32] *Id.* at 881.

[33] *Id.*

[34] *See, e.g.*, Hubbard, *Meaningful Basis*, *supra* note 6, at 561-77.

imposed except in clear cases of very wrongful murder.[35] For example, a death penalty decision can be reversed, but a life imprisonment decision is difficult or impossible to reverse.[36] Because of this bias in favor of mercy and life imprisonment, some murderers will receive life imprisonment while "similar" murderers will be sentenced to death. Thus, absolute evenhandedness is impossible.[37]

Nevertheless, even though the model does not require comparative proportionality in every death penalty appeal, it does mandate comparative review of all sentences in homicide cases where the defendant produces evidence that indicates that one of several circumstances exists. The first circumstance arises when there is evidence to show that sentencing a particular defendant to death could offend the eighth amendment prohibition of cruel punishment because the culture has clearly rejected capital punishment for such defendants.[38] For example, comparative review of all murders accompanied only by simple larceny might be necessary in order to determine how often the death penalty is imposed in these cases. If very few such murderers are sentenced to death, this pattern of prosecutorial decisions and jury verdicts suggests that such crimes no longer merit the death penalty under current cultural standards of proportionality. Second, sentencing patterns may indicate that death penalty decisions are based on arguably irrelevant factors and thus suggest that the scheme is arbitrary as applied. For example, murderers in rural areas may be more likely to be subject to the death penalty, and this geographic variance may be so substantial that the court must consider whether the process in fact provides a

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[35] *Id.* at 568-70.

[36] Prosecutorial decisions for life are not reversible. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 199-200 (1976). Trial court proceedings are more complicated, but they are generally very much biased in favor of life. For example, although jury sentencing is not constitutionally required, Spaziano v. Florida, 104 S. Ct. 3154 (1984), most states require a unanimous jury verdict before the death penalty can be imposed. *Id.* at 3164; *see also* Note, *Fairness and Consistency*, *supra* note 17, at 1240-41. Appellate procedures are also biased toward life. For example, a death sentence is automatically appealed in every state, *id.* at 1241, but the double jeopardy clause prohibits the death penalty from being imposed where a trial court has imposed life imprisonment. Arizona v. Rumsey, 104 S. Ct. 2305 (1984).

[37] *See, e.g.*, Hubbard, *Meaningful Basis*, *supra* note 6, at 440-42, 570-73.

[38] *See, e.g.*, Enmund v. Florida, 458 U.S. 782 (1982), discussed *infra* notes 73-77 and accompanying text; Gregg v. Georgia, 428 U.S. 153, 206 (1976) ("If a time comes when juries generally do not impose the death penalty in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.").

meaningful basis for selecting persons to be executed.[39] Finally, patterns may indicate that decisions in capital cases are influenced by impermissible factors like race or by arguably impermissible factors like gender or wealth.[40] For example, if the defendant presents statistical evidence indicating that white capital defendants usually receive life while black capital murderers are almost always sentenced to death, then the model would clearly require comparative review of all cases. The next section discusses problems involved with the statistical nature of each of these three types of patterns.

II. "Reasonable Levels of Arbitrariness" and Statistical Patterns of Sentencing

As the preceding section indicates, some comparative proportionality review is still required after *Pulley*. However, issues remain concerning such matters as the burden of gathering data on which to base such a review, the burden of proof to demonstrate impermissible patterns, individual standing to challenge an alleged pattern, the standards used to determine whether a pattern is constitutionally improper, and the appropriate remedy for impropriety. This Article does not attempt to provide a full, detailed resolution of all these doctrinal issues. Instead, it discusses the nature of the difficulties involved in addressing such specific questions within the context of the basic constitutional model.

In particular, this section addresses the problems resulting from the fact that any procedural system for determining guilt and sentence will produce results that vary in accordance with factors that are to some degree irrelevant — for example, individual characteristics of the judge, the attorneys, the jury, and the witnesses. Moreover, many persons in society will share some irrelevant characteristics, such as conscious or unconscious reactions to crimes based on race, sex, and age of the victim and of the defendant. (Does he look like me? Could that have been me?) As a result, it is not surprising that, regardless of the crime involved, research reveals that irrelevant factors influence both attitudes and patterns in sentencing.[41] Given the discretionary approach of the four-stage process model, capital sentencing decisions will necessarily reflect irrelevant personal qualities and reactions. As a result, it is impossible for any version of this model to provide a perfect, objectively

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[39] *See infra* notes 79-84 and accompanying text.

[40] *See infra* notes 86-92 and accompanying text.

[41] *See, e.g.*, The Death Penalty in America 85-94 (H. Bedau 3d ed. 1982); Blaustein & Cohen, *Sentencing of Convicted Offenders: An Analysis of the Public's View*, 14 Law & Soc'y Rev. 223, 239-52 (1979).

neutral, evenhanded procedure to determine whether to impose the death penalty in particular cases.[42]

Some critics of capital punishment have argued that this inevitable arbitrariness indicates that the death penalty is per se unconstitutional.[43] However, such an impossible standard of procedural perfection has been consistently rejected by the majority of the Supreme Court. Instead, the constitutional model only requires stricter control on arbitrariness in capital cases than in noncapital cases. Reasonably fair procedures, not perfect ones, are the requirement.[44]

At some point, however, a pattern of sentencing results may indicate that the procedures are not functioning as fairly as contemplated. The assertion that we need to review the results of the sentencing process implies that there is some standard for distinguishing proper and improper sentencing decisions. This implication is consistent with the constitutional model's assertions that discretion is necessary and that mandatory sentencing schemes are impermissible.[45] Without some rough notion of factors relevant to sentencing, lists of aggravating and mitigating circumstances cannot be developed. More importantly, we have fairly clear views on a number of factors — race of killer, for example — which are not only irrelevant but also impermissible. Thus, it is consistent with the model to require a meaningful review of the substantive results of the sentencing process.

Moreover, if society is sincere about using a process model to provide a meaningful basis for sentencing in capital cases, there must be a point at which the results of the process force it to reconsider the assumption that the measures to guide discretion are sufficiently effective. The constitutional model, therefore, necessarily contemplates not only a review of patterns that strongly suggest the involvement of arbitrary factors but also reform or abandonment of the scheme if the patterns exceed a permissible "reasonable level of arbitrariness." So long as sentencing patterns do not exceed this level, there is good reason to assert that a

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[42] *See supra* notes 1-37 and accompanying text.

[43] *See infra* notes 220-21 and accompanying text.

[44] *See supra* notes 1-37 and accompanying text. In Pulley v. Harris, 104 S. Ct. 87 (1984), the Court acknowledged that the California scheme had flaws but noted that it was "sufficient to *minimize* the risk of wholly arbitrary and capricious action" and that it is not possible to devise a "*perfect* procedure for deciding in which cases governmental authority should be used to impose death." *Id.* at 881 (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1977)) (emphasis added). In Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court noted that "*reasonable* consistency" is required. *Id.* at 112 (emphasis added).

[45] *See supra* note 14 and accompanying text.

meaningful basis for the results exists. However, when a pattern for a certain class of defendants exceeds this level, then it is no longer valid to claim that the process provides a meaningful basis for sentencing persons in this class.

The focus of the constitutional model is on the need to satisfy the eighth amendment by imposing sufficient standards and checks on the exercise of discretion that we can be confident that the system provides a meaningful basis for a death sentence. Consequently, fourteenth amendment equal protection concepts do not necessarily apply, even though challenges to sentencing patterns resemble equal protection claims since both types of claims are phrased in terms of disparate treatment of similar classes.[46] In particular, it should not matter whether unreasonably arbitrary patterns result from an intent to discriminate against a particular defendant or class of defendants.[47] It is inconsistent to say that no meaningful basis for death sentences exists where the sentencing pattern reflects deliberate discrimination, while also saying that a meaningful basis would exist, even if the same pattern is present, so long as it results from unconscious discrimination. In other words, race is an arbitrary factor in sentencing, regardless of whether it results from intent or from unconscious bias. Consequently, if the eighth amendment model is to be used consistently, it should only be necessary to show that patterns of sentencing indicate that the scheme exceeds the permissible level of reasonable arbitrariness in practice. Intent or motivation should be irrelevant except to show that the level has been exceeded.[48]

Determining a "reasonable level of arbitrariness" cannot be done simply or mechanically. The setting of this level is discretionary and subjective. Moreover, the classification of patterns, the allocation of the burden of proof, the review of an individual sentence within a class, and the formulation of a remedy all involve judgment. The next section therefore considers the extent to which the review of sentencing patterns is also subjective and "arbitrary." The final portion of the Article considers some of the implications of this necessary "arbitrariness."

A. Classification of "Similar" Cases

To make statistical comparisons, one must identify relevant classes of similar and dissimilar persons or situations to be compared. Although

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[46] *See supra* note 3 and accompanying text.

[47] For a critical analysis of cases arguing that intent must be shown, *see infra* note 201 and accompanying text.

[48] *See infra* notes 109 & 115 and accompanying text.

this classification process is somewhat ad hoc and arbitrary, it often determines the "pattern" which is "discovered." Thus, it is essential that this classification be done very carefully. A recent case, *Shaw v. Martin*,[49] illustrates both the importance of classification and the need for careful analysis.

The defendant in *Shaw* introduced evidence indicating that killers of blacks are less likely to receive the death penalty than are killers of whites and argued that this constituted improper discrimination.[50] The court noted that these data were based on a comparative study of all capital murders and did not make comparisons within the subclass of all "murders of similar atrocity."[51] The court also suggested that this subclass should be so narrowly defined that only one such case — the defendant's — fell within it.[52] Thus, if one accepts the defendant's broad classification scheme in *Shaw*, there is at least arguably a pattern of racial discrimination. On the other hand, if the court's narrower approach is used, no such pattern exists because the defendant did not show that race would affect the sentence for killers "like" him.

A related problem arises when one tries to place a "meaning" on statistics. For example, in *Shaw* the defendant's evidence indicated the following pattern of racial discrimination based on race: 6.2 percent of the killers of whites were sentenced to death while only 4.2 percent of the killers of blacks were sentenced to death.[53] One could interpret this to mean that the likelihood of a death sentence is almost 50 percent greater for killers of whites than for killers of blacks[54] However, the court in *Shaw* took a different perspective and concluded that these percentages were "hardly significant figures when we consider that 95.8% of the killers of black victims do not have the death penalty imposed, and 93.8% of the killers of white victims do not."[55]

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[49] 733 F.2d 304 (4th Cir.), *cert. denied*, 105 S. Ct. 230 (1984).

[50] *Id.* at 311-14.

[51] *Id.* at 312. This type of approach has also been used by other courts. *See, e.g.*, McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985).

[52] Shaw v. Martin, 733 F.2d 304, 312 (4th Cir.), *cert. denied*, 105 S. Ct. 230 (1984).

[53] *Id.*

[54] For example, in a study of the prosecutor's decision to seek the death penalty, the authors assert that where the death penalty was sought in 51 of 148 white victim cases and in 6 of 55 black victim cases, "defendants who were charged with killing whites were 3.2 times more likely to have prosecutors seek the death penalty than those charged with killing blacks." Jacoby & Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J. CRIM. L. & CRIMINOLOGY 379, 384 (1982).

[55] Shaw v. Martin, 733 F.2d 304, 312 (4th Cir.), *cert. denied*, 105 S. Ct. 230

Shaw indicates the importance of assigning "meaning" when analyzing patterns. It also illustrates the need for extreme care in this task. If a study of sentencing patterns in all capital cases indicates that race is a factor, then there is at least reason to believe that race may be a factor in any particular subcategory of potential capital defendants. We cannot simply ignore the possibility of discrimination by assuming that racial patterns are irrelevant for a particular subcategory. This assumed irrelevance requires a further assumption: that persons in the subcategory would always be sentenced to death regardless of racial considerations. However, this second assumption is inconsistent with the constitutional model's underlying premise that a process approach is necessary because no one can be sure that individuals in certain categories should or will in fact always be sentenced to death. If we could establish such categories, mandatory capital punishment schemes would be permissible.[56]

Thus, the *Shaw* opinion seems to be based on the idea that even though the evidence could be relevant to his subcategory, it was insufficient to establish a prima facie case that racial patterns affected Shaw's category of criminals. However, when discussing the evidence in these terms, *Shaw* engaged in questionable reasoning.[57] For example, in discussing the relative percentages of killers of whites as against killers of blacks, the court based its conclusion on flawed statistical analysis. The court was unimpressed by the assertion that 6.2 percent of killers of whites were sentenced to death while 4.2 percent of killers of blacks were sentenced to death because these percentages were "hardly significant" when compared with the relative percentages of persons sentenced to life imprisonment.[58] This is improper statistical analysis. Suppose, for instance, that no white killers were being sentenced to death while two percent of black killers were sentenced to death. Under the

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(1984). Other courts have also focused on the small amount of relative variation in life sentencing patterns and argued that these indicate that the system as a whole is essentially rational. *See, e.g.*, McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985).

[56] *See supra* note 14 and accompanying text.

[57] For further criticism of the reasoning in *Shaw*, see *supra* note 47 and *infra* notes 58-59 and accompanying text. In McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985), the court explicitly considered statistical patterns to determine whether a prima facie case had been shown. However, *McCleskey* adopts the view that the defendant must demonstrate a prima facie case of intentional discrimination. *See infra* note 201 and accompanying text. Consequently, its analysis is also flawed because eighth amendment challenges of patterns should not be required to show intent. *See supra* notes 46-47 and accompanying text and *infra* note 65 and accompanying text.

[58] 733 F.2d at 312.

Shaw approach this pattern of only blacks being executed would be permissible because the two percent difference between the one hundred percent of white killers and the ninety-eight percent of black killers who receive life is "hardly significant." This view is untenable because it endorses a scheme in which only blacks are executed.

B. Factors to be Considered and the Burden of Proof

Statistical studies are designed to discover and explain correlations. Where the study reveals clear patterns — for example, if only black defendants are sentenced to death and if no other explanation for the correlation can be found — then we can say that race is "causing" the pattern.[59] However, such a starkly identifiable correlation is not usually the case because other potential explanations exist. For instance, if a test is used in hiring and only whites are hired, we cannot be sure that race caused the pattern of hiring only whites. Instead, we would also have to consider the possibility that ability and test performance caused the pattern. Consequently, further study would be required to determine whether the test was the determining factor and whether the test is racially neutral.[60]

Sentencing decisions are so complex that it is virtually always possible to identify a permissible, but unstudied, factor which could have "caused" an apparently discriminatory pattern. Once again *Shaw* is illustrative. One of the court's criticisms of the defendant's statistical comparison was that it did "not take into account many other factors entering into prosecutorial discretion, such as the willingness of a defendant to plead guilty, or whether the prosecutor has sufficient evidence to prove a defendant guilty."[61] There is merit in the court's skepticism concerning the utility of a limited number of mechanical variables to capture the complexity of actual litigation. Moreover, the initial burden of gathering statistical data and of showing the likelihood of an impermissible correlation clearly rests on the defendant challenging the sentence.[62] Nevertheless, defendants will never be allowed a

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[59] *See, e.g.*, A. STINCHCOMBE, CONSTRUCTING SOCIAL THEORIES 31-38 (1968).

[60] *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976).

[61] Shaw v. Martin, 733 F.2d 304, 313 (4th Cir.), *cert. denied*, 105 S. Ct. 230 (1984). For critical discussion of other cases holding that studies are incomplete and inadequate, see *infra* note 199 and accompanying text.

[62] Capital punishment is not prohibited by the eighth amendment so long as it is imposed in accordance with the constitutional model of a formal process that should, on its face, adequately structure and limit discretion and thus provide a meaningful basis for the sentence. *See supra* notes 1-23 and accompanying text. Thus, the legislative

meaningful opportunity to challenge improper patterns if they must disprove the causal impact of every conceivable factor. Furthermore, it is becoming increasingly difficult for courts simply to conclude that other factors could be involved because, as the studies of racial patterns become more richly developed, they eliminate more and more neutral factors as possible explanations for racial patterns.[63] Thus, it is becoming harder to argue that the problems do not result from improper racial discrimination. At some point — which may already have been reached — the burden must shift to the state to show how racially neutral factors like strength of case can affect a random sample of cases in a nonrandom manner. Consequently, courts must develop some standard, which will necessarily be arbitrary to some extent, to determine when the burden of proof will shift.

C. The Individual Sentence

The appeal of a particular sentence challenges the appellant's sentence as improper. As a result, it is his individual sentence, not the system, that is normally at issue. Consequently, there may be reason to doubt the relevance of a systemic pattern to a particular appeal even if, for example, the pattern clearly indicates that the death penalty scheme is to some extent racially discriminatory.

Initially, such systemic attacks may involve problems, analogous to issues of standing, that would arise when the pattern has nothing to do with the defendant. Such a pattern would be involved if killers of whites are more likely to be sentenced to death than are killers of blacks. In this case, the killer of a black could not suffer from the discrimination. Moreover, it is not clear whether the killer of a white has suffered from legally cognizable discrimination because it is arguably black victims who suffer from discrimination. If the burglar of a white residence challenged his conviction on the ground that police and prosecutors devoted more resources to burglary of white homes, the challenge would probably be rejected.[64] Thus, the killer of a white would be

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scheme is prima facie neutral, rational, and fair.

[63] For studies of such racial patterns, see *infra* note 86 and accompanying text.

[64] *See, e.g.*, 16 AM. JUR. 2D *Constitutional Law* § 192 (1979). On the other hand, black residents would have a ground for asserting that the denial of equal law enforcement services constitutes a denial of equal protection. *See, e.g.*, Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir.), *aff'd en banc*, 461 F.2d 1171 (5th Cir. 1971). For a philosophical criticism of the position that injustice is done to a defendant who is given his merited sentence while similar criminals are given lesser sentences, see Davis, *Sentencing: Must Justice Be Evenhanded?*, 1 LAW & PHIL. 77 (1982).

granted standing only if capital punishment is so different from other penalties that normal standards of equal treatment analysis do not apply. Logically, such a different standard of standing should apply because the constitutional model requires that the sentencing scheme provide a meaningful basis, and any pattern based on race would cast doubt on the scheme's rationality. Thus, it is not surprising that the cases have been generous in allowing defendants to argue that patterns based on race of the victim indicate that this basis does not exist.[65]

Even if standing is not a concern — either because the basis of the pattern is irrelevant to standing in eighth amendment challenges in capital cases or because the pattern is based on characteristics of the defendant — attempting to identify with certainty the "cause" of a particular sentence creates further problems. For example, if the discrimination involves patterns based on the race of the defendant, it is impossible to be certain that any particular defendant's sentence resulted from this discrimination. The crime may have been so egregious that the defendant would have been sentenced to death regardless of race.[66]

Although these causation issues are important, it is unclear how much, if any, importance they should be given. The four-stage constitutional model seeks to provide a meaningful basis for sentencing some to death and others to life. If racial disparity exists, the cause of that disparity should not necessarily affect our concern about whether such a

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[65] *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 249-52, 306-13 (1972); McCleskey v. Kemp, 753 F. 2d 877 (11th Cir. 1985); Shaw v. Martin, 733 F.2d 304, 311-12 (4th Cir.), *cert. denied*, 105 S. Ct. 230 (1984); Spenkelink v. Wainwright, 578 F.2d 582, 612-16 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979).

[66] This problem can be illustrated by assuming a pattern in which ten percent of black killers are sentenced to death while five percent of white killers are sentenced to death. In this situation, one of two cases may be involved. First, only five percent of the black killers might be sentenced to death in a racially neutral scheme. If so, racial discrimination "causes" the sentence of black killers who do not "deserve" capital punishment. However, even though discrimination causes the sentences, we still do not know whether to place a particular black defendant in the discriminatory five percent or the neutral five percent. In other words, statistical studies cannot show that any particular prosecutor, jury or judge improperly considered race, whether consciously or unconsciously, in sentencing a specific defendant. The second possible situation is that racial discrimination did not "cause" any black defendants to be sentenced to death. In this case, racial neutrality in sentencing might result in ten percent of the white killers being sentenced to death. As a result, discrimination in the grant of mercy "causes" the sentence of life imprisonment for five percent of the whites rather than "causing" the death penalty of any blacks. Because of this problem, some courts have held that studies of the system as a whole are simply irrelevant to the issue of discrimination in a particular case. *See, e.g.*, McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985); Prejean v. Blackburn, 743 F.2d 1091, 1101 (5th Cir. 1984).

meaningful basis exists. Thus, causation in a particular case is analogous to causation in a particular subcategory of cases.[67] Causation, either in particular cases or subcategories, might be relevant to remedy.[68] However, where the defendant has shown good reason to believe an improper factor significantly affects the system as a whole, then the burden should shift to the state to show that improper factors did not cause the sentence in a specific case.

D. Types of Patterns

1. Patterns Indicating Cultural Rejection of Death Penalty for Certain Classes of Murderers

One type of possible arbitrariness in sentencing results when virtually all persons in a category of murderers receive prison sentences while only a rare, occasional member of the category receives the death sentence. In such a case, society has rejected capital punishment for murderers in that category, and it is arbitrary for any person in the category to be singled out for execution.[69] As indicated above,[70] the first steps in the evaluation of such a pattern are to establish a classification scheme and then to determine whether legitimate factors are, or reasonably could be, responsible for selecting the persons within a particular category to be executed. If such permissible factors appear unlikely, then it is necessary to determine whether death sentences are imposed so rarely in these cases that the pattern indicates a cultural rejection of the death penalty in such situations.[71] Given the bias in favor of life in the basic constitutional model,[72] it is not surprising that such a demonstration of cultural rejection requires an extreme statistical pattern under existing case law.

For example, in *Enmund v. Florida*,[73] Justice White argued that, in the category of felony murderers who neither killed, intended to kill, nor could reasonably anticipate killing, no one had been executed in over twenty-five years and that only three such persons were currently

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[67] *See supra* text accompanying note 63.

[68] For a discussion of the remedy for discrimination "caused" by geographical factors, see *infra* note 98 and accompanying text. For consideration of the way in which remedy affects the treatment of causation issues, see *infra* notes 104-15 & 202 and accompanying text.

[69] *See supra* note 38 and accompanying text.

[70] *See supra* notes 49-63 and accompanying text.

[71] *See supra* note 38 and accompanying text.

[72] *See supra* notes 35-37 and accompanying text.

[73] 458 U.S. 782 (1982).

sentenced to death. Such an extremely small number indicated to Justice White that society had rejected execution as an appropriate punishment in such cases. Thus, he concluded that the death penalty in Enmund's case was disproportionate to the crime and his sentence was unreasonably arbitrary.[74]

However, even in an extreme case like *Enmund*, the problems of evaluating statistical patterns remain. Thus, Justice O'Connor could accept Justice White's classification scheme for purposes of argument and still criticize his position on several grounds. First, Justice O'Connor criticized the statistical data because the methodology used did not precisely identify which defendants were "similar" to Enmund.[75] Second, she argued that given the bias in favor of life and the possibility that permissible factors were involved, the small number of "similar" persons sentenced to death could be the result of a "good" exercise of discretion.[76] Finally, she noted that even if one could eliminate the first two problems, the analysis of cultural acceptance involves a consideration of other indicators of cultural attitudes, particularly legislation. Justice O'Connor's survey of the statutes indicated that half the death penalty states allow capital punishment for persons like Enmund.[77]

The close result in a case with as extreme a disparity as *Enmund*[78] indicates how broad a standard is used to determine cultural acceptance. This approach is understandable, given the constitutional model's bias in favor of life. In addition, there is the need for courts, particularly federal courts, to use restraint in striking down state legislation. Nevertheless, so long as this broad standard is used, few, if any, defendants will be able to demonstrate through comparative sentence review that their sentences are disproportionate to the crimes involved. In other words, it is likely that a sentence will be held to be "reasonably arbitrary" even if it is almost never imposed for a particular type of murder. The close split in *Enmund* also indicates the subjective nature of judicial review of particular patterns. To some, the pattern indicates

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[74] *Id.* at 783-801.

[75] *Id.* at 818-19 (O'Connor, J., dissenting).

[76] *Id.* at 819 (O'Connor, J., dissenting). Justice O'Connor notes that the rare imposition of the death penalty in this category "may only reflect that the sentencers are especially cautious in imposing the death penalty, and reserve that punishment for those defendants who are sufficiently involved in the homicide." *Id.*

[77] *Id.* at 813-15, 819-23 (O'Connor, J., dissenting).

[78] *Enmund* was a five-to-four decision; Justices White, Brennan, Marshall, Blackmun, and Stevens voted to reverse, while the Chief Justice and Justices Powell, Rehnquist, and O'Connor voted to uphold the death penalty.

cultural rejection, while to others it indicates reasonable selectivity in imposition of the death penalty.

2. Patterns Based on Neutral but Irrelevant Factors like Geographic Location

In an absolutely neutral, evenhanded sentencing scheme it should not matter whether a defendant committed a particular murder in a rural or urban area. However, some studies indicate that there is a greater likelihood of a death sentence in rural areas than in urban areas.[79] This section focuses on such geographic variations to consider whether there is anything constitutionally impermissible about patterns based on such facially neutral but irrelevant factors.

Our federal system already tolerates geographic diversity in the application of the death penalty; a murderer in a noncapital punishment state is never sentenced to death.[80] However, one could argue that if a state adopts a capital punishment scheme, that scheme must not vary in its geographical application within the state. For example, it is probably unconstitutional to have a death penalty statute that provided for life imprisonment for murders in urban areas and for the death penalty for murders in rural areas. Such a pattern fails to provide a meaningful basis for sentencing.

Nevertheless, a statistical pattern of some geographic variation in the application of a sentencing scheme is not the same as the mandatory total difference resulting from a statutory provision. Moreover, some degree of variation is inevitable in a discretionary system. If views on culpability vary according to whether one lives in a rural or an urban area,[81] then discretionary sentencing decisions will understandably vary accordingly. This variation is improper only if one of three things is true: (1) some of the rural sentences are disproportionate to the crime and the criminal; (2) despite the need for an individualized determination of sentence, absolute evenhandedness in sentencing is required; or

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[79] *See, e.g.*, Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-*Furman *Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067 (1983); Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754 (1983).

[80] Fourteen states have not adopted a death penalty scheme of some sort. Note, *Fairness and Consistency, supra* note 17, at 1220.

[81] *See, e.g.*, Prejean v. Blackburn, 743 F.2d 1091, 1101 (5th Cir. 1984): "Parishes, and the judicial districts they compose, are individualistic. We take judicial notice that the political and economic make-up, and educational background of citizens vary from one district to the next. Such characteristics identify a parish with certain views, beliefs and practices."

(3) even if absolute evenhandedness is not required, there is nonetheless a constitutionally mandated level of reasonable geographic consistency and this level has been exceeded.

It is impossible to know whether the sentences imposed in rural areas are disproportionate to the crime and criminal because there are no substantive measures of proportionality that can be used to identify precisely which murderers should be executed. The geographic disparity could be due to a merciful perspective adopted by the population in urban areas. Thus, it is hard to know whether any of the rural death sentences are disproportionate to the crime.

Nor is it possible to achieve perfectly equal treatment. The lack of sufficient substantive tests of proportionality in capital punishment cases prevents the use of mechanical per se tests like mandatory death sentencing schemes. Discretion is required, and "guided discretion" is still discretion. Thus, personal, subjective judgments are inevitable; and absolute evenhandedness is impossible. Because of this impossibility, adopting a requirement of absolute equality would be the equivalent of finding the death penalty per se unconstitutional. However, the Supreme Court has explicitly refused to adopt such a position.[82] Instead, its position has been that the death penalty is different but not totally different. As a result, the constitutional model requires heightened or increased due process; it does not require perfect due process.[83]

As indicated above, the increased procedural protections of the constitutional model necessarily include the general requirement that arbitrariness be held to be a reasonable level.[84] This requirement should include a constitutionally mandated level of reasonable geographic arbitrariness. The need for this specific requirement can be seen by considering the extreme case of all potential capital murderers being sentenced to death in rural areas and no potential capital murderers being sentenced to death in urban areas. In this case it could be argued that the death sentences imposed in rural cases still have a meaningful basis. The thrust of the argument is that the four-stage winnowing process validates sentences in rural areas and the validity of these sentences is not affected by the merciful pattern of decisions in urban areas.

This argument is based on the assumption that there is a meaningful basis for the rural sentences because there has been a careful consideration of the unique circumstance of each case. However, where an irrelevant variable like location becomes the dominant factor in sentencing,

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[82] *See supra* note 4 and accompanying text.

[83] *See supra* notes 15-22 & 44 and accompanying text.

[84] *See supra* notes 44-47 and accompanying text.

one may validly question whether in fact the four-stage process provides a meaningful basis for sentencing. As a result, in the extreme case society might be forced either to modify the scheme substantially or to abandon the death penalty because it appears to be imposed for irrelevant reasons.

Setting the standard of "reasonable levels of arbitrariness" is difficult, however, because in the real world, the extreme case does not exist. Location is a factor, but it is not the sole factor in deciding to impose the death penalty. For example, a study of the exercise of prosecutorial discretion in South Carolina revealed the following pattern:[85]

Location of Crime	Number of Homicides	Number of Capital Murders	Number of Death Requests	Probability for all Homicides	Probability for Capital Murders
Urban	400	102	31	.078	.304
Rural	838	169	84	.111	.497

Do such statistics indicate that geographic location has become sufficiently determinative to cast doubt on the rationality of the four-stage process? In other words, has the pattern of arbitrary geographic variation exceeded the permissible level of reasonable arbitrariness?

There can be no clear test or answer for this question; it requires a value judgment concerning the amount of variation that will be tolerated before the discretionary procedure will be eliminated or reformed. Thus, the four-stage discretionary sentencing scheme is itself measured by a higher-order discretionary scheme of constitutional review by the Supreme Court. This discretionary determination of permissible levels of arbitrariness in sentencing also involves a necessary amount of "arbitrariness."

3. Patterns Based on Impermissible Factors Like Race, Gender, and Wealth

Recent studies indicate that death penalty decisions are influenced by factors like race,[86] gender,[87] and wealth.[88] Patterns that reflect such fac-

[85] Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754, 780 (1983).

[86] *See, e.g.*, McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985); Baldus, Pulaski & Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 706-10 (1983); Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-*Furman *Capital*

tors raise more troublesome doubts about the fairness of the four-stage sentencing process than geographic location because they are not only irrelevant but also improper. A juror's views on culpability and mercy could properly be based on his rural subculture. For example, rural jurors may have a strict, punitive concept of just deserts that is different from that of their urban counterparts. However, a juror's views on punishment cannot properly be based on a racist bias such as "black killers of whites are more culpable than white killers of blacks." Similarly, it is shocking to think that poverty would be responsible for a person being executed rather than imprisoned.

Nevertheless, it is impossible to assure absolute lack of any racial patterns for two reasons. First, methodological problems inevitably hinder the determination of whether a pattern is caused by race or by a legitimate factor.[89] Second, racial differences and discrimination so permeate our society that even if prosecutors, judges and jurors were color

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Statutes, 74 J. CRIM. L. & CRIMINOLOGY 1067 (1983); Bowers & Pierce, *Arbitrariness and Discrimination Under Post*-Furman *Capital Statutes*, 26 CRIME & DELINQ. 563, 593-601, 607-16, 629-32 (1980); Jacoby & Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J. CRIM. L. & CRIMINOLOGY 379, 383-84 (1982); Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 LAW & SOC'Y REV. 437 (1984); Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754 (1983); Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918 (1981); Radelet & Vandiver, *The Florida Supreme Court and Death Penalty Appeals*, 74 J. CRIM. L. & CRIMINOLOGY 913 (1983); Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981). *But see infra* note 89.

[87] *See, e.g.*, Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post*-Furman *Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067, 1079-80 (1983); Radelet & Vandiver, *The Florida Supreme Court and Death Penalty Appeals*, 74 J. CRIM. L. & CRIMINOLOGY 913, 919-26 (1983); *but see, e.g.*, Bowers, *supra*, at 1085 (despite correlation by gender at the indictment and conviction stages, gender of victim has no effect at sentencing stage).

[88] Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post*-Furman *Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067 (1983); Radelet & Vandiver, *The Florida Supreme Court and Death Penalty Appeals*, 74 J. CRIM. L. & CRIMINOLOGY 913, 919-22 (1983).

[89] *See supra* notes 49-60 and accompanying text. The problems are complicated by anomalous results that could be due to the small size of the samples involved. For example, a study of the prosecutorial decision to seek the death penalty in South Carolina indicates that the death penalty is more likely to be sought if a white defendant kills a black victim than if a black defendant kills a black victim. Jacoby & Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J. CRIM. L. & CRIMINOLOGY 379, 383 (1982).

blind, cultural and economic differences would remain. As a result, a randomly selected group of black killers and black victims would be very different in terms of income, occupation, education, and general appearance from a similar sample of whites. Some level of racial variation is, therefore, to be expected and is found throughout the entire criminal justice system.[90]

Similarly, the wealth of the defendant affects not only his likelihood of committing certain crimes but also the outcome of all criminal proceedings.[91] So long as lawyers are allocated largely by a market system, differences in wealth will necessarily affect their distribution. Moreover, the quality and the availability of litigation support like investigators, ballistic experts, and psychiatrists will also be affected by wealth.[92]

Finally, gender is inevitably influential in criminal adjudication, particularly where crimes of violence are involved, because women are generally physically weaker and thus more vulnerable and sympathetic victims than men. In addition, regardless of whether culture or genetics is the cause, women seem statistically less likely to engage in criminal activity, particularly in aggressive crimes.[93]

Despite the role that race, wealth, and gender inevitably play in sentencing, it is nonetheless clear that if only blacks, indigents, and males were sentenced to death, the pattern would be unconstitutional. Therefore, the central issue in considering patterns reflecting race, wealth, and gender is "what level of differences in sentencing patterns involving these factors is permissible?" Determining this level of reasonable arbitrariness is a subjective matter involving one's personal views on such issues as how different is the death penalty from other punishments. Thus, once again, subjective choice and "arbitrariness" are implicated because of the need for a higher-order level of judicial discretion in reviewing sentencing systems.

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[90] *See, e.g.*, R. QUINNEY, CRIMINOLOGY 102-05 (1975); J. REIMAN, THE RICH GET RICHER AND THE POOR GET PRISON 77-110 (1984); U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 31-38 (1983).

[91] *See, e.g.*, R. QUINNEY, *supra* note 90, at 100-02; J. REIMAN, *supra* note 90, at 77-110; U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 31-38 (1983).

[92] There are constitutional and statutory rights to some expert assistance. *See, e.g.*, Ake v. Oklahoma, 105 S. Ct. 1087 (1985) (state must provide psychiatric expert to indigent defendant); S.C. CODE ANN. § 16-3-26(c) (Law. Co-op. 1983) (indigents entitled to two thousand dollars for investigative expenses or other services). However, these rights are limited and the funds provided are not comparable to the amount a wealthy defendant could spend on defense.

[93] *See, e.g.*, R. QUINNEY, *supra* note 90, at 99-100; U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 31-38 (1983).

E. Remedies

If comparative review indicates that a particular death sentence was imposed improperly, the remedy depends in part on the nature of the pattern. Where cultural rejection of a particular category is involved, then the remedy is to reverse the sentence and enjoin the death sentence is similar cases.[94] The proper remedy for the other types of patterns, however, is not so clear or simple for two reasons: first, reforms might eliminate the problem; and second, if reform cannot resolve the difficulty, the courts will be forced to prohibit the death penalty in all cases despite its considerable legislative and popular support.[95]

Possible reforms could take a number of guises, ranging from minor changes like additional jury instructions[96] to major changes like judicial review of prosecutorial discretion or replacing jury sentencing with sentencing by a panel of judges who must give reasons for their sentences.[97] Regardless of the nature of the reform, it will render data based on the old system suspect. Consequently, one must wait years while new data is gathered and the patterns of sentencing under the reformed system are studied. If impermissible patterns persist, additional reforms could be adopted and the process could repeat itself. If one is skeptical about the ability of procedural schemes to guide discretion, then one might conclude that it is possible that this cycle could continue indefinitely.

Throughout this reform and review process, the individual defendant could proceed through a series of sentencing hearings. Each time the defendant's sentence is reversed for lack of a necessary procedural protection, he will postpone the execution and get another chance at a sentence of life imprisonment rather than death. However, he will not necessarily avoid the death penalty.

Even if a reform could be adopted and implemented easily and quickly, there may still be a problem with the method used to eliminate

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[94] *See supra* note 38.

[95] Thirty-six states have adopted the death penalty, *see* Note, *Fairness and Consistency, supra* note 17, at 1220, and polls indicate that popular support for the death penalty is overwhelming. *See, e.g.*, Kaplan, *Administering Capital Punishment*, 36 U. FLA. L. REV. 177, 191 n.31 (1984) [hereafter Kaplan, *Administering Capital Punishment*] (66% favor capital punishment, 28% oppose it and 7% have no view); The State (Columbia, S.C.), Jan. 31, 1985, at 1A, col. 2; at 8A, col. 1; at 9A, col. 1 (84% of Americans support the death penalty).

[96] *See, e.g.*, Bell v. Ohio, 438 U.S. 637 (1978); Lockett v. Ohio, 438 U.S. 586 (1978).

[97] For an example of a scheme utilizing judges who must give reasons, see, e.g., NEB. REV. STAT. § 29-2522 (1979).

inequality. For example, if location is a determinative factor in sentencing, this factor can be eliminated either by sentencing more rural defendants to life or by sentencing more urban defendants to death. Adopting some procedural scheme to ensure the latter result, however, may seem a very questionable "reform" to some.[98]

Because of these "flaws" in reform approaches, it has been argued that the death penalty scheme should be found per se unconstitutional.[99] However, the Supreme Court has consistently rejected such an approach[100] and stressed the need for restraint when a federal court reviews state death penalty legislation.[101] So long as the state courts and legislatures are attempting to reform their schemes, it is unlikely that the Court will prohibit all death penalty schemes in the near future, particularly since the death penalty has considerable legislative and popular support.[102] The failure of repeated reform over a long period of time might alter the Court's stance, but this development will take time.[103]

This reluctance to prohibit capital punishment will likely affect the treatment of challenges based on improper sentencing patterns. For example, where racial discrimination is involved, the only possible remedy seems to be total prohibition of the death penalty.[104] Consequently, con-

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[98] For an account of an informal effort by prosecutors to remove racial discrimination by prosecuting more killers of blacks, see, e.g., Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456, 465-66 (1981). For critical discussions of such a "remedy" for race discrimination, see, e.g., Lempert, *Capital Punishment in the 80's: Reflections on the Symposium*, 74 J. CRIM. L. & CRIMINOLOGY 1101, 1110-14 (1983); Zeisel, *supra*, at 465-66.

[99] *See, e.g.*, Godfrey v. Georgia, 446 U.S. 420, 437-42 (1980) (Marshall, J., concurring). For further discussion of arguments for a per se approach based on the inevitability of procedural flaws, see *supra* note 44 and accompanying text and *infra* notes 218-19 and accompanying text.

[100] *See supra* notes 4, 32-33, & 43-44 and accompanying text.

[101] *See, e.g.*, Hubbard, *Meaningful Basis*, *supra* note 6, at 481-84, 487-90.

[102] *See supra* note 95.

[103] *See supra* text accompanying notes 96-98.

[104] Mandatory, nondiscretionary sentencing cannot resolve the inequality because such sentencing is prohibited. *See supra* text accompanying note 14. Successful elimination of the inequality by process reform is impossible because several factors make it seem unlikely that more procedural safeguards could limit abuse of discretion adequately. First, racism permeates our society. *See supra* text accompanying note 90. Second, jurors already know they should not consciously consider race in sentencing. Consequently, additional instructions cannot provide additional restraint. Finally, judicial review cannot serve as a check on racial abuse because we cannot determine which sentences result from discrimination and which are proper. *See supra* notes 49-68 and accompanying text.

cern for avoiding such an extreme remedy might have influenced the lower courts in their adoption of stringent standards concerning the validity and relevance of studies of racial patterns.[105] Similarly, since the eighth amendment process model prohibits even unintentional arbitrariness,[106] concern about remedy may have been partly responsible for the adoption of the requirement that intentional discrimination be shown.[107] The net result of these requirements is that no racial discrimination challenges to current death penalty schemes have been successful even though all the studies indicate some level of certain types of racial discrimination.[108]

F. Conclusion — The Paradox of "Reasonable Arbitrariness"

Although a consideration of "patterns" of sentencing might appear to be an objective, empirical undertaking, the exact opposite is true. Subjective, discretionary decisions are necessarily involved in determining whether the inevitable arbitrariness in these patterns has exceeded a reasonable level. For example, there are no clear, objective tests for deciding such important issues as how to classify "similar" cases; whether all the relevant factors have been studied sufficiently; whether an individual sentence is the result of an impermissible factor; when the burden of proof will shift to the state; whether "normal" standing rules apply; and the appropriate remedy for any improper pattern. Despite the lack of clear answers to such issues, it seems that several concerns are central to determining the standard to use in deciding whether a particular pattern exists and whether it has exceeded the reasonable level of arbitrariness.[109]

First, the nature of the pattern is crucial. Given the importance of avoiding racial discrimination, the permissible level of racial variation should be much lower than the acceptable level of geographic variation. In addition, where race is involved, the courts should be less stringent in assessing the adequacy of studies and in determining whether a study is relevant to the sentencing of a subcategory or for a particular

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[105] *See infra* notes 197-99 and accompanying text.

[106] *See supra* text accompanying notes 46-48.

[107] For discussion of the cases requiring intentional discrimination, see *infra* note 203 and accompanying text.

[108] *See supra* note 86 and accompanying text. For further discussion of the possible reasons for imposing extremely high standards for reviewing sentencing pattern challenges, see *infra* text accompanying notes 198-216.

[109] For further discussion of setting and applying this level of reasonable arbitrariness, see *infra* notes 197-216 and accompanying text.

individual. Although intentional discrimination need not be shown to prove an impermissible pattern, it is important to consider motivation. Where evidence independent of the pattern — for example, testimony concerning the stated motives of the prosecution — indicates intentional discrimination, the reviewing court should permit little, if any, variation.

Second, the potential remedies are also important. In some cases, limited reforms can eliminate the problem. For example, where a pattern indicates cultural rejection of the death penalty for particular types of murders, capital punishment for this category can be prohibited without substantial impact on the total death penalty scheme. However, in other cases, total prohibition of capital punishment may be the only approach to eliminating an improper pattern. In these situations, respect for legislation and popular views, as well as for federalism where a federal court is involved, weigh on the side of adopting strict standards to evaluate the reliability and relevance of studies and to determine whether the pattern exceeds permissible levels.

In setting these standards, the concern for remedy should not be given excessive weight. Even if the death penalty scheme is completely stricken down, it is still possible to impose the severe penalty of life imprisonment on murderers, and thus achieve the legitimate goals of retribution, deterrence, and incapacitation.[110] Consequently, the state's interest in capital punishment is more limited than its interest in punishment in general.[111] Racial patterns characterize all punishment,[112] but to prohibit all sentencing because of such patterns would improperly interfere with the compelling state interest in law enforcement.[113] Therefore, it is legitimate, for example, to require that intent to discriminate be shown where noncapital sentencing patterns are being challenged. On the other hand, because prohibiting the death penalty does not interfere with such a compelling state interest, defendants should not be required to prove intent,[114] and there should be less reluctance to prohibit capital punishment if necessary. Consequently, the

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[110] *See supra* notes 8-16 and *infra* note 116 and accompanying text.

[111] *Cf., e.g.*, Spaziano v. Florida, 104 S. Ct. 3154, 3172-73 (1984) (White, J., concurring) (goals of retribution, deterrence, and incapacitation are all served by life imprisonment and capital punishment). See *infra* note 127 and accompanying text for analysis of another perspective on the distinction between punishment in general and the death penalty in particular.

[112] *See supra* note 90 and accompanying text.

[113] *See, e.g.*, McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (Clark, J., dissenting).

[114] *Id.*

standards for evaluating the adequacy and relevance of studies should be less stringent.

Finally, setting the level of reasonable arbitrariness necessarily involves paradox. For example, it requires the court to acknowledge a right to racial equality while also speaking in terms of permissible levels of racial discrimination in sentencing persons to death.[115] Such paradoxical statements illustrate the fundamental value conflicts involved in reviewing death penalty sentencing patterns. The next section addresses the tragic nature of these conflicts and discusses the tactics used to avoid the necessarily arbitrary nature of their resolution.

III. The Tragic Aspect of the Death Penalty Debate

The debate about the justice and constitutionality of the death penalty cannot be fully understood without first developing an appreciation of the nature of the debate. For instance, the discussion might be phrased in terms of deterrence or fair procedures, but the basic dispute is usually over more fundamental questions concerning the way and extent to which intentional killings — both murders and executions — differ from other human crimes and punishments. Similarly, our appreciation of the death penalty dispute is enhanced if it is viewed in terms of symbolic positions and of deeply held, pretheoretic views on crime and punishment, as well as in terms of instrumental goals such as deterrence.[116] This approach is necessary because most persons' views about the death penalty are apparently unaffected by data on its deterrent effect or by information concerning its administration and its psychological and physical impact on persons executed.[117]

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[115] "We are challenged to determine how much racial discrimination, if any, is tolerable in the imposition of the death penalty." *Id.* at 920.

[116] *See, e.g.*, Stolz, *Congress and Capital Punishment: An Exercise in Symbolic Politics*, 5 Law & Pol'y Q. 157 (1983); Thomas & Foster, *A Sociological Perspective on Public Support for Capital Punishment*, in Capital Punishment in the United States 172 (H. Bedau & C. Pierce eds. 1976).

[117] *See, e.g.*, Ellsworth & Ross, *Public Opinion and Judicial and Decisionmaking: An Example from Research on Capital Punishment*, in Capital Punishment in the United States 152 (H. Bedau & C. Pierce eds. 1976); Sarat & Vidmar, *The Public and the Death Penalty: Testing the Marshall Hypothesis*, in Capital Punishment in the United States 190 (H. Bedau & C. Pierce eds. 1976); Stolz, *Congress and Capital Punishment: An Exercise in Symbolic Politics*, 5 Law & Pol'y Q. 157 (1983); Tyler & Weber, *Support for the Death Penalty; Instrumental Response to Crime, or Symbolic Attitude?*, 17 Law & Soc'y Rev. 21 (1982); Vidmar & Ellsworth, *Public Opinion on the Death Penalty*, in Capital Punishment in the United States 125 (H. Bedau & C. Pierce eds. 1976). For discussion of the importance of the psychological impact of waiting to be executed, see, e.g., Kaplan, *Administering Capital Punish-*

When this cultural perspective is adopted, it becomes apparent that the death penalty dispute in general, and the question of sentencing patterns in particular, can be understood more fully by considering it in terms of a tragic dilemma. This tragic quality explains otherwise puzzling aspects of the death penalty debate — for example, the way in which both proponents and opponents strongly argue that their position is correct because it is clear that certain things "just aren't done."[118] It also sheds light on the unusually emotional nature of even scholarly writings on the topic.[119]

A. Tragic Qualm and the Death Penalty

Tragedy as an art form gains its basic strength from its ability to force us to confront the limits of the human condition.[120] These tragic limits are not simply the scarcity that economists address when they offer techniques to impose distributive order on scarce goods. Rather, these limits involve our inability to find or impose order in the universe. A tragic drama has a unique impact because of its ability "to shock profoundly the moral prepossessions of the race — to shake, if not unsettle, confidence in the moral order, in the moral reality of the universe."[121] This shock results in a feeling of "tragic qualm," which is a "feeling of insecurity and confusion, as if it were a sort of moral dizziness and nausea, due to the vivid realization, in the dramatic-fable, of a suspicion which is always lurking uncomfortably near the threshold of consciousness, that the world is somehow out of plumb."[122]

Every culture has issues that are unanswerable within the context of its view of the moral order. If the issue is sufficiently important, the failure of the moral system to address it will give rise to a sense of

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ment, supra note 95, at 182-86; van den Haag, *Comment on John Kaplan's "Administering Capital Punishment,"* 36 U. FLA. L. REV. 193, 195-97 (1984).

[118] *See infra* notes 150-58 and accompanying text.

[119] Although it is difficult to generalize about the normal tone and range of scholarly disagreement, some recent death penalty pieces seem unusually caustic and personal. *Compare, e.g.*, Bedau, Book Review, 81 MICH. L. REV. 1152 (1983) *with* Berger, *Death Penalties and Hugo Bedau: A Crusading Philosopher Goes Overboard*, 45 OHIO STATE L.J. 863 (1984). Even where critiques are measured and dispassionate, the criticisms are sometimes blunt and total. *See, e.g.*, Little, *Another View*, 36 U. FLA. L. REV. 200, 200 (1984) ("John Kaplan's paper is a failure.").

[120] *See, e.g.*, A. BRADLEY, SHAKESPEAREAN TRAGEDY 15-40 (1904); P. FRYE, ROMANCE AND TRAGEDY 92-155 (1908); F. LUCAS, TRAGEDY 34-69 (rev. ed. 1962); D. RAPHAEL, THE PARADOX OF TRAGEDY (1960).

[121] P. FRYE, ROMANCE AND TRAGEDY 97 (1961).

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

tragic qualm. Because two societies may have different cultural views of the moral order, the particular situations which give rise to tragic qualm may vary according to the culture involved.[123]

A central feature of our cultural system for imposing moral order on the political system is a constitutional scheme based on a shared view that all human persons are entitled to certain "natural rights."[124] Such schemes of specific rights presuppose that the possessor of the rights is a "person," which requires that he be alive and able to make rational, self-conscious decisions.[125] Rights theories also presuppose that each person who is capable of responsible choice will be accorded respect for the exercise of his rights.[126] Thus, our society places great value on the sanctity of life, responsible choice, and respect for individuals, and this value scheme provides order and consistency in much of our lives. However, when the values of sanctity of life and respect do not indicate a clear result — for example, where we need to decide how to punish a person who has committed a brutal murder — our shared theory does not provide clear guidance for social decisionmaking.[127]

The disagreement which inevitably will result can be seen by considering the following chain of reasoning sometimes used by proponents of the death penalty:

(1) A very culpable murderer has rejected not simply the notion of sanctity of life but also the very foundation of social contract: a minimal respect for the most basic rights of others; and

(2) This murderer, therefore, has totally forfeited his right to life and respect; and

(3) In order to affirm the social contract and sanctity of life, we must execute this murderer.[128]

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[123] *See, e.g.*, G. CALABRESI & P. BOBBITT, TRAGIC CHOICES 17-28, 167-91 (1978).

[124] *See, e.g.*, Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149-185, 365-409 (1928).

[125] *See, e.g.*, R. FLATHMAN, THE PRACTICE OF RIGHTS 70-74, 86-88 (1976); A. WHITE, RIGHTS 75-92 (1984); Hart, *Are There Any Natural Rights*, 64 PHIL. REV. 175 (1955); Sapontzis, *A Critique of Personhood*, 91 ETHICS 607 (1981).

[126] *See, e.g.*, R. FLATHMAN, *supra* note 125, at 70-74, 86-88; A. WHITE, *supra* note 125, at 75-92; Hart, *supra* note 125; Sapontzis, *supra* note 125.

[127] Similar problems occur if preconditions of personhood do not exist. Thus, we have no clear guidance on such questions as abortion or euthanasia where an incompetent person suffers from a severe, incurable, and painful illness. *See, e.g.*, J. GLOVER, CAUSING DEATH AND SAVING LIVES (1977); Sapontzis, *supra* note 125, at 618.

[128] *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 183-84 (1976); Berns, *The Morality of Anger*, in THE DEATH PENALTY IN AMERICA 333, 333-34 (H. Bedau 3d ed. 1982); van den Haag, *In Defense of the Death Penalty: A Practical and Moral Analysis*, in THE DEATH PENALTY IN AMERICA, *supra*, at 323, 331-33. For further analysis of the

Although this somewhat paradoxical reasoning is fatally incomplete, it cannot simply be rejected out of hand, for something akin to a forfeiture of rights and affirmation of obligations is essential to the justification of any punishment.[129] In addition, it is highly questionable to assert that all humans, including brutal murderers, are equally entitled to rights regardless of merit or moral character.[130]

Nevertheless, the reasoning is incomplete in a basic respect because the second assertion is highly debatable. It is not clear that brutal murderers, much less other types of murderers, have totally forfeited their basic right to life and respect. The general practice of punishment can be justified by using only a concept of partial forfeiture of rights where a person breaches his obligation to obey the law.[131] Difficulty arises, however, when we attempt to develop a substantive scheme of total forfeiture, because our basic social theory does not clearly indicate how to do so.[132] A consequence of this lack of guidance is that we can only say that the assertion of total forfeiture of rights is "open to debate;" we cannot say that it is clearly wrong.

A similar problem arises when we critique the third assertion. Our cultural framework does not clearly indicate how best to affirm the sanctity of life and increase respect for law. Some punishment is required, but taking a life in order to condemn killing is, at least, paradoxical. Some argue that the paradox is only apparent because executing convicted murders is different from murdering innocent victims.[133] This is, of course, a valid distinction because criminals "deserve" punishment while innocent persons do not.[134] However, the distinction justifies only some punishment; it does not address the question of whether only executions can affirm the sanctity of life. Moreover, some persons may not see executions as life-affirming; instead, it is possible that ex-

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concept of "affirming social norms," see *supra* note 11 and accompanying text and *infra* notes 150-69 and accompanying text.

[129] *See, e.g.*, Hubbard, *Meaningful Basis*, *supra* note 6, at 546-49, 552-56.

[130] *See, e.g.*, Sapontzis, *supra* note 125, at 615-17. For examples of the tragic dilemma resulting from the conflict between merit and egalitarianism in allocating scarce health resources, see, e.g., H. BOWIE & R. SIMON, THE INDIVIDUAL AND THE POLITICAL ORDER 10-11 (1971); G. CALABRESI & P. BOBBITT, *supra* note 123.

[131] *See, e.g.*, Hubbard, *Meaningful Basis*, *supra* note 6, at 552-56.

[132] *Id.* at 556-58. This distinction between total forfeiture and partial forfeiture also underlies the difference in relative treatment of the equal protection objections to punishment in general and to the death penalty in particular. *See supra* notes 100-04 and accompanying text.

[133] *See, e.g.*, van den Haag, *In Defense of the Death Penalty: A Practical and Moral Analysis*, in THE DEATH PENALTY IN AMERICA 323, 327-28 (H. Bedau 3d ed. 1982).

[134] *See* Hubbard, *Meaningful Basis*, *supra* note 6, at 554-56.

ecutions will diminish respect for life while making celebrities of murderers. Such a brutalization of people's views could cause murders.[135] Again, however, we can only conclude that the assertion is not clearly right; we cannot show that it is clearly wrong.

Our culture's inability to provide clear answers is not troubling when lesser punishments are involved; however, uncertainty and paradox in the moral order are more unsettling where the death penalty is at issue. As a result, we often resort to rationalizing tactics to avoid the tragic qualm that accompanies such cases.[136] The next section illustrates this technique by discussing several of the tactics used in arguing for and against capital punishment. The final section then uses this tragic perspective to analyze the constitutional model and judicial review of sentencing patterns in capital cases.

B. Three Common Tactics to Avoid "Tragic Qualm" in Death Penalty Analysis

1. There Are No Tragic Dilemmas

One common approach to tragic situations is to deny their existence. At one extreme, this denial takes the form of a belief in a supreme being or a transcendental union of conflicting moral values.[137] Unfortunately, these denials have not been accompanied by a coherent blueprint for implementing such a vision in a modern pluralistic society.[138] Moreover, it is unlikely that anyone could develop a theistic scheme that would be broadly acceptable today.[139]

Another approach to denying tragic qualm cannot be faulted for such a lack of specific proposals. This approach asserts that there are no tragic dilemmas, just hard choices, and often suggests specific schemes for making these choices.[140] Although these schemes may provide guidance where hard choices are involved, they cannot do so where tragic choices are involved. For example, choosing to kill one innocent person to save six innocent lives is a hard choice; that is, to most members of

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[135] *See infra* note 165 and accompanying text.

[136] *See, e.g.*, G. CALABRESI & P. BOBBITT, *supra* note 123, at 17-28.

[137] *See, e.g.*, R. UNGER, KNOWLEDGE AND POLITICS (1975); R. UNGER, LAW IN MODERN SOCIETY (1976).

[138] *See, e.g.*, Harries, Book Review, 85 YALE L.J. 847 (1976).

[139] *See, e.g.*, Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229.

[140] *See, e.g.*, Barry, *Tragic Choices*, 94 ETHICS 303 (1984). For a useful critique of the view that "tragic choices" do not exist except within the context of primitive theories, see, e.g., Nussbaum, *Aeschylus and Practical Conflict*, 95 ETHICS 233 (1985).

our culture the proper answer is clear, though regretful.[141] However, the choice becomes tragic when we must choose between:

(1) Executing six identifiable persons who have committed brutal murders and risking the lives of unknown innocent victims who may be murdered because these executions may "brutalize" some persons' views on death and thus may result in additional murders;[142] or

(2) risking the death of unknown innocent victims whose murders might be deterred by the executions.

One can choose in such a case; indeed, one must choose.[143] But it is a tragic choice because there is no socially acceptable formula that can tell us how to calculate costs and benefits and find the optimal solution.[144]

Where constitutional adjudication is involved, some argue that there is no tragic dilemma in resolving the death penalty issue because the literal wording of the Constitution clearly indicates that capital punishment is constitutionally permissible and is a matter of state law.[145] This position contradicts our understanding of the nature of judging because judicial decisionmaking, including constitutional adjudication,[146] always involves the need to choose.[147] This position is also debatable in terms of the relevant provisions of the Constitution.[148] It is, therefore, reassur-

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[141] *See, e.g.*, Nussbaum, *supra* note 140.

[142] *See infra* note 165 and accompanying text.

[143] *See, e.g.*, Hubbard, *Meaningful Basis*, *supra* note 6, at 575-76; Kaplan, *supra* note 7, at 559. For further discussion of similar choices, see, e.g., S. KADISH, S. SCHULHOFER & M. PAULSEN, CRIMINAL LAW AND ITS PROCESS 787-88 (4th ed. 1983).

[144] Even were society to ignore the problems involved in comparing incommensurable values and attempt to do a cost benefit analysis of "comparable" items, it would be impossible to determine relative costs and benefits. For example, how does one calculate the value of the public's being "assured" that criminals are punished? *See, e.g.*, Stolz, *supra* note 116, at 163-65.

[145] *See, e.g.*, R. BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE (1982).

[146] *See, e.g.*, Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029 (1977).

[147] *See, e.g.*, B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); R. DWORKIN, TAKING RIGHTS SERIOUSLY (1978); J. GRAY, THE NATURE AND SOURCES OF THE LAW (2d ed. 1971); K. LLEWELLYN, THE COMMON LAW TRADITION (1960); 3 R. POUND, JURISPRUDENCE § 109 at 383-415 (1959); Aldisert, *The Nature of the Judicial Process: Revisited*, 49 U. CIN. L. REV. 1 (1980); Dewey, *Logical Method and Law*, 10 CORNELL L. Q. 17, 24 (1924).

[148] *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 380-83, 409, 419-20, 429-30 (1972); Conrad, *The State as Killer*, 1983 AM. B. FOUND. RESEARCH J. 451, 456-60; Bedau, Book Review, 81 MICH. L. REV. 1152 (1983).

ing to note that the Supreme Court has rejected this mechanical approach to the eighth amendment and has accepted the responsibility to review capital punishment both in terms of cultural acceptance and in terms of an objective theory of just punishment.[149]

2. Certain Acts Are Absolutely Forbidden

Another approach to tragic dilemmas, particularly where the death penalty is concerned, is to impose absolute limits on permissible actions. Under this view, certain things "just aren't done." Both opponents and proponents of the death penalty use this tactic. For example, supporters of capital punishment argue that death is appropriate for certain murders because society must affirm clearly and forcefully that such crimes "just aren't done."[150] Opponents, on the other hand, assert that deliberate killings by the state "just aren't done" in a civilized society.[151]

Any tactic that can so easily support either side can justly be criticized as potentially ad hoc and subjective. This criticism is strengthened when one considers the reasons often given for the absolute prohibition. For example, both sides often defend their position by asserting that "death is different." This truism is indisputable, but the further question of "how different" still remains, particularly since there seems to be considerable agreement that it is permissible to kill an aggressor in self defense.

The importance of this second question is clear when one considers several arguments sometimes made by critics of the death penalty. Some opponents argue that the death penalty is absolutely prohibited because it is "legalized killing."[152] However, they do not address the question of why "legalized kidnapping" in the form of imprisonment is permissible. This is a crucial omission because it is not obvious that the difference between imprisonment and execution is sufficient to justify "legal kidnapping" but not "legal killing."

Avoiding the question of "how different" also allows critics to make two somewhat inconsistent arguments: first, that death is so final and severe that it is totally different, and that therefore only life imprison-

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[149] *See, e.g.*, Hubbard, *Meaningful Basis*, *supra* note 6, at 482-91.

[150] *See, e.g.*, Stolz, *supra* note 116, at 165-70. For discussion and criticism of the notion that the death penalty is necessary to affirm social norms, see *supra* notes 11, 128-35 and accompanying text and *infra* notes 161-69 and accompanying text.

[151] *See, e.g.*, Amsterdam, *Capital Punishment*, in THE DEATH PENALTY IN AMERICA 346 (H. Bedau 3d ed. 1982); Little, *supra* note 119, at 205-06.

[152] *See, e.g.*, Amsterdam, *supra* note 151; Stolz, *supra* note 116, at 168-70.

ment is permissible; and second, that life imprisonment is so awful a punishment that society need not execute to deter murders.[153] If life imprisonment is as bad as the second argument suggests, the assertion of the overwhelming difference between the two penalties is considerably undermined.

Proponents of the death penalty also avoid the question of "how different" the death penalty is. As a result, they fail to distinguish among types of homicides or provide a coherent set of reasons for executing some killers while imposing life imprisonment on still others[154] and imposing only relatively short prison sentences on others, such as manslaughterers.[155] By avoiding the question they also escape the need to defend the position that only executions — and not some form of imprisonment — can affirm the view that life is sacred.[156]

Regardless of whether one favors or opposes the death penalty, avoiding the question of exactly how different death is creates two other, very troublesome problems. First, because enormous resources are devoted to implementing death penalty schemes, fewer resources are available to address other, more widespread problems in the criminal justice system, such as race- and class-oriented patterns in noncapital sentencing[157] and disproportionate punishment for noncapital crimes.[158] If the unwillingness of the absolutist position to compare executions

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[153] *See, e.g.*, Amsterdam, *supra* note 151.

[154] The statutory lists of aggravating circumstances vary considerably from state to state, *see, e.g.*, Note, *Fairness and Consistency*, *supra* note 17, at 1227-32, and some circumstances appear ad hoc and irrational. *See, e.g.*, Godfrey v. Georgia, 446 U.S. 420 (1980); Hubbard, *Meaningful Basis*, *supra* note 6, at 563-64, 568, 569-70, 573.

[155] *See, e.g.*, S.C. CODE ANN. §§ 16-3-50 (Law. Co-op. 1983) (two to thirty years for voluntary manslaughter, that is, intentional homicide without malice aforethought, and three months to three years for involuntary manslaughter, that is, unintentional but criminally reckless homicide). For a general discussion of homicide, see, e.g., W. LAFAVE & A. SCOTT, CRIMINAL LAW §§ 67-79 (1972).

[156] *See, e.g.*, Committee on the Judiciary, U.S. Senate, *Capital Punishment as a Matter of Legislative Policy*, in THE DEATH PENALTY IN AMERICA 311 (H. Bedau 3d ed. 1982). The committee report argues that the death penalty is a proper punishment for murder because the punishment "must acknowledge the inviolability and dignity of innocent human life." *Id.* at 316.

[157] *See supra* notes 90-91 and accompanying text.

[158] Studies of disparities in noncapital sentencing within particular states indicate extraordinarily wide disparities in sentences for the same or similar crimes. *See, e.g.*, Knapp, *Impact of the Minnesota Sentencing Guidelines on Sentencing Practices*, 5 HAMLINE L. REV. 237 (1982). In addition, many punishments are imposed which seem vastly disproportionate to the crime involved. *See, e.g.*, Solem v. Helm, 103 S. Ct. 3001 (1983); Hutto v. Davis, 454 U.S. 370 (1982); Rummell v. Estelle, 445 U.S. 263 (1980); Annot., 33 A.L.R.3D 335 (1970).

and imprisonment prevents giving other injustices a proper share of resources, then the avoidance of the tragic dilemma will itself result in a tragic, or at least a sad, result. Second, absolute positions make meaningful dialogue difficult, if not impossible. Impasse is particularly likely if crucial questions like "how different is killing" are ignored.

3. Some People Are Not Persons

A third approach to avoiding the tragic qualm in death penalty analysis is to assert that the one being killed is somehow not a "person." If the individual is not a person, then deliberately killing him is not a problem for our cultural framework's emphasis on respect for every person's life and rights. Once again, this is a tactic available to both opponents and proponents, and both have used it to avoid the tragic dimension involved in deliberately killing a "person."

As indicated above,[159] this tragic aspect is involved because of the uncertainty that executions save innocent lives through deterrence. If we could be sure that the only effect of the death penalty is to deter murders that life imprisonment did not, the tragic dilemma would be removed and some notion that the right to life is forfeited might be justifiable.[160] However, because deterrence is an open issue, and because executions may cause the murder of innocents, the tragic dilemma cannot be avoided.

Death penalty proponents have occasionally used three approaches to avoid this conflict between persons. First, some supporters of the death penalty argue that brutal murderers have totally forfeited their right to be treated as persons; or, alternatively, they argue that the killer is simply unlike the rest of us because a truly human person would not commit such a brutal act.[161] Either alternative enables death penalty sup-

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[159] *See supra* notes 140-44 and accompanying text.

[160] *See, e.g.*, Hubbard, *Meaningful Basis*, *supra* note 6, at 552-56, 564-65.

[161] *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 184 (1976); F. CARRINGTON, NEITHER CRUEL NOR UNUSUAL 127-38 (1978); Berns, *The Morality of Anger*, in THE DEATH PENALTY IN AMERICA 333 (H. Bedau 3d ed. 1982); van den Haag, *In Defense of the Death Penalty: A Practical and Moral Analysis*, in THE DEATH PENALTY IN AMERICA 323, 331-33 (H. Bedau 3d ed. 1982); *cf., e.g.*, Godfrey v. Georgia, 446 U.S. 420, 448 (1980) (White, J., dissenting) (permissible to execute for reason that murder was "outrageously or wantonly vile, horrible or inhuman or that [the murder] involved . . . depravity of mind" despite asserted vagueness of phrase). In Gregg v. Georgia, 428 U.S. 153 (1976), the plurality opinion noted that "the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Id.* at 184. The

porters to conclude that a total forfeiture of the right to personhood has occurred and that, therefore, the question of deterrent impact is simply irrelevant.[162] Second, forfeiture has been used to justify the death penalty in terms of incapacitation or specific deterrence. Since parole or commutation is available and since some people kill in prison or after escaping, life imprisonment cannot be totally effective in preventing recidivism. As a result, some murderers might kill again. Because of this risk, some argue that all murderers should be executed.[163] Finally, some proponents use the forfeiture argument to apportion the burden of proof on the deterrence issue. They argue that since we cannot be sure about deterrence, it is better to risk executing very culpable killers, because they have at least partially forfeited that right to full personhood, rather than to risk having innocent victims murdered.[164]

None of these approaches eliminates the tragic conflict. One reason for this failure to resolve the dilemma is that all three require one to assume that little, if any, increase in murders occurs because of the possibility of a "brutalization effect." This effect might result because by making murderers seem "important" and by lessening respect for life by sanctioning deliberate killing by the state, executions may actually increase the number of murders.[165] If the assumption that there is

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total forfeiture of rights has the further effect that a person may be punished solely to satisfy society's sense of outrage or desire for revenge. *See, e.g.*, *id.* at 183-84; Berns, *supra*. Such a forfeiture is necessary because we would not normally punish a person simply to satisfy the emotional response of others. *See, e.g.*, Hubbard, *Meaningful Basis*, *supra* note 6, at 552.

[162] *See supra* notes 128-35, 150-58, & 161 and accompanying text.

[163] *See, e.g.*, Anders, *Pro*, The State (Columbia, S.C.), Jan. 10, 1985, at 15A, col. 1. A recent poll indicates that 42% of Americans favor the death penalty "to protect society from future crimes that person might commit." The State (Columbia, S.C.), Jan. 31, 1985, at 9A, col. 1. For a satirical critique of the incapacitation argument, see Bartels, *Capital Punishment: The Unexamined Issue of Special Deterrence*, 68 IOWA L. REV. 601 (1983).

[164] *See, e.g.*, Hubbard, *Meaningful Basis*, *supra* note 6, at 561-62, 564-68, van den Haag, *In Defense of the Death Penalty: A Practical and Moral Analysis*, in THE DEATH PENALTY IN AMERICA 323 (H. Bedau 3d ed. 1982).

[165] For discussions of the brutalization effect, see, *e.g.*, Bailey, *Disaggregation and Death Penalty Research: The Case of Murder in Chicago*, 74 J. CRIM. L. & CRIMINOLOGY 827, 855-59 (1983); Bowers & Pierce, *Deterrence or Brutalization, What is the Effect of Executions?*, 26 CRIME & DELINQ. 453 (1980); Forst, *Capital Punishment and Deterrence*, 74 J. CRIM. L. & CRIMINOLOGY 927, 938-40 (1983); King, *The Brutalization Effect: Execution Publicity and the Incidence of Homicide in South Carolina*, 57 SOC. FORCES 683 (1978). For discussions of how the possibility of a brutalization effect complicates deterrence analysis, see, *e.g.*, Hubbard, *Meaningful Basis*, *supra* note 6, at 566-67; Kaplan, *Problem*, *supra* note 7, at 560-61.

no such brutalization effect is invalid, then innocent deaths are caused by executions and the tragic choice between "persons" remains.

Another problem with the first two approaches is that they require that killers totally forfeit their rights. However, although a total forfeiture of rights requires some additional justification beyond that required for a partial forfeiture, none is given. For example, such a justification is needed in the second approach because recidivism among killers is low.[166] Consequently, recidivism is so minor a factor that this argument requires one to say that murderers have totally forfeited all rights. Moreover, even if we could identify those murderers who are likely to kill again, the constitutional sentencing model apparently does not require the states to focus on this issue and most states do not.[167] This lack is not surprising, because the Supreme Court has apparently rejected incapacitation as a rationale for the death penalty.[168]

Developing a theory of total forfeiture is particularly difficult where murder is concerned. For example, as a condition to forfeiting rights, the killer must be able to make a clear, deliberate moral choice. However, the life histories and psychological profiles of many murderers suggest that many are substantially deficient in their capacity to make such a responsible choice.[169]

Critics of the death penalty sometimes adopt one of two methods to avoid recognizing that murder victims are real persons. One is simply to say that we cannot use capital punishment until we are sure that the death penalty deters.[170] Since we can never be sure about deterrence, this approach means that there will be no executions regardless of the deterrent potential. Thus, the net effect of this arbitrary allocation of the burden of proof of the unprovable is that victims who might be saved by deterrence do not count as persons. The other approach takes the position that statistical persons are not like identifiable persons and thus do not count in the moral analysis. Under this view it is wrong to execute a murderer, who is a "real" person because his identity is known, even though this might deter the murder of an unknown, statis-

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[166] *See, e.g.*, Kaplan, *Problem*, *supra* note 7, at 560-61.

[167] *See, e.g.*, Note, *Fairness and Consistency*, *supra* note 17, at 1225-37.

[168] *See, e.g.*, Spaziano v. Florida, 104 S. Ct. 3154, 3172 n.19 (1984) (White, J., concurring).

[169] *See, e.g.*, Hutchins v. Garrison, 724 F.2d 1425 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 750 (1984); Kaplan, *Problem*, *supra* note 7, at 567-70.

[170] *See, e.g.*, Archer, Gartner & Beittel, *Homicide and the Death Penalty: A Cross-National Test of a Deterrence Hypothesis*, 74 J. CRIM. L. & CRIMINOLOGY 991, 1012-13 (1983).

tical person in the future.[171] The flaw in this approach is that statistical victims are real persons.[172]

The view that some humans are not persons overlaps somewhat with the absolute position that certain things are not done. For example, the assertion that brutal murderers have totally forfeited their right to personhood could be restated as an absolute prohibition of brutal murders. In addition, the rejection of personhood by both proponents and critics resembles the absolute position in that both inhibit debate about capital punishment. Meaningful analysis requires an open discussion of such topics as the nature of personhood, forfeiture of rights, and the proper resolution of the empirical questions concerning deterrence. Such discussion cannot occur if disputants simply assert that some humans are not persons.

C. Equal Treatment and the Myth that Procedures Can Solve Tragic Dilemmas

1. The Use of Procedures to Avoid Tragic Dilemmas

Another approach to avoid tragic dilemmas is to design a "fair" procedural scheme to resolve the choice.[173] Because tragic conflicts arise where the shared cultural value system does not provide substantive answers, the use of a process has appeal because we can often agree on a fair process even though we cannot agree on results.[174] Thus, it is not surprising that the Supreme Court has adopted a process approach in developing the constitutional model of the death penalty.

This lack of substantive guidance in tragic situations not only results in a preference for a process approach; it also has two impacts on the nature of the decisionmaking process itself. First, because "fairness" cannot have any substantive dimension, the process will often seek to be fair by being "representative." In this way, it can reflect society's views. Second, because legitimate substantive criteria for identifying classes of cases cannot be articulated — except in very broad terms — the representative decisionmaker must reach decisions on a case-by-case basis. Finally, the lack of substantive guidance means that it will be impossible to state culturally acceptable reasons for the decision; if it were pos-

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[171] For a statement of this argument, see, e.g., Kaplan, *Problem*, *supra* note 7, at 559-60.

[172] For a more complete criticism of the argument, see, e.g., Hubbard, *Meaningful Basis*, *supra* note 6, at 575-77.

[173] *See, e.g.*, G. CALABRESI & P. BOBBITT, *supra* note 123.

[174] *See, e.g.*, Rawls, *Justice as Fairness*, 67 PHIL. REV. 164 (1958).

sible to give reasons that satisfy the cultural value scheme, the choice would not be tragic. As a result, the process will only give us results; no reasons will be given. Such a procedural scheme for resolving dilemmas has been aptly termed an "aresponsible agency."[175]

Perhaps the paradigm of an aresponsible decisionmaker is the jury;[176] it is "representative," decides only the particular case before it, and never gives reasons. Consequently, it is not surprising that the jury plays a central role in death penalty schemes.[177] It not only considers the question of penalty, but also addresses such issues as whether the killing was done with "malice."[178] It is possible to guide and structure this discretionary power in sentencing by using rules that limit the use of the discretion to certain cases — aggravated murders — and by articulating relevant factors to be considered. But these techniques only constrain the jury; they do not eliminate its discretionary power as an aresponsible agency.

The jury is not the only aresponsible decisionmaker in capital cases. Perhaps just as important is the prosecutor, who has the power to determine whether a defendant will be charged with a capital offense, if the death penalty will be sought, and how to prepare and present the case. In exercising this power, the prosecutor is viewed as the appointed or elected representative of the state, can focus on one case at a time (even while thinking about classes of cases), and need not give reasons. Moreover, the prosecutor must be fair in his decisions because, although the advocate of the state at trial, he is ethically bound to seek justice, not simply to secure convictions.[179] At the final stage of a capital case, the governor also functions as an aresponsible decisionmaker because commutation powers are representative, applied case-by-case, and require no statement of reasons.[180]

The discretionary, aresponsible powers of the jury, the prosecutor, and the executive play a central role in all criminal proceedings. However, these powers are particularly central to death penalty schemes because they enable us to avoid the tragic dilemma involved in sentencing.

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[175] G. CALABRESI & P. BOBBITT, *supra* note 123, at 57-58.

[176] *Id.*

[177] *See, e.g.*, Pulley v. Harris, 104 S. Ct. 871 (1984). In upholding the Georgia process model, the Court "relied on the jury's finding of aggravating circumstances . . . as rationalizing the sentence." *Id.* at 879.

[178] *See, e.g.*, W. LAFAVE & A. SCOTT, CRIMINAL LAW § 67 at 528-30 (1972).

[179] *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1979); ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, Standard 3-1.1(c) (1979).

[180] *See, e.g.*, S.C. CONST. art. IV, § 14.

However, the four-stage process only avoids the dilemma; it cannot eliminate the tragic nature of the death penalty choice.

2. Tragic Dilemmas that Arise with the Use of Procedures and Tactics to Avoid these New Dilemmas

Paradoxically, the constitutional model actually exacerbates the conflict because it appears to promise a "meaning-*full*" basis for capital punishment.[181] The phrase suggests both a "rational" resolution of the problem and an "equal" imposition of the death penalty. However, it is impossible to achieve both because the process model achieves "rational" results by utilizing a bias in favor of life.[182] Thus, equality in results is impossible, and the apparent promise of equal treatment cannot be fulfilled.[183]

Even though total equality is impossible, it is still possible at least to reduce inequality — for example, through increased use of statistical studies of sentencing patterns in all potential death penalty cases and a greater willingness to reverse "aberrational" death sentences. However, accomplishing this reduction would involve a considerable investment of limited judicial resources. For example, the review of death cases in Florida currently consumes thirty-five to forty percent of the Florida Supreme Court's total work time,[184] yet this review does not include a comparative analysis of all potential death penalty cases.[185] If state supreme courts are to utilize statistical studies in anything other than a mechanical manner, even more resources will necessarily be directed to death penalty review. Thus, the capacity of the process model to reduce inequality is constrained by the limits on judicial resources. Consequently, reform efforts require us to choose between improved justice for capital defendants as opposed to other defendants and litigants.

These limits give additional support to the decision in *Pulley v. Harris*.[186] The first part of this Article argued that *Pulley* was consistent with the constitutional model because total equality is impossible

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[181] *See supra* notes 1-37 and accompanying text.

[182] *See supra* notes 34-37 and accompanying text.

[183] *Id.*

[184] Radelet & Vandiver, *supra* note 86, at 914.

[185] *See, e.g.*, Sullivan v. State, 441 So. 2d 609 (Fla. 1983): "Proportionality review is a process whereby we review the case before us in light of the cases *that have previously been decided.*" *Id.* at 613 (emphasis added); *cf., e.g.*, Pulley v. Harris, 104 S. Ct. 871, 877-78 n.8 (1984) (review of cases reflects narrow approach to proportionality review).

[186] 104 S. Ct. 3154 (1984).

under the model.[187] In addition, it is now clear that the approach in *Pulley* can be defended on the ground that because of limitations on judicial resources, federal courts should be reluctant to require states to adopt procedures that might reduce inequality. Such requirements could substantially and improperly interfere with each state's allocation of resources.

Even if states emphasized equal treatment to a greater degree and provided for detailed comparative proportionality review procedures, the tragic dimension of the death penalty would not be eliminated. As indicated in the preceding paragraph, an initial problem is that committing resources to the death penalty process reduces courts' ability to address other serious inequalities in the criminal justice system.[188] This reduction is at least sad, if not tragic. More fundamentally, as the earlier discussion of comparative review indicated,[189] procedures cannot eliminate the tragic dilemma; they merely rephrase the issues.

These new issues are not limited to review of sentencing patterns. For example, for the jury to function as an aresponsible agency, it must be unbiased and representative. However, hard issues concerning the representativeness of the jury have been raised by studies indicating that the jury in a capital case is not neutral and representative.[190] This lack of neutrality and representativeness results from the process used to select a jury that is unbiased on the issue of capital punishment. The prospective jurors are questioned and those who would never vote for or against capital punishment are disqualified.[191] This approach is consistent with the need to have a jury willing to apply the law in deciding the sentence for a particular defendant.[192] Unfortunately, however, asking the jury about their views on sentencing may tend to make them more likely to think that the defendant is already guilty.[193] Moreover, the studies indicate that disqualifying persons with rigid views on sentencing results in a jury that is more likely, when compared to a randomly selected jury, to believe the state's case and thus find the defen-

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[187] *See supra* notes 29-37 and accompanying text.

[188] *See supra* notes 89-91 & 158 and accompanying text.

[189] *See supra* text accompanying notes 49-50.

[190] *See infra* note 195 and text accompanying notes 191-93.

[191] *See, e.g.*, Wainwright v. Witt, 105 S. Ct. 844 (1985).

[192] *Id.*

[193] *See, e.g.*, Hovey v. Superior Court, 28 Cal. 3d 1, 69-82, 168 Cal. Rptr. 128, 174-82, 616 P.2d 1301, 1347-55 (1980); Haney, *Juries and the Death Penalty: Readdressing the* Witherspoon *Question*, 26 CRIME & DELINQ. 512 (1980); Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121 (1984).

dant guilty.[194]

Although the courts have disagreed over whether this impact requires a change in current jury selection procedures, most have held that the studies are inadequate or that they fail to indicate constitutional flaws.[195] Regardless of the ultimate resolution of this issue as a

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[194] *See, e.g.*, Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Venireman*, 42 U. COLO. L. REV. 1 (1970); Bronson, *Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict? Some Evidence from California*, 3 WOODROW WILSON L. REV. 11 (1980); Fitzgerald & Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31 (1984); Gross, *Determining the Neutrality of Death-Qualified Juries: Judicial Appraisal of Empirical Data*, 8 LAW & HUM. BEHAV. 7 (1984); Haney, *supra* note 193; Jacoby & Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J. CRIM. L. & CRIMINOLOGY 379 (1982); Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971); Kadane, *After* Hovey*: A Note on Taking Account of the Automatic Death Penalty Jurors*, 8 LAW & HUM. BEHAV. 115 (1984); Thompson, Cowan, Ellsworth & Harrington, *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 LAW & HUM. BEHAV. 95 (1984).

[195] Because of the adverse impact of the qualification process on the right to have a representative, impartial jury, two federal district courts have reversed convictions based on juries selected by this process. Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983); Keeten v. Garrison, 578 F. Supp. 1164 (W.D.N.C. 1984). *Grigsby* has been affirmed by the Eighth Circuit. Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985). However, it is the only circuit to adopt such a holding. *Keeten* has been reversed by the Fourth Circuit, Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984), and the Fifth and Eleventh Circuits have rejected challenges to the composition of the death-qualified jury. McCorquodale v. Balkcom, 705 F.2d 1553, 1556 (11th Cir. 1983), *aff'd following remand*, 721 F.2d 1493 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 2161 (1984); Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981); *modified*, 671 F.2d 858 (5th Cir. 1982), *cert. denied*, 459 U.S. 882 (1982); Spenkelink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979). In rejecting these challenges, the courts have consistently used tactics that avoid the tragic dilemma involved in the challenge to the representativeness of the jury. For example, the court often claims the studies are inadequate, although it is not clear how the inadequacies involved could be corrected. *See, e.g.*, Keeten v. Garrison, 742 F.2d 129, 133 n.7 (4th Cir. 1984); Smith v. Balkcom, 660 F.2d 573, 578 n.13 (5th Cir. 1981). In addition, these three circuits have consistently distorted the nature of the challenge. The defendants are claiming that they have a right to a representative, neutral jury — that is, a jury that is neither more nor less guilt-prone than a randomly selected jury that has not been subject to the death penalty qualification process. However, in rejecting the challenge, the courts have characterized the assertion of a right to neutral jury as a right to a jury that would favor the defense. For example, the Fifth and Eleventh Circuits have consistently relied upon the following reasoning in Spenkelink v. Wainwright, 578 F.2d 582, 594 (5th Cir. 1978): "That a death-qualified jury is more likely to convict than a nondeath-qualified jury does not demonstrate which jury is impartial. It indicates only that a death-qualified jury might

matter of constitutional law, it illustrates how the process approach to capital punishment forces society to address new, equally troublesome issues. For example, because the studies all suggest that more guilt-prone juries result, they would, if valid and reliable, force us to consider how much variation in the likelihood of finding guilt must be shown. In other words, it could be necessary to decide how much bias and lack of representativeness is reasonable. The difficulties in answering such questions may have influenced the courts' findings that the studies are inadequate and irrelevant.

New questions are also inevitable because of the possibility of improper patterns of decisionmaking by aresponsible agencies. This problem exists because, although aresponsible decisionmakers focus on the just result in individual cases, it is possible to study patterns in these individual decisions. Moreover, even though we lack sufficient substantive guidelines to agree on how to decide individual cases, we can often agree on how not to decide them. As a result, the use of an aresponsible decisionmaker inevitably involves the possibility that the pattern of its decisions indicates that many cases may not have been decided properly. When this happens a new question arises: Is the process functioning adequately?

This is precisely the question that has arisen in the context of capital sentencing. Even though prosecutors and juries focus on one case at a time and may try to be fair and neutral in addressing that case, the system of such individual decisions appears to be less than perfectly fair and neutral. As a result, the use of an aresponsible decisionmaker in the constitutional process model requires us to develop the paradoxical concept of "reasonable arbitrariness." Developing such a concept involves such questions as "how much racism is permissible in a system that claims that race is irrelevant in capital sentencing."[196] These questions force us once again to experience the tragic qualm that comes from answering a question which has no "objective" answer. Here the qualm involves not only the internal tensions in our shared view of personal rights,[197] but also our commitment to equal rights in the sense

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favor the prosecution and that a nondeath-qualified jury might favor the defendant." This argument assumes that there are only two types of juries: defense-biased and prosecution-biased. Because a neutral jury is not prosecution-biased, the argument combines it with the defense-biased category. Under this approach, the defendant can never prevail because it is obvious that he is not entitled to a defense-biased jury.

[196] *See supra* note 115 and accompanying text.

[197] *See, e.g.*, McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985); Prejean v. Blackburn, 743 F.2d 1091, 1101-02 (5th Cir. 1984); McCorquodale v. Balkcom, 705 F.2d 1553, 1556 (11th Cir. 1983), *aff'd following remand*, 721 F.2d 1493 (11th Cir.

that no one will receive a particular punishment because of race.

Appellate courts appear to have adopted two strategies to avoid this qualm. First, they eliminate the problem of considering whether racially discriminatory patterns are unreasonably arbitrary by rejecting the studies as inadequate[198] and/or as irrelevant to the individual sentence.[199] Second, they distort the eighth amendment basis for the requirement of a meaningful basis[200] by holding that only deliberate discrimination is forbidden.[201]

The adoption of this approach to the review of patterns in sentencing has three advantages in addition to avoiding the tragic conflict. First, the strict standards enable the courts to avoid striking down all or part of death penalty schemes and thus to avoid clashing with the popular and legislative support for the death penalty.[202] This concern has additional weight where a federal court is reviewing state legislation. Second, insurmountable standards limit the strain on judicial resources, because reviewing death penalty sentencing patterns requires a signifi-

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1983), *cert. denied*, 104 S. Ct. 2161 (1984); Spenkelink v. Wainwright, 578 F.2d 582, 612-13, 615-16 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979).

[198] *See supra* notes 124-27 and accompanying text.

[199] *See, e.g.*, McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985); Prejean v. Blackburn, 743 F.2d 1091, 1101 (5th Cir. 1984); Shaw v. Martin, 733 F.2d 304, 311-13 (4th Cir.), *cert. denied*, 105 S. Ct. 230 (1984).

[200] *See supra* notes 46-47 & 65 and accompanying text.

[201] A number of cases considering racial patterns in sentencing have required that the challenges prove motive or intent to discriminate. All of the cases adopting this standard have found that the statistical evidence was insufficient to establish a prima facie case of improper discrimination. Most of these cases have treated the claim as a fourteenth amendment claim. *See, e.g.*, McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985); Prejean v. Blackburn, 743 F.2d 1091, 1099-1101 (5th Cir. 1984); Shaw v. Martin, 733 F.2d 304, 312 (4th Cir.), *cert. denied*, 105 S. Ct. 230 (1984); Smith v. Balkcom, 660 F.2d 573, 585 (5th Cir. 1981), *modified*, 671 F.2d 858, 859-60 (5th Cir.), *cert. denied*, 459 U.S. 882 (1982); Spenkelink v. Wainwright, 578 F.2d 582, 614-16 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979).

Some courts have treated the challenge to patterns as an eighth amendment claim and explicitly held that the challenger had to show motive or intent to prevail on such a claim. *See, e.g.*, McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985). The Fifth Circuit took an even more extreme position on eighth amendment claims in Spenkelink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979), holding that if the four-stage constitutional model has been used in sentencing, "then the arbitrariness and capriciousness — and therefore the racial discrimination — . . . have been *conclusively* removed." *Id.* at 613-14 (emphasis added). *Spenkelink* has been used to justify the rejection of eighth amendment claims even where the sentencing patterns "reveal glaring disparities in the imposition of the death penalty based on race, sex, and poverty." Mitchell v. Hopper, 538 F. Supp. 77, 90 (S.D. Ga. 1982).

[202] *See supra* note 95 and accompanying text.

cant time commitment by both state and federal courts. Finding the studies inadequate is a relatively inexpensive alternative to meaningful review. Finally, these standards enable courts to limit the examination of patterns in both capital and noncapital criminal cases. Because we know that both patterns are questionable,[203] difficult issues might be raised when defendants later assert that the standards of review in capital cases should be used in reviewing noncapital sentencing patterns.[204]

All of these factors — validity of studies, relevance of studies, motivation of discretionary decisionmakers, popular attitudes, legislative support, conservation of judicial resources, and the relationship of capital procedures to noncapital sentencing procedures and patterns — are relevant to defining and applying the level of reasonable arbitrariness in sentencing patterns.[205] However, it is not clear that they justify avoiding the need to set that level. Such avoidance, however, appears to be the tactic adopted thus far.[206]

The criticism that the courts are avoiding the tragic dilemma by using too high a standard for reviewing challenges to sentencing patterns is, in a sense, contrary to this Article's position that the review of patterns involves subjective, discretionary decisions at various points.[207] If no objective test for evaluating patterns exists, how can one claim that courts have not adequately assessed them? The judicial evaluation of challenges to sentencing patterns is, after all, discretionary. There are several responses to the argument that the rejection of sentencing pattern challenges results from discretion rather than the avoidance of the tragic dilemma.

First, as indicated often above,[208] we may not know what the proper results should be, but we do have fairly clear notions of improper results. For example, it is clear that if sentences are substantially influenced by race, then we can no longer confidently say that capital sentences are based on meaningful considerations rather than arbitrary factors.

Second, the decisions themselves suggest that the standard of review of sentencing patterns has been set so high that the tragic dilemma need

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[203] *See supra* notes 89-91, 112, & 158 and accompanying text.

[204] For an argument that this concern is invalid because capital punishment can be distinguished from noncapital punishment because of the compelling state interest in punishment in general, see *supra* text accompanying notes 112-14.

[205] For a further discussion of setting and applying this level of reasonable arbitrariness, see *supra* notes 109-15 and accompanying text.

[206] *See supra* notes 198-201 and accompanying text.

[207] *See supra* notes 47-49, 85, & 115 and accompanying text.

[208] *See supra* notes 45-46 and accompanying text.

not be faced. For example, requiring defendants to show intentional discrimination is inconsistent with the eighth amendment model.[209] Thus, the adoption of this requirement suggests an unwillingness to face the dilemma. In addition, no matter how detailed and thorough the studies of sentencing patterns are, they are always found to be inadequate.[210] This could be due to the faults in the quality of the studies, but there is reason to suspect that the studies themselves are not the basic problem. For example, the studies are often criticized for failing to include important variables that may have affected the outcome;[211] yet no court has considered why random factors like strength of the prosecution's case affect the outcomes in such a nonrandom manner. Considering this question could lead to the conclusion that the state should have the burden of proof. However, if the state failed to satisfy that burden, absolute prohibition of the death penalty could be the only remedy. The understandable desire to avoid such a draconian remedy suggests avoidance.[212] The courts have also consistently addressed the issues of classification and relevance narrowly.[213] These decisions are discretionary and could be due to a "proper" exercise of that discretion. However, the resistance to considering whether racial discrimination in the system is relevant to a subcategory of a particular defendant[214] and the improper statistical analysis resulting from the emphasis on relative percentages of life sentences rather than death sentences,[215] at least provide reasons to question whether the court is avoiding the tragic dilemma.

Third, other values are involved. In particular, sentencing review is likely to be affected by institutional concerns like respect for popular views and legislation, the need for restraint by federal courts, and the need to conserve judicial resources and avoid excessive appellate intervention in both noncapital and capital sentencing decisions. It certainly seems plausible to assume that, like the understandable desire to avoid tragic dilemmas, these institutional concerns could also support a desire to avoid reviewing the results of sentencing patterns too closely.

Finally, the judicial treatment of the issue of the neutrality and rep-

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[209] *See supra* text accompanying notes 46-48 & 66.

[210] *See supra* note 195 and accompanying text.

[211] *See supra* notes 59-63 and accompanying text.

[212] *See supra* note 95 & text accompanying note 202.

[213] *See supra* text accompanying notes 49-58 and notes 66-68 and accompanying text.

[214] *See supra* text accompanying notes 63 & 67-68.

[215] *See supra* notes 53-58 and accompanying text.

resentativeness of the jury[216] parallels the review of sentencing patterns. Both types of challenges to death penalty schemes involve statistical studies, and courts have used similar tactics to deal with statistical attacks on the constitutional process model and thus to avoid the tragic conflict.

3. The Inevitability of Tragic Conflict

The issues of representativeness of the jury and equality in sentencing patterns are symptomatic of a deeper problem. Even if we could somehow resolve these particular issues, the four-stage process model would not eliminate the tragic aspect of capital punishment. Procedures, no matter how thorough and "rational," simply cannot fully address the underlying substantive issues.[217] For example, does the death penalty deter or cause murders that would not otherwise occur? What crimes, if any, are so culpable that execution is ever justified?

Because of this fundamental shortcoming of procedures, it is clearly impossible to claim to be neutral on the substantive issues. Thus, given the evidence on sentencing patterns, it is not possible for a court to uphold them without having made a series of substantive decisions ranging from "how reliable must a study be" to "how much racial discrimination is permissible."

At the same time, it is not always possible for opponents to claim to be neutral when they use procedural arguments against capital punishment. For example, some opponents argue that the death penalty is permissible, but only if imposed in accordance with a procedural exactness that is impossible to achieve — for example, if we can be perfectly sure that no innocent persons are executed[218] or that perfect equality in

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[216] *See supra* notes 194-96 and accompanying text.

[217] For a general criticism of this shortcoming in all process approaches, see, *e.g.*, F. NORTHRUP, THE COMPLEXITY OF LEGAL AND ETHICAL EXPERIENCE 46-48 (1959).

[218] *See, e.g.*, Godfrey v. Georgia, 446 U.S. 420, 437-42 (1980) (Marshall, J., concurring); C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (2d ed. 1981); Amsterdam, *Capital Punishment*, in THE DEATH PENALTY IN AMERICA 346, 349-52 (H. Bedau 3d ed. 1982); Bedau, *Miscarriages of Justice and the Death Penalty*, in THE DEATH PENALTY IN AMERICA, 234-41 (H. Bedau 3d ed. 1982); Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177, 1225-31 (1981); Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980).

If one considers legal errors, such as denial of the right to a neutral jury through improper *voir dire*, as well as factual errors, then the problem is compounded. *See, e.g.*, Amsterdam, *supra*. It should be stressed that the underlying problem — punishment of

result will be achieved.[219] Given this impossibility, many of these critics can conclude that the death penalty is not permitted even while claiming neutrality on the substantive issue. However, their neutrality is illusory because perfection is clearly impossible. Thus, their position utilizes the myth of perfect procedural justice to avoid the tragic issues involved.

Despite the inability of procedures to resolve the tragic conflict, the constitutional model is a justifiable effort to provide more consistent, less arbitrary results than prior methods.[220] Thus, stricter procedures

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the wrongly convicted innocent person — exists with all punishment. *See* Hubbard, *Meaningful Basis*, *supra* note 6, at 555 n.863. However, risking the punishment of the innocent is not the same as deliberately punishing the innocent. *Id.*; *see also* Alexander, *Retributivism and the Inadvertent Punishing of the Innocent*, 2 LAW & PHIL. 233 (1983).

A similar objection to the death penalty is that, even where society can be certain that a defendant is guilty of murder, a serious risk exists that the defendant will be sentenced to death even though he is not sufficiently culpable to justify such a sentence. *See, e.g.*, Kaplan, *Administering Capital Punishment*, *supra* note 95, at 186-88. Given the bias in favor of life that is built into the constitutional model, *see supra* notes 34-37 and accompanying text, this objection is tantamount to a demand for perfection, which is impossible. Thus, the position is in reality a substantive attack on the death penalty phrased in procedural terms.

[219] *See, e.g.*, Baldus, Pulaski & Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 664 (1983) (authors assert that it is "clear" that comparative inequality violates the eighth amendment); Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456, 468 (1981) ("There simply is no way to ensure the evenhanded administration of the death penalty. That alone should be sufficient reason for its abolition."). *Cf., e.g.*, Goodpaster, *Judicial Review of Death Sentences*, 74 J. CRIM. L. & CRIMINOLOGY 786, 821 (1983) (at times reforms are urged so that discrimination can be reduced to reasonable levels; however, the author also argues that "[w]hile it may be *impossible to eliminate* completely the discriminatory effects of race and place, appellate courts *must demand* principled and *nondiscriminatory sentences*, and must vacate death penalties imposed for either reason") (emphasis added); Greenberg, *Capital Punishment as a System*, 91 YALE L. J. 908 (1982) (abolition implicitly urged because of author's feeling that American society will not tolerate reducing procedural protections to a point necessary to reduce effectively the increase in death row population); Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305 (not expressly calling for abolition but criticizing Court for imposing a process which gives the form of rationality without truly guiding discretion, and thus allowing choice without a sense of responsibility); Note, *Fairness and Consistency*, *supra* note 17 (not specifically urging abolition but criticizing Court for "abandoning" effort to achieve virtually perfect procedures).

[220] Although it is hard to compare the current system with earlier approaches, the four-stage model clearly achieves a substantial degree of consistency. For example, a recent, thorough study of patterns in Georgia indicated that cases of obviously severe

may have created some improvement. The essential point, however, is that procedures are subject to severe limits. Consequently, they can "legitimize" the death penalty in only a very narrow sense.

Where patterns of sentencing are involved, these limits have a twofold impact. First, as indicated above,[221] these limits suggest that a system of guided discretion cannot be expected to achieve anything more than "reasonable arbitrariness." The system cannot be "perfect," and to demand perfection is tantamount to opposing capital punishment in all cases. Second, these limits require that the standard of reasonable arbitrariness be sufficiently realistic to provide defendants with a fair opportunity to challenge patterns of sentencing. This is necessary because the inherent limits of the process model prevent us from placing total confidence in its performance. In short, we cannot simply assume that the model works as intended; we must critique its performance in terms of its results. Though we lack substantive guides to indicate what these results should be in all cases, we do have clear standards — the prohibition of racial discrimination, for example — to use in determining when the results are improper.

Despite the need for a realistic standard of reasonable levels of arbitrariness, the courts appear to have adopted a virtually impossible standard of review of sentencing patterns. This standard makes it possible to avoid the tragic dilemma and to satisfy a variety of legitimate concerns. However, it accomplishes this avoidance at the expense of honesty and, perhaps, the goal of reasonably fair and equal treatment as well. As a result, it is more difficult to assume that the model provides a meaningful basis for capital sentencing. Consequently, this avoidance of sentencing review seriously undermines whatever ability the process model has to legitimize capital punishment.

Conclusion

Since the Supreme Court has relied on the four-stage model to legitimize the death penalty, we can anticipate that future litigation, studies, and articles will address further refinements of this process. We can also anticipate that proponents of capital punishment will complain of delays, technicalities, and loopholes in the process, while opponents will criticize the system for arbitrariness, unfairness, inequality and reliance on "extra-legal" factors. These responses are inevitable because proce-

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aggravation are more likely to involve a death sentence than cases at the other end of the spectrum. *See* McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985).

[221] *See supra* notes 34-38, 44-48, 78, 84-93, & 109-15 and accompanying text.

dures cannot resolve the underlying tragic dilemma. Moreover, the debate can be counterproductive if it so occupies our attention that it prevents us from acknowledging that our positions on the death penalty are based on a subjective, individual, arbitrary, nonrational resolution of a tragic dilemma.

Once the nature of the death penalty issue is faced and accepted, we can achieve an improved perspective on the dilemma. The dilemma is not eliminated, but our understanding of the human condition is enhanced. Dramatic tragedies are written to have this effect on the audience. Thus, their dramatic resolution or "catharsis" has a dynamic dimension insofar as it depends on the response of the audience and on its actions after leaving the theatre.[222]

Similarly, a tragic perspective on the death penalty requires a personal response. It is not sufficient to understand the tragic nature of dilemma and identify the tactics used to avoid the dilemma. The conflicts remain and the death penalty issue demands some decision. Each of us must make a subjective choice that conforms to his individual view of just punishment. In doing this, it is necessary to remember that our views are just that — our personal choice. Where patterns of sentencing are involved, this awareness of the nature of our position forces us to recognize the subjective quality of any definition of the permissible range of "reasonable arbitrariness" in sentencing patterns.

This awareness does not commit us to the view that positions on the death penalty are "arbitrary." Views on justice are like death penalty decisions in that both can be said to have a meaningful basis if they are made in accordance with a process that guides subjective, discretionary choices.[223] These views will not be perfect, but they are not arbitrary; or at least they are not "unreasonably arbitrary." However, this awareness does force us to eschew tactics that enable us to hide from the dilemma. In particular, it prevents us from avoiding the tragic aspect of the death penalty by adopting a process model while refusing to adopt a realistic standard of review of the sentencing patterns that result from the use of that model. Instead, we must be willing to ask in a fair manner whether the model in fact works.

If we do adopt such a meaningful approach to review of sentencing

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[222] P. FRYE, *supra* note 120, at 99-155; F. LUCAS, *supra* note 120, at 34-69; D. RAPHAEL, *supra* note 120.

[223] *See, e.g.*, B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980); R. DWORKIN, *supra* note 147, at 22-28, 105-23, 279-90, 331-38 (2d ed. 1978); J. RAWLS, A THEORY OF JUSTICE (1971); AND JUSTICE FOR ALL 1-16 (T. Regan & D. VanDeVeer eds. 1982). *But see, e.g.*, Leff, *supra* note 139.

patterns, the review may indicate that the system does function within permissible levels of reasonable arbitrariness. On the other hand, if the model exceeds these levels, then it must be reformed. If reform is impossible — as it appears to be if racial patterns exceed permissible levels[224] — then only two options remain. Either a new approach to justification of capital punishment must be used since the process model is unsatisfactory, or we must abandon capital punishment entirely.

[224] *See supra* note 104 and accompanying text.