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CAPITAL PUNISHMENT IN THE '80's: *REFLECTIONS ON THE SYMPOSIUM**

RICHARD LEMPERT**

I. LAWYER'S PERSPECTIVES

Looking at this, the first major symposium treating capital punishment as it is administered in the post-*Gregg*¹ era, one is struck by both the ways in which this body of scholarship resembles the work of the pre-*Furman*² era and by the ways in which it is different. The most striking difference lies in the concerns of the legal scholars. The big issue that so concerned an earlier generation—the constitutionality of the death penalty given the eighth amendment and evolving standards of decency—is nowhere directly addressed. Instead, the task that lawyers in the symposium set themselves is to identify constitutional deficiencies in the way that people are selected for death and to suggest ways that these deficiencies may be corrected.

The result is a body of work that is decidedly ameliorative. Thus, Professor Strafer does not use his powerful description of conditions on death row to argue that a penalty system that entails such conditions should be abolished. Rather, he uses it to support the position that the condemned should not be allowed to “volunteer” for execution by refusing to pursue appeals. If the argument is accepted, perhaps a few lives a decade will be saved. The same can be said about the case that Professor White makes for attaching a fifth amendment privilege to statements made in psychiatric examinations.

Perhaps the starkest contrast between the old and new perspective is found in that work which focuses on disparities in sentencing people to death. Contrast the work of Professor Goodpaster and Professors Baldus, Pulaski and Woodworth in this issue with that of Charles

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¹ *Gregg v. Georgia*, 428 U.S. 153 (1976).

² *Furman v. Georgia*, 408 U.S. 238 (1972).

Black.³ For Professor Black, the "arbitrary and capricious" nature of the system was enough to condemn it,⁴ but for Goodpaster and Baldus and his colleagues the challenge that arbitrariness poses is as much technical as moral, and the scholar's task is not to condemn the system but to develop a technology that will enable it to escape condemnation. Here, however, the suggested reforms may save the lives of hundreds of condemned men and women. Then again, as I shall suggest shortly, they may not.

In some circles, to characterize the goals of scholarship as "ameliorative" is to criticize or condemn. Certainly those opposed to the death penalty may be disappointed to find that powerful criticisms of the current system end not in a legal or moral case against capital punishment but in suggestions for reform. Yet there are good reasons for the authors to take the positions they do, even if, as is suggested by the writing of some, they are adamantly opposed to capital punishment. Lawyers are practical people, and *Gregg v. Georgia*,⁵ together with its progeny, have, at least for the moment, resolved the fundamental eighth amendment issue. Death as a penalty is not per se cruel and unusual, and there is no chance that the current Supreme Court or the Congress is going to overrule *Gregg* and say that it is. The only ideas likely to influence courts and forestall the execution of some are ameliorative ones, and, totally apart from lives saved, there is virtue in procedural fairness.

II. SOCIAL SCIENCE PERSPECTIVES

The movement to abolish the death penalty which led first to the moratorium on executions in the 1960's and then to the *Furman* reprieve of all those then on death row was fostered by a series of social science studies that suggested that the death penalty was unfairly applied and had no deterrent value. The social science papers in the current symposium are consistent with the earlier research, but their likely impact on public opinion and elite decision makers is, as of this writing, problematic.

Looking at the social science research one is struck largely by continuities with earlier work. Consistent with the bulk of earlier research, no study finds substantial evidence of a deterrent effect. Forst's conclusion that "the deterrence theory may apply to most sanctions, but the evidence indicates that the death penalty is an important exception" could have been written by Schuessler in 1952⁶ or by Sellin in almost

³ C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (1974).

⁴ *Id.*

⁵ 428 U.S. 153 (1976).

⁶ Schuessler, *The Deterrent Influence of the Death Penalty*, 284 ANNALS 54 (1952).

any of the studies he published during the fifties and sixties.⁷

If one can dare to generalize from a small, nonrandom collection of articles, it does appear that certain concerns and methods will be more fully represented in future work on capital punishment than they have been in the past. First, despite the fact that Isaac Ehrlich's results⁸ have been substantially discredited,⁹ it appears that Ehrlich's views have prevailed in one respect. The bulk of the current research, including the studies by McFarland, Bailey, and Forst in this issue, evaluates the deterrent effect of capital punishment by looking at actual executions rather than at the inchoate threat of laws permitting capital punishment. Elsewhere I argue that one approach is not necessarily superior to the other, and that we can better evaluate the effects of systems of capital punishment if we attend both to the existence of the death penalty and to its actual implementation.¹⁰ Thus, it is refreshing to see that one article in this symposium, the piece by Archer, Gartner and Beittel, does look at the *de jure* situation. However, I expect that *de jure* studies, which once dominated death penalty research, will continue to constitute but a small fraction of the published work on deterrence.

Second, the articles by Bailey and McFarland suggest the continued vitality of the recent trend to look at the deterrent effects of the death penalty on less aggregated bases than state or nationwide homicide rates.¹¹ The interest in disaggregation is not an entirely new phenomenon,¹² but new statistical tools may mean that we can learn considerably more from a closer look at executions than we have in the past. At the same time we should be aware that random factors associated with particular executions, time periods, or areas may falsely suggest deterrent or brutalization effects. As we aggregate, random factors associated with particular cases tend to cancel out.

Finally, consistent with Bowers and Pierce's work,¹³ we see "rumors" of brutalization. Again, the finding is not unique to the most recent research; abolitionist states typically had homicide rates lower

⁷ See CAPITAL PUNISHMENT (T. Sellin ed. 1967).

⁸ Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975).

⁹ See Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177 (1981).

¹⁰ Lempert, *The Effect of Executions on Homicides: A New Look in an Old Light*, 29 CRIME & DELINQ. 88 (1983).

¹¹ See, e.g., King, *The Brutalization Effect: Execution Publicity and the Incidence of Homicide in South Carolina*, 57 SOC. FORCES 683 (1978); Phillips, *The Deterrent Effect of Capital Punishment: New Evidence on an Old Controversy*, 86 AM. J. SOC. 139 (1980).

¹² See, e.g., Dann, *The Deterrent Effect of Capital Punishment*, 29 FRIENDS SOC. SERV. SERIES 1 (1935); Graves, *A Doctor Looks at Capital Punishment*, 10 MED. ARTS & SCI. 137 (1956).

¹³ Bowers & Pierce, *Deterrence or Brutalization: What is the Effect of Executions?*, 26 CRIME & DELINQ. 453 (1980).

than their contiguous death penalty neighbors,¹⁴ and psychiatrists have provided anecdotal accounts of brutalization.¹⁵ But when brutalization effects emerge from sophisticated statistical analyses, the argument that such effects do exist becomes more compelling. We are, however, not yet compelled to accept the argument that capital punishment, on balance, takes more innocent lives than it saves, either by the work appearing in this issue or by that published elsewhere. The existence of net brutalization effects is still to be established. Forst's conclusions in this issue are much like a judgment I reached two years ago; namely, that if brutalization effects exist, they are probably small and largely counter-balanced by small deterrent effects.¹⁶ Nevertheless, the matter is both important to public policy and scientifically intriguing. Research into brutalization should and no doubt will continue.

One may ask how the new research, with its consistent failure to find a deterrent effect of the death penalty, is likely to affect public policy on the issue. I think it is unlikely that the research suggesting capital punishment does not deter will have any substantial short term effect in persuading decision makers, be they courts or legislatures, to abolish capital punishment. In *Gregg*, retribution got equal billing with deterrence as a justification for capital punishment,¹⁷ and the absence of deterrence does not destroy retributionist arguments. Furthermore, even if the Supreme Court were to regard deterrence as the sole justification for capital punishment, it is not likely that the Justices will find either in the recent research or in research likely to be done over the next term evidence sufficiently comprehensive and conclusive for them to hold as a matter of constitutional law that a state can never execute.¹⁸

This does not mean, however, that the research lacks practical importance. In those abolitionist states that remain, research results like those presented in this issue provide powerful evidence for proponents of the status quo. Furthermore, in some states with the death penalty, experts have been allowed to testify in penalty trials on the deterrent effects of the death penalty. Thus, those studies that continue to search in vain for a deterrent effect of death may in a small way contribute to the preservation of the lives of individual defendants. Finally, the research on deterrence may, if it continues to show no effect attributable to the death penalty, help over the long run to shape a new consensus favoring

¹⁴ DEATH PENALTY (T. Sellin ed. 1959).

¹⁵ West, *Psychiatric Reflections on the Death Penalty*, 45 AM. J. ORTHOPSYCHIATRY 689 (1975).

¹⁶ See Lempert, *supra* note 9.

¹⁷ 428 U.S. at 183.

¹⁸ Some questions, such as the question of whether capital punishment deters homicides by those serving life sentences, pertain to such small numbers of homicides that social science is unlikely ever to be able to provide a definite answer.

the abolition of capital punishment. What is necessary for this to occur is for the learning on deterrence to become public knowledge.¹⁹ It may be that the increasingly sophisticated statistical designs that characterize frontier research on this issue make the task of communication difficult, and it is certainly the case that poorly designed research is likely to lead to popular confusion. When poorly designed research shows a deterrent effect, it is likely to be highly publicized even after it is discredited, and if such research fails to show an effect, knowledge that it is discredited is likely to confuse the public about the scientific status of all research that reaches similar conclusions.

All this assumes that future research will, like the body of past research, fail to show any substantial association between the utilization of the death penalty and homicide rates. If social science research should reveal a consistent and significant brutalization effect, and if that finding were highlighted in the public mind by a highly publicized case or two in which a killer explained a brutal murder by a desire to be executed, the effect on public policy is likely to be enormous. Legislatures rather than courts could be expected to act so as to eliminate or severely restrict punishment by death. If, on the other hand, future research should show that the death penalty had a consistent and significant deterrent effect, abolitionist states would be unlikely to resist pressures for capital punishment, and judges and juries would probably grow more willing to sentence offenders to death.

One cannot state flatly that future research will not show a deterrent effect. To date there have been too few executions in the post-*Gregg* period to allow aggregate statistical studies or to test fairly the deterrence hypothesis if one believes that actual executions are crucial to deterrence. Although the experience during the depression years is to the contrary, it is not inconceivable that a massive wave of executions following the expiration or lifting of the legal barriers that have prevented the executions of those now on death rows will have effects unlike those we have heretofore experienced.²⁰ Furthermore, supporters of the death penalty can argue that the new capital punishment statutes are more predictably or fairly applied than those they replaced and for this reason are more likely to have a deterrent effect.

To recognize possibilities is not, however, to state probabilities.

¹⁹ Kalven, *The Quest for the Middle Range: Empirical Inquiry and Legal Policy*, in *LAW IN A CHANGING AMERICA* 68 (G. Hazard ed. 1968).

²⁰ The effects might be those of brutalization rather than deterrence. Furthermore, if substantial deterrent or brutalization effects were to be revealed, it is not clear that they would be of great policy relevance. To the extent they are the result of a wave of executions following the breaking of a legal logjam, they are unlikely to predict the deterrent or brutalization effects of a routinized system of capital punishment.

Given what we do know about the death penalty's effects on homicide rates, and we know quite a bit, there is little reason to expect that the effects of capital punishment will in the future be very different from what they have been in the past. This is so even if the future is characterized by a sudden wave of executions or by the regular march of murderers to death. Although one can always speculate that tomorrow will be different, recent research, including that published in this issue, only serves to confirm my earlier conclusion that the failure of the death penalty to deter has been proven "to a moral certainty."²¹

There is, however, a real possibility that deterrence research in the 1980's will falsely suggest a deterrent effect. The moratorium on capital punishment in the 1960's and '70's coincided with a substantial rise in homicide rates attributable, at least in part, to a large increase in the number of male youth in the most crime-prone age groups. The renewed permission to execute has, by happenstance, coincided with a period when a general diminution in the crime rate can be expected because of a drop in the number of male youth in the most violence-prone years. To the extent that population age trends overlap with increased execution rates, it will be difficult to untangle fully the effects on the propensity to violence that criminologists confidently attribute to age from the effects that deterrence theorists would like to attribute to the application of the death penalty. In particular, it will be relatively easy for unscrupulous or incompetent social scientists to come up with aggregate results that suggest executions substantially deter. Thus, there is a good social science reason to applaud the success of those lawyers who are working to postpone the executions of those now on death row. The longer the onset of a period of regular executions can be delayed, the better our ultimate ability to separate the deterrent effects of capital punishment from effects attributable to the country's changing age structure.

The final set of social science papers, by Paternoster, Bowers, Radelet and Vandiver, and Baldus, Pulaski and Woodworth deals with inconsistencies and discrimination in selecting murderers for death. The basic findings of inconsistency and discrimination are familiar, harking back to a study Garfinkel published in 1949.²² Interestingly, both Paternoster and Baldus and his coauthors replicate Garfinkel's basic finding in that they locate discrimination in the application of the death penalty not primarily in the race of the defendant but in the race of the victim. This finding is consistent with other research, some of which also finds that there is an interaction between the race of the victim and the race

²¹ Lempert, *supra* note 9, at 1222.

²² Garfinkel, *Research Note on Inter- and Intra-Racial Homicides*, 27 SOC. FORCES 369 (1949).

of defendants such that blacks with white victims are most likely to be executed and whites with black victims are least likely to be so treated.²³ In addition, Paternoster, Bowers, and Baldus and his colleagues, like Bowers and Pierce before them,²⁴ find that the location in which a case is tried affects the probability that a defendant will receive the death penalty. Offenders have a better chance of escaping death in urban courts than in rural ones.

The now oft-replicated finding of the importance of the race of the victim is important because it explains a fact that some people have found puzzling; namely that black murderers do not appear more likely to be sentenced to death than white ones.²⁵ Racial values do affect death penalty decisions, but they are most salient with respect to the victim. In other words, greater retribution is demanded when whites are victims than when blacks are victims because the white dominated society values innocent white lives more than innocent black ones.²⁶

Furthermore, if as is clearly true in the case of rape²⁷ and as may be true, in some regions at least, in the case of homicide,²⁸ the racial configuration of the victim-defendant pair affects the demand for retribution, black defendants with white victims have suffered (and whites with black victims have benefited) because of their race. The results reported in this issue by Bowers on the one hand and Paternoster and Baldus and his coauthors on the other do not resolve the question whether such "interactive" discrimination continues to be important. If it does, it can be particularly difficult to spot. Table 1 presents hypothetical data that illustrates the basic point.

We see from the third and sixth columns that eighteen percent of all black murderers and eighteen percent of all white murderers are sentenced to death. Thus, the overall figures convey not the slightest hint of discrimination. Yet blacks must be suffering on account of their race,

²³ See *id.*; Bowers & Pierce, *Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563 (1980); Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918 (1981); Wolfgang & Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS 19 (1973).

²⁴ Bowers & Pierce, *supra* note 23, at 607.

²⁵ Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783 (1981).

²⁶ If the data showed that white victims were more likely to be strangers, or more likely to be killed brutally, or more likely to be killed during the course of other felonies than blacks, whether the killer was white or black, this conclusion would not hold and there would be an acceptable legal reason for the disparity. However, while whites killed at the hands of blacks are more likely to be strangers or victims of felony murders than blacks killed by blacks, the reverse is true when killers are white. Furthermore, as we see from the work in this issue, the pattern of demanding greater retribution when victims are white persists, although it is not as strong, when important legal variables are controlled.

²⁷ Wolfgang & Riedel, *supra* note 23.

²⁸ Bowers & Pierce, *supra* note 23.

TABLE 1
A HYPOTHETICAL SENTENCING PATTERN RESPONDING TO VICTIMS' AND DEFENDANTS' RACES

	White Defendant/ White Victim	White Defendant/ Black Victim	Total White Defendants	Black Defendant/ White Victim	Black Defendant/ Black Victim	Total Black Defendants	Total White Victims	Total Black Victims
Number of Cases	200	50	250	50	200	250	250	250
% of Death Sentences	20%	10%	18%	30%	15%	18%	22%	14%
Number Sentenced to Death	40	5	45	15	30	45	55	35

because blacks who kill whites are more likely to be sentenced to death than whites who kill whites, *and* blacks who kill blacks are more likely to be sentenced to death than whites who kill blacks. The apparent anomaly by which clearly discriminatory practices aggregate to a pattern of nondiscrimination is explained by two factors. The first is that intraracial homicide is more common than interracial homicide, and the second is that the death penalty is more likely to be demanded when victims are of one race rather than the other. When such patterns exist, as they apparently do in the case of homicide, one must be careful about drawing conclusions of no discrimination from aggregate data.

These data are, to be sure, hypothetical, but the fact that executions are more common when whites are victims now seems well documented, and there is at least some evidence that blacks with white victims are treated especially harshly, as well as reason to believe that whites with black victims are somewhat advantaged.²⁹

Here is the stuff with which a constitutional challenge to the death penalty can be raised. The Supreme Court in *Furman* was fundamentally concerned with the fairness with which people are selected for death, and *Gregg* seems to be based largely on the supposition that the new death penalty statutes are carefully tailored to their objectives and capable of being consistently applied. If it can be shown that the chances that one will be sentenced to death are crucially affected by whether one has killed in a farming community or an urban area, even those Justices most prone to hold the death penalty to be constitutional are likely to be troubled. If it can be unequivocally shown that race, whether of the criminal or the victim, is crucial in determining who, from among an equally heinous group of offenders, are selected for death, it is unlikely that any but the most narrowly drawn death penalty statutes will survive constitutional scrutiny.

There were studies of discrimination in the application of the death penalty before *Furman*, but when the hope was that the Court would answer the fundamental moral question, deterrence studies that bore on the utility of the death penalty seemed to be of greater policy relevance. *Furman* signified that they were not, for the Court in *Furman* was more concerned with the apparent arbitrariness of death sentencing than with its likely deterrent effect. After *Gregg*, the area of prime policy relevance is clearer still. What most matters are procedures. Only by showing that the death penalty is inescapably and invidiously arbitrary is social

²⁹ Much of the available evidence pertains to the Southern states. Given the racial history of the region, one might not expect strong patterns of discrimination to prevail in Northern states. However, since the South today is apparently far more willing to sentence to death than other regions, discrimination confined to the South potentially affects a high proportion of those realistically threatened with execution.

science likely to have an immediate effect on the ongoing constitutional debate.

Thus, it would appear that research results like those reported by Bowers, Paternoster, Radelet and Vandiver, and Baldus, Pulaski and Woodworth provide the social science backdrop for the most promising of the constitutional arguments that can be brought to bear against the new systems of capital punishment. This judgment is apparently shared by some of those litigating on behalf of capital defendants, for Radelet and Vandiver's work was funded in part by the NAACP Legal Defense and Educational Fund, and Paternoster reports that the cooperation of a member of the South Carolina Office of Appellate Defense was essential to his efforts. Yet there is lurking in this strategy a potential threat to the interests of those adamantly opposed to capital punishment. As reactions to *Furman* showed, supporters of the death penalty can be as passionately attached to their position as opponents are to theirs. If systems of capital punishment appear vulnerable because they are not consistently applied, one way to increase consistency and preserve a punishment that is dear to so many is to capture more people in the death penalty net.

While Baldus and his coauthors reveal important inconsistencies in selecting murderers to die, from another perspective their analysis is remarkable for the consistency it shows. Their data certainly do not suggest the kind of haphazard selection for death that before *Furman* was thought common. Furthermore, the inconsistency that does exist in death sentencing in Georgia results more from the presence of eminently death-eligible defendants who escape the death sentence than it does from numbers of less culpable offenders being ideosyncratically sentenced to die. If to keep the death penalty for those regarded as most deserving, death must be sought for murderers who ordinarily would not be subject to capital punishment, prosecutors and legislators may regard this as a small price to pay.

Indeed, this has probably happened. Professor Zeisel tells us that in an apparent response to research suggesting the discriminatory application of the death penalty in Florida, state prosecutors sought and achieved, for the first time since reconstruction, a death sentence for a white convicted of killing a black.³⁰ Indeed, two such sentences were sought before one stuck. So interested were the prosecutors in filling in the "black victim-white defendant" box in our execution table that they first sought and obtained a death sentence for a white who, had he killed a fellow white, would never have been sentenced capitally. The Florida

³⁰ Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981).

Supreme Court had no choice but to reverse and the prosecutors had to try again.

If prosecutors seek to resolve those racial disparities that turn on the victim's race by consciously suppressing this factor in deciding whether to seek death, the overwhelming number of those who suffer for it will be blacks. The reason is that most killers with black victims are themselves black, so any increase in the death penalty rate for those who kill blacks will fall disproportionately on black defendants. This is likely to be true even if discrimination on the basis of the defendant's race is at the same time eliminated, for in the decision to seek death the influence of the victim's race is more substantial than the effect of the defendant's. Consider, for example, Table 2, which is a hypothetical illustration but which uses data drawn from Paternoster's Table 1 on the frequency with which South Carolina prosecutors in capital cases seek the death penalty. Let us assume that the rate at which prosecutors sought death for all defendant-victim combinations was the rate at which death was in fact sought when both defendants and victims were white. This assumption eliminates what is in the uncontrolled data an apparent interaction effect between the race of defendants and victims, for blacks who kill whites are about twenty-five percent more likely to face death penalty requests than whites who kill whites.³¹ Despite the elimination of this disparity, the number of blacks facing death penalty requests under a system that did not attend to the victim's race would increase by seventeen percent. Furthermore, South Carolina defines capital murder so as to exclude far more black-black killings than white-white ones. If this were not the case, the increase in blacks for whom death was sought would be far more dramatic.

For prosecutors to respond to the burgeoning evidence of discrimination by seeking death more frequently in cases involving black victims is immoral if it is done to preserve the death penalty, and it should be unconstitutional as well. Mandatory capital sanctions for homicide are unconstitutional. Defendants must have an opportunity to present evidence in mitigation. Thus, the appropriate occasions for the death penalty are to be defined within parameters set forth by the legislature but with reference to the community's sense (as evidenced by the prosecutor, judge and jury) of when the capital sanction is appropriate. Under none of the moral arguments that have been advanced in favor of capital punishment is it permissible to execute someone who would not

³¹ Whites who kill blacks are, in Paternoster's study, also more likely to be the subject of death penalty requests than whites who kill whites, but the numbers on which this figure is based are so small that the percentages are likely to be quite unstable.

TABLE 2
THE EFFECTS OF TREATING ALL CAPITAL KILLERS LIKE WHITES WHO KILL WHITES*

	Number of Capital Murders	Current Probability of Death Requests	Current Number of Death Requests	Number of Death Requests with Probability of .389	Change in Death Requests
Black Kills White	111	.486	54	43	-11
White Kills White	113	.389	44	44	0
Black Kills Black	76	.105	8	30	+22
White Kills Black	16	.438	7	6	-1

*Numbers in the first three columns are based on Paternoster's Table 1 which describes the pattern of death penalty requests by prosecutors in South Carolina. See Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754, 767 (1983).

otherwise be killed simply because his execution is necessary to the maintenance of a system for executing others. The constitutional situation seems similar. The death penalty is justified, according to the Court in *Gregg*, for reasons of deterrence and retribution. To sentence individuals to death and to increase greatly the number of people sentenced to death simply to create an appearance of fairness is to demand death for a purpose that is nowhere constitutionally sanctioned.

Thus, the ongoing social science research into the equity of the capital sanction has another purpose, to establish a baseline—before the system begins to react to its findings—of the kinds of cases in which capital punishment is thought appropriate. If a system of capital punishment that is more lenient with killers of blacks than with killers of whites will not pass constitutional or moral muster, then the task for proponents of the death penalty is to identify those crimes so heinous that even killers of blacks are punished capitally. Only in these situations can we be certain that American race consciousness has not played a role in identifying the subset of capital murderers selected for death.

Of course, it is possible that an appropriate subset of heinous crimes can never be adequately identified. An ironical implication of the work done on discrimination and the death penalty is that any punishment system that is humane—in the sense that the human instinct for mercy has some place in it—will never achieve the kind of equality of application that fairness in the eyes of third parties, including the courts, demands. Professor Black's thesis that the selection of murderers for death is inescapably arbitrary and capricious³² may turn out to be correct not for the worst of reasons but for the best. The disparities that persist after *Gregg* may in large part be due not to systemic failings such as the presence of racial prejudice or prosecutorial vindictiveness, but to the simpler and ineluctable fact that it is humans who sentence and who are sentenced to death. The human interaction between sentencer and sentenced, and the capacity to grow indignant or suppress indignation that may arise from that interaction, are likely to remain no matter how standardized sentencing procedures become.

I suspect that the relationship researchers have found between the victim's race and the capital sanction results from a simple fact. Whites, who as judges, prosecutors and jurors dominate the death sentencing process, cannot help feeling more indignation upon learning that a white (like them) has been killed than they do when there is a black victim. This extra indignation may suppress what would otherwise be an instinct for mercy. There is little point in labeling such reactions and similar same race preferences by blacks with the pejorative "racism."

³² C. BLACK, *supra* note 3.

They are simply part of what it is to be human in a race-conscious society. But to execute one whose victim is white when he would have been spared had his victim been black is intolerable in a system that demands equality and fairness, however understandable or even admirable the process that led to the distinction. At the same time, achieving equality by suppressing what is most human about us and executing on the basis of hard data that neither reflects individualized judgments of the heinousness of the offense and offender nor allows for feelings of mercy seems equally intolerable. In such a system people will be killed not because those who hear their cases think *they* deserve to die but because the sentencers think that *others* do. If capital punishment is to endure, the measures must be reversed. Where differences between offenders cannot be articulated or, as with the race of victim data, cannot withstand articulation, the more merciful disposition must control. If such a standard were faithfully applied we would soon find that capital punishment was confined to a small subset of the most heinous offenders. Other options are to turn a blind eye to the inequalities that permeate the system or to so increase the rate at which we sentence people to death that the state infliction of death will be, literally, an everyday occurrence. Or we may recognize that retribution by death inescapably conflicts with other deeply held and more civilized values, and for this reason we may cease to inflict it.