

## WHAT MAKES THE DEATH PENALTY ARBITRARY? (AND DOES IT MATTER IF IT IS?)

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A common objection to the death penalty is that it is “arbitrarily” imposed. Indeed, the Supreme Court in the 1970s held the death penalty as it was then administered to be unconstitutional precisely because the states seemed to have no clear standards for who got death and who did not. In the most famous passage in that opinion (*Furman v. Georgia*), Justice Stewart wrote that the death penalty was “cruel and unusual” in the same way that being “struck by lightning” was “cruel and unusual.”

It is thus surprising that the Court and those scholars who push this objection have done so little to articulate a coherent notion of “arbitrariness” against which the Court’s jurisprudence has fallen short. Too often hard issues are avoided by resort to metaphor or slogan (such as Justice Stewart’s lightning or the repeated refrain that we should execute only the “worst of the worst”). Thus critical questions remain unanswered: Can there be *any* arbitrariness in the imposition of the death penalty? Some scholars appear to believe that *any* arbitrariness would be impermissible, but the Court has not. And if some arbitrariness is permissible, at what point is there too much arbitrariness—so that it becomes intolerable? And what exactly is wrong with a penalty that is arbitrarily imposed?

I hope to show in this Article that there are different kinds of arbitrariness, some worse than others. Some arbitrariness (“extrinsic arbitrariness”) may be more or less harmless, at least as a normative and constitutional matter. Some arbitrariness, too, may be the inevitable upshot of allowing discretion in various places in the law—discretion which we do not necessarily want to give up. In the case of the kind of arbitrariness that is bad (“intrinsic arbitrariness”) the Court’s death penalty jurisprudence post-*Furman* has been dedicated to getting rid of it. Those scholars who attack any level of arbitrariness as unacceptable need to say more about not only what they mean by “arbitrary” but how much arbitrariness (if any) would be acceptable. Without good answers to these questions, we may wonder if the objection to “arbitrariness” is actually a stand-in for

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opposition to the death penalty itself, rather than to how it is applied. At least, this paper concludes that the case for the arbitrariness objection has not yet been made with the strength it has, for too long, been taken to have.

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## INTRODUCTION

A common and persistent objection to the death penalty is that it is “arbitrarily” imposed.<sup>1</sup> Indeed, the Supreme Court in the 1970s held the death penalty as it was then administered to be unconstitutional in part because the states seemed to have no clear standards for who got death and who did not.<sup>2</sup> In the most famous passage in that opinion,

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1. The objection has been made most recently by Justice Breyer in his dissent to the denial of certiorari in *Jordan v. Mississippi*, 138 S. Ct. 2567, 2569 (2018) (Breyer, J., dissenting) (“In addition, both Richard Jordan’s case and that of Timothy Nelson Evans, the second petitioner here, illustrate the problem of arbitrariness.”); see also *Singleton v. Norris*, 108 F.3d 872, 874–75 (8th Cir. 1997) (Heaney, J., concurring) (“My thirty years’ experience on this court have compelled me to conclude that the imposition of the death penalty is arbitrary and capricious. At every stage, I believe the decision of who shall live and who shall die for his crime turns less on the nature of the offense and the incorrigibility of the offender and more on inappropriate and indefensible considerations: the political and personal inclinations of prosecutors; the defendant’s wealth, race, and intellect; the race and economic status of the victim; the quality of the defendant’s counsel; and the resources allocated to defense lawyers.”). A version of the arbitrariness objection also did work in the recent Washington state Supreme Court decision invalidating Washington’s death penalty. See *State v. Gregory*, 427 P.3d 621, 627 (Wash. 2018) (“As noted by appellant, the use of the death penalty is unequally applied—sometimes by where the crime took place, or the county of residence, or the available budgetary resources at any given point in time, or the race of the defendant.”).

2. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). As Justice Douglas put it, “[u]nder these laws no standards govern the selection of the penalty.

Justice Potter Stewart wrote that the death penalty was “cruel and unusual” in the same way that being “struck by lightning” was “cruel and unusual.”<sup>3</sup> Stewart went on: “For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.”<sup>4</sup>

Although the Court subsequently found in *Gregg v. Georgia*<sup>5</sup> that at least some states had come up with standards that made the death penalty less arbitrary—and thus a constitutionally permissible punishment<sup>6</sup>—the story of the Supreme Court and the death penalty since *Furman* and *Gregg* can be read as an effort to make sure that the death penalty is not applied in an arbitrary way. Still, some members of the Court over that time, and many more scholars and litigators, have maintained that the death penalty is imposed in an unacceptably arbitrary way,<sup>7</sup> and that the Court’s efforts have done little to make the death penalty less “wanton” and “freakish”—to use again the words of Justice Stewart in his *Furman* concurrence.<sup>8</sup>

It is thus surprising that, over the past fifty years, the Court and those scholars who push this line have done so little to articulate a coherent notion of “arbitrariness” against which the Court’s jurisprudence has fallen short. Too often hard issues are avoided by resort to metaphor or slogan (such as Justice Stewart’s lightning or the repeated refrain that we should execute only the “worst of the worst”<sup>9</sup> rather than just a randomly chosen few). One question we might ask is whether there can be *any* arbitrariness in the imposition of the death penalty. Some scholars appear to believe that *any* arbitrariness is impermissible, but the Court has not.<sup>10</sup> Yet even if some arbitrariness is

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People live or die, dependent on the whim of one man or of 12.” *Id.* at 253 (Douglas, J., concurring). Some Justices, of course, wanted to abolish the death penalty altogether.

3. *Id.* at 309 (Stewart, J., concurring).

4. *Id.* at 309–10 (Stewart, J., concurring).

5. 428 U.S. 153 (1976).

6. *Id.* at 195.

7. Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 414 (1995) (noting that there remains “significant arbitrariness” in administration of the “current” death penalty).

8. *Furman*, 408 U.S. at 310 (Stewart, J., concurring).

9. A phrase used most recently by Justice Breyer. See *Glossip v. Gross*, 135 S. Ct. 2726, 2762 (2015) (Breyer, J., dissenting) (“[U]nless we return to the mandatory death penalty struck down in *Woodson*, the constitutionality of capital punishment rests on its limited application to the worst of the worst. And this extensive body of evidence suggests that is not so limited.”) (internal citations omitted).

10. Justice Marshall at one point expressed the hope that the Court would one day take this view:

permissible, at what point is there too much arbitrariness—so that it becomes intolerable? And what exactly is wrong with a penalty that is arbitrarily imposed?<sup>11</sup>

In addition to not giving good answers to these basic questions about the nature of arbitrariness, the Court and scholars have also been too quick to assume that all arbitrariness is of a kind. But as I hope to show in this Article, there are different kinds of arbitrariness, some which may be worse than others. And not only may some kinds of arbitrariness be ineliminable, as I will also suggest, some arbitrariness may be more or less harmless, at least as a normative and constitutional matter. Indeed, a certain amount of arbitrariness may be the inevitable upshot of allowing discretion in various places in the law—discretion which we do not necessarily want to give up and in some cases might value. That the Court has sometimes assumed that all arbitrariness is the same (and that therefore no arbitrariness is permissible) should lead us to clarify the meaning of the Court’s now decades-long struggle to make the death penalty less “arbitrary.” In the case of those scholars who attack the arbitrariness of the death penalty, it should make us wonder whether arbitrariness is actually a stand-in for a deeper objection to the death penalty itself rather than to how it is applied.<sup>12</sup>

In this Article, I want to challenge the centrality of arbitrariness objections to the Court’s death penalty jurisprudence. Much of this task involves the work of categorization, although some of it involves revising a traditional story usually told about the Court’s capital punishment jurisprudence. In Part I of the Article, I look at pivotal cases in the 1960s and 1970s when the concern about arbitrariness was first raised, and confronted. I start that story not with *Furman*, but with

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[R]emain hopeful that even if the Court is unwilling to accept the view that the death penalty is so barbaric that it is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, it may eventually conclude that the effort to eliminate arbitrariness in the infliction of that ultimate sanction is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether.

*Godfrey v. Georgia*, 446 U.S. 420, 442 (1980) (Marshall, J., dissenting); see also CHARLES L. BLACK, JR., CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 38 (1981); see *infra* Part I.

11. The importance of this further question is inadvertently indicated by Carol S. Steiker and Jordan M. Steiker, when they contrast “arbitrary” and “invidious” decisions to execute someone. See Steiker & Steiker, *supra* note 7, at 391 (“By making constitutionally relevant any and all traits or experiences that distinguish one individual from another, the Court invites arbitrary and even invidious decisionmaking.”).

12. A point made more generally by Mary Sigler in her probing essay, *Principle and Pragmatism in the Death Penalty Debate*, 37 CRIM. JUS. ETHICS 72, 77 (2018).

*McGautha v. California*,<sup>13</sup> the case that *Furman* squarely (if not explicitly) rejected.<sup>14</sup> In *McGautha*, arbitrariness was accepted, and even celebrated, as something that showed the jury's power and significance.<sup>15</sup> *Furman*, though, said there was such a thing as too much arbitrariness, but left an ambiguity as to what was meant by "too much."<sup>16</sup> In addition to *McGautha*, the key decision to help to determine what the *Furman* concurring opinions—in particular, those of Justices Stewart and White—is *Woodson v. North Carolina*.<sup>17</sup> Justices Stewart and White split in *Woodson*, and seeing *why* they split is important to figuring out what, exactly, the kind of arbitrariness the Court was most worried about in the cases culminating in *Gregg*. In telling the story up to *Gregg* in Part I, I argue that the Court was most concerned with what I call *intrinsic* arbitrariness—or the idea that the death penalty is arbitrary when it gives death to those who do not really deserve it (this is Stewart's concern) or when it does not give death to those who do (this is White's concern).

In Part II of this Article I elaborate on the idea of intrinsic arbitrariness. The focus of a concern with intrinsic arbitrariness is on the crimes that are subject to the death penalty, on the one hand, and the characteristics of offenders who are candidates for the death penalty. In Justice Stewart's version of intrinsic arbitrariness—the one that I argue carries the day with the Court—the worry is that some people are being put to death who are not bad enough or who did not do a bad enough thing to deserve the death penalty. The death penalty is arbitrary in this way when some people are getting death when they do not deserve it—and relatedly, that juries are not being restricted enough in making the decision when to give death, precisely because of the risk that they may hand out death sentences to those who do not deserve it. There are two ways to attack intrinsic arbitrariness. One way is substantive: limit the types of crimes and the type of people that can get the death penalty. Another way is procedural: put greater constraints on the people or institutions who make decisions about the death penalty—mainly the jury. The Supreme Court has gone down both of these tracks.

Intrinsic arbitrariness is bad, even obviously so, and a real concern we should have about the death penalty's administration, and I spell out in Part II what I think this badness amounts to. If some people really do not, as an underlying substantive matter, deserve the death penalty,

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13. 402 U.S. 183 (1971).

14. See *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam).

15. See discussion *infra* Part I.

16. See *infra* Part I.

17. 428 U.S. 280 (1976). See also the companion case to *Woodson*, *Roberts v. Louisiana*, 428 U.S. 325 (1976).

than they should not get it—it is bad when people get something (e.g., death) that they did not deserve.<sup>18</sup> But if we buy the Court’s story of our evolving standards (discussed in Part II), we are actually getting better at not punishing with death those who don’t really deserve death.<sup>19</sup> It is when opponents of the arbitrariness of the death penalty push for something more beyond this story of progress—that there is something that remains wrong with giving the death penalty to those who deserve it even though we don’t give it to all who deserve it—that we begin to lose a grip on the badness of arbitrariness.<sup>20</sup> It is here that opponents of the death penalty need to say why there still remains too much arbitrariness in the death penalty as it is currently applied, and why that remaining arbitrariness renders the death penalty impermissible.

In Part III, I develop the concept of *extrinsic* arbitrariness. It is this kind of arbitrariness which, I think, scholars and other critics are referring to when they object that the death penalty is still arbitrarily imposed, and objectionably so, even when it is imposed on those for whom death has found to be an appropriate punishment. Extrinsic, as opposed to intrinsic, arbitrariness, deals not with the character of the offender, or the nature of the crime, but instead on factors which may—so the objection goes—represent an “arbitrary” basis for selection. So, for example, it may be that whether or not you get the death penalty will depend on where you commit the crime, what the prosecutor decides, what your race is, or who your lawyer is. We could stipulate, in these cases where “extrinsic” factors are decisive, that the crime

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18. One may object at this point that desert is an incoherent concept. I have myself suggested as much as this in other work. See Chad Flanders, *Can Retributivism Be Saved?*, 2014 B.Y.U. L. REV. 309, 333 (2014). But two points in response, the former more important than the latter: (a) the Court does not think desert is incoherent, see, e.g., *Roper v. Simmons*, 543 U.S. 551, 555 (2005), and (b) I do not think that desert is a wholly incoherent concept. I cannot argue (b) here (although see Flanders, *supra*). It should be sufficient for the purposes of this Article that the *Court* takes desert seriously, and the potential of putting a person to death who does not deserve it very seriously indeed.

19. Commentators have claimed that the Court gradually came to “abandon” its concern with arbitrariness. But of course this depends on what arbitrariness is; maybe the Court felt that it achieved what it could regarding arbitrariness and found the remaining arbitrariness tolerable. Cf. Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today’s Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 390 (1998) (“Today, the Court still acknowledges a concern about arbitrariness, and it is mainly in its results that the Court has appeared to abandon such a concern.”).

20. As should be clear, I am mostly concerned in this Article with those who use the arbitrariness argument in service of an *anti*-death penalty argument. For those who support the death penalty, arbitrariness is still going to be a problem, but the solution is rather straightforward: give death to all who deserve it. Justice Scalia seems to adopt this position in his concurring opinion in *Walton v. Arizona*, 497 U.S. 639, 671 (1990) (Scalia, J., concurring).

and the offender are similarly situated—so that, in other words, there is no problem with intrinsic arbitrariness. But extrinsic arbitrariness could remain. The “extrinsic” problem comes when we have two similarly situated offenders and what tips the balance in favor of the death penalty is some outside factor that is morally arbitrary, that has nothing to do with the badness of the crime or the rottenness of the offender.

Again, as with intrinsic arbitrariness, we may have a feeling that something is wrong about extrinsic arbitrariness, but this time it is harder to say what precisely this is. There are some factors that are extrinsic to the wrong of the crime and the character of the offender that should *never* be the basis of a decision. This is where race factors in. It is wrong to make a decision to sentence someone to death because of his or her race. At the same time, it is wrong to arrest someone, to charge someone, to prosecute someone, to sentence someone to anything where race is a decisive factor. This is a problem not of arbitrariness—intentional racism is anything but arbitrary—but a problem of *discrimination*.<sup>21</sup> When we turn from those extrinsic factors that are themselves impermissible motives (for anything), however, it becomes harder to say what the arbitrariness objection amounts to. Does it amount to an objectionable form of arbitrariness that a person gets the death penalty because he committed a horrible crime in a jurisdiction that has the death penalty where someone who committed the exact same crime in a jurisdiction without the death penalty does not? It might be, but it is hard to say how, exactly.

When we clarify what the arbitrariness objection amounts to, it seems less devastating, and in some cases not that much of a problem at all. My suspicion is that the objection of arbitrariness at bottom represents a disguised version of an objection to the death penalty itself. Those who oppose the death penalty because it is arbitrarily imposed are apt to oppose the death penalty *generally* (this becomes clearest when we see that the solution to the problem of arbitrariness could just as well be to *increase* the number of times the death penalty is given as it would be to *decrease* the use of the death penalty).<sup>22</sup> Where the abolitionist and the arbitrariness positions meet and join is the idea that we cannot really say when a murder or other crime is “bad enough” to merit the death penalty—that there are at bottom no standards to specify when the death penalty is appropriately imposed.

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21. It is of course even worse when race leads to someone being given a punishment that they do not deserve. But that would be a problem of intrinsic, not extrinsic, arbitrariness (as I am using the terms). *See infra* Part III.

22. Again, a point made by Sigler, *supra* note 12. *See also* BLACK, *supra* note 10, at 156 (“People sometimes ask me, ‘Would you be for capital punishment if you were sure it were being administered with perfect fairness?’ The short answer, of course, is that I would not, as the questioner, desiring to embarrass me, well knows.”).

Ironically, this argument is almost the exact mirror image of the one Justice Harlan made in the *McGautha* case—the case I begin with in Part I of my paper. In *McGautha*, Harlan rejected the due process point that would later be successful in *Furman* by saying that we could not tie down juries to any standards or rules regarding what crimes or people were “the worst” and so deserved the death penalty.<sup>23</sup> It was impossible to guide juries as to what sorts of things made a crime or a person worse than another. Harlan drew from this the conclusion that there was no due process violation when states did not specify any standards for the jury to determine who would get the death penalty.<sup>24</sup> Critics today disagree with the conclusion, but seem to embrace the premise: there is nothing that can really put one terrible crime as “worse” than some other terrible crime, so any choice between them must really be arbitrary.<sup>25</sup> Indeed, the objection today adopts an even more extreme premise. Whereas Harlan’s premise may simply have been about how hard is to specify the standards, the basis of the objection today is that there cannot be any standards. This paper argues that we should reject this premise. The death penalty has become less arbitrary over the years, and juries are more guided than they have been. The remaining sorts of arbitrariness are either ineliminable, not that bad, or not bad at all. At least, this paper concludes that the case for the arbitrariness objection has not yet been made with the strength it has, for too long, been assumed to have.

## I. BACKGROUND

The traditional starting points for analyzing the death penalty is usually the interaction between *Furman* and *Gregg*. *Furman* said there had to be standards for juries in applying the death penalty, and *Gregg* showed that this challenge was not an unmeetable one, at least according to the Supreme Court.<sup>26</sup> But in fact it is better to take a step back, and set the story regarding arbitrariness as beginning with *McGautha*, an opinion which now seems striking in its tolerance and even approval of wide-ranging discretion on the part of juries. It is

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23. *McGautha v. California*, 402 U.S. 183, 208 (1971) (“The infinite variety of cases and facets to each case would make general standards either meaningless ‘boiler-plate’ or a statement of the obvious that no jury would need.”).

24. See discussion *infra* Part I.

25. This criticism is most often made in the context of criticizing some “aggravating” factors as hopelessly arbitrary (i.e., that it is impossible to say what makes one murder more “heinous” or “vile” than another).

26. *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (“In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.”).

against this baseline—of absolute discretion—that *Furman* works against, and finds (after merely a few years) to be intolerable. On this story, *Gregg* ends up as the synthesis of which *McGautha* and *Furman* are the thesis and antithesis. In particular, if we keep in mind the extreme position of *McGautha*, then the rather quick embrace of *Gregg*'s seemingly tepid standards for guiding juries makes a little more sense. If the baseline is literally *no* constraints at all (and this is thought to be both a matter of what is descriptively possible and what is normatively desirable), then it may be easier to see why some standards to guide juries seem to be a major improvement. What is unacceptable is total discretion, which allows an objectionable level of arbitrariness, rather than some discretion within which the jury is still free to operate.

But if *Furman* inveighed against the arbitrariness that *McGautha* seemingly endorsed, what did it mean by “arbitrariness”? This is harder to figure out than it looks, in part because the stand made by *McGautha* was so extreme—the Justices seemed content to say in *Furman* that whatever arbitrariness was, *McGautha* certainly allowed far too much of it. And so the language of some of the concurring opinions in *Furman* is long on invective and metaphor and somewhat shorter on analysis. Still, I do think that the Justices were more likely than not talking about what I will call *intrinsic* arbitrariness—the arbitrariness that means that some people are getting the death penalty who may not in fact deserve the death penalty. If this is correct, then I think that the Justices were onto a real problem regarding the standardless imposition of the death penalty. Decisions by juries really can be arbitrary, in the sense that the decisions of the juries can range so widely that some people will get the death penalty who in fact *should not get it*.<sup>27</sup> At the very least, the Justices worried that the current system could provide nothing in the way of guarantees that this sort of thing was *not* happening much of the time. I spell out this interpretation of some of the concurring opinions—in particular, those of Justices Stewart and White—of *Furman* in section A of this Part.

But what turns out to be the key case in understanding *Furman* is not *Gregg*, or not only *Gregg*, but also *Woodson* and the related *Roberts* case.<sup>28</sup> In rejecting South Carolina and Louisiana's mandatory death penalty for certain crimes, Stewart and White end up split in *Woodson* and *Roberts*, while they were together on the same side in *Furman*. Stewart finds a risk of arbitrariness present even in a mandatory death penalty, whereas White sees in the mandatory death

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27. There is the same problem on the other side, too: juries may end up not giving the death penalty to those who clearly deserve it.

28. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

penalty a solution to the problem of *Furman*.<sup>29</sup> Stewart's opinion in *Woodson* provides the insight into the kind of arbitrariness that most troubles Stewart: that some people are getting the death penalty who do not deserve it. The mandatory death penalty for murder does not solve this, because according to Stewart not all murderers deserve death.<sup>30</sup> So we are thrown into a situation where we have to have some sort of individualized determination (so no mandatory death penalty) but we must guide juries enough so that their discretion does not lead to some getting a penalty they do not deserve (so no unfettered discretion).

If we look at the kind of arbitrariness that *Furman* (in light of *Woodson* and *Gregg*) was worried about as what I am calling *intrinsic* arbitrariness, it becomes possible to tell a slightly different—and to me, more compelling story about the Court's battle against arbitrariness. Part of this story is the conventional one, about making sure that juries have standards in their particular decision-making process—this is the story of “guided discretion.”<sup>31</sup> Guided discretion is of course necessary if you want to allow some room for jury discretion, but at the same time want significant assurance that juries will not be sentencing someone to death who does not deserve it. But there is another, equally significant part of the story that involves the Court's death penalty jurisprudence limiting the death penalty only to certain classes of people for certain kinds of crime. If the worry is that the death penalty is sometimes being imposed on an arbitrary basis to people who do not deserve the penalty, then in addition to *guiding* the jury, the Court can also choose to *limit* the jury's power, by removing from it even the option to impose death for certain classes of offenders and for certain crimes. In other words, looking at the problem of intrinsic arbitrariness allows us to tell a rather unified story of the Court's death penalty jurisprudence, one which I hope to begin to tell in this Part.

#### A. *The Impossibility of Guidance: McGautha*

*McGautha* is a fascinating case to revisit after almost fifty years of Supreme Court opinions trying to rebut it and to resist its position—that the nearly complete absence of standards guiding juries in death penalty cases is perfectly consistent with the Constitution. The frank tone of the Court's opinion, written by Justice Harlan, belies what seems now in

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29. See *Woodson*, 428 U.S. at 285–87; *Roberts*, 428 U.S. at 328–29, 331–34.

30. *Woodson*, 428 U.S. at 285–87; *Roberts*, 428 U.S. at 328–29, 331–34.

31. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 334 n.9 (1987) (Brennan, J., dissenting) (“Since *Gregg v. Georgia*, the Court's death penalty jurisprudence has rested on the premise that it is possible to establish a system of *guided discretion* that will both permit individualized moral evaluation and prevent impermissible considerations from being taken into account.”).

retrospect as its strong and even extreme position. Indeed, the statements of the objection raised by the plaintiffs McGautha and Crampton reads almost exactly like what was to be the holding a few years later in the *Furman* case, viz., “that the absence of standards to guide the jury’s discretion on the punishment issue is constitutionally intolerable” and “that to leave the jury completely at large to impose or withhold the death penalty as it sees fit is fundamentally lawless and therefore violates the basic command of the Fourteenth Amendment that no State shall deprive a person of his life without due process of law.”<sup>32</sup> The overall point of the opinion seems to be that there can be no standards in the death penalty realm because there really are no standards to be had. But we should be careful, because this could mean at least three distinct things, all of which find some support in Harlan’s opinion, (a) that in fact, there *are* no standards that can distinguish cases where the defendant deserves to die and those in which he or she does not, (b) that there are *too* many standards, too many possible factors for the jury to consider, so that to try to codify these standards would be hopeless, (c) that jurors cannot really be constrained by legislatures and by the courts, and we should not worry overmuch that we cannot constrain them. I think the important thing is to see that Harlan’s position is *not* (a), and that it is close to a combination of (b) and (c)—but that the fact that his position is not (a) makes his overall conclusion problematic.

Start with the distinction between (a) and (b). (a) suggests that there really is, at bottom, no reason or rationale that could guide a jury in deciding whether or not to impose the death penalty. It is really just up to the whim and caprice of the jury—for it is simply impossible to say *which* kinds of crimes are really worse than others and which deserve death. Many people have since taken this position, including Supreme Court Justices and scholars. You may say that this murder is “heinous and cruel” and other may disagree, and who really is to say?<sup>33</sup> In the *Godfrey* case, this is precisely what the Court held about an

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32. *McGautha v. California*, 402 U.S. 183, 196 (1971).

33. See, for example, Norval Morris’ claim about the decision in *Gregg*:  
Involved in their decision is the stupendous and false claim that prosecutors, juries, and judges can distinguish one murderer from another, not just in the extent of harm done, the numbers killed, the manner of killing, or the degree of preplanning, but in the degree of moral guilt of the killer. This is a task fit only for one who sits on the right hand of God (St. Peter is reputed to be able to do it with immense consequences), but it is a task certainly beyond the ability of any one of us or even the abilities of the assembled nine on the Supreme Court.

“*The Ultimate Nightmare*,” 21 FED. SENT. R. 272, 273 (2009).

“inhuman” and “vile” aggravating factor.<sup>34</sup> Short of a limiting construction, such an aggravating factor gives no guidance to juries because there is nothing really to the factor; we cannot say what the standard is, because there really is no standard to be had. The broader position would be to say that in general we cannot say whether one sort of killing is really worse than another sort of killing, because we have no way of really telling what makes one murder worse than another. *This* is a sort of relativism when it comes to determinations of death, and it is not Justice Harlan’s position.

Harlan’s position is that there are standards by which juries can rationally decide that one crime is worse than another (or that one criminal is more deserving of death than another), but that there are *too many* and they are too varied, for it to be possible to list them all. This position—which is option (b) for understanding Harlan’s position—seems superficially similar to one that holds there are no standards (option (a)), because it looks like in both cases that we have to throw up our hands and trust the jury; on the one hand because there is in fact nothing at bottom that we can tell them about what to choose, and on the other hand because there is *too much* to tell them. But the positions are importantly different. The latter—Harlan’s—position is not relativistic, or at least not necessarily so. There is a difference between saying that there are *no* standards to articulate and saying that there are a great number of standards, too many to articulate. One has to do with the existence of standards, the other with the ability to adequately express in language or in a formula those standards. As Harlan writes in his opinion, pointing to his adoption of the latter, but not the former belief: “To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.”<sup>35</sup> The language here is a little purple and maybe exaggerated, but the point is not that juries are acting without guidance at all, but that the potential sources of guidance are so great and so varied that to attempt to put them all down in words in an effort to constrain the jury is a futile task, doomed to fail. Harlan quotes a report prepared by the Royal Commission on Capital Punishment to precisely this effect: “No formula is possible that would

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34. *Godfrey v. Georgia*, 446 U.S. 420, 432–33 (1980); *id.* at 433 (1980) (finding that, given the vague aggravating factor, there was “no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not”).

35. *McGautha*, 402 U.S. at 204.

provide a reasonable criterion for the infinite variety of circumstances that may affect the gravity of the crime of murder.”<sup>36</sup>

But it is here, too, that some of the weaknesses of Harlan’s position begin to show. For it was the conclusion of the Royal Commission *not* that juries could never be reasonably constrained, but indeed that it was “within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed and weighed against each other when they are presented in a concrete case.”<sup>37</sup> Even if we cannot put all of the innumerable possible factors into a formula and place it in front of juries, we can still point out the major aggravating and mitigating factors and let juries consider them. We do not simply have to give up in the face of all of the possible ways that juries could decide a death penalty case and give up; maybe there are many ways one murder could be worse than another, but we can point to the *most important* ways to juries. This may make the choice of the jury at least informed by some considerations, if not wholly controlled by those considerations. And in fact, it was this type of solution—this way of guiding the jury in its exercise of choice—that the Court would point to in *Furman* and endorse in *Gregg*.<sup>38</sup> Why, then, does the *McGautha* court reject the solution—the solution put forward by a report that (the majority agrees) correctly identifies the problem?

There seem to be three reasons, two practical and one normative. The first practical reason is that any standards that the court or a legislature could come up with would be “minimal,”<sup>39</sup> so tepid, that a jury would not really be guided by them. The list would inevitably be partial, with the result that a jury would still be left mostly to its own devices—the list could not possibly list everything they *should* consider, let alone list those things which they positively should *not* consider (i.e., those factors that would be constitutionally impermissible<sup>40</sup>). And the things that would be listed would probably be the “obvious” things that the jury was going to be considering *anyway*.<sup>41</sup> The second thing, practically speaking, is that a jury could always just to decide what it wanted to decide. A list of factors that the jury should consider would could not stop a jury determined “to decide on whimsy or caprice.”<sup>42</sup> So, a list would be unhelpful and possibly irrelevant.

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36. *Id.* at 205 (quoting REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949–1953, at 208 ¶ 595 (1953)).

37. *Id.* at 205–06 (internal emphasis omitted) (quoting MODEL PENAL CODE § 201.6 (AM. LAW INST., Preliminary Draft 1959)).

38. *See, e.g., Furman v. Georgia*, 408 U.S. 238, 248 n.11 (1972) (Douglas, J., concurring) (noting the obvious “tension” between *McGautha* and *Furman*).

39. *McGautha*, 402 U.S. at 207.

40. *Id.*

41. *Id.* at 208.

42. *Id.* at 207.

But these are not the only reasons the court seems to feel a list would be wrong. Harlan also believes, as a normative matter, that we should trust the jury, or at least, that states are entitled to put their trust in juries. Indeed, the more grave the punishment, the greater the trust we can have in the jury. In one of the more rhetorically loaded passages of the opinion, Harlan writes that it is not wrong to trust juries will take seriously the “truly awesome responsibility of decreeing death for a fellow human.”<sup>43</sup> Taking that responsibility seriously, jurors will of course consider those factors suggested by the defense, and by the evidence of the case itself—plus perhaps any number of other things besides, things which we cannot possibly hope to catalog ahead of time. In the place of lists and rules, Harlan urges us to trust the hearts and minds of the jurors. And so this gets us to (c) on the above list: jurors cannot really be constrained by legislatures and by the courts, and we should not worry overmuch that we cannot constrain them. This seems to be true for Harlan *even if* we could codify and list some standards for the jury to follow. We should trust the jury and its discretion—even to the point of trusting them almost blindly, by giving them *no* standards to guide them.

The position is extreme—again, consider the phrase “untrammelled discretion”<sup>44</sup>—as it rejects *any* type of control on the jury. And so it did not take much in the way of a shift in the Court’s attitude to get to *Furman* from *McGautha*. The Court only had to see that the jury was not acting in a way that showed that the jury’s decisions – across time and across cases – showed any real pattern or rationality, meaning that Harlan’s trust was misplaced. Coupled with this was the belief that putting constraints on the jury could actually do some work: maybe not getting perfect rationality in every case, but at least guiding the jury away from impermissible factors and pointing them in the direction of proper bases for their decision. Again, because Harlan’s position takes a stand in favor of no limitation on the jury, it invites the objection that Harlan paves the way for random or arbitrary decisions. The jury is not told what to do, nor is there any consequence if they decide for a bad reason or for no reason at all, so of course arbitrariness is invited, if not in a way mandated. And this was exactly what the dissent alleged, with some force.<sup>45</sup> What is more, the dissent correctly pointed out that

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43. *Id.* at 207–08.

44. A phrase used by Harlan in apparent endorsement: “In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the *untrammelled discretion* of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.” *Id.* at 208 (emphasis added).

45. As Brennan began his dissent:

The question that petitioners present for our decision is whether the rule of law, basic to our society and binding upon the States by virtue of the Due

the distinction was not between totally controlling the jury on the one hand and standardless discretion on the other.<sup>46</sup> The question was whether there could be some meaningful limits on that discretion, so as to diminish the risk of arbitrariness, even if it could not eliminate arbitrariness altogether.<sup>47</sup> We might be able to incrementally make jury decision-making better; at least, we should not rule this out from the start.

What is surprising is that something like Harlan's position—despite vigorous dissents—becomes the accepted wisdom of those who would go on to *oppose* the sentencing regime inaugurated by *Gregg*.<sup>48</sup> The emphasis is on the impossibility of providing standards that meaningfully constrain juries—and this could be either because there really are no standards, or because there are so many factors (and such a risk of juries ignoring or disregarding them) that there can be no possible way to meaningfully constrain jurors. So where Harlan endorsed and to some extent even promoted the ability of juries to act in an arbitrary way, and dissenters wanted juries to be guided and restricted, the dissenters would—in later years—come to say things very similar to Harlan, but now in a primarily negative register: juries cannot be guided, ever, their choices are always arbitrary and *therefore* the death penalty is unconstitutional. We can no longer trust jurors to

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Process Clause of the Fourteenth Amendment, is fundamentally inconsistent with capital sentencing procedures that are purposely constructed to allow the maximum possible variation from one case to the next, and provide no mechanism to prevent that consciously maximized variation from reflecting merely random or arbitrary choice.

*Id.* at 248 (Brennan, J., dissenting).

46. *Id.* at 311 (Brennan, J., dissenting).

47. *Id.* at 249 (Brennan, J., dissenting) (“Unlike the Court, I do not believe that the legislatures of the 50 States are so devoid of wisdom and the power of rational thought that they are unable to face the problem of capital punishment directly, and to determine for themselves the criteria under which convicted capital felons should be chosen to live or die.”); *see also id.* at 280 (Brennan, J., dissenting) (“I think it is fair to say that the Court has provided no explanation for its conclusion that capital sentencing is inherently incapable of rational treatment.”).

48. *Godfrey v. Georgia*, 446 U.S. 420, 442 (1980) (Marshall, J., concurring) (“For this reason, I remain hopeful that even if the Court is unwilling to accept the view that the death penalty is so barbaric that it is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, it may eventually conclude that the effort to eliminate arbitrariness in the infliction of that ultimate sanction is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether.”); Kirchmeier, *supra* note 19, at 458 (“The Court’s twenty-year struggle to attain this goal through regulating sentencing criteria has taught us that the goal is impossible to attain and has left us with an arbitrary mandatory death penalty system. As human beings, defendants are too complex for legislatures to design clear and specific guidelines for determining whether the accused should be destroyed. Thus, we are left only with the choice of executing all first-degree murderers or executing none.”).

act in the absence of clear guidance, and in the absence of the possibility of such guidance (which both Harlan and later death penalty opponents seem to agree on), we should remove the death penalty as a legitimate punishment. How we get to this result will be the burden of most of the rest of the paper to show. The next step in the story is to see how arbitrariness begins to be seen not as an inevitability, or even a good thing (because it means the jury retains discretion to choose freely and to use its judgment), but as a real problem, even to the extent of invalidating the death penalty. This is the story of the sudden and abrupt transition from *McGautha* to *Furman*.

*B. The Rise of the Arbitrariness Objection: Furman*

*Furman* famously was a paragraph per curiam opinion joined by five Justices, who filed five extremely long opinions.<sup>49</sup> Four dissented, while also giving lengthy opinions.<sup>50</sup> The two opinions that I believe are most important—and I do not think that this judgment is all that controversial—are those of Stewart and White.<sup>51</sup> These are the justices whose votes swing the other way in *Gregg*,<sup>52</sup> and so they bear careful study, especially given that the ground of their objection is arbitrariness, the focus of our inquiry. What is even more interesting, given the focus on Stewart and White, is that they unite in *Gregg*, agreeing that the problem of arbitrariness is more or less solved by the punishment regime in Georgia, but they disagree in *Woodson* (and its companion case, *Roberts*, decided on the same day), with Stewart (writing for the plurality) maintaining that a mandatory death penalty for murder still gives us an intolerable amount of arbitrariness while White insisting that to the contrary, a mandatory death penalty basically solves the problem of arbitrariness.<sup>53</sup> Following the movement of White and Stewart across *Furman*, *Gregg*, and *Woodson* will give us a handle on what arbitrariness for the Court ultimately means. It means, I think, something like what I will call “intrinsic” arbitrariness—or the risk that the death penalty will not be given only to those who deserve it. With Stewart’s position in the end triumphant, this position has to be qualified a little further: arbitrariness is the risk that some will be killed who do not deserve it; it is not primarily about the risk on the other side that some will *not* be killed who may have deserved death. I will

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49. *Furman v. Georgia*, 408 U.S. 238, 239 (1972) (per curiam). The concurring opinions were by Justices Brennan, Douglas, Marshall, Stewart, and White.

50. Dissents were written by Justices Burger, Blackmun, Rehnquist, and Powell.

51. *Id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring).

52. *See Gregg v. Georgia*, 428 U.S. 153, 154–58 (1976).

53. *See Woodson v. North Carolina*, 428 U.S. 280, 280, 306–07 (1976).

explain the significance of this qualification below, when we get to the absolutely crucial (for our purposes) decision in *Woodson* and the related decision in *Roberts*.

But it will be worthwhile, before getting to White and Stewart, to briefly look at the opinions of Douglas and Brennan, who also raise the problem of arbitrariness, at least nominally. Their opinions are important in their own right, but they also show something which I will be arguing later—that sometimes opposition to the death penalty on the basis of arbitrariness really is just a stand in for an objection to the death penalty on other grounds.<sup>54</sup> Douglas cites the rule against arbitrary punishment, but in fact his main point of opposition to the death penalty is that it in fact is not at all arbitrary—that it falls disproportionality on African-Americans and the poor.<sup>55</sup> This is clear in his imagining that there was a law that said explicitly that the death penalty was going to be leveled on only these groups.<sup>56</sup> Such a law would clearly be a violation of the Constitution. But this is not, in the end, a problem with arbitrariness. It is, as Douglas concludes his opinion, a problem with the equal protection of the laws.<sup>57</sup> It is a path that would, in various ways, be blocked by the Supreme Court in the following years.<sup>58</sup> It is, nonetheless, a sound point against the way the death penalty works in application. It is not, however, an objection that is based on the arbitrariness of the death penalty application. If anything, Douglas's point, is that the death penalty is almost the exact opposite of arbitrary, in the way that it singles out for death certain groups. (I will revisit Douglas's opinion later in this paper.)<sup>59</sup>

Brennan also mentions and argues arbitrariness in his opinion, almost in passing.<sup>60</sup> Brennan does in fact make a clearer claim about arbitrariness, in terms that echo those of Stewart's opinion (and in fact he quotes Stewart in order to endorse his argument). Brennan worries that there are in fact no real standards in this area—that “[n]o one has suggested a rational basis that could differentiate in those terms the few

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54. That objection to the death penalty is usually categorical, so that it would stand even if the death penalty were made non-arbitrary.

55. *Furman*, 408 U.S. at 255 (Douglas, J., dissenting) (“Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.”).

56. *Id.* at 256–57 (Douglas, J., dissenting).

57. *Id.* (Douglas, J., dissenting).

58. *See, e.g., San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (suggesting that the poor were not a suspect class); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (rejecting race-based equal protection challenge to the death penalty).

59. *See infra* Section III.A.

60. *Furman*, 408 U.S. at 274 (Brennan, J., concurring).

who die from the many who go to prison.”<sup>61</sup> Here we see in early form the Harlan argument now used in a way to argue against the death penalty, rather than as means to protect the death penalty from an arbitrariness challenge. If we cannot name any standards, how can the death penalty be administered in a non-arbitrary way? How can we say that any jury’s decision to impose death in one instance rather than another is reasoned? How can we say that this or that murder is really more “extreme” than another? As with Harlan’s opinion, I think this position goes too far—it makes a fair point, but pushes it to a point where it loses plausibility. As if to recognize this point, Brennan at this point draws back, and makes clear that arbitrariness is not the sole basis for his objection to the death penalty, and indeed, that even if the arbitrariness point is proven, the unconstitutionality of the death penalty could not rest on a showing arbitrariness alone. “I am not,” Brennan writes, “considering this punishment [i.e., the death penalty] by the isolated light of one principle. The probability of arbitrariness is sufficiently substantial that it can be relied upon, *in combination with other principles*, in reaching a judgment on the constitutionality of the punishment.”<sup>62</sup> In fact, later in his opinion Brennan uses arbitrariness as evidence of *other*, deeper things being wrong with the death penalty—that, e.g., society will disapprove of an arbitrary punishment, or that an arbitrary punishment is unlikely to deter.<sup>63</sup>

Of the two key opinions that rest almost wholly on an arbitrariness objection, Justice Stewart’s is the most famous. His metaphor, of the arbitrariness of the death penalty being like the arbitrariness of being struck by lightning, has been quoted repeatedly, in court cases and in the scholarly literature.<sup>64</sup> But the metaphor itself is rather puzzling, at least on first impression. It is not, after all, wholly capricious who gets struck by lightning—if you are on a golf course or out fishing, for instance, and there is a thunderstorm, the odds of getting hit by lightning go up. If you are inside, in a bank, for example, the odds of you getting hit by lightning go way down. It is not the same as a lottery; indeed, it seems rather different than a lottery. It does not seem

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61. *Id.* at 294 (Brennan, J., concurring). Brennan here seems to depart from his dissenting opinion in *McGautha*, where he strongly suggested that such a “rational basis” was possible. As he wrote in that case: “I see no reason whatsoever to believe that the nature of capital sentencing is such that it cannot be surrounded with the protections ordinarily available to check arbitrary and lawless action.” *McGautha v. California*, 402 U.S. 183, 287 (1971) (Brennan, J., dissenting).

62. *Furman*, 408 U.S. at 295 (Brennan, J., concurring) (emphasis added).

63. *Id.* at 295, 300 (Brennan, J., concurring).

64. *Id.* at 309 (Stewart, J., concurring) (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”); *see, e.g., State v. Cross*, 132 P.3d 80, 109–10, 115 (Wash. 2006) (Johnson, J., dissenting) (“The death penalty is like lightning [sic], randomly striking some defendants and not others.”).

random. There are certain things you can do to reduce your risk of being hit by lightning.

But of course, Stewart has a response to these points—as he does when he clarifies the meaning of his example.<sup>65</sup> There are many people who are charged and convicted of rape and murder, Stewart says.<sup>66</sup> But among those, only a few—and here he refers to the petitioners in the case—“are among the capriciously selected random handful upon whom the sentence of death has in fact been imposed.”<sup>67</sup> In other words, even *after we define the class of people eligible for the death penalty*, it becomes a matter of chance who gets killed and who gets to live. So to bring it back to the lightning example—of those who are at risk of being hit by lightning, who actually gets hit is a matter of chance, a sort of lottery. At one level, we may see lack of randomness (you may have put yourself at risk of the death penalty or of being hit by lightning by what you have done or by where you are), but at another level, it may be just a matter of chance as to whether you are killed or not. It is at this, the second level, that the imposition of the death penalty is “wanton” or “freakish,” because only *some* of the group of rapists and murderers, many who have committed equally “reprehensible” crimes, are sentenced to death.<sup>68</sup>

The language here is important, because there are two ways in which the arbitrary infliction of the death penalty could be worrisome. I think Stewart’s position on this evolves, so we should mark what it is at this point. Stewart notes that there are rapists and murders who were just as bad as Furman and they didn’t get the death penalty.<sup>69</sup> This suggests that the arbitrary imposition of the death penalty is bad because *not everyone gets the death penalty that deserves it*—why are some reprehensible criminals spared, and others not? But one could also see a worry on the other side, which Stewart however does not articulate clearly (at least not here), which is that arbitrariness is bad because *some people get the death penalty who don’t deserve death*. Now, this may be implicit in what Stewart says,<sup>70</sup> but his focus seems to be on those who commit crimes that are pretty much the same in terms of awfulness, but who escape death. Of course, both of these things—that arbitrariness is bad because it represents both the under and over inclusive application of the death penalty—can be summed up as the death penalty is arbitrary *when it is not given to those who deserve*

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65. I will offer a slightly different explanation of this passage later in this essay in light of what Stewart says in *Woodson*. See *infra* Section I.C.

66. *Furman*, 408 U.S. at 309–10 (Stewart, J., concurring).

67. *Id.* (Stewart, J., concurring).

68. *Id.* at 310 (Stewart, J., concurring).

69. *Id.* (Stewart, J., concurring).

70. I will argue this point in more detail in the next section.

*it*. This phrasing is meant to encompass both the possibility that arbitrariness is a possibly in applying the death penalty too little as well as too much. As we shall see, it is a continuing risk of the arbitrariness argument—especially when made by abolitionists—that it can cut both ways. It can lead to the conclusion that we should impose the death penalty more just as much as it can lead to the conclusion that we should impose the death penalty less, or not at all.

Justice White also inveighs against the arbitrariness of the death penalty, but he lies somewhere between Stewart and Brennan in how much force exactly he gives to the fact of arbitrariness. At one point, he simply sounds like Stewart—and indeed may simply be summarizing him. “The death penalty,” White writes, “is exacted with great infrequency even for the most atrocious crimes.”<sup>71</sup> Moreover, White says, “there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.”<sup>72</sup> But where Stewart was at best unclear as to whether he was worried more about juries imposing the death penalty too much or too little, White’s concern seems squarely with the *too little* side. Giving discretion to the juries, White maintains, has led to a situation where juries are opting to refuse to impose death “no matter what the circumstances of the crime,” leading White to conclude that the experiment with letting juries decide whether to impose the death penalty may have “run its course.”<sup>73</sup> White does not explicitly signal that a mandatory death penalty would solve the problem of jurors’ refusing to decide on death for serious crimes—but he does intimate that this might change the equation. It would be a different question, rather than the “narrow” one *Furman* presented, if the legislature had mandated the death penalty in a “particular class or kind of case.”<sup>74</sup> He repeats the same point, more specifically, later on in his opinion.

But White’s position is not ultimately grounded in a pure concern for arbitrariness. Like Brennan, White is concerned about arbitrariness mostly as a means to an end. For Brennan, arbitrariness might be bad in its own right, but the badness also pointed to other problems with the death penalty—the fact that a randomly imposed punishment would not be favored by many, e.g. White is interested in arbitrariness for another reason (also cited by Brennan). White thinks that when the death penalty is so infrequently imposed, and when it is unclear for what reason the penalty is imposed (this is where the worry about arbitrariness most directly enters his analysis), the death penalty cannot

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71. *Furman*, 408 U.S. at 313 (White, J., concurring).

72. *Id.* (White, J., concurring).

73. *Id.* at 313–14 (White, J., concurring).

74. *Id.* at 311 (White, J., concurring).

deter.<sup>75</sup> The cruelty of the death penalty *in these circumstances*, says White, comes when you have a punishment which, because of the way it is imposed (infrequently and arbitrarily) cannot serve any purpose.<sup>76</sup> A death penalty that is imposed randomly cannot deter. Or, as White puts it, “I cannot avoid the conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice.”<sup>77</sup> Importantly, if it were the case that the death penalty were to be more consistently and rationally imposed it could serve this interest; it’s just that White at the time didn’t think that this was a live possibility. So White’s opposition to the death penalty is conditional in a way that Brennan’s clearly is not—and a way that is clearer than Stewart’s is (although Stewart would have to say more about what would happen if the death penalty were to be applied consistently). It seems fair to infer from what White says in his opinion in *Furman* that if legislatures were to make the death penalty mandatory, then he would assume that, now, the death penalty would be serving its purpose (or at least legislatures could fairly assume that it would).

It is important to see how, nonetheless, the worry about arbitrariness that come from Stewart and White converge in *Furman*. First, they both start with the idea that it is possible that some people deserve the death penalty.<sup>78</sup> Second, and this is important for what happens later on between Stewart and White, the concern seems to be that not all who deserve the death penalty will actually get it, because of the wide latitude given to the jury. Two juries can look at pretty similar crimes, but there is no guarantee that they will come to the same conclusion as to whether death is merited. That petitioner Furman got the death penalty and others did not cannot be given a rational explanation. Third, this gives us the problem with arbitrariness that I have already canvassed. Arbitrariness means that you have a process where not everyone gets the death penalty when they deserve it. Whether this means that all murderers get the death penalty or only subset of them is a question that can be put off—but it will have to be addressed eventually. For now, the problem is that the way the death penalty was administered pre-*Furman* cannot give us any guarantees that the death penalty is being imposed in a way that we are sure that all who deserve it are getting the death penalty. As I will put it in this paper, this is a concern with *intrinsic* arbitrariness, or the idea that we need to have a reliable procedure that ensures that the people who get

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75. *Id.* at 312–13 (White, J., concurring).

76. *Id.* at 311 (White, J., concurring).

77. *Id.* at 313 (White, J., concurring).

78. Again, I assume for the purposes of this Article that we can give some coherent sense to the idea that people may “deserve” a punishment, including death.

the death penalty actually *deserved* the death penalty, so that we remove those cases where someone who does not do something sufficiently bad is punished, and where someone who *does* do something sufficiently bad is not. This is to be contrasted, later, with what I will call extrinsic arbitrariness, which is a concern that *even among those who deserve the death penalty*, external factors—like race, or geography—are dictating who gets executed.

It may seem that Justice Stewart's concern in *Furman* is precisely with extrinsic arbitrariness. After all, he says that there does not seem to be any reason why Furman, rather than others who have done equally bad things, is not punished.<sup>79</sup> He seems to be saying, "Here we have a group of people all who deserve the death penalty, and there is no reason why one gets the ultimately penalty and another does not." He does not, in other words, seem to be expressing the worry that some who do get the death penalty are not deserving of it. Rather, Stewart seems to be saying that there is something inherently wrong with an arbitrary selection process, even if it is a selection among those who all are equally deserving of the death penalty. There could be two solutions to this: one is to get rid of the death penalty (removing the punishment and with it the arbitrary process that leads to it), and the other would be to make the death penalty mandatory (thus removing any chance of arbitrariness). If you wanted to get rid of all non-arbitrary selection of candidates for the death penalty, you would have to go all or nothing: either everyone who is eligible for death gets it, or no one does. You are stuck with either a mandatory death penalty (White's position), or no death penalty at all.

Surprisingly, perhaps, Stewart tries to steer a middle way in his subsequent death penalty opinions which show that he is not interested in eliminating *all* possible traces of arbitrariness in the selection of who dies. His majority opinion in *Gregg* repeats his arbitrariness worry from *Furman*, but says that the state of Georgia's statutory scheme has successfully addressed that worry. "While such standards are by necessity somewhat general," Stewart concludes in *Gregg*, "they do provide guidance to the sentencing authority and thereby reduce the likelihood that it [the sentencing authority] will impose a sentence that can fairly be called capricious or arbitrary."<sup>80</sup> "A carefully drafted statute"—as well as automatic appellate review—can be sufficient to meet the risk of arbitrary or capricious imposition of the death penalty.<sup>81</sup> It will take a close reading of Stewart's opinions in *Gregg* and *Woodson* (handed down on the same day) to see that the solution Stewart endorses in *Gregg* is not a remedy for *all* kinds of arbitrariness,

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79. *Furman*, 408 U.S. at 309 (Stewart, J., concurring).

80. *Gregg v. Georgia*, 428 U.S. 153, 193–95 (1976).

81. *Id.*

but only the risk that a person who does not deserve to die will arbitrarily get death anyway. In other words, Stewart in *Gregg* and *Woodson* reveals himself to be concerned not with eliminating *any* possible arbitrariness, but only with eliminating *intrinsic* arbitrariness. If we are mostly interested in eliminating intrinsic arbitrariness, as I believe Justice Stewart is, we do not have to go all or nothing. We can have a system in which not everyone who is eligible for the death penalty is executed, provided we have adequate safeguards to avoid the opposite and more serious error: punishing some with death who do not deserve it.

### *C. Defining Intrinsic Arbitrariness: Gregg and Woodson*

What *Gregg* and *Woodson* did was, first and foremost, to clarify what *Furman* exactly had meant. When it was handed down, with its brief per curiam opinion and multiple and conflicting concurring opinions, *Furman* could have been (and was) interpreted in two ways. First, it could have been read as a command that the death penalty was finished, over in America—this was the interpretation that Brennan and Marshall, and to a lesser extent, Douglas wanted and hoped for. But *Furman* also admitted of a second interpretation, and it is this one that won the day in the end. *Furman* could be read as a *challenge* to the states to come up with a system of administering the death penalty that constrained jurors, and led to a more uniform, and less arbitrary, application of the sentence of death.<sup>82</sup> In a way, and in retrospect, this was the position of White and, especially, Stewart. It should be emphasized, however, that at the time *Furman* was decided, a lot depended not on what the Justices said, but on what the states did in response to what the Justices said. If the states stood back and did nothing, left their death penalty statutes struck down and void, this would be a confirmation of Brennan’s and Marshall’s prediction that the death penalty no longer comported with America’s “standards of decency.” But if the states fought back, and passed new death penalty statutes, which in various ways tried to respond to the concerns about arbitrariness made by Justices White and Stewart, then the United States had not, in fact, given up on the death penalty. This would show that the states still by and large wanted it, and all they had to do—to use

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82. Justice Burger explicitly called on states to try to meet this challenge. *Furman*, 408 U.S. at 400 (Burger, J., dissenting) (“While I would not undertake to make a definitive statement as to the parameters of the Court’s ruling, it is clear that if state legislatures and the Congress wish to maintain the availability of capital punishment, significant statutory changes will have to be made.”); *id.* at 403 (Burger, J., dissenting) (“I am not altogether displeased that legislative bodies have been given the opportunity, and indeed unavoidable responsibility, to make a thorough re-evaluation of the entire subject of capital punishment.”).

Blackmun's famous description from many years later—was to tinker with it a bit.<sup>83</sup> Of course, as we now know, the states took the second course, with a vengeance.<sup>84</sup>

If *Furman* was a challenge to states to come up with a way of administering the death penalty in a way that was non-arbitrary, states responded to it in two main ways—which is why there had to be two sets of opinions on July 2, 1976, and not just one. Some states responded to *Furman* with a system of what was called “guided” or “channeled” discretion.<sup>85</sup> Juries still had the final say in who lived and who died, but they had to do so in a way that was informed by statutory guidelines—they could not be given the free reign that *McGautha* had allowed them. But other states responded by making the death penalty mandatory for certain crimes, e.g., murder, or aggravated robbery.<sup>86</sup> Both sets of responses deal with the arbitrariness problem, although in very different ways. And at a first glance, the second response seems the more promising as a response to the worry about arbitrariness, and even sensible. If the risk is that juries cannot be counted on to apply the death penalty consistently—juries in different jurisdictions, or even in the same jurisdiction—then the solution is to get rid of the role of juries in sentencing. If the jury finds guilt beyond a reasonable doubt as to the crime—say first degree murder—then they have by the same token determined that the person should be sentenced to death. The solution for arbitrary juries at sentencing is simply this: eliminate juries from sentencing altogether. What is more, this solution fits well with the diagnosis and condemnation of juries in *McGautha*—that there is no possible set of standards that could reasonably inform juries in making their decisions. There are just too many factors, too many subtleties, to make a rule that juries could be counted on to follow (and it would be unreasonable and even wrong to put them up to this task). But if juries do not have to make that decision at all, then they *a fortiori* cannot make that decision arbitrarily. Justice White—one of the two Justices who were concerned with arbitrariness in *Furman*—blessed this strategy

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83. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) (“From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor.”).

84. As one state Court noted in the late 1970s, “The *Furman* decision evoked a wide legislative reaction throughout the United States, with some thirty-five states adopting new death penalty statutes.” *Commonwealth v. McKenna*, 383 A.2d 174, 178 n.8 (Penn. 1978).

85. See discussion of *Gregg* and *Jurek*, *infra*.

86. See discussion of *Woodson* and *Roberts*, *infra*.

in his dissents in *Woodson* and its companion case, *Roberts v. Louisiana*.<sup>87</sup>

But, importantly, White was in *dissent* in both of those cases. He lost the battle of how to define the post-*Furman* death penalty landscape. July 2, 1976 was Justice Stewart's day, and we have to look closely at his majority opinions in these four cases—*Gregg*, *Woodson*, and their companion cases *Jurek* (for *Gregg*) and *Roberts* (for *Woodson*)—to get a better grip on what Justice Stewart saw the problem of arbitrariness to be, and why he thought (a) that a system of guided discretion would work to solve the problem arbitrariness, and (b) why he thought that a mandatory death sentence for certain crimes would *not* solve the problem of arbitrariness, and might even give us more arbitrariness. The separation between White and Stewart can seem surprising, given that they seemed to present a unified front in *Furman*. That is, they both seemed to be of the opinion that the death penalty was acceptable, but not in its current form, because in its current form the death penalty yielded results that were wanton and freakish. But this unity masked an underlying division about what the real problem with the wanton and freakish imposition of the death penalty was. White saw the problem with arbitrariness as really a derivative one, because when the death penalty was not applied with some frequency, some rationality, it couldn't act as a deterrent. We needed predictability and frequency in order to send a signal that serious crimes will be punished with the most extreme sanction possible. If juries are just picking and choosing at random who dies, then the death penalty can't effectively deter: people may just take their chances. If the death penalty is made *mandatory*, though, this solves the problem of deterrence. The message sent by a mandatory death penalty couldn't be clearer: if you kill someone after deliberation, then you will die. No margin is left for a jury to—randomly and freakishly—give you life in prison instead of death. In retrospect, Justice White's opinions in *Woodson* and *Roberts* approving the mandatory death penalty fit perfectly with his worries about arbitrariness in *Furman*. He didn't want to eliminate arbitrariness as such; he wanted the death penalty to effectively deter, or at least he wanted a system that could offer a reasonable reassurance that it could. A mandatory death penalty would deter murderers, or at least could be reasonably expected to deter them.

Justice Stewart by contrast seemed genuinely troubled by arbitrariness itself. It wasn't that an arbitrary death penalty couldn't deter—it was that an arbitrary death penalty was wrong. It is only, I think, in *Gregg* and *Woodson* that we can really see what Justice Stewart meant by the wrongness of an arbitrary death penalty, and what

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87. *Woodson v. North Carolina*, 428 U.S. 280, 306 (1976) (White, J., dissenting); *Roberts v. Louisiana*, 428 U.S. 325, 337 (1976) (White, J., dissenting).

he thought could solve that problem. It might be well, before we get to those opinions, to look in full at the key passage in Stewart's opinion in *Furman*, which he repeats again in *Gregg*:

Indeed, the death sentences examined by the Court in *Furman* were "cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [capital crimes], many just as reprehensible as these, the petitioners [in *Furman* were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."<sup>88</sup>

The language here is important, and has to be parsed with some care. Three interpretive points bear mentioning, because they will be confirmed and clarified in the *Woodson* and *Gregg* opinions; and they will support, I argue, a concern on Justice Stewart's part, with *intrinsic* rather than *extrinsic* arbitrariness. First, Stewart points out the arbitrariness of the fact that some people who have committed the same crime are getting death (the petitioners in *Furman*) and some are not, without any rational basis for the distinction.<sup>89</sup> Some have raped and murdered *in just as awful a way* as Furman has, but they will live and Furman is sentenced to die. This suggests that fairness and non-arbitrariness would require that either *all die* or *all live*—i.e., that either the death penalty should be abandoned or something like a mandatory death penalty should be required. This was the conclusion we were left with at the end of the last section. That Justice Stewart does not go in this direction in *Woodson* is something that will require some explaining; but we can begin by noting a second point in this same *Furman* passage.

Second, what is left implicit in the quote from *Furman* is that while many who have committed reprehensible crimes are getting life rather than death, *some who have not committed reprehensible crimes* are getting the death penalty. In other words, Stewart's analysis comprises not just two groups of people, but in fact three. There are those who have committed terrible crimes, and who are (justifiably) getting the death penalty. Then there are those who have committed terrible crimes *just as bad as those who got the death penalty*, and are getting life. But then there are also those who have committed crimes

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88. *Gregg v. Georgia*, 425 U.S. 153, 188 (1976) (alterations in original) (quoting *Furman v. Georgia*, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring)).

89. *Id.*

that are in fact *less* bad than Furman's and they are getting death. That is, of those convicted of rape and murder, it is only "many" of them whose crimes are as bad as Furman's—*not all*.<sup>90</sup> This has to speak, to Stewart, of the randomness of the death penalty, when it is not just the case that some bad people don't get the death penalty, but that some people who are not as bad as Furman *do*. This suggests that a mandatory death penalty may *not* solve the underlying problem of arbitrariness, because if we executed everyone who committed a rape or a murder, some whose rapes and murders were in fact *less bad* than Furman's would get the death penalty, simply because of the fact that they had raped or murdered. There would *still* be a kind of arbitrariness if we did not reserve the death penalty for the *most reprehensible crimes*; we still need some sort of selection mechanism to work. Again, this point is by and large implicit in *Furman*, but it is there, and it becomes easier to see it when we look at *Woodson*.

But there is still a third point, which sheds light on the first two points, and which will provide one of the keys to Stewart's decision in *Woodson*. For what Stewart focuses on in the *Furman* passage is the fact that just looking at people's *crimes* may not be enough. Some have committed crimes just as bad as Furman and they aren't getting death; similarly, some have committed crimes *not* as bad as Furman's and they are getting death. What Stewart seems to be saying is that if we focus on crimes *alone*—just on what they have been charged and convicted of—we can't get the information we need to make sure only that those who deserve death really get death. Stewart does not seem willing to rule out death as a penalty altogether. He just worries how it is being applied. And I think when we read *Furman* together with *Woodson* and *Gregg* we get this understanding of arbitrariness: the death penalty is arbitrary when we leave it to the jury to decide who gets death based just on their analysis of the crime alone, without telling them that they have to consider, further, the circumstances of the crime and especially the character of the accused. It is these additional factors that can give the jury a non-arbitrary basis for determining that *this* criminal should get the death penalty. This also explains why the mandatory death penalty will not do, because it means that the jury can only decide whether the person has committed the crime—but not all people who commit rape and murder deserve death. Those who commit reprehensible crimes and (especially) those who are *reprehensible people* deserve death. And we cannot just infer the latter from the former—only the jury can do this.

These three points are not obvious from Stewart's *Furman* opinion itself, but they become obvious when we read the key passages from

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90. *Id.*

*Furman* in light of *Woodson*. Doing so makes sense of *Woodson*'s concern with the jury's ability to look not just at the crime, but also the circumstances of the crime and (especially) the character and record of the accused. It is not just a note sounded once or twice in *Woodson*, but repeatedly, and even movingly. In an important and rhetorically charged passage, Stewart writes that:

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.<sup>91</sup>

A rational death penalty process cannot just look at the crime of conviction alone. It cannot simply look at the fact that a person has committed a rape or a murder, even if these crimes are in fact reprehensible. A rational death penalty process must look at the offender *as a person* and consider whether the offender *as a person* really has the kind of character and record that deserves the death penalty. A mandatory death penalty which just considers all people who commit rape or murder as the same, as of the same character and record, is arbitrary, because it doesn't distinguish the people who really deserve death and the people who don't. It won't give us "reliable" results, to use Justice Stewart's word.<sup>92</sup> So North Carolina's mandatory death penalty had to go.<sup>93</sup> Juries must be forced—in some way—to fix not just on the crime and its details but on the person, especially when we are assessing the most serious penalty the state can give. There can be no serious doubt that *this person* deserves death, not just that he or she has committed a reprehensible crime. Any process that leaves it open that a person who committed a bad crime *and that's all* can be convicted of death leaves itself open to the possibility of arbitrariness—by which I mean intrinsic arbitrariness, or the risk that someone who does not deserve to die still gets the death penalty.

Thus in *Gregg*, when Stewart returns to the theme of a rational—non-arbitrary—death penalty, it is in the context of a sentencing scheme that requires juries to act in an "informed manner" by asking jurors to

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91. *Woodson*, 428 U.S. at 304 (Stewart, J., concurring).

92. *Id.* at 305 (Stewart, J., concurring).

93. *Id.* (Stewart, J., concurring).

consider not just the crime the person has committed but the circumstances of the crime and the character of the offender.<sup>94</sup> And again, it is this latter point especially that Stewart was asking for consideration in his *Furman* opinion—who are these people who have committed these crimes? What is their background? What is their *character*? Are they deserving of death when we look at their lives as a whole, or should we show mercy? Of course, *McGautha* contemplated that juries would look at these factors as well—but Stewart wanted more. He wanted an assurance of a process that would provide a rational “basis” for distinguishing who got death and who did not.<sup>95</sup> It was only with a process that distinguished crimes based on the circumstances of the offense and the character of the person involved. It is in this way that we could make a *rational* division between those who had raped and murdered and deserved death and those who raped and murdered and who did not.<sup>96</sup> Not all the people who committed a reprehensible crime deserved to die, and it should not be left to chance whether or not they *might* die—or at least it should not be left to chance. Georgia’s capital sentencing scheme did this, or at least well enough.

This is where Stewart adds an important—and revealing—qualification to his decisions (*Gregg* and *Jurek*) affirming sentencing schemes that rely on “guided jury discretion.” Stewart writes that these schemes do not eliminate all possibility of arbitrariness. Rather, they reduce the risk, in his words, of decisions that are “wholly arbitrary.”<sup>97</sup> Juries have to be guided through a process which makes things like the character of the offender salient. We have to make juries tell us why this person really is worse than the others, and why his crime was especially bad. Juries may lie, they may not follow instructions, but we owe it to try to guide them toward a “rational sentence.”<sup>98</sup> And that is enough—enough that we have a system where we “reduce the likelihood” that death penalties are imposed “capriciously or in a

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94. *Gregg*, 428 U.S. at 189.

95. *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring).

96. *See, e.g., Gregg*, 428 U.S. at 190 (“If an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information about a defendant and the crime he committed in order to be able to impose a rational sentence in the typical criminal case, then accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision.”).

97. *Id.* at 189; *see also Jurek v. Texas*, 428 U.S. 262, 276 (1976) (“Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law. Because this system serves to assure that sentences of death will not be ‘wantonly’ or ‘freakishly’ imposed, it does not violate the Constitution.”).

98. *Gregg*, 428 U.S. at 190.

freakish manner.”<sup>99</sup> Nor in a way is it bad to not eliminate arbitrariness altogether. It is only necessary to put it within bounds.<sup>100</sup> For arbitrariness in one context can be mercy in another.<sup>101</sup> And we should not, Stewart says, let the possibility of an “isolated decision of a jury to afford mercy” render “unconstitutional” those sentences “imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice.”<sup>102</sup>

## II. INTRINSIC ARBITRARINESS

When looked at together, *McGautha*, *Furman*, *Gregg*, and *Woodson* present a sort of dialectic. The thesis is that arbitrariness is an inevitable, even welcome, feature of the jury system (this was the argument of *McGautha*). To fully get rid of arbitrariness would be to get rid of the jury—something that is not necessarily desirable. *Furman*, however, in the form of the two opinions by Stewart and White, rejected arbitrariness, or at least the unlimited arbitrariness that *McGautha* permitted and even championed. In doing so, *Furman* put at least a pause on executions, until states could figure out how to manage arbitrariness, to bring it in line with the procedural and substantive worries of the two Justices. That’s the antithesis to the thesis that “untrammled” jury discretion was acceptable, the thesis championed in *McGautha*. In *Gregg* and *Woodson*, we finally get to the synthesis: a way to allow the jury to exercise its discretion, but not too fully, not to the point where they can act in a way that is wanton or freakish. This, at least is the story that seems conventional and rather easy to tell. By telling it, I want to press that the arbitrariness that the Court is most interested in reducing or eliminating is of a certain kind, what I am calling “intrinsic arbitrariness.” A process is “intrinsically arbitrary” if it tolerates the possibility that someone may get something that they do not deserve—an arbitrary *system* is one that does not adequately filter between the deserving and the undeserving. In the context of the death penalty, Stewart’s worry (as I have been presenting it) is that the pre-*Furman* death penalty regimes gave out the death penalty sometimes to those who did not really deserve it, who may have committed a terrible crime, but were not themselves terrible, or terrible enough, people to get the death penalty. Some deserved death, to be sure, but some

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99. *Id.* at 194–95.

100. F. Patrick Hubbard, “Reasonable Levels of Arbitrariness” in *Death Sentencing Patterns: A Tragic Perspective on Capital Punishment*, 18 U.C. DAVIS L. REV. 1113, 1122 (1985) (“[T]he constitutional model only requires stricter control on arbitrariness in capital cases than in noncapital cases. Reasonably fair procedures, not perfect ones, are the requirement.”).

101. I will return to this point later. *See infra* Section III.D.

102. *Gregg*, 428 U.S. at 203.

deserved something less than that. The way to move past this kind of arbitrariness was to guide or channel the jury, according to Stewart.<sup>103</sup> Make them decide whether the crime was committed in a particularly bad way, or had some other bad feature, and make them rule on whether the criminal had a character that was especially reprehensible. No system could be perfect, but a system at least had to put the jury through its paces, to get it to provide a rational basis to show that death in this case for this person really was warranted, and not a lesser punishment.

If we look at the concern of Justice Stewart to be one of intrinsic arbitrariness, we do not need to tell a long or philosophically complex story about why intrinsic arbitrariness is bad. Intrinsic arbitrariness is bad because it results in giving some people a punishment they do not deserve. Just as it would be wrong to punish someone who did not commit any crime, so too would it be wrong to punish someone with a penalty more than he or she actually deserved. Both are, in a way, forms of punishing the innocent. In one case, the person deserves no punishment, and it would be wrong to give him or her any punishment. In the other case, the person deserves *not that much punishment*, and punishing him or her beyond the punishment he or she deserves involves punishing out of proportion to guilt. The only concepts we really need to understand intrinsic arbitrariness are the idea of deserved guilt and the idea of proportionate punishment. A system that resulted in meting out punishment not in any way correlated to desert—that left it to the unregulated whim or the jury would risk handing out punishment on an arbitrary basis. Of course, that juries would act this way is in part an empirical judgment.<sup>104</sup> In *McGautha*, Justice Harlan seemed to

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103. This was not so for Justice White, who felt that a mandatory death penalty adequately solved any worry about the arbitrariness of the death penalty—and itself created no *new* problems with arbitrariness. See *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring).

104. To be sure, we need to get clear first on what we are measuring, so that we might be able to tell when and whether the death penalty has become less arbitrary. I think it is obvious that it has, although this is not a widely shared opinion, especially among death penalty critics. See, e.g., Kirchmeier, *supra* note 19, at 441 (“The system, however, is not *much* better, and many of the improvements are not necessarily a result of the guided discretion system. Although the present system has made some small progress toward achieving a fairer sentencing system, it has not come close to the Eighth Amendment goals envisioned by the Court in *Furman*.”). Sometimes the lower number of executions is used to “prove” that the death penalty is arbitrarily imposed, so that today we have as much (or more) arbitrariness as before. See, e.g., Lindsey S. Vann, *History Repeats Itself: The Post-Furman Return to Arbitrariness in Capital Punishment*, 45 U. RICH. L. REV. 1255, 1268–69 (2011) (“Since then, the number of executions throughout the country decreased to thirty-seven in 2008, fifty-two in 2009, and only forty-six in 2010. These numbers are especially significant in light of Justice Brennan’s conclusion that a strong inference of arbitrariness results from the infliction of the death penalty less than fifty times in a country of over 200 million people. Since

think we could trust juries to assess guilt and punishment without any help, without any guidelines. We had to believe that they could take this task seriously, and perform it reasonably well—or so Harlan believed. But experience proved this wrong, or at least Justice Stewart (and others) thought. He saw juries giving out punishments that seemed not appropriately related to desert. He saw equally reprehensible crimes being given different punishments. He saw, more pointedly, less than reprehensible crimes and less than reprehensible people getting death. The solution to this was to make the jury prove that it was giving out death only to those who really deserved it—who committed the worst crimes, and were the worst people, hence the result in *Gregg* and in *Woodson*.

When we look at the Court's jurisprudence in terms of avoiding intrinsic arbitrariness—rather than what I will go on to call extrinsic arbitrariness—the vast sweep of its decisions in the past half century come into much better focus. Of course, the validation of Georgia's system in *Gregg* set the standard for the Court's subsequent review of various similar statutory schemes over the years. But two other strains of the Court's case law also make more sense when we look at them in terms of eliminating intrinsic arbitrariness. First, there is the Court's finding that certain crimes are simply not awful enough to deserve death. Over the years, the Court has all but limited the death penalty to cases where one person kills another person. It has gotten rid of the death penalty for rape, even of a child, and it has nearly abolished the death penalty in cases of felony murder—where, although there is a death, it is not a death that is intended.<sup>105</sup> Second, the Court has also restricted the death penalty as applied to certain classes of people. Those who are severely mentally disabled and those who are under eighteen cannot be executed.<sup>106</sup> This second class of limitations resonates most deeply with Justice Stevens' interest in applying the death penalty only to those whose character and record show the most depravity. Some—the mentally disabled and the young—simply cannot be said to have characters of this sort; their characters are not fully formed, or not formed enough for us to pass judgment on them that they deserve death for who they are. With these two types of

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Justice Brennan drew his conclusions, the population has risen to over 300 million people, yet the number of executions remains less than fifty per year. Accordingly, the low imposition rates raise the same inference of arbitrary imposition today as they did in 1972, if not an even stronger one.”). But this could another way, viz., the lower number could also “prove” that the death penalty is being applied more *selectively*.

105. *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (rape); *Enmund v. Florida*, 458 U.S. 782, 797, 801 (1982) (minor participant in a felony murder); *Kennedy v. Louisiana*, 554 U.S. 407, 445–47 (2008) (rape of a child).

106. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (mentally disabled); *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (juveniles).

categorical bans on death (for certain crimes and for certain people) the Court does with an axe what it was doing with a scalpel in its *Gregg* line of decisions. Giving the jury guidelines for how to decide which person gets the death penalty, given his or her crime and his or her character reduces intrinsic arbitrariness by getting the jury to provide a reasoned decision that *this* murderer (say) should get the death penalty and this *other* murder should not. But categorical exclusions do the same thing, albeit in a sweeping way. They announce that the death penalty should not range over some crimes and some criminals—because if it did, it would risk bringing in some people that did not deserve to be punished with death.

#### *A. Reducing Intrinsic Arbitrariness: Guided Discretion*

The revolution in *Gregg* and *Jurek* was the idea that jury discretion could be managed in a way that would reduce arbitrariness, or at least make the jury decision-making not “wholly” arbitrary. Again, the sea change from *McGautha* to *Gregg* is obvious. *McGautha*, at worst, saw wholesale jury discretion as an ineliminable part of having a jury system. To get rid of it was to put into question the whole criminal justice system by putting into question the main driver of that system—the men and women who made up the jury. At best, *McGautha* saw the jury as a positive force, able to make the fine-tuned judgment as to who deserved death, and able to dispense mercy when it was necessary (and even when it was unnecessary). *Woodson* was not wrong in seeing inherent in *McGautha* an implicit condemnation of a mandatory death penalty system, which would take the jury out of sentencing altogether. But *Furman* changed all this, seeing in *McGautha*’s tolerance of the jury as, in fact, a tolerance for permitting the jury to make a judgment that someone should die when in fact he or she might not deserve death. *Gregg* and *Jurek* had to thread the needle of limiting the jury’s discretion without eliminating the role of the jury. They did so by endorsing various systems of guided discretion, where a jury could use its judgment, but not have that judgment taken away from it. It had to give a reasoned decision. Some arbitrariness was inevitable, but what had to be limited was the kind of arbitrariness that would result in someone whose crime—and more importantly, someone whose character—was not of the sort such that death was the proper punishment.

The basic of outline of the acceptable and approved system was this: the jury, after determining that the person was in fact guilty of a crime has to go on to find at least one aggravating factor in order to move the person from being “guilty of a crime” to “guilty of a crime

where death is a permissible punishment.”<sup>107</sup> If the jury cannot find an aggravating factor, then the person cannot get death. But supposing the jury has found an aggravating factor, it then *must* go on to consider possible mitigating factors—and here, unlike was the case with the aggravating factors—the mitigating factors can be *anything*.<sup>108</sup> The state has to specify, beforehand, what factors the jury can consider aggravating. When it comes to mitigators, however, the jury can roam free. It can consider any detail of the crime, and of the person’s character, it wants. No limitation can—or should be made—on what the jury can consider. It is here, as I will explain later, that the Court has shown its preference for avoiding giving the death penalty to a person who *may* deserve it. There is an asymmetry between the risk of putting someone to death who does not deserve it, and the risk of preventing someone’s execution who may, after all, deserve it. The system seems designed, in other words, to be *lenient* rather than to guarantee justice.<sup>109</sup> I will have more to say about this in this Part and the next.

At this point, however, it is worth emphasizing how the system of statutory aggravators and unlimited mitigators would, in Stewart’s mind, prevent intrinsic arbitrariness. Stewart wanted a system that would force the jury to give a *reasoned* response to the question: why should this person get death while someone else who committed the same crime would not? At the step of providing aggravating factors, the system forces the jury to answer this question by specifying why this crime or this criminal was especially bad. He did not just commit murder, for example—he murdered *a police officer* or he murdered *a judge*. Or perhaps this was not the first serious felony he committed. These are things that give a rational basis for saying why this person is elevated to the level of being “death eligible”—his crime was, in a way, more reprehensible than other crimes that might be of the same type. The aggravating factors provide the “reasoned basis” that Stewart saw was lacking in *Furman*. It was not that juries might not have been providing reasoned bases *anyway*, but we could not be sure, and that

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107. See *Gregg v. Georgia*, 428 U.S. 153, 206–07 (1976); *Jurek v. Texas*, 428 U.S. 262, 276 (1976). See also *Lockett v. Ohio*, 438 U.S. 586 (1978), discussed *infra* note 108.

108. *Lockett*, 438 U.S. at 604 (“We . . . conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”). *Lockett* explicitly builds on *Woodson*’s command to consider the defendant in all of his or her individuality. *Id.* at 603–04.

109. As David McCord puts it, the system is designed to reduce the risk of *overinclusiveness*. David McCord, *Judging the Effectiveness of the Supreme Court’s Death Penalty Jurisprudence According to the Court’s Own Goals: Mild Success or Major Disaster?*, 24 FLA. ST. U. L. REV. 545 (1997).

was the problem. Juries were not explicitly required to think about aggravating or mitigating factors, were not required to check off boxes, and were not required to actually *commit* to a reason why this crime or this criminal was really deserving of death.

But this is not the only part where the jury is forced to be put through its paces. Even after it has shown that the person fits within the category of the death eligible, they are instructed to consider whether there is *anything* in the circumstances of the person's crime or the person's character that might make death nonetheless not the appropriate punishment. That is, they are required to separately consider mitigating circumstances, and whether there are any (taken singly or collectively) that would make death an excessive punishment for this person. So the jury is really required to make two judgments at sentencing, one more fine grained than the other. First, they must point out why this crime or this criminal is especially bad. Second—for a sentence of death to be appropriate—they must find that the aggravating circumstances are not outweighed by anything, *anything*, that is relevant and that is mitigating. What results, at least in Stewart's estimation, is a sentence that is reasoned and not arbitrary, or at least not "wholly arbitrary."<sup>110</sup>

What the scheme does, in fact, is to *force* a reasoned decision making process on the jury's part. The jury in the first step has to find an aggravating factor, and in so doing, decide that the person who is facing death fits in the category of the worst.<sup>111</sup> After this stage the jury has already considered the character of the offender and the circumstances of the crime—in a way narrowed by the state's having to specify which factors are salient. It is of course possible that *after this* the jury's decision could be random. But it cannot—by virtue of the first decision-making stage at sentencing—be wholly random.<sup>112</sup> It will

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110. *Gregg*, 428 U.S. at 189.

111. Of course, to do this work, the aggravating factor must not be vague—it must actually pick out a feature of some but not all murders. *Zant v. Stephens*, 462 U.S. 862, 877 (1983) ("An aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."); see also Chad Flanders, *Is Having Too Many Aggravating Factors the Same as Having None at All? A Comment on the Hidalgo Cert. Petition*, 51 U.C. DAVIS L. REV. ONLINE 49 (2017). For further discussion on the same theme (although taking issue with my analysis), see Tyler Ash, Note, *Can All Murders Be "Aggravated"? A Look at Aggravating Factor Capital-Eligibility Schemes*, 63 ST. LOUIS U. L.J. (forthcoming 2019).

112. Thus I disagree with Vivian Berger's comment that it is hard to see "why differentiating among a narrower, more similar group of convicted murderers with respect to sentence is less capricious than doing so among a larger group of less comparable killers." "Black Box Decisions" on Life or Death—If They're Arbitrary, Don't Blame the Jury: A Reply to Judge Patrick Higginbotham, 41 CASE W. RES. L.

be the choosing who gets death *among those whom the jury has already decided deserve death*. Indeed, after this, the jury's decision as to whether to impose the death penalty can best be deemed a decision as to whether or not to dispense (arbitrary) mercy based on any mitigating factor it can think of, or even none at all. To eliminate the arbitrariness here, at his stage, would be at the same time to give up the possibility that the jury can show mercy.<sup>113</sup> It would be effectively to make it the case that all who are death eligible should get death. But the extra layer ensures this is not the case, and in so doing adds another prophylactic layer to the sentencing decision. Even here, where the jury need not mitigate (as opposed to the previous stage, where it *must* find an aggravator), it is at least forced to *consider* the possibility of mitigation; it again puts the jury through its paces, to show that its determination that *this person* deserves death for *this crime* and that there is nothing that suffices to defeat the aggravating circumstance or circumstances. It allows yet another layer where the risk of sentencing someone who does not deserve death can be spared execution. This pattern—where the class of people who are spared is by design larger than the class of those who deserve death—is a recurring feature (at least on paper) of the Court's death penalty jurisprudence. It remains to trace that feature through an apparently separate line of cases, where the Court has limited which crimes and which persons can be eligible for death.

### *B. Reducing Intrinsic Arbitrariness: Crimes*

The idea that the Court in its line of decisions limiting the death penalty to certain crimes—ultimately only murder, and probably only first degree murder—has usually been told as part of story of “evolving standards.”<sup>114</sup> We (who exactly the “we” is has never been entirely clear<sup>115</sup>) used to think that the death penalty was appropriate for all

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REV. 1067, 1081 n.81 (1991). What narrowing does is precisely to reduce the risk of arbitrary or capricious selection.

113. See *infra* Section III.D, for further reflections on mercy.

114. As summarized by Justice Kennedy:

The [Eighth] Amendment “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.” This is because “[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.”

*Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (internal citations omitted).

115. For a discussion of this point, see Chad Flanders, *Bridges and Ballots: Comment on Levinson*, 58 ST. LOUIS U. L.J. 1097, 1103 (2014) (“[W]e can be defined by how we vote, how we respond to polls, how we think after we have deliberated, who represents us, what laws our representatives pass, etc. Or consider a more classic variation of the question: are we fifty states, or are we a nation?”).

manner of crimes and all manner of people. But we have grown in our standards and our beliefs about the appropriateness of death as a penalty. The Court merely endorses this evolution and follows the wishes of “we, the people” in limiting the death penalty to certain crimes. This narrative is not wrong, but it is incomplete. First, it does not do adequate justice to the Court’s repeated insistence that *it*, not the people has the last word—whether this last word is grounded in its superior moral understanding, or just its place as the final arbiter of constitutional norms. The Court does not merely rubber stamp what the people say, although it does take that into account. The criticism that the Court simply manipulates popular support or opposition to the death penalty to its ends should be read against this backdrop. Popular opinion can only work as a post hoc rationalization of the Court’s own judgment, not as the driver of it.<sup>116</sup> But there is a second point about evolving standards which I think shows the deeper problem with the narrative that revolves around it. If the Court really is purporting to let evolving standards drive the death penalty, and evolving standards is determined by *what the people do*, then the people can of course make their opinions known, at the state level, at the national level, and (what is most important for our purposes) *in the jury room*. Justice Scalia made this point powerfully in one of his many dissents to the Court’s use of the “evolving standards” paradigm, when he cites Matthew Hale for the proposition that it was the *jury* who represented the best *populist* method of deciding who really deserved the death penalty or not.<sup>117</sup>

The decisions that have the Court limiting which crimes and which criminals can get the death penalty are, in the end, limitations on the jury’s power to pass down a certain judgment, i.e., that this person get death for this crime. If we look at this in terms of the Court wanting to avoid intrinsic arbitrariness we can make sense of these moves as designed to avoid giving the death penalty to those who do not deserve it. It is just a categorical restriction on the power of the jury, as opposed to giving the jury guidelines: it sets absolute bounds within which they can make their decision. The Court is saying, in so many words, that the jury cannot make a *rational* decision to give someone who merely rapes, or who is under eighteen, the death penalty. A system that leaves these types of questions open risks being arbitrary, because it means that a jury *could* decide to send to death a juvenile, or a rapist, when in fact it would be unjust to do so. This is another way of

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116. See also William Berry, *Evolved Standards, Evolving Justices?*, 96 WASH. U. L. REV. 105, 145–50 (2018).

117. *Atkins v. Virginia*, 536 U.S. 304, 349 (2002) (Scalia, J., dissenting). Juries are especially valuable in instances where a line has to be drawn, but it is not clear that *where* that line should be drawn (or whether it should be drawn at all as a categorical matter). I return to this point *infra*, Part III.

channeling jury discretion, but in a more radical way. It is not merely requiring the jury to make clear the basis of its decision; it rules out certain decisions altogether, because of a judgment by the Court that some crimes and some people do not merit the death penalty. If we look at things this way, then the Court's so-called "evolving standards" jurisprudence and its jurisprudence around guiding juror discretion are really of a piece. They are both trying to get juries to focus on only giving the death penalty to those who really deserve it. Sometimes this means requiring the jury to make explicit the reasons for its decisions, to give a "reasoned basis" for applying the death penalty. Sometimes this means taking some decisions out of the juries' hands altogether.<sup>118</sup>

The first decision in this regard was *Coker v. Georgia*,<sup>119</sup> and the difference between Burger's majority opinion and Powell's concurring opinion—agreeing with the result, but not the rationale—is illuminating. Justice Burger's opinion concludes that the death penalty for rape is disproportionate because even though rape is devastating for the victim, it still leaves the victim alive and "life" for the rape victim "may not be nearly so happy as it was ... it is not over and normally is not beyond repair."<sup>120</sup> So the majority in *Coker* finds that the death penalty is *per se* impermissible for rape.<sup>121</sup> Powell agreed in the case of *Coker*, but was not willing to go to the extreme of abolishing the death penalty for rape. Powell wanted to limit jury discretion in the rape context, not eliminate it.<sup>122</sup> If a rape is sufficiently aggravated, Powell said, he would give the jury the power to impose death for the rapist.<sup>123</sup> It

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118. The Court has summarized its recent death penalty jurisprudence in roughly this way:

In sum, our decisions since *Furman* have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

*McCleskey v. Kemp*, 481 U.S. 279, 305–06 (1987).

119. 433 U.S. 584 (1977).

120. *Id.* at 598.

121. *Id.* at 600.

122. *Id.* at 601 (Powell, J., dissenting) ("The plurality, however, does not limit its holding to the case before us or to similar cases. Rather, in an opinion that ranges well beyond what is necessary, it holds that capital punishment always regardless of the circumstances is a disproportionate penalty for the crime of rape.").

123. *Id.* at 604 (Burger, C.J., dissenting).

should be clear that Powell's strategy is to apply the *Gregg* idea of narrowing jury discretion, but this time to the crime of rape—have the jury find aggravating facts that make *this* rape that much more reprehensible than the others. Make the jury give a reason for imposing death in this case of rape, rather than the other case, and in the process try to guide the jury to a rational decision. But Burger and Powell do not differ as much as they may seem to—even though one would keep the death penalty for rape and the other would not. Both want to limit the discretion of the jury, to keep them from sentencing a person to death who does not deserve it. Powell employs a scalpel. Do not let the jury give the death penalty in the “ordinary rape” case.<sup>124</sup> Burger uses an axe. There is no ordinary rape case, he says, or perhaps he believes that the jury cannot be trusted to tell, reliably, which case is the aggravated rape case and which is the ordinary case.<sup>125</sup> The solution to this risk—which is a risk of arbitrariness in the application of the death penalty—*could* be to get the jury to try harder, or to focus. This is Powell's move. But the solution could also be to cut out altogether the possibility for the jury to act arbitrarily—whether this means the risk of giving the death penalty to an “ordinary” rapist or giving death to a rapist, ever.

This point—that removing arbitrariness can just as easily result in a category exclusion of death rather than an effort to “channel”—is even more evident in the over 30-year later follow-up to *Coker, Kennedy v. Louisiana*.<sup>126</sup> Justice Kennedy, in his majority opinion, himself raises the Powell-type objection to getting rid of the death penalty altogether in cases where the person is accused of raping a child. Why not just give the jury the task of finding “narrowing aggravators” so that the death penalty is only imposed on the very worst of the worst child rapists?<sup>127</sup> But Justice Kennedy rejects that as inviting an impermissible degree of arbitrariness, citing Stewart's opinion in *Furman*.<sup>128</sup> He suspects, firstly, that cases of child rape are so intense, so horrific, that a jury would be hard-pressed to rank child rapes—that there is something that could be called an ordinary child rape, as opposed to an aggravated one.<sup>129</sup> Second, and relatedly, Kennedy rejects the analogy

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124. *Id.* at 601 (Powell, J., dissenting).

125. *Id.* at 604 (Burger, C.J., dissenting).

126. 554 U.S. 407 (2008).

127. *Id.* at 439.

128. *Id.* (“In this context, which involves a crime that in many cases will overwhelm a decent person's judgment, we have no confidence that the imposition of the death penalty would not be so arbitrary as to be ‘freakis[h].’ . . . We cannot sanction this result when the harm to the victim, though grave, cannot be quantified in the same way as death of the victim.”) (quoting *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring)).

129. *Id.*

to individual aggravating factors for death, but not without raising the prospect that individualized sentencing even in the case of the death penalty for murder introduces an intolerable risk of arbitrariness.<sup>130</sup> Nonetheless, we have some experience in fashioning adequate aggravators and mitigators in the murder context, Kennedy goes on—and we do not have it in the case of child rape.<sup>131</sup> To start something like this—developing a list of aggravating factors and mitigating factors for child rapists—would require a great deal of “experimentation.”<sup>132</sup> But this is problematic, Kennedy concludes, because it means experimenting in an area “where a failed experiment would result in the execution of individuals undeserving of the death penalty.”<sup>133</sup> This is the language of avoiding what I have called “intrinsic arbitrariness.” Allowing juries to decide which child rapist gets the death penalty, when there is a good chance that *no* child rapist deserves the death penalty, means risking arbitrariness in the death penalty—giving death to those who do not morally deserve death. Rather than risk this, Kennedy says he will not merely channel the jury’s discretion in the case of child rape; he will get rid of it, by getting rid of the death penalty for child rape.<sup>134</sup>

In doing so, Justice Kennedy draws a contrast in *Kennedy* about two approaches to the death penalty—one of “rules” and the other of “case-specific circumstances.”<sup>135</sup> Kennedy writes that there is a tension between these.<sup>136</sup> But the way I am interpreting the Court’s moves in *Coker* and *Kennedy* shows them just to be variations on the same strategy. One can try to limit arbitrariness by giving the jury standards it has to consider in applying the death penalty. But one can also try to limit arbitrariness by *removing* from the purview of the jury the possibility of imposing death for certain crimes, e.g., rape—i.e., by making a rule. The key to see both standards and rules as after the same end is to interpret the (shared) goal as removing intrinsic arbitrariness, or the possibility that the jury may give the death penalty to someone who does not deserve it. In the case of murder, this means giving the jury guideposts to make sure it is making a reasoned decision. In the case of rape, this means banning the death penalty altogether. Importantly—and I will develop this point in the next section—the avoidance of intrinsic arbitrariness as Stewart understands it involves arbitrariness in the *imposition* of the death penalty. It does

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130. *Id.* at 439–40.

131. *Id.*

132. *Id.* at 441.

133. *Id.*

134. *Id.* at 440–41, 447.

135. *Id.* at 436.

136. *Id.*

not mean avoiding arbitrariness in who does *not* get the death penalty.<sup>137</sup> The idea is that we have to be able to explain why those who got the death penalty deserved to get it. If there are some crimes for which no one deserves the death penalty or (as Kennedy suggests in the case of the aggravated child rapist) who *may*, then it may be best to not have the death penalty for that crime at all. Doing so removes the risk of intrinsic arbitrariness as to that crime altogether.

### *C. Reducing Intrinsic Arbitrariness: Criminals*

In the same way that eliminating some crimes can reduce the risk of a jury finding death a fitting punishment for someone who committed that crime (by removing that crime from the list of death-eligible crimes) so too can the Court categorically remove a type of *person* from the death penalty. This is what it did in its rather conflicting and sometimes meandering jurisprudence as to the mentally disabled and the young.<sup>138</sup> Saying that the mentally disabled and the young are just not the right *type* of persons to get death arguably gets closer to what Stewart was aiming for in his *Gregg* and *Woodson* opinions—they both go to the character of the offender. Severe mental disability and youth certainly go to someone’s character, especially as these two qualities are articulated by Justice Stevens in *Atkins* and Justice Kennedy in *Roper*.<sup>139</sup> Being young, especially, means that one’s character is not yet fixed, that one is still in progress, so to speak.<sup>140</sup> To punish someone who is mentally disabled or young for his crime because the crime somehow discloses his character is to make a mistake: there is not present a fully-formed character to be held responsible, or at least in a way that their responsibility would make them a candidate for

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137. This is basically the asymmetry (i.e., a bias towards not giving people the death penalty) blessed by the Court in *Lockett*. See *Lockett v. Ohio*, 438 U.S. 586, 602–05 (1978).

138. For the cases involving executing the mentally disabled, see Aimee Logan, Note, *Who Says So? Defining Cruel and Unusual Punishment by Science, Sentiment, and Consensus*, 35 HASTINGS CONST. L.Q. 195, 201 (2008) (section on “The Long Road to *Atkins*”); for the cases involving executing juveniles, see Josie Fohrenbach Brown, *Developmental Due Process: Waging A Constitutional Campaign to Align School Discipline with Developmental Knowledge*, 82 TEMP. L. REV. 929, 933 (2009) (section on “The Road to *Roper*”).

139. *Roper v. Simmons*, 543 U.S. 551, 569 (2005); *Atkins v. Virginia*, 536 U.S. 304, 318 (2002).

140. See, e.g., *Roper* 543 U.S. at 570 (“[T]he character of a juvenile is not as well formed as that of an adult.”). The Court says something similar with regard to mental disability, except it speaks in terms not of lack of development, but impairment of capabilities. See *Atkins*, 536 U.S. at 306 (“Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.”).

execution, rather than for a long stay in prison. Being young or being mentally disabled prevents the usual inference from act to character—the act may not be representative of the person’s character at all; it may rather be the result of the influence of others or impulse, so that in a way your character was not even involved. Such details of one’s character could of course already be invoked in the mitigating phase of sentencing. Even before *Atkins* and *Roper*, that is, one could invoke one’s youth or one’s mental disability, and one still can, if one’s mental disability is not to the degree *Atkins* requires or one is older than eighteen. These could be factors that the jury can consider in deciding whether one is the sort of character who deserves the death penalty. The point, however, is that after these decisions the line is drawn conclusively as to one’s character: if one is mentally disabled or one is under eighteen, then one simply cannot be the sort of person who gets the death penalty. One cannot deserve death, period.

It is worth pausing to note how radically *Atkins* and *Roper* separate the “character” features of severe mental disability and (severe) young age from the facts of the crime. We can stipulate cases where a crime committed by a person who was under eighteen or a person who was mentally disabled was reprehensible. Suppose that a jury has also found that the person committed every element of the crime beyond a reasonable doubt; suppose too that the crime was of a sort where aggravating factors could obviously be found—multiple people were killed, or a policeman was killed, or the victim was tortured.<sup>141</sup> Still, even in these cases, the fact that the person was under eighteen or was mentally disabled will be enough to make them ineligible for the death penalty. One’s character can be of a sort that death is not the right punishment for you, even if your crime was terrible and aggravated, and even if you had been found responsible enough to have committed it. This is almost as extreme an example of character preventing the imposition of the death penalty as one can imagine. We do not need to know anything else about the person’s character besides the facts of disability or of youth. Nothing else matters—nothing can tip things so that you would deserve death, and nothing else is needed to show that you do not deserve death. Certain classes of people simply cannot be candidates for the death penalty, no matter what other features of their character or crime that we can or cannot enumerate. They are categorically excluded from being the worst of the worst. It follows, then, that if we had a death penalty scheme where the mentally disabled

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141. Aggravating factors were found in both *Atkins* and *Roper*. In the former, it was the offender’s prior record and the “vileness of his crime.” *Atkins*, 536 U.S. at 308–09. In the latter, it was that the crime was done for money and to interfere with the discovery of the crime, and was “vile” and involved “depravity of mind.” *Roper*, 543 U.S. at 557–58.

or the young were included as possible candidates for death—where the jury got to weigh death for them (and consider youth and mentally disability only as possible mitigating factors)—we would risk giving the death penalty to someone who did not deserve it. It is the same structure as removing certain crimes from being eligible for the death penalty. We remove it from the jury’s consideration, because we are confident that there is a line that can be drawn. There is no rape, however aggravated, that deserves death. So too, there is no mentally disabled person or person under eighteen *no matter the crime* who can deserve death.

But to look at this comparison is also to discover an asymmetry. It is not as if there is a continuum between rape and death. It is not as if at some point a particularly gruesome rape *must* result in death. It is different with mental disability and (even more obviously) with youth. Start with the latter case, first. There is no clear, obvious line that makes the person who is one day younger than eighteen have a less than fully formed character (and so be less culpable for a terrible crime), especially when compared to someone who has just turned eighteen.<sup>142</sup> And the Court’s cases after *Atkins* have only confirmed the concern that there is no exact science to determining when someone is mentally disabled.<sup>143</sup> How do we draw the line, so that we know that those below the line should be excluded from the death penalty, and those above the line can be subject to a jury determination that they do deserve death? Such, of course, have been the questions of those who have criticized the Court’s decisions in *Atkins* and *Roper*. The better solution, they say, is to leave *all such questions* to the jury, not only because the jury better reflects our understanding of “evolving standards” but because of the jury’s flexibility.<sup>144</sup> Here the scalpel is better than the axe, because the scalpel can make these subtle and refined distinctions that a categorical rule by its very nature cannot. The jury can take age and mental condition as mitigating factors, and decide on which side the person should fall, based on its consideration of the evidence. The jury can judge those cases where a person who falls on the non-mentally disabled side of the line but who does not deserve death. But so too should the jury be able to determine that a person who falls on the mentally disabled side of the line may still be responsible enough to deserve death. When the Court draws a bright line where no

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142. A point made by Justice Alito in his dissent in *Miller v. Alabama*, 567 U.S. 460, 513 (2012) (Alito, J., dissenting) (“Seventeen-year-olds commit a significant number of murders every year, and some of these crimes are incredibly brutal.”).

143. See, e.g., *Hall v. Florida*, 572 U.S. 701, 724–26 (2014) (Alito, J., dissenting); *Moore v. Texas*, 137 S. Ct. 1039, 1053–54 (2017) (Roberts, J., dissenting).

144. See *Atkins*, 536 U.S. at 341, 349–54 (Scalia, J., dissenting) (arguing that such line-drawing questions are best left to the jury).

bright line exists, it risks falling into its own sort of arbitrariness: it puts some outside of the reach of the death penalty when it is possible that they *could* deserve death.<sup>145</sup> In other words, a categorical rule can arbitrarily *exclude* some from the death penalty, by preventing the jury from making its own determination of moral responsibility. And because the line here is not—in truth—a bright one, but involves dropping a pin on a more or less arbitrary basis, we cannot rule out the possibility that the jury *might be right* that a person who is under eighteen or mentally disabled (as the Court has defined it) might really deserve the death penalty.

Answering this objection will allow me to further clarify the nature of intrinsic arbitrariness, and how it works as the Court's goal in its death penalty cases. The point of avoiding intrinsic arbitrariness is avoiding giving the death penalty to those who do not deserve it, not to make sure that all who deserve the death penalty get death.<sup>146</sup> Inherent in this is an asymmetry between two possible risks: (a) the risk of not punishing with death all those who deserve it, and (b) the risk of punishing with death those who do not deserve it (this is one way of capturing the difference between the positions of Justice Stewart and Justice White). As the Court has developed it, intrinsic arbitrariness views (b) as the much worse possibility, especially given that it is Justice Stewart's vision of arbitrariness that wins out.<sup>147</sup> So the fact that the Court's decisions in *Atkins* and *Roper* may result in a regime that overprotects some of the mentally disabled and some juveniles who may in fact deserve death is not a devastating objection. In fact, it is something of the *goal* of the Court's jurisprudence in the area. If there is a risk of arbitrarily overprotecting, this is better than a risk of arbitrarily underprotecting. Intrinsic arbitrariness says: do not give the jury the possibility of assessing the death penalty to someone who does not deserve it. Sometimes the Court can do this—as we have seen—by trying to get the jury to spell out the reasons this person deserves the death penalty for this crime, by having the jury find aggravating circumstances. But the Court can also do this by simply excluding a large class of people from the death penalty altogether. It has done precisely this in *Atkins* and *Roper*. The tension between the categorical exclusions and the idea of channeled discretion only appears problematic if we ignore the asymmetry implicit in the Court's

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145. See Steiker & Steiker, *supra* note 7, at 418 (“The most obvious drawback of Court-imposed categorical exclusions on death-eligibility is the difficulty of drawing lines that accurately reflect insufficient harm or culpability to justify the death penalty. If ‘youthful’ offenders are to be exempted, at what age should death-eligibility begin? What standard should be applied to gauge ‘mental retardation’ or ‘minimal involvement’ in the offense?”).

146. See *id.*, for a similar response.

147. Again, see *Lockett v. Ohio*, 438 U.S. 586 (1978).

decisions—the asymmetry that prefers underpunishing to overpunishing—and thought that it was *equally* bad if a juvenile who deserved it did not get death and if a juvenile got death who did not deserve it. It is not the worst thing if a juvenile who deserves death does not get it; but it is the worst thing—or very near to it—if a juvenile who does not deserve death gets it. To avoid the possibility that a jury might extend death to the latter type of the case is why the Court adopts the type of prophylactic rules it does in *Atkins* and *Roper*.

#### *D. Further Cutting Down on Intrinsic Arbitrariness*

There are further ways that the Court could continue on in this line—reducing intrinsic arbitrariness by limiting the risk that a jury could give the death penalty to someone who did not deserve it. This is what the Court took some steps towards doing as regards *crimes* when it decided *Enmund v. Florida*,<sup>148</sup> holding that the death penalty was categorically not a proportionate punishment for someone who was merely a minor participant in a murder.<sup>149</sup> The Court went back on this, a little bit, when it found in *Tison v. Arizona*<sup>150</sup> that a person guilty of felony murder was not *per se* ineligible for the death penalty.<sup>151</sup> If the death was foreseeable enough, and the *mens rea* of the participant was one of extreme recklessness, then the death penalty was at least on the table.<sup>152</sup> Whether this in time will resolve itself into a categorical rule against the death penalty for felony murders remains to be seen. Commentators have persuasively argued that it should.<sup>153</sup> At the least, the Court has made clear in *Kennedy* that for the death penalty to be an appropriate punishment—outside the realm of very grave crimes against the state—the crime has to involve, directly or indirectly, the death of at least one other person.<sup>154</sup> Where the Court could go from this point, apart from removing death as an option for treason or for felony murder, is unclear. In the early days of the *Furman* litigation, some

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148. 458 U.S. 782 (1982).

149. *Id.* at 787–88, 801.

150. 481 U.S. 137 (1987).

151. *Id.* at 137–38, 151–52, 157–58.

152. *Id.* at 158.

153. For a discussion of this and related points, see Guyora Binder, Brenner Fissell & Robert Weisberg, *Capital Punishment of Unintentional Felony Murder*, 92 NOTRE DAME L. REV. 1141 (2017).

154. *Kennedy v. Louisiana*, 554 U.S. 407, 437 (2008) (“Our concern here is limited to crimes against individual persons. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State. As it relates to crimes against individuals, though, the death penalty should not be expanded to instances where the victim’s life was not taken.”).

Justices observed that the death penalty could be reserved only for cases of the murder of certain people, as some states had done—police officers were a favorite example.<sup>155</sup> It seems more likely that the Court would altogether eliminate the death penalty rather than limit crimes eligible for the death penalty to deliberate or intentional killings of specific people.

The path for limiting the death penalty as regards the nature of the *criminal* is clearer, however. The Court could simply lower the cut-off point for mental disability—something it arguably has already done by allowing adjustments for the margin of error.<sup>156</sup> And the Court could simply raise the age for being too young to deserve death, as at least one adventurous lower court has already done.<sup>157</sup> Again, the objection that these lines too will be arbitrary is no objection at all—of course they are arbitrary, to a degree, but we want to err on the side of excluding people from death, and so some degree of arbitrariness that balances things in favor of life over death is a welcome consequence, not an objectionable “bug.” The Court, too, in these areas has shown a willingness to look toward both science and common sense in its determinations, rather than to wait for an evolving standard of decency.<sup>158</sup> Its tenuous reliance on popular opinion was evident even in the early decisions, but it has become clearer in more recent cases, such as *Moore* and *Hall*, where the dissents took Justices Kennedy and Ginsburg to task for departing from looking at national consensus and instead relying on the consensus of clinicians.<sup>159</sup> And the Court also has room to strike out in new directions for excluding certain classes of people. One category of people which the Court has been repeatedly urged to exclude is those suffering mental illness.<sup>160</sup> Moreover, the Court could further refine its exclusion of the mentally disabled by removing the obviously arbitrary requirement that the mental disability

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155. *Furman v. Georgia*, 408 U.S. 238, 340 n.78 (1972) (Marshall, J., concurring) (“New York authorizes the death penalty only for murder of a police officer or for murder by a life term prisoner. N.Y. Penal Code § 125.30 (McKinney’s Consol. Laws, c. 40, 1967).”).

156. *Hall v. Florida*, 134 S. Ct. 1986, 1995 (2014).

157. *Commonwealth v. Bredhold*, No. 14-CR-161, 2017 WL 8792559, at \*6 (Ky. Cir. Ct. 2017) (“Given the national trend toward restricting the use of the death penalty for young offenders, and given the recent studies by the scientific community, the death penalty would be an unconstitutionally disproportionate punishment for crimes committed by individuals under twenty-one (21) years of age.”).

158. See the critical discussion of this point in Sigler, *supra* note 12, at 13–14.

159. See, e.g., *Hall*, 134 S. Ct. at 2002 (Alito, J., dissenting); *Moore v. Texas*, 137 S. Ct. 1039, 1053 (2017) (Roberts, J., dissenting).

160. See, e.g., Bruce J. Winick, *The Supreme Court’s Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. REV. 785, 785 (2009).

be *organic*, i.e., present before the person has turned eighteen.<sup>161</sup> This restriction has absolutely no basis in the Court’s jurisprudence, and seems simply an example of a blind reliance on an industry definition.<sup>162</sup>

There is a final area where the Court could further limit the jury discretion in an effort to avoid intrinsic arbitrariness, but the Court has shown a striking reluctance to do so. In its decisions in *Gregg* and *Jurek*, the Court endorsed a system of guided discretion where the jury had to find an aggravating factor before they could impose a sentence of death. The candidate for the death penalty had to have committed an especially bad crime, or be an especially bad sort of person (a repeat offender, for instance) to go on to the next stage where, although he or she is death-qualified, the jury may yet choose to spare him or her. So it would stand to reason that the Court would want to make sure that these aggravating factors in fact *really do represent* aggravating factors, that is, that they really represent things that would make a person fall into the class of the “truly reprehensible.” But the Court has not done so, or done so only in the most limited fashion. It has struck down some aggravating factors if they are so broad as to encompass every possible murder.<sup>163</sup> So aggravators which require that the jury find that the murder was heinous or cruel or depraved will be rejected by the Court because they do not require the jury to really specify how this murder is worse than others—because every murder could be described as heinous, whether it is a bullet to the head or a knife across the throat.<sup>164</sup> In other words, aggravators that require the jury *not to do any work* will be rejected. But beyond this, the Court has not rejected an aggravator for not really specifying a true aggravating factor, viz., a factor that makes this or that killing or this or that person worse than others. It has—as we have seen—made some categorical exclusions, so that a rape cannot be itself the basis of the death penalty, and youth and mental disability can prevent one from getting the death penalty. These rulings may incidentally affect aggravators. If one cannot get the death penalty if one is under eighteen, the youth of the offender cannot act as an aggravating circumstance (as it arguably did it in the *Roper* case). This is not the same, however, as going after an aggravating factor directly. To take an example, why is it that using a stun gun to commit

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161. A standard endorsed by the Court in its *Atkins* decision. *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (“Clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18.”).

162. *See id.*

163. *See* discussion in Flanders, *supra* note 111.

164. For more on this point, see *id.* and the sources cited therein.

a killing puts one in the category of those especially deserving death?<sup>165</sup> To be sure, the use of a stun gun may serve to *distinguish* one murder from another, but it does not seem to give the jury a rational basis for making that particular crime eligible for the death penalty, where a plain, ordinary murder with a gun would not be.<sup>166</sup>

It is important to be clear about the nature of the problem here. It is not that some states have many aggravating factors.<sup>167</sup> Many do, but it may be the case that these aggravating factors really do pick out features that really do make a murder worse than others. So it is not the sheer number of aggravating factors that states pick out that is in itself problematic.<sup>168</sup> It is that fact that some of these aggravating factors do not “aggravate” in any meaningful sense of the word. And this is an objection that is grounded in a worry about intrinsic arbitrariness. If Stewart’s problem in *Furman* was that juries were not selecting the most reprehensible crimes and criminals for death, then it is no solution to give the jury factors that “narrow” the class of people who face the death penalty that are not really tracking the awfulness of the crime or the criminal. A jury that votes on an aggravating factor—use of a stun gun—that is present, but does not show that the person really deserves death is acting arbitrarily, and it is the aggravating factor that gives them both an opportunity and a license to do so. They are acting in accord with a statutory scheme, to be sure, and so they are following rules; they are following a procedure. In that sense, they are not acting arbitrarily. Nonetheless, they are working within an arbitrary system, because such a system does not track the right things. It allows them to sentence someone to death who does not deserve death. A scheme which has pseudo-aggravating factors is going to allow a degree of intrinsic arbitrariness—they are, to use a metaphor, the crack in the system that can allow intrinsic arbitrariness to creep in.<sup>169</sup>

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165. The example is from Arizona’s list of aggravating factors. ARIZ. REV. STAT. ANN. § 13-701(D)(22) (2018) (“The defendant used a remote stun gun or an authorized remote stun gun in the commission of the offense.”).

166. See also BLACK, *supra* note 10, at 154 (citing Texas aggravating factor of “killing a candidate for lieutenant governor”).

167. On this, see Flanders, *supra* note 111; see also the excellent essay by Chelsea Creo Sharon, *The “Most Deserving” of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 HARV. C.R.-C.L. L. REV. 223 (2011).

168. Flanders, *supra* note 111.

169. Jonathan Simon & Christina Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*, in THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS AND CULTURE 82 (Austin Sarat ed., 1999) (“[N]ew aggravating circumstances have been added to capital statutes, like Christmas tree ornaments. These new factors reveal a process self-consciously freed from the dictates of substantive Supreme Court review.”).

## III. EXTRINSIC ARBITRARINESS

Intrinsic arbitrariness is when there is a chance that a punishment will go to someone who does not deserve it. The wrongness of such a punishment is obvious, or should be, so long as we believe in something like desert. In a death penalty scheme that involves intrinsic arbitrariness—such as existed pre-*Furman* and pre-*Gregg*—the jury is given a nearly wholly free hand to impose the death penalty, on those who truly deserve and on those who do not. Those who get death when they deserve something else, e.g., life in prison, are being treated unjustly. The argument of my paper so far is that the Supreme Court’s jurisprudence starting with *McGautha* and extending to the present day—including its jurisprudence of “evolving standards of decency”—can be understood as an effort to combat intrinsic arbitrariness. The Court does this in two ways, one more aggressive than the other: first, by limiting those crimes and criminals who can get the death penalty, by categorically excluding some crimes and some criminals altogether and second, by channeling the jury’s discretion in those cases (probably just murder cases) where death *is* an option, by making them find an aggravating factor and to consider all possible mitigating factors. The resulting scheme, if it works, is one where the risk of the jury giving the death penalty to a person who does not deserve it is, if not eliminated, at least severely cut down. Some resulting sentences of death *may* be arbitrary. Certainly, there may be cases—possibly many—where a person does not get death when he or she could be said to deserve death. But the greater worry—and the one the system is designed to curb—is where a person who does not deserve death gets it. This may still happen, but the Court has worked to make this happen less, while continuing to affirm the constitutional validity of the death penalty.

So much for intrinsic arbitrariness. Is there another kind of arbitrariness that the Court could have been concerned with? There is, although I want to suggest in this Part that it is a concern mostly raised by commentators and litigators, and not primarily by the Court.<sup>170</sup> This is a concern with something I will call *extrinsic* arbitrariness. In the way I will be using that term throughout this part, extrinsic arbitrariness refers to a choice made among those who can be said to deserve death based on factors *external* to the circumstances of the crime or the character of the offender. For example, suppose that we have two criminals, both who have similar and extensive criminal

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170. See the sources cited *infra*, notes 206–212. Breyer is the one exception, but he has not been careful to distinguish between types of arbitrariness. The recent Washington Supreme Court case, *State v. Gregory*, 427 P.3d 621 (Wash. 2018), is similarly ambiguous. See *infra* note 213.

records and who have both engaged in mass murder. Suppose, that is, that both meet the first stage test of the *Gregg* test—they have committed a pretty bad crime, and they have pretty bad characters. They can be said to be among the “most reprehensible.” And let us stipulate that in neither case are there mitigating factors that would outweigh the aggravating factors of their crimes and their persons. They meet, then, stage two of the *Gregg* scheme as well. *Extrinsic arbitrariness* comes in when it turns out that one person gets death and one does not, because (for example) in one case the jury was prompted by the one defendant’s brown eyes to impose death. Here we have a case where it can be said that the fact that one defendant got death and the other did not was *arbitrary*. It was a matter of one jury’s almost whimsical and capricious decision to execute a defendant based merely on the color of his eyes. Now, it is possible for extrinsic and intrinsic arbitrariness to overlap. There could be cases where a jury decides to give a defendant death because he is ugly *even though* the defendant did not really deserve death (maybe there were overwhelming mitigating factors that the jury did not consider because they found the defendant ugly). But I will not be so much concerned with this case, because I want to isolate as much as I can the phenomenon of extrinsic arbitrariness, as in the case where the final decision to impose death is made on the basis of non-desert factors even though there is a sense in which the defendant *does* deserve death—that is, the punishment would not be intrinsically arbitrary.

Earlier in this paper (in Part II), I read Justice Stewart’s famous “lightning” passage as involving a critique of intrinsic arbitrariness, especially when read in conjunction with *Gregg* and *Woodson*. But it can also be read as condemning extrinsic arbitrariness as well, something I also intimated in Part I. Consider what I take to be the key passage from his opinion: “For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.”<sup>171</sup> Before, I focused on the idea that the class of those who received a sentence of death could include those who did not deserve death—and so their punishment was intrinsically arbitrary. Some got a punishment they did not deserve, and courts were tolerating a system that allowed this. Yet if we look at the passage again, it seems to condemn a scheme where the people and their crimes are just as reprehensible, and one person gets death and the other does not. That is, a system would be capricious and random if *even among those who deserve death*, the way jurors decided one person should get death and the other did not was based on

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171. *Furman v. Georgia*, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring).

factors apart from desert. It would be like, in the words of Justice Brennan, a “lottery system.”<sup>172</sup>

A sentencing system would be bad, on this reading of the passage, if there was no good reason we could point to where one person got death and the other did not, even if we could agree that both people did equally bad things and were equally bad persons. According to this interpretation, Stewart may have been interested in intrinsic arbitrariness, but he was *also* interested in extrinsic arbitrariness. He was worried about a system that allowed juries the leeway to pick and choose who got to die *for any reason or for no reason*, even if we stipulated that the jury was picking and choosing among those who deserved death. Note that it is not at all clear that a system of channeled discretion would or even could solve this problem. For even after juries had looked at the aggravating and mitigating factors, and found that death was appropriate, a system of channeled discretion might *still* result in a final, arbitrary decision that one person should die and one should not—even if the jury had checked all the boxes as to desert. It seems that the only solution to the problem of extrinsic arbitrariness in giving the death penalty would be to remove the decision from the jury, either by a mandatory death penalty or by getting rid of the death penalty. The fact that Justice Stewart rejected both of these options makes me think that he was not primarily worried about extrinsic arbitrariness; maybe it was not ideal, but it could be tolerated (this is why it was sufficient that a system be not *wholly* arbitrary, for Stewart). Intrinsic arbitrariness was more of a problem for Stewart, and too much of it meant that the death penalty was unconstitutionally cruel and unusual.

Still, we can examine extrinsic arbitrariness and look at it as a problem with the death penalty. Surely there is something wrong with a jury that bases its ultimate decision as to who lives and who dies not on anything desert related, but on factors wholly unrelated to desert—the color of a defendant’s hair or even the flip of a coin. I agree that there is something worrisome about extrinsic arbitrariness but it is hard to pin down what it is, exactly. I think, and will argue in this Part, that in many cases a worry about extrinsic arbitrariness is in fact a disguised worry about intrinsic arbitrariness. In other cases, the worry about extrinsic arbitrariness is in fact a worry about some other important thing—such as lack of good legal representation or racism.<sup>173</sup> In fact,

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172. *Id.* at 293 (Brennan, J., concurring) (“When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system.”). I discuss the “lottery” metaphor in note 225.

173. There is a third possibility, which I return to in my conclusion: that a complaint about any extrinsic arbitrariness is in fact a disguised objection to the death penalty *tout court*.

these things (lack of good representation and racism) are very bad things, and inherently bad things, but they are bad things that are separable from the wrong of extrinsic arbitrariness. Having a bad lawyer is a bad thing whether or not you are guilty of the crime charged, and so too is racism in any part of a criminal proceeding.

It may be helpful, in order to narrow the focus on the wrongness of extrinsic arbitrariness, to start with those things that *are* extrinsically arbitrary and are bad, but their badness is not because of their extrinsic arbitrariness. The two main examples in the literature are when some get the death penalty and some do not because of a) their race and b) the effectiveness (actually the lack of effectiveness) of their counsel. I will then go on to discuss those cases where we do have “pure” extrinsic arbitrariness, and where the arbitrariness appears problematic in its own right—such as when certain jurisdictions pursue the death penalty with special vigor, and others do not, so that whether or not you get death can depend mainly on where you live and not just on who you are and what you did. I will then conclude this Part with a reflection on the relationship between jury discretion, mercy, and extrinsic arbitrariness. For I suspect that the only way to truly reduce extrinsic arbitrariness would be to radically restrict the ability of the jury to use its discretion, which may not always be a good thing. It may be that we *want* the jury to arbitrarily spare some people from death based on non-desert factors, even when death would be a just punishment. We can call this extrinsic arbitrariness, but we might also want to call it *mercifulness*.

#### A. *Extrinsic Arbitrariness: Race*

Race is frequently invoked in the same breath when the death penalty is criticized as arbitrary. In fact, sometimes it is precisely what is meant when the death penalty is criticized as arbitrary. The death penalty, it is claimed, is arbitrarily imposed on people based on their race. At first, this claim can seem puzzling, for reasons I canvassed in Part I.<sup>174</sup> In one sense, to say that the death penalty is imposed on the basis of race seems to be the opposite of saying that the death penalty is imposed in an arbitrary or capricious manner—indeed, the problem is that it is not! It is imposed based on—and because of—people’s *race*. So it may be better, if one means that the death penalty is arbitrary because it is imposed primarily on the basis of race to say that the death penalty is instead *discriminatory*. It was on this basis that Justice Douglas opposed the death penalty in *Furman*.<sup>175</sup> He thought that it was obvious that the death penalty discriminated based on class and race,

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174. See *supra* Part I.

175. *Furman*, 408 U.S. at 256–57 (Douglas, J., concurring).

and was unconstitutional on this basis. Death penalty statutes, Douglas said, were “pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual punishments.’”<sup>176</sup> Douglas linked this idea to the death penalty being “unusual,” but it is for good reason that Douglas is not usually linked with Stewart and White and their objections to the death penalty. For one, Douglas seemed more likely to see the death penalty as hopelessly unconstitutional and not capable of a statutory fix. But secondly, the objection that the death penalty is racist is not the same as saying that the death penalty is arbitrary. Arbitrariness goes more with randomness than racism does. To say that the death penalty is racist shows something much more sinister than randomness. It shows—and Douglas certainly thought this was the case—a desire, conscious or unconscious, to impose the penalty *systematically* on those who were poor and those who were black.<sup>177</sup>

But this may be too quick, because there may be a way to look at the use of race in death penalty decisions that is different than the way Douglas uses it in his *Furman* concurring opinion. It is true that there is one sense in which a discriminatory choice is the opposite of an arbitrary choice.<sup>178</sup> But there is another sense in which when a jury decides to assess a punishment on a person on the basis of their race, they are acting arbitrarily—they are letting a morally arbitrary factor do work for them, when it should not. And indeed, consider how race may make a difference in sentencing so that the difference it makes is a matter of intrinsic arbitrariness. A jury may fail to weigh adequately a set of mitigators because they are racist—because they let a defendant’s race weigh in the balance, either implicitly or explicitly, against the mitigating factors. The result would be a punishment that the defendant did not deserve, and all because a morally irrelevant factor guided the jury in its decision-making process. If we thought that race was doing this in many death penalty cases, we might worry in fact that the influence of race was making the death penalty arbitrary, in the sense of intrinsic arbitrariness. Race was influencing jurors to assess the death penalty against those who did not, in fact, deserve it. The argument made in *McCleskey v. Kemp*, in fact, can be seen as pressing

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176. *Id.* (Douglas, J., concurring).

177. This explains why his concurring opinion concludes on an *equal protection* note rather than a *cruel and unusual* note. *Id.* at 257 (Douglas, J., concurring).

178. See generally Richard W. Garnett, *Confusion about Discrimination*, PUBLIC DISCOURSE (April 5, 2012) (“‘Discrimination,’ after all, is just another word for decision-making, for choosing and acting in accord with or with reference to particular criteria.”), <http://www.thepublicdiscourse.com/2012/04/5151/> [https://perma.cc/S2YD-VF4J].

precisely this point.<sup>179</sup> Statistics showed that black perpetrators who had white victims were much more likely to get the death penalty.<sup>180</sup> That is, as a general matter, race was having an effect on who got the death penalty, and if this is so, then we might legitimately worry that in some cases a person who did not deserve death was nonetheless sentenced to death because of racial bias. Allowing race to creep in like that and affect juries meant risking intrinsic arbitrariness.

Of course, the Court in *McCleskey* rejected this argument. The Court held that so long as you could not prove racism in *this* particular case, then there was no viable claim of racial bias.<sup>181</sup> Statistics showed that on whole juries were racist; but they could not prove that *this* jury assessing *this person for this crime* was in fact racist.<sup>182</sup> No study could show this; only interviews with the jurors could, although even that is hard to imagine. Perhaps one would have to make a sort of experiment where the exact same jury heard the exact same facts, with only the races reversed, and see if they would get to the same judgment. Moreover, the Court continued in its opinion, to effectively eliminate the possibility that race would come into the jury's mind would mean effectively getting rid of the jury's discretion to impose death.<sup>183</sup> We can require, the Court said, "individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant"<sup>184</sup>—this is what the *Gregg* line of decisions required, of course—but we cannot guarantee that the jury's exercise of discretion will be free of racial bias, although we should not presume that it *will* have racial bias.<sup>185</sup> Again, there is a point where the only satisfactory remedy to abuses of jury discretion is a mandatory death penalty; but that has its own problems (as we have seen). Besides, what the Baldus study did show was that when the crime was sufficiently serious and the person accused of the crime had a significant criminal background,

179. *McCleskey v. Kemp*, 481 U.S. 279, 336 (1987) (Brennan, J., dissenting) ("Considering the race of a defendant or victim in deciding if the death penalty should be imposed is completely at odds with this concern that an individual be evaluated as a unique human being. Decisions influenced by race rest in part on a categorical assessment of the worth of human beings according to color, insensitive to whatever qualities the individuals in question may possess.").

180. *Id.* at 287; David C. Baldus, George Woodworth & Charles A. Pulaski Jr., *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia*, 18 U.C. DAVIS L. REV. 1375, 1399–406 (1985).

181. *McCleskey*, 481 U.S. at 292–94.

182. *Id.* ("Thus, to prevail under the Equal Protection Clause, *McCleskey* must prove that the decisionmakers in *his* case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence.").

183. *Id.* at 297.

184. *Id.* at 311.

185. *Id.*

juries tended to converge on a sentence of death, regardless of the races of the victim and the perpetrator.<sup>186</sup> McCleskey's case, in fact, was one of those types of cases: he had killed a police officer during a robbery of a furniture store.<sup>187</sup> We might be able to say with some confidence that the death penalty in McCleskey's case was not, in fact, morally arbitrary, even though there was a black perpetrator and a white victim, *contra* whatever some (generic) studies might indicate.

But even this last point shows the risk of intrinsic arbitrariness, something highlighted by Justice Stevens in his dissent in *McCleskey*.<sup>188</sup> It is true, there are some cases where jurors will tend to agree *no matter what race the victim and the perpetrator are*. But then there are a so-called "intermediate range" of cases where race probably *does* have an influence, and so there is a risk of intrinsic arbitrariness, that is, the risk that race may play a role in giving someone death when they in fact deserve life.<sup>189</sup> Of course, the studies suggest that only this *may* happen in any individual case, and that we cannot know, in fact, whether it was a factor in any individual case. But this is not a decisive objection. In *Furman*, the Court did not require proof that the jury in any given case *had* acted arbitrarily.<sup>190</sup> The problem was the system as it was structured left too much to chance in a large number of cases. States had to reform their systems accordingly, to reduce the extent of the risk. Justice Stevens, in his *McCleskey* dissent, drew the same conclusion in the case of the risk of racial bias:

One of the lessons of the Baldus study is that there exist certain categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender. If Georgia were to narrow the class of death-eligible defendants to those categories, the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated. As JUSTICE BRENNAN has demonstrated in his dissenting opinion, such a restructuring of the sentencing scheme is surely not too high a price to pay.<sup>191</sup>

In other words, the problem with race playing an unjustified role in sentencing can be looked as parallel to the problem of any other

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186. *Id.* at 366 (Stevens, J., dissenting).

187. *Id.* at 285.

188. *Id.* at 366 (Stevens, J., dissenting).

189. *Id.* at 324 (Brennan, J., dissenting).

190. Thanks to Joe Welling for this observation.

191. *McCleskey*, 481 U.S. at 367 (Stevens, J., dissenting).

arbitrary factor playing an unjustified role, and measures can be taken to limit that arbitrariness, specifically by focusing only on those most serious crimes where jurors will tend to decide on the relevant facts and circumstances, and not on the arbitrary factors such as race. We could, as well, decide based on the risk of arbitrariness that we should eliminate the death penalty or, instead, make it mandatory.

The above assumes cases where race may come in and tip the balance in favor of an unjustified sentence—that is, it looks at cases where race may play a role in increasing the risk of what I have called intrinsic arbitrariness. What of the case where race acts as a factor in the decision-making of a juror faced with a person who may in fact deserve death? Suppose that we have a case where a jury has found an aggravating factor or two (and let us further assume they are serious ones) and the suspect has a long criminal record. And now suppose that race for the jury really does do work in their decision: that *because* the suspect is of a certain race, the jury has decided to vote for the death penalty, where if the suspect was of another race, they would have voted for life. This involves a morally arbitrary determination, but it does not offend against intrinsic arbitrariness. Why not? We have *assumed* that death would be an appropriate decision in this case, at least a morally permissible one. But it seems clear that we can find something wrong with the jury's decision, and that is because the factor being used for choosing death over life is itself an objectionable one. *It is racist!* Not offending intrinsic arbitrariness is not the only way a jury can be in the wrong—they can make an otherwise justified decision unjustified if they use a factor to tip the decision that it is wrong to use, *even if that decision tracks what might be deserved in any given case.*<sup>192</sup> The Court has been clear in its recent decisions that race occupies such a notorious place in our history that we should go out of our way to avoid it making *any* difference in the criminal justice system.<sup>193</sup>

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192. As Brennan emphasized in his dissent, *id.* at 341 (“That a decision to impose the death penalty could be influenced by *race* is thus a particularly repugnant prospect, and evidence that race may play even a modest role in levying a death sentence should be enough to characterize that sentence as ‘cruel and unusual.’”).

193. It is worth quoting the Court's recent holding in *Pena-Rodriguez* at some length:

The unmistakable principle underlying these precedents is that discrimination on the basis of race, “odious in all aspects, is especially pernicious in the administration of justice.” *Rose v. Mitchell*, 443 U.S. 545, 555, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979). The jury is to be “a criminal defendant's fundamental ‘protection of life and liberty against race or color prejudice.’” *McCleskey v. Kemp*, 481 U.S. 279, 310, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) (quoting *Strauder*, *supra*, at 309). Permitting racial prejudice in the jury system damages “both the fact and the perception” of the jury's role as “a vital check against the wrongful exercise of power by the State.” *Powers v. Ohio*, 499 U.S. 400, 411, 111 S.Ct. 1364, 113

Does this get us any closer to understanding the wrong of extrinsic arbitrariness? I do not think so. The wrongness of race playing a factor, I think, can be almost wholly exhausted by two explanations, neither of which are explained by the wrongness of extrinsic arbitrariness. First, race wrongly plays a factor if it results in an unjust sentence being passed down, or even if it increases the risk that an unjust sentence will be passed down. If a person who should have gotten life gets death because of his race, or if the current sentencing scheme means that this possibility is a real one, then this is a problem but it is a problem that can be explained in terms of intrinsic arbitrariness. Second, it may be that any use of race by the jury is problematic, even when a person may deserve death and gets death. If race somehow plays a factor—even counterfactually, so that a jury would have given a white defendant only life in prison—this seems odious and wrong. But—and this is the important point—the wrongness of using race in this way goes to the wrongness of using race as a factor, not on anything having to do with the arbitrary nature of the decision.<sup>194</sup> This goes back to Justice Douglas’s point in his opinion in *Furman*. Discrimination is wrong by itself, it does not need to be explained further in terms of extrinsic arbitrariness. If we are using race to explain what is wrong extrinsic arbitrariness, we need to start again. The problem with using race as a factor is usually best explained simply in terms of wrongness of using race as a factor. It is true that sometimes it *also* means that justice is not done, because race may lead to an unjust sentence. We are still searching, however, for an explanation of why it may be bad for a jury to choose life for one person based on a non-desert based factor *other than race* (because race seems like a factor that should never be used, whether or not it tracks desert). We are still searching, that is, for an explanation of what is wrong with extrinsic arbitrariness.

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L.Ed.2d 411 (1991); cf. *Aldridge v. United States*, 283 U.S. 308, 315, 51 S.Ct. 470, 75 L.Ed. 1054 (1931); *Buck v. Davis*, *ante*, at 22.

*Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017).

194. A point made well by Mary Newcomer:

Furthermore, suppose that the decision to afford mercy was based on the fact that the defendant was white. In such a case, one would not hesitate to recognize that the system as a whole, and thus each affirmative death penalty decision made within the system, is tainted by consideration of the race of the defendant—a factor that is universally recognized as an impermissible consideration in death penalty decisions.

*Arbitrariness and the Death Penalty in an International Context*, 45 DUKE L.J. 611, 643 (1995). Newcomer is using “arbitrary” (in the title to her essay) in the sense hinted at above—where race is a “morally arbitrary” because it relates neither to the character of the defendant nor the nature or circumstances of the crime.

*B. Extrinsic Arbitrariness: Bad Lawyering*

In a classic article on the death penalty, Stephen Bright famously asked whether there should not be a death penalty “not for the worst crime” but for the “worst lawyer.”<sup>195</sup> Bright then went on to catalog various instances of not just bad, but reprehensibly bad lawyering, made all the more galling because a person’s life is at stake. The larger point Bright was making was that who lived and who died frequently depended on the adequacy of one’s counsel. A good lawyer could mean that, no matter how bad you were or how bad your crime, you would be spared the death penalty. A bad lawyer might mean that, even if you did not commit the crime, you might be subject to execution. As Bright wrote, “Arbitrary results, which are all too common in death penalty cases, frequently stem from inadequacy of counsel. The process of sorting out who is most deserving of society’s ultimate punishment does not work when the most fundamental component of the adversary system, competent representation by counsel, is missing.”<sup>196</sup> In a footnote, Bright quotes from a dissent in a Mississippi Supreme Court case, seemingly with approval, that making death depend on the quality of one’s counsel exemplified arbitrariness at its worst: “We can think of no more arbitrary factor than having nimbleness of counsel on points of procedure determine whether Alvin Hill lives or dies,” the court said.<sup>197</sup> And Bright is certainly correct in his assessment. Having a good lawyer can make the difference in death penalty cases, as it can make a difference in a lot of cases. The seminal decision on adequacy of counsel, *Strickland v. Washington*,<sup>198</sup> was a death penalty case, and for good reason.<sup>199</sup> When the stakes are the highest, and making sure your client gets every procedural protection he or she is entitled to, an effective lawyer is critically important. And sometimes, given the reality of the modern day public defender system, whether you get even a minimally competent lawyer, even in a death penalty case, can frequently be a matter of chance.

Why is having a bad lawyer bad? The answer may be obvious, but it is important to be clear on this point. Bright is saying that bad lawyers make the imposition of the death penalty arbitrary.<sup>200</sup> What

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

196. *Id.* at 1837.

197. *Id.* at 1837 n.160 (quoting *Hill v. State*, 432 S.2d 792, 801 (Miss. 1983) (Robertson, J., concurring in part and dissenting in part)).

198. 466 U.S. 688 (1984).

199. *Id.* at 693.

200. Louis D. Billionis & Richard A. Rosen, *Lawyers, Arbitrariness, and the Eighth Amendment*, 75 TEX. L. REV. 1301, 1303 (1997) (“The arbitrariness problem takes root at the earliest pretrial stages of a capital prosecution, when an attorney is

does he mean by this? The first thing he could mean is that having a good or bad lawyer may make the difference between whether a person *who does not deserve the death penalty* gets the death penalty. A bad lawyer (or even a good lawyer, improperly trained) may so mess things up that a person who is wholly innocent of the crime is sentenced to death. This would be a case where the values of intrinsic arbitrariness are implicated, and an extreme one.<sup>201</sup> But there are less extreme cases that do not involve claims of innocence. Having a good lawyer may be what makes it possible for a person who does not deserve death to adequately explain why he does not deserve death. A good attorney could raise (and investigate) issues that would be relevant to the jury's assessment of the circumstances of the crime or the character of the offender. A bad attorney would not. And this difference would make the difference between life and death, and more importantly, it would make the difference between a person who does not deserve the death penalty getting death and not getting death. So while a good or bad attorney does not go directly to whether one deserves the death penalty, it can be importantly related to desert. Having a good attorney will make it more likely that the process works in effectively separating those who deserve death and those who do not. So one may believe that intrinsic arbitrariness is the only thing that matters, yet still be concerned about adequate counsel as a means to making sure that only those who deserve death get it—and especially that those who do not deserve death do not get the death penalty.

I should be clear here that desert in the legal context can and should be construed broadly. Guilt is not just moral guilt; it is legal guilt as well, and maybe even especially.<sup>202</sup> So if a good attorney would be able to argue that some evidence—evidence that shows conclusively that a person is the killer—should be suppressed and a bad attorney could not, then this too is relevant to whether one has gotten the death penalty when one did not deserve it. One deserves the death penalty, in the sense of legally deserves, when the evidence the state is entitled to present proves beyond a reasonable doubt both that one did the crime and that one deserves to die for it. If an attorney can argue that you did not do the crime, or that your character is not of the sort that you deserve to die for what you did, or that some procedural protection means that the state cannot prove you deserve the death penalty, then the attorney has demonstrated that you do not deserve to die. So it is in

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appointed to represent the customarily indigent defendant, and continues throughout the trial and direct appeal.”).

201. Of course, even a good lawyer may face a struggle to prove a client is in fact innocent of his or her crime.

202. Again, as I have emphasized above, I am assuming we can give sense to the concepts of legal and moral “desert.”

a very broad sense that having a good attorney can be relevant to whether or not you get the death penalty. A good attorney can not only effectively present your *moral* claims as to the deservingness of the death penalty, he or she can also effectively make any *legal* arguments as to whether the state is entitled, based on the evidence presented, to sentence you to death. Both of these go to desert (broadly speaking) so again, having a good attorney can reduce the chance that a person who does not deserve death will be executed—which is, again, a matter of whether the death penalty allows jurors to make judgments that would present a risk of *intrinsic* arbitrariness. In the words of *Strickland*, good attorneys give us confidence in the justness of the result—that the person really deserved the punishment he got, and not some other punishment.<sup>203</sup>

The force of the idea that bad lawyers make the death penalty arbitrary in its application comes from the fact that a bad lawyer can make the difference as to whether a person who does not deserve death actually gets death. If we agree with that, then we can effectively criticize the Court's current jurisprudence on effective assistance of counsel as doing a terrible job of assuring that this is actually the case (as Bright does). The standard is too low, we may think, if the goal is to provide defendants with the ability to show that they do not actually *deserve* the death penalty. In other words, the objection that the death penalty is arbitrary because it depends on whether you have a good lawyer is really just a version of the idea that there is too much risk of intrinsic arbitrariness in the system. Again, having a good lawyer seems to be rather necessary for the jury to do its job of filtering out those who deserve death and those who do not.

But we should not confuse the arbitrariness of whether or not you get a good lawyer with intrinsic arbitrariness. It could, after all, be the case that you got a bad lawyer *and* you deserve the death penalty (both morally and legally). In some cases, a good or bad lawyer would not have made a difference in the outcome. We can argue about how large this class of cases is, but it does not remove the analytical point. Still, we might think that you still deserve a good lawyer, even if you are bound to lose anyway. This is the case, of course, because we often do not know in advance who is “bound to lose.” The goodness of a good lawyer may be that he or she is able to take “bound to lose cases” and make them close cases—and even turn some into wins. But more fundamentally, we might think that a good lawyer is just something you deserve. You deserve it even if your case is a slam-dunk loser. That is,

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203. *Strickland*, 466 U.S. at 686 (“The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”).

you deserve a good lawyer, even if you deserve to die for your crime. So we should be careful to separate two things. First, you deserve a good lawyer because a good lawyer can help press your claims that you do not deserve a certain punishment. Second, you deserve a good lawyer *because that is your right*. Getting a bad lawyer can thus be bad for two reasons, in other words. First, a bad lawyer may make it the case that you get a punishment that you do not deserve. Second, getting a bad lawyer is just bad in its own right, because even bad people who have done bad things deserve to have a good lawyer.

We might think that there is another thing that is bad about having an ineffective lawyer and it is this: a good lawyer may be able to get a jury to sentence a person who deserves the death penalty as a matter of legal and moral guilt to something less than death. That is, suppose we have a person who has the good lawyer he deserves *and* he is able to get less than death even though a jury could rightly and properly make the judgment that the person should be executed for his crime. This would be an example of effective counsel making a difference in an *extrinsic* way. That is, we have stipulated that the person really is eligible to get the death penalty—that there is no good legal or moral reason given a *Gregg*-type scheme why the person should not die. Death, in this case, would not be an unjust result. Still, the attorney for the defendant is able to persuade the jury to give the person only a life sentence. We can even stipulate further that if the person had a not-as-good lawyer he would have gotten death. Maybe the jury just likes the attorney and wants to please her by treating her client well. In a case like this, the wrong (if there is a wrong) with the sentence of life as opposed to the sentence of death is that it has been made in the last instance on a factor extrinsic to matters of desert. I am not yet in a position to say what is wrong with this—if there is anything wrong with it—but it helps that we have narrowed the class of cases where we can say a result has been extrinsically arbitrary. It can be confusing in the case of counsel precisely because a lot of why counsel is “good” is because good counsel makes results less likely to be intrinsically arbitrary, and good counsel is something defendants have a right to. There are bad things about having bad counsel that are *not* a matter of extrinsic arbitrariness. Indeed, I would say that *most* of what is bad about having bad counsel is quite apart from any risk of extrinsic arbitrariness. Of course, this is not to say that extrinsic arbitrariness is not also bad, but at this point the nature of its badness is still unclear—especially if our worry is that a good lawyer may sometimes mean a bad person does not die, even when he or she can be said to deserve to die.

*C. Extrinsic Arbitrariness: Geography*

The last two examples were not terribly helpful in explaining why extrinsic arbitrariness might be bad, because it turned out that the badness of having race factor into jury decisions and having a bad lawyer influence the outcome of a case could be explained by things *other than* what I have been calling “extrinsic arbitrariness.” First, in both cases, race and bad lawyering might have the upshot that a person was given a punishment he or she did not deserve, in particular, a person might be given the death penalty when only life in prison was deserved. Race might influence a jury to give death rather than life, and a bad lawyer might not raise legitimate claims—of mitigation, say—which would enable a person to get the sentence that he or she deserve. So the “arbitrary” fact that one did not get a good lawyer, or that the perpetrator was black and his or her victim was white could be bad insofar as they raised the risk that the sentence would be intrinsically arbitrary. Second, having race play a role in jury decision making or having a bad attorney are bad things in themselves. Juries should not be making decisions on race, even a little bit, and people are entitled to have an adequate lawyer in their defense. Whether, if either of these things happens, the sentence should be void is a separate question, of course. It does not seem as obvious to me that this is the case, as opposed to when one gets a sentence that one does not deserve. Still, we can see not having a lawyer and as having race influence a jury as themselves bad *even if one gets the sentence one deserves*. So what we are looking for is a factor that may play a role in whether or not one gets the death penalty, but that does not seem inherently wrong to be playing a role. Moreover, to focus just on extrinsic rather than intrinsic arbitrariness, we would need a case where a person may in fact deserve the death penalty, so that there is no question as to whether intrinsic arbitrariness is really doing the work in explaining the badness of why a certain “extrinsic” factor has influenced the jury’s decision-making.

One factor which may seem to fit the bill would be the effect of *geography* on who gets the death penalty.<sup>204</sup> And as it happens, the role of geography figures prominently in Justice Breyer’s forceful dissent in the recent *Glossip v. Gross*<sup>205</sup> case, and Breyer in turn relies on recent scholarly work in this area by Rob Smith.<sup>206</sup> The argument goes

204. See Hubbard, *supra* note 100, at 1131.

205. 135 S. Ct. 2726 (2015).

206. *Id.* at 2761 (Breyer, J., dissenting) (“Geography also plays an important role in determining who is sentenced to death.”); Robert J. Smith, *The Geography of the Death Penalty and its Ramifications*, 92 B.U. L. REV. 227, 231–32 (2012). Breyer has also emphasized geography in some of his more recent dissents from denials of certiorari. See *Jordan v. Mississippi*, 138 S. Ct. 2567, 2570 (2018); *Reed v. Louisiana*, 137 S. Ct. 787, 197 (2017) (“The arbitrary role that geography plays in the imposition

something like this. It turns out that it is a small number of counties that are responsible for most of the death sentences in America. Note that it is not just a matter of *states* that are responsible for death sentences—rather, we can go even more granular than that. We can go to particular counties, which in some cases, are responsible for more death sentences than most states. Prosecutors in these areas will just more aggressively pursue death, just as a sort of default. As Breyer summarizes the research:

Geography also plays an important role in determining who is sentenced to death. . . . And that is not simply because some States permit the death penalty while others do not. Rather *within* a death penalty State, the imposition of the death penalty heavily depends on the county in which a defendant is tried. Smith, *The Geography of the Death Penalty and its Ramifications*, 92 B.U. L. Rev. 227, 231–232 (2012) (hereinafter Smith); see also Donohue, *supra*, at 673 (“[T]he single most important influence from 1973–2007 explaining whether a death-eligible defendant [in Connecticut] would be sentenced to death was whether the crime occurred in Waterbury [County]”). Between 2004 and 2009, for example, just 29 counties (fewer than 1% of counties in the country) accounted for approximately half of *all* death sentences imposed nationwide. . . . And in 2012, just 59 counties (fewer than 2% of counties in the country) accounted for all death sentences imposed nationwide. DPIC, *The 2% Death Penalty: How A Minority of Counties Produce Most Death Cases At Enormous Costs to All* 9 (Oct. 2013).<sup>207</sup>

And so one may say that whether or not one is faced with the possibility of a death sentence will turn out to be a matter of whether or not you committed a crime in one of these counties (and with *this* prosecutor with *this* budget<sup>208</sup>) as opposed to almost anywhere else in

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of the death penalty, along with the other serious problems I have previously described, has led me to conclude that the Court should consider the basic question of the death penalty’s constitutionality.”); see also Stephen B. Bright, *Will the Death Penalty Remain Alive in the Twenty-First Century?: International Norms, Discrimination, Arbitrariness, and the Risk of Executing the Innocent*, 2001 WIS. L. REV. 1, 15 (“As a result of the enormous discretion given prosecutors, the death penalty is also a matter of place.”). As Jeffrey L. Kirchmeier has noted, however, “[t]he Supreme Court . . . has never indicated that the Eighth Amendment requires consistency among the states in their use of the death penalty.” Kirchmeier, *supra* note 19, at 387.

207. *Glossip*, 135 S. Ct. at 2761.

208. See Ashley Rupp, *Death Penalty Prosecutorial Charging Decisions and County Budgetary Restrictions: Is the Death Penalty Arbitrarily Applied Based on County Funding?*, 71 FORDHAM L. REV. 2735, 2767 (2003) (“If the above data indicate

America. Breyer cites the prominent role that geography plays in who gets the death penalty as an “improper factor,” alongside race and class.<sup>209</sup> It is a circumstance which “ought not” affect the application of the death penalty. The research shows, Breyer says, that the death penalty is imposed “arbitrarily.”<sup>210</sup>

Again, we have to be careful to isolate what exactly arbitrariness means in this context, and why it is wrong. If the death penalty in some of these counties is being pursued by prosecutors when it is not deserved, then we have a problem, but it is the obvious and by now familiar problem of intrinsic arbitrariness. If a zealous prosecutor in Maricopa County<sup>211</sup> is going for death in cases where a person has not committed an aggravated murder or when a person has overwhelming mitigating factors that counsel against death, then the objection to this is obvious: the prosecutor should not go for death in cases where it is not deserved. Something needs to change. But this is not a problem of geography *per se* playing an unjustified role, at least not directly. It is more immediately a problem of a morally flawed prosecutor. Again, geography may be a sort of proxy as to where we can find a greater risk of intrinsic arbitrariness, but this does not show that geography itself is the problem.

But is there something wrong with the fact that some prosecutors more zealously pursue the death penalty *within the bounds* of *Gregg*? If there was, this could be a case of showing what was wrong with extrinsic arbitrariness. Suppose we have two people who commit the same crime and have roughly the same priors, but one is caught in a county with a zealous death-minded prosecutor and one is caught with a prosecutor who has basically vowed not to pursue death except in the most extreme cases. One is sentenced to death and the other is not, but let us assume that *both* could permissibly have been sentenced to death, but for the discretion of the prosecutors in each county. What is the problem here? A non-desert factor is playing a role in who gets death, not at the level of the jury (such as when race may influence a jury’s decision) and not at the level of defense counsel (where a bad lawyer

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a causal relationship between county budget allocations and prosecutorial charging decisions, then the death penalty is being arbitrarily applied.”).

209. *Glossip*, 135 S. Ct. at 2763.

210. *Id.*

211. Michael Kiefer, *Maricopa County Runs Out Of Death-Penalty Defense Attorneys*, AZ CENT. (Mar. 26, 2017), <https://www.azcentral.com/story/news/local/arizona-investigations/2017/03/26/death-penalty-cases-maricopa-county-attorney-bill-montgomery/99238852/> [<https://perma.cc/QQB3-4CS2>] (“In the past two fiscal years, the County Attorney’s Office has filed more death penalty cases than it has resolved. And by January, there were so many potential capital cases that the county ran out of specialized attorneys to defend them.”).

may make the difference between a life sentence and the death penalty) but at the level of the prosecutor choosing to go for death. Intrinsic arbitrariness is not at play, nor does it seem that we have a factor—geography—which is itself morally objectionable. Indeed, I am not sure there is a problem if some prosecutors consistently recommend much less egregious cases for death than others, provided that they do not violate intrinsic arbitrariness in doing so. There can be variations in which prosecutors pursue death, so long as those who do pursue death are doing so in ways *in which it would be permissible for other prosecutors to do so*. But this is just another way of saying that the relevant constraint here is intrinsic arbitrariness, not some constraint of geographical uniformity.<sup>212</sup>

If we start looking at geography in the way Breyer does, we can of course see many other reasons why some counties will prosecute more than others.<sup>213</sup> There may be different political pressures in those counties. There may be different crime rates. It may be that the police in some countries are just better at catching criminals than the police in others. Some governors may be more willing to commute death sentences in some states than in other states. Juries may be more willing to impose death in some places rather than others. *All* of these things will matter to where people get put to death and where they do not. Is it wrong that there are variations like this? If we stipulate that in each case the person can be said to deserve death, then I do not think there is a problem. It does not seem *in itself* objectionable that there be geographical variations, and that this may affect whether one gets death or not—as opposed to the inherent objectionableness of race playing a factor. No one has a right to a merciful governor, in the way that one has a right to a good lawyer. To eliminate geographical variation totally we would have to go a long way toward eliminating our system of government. Now, that might be worth it, if it turned out that geographical variation permitted real risks of intrinsic arbitrariness. We might say, then, that giving prosecutors discretion that was unlimited was a failed experiment in the same way that giving juries too much discretion was a failed experiment. But I do not see this. That is, I do not see that the *Gregg* system, by allowing there to be geographical variation, represents an intolerable risk of intrinsic arbitrariness.

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212. One could certainly say that too many people are getting death even given the Court's constraints on the death penalty, but (again) this is a point about intrinsic arbitrariness.

213. See also the decision by the Washington Supreme Court in *State v. Gregory*, 427 P.3d 621 (Wash. 2018), which lists several types of geographical arbitrariness.

*D. Mercy*

I conclude that the inherent wrongness of extrinsic arbitrariness remains something of a mystery. I agree that there is a sense in which it is somehow wrong and that, ideally, it should not be there. Those concerns may seem magnified in the context of the fact that the punishment we are dealing with is death, and as the Court has emphasized in countless ways, death is “different.”<sup>214</sup> The nagging concern with extrinsic arbitrariness may lead us to condemn the death penalty altogether, although I suspect that it is not a sufficient reason on its own to reject the death penalty.<sup>215</sup> I deal with this possibility in my conclusion. In this section, I need to briefly consider a confounding factor that may lead one to qualify an absolute condemnation of extrinsic arbitrariness. From one angle, extrinsic arbitrariness looks to add a level of arbitrariness into the decision to give someone the death penalty. And perhaps there should be *no* room for any kind of arbitrariness, even when we are dealing with a person who can be said to deserve the death penalty. But from another angle, if we do have the death penalty, and there is a more or less well-defined class of people who can be said to deserve it, then we may want to reserve *some* power to the jury to make a decision that is not fully rational. That is, we might want to give the jury an “out,” even when it decides that the crime is aggravated, the person has a bad character, and there are no mitigating factors sufficient to outweigh either the badness of the crime or the badness of the person who committed it. In those cases, we may speak of the jury being *merciful*. And mercy, at least on some definitions, is just arbitrary.<sup>216</sup> It can be given for no reason at all. It is gratuitous.

So the fact that two juries can take two people equally deserving of death and in one case sentence a person to death and in another case

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214. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (“While *Furman* did not hold that the infliction of the death penalty *per se* violates the Constitution’s ban on cruel and unusual punishments, it did recognize that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice.”). See generally BLACK, *supra* note 10, 38–45 (arguing for the “specialness” of death).

215. It could also be a reason to favor a mandatory death penalty.

216. Indeed, this was paradoxically part of the defendant’s argument in *Gregg*; that the death penalty, even after the post-*Furman* reforms, was still too arbitrary, because grants of mercy could be (arbitrarily) given. *Gregg*, 428 U.S. at 200 (“Specifically, Gregg urges that the statutory aggravating circumstances are too broad and too vague, that the sentencing procedure allows for arbitrary grants of mercy, and that the scope of the evidence and argument that can be considered at the presentence hearing is too wide.”); see generally Stephen P. Garvey, “*As the Gentle Rain from Heaven*”: Mercy in Capital Sentencing, 81 CORNELL L. REV. 989, 1040 (1996). I have also considered similar themes in Chad Flanders, *Pardons and the Theory of the “Second-Best,”* 65 FLA. L. REV. 1559 (2013).

sentence a person to life in prison can be seen not as extrinsic arbitrariness (although it is that) but as an exercise of mercy. The same can be applied to the exercise of a prosecutor's discretion and, as classically applied, to the exercise of a governor's power to commute sentences. They are all ways of sparing a person from a fate he or she can be said to deserve. Of course, commutations, etc., can also be used to spare a person from a fate he or she does *not* deserve. Discretion can be used to remove intrinsic arbitrariness—and in these cases, we should say that the exercise of such discretion is not just discretionary, but in fact mandatory.<sup>217</sup> But there are classes of cases where mercy is up to the decision-making body. Whether or not we view mercy as good depends crucially on how we look at it. If we are beneficiaries of mercy—a lower sentence when a greater one was deserved—mercy can look quite good. When someone gets mercy and we do not, and we are similarly situated, mercy can look quite unfair. The basis for this unfairness, however, is also something of a mystery. To take a related case: can we complain at not being pardoned when someone else has been pardoned, who was just like us?<sup>218</sup> It would seem not.<sup>219</sup> After all, we can concede, in cases where both deserve the punishment, the person pardoned *did not deserve* to be pardoned. And it would seem strange to say that *no one should be pardoned* because the pardons were not distributed fairly. The alternative to this, assuming that we accept the death penalty as a legitimate punishment, would be that *everyone* who deserved to be punished with death got death. We are back to the position that *Woodson* rejected, but now we can see a further reason to reject a mandatory death penalty. *Woodson* thought it would be difficult to craft a rule where we could be sure that everyone who committed a certain crime and had a certain character should *automatically* get the death penalty. Better to let the jury engage in individualized assessment. But now we can add that getting rid of a mandatory death penalty gives the jury not only a chance to make a fine-tuned judgment as to desert, but also to exercise mercy even in cases where it has found that the death penalty is deserved.<sup>220</sup>

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217. See Flanders, *supra* note 216, at 1570–71.

218. *Id.* at 1578 (“Do gifts have to be distributed equally, or not at all?”).

219. Matthew C. Altman, *Arbitrariness and the California Death Penalty*, 14 OHIO ST. J. CRIM. L. 217, 224 (2016) (“Inmates who are executed are not getting more than they deserve, even though some inmates—those who are not executed—are getting less than they deserve.”).

220. As the Court said in *Gregg*:

Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. Furman held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had

There are, however, going to be problematic instances of mercy, which I have talked about in another context, and so won't belabor here.<sup>221</sup> Suppose a jury decides that a person deserves death, but they are going to spare him—because he is white. Such an exercise of mercy seems wrong, because it is based on a morally odious reason. Why should a person be spared just because he is white? In these cases, we may find that the desire for equitable punishment outweighs the good—mysterious, to be sure—of mercy. There are probably other factors like this as well, where we would say that the basis for being merciful corrupts and debases the very exercise of mercy. Perhaps certain reasons make it problematic even to use the term “mercy”; deciding to spare someone because he is white speaks of a sort of crude racial chauvinism rather than some elevated sentiment like mercy. It could be, too, that articulating *any* basis for mercy that is in no way related to desert—he had a nice smile, he was from a small town—makes mercy seem suspect. Again, I do not want to deny the strangeness of mercy. At the same time, I do not think it is altogether out of place to talk about juries exercising mercy. Doubtless, some have, and many will continue to do so. The point is that we cannot automatically condemn those exercises of arbitrary judgment as bad, because from another angle, they may seem good—especially to those whose lives are spared.<sup>222</sup>

#### CONCLUSION

I have made many claims in this article, but they can be resolved into essentially two. The first, a historical and normative claim, is that the Supreme Court has—in much of its jurisprudence surrounding the death penalty, been concerned with what I have been calling “intrinsic arbitrariness,” or the risk that someone who does not deserve death (who deserves, instead, something less, such as a life sentence) might get it. Moreover, the Supreme Court has, I think, reduced the risk of intrinsic arbitrariness by both its endorsement of schemes of “guided discretion” and also by eliminating certain crimes and certain classes of people from death-eligibility.<sup>223</sup> My second claim has been that there

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to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant

*Gregg*, 428 U.S. at 199.

221. See generally Flanders, *supra* note 216.

222. Cf. BLACK, *supra* note 10, at 84 (“For clemency knows no standards that are invocable as a matter of law. To the saved, this is mercy, of a quality not strained. To those who learn they are to die, it is irrational choice for death—the final such choice in a long series.”).

223. This is of course an empirical claim; I could be wrong. What seems clearer, however, is that this is what the *Court* sees itself as doing. *But see* McCord,

exists another kind of arbitrariness that we can call “extrinsic arbitrariness.” Extrinsic arbitrariness is when a jury or some other decision-making body decides who should get death according to a factor other than the circumstances of the crime or the character of the offender. Importantly, I have tried to emphasize that there can be cases of extrinsic arbitrariness *even when the offender can be said to deserve his or her sentence*, that is, deserves death. These cases are important, because many times when lawyers or scholars attack judgments on the ground that the decision was due to a bad lawyer or made on racial grounds, they may be simply using that factor as proxy for the fact that someone has gotten a punishment he or she did not deserve. But this is an attack on the possibility of intrinsic arbitrariness, not an objection to extrinsic arbitrariness as such. Another way in which extrinsic arbitrariness may just be a stand in for another value is when a particular factor is objectionable in itself—such as race—so what is being criticized is the use of *this factor* in making the decision, not merely the use of a non-desert factor. My conclusion about extrinsic arbitrariness is that it is probably not a bad thing *after* we strip away and just look at extrinsic arbitrariness by itself, and not when it is used as a proxy for something else. Moreover, there are cases that I think we can see the ability of the jury to make an extrinsically arbitrary decision for life as a good thing: those are the cases when we say that the jury (or a prosecutor or a governor) has been “merciful.”

This conclusion may seem too strong, especially because we may think that in the case of death that really *any* trace of arbitrariness should be removed. But we have to be careful in parsing this objection. Is it an objection that the *current* way of applying the death penalty does not get at the “worst of the worst” and instead gives us something like a “death lottery”? But what does this objection mean in the abstract? To give this objection some purchase, we would need some cases where a person has gotten the death penalty and it seems plausible that he or she did not deserve it. Even better would be to supply some aggravating circumstances or evidence of bad character that should not figure into assessing the death penalty. To give example like these would show that there are in fact cases where the death penalty is deserved, but that the statutory schemes of states do not adequately capture *only* these cases. I have suggested just one such example earlier in this paper, in Arizona’s death penalty scheme. It allows the use of a stun gun in a killing to be used as an aggravating factor—and more than that, a certain *type* of stun gun. This seems to allow the jury to impose death in a case instead of life in a way that violates intrinsic arbitrariness. If only the worst deserve to die, and the system is killing

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*supra* note 109. McCord’s conclusion that the Court has reduced the risk of overinclusiveness in the administration of the death penalty strikes me as persuasive.

people who are *not* objectively “the worst,” then we have an obvious (and obviously identifiable) problem. The truly objectionable death lottery is one which kills people indiscriminately and not on the basis of desert at all.<sup>224</sup> But we do not have such a system.<sup>225</sup>

At the same time, it would not seem to me completely wrong if the jury *after finding several other aggravating circumstances and no countervailing mitigators* to use the stun gun as a tie-breaker in favor of death. It does not seem to me a wholly arbitrary factor. But it does not seem to me so related to desert as to be, taken by itself, the basis for imposing death. In the absence of consideration of particular aggravating circumstances and their inadequacy as aggravating factors, the idea that the death penalty is arbitrary does not get much traction. Even in cases where race or a bad lawyer has been a factor in a person getting the death penalty, there may still be overwhelming evidence of guilt. In those cases, there is also an obvious objection, but it is not objection of arbitrariness—it is an objection based on the idea of using race as a factor, or the injustice of not having a good lawyer. In the latter instance, I am not sure how much of an objection it in fact is. If we are sure that the goodness of the badness of the lawyer did not affect whether a person got a penalty he or she did not deserve, there does not seem to be a convincing moral objection to assessing that

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224. Again, one could object that our current constraints on the risk of intrinsic arbitrariness are not constraining enough—but (as I go on to argue below) then one must say *in what ways* we need to constrain the process more.

225. Is a death *lottery* per se objectionable even among the guilty and deserving of death? See David McCord, *Lightning Still Strikes Evidence from the Popular Press That Death Sentencing Continues to Be Unconstitutionally Arbitrary More Than Three Decades After Furman*, 71 BROOK. L. REV. 797, 808 n.3 (elaborating on lottery metaphor); see also John D. Bessler, *The Concept of “Unusual Punishments” in Anglo-American Law: The Death Penalty As Arbitrary, Discriminatory, and Cruel and Unusual*, 13 NW. J.L. & SOC. POL’Y 307, 378 (2018) (“state-sanctioned killing in the U.S. now resembles a corrupted, state-sponsored lottery system”). We might think so. A few points will have to suffice in reply. First, the jury is not a pure lottery—it involves human beings making choices. The idea of a lottery may seem objectionable because one imagines putting people’s fates in the hands of something impersonal. But that is not what we have. (One may similarly recoil at the image of just a single person—a King, perhaps—deciding on a whim who lives or dies; but that is not what we have, either). Second, there are aspects of *any* human endeavor that will be like a lottery, and the criminal justice system is no exception. It will be—to some extent—a matter of chance whether a person gets caught, gets prosecuted, gets convicted, and gets sentenced to death. See, on this point, BLACK *supra* note 10, *passim*. If one were to try to eliminate chance altogether then there could be no criminal justice system (or any other human-designed and operated process for that matter). Finally, as I point out below, one solution to a death lottery is to make death mandatory for certain crimes. But I suspect those who object to the idea of a lottery do not endorse *this* particular solution. For further reflections on the lottery metaphor, see Vincent Chiao, *Ex Ante Fairness in Criminal Law and Procedure*, 15 NEW CRIM. L. REV. 277 (2012).

penalty.<sup>226</sup> With race, of course, things are different, and I am sympathetic to the claim that if the death penalty is imposed on the basis of race *even when the punishment was deserved* then the penalty is unjust. Again, however, this is not a case of objecting to the death penalty on the basis of sheer arbitrariness—it is a case of objecting to racism in the criminal justice system. With geography, I am at a bit of a loss to explain why sheer geographical variation alone should be objectionable in any given case, so long as the intrinsic arbitrariness constraint is satisfied.

I used the phrase “the worst of the worst,” in the previous paragraph, and I have on occasion employed a variation of that phrase in the body of the paper.<sup>227</sup> We might think that if, in the final instance, a sentence of death is ever assessed because of a factor extrinsic to a person’s desert (the circumstances of the crime or the character of the offender) the death penalty is not justified. It should be desert all the way down and what is more it should be given to the *worst* of the offenders (again measured by desert).<sup>228</sup> But the “worst of the worst” is a hard phrase to get a handle on. In any group, we can always whittle things down to the worst of the worst, at least in theory. In the real world, as opposed to hypotheticals, there will always be subtle gradations of badness. So even in the case of only two people, there will be a worst among them—one of the two will be more bad than the other. The objection cannot be that we must isolate the *one worst person* and only he or she can deserve the death penalty. Rather, the idea behind the Supreme Court’s jurisprudence is that there is a class of people who deserve death, and among those, the death penalty is a permissible punishment for them. They *all* have to meet a certain level of reprehensibility, and if they do, the death penalty can be applied. The fact that some *within* that class are worse than others may be true, but it is not directly to the point—the punishment can be imposed if you meet a threshold, not if you are the very *worst* among those who meet the threshold.<sup>229</sup> It is a fair objection to the Court’s line of decisions that it has done a bad job of deciding who that class is—that there are

226. The problem is, we may not know when this has happened. This is a problem, but it is an epistemic problem about being able to “know” when someone deserves death—not about whether the death penalty is applied in a way that fairly picks out those who deserve death.

227. For the most extensive use of this phrase, see McCord, *supra* note 225, at 801 n.13. For a discussion of this article, and rebuttal, see *Glossip v. Gross*, 135 S. Ct. 2726, 2752 (2015) (Thomas, J., concurring).

228. For this use of the phrase, see, for example, Vann, *supra* note 104, at 1271–72.

229. See generally *Zant v. Stephens*, 462 U.S. 862 (1983). Note that the “worst of the worst” objection is *not* the same as the objection that one or another aggravating factor does not really pick out a particular murder as more awful than others—an objection I have endorsed, above.

aggravators that put people in that class when they don't deserve to be. This is the problem of intrinsic arbitrariness. But once you are in the class *and* rightly so—that is, based on proper aggravators without outweighing mitigators—the fact that some are selected for death and some are not, based on factors extrinsic to desert, does not seem to be a serious moral problem. Indeed, as I have suggested, it can be seen not as a bad, but as the positive good of the exercise of mercy.

There remains one point to consider in closing, although I have suggested it throughout this paper.<sup>230</sup> Perhaps the worry about extrinsic arbitrariness is in fact a disguised version of the complaint that there really is no way to decide who is truly deserving—that no set of aggravators can pick out the subclass of the worst who deserve to die rather than who deserve to only get life in prison. Here we get back to the skepticism of *McGautha* but in a different form. In *McGautha*, the worry was that we could not specify in advance what sorts of things the jury might consider relevant to deciding who was deserving of death. The Court in *McGautha* said this was OK, and that if we were to have a jury decide sentencing, we had to trust them. We could just as easily say that we *cannot* trust the jury with this power, because again we *cannot* specify all those things a jury might find relevant, and the risk of arbitrariness is too great, and the absence of reliable standards too profound. But this objection seems to me to go too far. Is the death penalty really just as arbitrary as it was at the time of *McGautha*? To say so would be to say that the efforts of the Court to limit the discretion of jurors—by, in many cases, simply taking it away—has been a total failure. To spell this out further, can we say that the death penalty is *just as arbitrary* as it was when it could be applied without the jury having to find aggravators, and when it could be given to someone who was fifteen or seriously mentally disabled?<sup>231</sup> Either the objection here really means to specify ways in which jurors should be limited further, or it is in fact an objection to any method of applying the death penalty to human beings by human beings. If it is the latter, then the arbitrariness objection to the death penalty becomes something like, “the death penalty is impermissible because any choice to impose death is wrong.” This is a strong version of intrinsic arbitrariness, because it says that in every case the imposition of death is undeserved: no one deserves an immoral punishment. But it would be better in this case not to present the argument as one of the arbitrary imposition to the death penalty, if one thought in every instance the death penalty was

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230. See also Sigler, *supra* note 12.

231. Cf. Steiker & Steiker, *supra* note 7, at 436 (asserting that the “pre-Furman world of unreviewable sentencer discretion lives on, with much the same consequences in terms of arbitrary and discriminatory sentencing patterns”).

wrong. It would be better to lodge the objection directly, to the death penalty itself, rather than to the arbitrary manner of its imposition.<sup>232</sup>

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232. As I have written elsewhere, the best place to look for arguments against the death penalty is in more substantive notions, like “human dignity” and “civilization.” See Chad Flanders, *The Case Against the Case Against the Death Penalty*, 16 NEW CRIM. L. REV. 595, 619 (2013) (“This lack of resources within the various punishment theories means we have to go elsewhere, to broader normative territory, to criticize the death penalty. We have to look at ideas of human dignity, or of decency, or of civilization.”). In the U.S. context, this would mean spelling out how the death penalty is inconsistent with “evolving standards of decency.” See *id.*

At the other end, there is certainly room for case-by-case determinations of the appropriateness of the death penalty, both as to whether death is deserved, and—as in the recent challenge in *Bucklew v. Precythe* before the Supreme Court—whether a method of applying the death penalty to a particular person is “cruel and unusual.” 883 F.3d 1087 (8th Cir. 2018), *aff’d*, No. 17-18151, 2019 WL 1428884 (U.S. Apr. 1, 2019).