A Retributivist Argument Against Capital Punishment

I

Even those opponents of the death penalty who reject retributive theories of punishment must confront the fact that the Supreme Court considers retribution a legitimate justification for capital punishment. In Gregg v. Georgia, the Court upheld Georgia's death penalty statute, arguing that this statute was free of the constitutional infirmities that had led the Court to strike down the death penalty four years earlier in Furman v. Georgia. As part of this decision, Justice Stewart, writing for the Court, argued that although retribution may no longer be the dominant objective of the criminal law, it is not "a forbidden objective nor inconsistent with our respect for the dignity of men." And so, even if opponents could prove, once and for all, that capital punishment has no deterrent value whatsoever, the constitutional debate would be far from over, since this punishment could still be justified by appealing to its retributive value. Retributivists argue that wrongdoers should be punished not because doing so will bring about some good consequences (such as deterring others from committing crimes), but because wrongdoers deserve to be punished. And individual moral desert, according to this view, is solely a product of wrongdoers' past actions, not any future consequences. Thus, even if the death penalty did not serve a deterrent purpose, it could still serve a retributive purpose, in which case it would still be defensible on constitutional grounds.

But even though retributivist arguments are not undermined by considerations of future consequences, it does not necessarily follow that these arguments cannot be threatened by challenges based on empirical evidence. It is one thing to say that certain types of empirical evidence are irrelevant when evaluating individual moral desert; it is quite another to say that empirical evidence is irrelevant when evaluating the justification of retributive punishments. The determination of individual moral desert does not exhaust the subject of retribution. This, however, is exactly the approach taken by some retributivists who continue to defend the death penalty even in light of evidence that the capital sentencing process is racially biased. In McCleskey v. Kemp the Court was presented with a statistical study conducted by David Baldus purporting to show that the capital sentencing process in Georgia is biased against blacks, particularly when the victims of crime are white. While it did not dispute the validity of the findings, the Court nevertheless rejected this challenge to the death penalty, arguing that such evidence does not prove that the particular individual in question had suffered racial discrimination. For some retributivists, this decision is not problematic, since racial bias in the sentencing process does not affect the moral desert of individual criminals. If all of the criminals who were eligible for the death penalty deserved to be executed, the argument goes, then the fact that some of them escaped this fate does not mean that those who were executed were treated unjustly. To say otherwise would be to say that giving people exactly what they deserve is unjust, which would be a strange claim indeed.

The central problem with this line of argument is that it is based on the assumption that those who were executed deserved to be executed by this authority. What retributivist justifications of capital punishment such as that put forward by Ernest van den Haag fail to consider is the crucial role that the right to punish plays in moral desert-claims. For there is a
connection between desert, punishment, and authority that cannot be ignored by anyone making a retributivist argument about punishment. In this essay, I will consider this connection and argue that in order for a particular punishment to be morally legitimate, the institution inflicting that punishment must also be morally legitimate. It is not enough to observe, as van den Haag does, that any particular person deserved to be executed in order to conclude that his execution was just. When someone deserves punishment, he deserves a particular form of treatment, for a particular reason, from a particular authority. If the harm that the person receives does not satisfy these requirements—if, that is, it is the wrong form of harm, or is given for the wrong reason, or is inflicted by someone without the right to do so—then the punishment is unjust and cannot be justified by an appeal to retribution. I will further argue that this understanding of moral desert provides retributivists with a strong reason object to the McCleskey decision. The evidence from the Baldus study calls into question the very legitimacy of the capital sentencing process in Georgia, and perhaps throughout the United States. And if this sentencing process is illegitimate, then the criminal justice system may be incapable of satisfying the moral desert-claims of those who deserve to be executed. Rather than promoting justice, such a system would simply create more injustice and thus would be contrary to the goal of retribution.

II

The appeal to retribution as a justification for punishment is, perhaps, as old as the idea of punishment itself. Even for those who eschew retribution-based punishment schemes, the fundamental moral intuition that punishment should only be inflicted on those who deserve it—on those who have done something to bring the punishment upon themselves—is an intuition that must, at the least, be accommodated in one way or another. The true test of a consequentialist justification of punishment is whether it can overcome the objection that some set of good consequences could justify punishing the innocent. The argument that desert is a sufficient condition for punishment may not be persuasive, but the intuition that it is a necessary condition is one that will be difficult to disregard.

For those who accept that retribution is a valid justification for punishment, this concept seems to fit neatly within a broader conception of justice. If justice demands, as many have argued, that each person receive what he is due, then defending the idea of retribution is simply a matter of demonstrating that under certain conditions people can deserve to suffer, just as under other conditions they can deserve respect or rewards. Even among retributivists, of course, the question of just what punishment each person deserves in a particular situation will be a source of controversy. But what is important here is the central retributivist claim that when a wrongdoer commits a crime, justice requires that he suffer in some way. He deserves, that is, to be punished.

Simply invoking the concept of retribution will not, of course, justify any and all punishments. There are certain forms of suffering, such as torture, for example, that it will be very difficult to justify by appealing to retribution. This is because retribution is not simply giving an “eye for an eye,” but is instead a moral response to the evil act that the wrongdoer has committed. The retributivist punishes, that is, not to gain revenge, but because the infliction of certain morally appropriate forms of suffering on the wrongdoer will serve justice. Now it may seem implausible to claim that human suffering could serve justice, but consider, for example, one of the most influential accounts of retribution, that put forward by Herbert Morris. According to
Morris, a retributive punishment is a way of forcing the wrongdoer to pay a debt that he owes to all of those who have not violated the law: "A person who violates the rules has something the others have—the benefits of the system—but by renouncing what others have assumed, the burdens of self-restraint, he has acquired an unfair advantage. Matters are not even until this advantage is in some way erased." The suffering that punishment entails, then, is a way to "erase" the wrongdoer's unfair advantage and restore the moral balance that existed before the wrongdoer committed his crime. So what this means is that if the goal of the retributivist is to restore the moral balance that has been upset by the wrongdoer's act, then committing further evil acts—such as, perhaps, torture—will obviously do little to achieve this goal. It is only by inflicting certain morally appropriate types of suffering on the wrongdoer that justice can be served.

Given this understanding of retribution, it is easy to see why the debate over capital punishment so often centers on the question of whether this punishment can ever be the morally appropriate response to wrongdoing. It may be the case that there are crimes so terrible that only death will set things right; then again, it may be the case that capital punishment, like torture, is by its very nature an evil act, and thus cannot restore the moral balance no matter how grave a crime the wrongdoer commits. But suppose that, for the sake of argument, we accept the retributivist justification of punishment—we accept the argument that moral desert is not just a necessary condition for punishment, but a sufficient condition—and furthermore we accept the position taken by some retributivists that it is possible for wrongdoers to deserve death for their crimes. Where exactly does this leave us? Does this provide us with enough information to determine whether any particular punishment is just? Consider the case of a wrongdoer who commits a crime so terrible that there is no question that he deserves death. Given this information, can we say conclusively that he is treated justly when he is executed for his crime?

On the face of it, answering this question seems very straightforward: the wrongdoer deserved death, that is the treatment he received, and therefore, yes, he was treated justly. But what if we are then given the added information that this wrongdoer was treated differently from others who deserved the same punishment? Suppose that he was one of ten people who deserved to die, yet he was the only one who was chosen to be executed. Could we then argue that he had been treated unjustly by those who had singled him out? Surely we wouldn't make such an argument if the desert-claim involved a benefit of some sort. If ten people deserved a reward, and only one was chosen to receive it, this wouldn't lead to the conclusion that the one who received what he deserved was treated unjustly. Most likely we would say that those others who didn't receive what they deserved were treated unjustly, while the one who received the reward was treated justly. But if this conclusion is correct in the case of deserved benefits, how then could we conclude that the one person who was executed was treated unjustly, since this treatment was consistent with his desert? Is there any way we could say that this treatment was inconsistent with his desert?

This is the question that those who wish to challenge the Supreme Court's decision in McCleskey v. Kemp on retributivist grounds must answer. In that case, the Court was presented with evidence that the capital sentencing process in Georgia is racially biased such that the killers of whites are 4.3 times more likely to receive the death penalty than the killers of blacks. But, according to retributivist defenders of this decision, this evidence does not lead to the conclusion
that people such as McCleskey are treated unjustly when they are executed. Ernest van den Haag, for example, argues that discrimination in the sentencing process may be wrong, but it is not unjust to those who end up being punished, for these are people who deserve to die. Desert, according to this view, is an individual matter, and since punishment is inflicted on individuals, not racial groups, the only morally relevant question is which individuals deserve to be punished. And once we know who deserves to be punished, any maldistribution of punishments does not render these particular punishments unjust. So if, as the Baldus study suggests, the capital sentencing process is biased so that killers of whites are more likely to be executed than killers of blacks, then the real victims of injustice are the black victims of murder, since their lives are not valued as highly as those of white victims. The solution to this problem is not to stop executing those who are currently being executed, but to pursue more vigorously those who are escaping justice—the killers of blacks. But since the guilt of any particular murderer remains unaffected by biases in the sentencing process, there is no reason to think those who are sentenced to die should not get what they deserve. Van den Haag even goes so far as to say that if punishments were distributed by lottery among the deserving, this still wouldn't make any particular punishment unjust.

Van den Haag's reliance on the concept of individual desert gives his argument a strong retributivist foundation. But even if we accept that individual desert remains unaffected by how others are treated, there still seems to be something wrong with a system that doles out punishments in a manner that is at best arbitrary and at worst racial. Indeed, this was the main reason why the Supreme Court struck down Georgia's death penalty law in Furman v. Georgia, which in effect abolished the death penalty in the United States. In that case, the Court ruled that the fact that death sentences were being handed down in an arbitrary manner rendered these punishments "cruel and unusual," and thus in violation of the Eighth and Fourteenth Amendments. In his concurring opinion, Justice Potter Stewart compared receiving the death sentence under current law to being hit by lightning, arguing that "the Eighth and Fourteenth Amendments cannot tolerate the inflicting of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." But if van den Haag is correct, then arbitrary methods of distributing punishments among those who deserve them are not unjust to those people who are punished. Since they deserve to be punished, and since they receive what they deserve, it simply makes no sense to say that they have been treated unjustly.

In response to van den Haag's argument, Stephen Nathanson has argued that the problem with arbitrary sentencing of deserving criminals is that these criminals are punished for the wrong reasons. To make this argument clear, Nathanson considers a case in which a highway patrolman, confronted with speeders of all types, makes the decision to pursue and fine only those speeders who have beards. The question, then, is whether in these circumstances the punishments received by bearded speeders are just. Nathanson argues that such punishments are unjust because the reason behind the punishments is irrelevant to the punishment. The speeders were fined not simply because they were speeding, but because they had beards. And this, Nathanson believes, demonstrates that these punishments are unjust, even though those who received them clearly deserved them. He concludes that "whether one is treated justly or not depends on how others are treated and not solely on what one deserves."

Although Nathanson is surely onto something here, as it stands his argument does not overcome van den Haag's response. In cases such as the one Nathanson describes, van den Haag
can again appeal to individual desert in order to demonstrate that the punishments are just. He argues that when a bearded speeder is pulled over for speeding by the biased patrolman, the fact remains that he deserves to be fined for breaking the law. The injustice in such a situation is not that the bearded speeder was punished, but that clean-shaven speeders were not also fined. The arbitrariness of the choice simply does not affect the guilt or the desert of those who received punishments, and thus those punishments are not unjust. Nathanson claims that it would be better if no one were punished under these circumstances rather than just punishing a capriciously chosen few. But the problem with this argument is that it does not address what is, from van den Haag's perspective, the objective of retributivism: punishing as many of the guilty as possible. If the goal of retributivism is to achieve a moral balance, then any time a deserving wrongdoer is punished, this works to promote justice. The fact that we could be punishing more wrongdoers, or that some wrongdoers are escaping their punishment, only indicates that we could be doing more to promote justice, not that those who have received punishments have been treated unjustly.

This is not to say that van den Haag's position is ultimately correct. For his argument does not take full account of what it means to deserve punishment. When someone deserves a particular punishment, this does not mean that any time this form of harm is inflicted justice has been served. Imagine, for example, that a vicious murderer has been sentenced to death and placed on death row. He has exhausted all of his appeals, he has gotten his affairs in order, and now it is just a matter of days before he gets what he deserves—a lethal injection that will cause his death. Now imagine that the guards at the prison decide that this business of a formal state execution is just too costly an affair and that they should do everybody a favor and take care of the job themselves. That night, they slip into the murderer's cell and give him a lethal injection while he sleeps. The murderer never feels a thing and is dead within minutes. Has anything morally wrong occurred in this situation? The guards have probably violated many laws and prison regulations, and in that sense their action was wrong. But has anything unjust been done to the murderer? After all, he did deserve to die by lethal injection, so what possible complaint could he have? In one sense, it seems that he got just what he deserved. Then again, maybe he didn't. Although the murderer deserved to die by lethal injection, it is only by taking a very superficial view of this situation that we can say that what happened to him is consistent with his just desert. This is because there is a distinction between punishment and harm simpliciter, and a desert-claim involves more than the brute physical act of inflicting harm. As Jeffrie Murphy argues, in order for a particular harm to even be punishment three conditions have to be met: there must be "a system of rules, authorities to apply these rules, and authorities to enforce sanctions for breaches of these rules." Now in the case of the murderer, the first two conditions appear to be satisfied. There is a law against murder that this person violated, and he was found to be guilty of this offense by legitimate authorities who determined that he deserved to die. But Murphy's third condition clearly has not been satisfied in this situation. Those prison guards did not have the authority to punish the murderer, and therefore when they injected him with the chemical it simply was not punishment—it was murder. The fact that the man deserved to be executed does not provide any moral support whatsoever for what the guards did. For although he did deserve to be killed by lethal injection, he did not deserve to be killed by the guards. They could never satisfy his desert-claim, since he deserved to be
punished by legitimate authorities, not murdered by vigilantes or do-gooders. The retributivist should thus consider this not an example of a punishment serving to restore a moral balance, but an instance where further injustice has occurred.

This connection between moral desert and legitimate authority is crucial for any retributivist account of punishment, for absent legitimate authority, legitimate punishment is impossible. Implicit in the desert-claim "X deserves punishment P" is the claim that X deserves this punishment from a legitimate authority. So if no one has the legitimate authority to inflict punishment—if, that is, no one has the moral right to punish—then any harm inflicted against the wrongdoer will not satisfy the desert-claim. The desert-claim only applies to the wrongdoer and the legitimate authority. When an illegitimate authority harms the wrongdoer, this no more satisfies the desert-claim than punishing some innocent third party would, since the desert-claim does not apply to innocent third parties and illegitimate authorities. Thus, the retributivist should not be satisfied whenever a wrongdoer is harmed, for some harms actually increase the net amount of injustice. It is only when a wrongdoer is punished—that is, when the authorities to whom the desert-claim applies cause him to suffer in the appropriate way—that justice is served. Anything else is simply more injustice.

Some will object, no doubt, to the argument that the claim "X deserves punishment P" means that X deserves this treatment only from a legitimate authority. For there are desert-claims that do not lead to the conclusion that the person deserves the treatment from anyone, much less from someone with special authority to deliver this treatment. Consider the claims "Albert deserves praise for his good deeds," and "the painting deserves admiration." In these cases, it does not seem to make sense to say that the treatments in question are deserved from anyone. But if this is true, then we need to consider whether desert-claims of this type really are claims of justice. We have to consider, that is, whether it would be unjust if Albert did not receive praise or the painting were not admired. This hardly seems plausible. Saying that Albert deserves praise or the painting deserves admiration is simply a way of saying that it would be a nice thing if Albert were praised and the painting were admired. But unlike in the case of a retributive punishment, Albert and the painting are not due these treatments in the sense that it would be unjust if the treatments were not provided, and thus these are, at the least, examples of a different type of desert-claim.

There are, however, other types of desert-claims that are claims of justice, but which do not seem consistent with my account of the desert-claim for punishment, such as, for example, the claim "all human beings deserve respect." In this case, the claim is a claim of justice, since if a human being is not treated with respect, we can say that an act of injustice has occurred. But this does not seem to lead to the conclusion that this treatment is deserved from anyone in particular, nor does it seem to lead to the conclusion that the person who delivers this treatment must have the authority to do so. Notice, however, that this desert-claim does in fact mean that the treatment is deserved from some other people. When we say that "all human beings deserve respect," what we mean is that this respect is due from all other human beings such that it would be unjust if they did not provide this treatment. The more difficult problem is that in this case it does not seem that any special authority is required to provide this treatment (except in the weak sense that everyone presumably has the right and the authority to treat each other with respect), and thus there is nothing in the desert-claim itself that compels the conclusion that satisfying a
desert-claim requires the authority to do so.

There is, however, a significant difference between a desert-claim for punishment and these other desert-claims, a difference that is based on the type of treatment being provided. Whereas treatment such as respect is something anyone can provide at any time, the kinds of suffering that punishment typically involves are such that it is only under certain conditions that these forms of suffering are punishment. Killing another human being, for example, can be either murder or punishment. How do we determine which it is in a particular case? One way is by looking to the person who inflicts this harm. In order for the particular harm to be punishment, it must, at the least, be inflicted by someone who has the right to do so in response to wrongdoing. If this person does not have the right to punish the wrongdoer (as in the case of the prison guards), then the treatment is simply harm, no matter what his reasons for inflicting it. It is the position of authority—the right—that makes the difference between harm and punishment. So when we say "X deserves punishment P," the concept of punishment itself constrains the claim in such a way that it can only be satisfied by someone with the moral authority to inflict this suffering. Since a desert-claim is a moral claim—a claim that a certain form of moral treatment will restore a moral balance—any treatment that is not moral in nature simply will not satisfy this claim.

At one level, this argument should be uncontroversial. It amounts to saying that in order for a particular punishment to be just, the person or institution that inflicts that punishment must have the right to punish. To dispute this would be to say that suffering can be just punishment no matter who inflicts it. This would mean that the claim "X deserves punishment P" could be satisfied even if the person who inflicts this suffering on X has no right to do so. But this does not make sense. If the treatment is not moral in nature (which will be the case if it is inflicted without right), then it obviously does not serve justice and restore the moral balance. Perhaps, following John Locke, we might argue that everyone has a natural right to punish, and thus the desert claim "X deserves punishment P" could be satisfied by anyone, since we all have an equal right to punish. But notice, first, that even this view requires that we acknowledge that those who inflict punishment have the right to do so—indeed the claim that we all have an equal right to punish is central to Locke's argument concerning the state of nature. Thus, the claim "X deserves punishment P" does mean that the criminal deserves this punishment from those who have the right to punish—it just so happens that this is a very large set of people. The second thing we should remember is that, according to Locke, although we all have a natural right to punish, we give up this right to punish when we enter civil society. Once we are in civil society, that is, the desert-claim no longer applies to everyone; it only applies to the legitimate authority to whom we have ceded our rights. Thus, even on Locke's account, the claim "X deserves punishment P" leads to the conclusion that the wrongdoer deserves this treatment from a legitimate authority.

What may seem more controversial is the attempt to connect this idea of rightful punishment with the desert-claim itself. But once we accept that punishment is just (or suffering is only punishment) only when inflicted by someone who has the right to do so, then we are inevitably led to the conclusion that the desert-claim "X deserves punishment P" means that X deserves this punishment from A, where A is the person (or institution) who has the right to punish. Since the desert-claim will be satisfied only by a form of moral treatment, and since harm simpliciter is not a form of moral treatment, then this means that only punishment—suffering...
inflicted by right—will satisfy the desert-claim and restore the moral balance.

What this means in the case of Nathanson's bearded speeder is that van den Haag is correct that the arbitrary means used to determine who gets punished do not affect the desert of those who are punished. But he is incorrect to say that those who are punished arbitrarily are not treated unjustly. For when we say that speeders deserve to be punished for their crimes, what we mean is that they deserve to be punished by a legitimate authority. But this is not what happened. Any highway patrolman who deliberately targets people with beards, or people without beards, or old people, young people, black people, or white people has violated his mandate and the public trust. He was hired and sworn to prosecute the law impartially, but this is not what he is doing. He is targeting a particular group because of his own personal bias. This is something he was never authorized to do; such judgments are far beyond the scope of his authority. Bearded speeders who are fined therefore do have a legitimate complaint. They may deserve to be punished, but not by him. Like the murderer who is killed by the prison guards, they deserve to be punished only by a legitimate authority. Any harm that the prejudiced patrolman inflicts on bearded speeders is therefore simply that—harm; and thus it is unjust.

Evaluating the justice of punishments, then, involves more than simply determining who deserves what, as van den Haag would have us believe. It is not enough to know that a murderer deserves punishment in order to conclude that the harm he receives is just. Such a determination requires a broader understanding of desert and justice, and the crucial role institutions play in this formula.

III

A full retributive theory of punishment will thus have to be considered in light of a larger conception of legitimate authority. When a retributivist claims that a state is in a position to inflict just punishments on moral wrongdoers, implicit in this claim is the belief that this state is legitimate, or at the very least that its criminal justice system is legitimate. If this authority is not legitimate, then it cannot satisfy the desert-claims of wrongdoers. But does this mean we can draw no conclusions about any particular punishments without a full-blown theory of state legitimacy? Perhaps not. For we can identify some practices that, at least from a liberal perspective, obviously disqualify a state from being considered legitimate. One candidate for this type of disqualification is disrespect for the rule of law. We do not need to trot out a fully developed theory of state legitimacy in order to determine that a government that does not respect the rule of law is fundamentally inconsistent with the principles of liberal democracy. Perhaps an even more obvious disqualifying practice is racial discrimination. Since one of the fundamental principles of liberalism is that all human beings are morally equal regardless of arbitrary features such as race and sex, any state that institutionalized racial discrimination would have to be illegitimate from a liberal perspective. There were many ways in which the government of Nazi Germany was unjust; but all we would need to know to determine that it was illegitimate was that it sought to exterminate an ethnic minority.

So if racial discrimination is fundamentally inconsistent with the principles of liberal democracy, what conclusions can we draw from the Baldus study? Does this study provide enough evidence to conclude that those people who are being executed in the United States are being treated unjustly? Can we say that because of the bias in the capital sentencing process the
authorities who are imposing capital sentences are in no position to satisfy the wrongdoers' desert-claims? If this is the case, then the retributivist should be in favor of, at the very least, suspending capital punishment, since any punishments which take place only serve to further injustice.

Before proceeding any further, we should consider an important question: to what degree do certain illegitimate practices affect the legitimacy of what is, for the most part, a legitimate institution? Thus far, we have only considered the conceptual relationship between moral desert-claims and the authorities that are in a position to satisfy those claims. When it comes time to start discussing actual institutions, things become more complicated, for the institution of government obviously has many levels and many different roles. If, as the Baldus study suggests, the capital sentencing process in Georgia is infected with racial bias, and if racial discrimination is inconsistent with legitimate government, does this mean that the entire state of Georgia is illegitimate, or, by extension, that the entire United States government is illegitimate? This hardly seems plausible. Certainly there are governments that engage in so many unjust practices, or whose leaders are so corrupt, that we could say the entire government is illegitimate. But if any single illegitimate practice automatically rendered an entire government illegitimate, then there would in all likelihood be no legitimate governments, ever. And so, since we cannot conclude that the entire government is illegitimate based on the fact that in this one area its practices are illegitimate, what conclusions can we draw from evidence like that presented in the Baldus study?

Perhaps the least we can say is that a government that aspires to be just should take steps to avoid participating in any practices that are unjust—for this government will be illegitimate in these areas. So if, as Charles Black has argued, there is simply no way to rid the capital sentencing process of the racial bias that comes with discretion, then our government simply ought to stop inflicting this punishment. If race is always going to play a significant role in the capital sentencing process, then our government can never have the moral legitimacy necessary to satisfy these desert-claims, and therefore its executions will always be illegitimate. The fact that our government is just in general does not provide moral support for any particular unjust practices, nor for any subordinate institutions created to carry out these practices.

An alternative solution to this problem would be to eliminate discretion from the system altogether. If it is impossible to rid the discretionary aspects of the capital sentencing process of the influence of racial bias, couldn't the retributivist argue that we should simply do away with discretion? One problem with this proposal is that the Court has already rejected it in Woodson v. North Carolina. In that case, the Court held North Carolina's mandatory death penalty—which was a post-Furman attempt to eliminate bias from the system—to be unconstitutional. The Eighth Amendment, according to Justice Stewart, "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." In light of this ruling, it seems unlikely that eliminating discretion will ever be a viable solution to the problem of racial bias in the capital sentencing process. But even if some form of discretion were not constitutionally required, the retributivist should still be wary of any attempt to remove individualized consideration from the sentencing process. The idea that all those guilty of, say, first degree murder should be treated the same, no matter what the particulars of their circumstances, is an idea that would be hard to reconcile with any retributivist account of
punishment. Each criminal's desert is a product of his individual circumstances, and thus ignoring these circumstances will inevitably lead to some people being treated unjustly. As Jeffrie Murphy argues, to avoid inflicting upon persons more suffering than they deserve, or to avoid punishing the less responsible, is a simple—indeed obvious—demand of justice. Basic demands of justice are that like cases be treated alike, that morally relevant differences between persons be noticed, and that our treatment of those persons be affected by those differences. This demand for individuation—a tailoring of our retributive response to the individual natures of the persons with whom we are dealing—is a part of what we mean by taking persons seriously as persons and thus is a basic demand of justice.²² It is a simple fact that not all those who are convicted of first degree murder are similarly situated, and so in order to satisfy the demands of justice, those who are imposing sentences must take into consideration the particulars of individual situations.

If eliminating discretion is not a viable solution to the problem of racial bias, does this then lead to the conclusion that we should put a halt to executions? A defender of the capital sentencing process might argue that we would first need to take into consideration the important difference between a system that affects racial groups unequally and one that deliberately discriminates against a particular group. In Nathanson's example, the highway patrolman was deliberately biased when he made his decisions, and it was because this bias was beyond the scope of his authority that his punishments were illegitimate. But what about a system that is not deliberately biased? In his opinion for the Court in McCleskey, Justice Powell argues that in order for the Court to accept an equal protection challenge such as McCleskey's, the defendant would have to prove that there has been purposeful discrimination against him. Although McCleskey was able to draw upon the Baldus study to show that there was bias in the Georgia system, this did not prove that any particular state actors had targeted him for discrimination. The only thing the Baldus study showed was that those who murder whites are more likely to receive the death penalty than those who murder blacks, and that blacks in general are slightly more likely to receive the death penalty than whites. This did not prove that McCleskey himself was discriminated against, and so the Court rejected his equal protection challenge.

While Justice Powell is correct that McCleskey did not provide any evidence to show that he had been discriminated against, this does not mean that we can conclude that McCleskey's sentence was just. We do not need to show that the system deliberately discriminated against any particular person in order to conclude that it is illegitimate and thus not in a position to inflict just punishments.²³ It is enough to prove that the system is discriminatory in general to conclude that any punishments it inflicts are unjust. The fact that a discriminatory system may occasionally get things right, or may treat some people quite fairly, does not mean that this system is legitimate, even in those cases. The legitimacy of an institution is not measured on a case-by-case basis such that we can say that it is legitimate with respect to some people but not to others. By that logic, we might have to conclude that the regime in Nazi Germany was legitimate when it dealt with people of Aryan descent, and illegitimate when it dealt with Jews. But this does not make sense. To say that an institution is morally legitimate is to say that its rule is just. And if racial discrimination is unjust, then any institution that practices racial discrimination is illegitimate, even
if in the particular case in question racial discrimination is not the motive for its actions. Consider again the patrolman who is biased against bearded speeders. Suppose that at the end of the month, it becomes clear to him that he is not going to meet his quota for handing out speeding tickets (and assume for this discussion that such a quota is not unjust). He decides to widen the net for the last few days and pull over anyone he catches speeding. He starts pulling over people who are clean-shaven, but he also catches some more people with beards. Have his actions somehow become legitimate at the end of the month? Does it matter that in these cases he is not deliberately targeting people with beards? Certainly not. The fact that this patrolman may occasionally act from motives that are not discriminatory in no way makes his authority legitimate. Those who are pulled over at the end of the month have just as much right to complain as those who were targeted because they have beards, because in both cases they were punished by an illegitimate authority.

Nor do we need conclusive evidence that an institution's policy is deliberately designed to discriminate in order to conclude that this institution is illegitimate. Justice Powell argues that there is a difference between acting "because of" the effect on a minority group and "in spite of" the effect on that group, and that in order for McCleskey to have an equal protection claim, the state of Georgia would have to have been deliberately trying to discriminate against blacks when it devised its death penalty statutes. Although Powell is correct that the evidence in the Baldus study, taken alone, is not enough to conclude that the capital sentencing process is illegitimate, this is not the only evidence that should be considered. There is also evidence that not so long ago the same institution that is dealing with McCleskey was engaged in widespread, systematic, deliberate racial discrimination. So what we have is statistical evidence that reveals that a policy is having a disparate impact on members of a minority group, and we have good reason to believe that this impact is not simply the result of random factors. The fact that the death penalty statutes are neutral on their face is not enough to conclude that the institutions inflicting this punishment are fair and impartial. Instead, an institution that was, until recently, clearly illegitimate, should have the burden of proving that it is no longer engaged in racial discrimination when confronted with evidence of disparate impact. And if the institution cannot provide an explanation for the racial disparities, as the state of Georgia could not when confronted with the Baldus study, then it should be presumed illegitimate and thus incapable of satisfying desert-claims.

What about the risk that such a presumption of illegitimacy poses to the goal of promoting justice through retribution? Wouldn't it be better to take a chance that the institution is actually legitimate and inflict punishments anyway? Of course, there is always some degree of risk that an institution is inflicting unjust punishments, and the arguments for and against suspending punishments will depend on just how high that risk is. The Baldus study suggests that a murderer is 4.3 times more likely to receive the death penalty if his victim is white. Does this evidence, combined with the history of racial discrimination in Georgia, demonstrate an unacceptable level of risk? If not, how much evidence would we need to conclude that the risk was unacceptable? There are no clear answers to these questions. The retributivist, however, should keep in mind that something more is at stake than simply the potential for deserving wrongdoers to escape their just punishments. What is also at stake is the potential for deserving wrongdoers to be harmed unjustly by an illegitimate authority. When a criminal is harmed by an illegitimate authority, this in no way works to restore the moral balance that is the goal of retribution. As a result of such an
act, the net amount of injustice has actually increased because the wrongdoer's original desert-claim remains unsatisfied, and a further unjust act has been committed. Contrast this to a situation in which we determine that the capital sentencing process reflects a racial bias and therefore is potentially illegitimate. Instead of sentencing wrongdoers to death, we play it safe and sentence them to the next worst punishment, life in prison. Now a retributivist might complain that a particular wrongdoer is not being made to suffer as much as he should, and thus some degree of injustice remains. But what this situation avoids is the risk of compounding the original injustice by killing the wrongdoer. Although the moral balance in this situation would be less satisfactory than if a legitimate authority had executed the wrongdoer, it is not as bad as it would be if an illegitimate authority had executed him. If the ultimate goal of retribution is to promote justice, then we should take those steps that are most likely to promote this goal while resulting in the least amount of injustice. And if the evidence in the Baldus study demonstrates an unacceptable level of risk, as I believe it does, then retributivists should want to play it safe and not inflict the death penalty.

Finally, we should consider what effect accepting statistical evidence such as that presented in the Baldus study might have on the rest of the criminal justice system. If we can conclude that an institution is illegitimate by appealing to statistical evidence of bias, this raises the specter of the entire criminal justice system grinding to a halt as a result of racial challenges. The easy answer to this problem is, “So be it.” If it is the case that the entire system is corrupted by racial discrimination, then it is an illegitimate system, and therefore bringing it to a halt might not be such a bad thing. But before making such a determination, we would again have to consider the level of risk. That is, we would have to weigh the risk of unjustly punishing wrongdoers against the risk of the injustice that would result from letting wrongdoers go unpunished. Now in the case of capital punishment, the potential for injustice when punishing someone is great. Execution is the gravest punishment the state can inflict, and so a mistake in this area would be a serious injustice. Because this kind of injustice would be so great—because the stakes are so high—we should probably be willing to accept evidence of the kind presented in the Baldus study, even if it fails to prove that there was any individual discrimination. In other areas of the criminal justice system, however, the potential injustice is not as great, and so perhaps we should demand stronger evidence than that provided in the Baldus study. Perhaps in those instances we would demand the kind of individualized evidence of discrimination that the Court required of McCleskey. I am not arguing that this is necessarily the case, for there certainly will be disagreement about what is and is not an acceptable level of risk; nor am I arguing that racial discrimination is any less odious in other areas of the criminal law. I simply wish to point out that the type of evidence that we accept as posing a threat to the legitimacy of the capital sentencing process does not necessarily have to threaten the legitimacy of the entire criminal justice system. We must keep in mind that for the retributivist, letting wrongdoers go unpunished is unjust. Therefore, unless the potential for greater injustice is so great as to be unacceptable, we should not be willing to give wrongdoers the opportunity to escape their just deserts. Thus, without having to fear that accepting statistical evidence in this instance will necessarily lead to what could be the even greater injustice of letting all wrongdoers go unpunished, the retributivist can support doing away with the death penalty.
IV

A simple appeal to individual desert, then, will not save the retributivist argument for capital punishment. Only by employing a constricted understanding of justice and moral desert could one conclude that executions carried out by a racially biased institution satisfy moral desert-claims. The first concern for the retributivist should be to see that justice is done. He insists that punishment be inflicted on wrongdoers only because it serves this goal. Therefore if a particular punishment does not serve this goal, or worse yet, undermines it, then he should oppose it. Moral desert thus does not provide the broad, open-ended justification for all punishments that some retributivists believe, but instead imposes serious restrictions on the conditions under which wrongdoers may legitimately be punished.

A capital sentencing process that is not fair and impartial in its distribution of penalties is unjust; and if it is unjust in this respect, then it cannot legitimately impose capital sentences, even if those who receive these sentences deserve to die for their crimes. Although the moral desert of the wrongdoers remains unaffected by biases in the capital sentencing process, the harms inflicted by an unjust system simply do not satisfy the wrongdoers’ desert-claims. There may be other good reasons for punishing wrongdoers under these conditions, but an appeal to retribution alone will not save such a system. When a system that is racially biased harms a wrongdoer, not only is it failing to inflict legitimate punishment, but it is also perpetuating further injustice. And since this obviously does not serve the cause of justice, the retributivist should not support the infliction of the death penalty under these conditions.

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Notes


2. Gregg, 428 U. S. at 184 (1976). Justice Stewart went on to argue that “the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community’s belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.” In addition, various opinions in the Furman decision discuss the legitimacy of retribution. In his concurring opinion, Justice Stewart argues that
retribution is a legitimate aim of punishment (at 308), while Justice Brennan, also concurring, rejects this goal as improper (at 342). In dissent, Justice Burger (Blackmun, Powell, Rehnquist) contends that this aim is legitimate (at 394). For other cases in which retribution is cited as one of the "traditional aims of punishment," see Williams v. Illinois, 399 U.S. 235 (1970); US v. Brown, 381 U.S. 437 (1965); US v. Barnett, 376 U.S. 681 (1964); and Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

3. Deterrence is the other "traditional aim of punishment" that the Court accepts as legitimate in the Gregg decision. See Gregg, 428 U. S. at 183.


5. The Baldus study was a statistical study of the capital sentencing process in Georgia. Baldus examined over 2,000 murder cases that took place in the 1970's. After controlling for 230 non-racial variables, Baldus concluded that defendants charged with killing whites were 4.3 times more likely to receive the death penalty than those charged with killing blacks. The presence of a white victim was about as strong a predictor of a defendant receiving the death sentence as the presence of a legitimate aggravating factor such as a prior murder conviction.


7. See Michael Moore, "The Moral Worth of Retribution," in Punishment and Rehabilitation, ed. Jeffrie G. Murphy (Belmont: Wadsworth Publishing Co., 1995), pp. 94-96, for a good discussion of some mistaken notions of what retribution entails, including the belief that retribution amounts to a particular measure of punishment, such as an "eye for an eye."

8. Herbert Morris, "Persons and Punishment," The Monist 52 (October 1968): 478. Consider also the views of Hegel, who argued that the act of punishing "annuls" the crime that has been committed. His argument is that when a person commits a crime, the evil of the crime in some sense continues to exist until the wrongdoer has suffered punishment. See G. W. Hegel, Philosophy of Right, ed. T. M. Knox (Oxford: Oxford University Press, 1967), pp. 69-70. For an account of retribution that places greater emphasis on the moral character of the offender when determining desert, see Moore, "The Moral Worth of Retribution."

9. Needless to say, the conclusions of this study are controversial. For the purposes of this essay, I will, following the Court, accept the validity of these results without delving into the intricacies of statistical analysis. If the Baldus study turned out to be fatally flawed, this would undercut the specific argument against the capital sentencing process in Georgia; it would not, however, affect the larger argument about the relationship between desert-claims and legitimate authority, and thus this line of argument would still be worth pursuing.


11. Ibid.
12. For this discussion, I will be concerned solely with racial disparities in the capital sentencing process, and not with those in the determination of guilt, or the decisions of prosecutors. Any racial disparities in these other areas would obviously pose a much greater threat to a retributivist defense of capital punishment, for such racial biases could potentially lead to more innocent people being prosecuted or convicted.


15. Ibid., p. 158.


19. This may seem to be an extravagant claim, particularly since it would mean, for example, that the Nazi government lacked the moral authority to arrest and punish petty thieves or issue parking tickets—but surely the reverse is much more implausible. For this would require us to accept that the same people who were sending Jews to the gas chambers somehow retained the moral authority to punish minor criminals. And why should we believe that? What theory of state legitimacy could support such a claim? The confusion here arises from failing to distinguish the moral desert of the wrongdoers from the right to punish them. Certainly petty thieves still deserved to be punished even while the Nazis were in power; but there is no reason to think that just because the Nazis held the power of government they therefore had the right to inflict these punishments. To say that an institution has the right to punish is to say that it occupies a special position of moral authority that enables it to serve justice by inflicting suffering on wrongdoers. It is to say, that is, that the agents of this institution are distinct from other people, that they have a kind of moral authority that others do not. But while the Nazis were certainly morally distinct from other people, it is, to say the least, unlikely that this distinctness conferred upon them any sort of special moral authority.


25. This assumes, of course, that it is only the capital sentencing process which is racially biased, and thus we avoid the evil of discrimination when we give all of those murderers who are death-eligible the same, lesser sentence.

26. If it turns out that the authority is legitimate, then the wrongdoer has still suffered for his crime, just not as much as he should have. How one would measure the relative weight of life in prison versus the death penalty is obviously an important question, but I take it for granted that life in prison is still a serious penalty and thus goes a long way towards “annulling” the wrongdoer’s crime.

27. Justice Powell makes a similar argument in *McCleskey v. Kemp*. He worries that “[i]f arbitrary and capricious punishment is the touchstone under the Eighth Amendment, such a claim could—at least in theory—be based upon any arbitrary variable, such as the defendant’s facial characteristics, or the physical attractiveness of the defendant or the victim, that some statistical study indicates may be influential in jury decision-making.” This kind of reasoning, if taken to its logical conclusion, he believes, “throws into question the principles that underlie our entire criminal justice system.” *McCleskey*, 481 U. S. at 315-317.

28. The Court has recognized this greater potential for injustice, which is reflected in its longstanding position that “death is different.” In *Woodson* the Court held that “[t]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.” *Woodson*, 428 U. S. at 305.